POLICY VIEWPOINT

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EFAMA DATA PLATFORM: CROSS-CUTTING ISSUES ON EU DATA

Objectives

There is a growing demand for financial and non-financial data from asset managers, as well as other market participants, to carry out their responsibilities and satisfy ever-increasing regulatory requirements. Moreover, the aggregation, analysis, and dissemination of these data frequently remain under the control of a small pool of oligopolistic data providers/vendors who are not always subject to appropriate EU regulations.

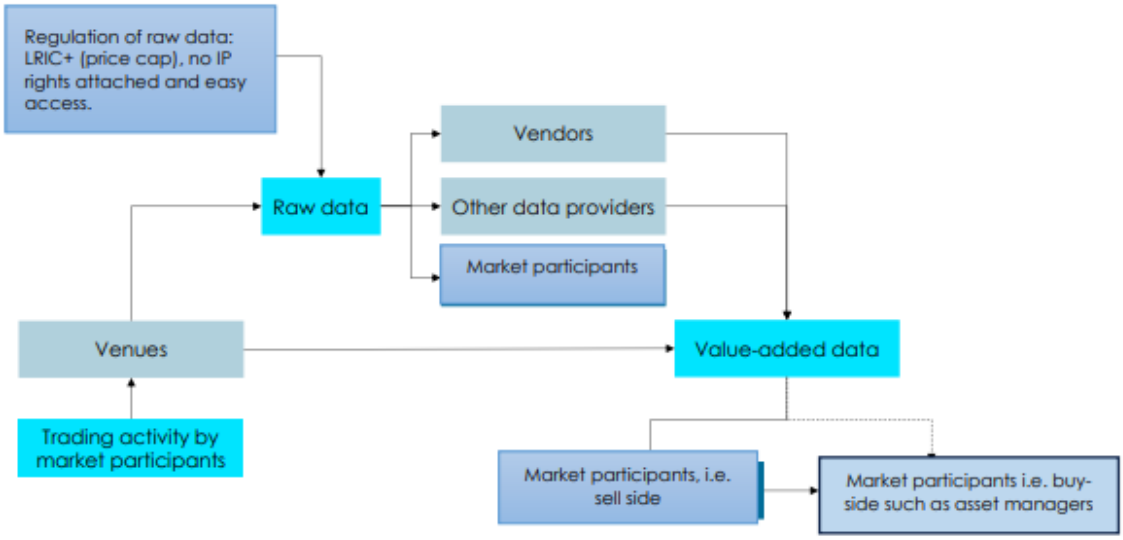
Retail investors also represent a growing body of data users. Rightfully so since quality data and the ability to have an aggregated view of European capital markets are important pillars of investor protection, and investor confidence in markets.

In this context, the purpose of this paper is to identify cross-cutting data issues and bring to light the uneven playing fields between data providers that are detrimental to the asset management industry. It also proposes overarching regulatory principles to foster consistency, quality, transparency, and availability of financial and non-financial data at a reasonable price.

Cross-cutting challenges

1. Intellectual property of data along the supply chain

A number of the cross-cutting challenges that follow below stem from a fundamental problem in the current market structure. There is currently no distinction between raw data where the contribution of the data provider is solely in the collection, normalization, formatting and cleansing of data, and truly value-added data where the data provider has used a raw dataset in order to calculate a derived output. In today's framework, raw data can benefit from intellectual property rights to the extent that the content is based on creativity. On the other hand, the majority of "raw" market data such as prices, index values, identifiers, credit rating values lack originality and creativity and are not protected by IP rights outside the strict limits of the European database regulation. However, even "raw" without IP rights is priced as such by the data provider even though there is no evidence of valuable qualitative input or improvement. The chart below shows data in different stages of data treatment. Data that is closer to raw data should not be priced and marketed with the full benefit of intellectual property rights if there is no creative value-added. Rather, the legal framework should ensure the supply and distribution of raw data on a cost basis only, allowing for reasonably-priced input data which serves as the basis for reasonably priced value-added data as illustrated below:



Such commercial pricing conditions would favour competition in the market and do away with the bottleneck and oligopolistic stronghold present today at the raw data end of the spectrum.

The data supply chain or data value chain can be represented as follows:

The early stages of the value chain are focused on gathering data mainly available on the market, and rely on technological resources (infrastructure/connectivity, databases, ETL framework, data storage, etc.) to streamline the data sourcing. In the later stages of the value chain, data providers create value by modelling standardized raw data into more sophisticated data and information such as analytics and research, indices or credit ratings . As we move along the value chain, the input of qualitative value becomes more important and valuable, as simple or complex derived data are created.

In our view, commercial pricing considerations should apply only when it is demonstrated that the data is subject to copyright, i.e includes elements of originality and creativity as is the case with e.g. research and ratings reports.

➔ **Suggested overarching regulatory principles:**

- The underlying regulation itself should make a clear distinction between raw and value-added data;
- Data can only be considered as proprietary by providers if they are complex derived data: i.e through true value-added treatment of the data (knowledge, resources, business rules…);
- Data only holds Intellectual Property if the data includes elements of originality and creativity, and should be considered only if qualitative input is significantly incorporated into the data;
- The right to provide and commercialize value-added data on the EU market should be conditioned to the provision of the underlying raw data being supplied on a cost-based approach (LRIC+), with no IP rights attached and with easy access.

