

# ANNEX 1 TO MSCI RESPONSE TO THE ESMA CONSULTATION PAPER ON MiFID II/MiFIR (ESMA/2014/548)

## Introduction

MSCI appreciates the opportunity to comment on the ESMA Discussion Paper relating to the contemplated measures implementing Article 37 of the Regulation 600/2014 on Markets in Financial Instruments and Amending Regulation No 648/2012 (MiFIR)<sup>1</sup>, and we look forward to working with ESMA on these and other issues going forward.

As we set out in further detail in our more detailed comments and responses in the response template to ESMA's Discussion Paper questions, MSCI believes that it will be important for ESMA to interpret and apply Article 37 and related provisions relatively narrowly. A broad application would be unjustified in light of the actual experience of companies like MSCI in the market, inconsistent with both the letter and intent of Article 37 and the MiFIR generally, and would raise serious legal concerns under both general principles and provisions of EU law, and international legal rules reflected in the World Trade Organization (WTO) Agreements in particular.

MSCI has been calculating equity indexes for over 40 years and private real estate indexes for over 20 years. To date, it has been MSCI's experience that trading venues and central counterparties (CCPs) only need index levels for trading and clearing futures and options, and for exchange-traded funds (ETFs) and non-OTC products trading venues and CCPs do not need any index level data or other data to trade or clear those products.

As ESMA has pointed out in the Discussion Paper, additional information may be used by trading venues and/or CCPs for other purposes, which largely depends on the type of index, the type of financial product and market practice. What is used for some indexes (such as private real estate indexes) will not be the same for other indexes (such as equity indexes). For index linked futures and options contracts, trading venues may want additional information for due diligence purposes before deciding to license an index for a futures or options contract or for marketing purposes to increase liquidity of their futures and options contracts. For equity index linked ETFs, on a rare and ad hoc basis, exchanges have requested point in time index composition data in connection with the regulatory filings for the initial listing of the ETF or for surveillance purposes with respect to a specific ETF. MSCI has licensed to trading venues/CCPs the data they need for their various purposes and has responded to ad hoc requests, without issue. Data that is not necessary for trading and clearing should be subject to normal discussions and agreement between the parties based on the particular need for the particular index. There is no justification to extend Article 37 MiFIR (which is focused on data necessary for trading and clearing purposes) to data that is not necessary for trading and clearing.

---

<sup>1</sup> OJ L 173/84, 12 June 2014.

Further, Article 37 MiFIR seeks to impose access and licensing obligations to secure interoperability of, and universal access to, CCPs and trading venues, in line with Articles 35 and 36 MiFIR. To that end, however, Article 37 MiFIR, as well as the ESMA Discussion Paper as drafted, appears to cover virtually all existing indexes on an apparently indiscriminate basis and without regard as to whether interoperability and access issues actually exist. In light of this, and in view of the legal issues this raises, MSCI has serious concerns about Article 37 MiFIR in general and any measures aimed at implementing it. Our concerns in this respect relate, in particular, to any potential measures' compatibility with EU fundamental rights, such as the right to property and principle of proportionality, as well as certain other provisions of the Treaties and EU's international commitments under the World Trade Organization (WTO) in particular. In addition, MSCI believes that certain licensing conditions, in particular making the relevant information available to the customers of CCPs and trading venues, may go beyond the powers vested in ESMA by Article 37 MiFIR.

MSCI discusses these and other concerns in the introductory section below. We also provide responses to specific questions included in Section 5.8 of the ESMA Discussion Paper. We look forward to working with ESMA as it considers these and other issues going forward.

### **About MSCI**

MSCI Inc. is a leading provider of investment decision support tools to institutional investors globally, including asset managers, banks, hedge funds and pension funds. MSCI products and services include indexes and portfolio risk and performance analytics. MSCI is headquartered in New York, with research and commercial offices around the world. MSCI has approximately 6200 customers worldwide across MSCI's different business units.

MSCI's flagship equity indexes include the MSCI Global Equity Indexes. The MSCI Global Equity Indexes have been calculated for more than 40 years, and today MSCI calculates over 160,000 equity indexes per day. MSCI Global Equity Index families include country and regional indexes, size indexes (large cap, small cap, micro cap), sector indexes, style (value/growth) indexes, strategy indexes, thematic indexes and ESG indexes. MSCI also calculates custom indexes at the request of clients, by applying client screens and constraints to MSCI Global Equity Indexes.

