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**Consultation on the regulation of indices
Response EUSIPA**

Brussels, 26 November 2012

PER MAIL

Dear Sir or Madam,

The attached paper constitutes the response of EUSIPA to the European Commission's *Consultation Document on the Regulation of Indices* dated 5 September 2012 (the "**Consultation Document**").

EUSIPA stands for European Structured Investment Products Association and represents the issuers of note-based and listed Structured Investment Products to retail customers. Our members are national industry associations from Austria, France, Germany, Italy, Sweden and Switzerland. Members of these national associations are major banking institutions. EUSIPA is listed in the transparency register of the EU under Nr. 37488345650-13.

Structured Investment Products, also called certificates in some markets, are securitised debt papers for which the issuer, usually a bank, takes the debtor position. The products are called structured because the pay-out to the investor depends on several clearly defined, or "constructed", conditions. These conditions mainly relate to the performance of an underlying asset (e.g. a share, a bond, a currency, a commodity or an index), over a certain time span. The main markets in the EU provided in the second quarter of 2012 for a volume (called open interest) of around 240b Euro, including Switzerland of around 430b Euro.

Members of EUSIPA have a close interest in the proper functioning of indices because products whose pay-off algorithm is based on an index (index-linked products) constitute a considerable part of the structured products universe.

However, members of EUSIPA also attach high importance to stressing that any future regulation of indices must not disregard that the notion of "index" is not exclusively used to designate market indices such as, e.g., the LIBOR; EURIBOR, FTSE 100, or DAX®. It rather also designates customized proprietary indices that reflect rules-based investment strategies hypothetically (i.e., with no actual trading or investment

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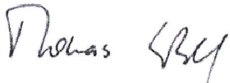
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activities) conducted by the index sponsor ("**Strategy Indices**"). Unfortunately, the definition of "*index*" or "*benchmark*" used in the consultation is so broad that it does not only cover market indices, but also encompasses Strategy Indices. This is somewhat of a concern because the questions asked in the consultation seem exclusively aimed at market indices insofar as they totally disregard the peculiarities of strategy indices. Therefore, we expect that the answers will also not reflect the difference between market indices and Strategy Indices. This will create a severely wrong perception, as potentially desirable rules on the creation, calculation, publication, transparency and governance of market indices do not at all fit to Strategy Indices.

Yours sincerely,



Thomas Wulf
Secretary General, EUSIPA



Dr. Nikolaus Dominik Neundörfer
Head of Legal Committee, EUSIPA

Comments
of the
European Structured Investment Products Association (EUSIPA)
on the
European Commission's Consultation Document on the regulation of indices

Brussels, 26/11/2012

I. GENERAL REMARK

Indices used as a "benchmark" are key to a very large part of the structured investment products universe issued by our members. Consequently, our members have a close interest in ensuring the integrity of any such indices. We note, however, that it is necessary to make a difference between indices that are objective reference data (as, e.g., the LIBOR; EURIBOR, FTSE 100, or DAX[®]), and Strategy Indices, i.e., customized proprietary indices that reflect rules-based investment strategies hypothetically (i.e., with no actual trading or investment activities) conducted by the index sponsor, who basically allocates a hypothetical amount of money as provided for by the index description.

The definition of "*index*" or "*benchmark*" used in the consultation is so broad that it does not only cover market indices, but also encompasses Strategy Indices. This is somewhat of a concern because the questions asked in the consultation totally disregard the peculiarities of Strategy Indices and are exclusively aimed at market indices. Throughout the consultation, indices are regarded as tools to "*accurately reflect the economic realities that they are intended to measure*" which are calculated as the average of the underlying data. However, this is not at all the case for Strategy Indices: These are not designed to reflect and/or measure certain economic realities, but rather represent rules-based investment strategies conducted by the index sponsor. The index sponsor conducts, within the limits of the rules set out in the description of the methodology, a virtual investment strategy with the purpose of maximising the index level.

Indices representing customized investment strategies constitute extended parts of the pay-off mechanism of any financial product linked to such index – in the form of general terms & conditions defining a substantial part thereof – that are incorporated in the relevant product terms & conditions (if the relevant financial product is a structured security) or the relevant agreement (if the relevant financial product is an OTC product) by way of reference. As a consequence, any investor in a product linked to a Strategy Index has a contractual right vis-à-vis his counterparty that the index methodology is followed, and is protected by the law on unfair contract terms.

The fundamental difference between indices that are objective data, and Strategy Indices is also recognised by the EU Prospectus regulation (i.e. Annex XII No. 4.2.2. (ii) of Regulation (EU) No 486/2012 amending the Prospectus Regulation (EC) No 809/2004) that basically treats indices composed by the issuer of a security as part of the pay-off formula. Anyway, it cannot really make a difference whether the index description of a Proprietary Index is set out in a separate documents (to which reference is made in the terms & conditions of the financial product) or is directly inserted in the terms & conditions.

It makes no sense at all to apply rules designated for indices that are objective reference data (as, e.g., the LIBOR; EURIBOR, FTSE 100, or DAX[®]) to indices that are not, and do not purport to be, objective reference data. Accordingly, there is no risk of misconception regarding the objectivity of the benchmark by investors in index-linked products. Potentially desirable rules on the creation, calculation, publication, transparency and governance of market indices cannot equally be applied to Strategy Indices. Any regulation of requirements in respect of the calculation of indices that would equally apply to Strategy Indices would – without any need, as the law on unfair contract terms provides sufficient protection to investors in products linked to a Strategy Index – confuse the name and the thing and thereby intrude in the contractual relationship between the parties to financial products linked to proprietary indices:

(i) Index composition and use of indices

From a structured products perspective appropriate control to ensure that both market indices and Strategy Indices fit for the purpose of relevant investors can be achieved by applying the MiFID framework. One must keep in mind that investors cannot directly invest into an index. Such investment is only possible via a financial product whose pay-off structure is linked to the index. As such financial products necessarily fall within the scope of the MiFID the responsibility to assess the suitability of the index (and of the financial product) is basically with the distributor, and, alternatively, with the manufacturer of the index-linked products who might determine on a generic basis for what category of investors a financial product linked to a specific index might be suitable.

(ii) Index determination

Any mandatory rules on the determination of the relevant index, including the determination of prices of underlying assets are impractical for Strategy Indices. While such rules may be appropriate for market indices, such determination is not feasible for many underlyings of Strategy Indices. The relevant Strategy Index may, for instance, relate to prices for trades that the index sponsor or a certain other person conducts. In such case it would not be possible to determine the price on the basis of price information offered by, or obtained from, external source such as, for instance, quotes of a panel, committee or a similar entity.

(iii) Index sponsor

Strategy Indices are typically sponsored by the very provider of the structured financial products relating thereto (or by an affiliate of such product provider). This is why Annex XII No. 4.2.2. (ii) of Regulation (EU) No 486/2012 amending the Prospectus Regulation (EC) No 809/2004 basically treats them as part of the relevant pay-off formula. Requiring any third person to act as the index sponsor would massively change the character of the products (i.e., to constitute rules-based investment strategies hypothetically conducted for the benefit of investors in the product by the relevant product provider).

(iv) Chinese walls

Additional regulation such as, for instance, Chinese walls between distribution and trading departments would not give investors in products linked to Strategy Indices any additional benefit, as such investors have a contractual claim to the proper execution of the index description.

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