2. Complexity of licensing agreements

Due to the increase and diversification in data use cases, data providers have refined their licensing models to encompass each stage of an asset manager or bank's entire value chain.

Data providers often claim that they do not sell their data but instead grant a limited right to rent and use their perceived Intellectual Property Rights (IPR) protected data for a specific purpose. Because the data is protected by intellectual property rights, specific utilisation purpose is actively monetised via a dedicated license on a cumulative basis. This licensing behavior extends beyond the raw data, meaning that data providers require payment for being allowed to collect and store T+1 data (historical data) or even new data which has been produced by the user on the basis of the licensed data right to produce an original data output (derived data). In addition to the reporting obligation related to the use of data within a firm, we see an increasing obligation to report the transmission of licensed data up or downstream in the value chain (e.g. outsourced portfolio or risk managers, custodians or clients). In the end, the so-called "slicing and dicing" practice results in a proliferation of licensing requirements for businesses and firms.

The existence of copyrights in most financial market data (FMD) industries is questionable. Basic financial market data such as transaction data (bid/ask prices, volume), reference data (unique instrument identifiers, credit ratings, as well as ESG raw data (report on controversies) and index data (price, values, constituents and their weightings) themselves do not have sufficient creativity for protection under the Berne Convention for the protection of literary and artistic works. **Therefore, their subsequent use after the first purchase should be free of licenses and usage restrictions** and should be priced on a cost of production-basis. Furthermore, only EU-based data providers may claim the protections of the EU database regulations for not copyrightable data. But even this protection should not extend beyond the first purchaser of the database content.

As provided for in MIFIDII/MIFIR, we believe that the data license cost for raw market data and basic data not protected by IP rights whose use is directly or indirectly required by regulation should be based only on the incremental/marginal cost of providing and distributing a given data service plus a reasonable profit margin.

In the alternative, EU regulators should provide for freely usable public data bases for data that is required in regulation or that is in the public interest. For example, basic credit rating data is available at the European Ratings Platform (ERP) operated by ESMA and basic financial and non-financial (ESG) information on EU

companies will be made available in the European Single Access Point (ESAP). The use of these public databases must remain free of fees and licenses. The ERP conditions of use are not clear in this respect.

We deeply regret that the EU, in the area of raw market data, i.e prices and index values, constituents and weightings has chosen a revenue generating model for the equity, bonds and derivatives consolidated tapes, and has limited the ability of those CTPs to increase competition by offering additional services such as an EU all firms equity index family.

Further adding to licensing complexity, there is no standardisation in the definition of license concepts (i.e. no taxonomy). As a result, data users (i.e asset managers) are not able to compare license models across different data providers.

➔ **Suggested overarching regulatory principles:**

- Impose a cross-cutting cost -based licensing mechanism for all kinds of raw data. Any data license costs should be based only on the incremental/marginal cost of providing and distributing a given raw data service plus a reasonable profit margin which may increase only in line with inflation. Derived and historical data licenses should be prohibited as these are not reflecting cost of production but aim at licensing the value created on the basis of already paid for raw / basic data;
- Improved standardisation of contract terms (definitions), audit policies, and free schedule templates;
- Data should only be priced where there is a direct contractual distribution relationship and for data delivered. Direct licensing with data sources such as exchanges or reference data providers whose data is procured through authorised data vendors should be discouraged;
- Raw data should only be paid for once; therefore, licenses on data already in possession of the user (historical data) or reporting licenses on the reporting entity should be discouraged;
- Raw data should be used freely after the initial purchase based on LRIC+ (long-run incremental cost): No IP rights may be attached and the data access must be easy and with no delay in formats requested by the data users;
- Raw or basic data mandated by regulation should be available for free or through low-cost databases such as ERP, ESAP and the CTP;
- Derived data licenses which are based on the value created by the user based on the procured data should be prohibited;
- Licensing models for value-added data should be standardized and comparable across providers.

3. Lack of price transparency

In order to be able to procure financial market data (FMD) asset managers need not only a good understanding of the data product but at a minimum the price in order to be able to compare and select between competing products. However, the FMD industry, with the exception of trading venues, does not publish price lists nor other indicators of the fairness of the product such as the cost of production of the data feeds. Instead, before making a price offer many FMD providers/vendors engage in pre-trade exploration of the clients' real and potential data usage with the help of lengthy and complex questionnaires so called ‘statement/declaration of use’.

Currently, only MIFIDII/MiFIR mandates market data providers, mainly trading venues, to disclose prices on market data products.

Nevertheless, and despite the mandatory requirements at Level 1, market participants experience a lack of information because cost of data production disclosure is restricted to highly aggregated figures, making it impossible for the reader to recalculate the true costs based on the application of pricing methods and predictable price increases.