MSCI Global Equity Indexes are used worldwide by:

- assets owners to help them with their mandate decisions and with reviewing their managers' performance;
- active asset managers so that they can actively manage their funds against an index and report performance;
- passive fund managers to issue passive funds and ETFs based on the indexes;
- broker dealers for providing trading execution services, creating OTC and non-OTC derivative financial products and writing research more generally;
- stock exchanges to create equity index linked futures and options contracts; and
- CCPs to calculate the risks of its positions for index linked futures and options contracts.

IPD, acquired by MSCI in 2012, is a leading provider of real estate performance and risk analysis, providing critical business intelligence to real estate owners, managers, brokers, lenders and occupiers worldwide. IPD's database holds searchable information on 77,000+ properties, which are located in 32 countries. The majority of properties in the IPD database are valued quarterly, and some IPD real estate indexes and benchmarks have performance histories stretching back more than 25 years.

IPD real estate indexes and benchmarks are designed to measure the performance and risk indicators of our clients' real estate holdings against their peers. Separate indexes are published for 24 national real estate investment markets as well as global and European composites. IPD delivers its indexes and benchmarks as data files as well as through the IPD Portfolio Analysis Service ("PAS"), which analyses the strengths and weaknesses of a real estate portfolio's performance relative to its benchmark. IPD also offers benchmarking services for income, management, fund level and cost. IPD market publications provide key real estate market analysis on countries, regions and sectors. IPD real estate indexes and benchmark are primarily used for reference purposes, although there are a limited number of financial products based on certain IPD real estate indexes and benchmarks.

MSCI recently announced that it has successfully completed an assurance review of its implementation of the IOSCO Principles for Financial Benchmarks. MSCI engaged PricewaterhouseCoopers LLP (PwC) to perform the review. The full report, including the PwC assurance review, is available at [www.msci.com/products/indexes/regulation.html](http://www.msci.com/products/indexes/regulation.html) for MSCI equity indexes and at [www.ipd.com/about/ipd-guides-and-standards/index-regulation.html](http://www.ipd.com/about/ipd-guides-and-standards/index-regulation.html) for select IPD real estate indexes and benchmarks.

### General Legal Concerns

MSCI is concerned about the legality of several key aspects of the potential implementing measures in particular which appear to go beyond the specific mandate provided under Article 37 MiFIR and raise significant legal concerns under both fundamental principles and specific provisions of EU law, as well as certain international legal obligations by which the EU is legally bound:

1. *Unlawful Extension of Access and Licensing Obligations Beyond CCPs and Trading Venues and Beyond Data Necessary for Trading and Clearing Purposes*

MSCI believes that certain access and licensing conditions considered by ESMA in the Discussion Paper go beyond the powers vested in ESMA under MiFIR. Article 37 MiFIR refers to CCPs and trading venues as the intended beneficiaries of access to price data and licenses. However, in para. 18 of the Discussion Paper, ESMA noted "that it is also important for the users of trading venues and CCPs to have access to relevant information for the access provisions to work effectively". Moreover, in paras 41-45 of the Discussion Paper, ESMA analyzes conditions relevant to granting access and/or licenses to certain index-related information with respect to customers of CCPs and trading venues. MSCI believes that an extension of the scope of Article 37 MiFIR to a category of entities not mentioned in that provision would raise serious legal concerns, as it would exceed the mandate agreed by the legislator. Such extension would also constitute a restriction to the right of property, protected by Article 17 of the EU Charter of Fundamental Rights ("the Charter"). Pursuant to that provision, any restriction to the right of property must be necessary and required by law. An extension of the access obligation to users of CCPs and trading venues by virtue of level 2 measures would not meet these requirements. This is particularly important for MSCI, because MSCI's indexes are already available to be licensed by institutional investors globally. Any institutional investor who would want information beyond MSCI's published, detailed methodologies can license MSCI data on a normal, commercial basis. There is, therefore, no necessity to secure special access rules for an additional category of entities and ESMA should limit the benefit of any access and licensing obligations to CCPs and trading venues. Further, users of trading venues/CCPs include existing clients of MSCI as well as potential clients. As mentioned in the introduction, MSCI's client base spans many different types of institutional investors globally who use MSCI's data for many different purposes, including as the basis of financial products or for reference purposes. Allowing trading venues/CCPs to redistribute MSCI's data for free without restrictions to an unknown and unlimited number of users would interfere with MSCI's existing agreements with its

clients and would seriously impact MSCI's ability to further license its data to its new and existing clients. Moreover, the proposed uses of data seem to include marketing to build liquidity in the stock exchanges' products and other uses which clearly go beyond Article 37's purpose which is access to data for "trading and clearing purposes". As such, these proposed actions which constitute compulsory licensing, could not be justified under Article 37 MiFIR, nor are they required by it.

## 2. Recital 40 of MiFIR and Consistency of any Level 2 Measures With Articles 101 and 102 TFEU

MSCI is deeply concerned as well about the broad and expansive interpretation of the potential access and licensing obligations resulting from Article 37 MiFIR that is currently suggested by the ESMA Discussion Paper. Article 37 MiFIR mandates access to relevant information and licenses with respect to indexes which provide a basis for calculation of the value of any financial instrument. Expansive interpretation of that provision, however, could lead to imposition of universal access and licensing obligations for *all* indexes and irrespective of their relevance, and the nature and availability of the underlying data. In that connection, MSCI would like to point to recital 40 of MiFIR and para. 3 of the ESMA Discussion Paper<sup>2</sup> in particular, as well as the principles following from Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU") that those provisions refer to.

Recital 40 of MiFIR provides explicitly that "(t)he licensing duties under [MiFIR] should be without prejudice to the general obligation of proprietary owners of benchmarks under competition law, and Articles 101 and 102 TFEU in particular, concerning access to benchmarks that are indispensable to enter a new market." (Emphasis added). MSCI agrees with this general principle underpinning compulsory licensing of products under EU competition law, as formulated in the case law of the EU Courts.<sup>3</sup> Against that backdrop, MSCI believes that only inputs which are indispensable to secure interoperability of CCPs and trading venues, and which are otherwise unavailable, should be covered by licensing obligations under Article 37 MiFIR and level 2 measures. Such a reading of Article 37 MiFIR would be consistent both with the general case law of the EU Courts and the objectives pursued by MiFIR itself, as reflected, inter alia, in Recital 40 cited above. Indexes that have reasonable substitutes are not indispensable, precisely because they are substitutable. This is the case for many indexes that measure the same market or strategy, and this is further evidenced by the fact that financial product issuers can and do switch index providers. To that end, ESMA should assess on a case-by-case basis whether and to what extent the access and licensing obligations envisaged in Article 37 are relevant for any given index (category), rather than making such a determination on a generalized and indiscriminate basis for all indexes or for an entire category of indexes across an entire industry.

Likewise, Article 37 MiFIR, seems to impose on owners and administrators of covered indexes conditions which are unwarranted by Articles 101 and 102 TFEU. In particular, Article 37(1) MiFIR stipulates that access to relevant information and licenses has to be granted on a non-discriminatory basis and refers to "equivalent terms" only in connection with the determination of a reasonable commercial price. However, ESMA has ratcheted up this concept in para. 37 of the Discussion Paper, by explaining that index-relevant information should be licensed "on the same terms and conditions as it does for existing licensees, only differing where there are material grounds". In other words, discrimination with respect to price and non-price conditions in a license agreement would only be permitted if there is an objective justification for such differentiation. That not only goes far beyond EU competition rules but also Article 37 MiFIR as written. EU competition rules condemn discriminatory practices only if the index owner or

---

<sup>2</sup> OJ C 326/47, 26 October 2012.

<sup>3</sup> Case T-201/04 *Microsoft v Commission*, judgment of the General Court of 17 September 2007, paras 332-333.

administrator is dominant in the relevant market, and in the absence of objective justification, or where discrimination is a product of collusive practices. Thus, a blanket prohibition of allegedly discriminatory conditions would be at odds with the principles following from Articles 101 and 102 TFEU. A more narrow application, by contrast, would not raise these legal concerns, or at least would do so only to a lesser extent.

### *3. Potential Violation of the Right to Property, the Principle of Proportionality, and the EU's International Legal Commitments under the WTO*

An additional and related concern with respect to Article 37 MiFIR and potential level 2 measures is that overly broad and indiscriminate licensing obligations would be irreconcilable with the principles of proportionality and respect for property, as enshrined in EU law, as well as the EU's international obligations, as reflected in the WTO's General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Intellectual Property Rights (TRIPS), in particular.

Article 17 of the Charter, stipulates that "the use of property may be regulated by law in so far as necessary for the general interest."<sup>4</sup> (Emphasis added). This requirement also applies to indexes and certain specific data enshrined in such indexes which are or contain the intellectual property rights of the index or data owners. In the same vein, the lack of a case-by-case assessment of indispensability of an input, where access to such input is mandated by Article 37 MiFIR, would be disproportionate and incompatible with Article 5(4) of the Treaty on the European Union (TEU).<sup>5</sup> This provision binds both the EU Institutions and specialized agencies, such as ESMA. For similar reasons, the onerous access and licensing obligations under Article 37 MiFIR raise doubts as to their compatibility with certain binding international agreements, such as the WTO GATS and TRIPS Agreements in particular, which contain specific safeguards for providers of certain financial services into the EU market and their intellectual property rights in particular.

MSCI, for these and other reasons, believes that the principle of proportionality and the respect for property rights as referred to above, as well as the international legal obligations to which EU legislation is subject, command a more narrow interpretation of access and licensing obligations under Article 37 MiFIR. Thus, and for the same reasons, any implementing measures elaborated by ESMA should also be based on such a narrow construction of access obligations, rather than a broad and reading of Article 37 which would be inconsistent with both general principles of EU and WTO law.

## **Conclusion**

MSCI appreciates the opportunity provided to it to comment on specific issues regarding ESMA's proposed Level 2 measures for further implementation of Article 37 MiFIR in particular. We have provided answers to specific questions raised in the ESMA Discussion Paper, in particular its Section 5.8 dealing with non-discriminatory access to obligation to license benchmarks and we have offered general comments as to potential legal concerns that would be raised by an overly broad and indiscriminate interpretation and application of Article 37 in general, rather than a much more narrow and case-by-case approach which MSCI believes would be more appropriate.

MSCI is of course available to discuss these and other issues in further detail and looks forward to working with ESMA's staff as it seeks to implement Article 37 and other provisions of MiFIR.

---

<sup>4</sup> OJ C 364/1, 18 December 2000.

<sup>5</sup> OJ C 83/13, 30 March 2010.

## Client Service Information is Available 24 Hours a Day

[clientservice@msci.com](mailto:clientservice@msci.com)

### Americas

Americas	1.888.588.4567 (toll free)
Atlanta	+ 1.404.551.3212
Boston	+ 1.617.532.0920
Chicago	+ 1.312.675.0545
Monterrey	+ 52.81.1253.4020
New York	+ 1.212.804.3901
San Francisco	+ 1.415.836.8800
Sao Paulo	+ 55.11.3706.1360
Toronto	+ 1.416.628.1007

### Europe, Middle East & Africa

Cape Town	+ 27.21.673.0100
Frankfurt	+ 49.69.133.859.00
Geneva	+ 41.22.817.9777
London	+ 44.20.7618.2222
Milan	+ 39.02.5849.0415
Paris	0800.91.59.17 (toll free)

### Asia Pacific

China North	10800.852.1032 (toll free)
China South	10800.152.1032 (toll free)
Hong Kong	+ 852.2844.9333
Seoul	00798.8521.3392 (toll free)
Singapore	800.852.3749 (toll free)
Sydney	+ 61.2.9033.9333
Taiwan	008.0112.7513 (toll free)
Tokyo	+ 81.3.5290.1555

## Notice and Disclaimer

- This document and all of the information contained in it, including without limitation all text, data, graphs, charts (collectively, the “Information”) is the property of MSCI Inc. or its subsidiaries (collectively, “MSCI”), or MSCI’s licensors, direct or indirect suppliers or any third party involved in making or compiling any Information (collectively, with MSCI, the “Information Providers”) and is provided for informational purposes only. The Information may not be reproduced or disseminated in whole or in part without prior written permission from MSCI.
- The Information may not be used to create derivative works or to verify or correct other data or information. For example (but without limitation), the Information may not be used to create indexes, databases, risk models, analytics, software, or in connection with the issuing, offering, sponsoring, managing or marketing of any securities, portfolios, financial products or other investment vehicles utilizing or based on, linked to, tracking or otherwise derived from the Information or any other MSCI data, information, products or services.
- The user of the Information assumes the entire risk of any use it may make or permit to be made of the Information. NONE OF THE INFORMATION PROVIDERS MAKES ANY EXPRESS OR IMPLIED WARRANTIES OR REPRESENTATIONS WITH RESPECT TO THE INFORMATION (OR THE RESULTS TO BE OBTAINED BY THE USE THEREOF), AND TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, EACH INFORMATION PROVIDER EXPRESSLY DISCLAIMS ALL IMPLIED WARRANTIES (INCLUDING, WITHOUT LIMITATION, ANY IMPLIED WARRANTIES OF ORIGINALITY, ACCURACY, TIMELINESS, NON-INFRINGEMENT, COMPLETENESS, MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE) WITH RESPECT TO ANY OF THE INFORMATION.
- Without limiting any of the foregoing and to the maximum extent permitted by applicable law, in no event shall any Information Provider have any liability regarding any of the Information for any direct, indirect, special, punitive, consequential (including lost profits) or any other damages even if notified of the possibility of such damages. The foregoing shall not exclude or limit any liability that may not by applicable law be excluded or limited, including without limitation (as applicable), any liability for death or personal injury to the extent that such injury results from the negligence or willful default of itself, its servants, agents or sub-contractors.
- Information containing any historical information, data or analysis should not be taken as an indication or guarantee of any future performance, analysis, forecast or prediction. Past performance does not guarantee future results.
- None of the Information constitutes an offer to sell (or a solicitation of an offer to buy), any security, financial product or other investment vehicle or any trading strategy.
- You cannot invest in an index. MSCI does not issue, sponsor, endorse, market, offer, review or otherwise express any opinion regarding any investment or financial product that may be based on or linked to the performance of any MSCI index.
- MSCI’s indirect wholly-owned subsidiary Institutional Shareholder Services, Inc. (“ISS”) is a Registered Investment Adviser under the Investment Advisers Act of 1940. Except with respect to any applicable products or services from ISS (including applicable products or services from MSCI ESG Research, which are provided by ISS), neither MSCI nor any of its products or services recommends, endorses, approves or otherwise expresses any opinion regarding any issuer, securities, financial products or instruments or trading strategies and neither MSCI nor any of its products or services is intended to constitute investment advice or a recommendation to make (or refrain from making) any kind of investment decision and may not be relied on as such.
- The MSCI ESG Indexes use ratings and other data, analysis and information from MSCI ESG Research. MSCI ESG Research is produced by ISS or its subsidiaries. Issuers mentioned or included in any MSCI ESG Research materials may be a client of MSCI, ISS, or another MSCI subsidiary, or the parent of, or affiliated with, a client of MSCI, ISS, or another MSCI subsidiary, including ISS Corporate Services, Inc., which provides tools and services to issuers. MSCI ESG Research materials, including materials utilized in any MSCI ESG Indexes or other products, have not been submitted to, nor received approval from, the United States Securities and Exchange Commission or any other regulatory body.
- Any use of or access to products, services or information of MSCI requires a license from MSCI. MSCI, Barra, RiskMetrics, IPD, FEA, InvestorForce, and other MSCI brands and product names are the trademarks, service marks, or registered trademarks of MSCI or its subsidiaries in the United States and other jurisdictions. The Global Industry Classification Standard (GICS) was developed by and is the exclusive property of MSCI and Standard & Poor’s. “Global Industry Classification Standard (GICS)” is a service mark of MSCI and Standard & Poor’s.

## About MSCI

MSCI Inc. is a leading provider of investment decision support tools to investors globally, including asset managers, banks, hedge funds and pension funds. MSCI products and services include indexes and portfolio risk and performance analytics.

The company’s flagship product offerings are: the MSCI indexes with approximately USD 7.5 trillion estimated to be benchmarked to them on a worldwide basis<sup>1</sup>; Barra multi-asset class factor models, portfolio risk and performance analytics; RiskMetrics multi-asset class market and credit risk analytics; IPD real estate information, indexes and analytics; MSCI ESG (environmental, social and governance) Research screening, analysis and ratings; and FEA valuation models and risk management software for the energy and commodities markets. MSCI is headquartered in New York, with research and commercial offices around the world.

<sup>1</sup> As of March 31, 2013, as reported on July 31, 2013 by eVestment, Lipper and Bloomberg

Jan 2014