Besides the MiFIDII and MiFIR price transparency requirements for market data, the EU regulatory frameworks for the remaining data types such as benchmark data, ESG data, and credit rating data do not mandate price transparency requirements for data providers.

➔ **Suggested overarching regulatory principles:**

- Enforcement of the current MIFID / MIFIR requirement on price transparency[1]; in particular establishment of:
  - Prices and cost accounting methodologies should be clear, accessible and easily comparable across providers (e.g. fee grids, price lists) and include historical price and license information
  - Price increases must be approved and justified
  - Revenue from data must be published
  - Client data usage questionnaires should be prohibited. The data user needs to be enabled by the data source or data vendor to buy data off the shelf
  - The data user needs to be enabled by the data source or data vendor to buy data off the shelf.
- The experience with the present regulatory requirements reveals a lack of compliance. Therefore, we propose the establishment of a dedicated enforcement entity at EU level with the authority to audit, regulate, and sanction data providers who commercialise data on the EU market;
- Transposition of MiFID/ MiFIR price transparency, methodologies and commercial terms requirements to the remaining data EU regulatory frameworks; namely CRAR, BMR and ESG regulation.

4. Monetised audit rights

Audit rights are imposed onto data users to evaluate the correct adoption and application of data. However, asset managers seem to bear the cost of cumbersome and time consuming audits, and these too often result in an additional income for data providers.

➔ **Suggested overarching regulatory principles:**

- Enforce and strengthen the current regulatory framework to ensure that audit procedures are fair;
- Audits should not constitute an additional revenue stream for data providers;
- Audits should start promptly at the end of the contract period, include an agreed audit process, including a right of first refusal, and be restricted to a look-back period which is no longer than 2 to 3 years;
- Data providers should not be allowed to prematurely terminate contracts and in case of dispute should not be allowed to cut off data feeds before a decision of a court of arbitration or law.

[1] Article 11, COMMISSION DELEGATED REGULATION (EU) 2017/567

5. Liability of data providers

ETF issuers and index fund managers have experienced instances of index calculation errors by the administrator, especially in volatile trading environments. There is increasing evidence highlighting how these errors have not been detected by the index providers themselves. Yet, the quality of an ETF's (or an index fund's) replication has suffered as a result, through greater tracking error and ultimate harm to investors. Users of these indices note how there are presently no liability clauses holding index administrators responsible for these sorts of errors. Moreover, there are various disclaimers in the relevant index use terms and licensing agreements to limit the administrator's responsibilities in this regard.

Data users cannot be held liable for errors that are linked to paid-for data products that are themselves often required by law. In particular, errors in ESG data products or ESG ratings should be the responsibility of the provider as users do not have the ability to check for errors, or sufficient leverage to force the data provider to improve the data quality.

➔ **Suggested overarching regulatory principles:**

- The entity which controls the entitlement of the data feed (or to the end-user) should be accountable for the quality of their data and be liable for errors and omissions in the data they provide (such as inaccurate, incomplete or late data). This liability should be reflected in the regulatory framework, and accountability should be enhanced (through increased transparency requirements, better business conduct rules etc.).

6. Unclear terms for redistribution

Firms purchase data to meet regulatory and operational requirements, which represents the direct cost of the data. Nonetheless, if a firm places such pre-purchased data as part of a data contribution to for example a third-party data vendor, data providers may consider the distribution of such data by the third party as redistribution and therefore charge extra fees to the asset manager.

Because it is technically impossible to oversee who will access the data after it is incorporated in a third-party data vendor platform (e.g., an asset management company transmits fund data to Morningstar, who may re-distribute the data globally), firms who are the initial purchasers of the data are exposed to a legal risk of oversight. Those companies cannot certify that Morningstar is verifying with its customers to determine if they hold the relevant license agreement with the original data.

➔ **Suggested overarching regulatory principles:**

- Define fair terms under which asset managers can consume and also supply fund-related data to a third-party provider (such as WM Daten) without being bound to unfair data usage terms particularly as these are unknown;
- All regulatory reporting (such as redistribution and/or external distribution, including for Solvency II requirement purposes) that require data consumption should be free of charge. The same applies to all historical storage of data required for regulatory reporting.

7. Ever-increasing data costs

MiFIDII/MiFIR requires market data to be sold on a "Reasonable Commercial Basis" (RCB) with a reasonable relationship to the cost of producing and disseminating such data. However, despite these

written provisions under Level 1, over the past decade, firms have experienced increased data costs which are not justified by an increase in the cost of production of such data.

That unjustified price inflation is also exacerbated by the market structure for data provision, suppliers being in the main monopolies and oligopolies. These companies have significant market power and can unilaterally set all contractual conditions since the customers on the asset management or banking side cannot undertake the activities that are essential to their business without the data provided by these firms. Essentially data users are required to accept the offered terms since terminating a data feed could mean going out of business.

➔ **Suggested overarching principles:**

- Ensure a true cost-based approach (Long Run Incremental Cost) in MiFIDII/MiFIR level 1 with further supporting requirements at level 2 enabling materialisation and compliance with the requirements;
- Enforcement of the cost-based approach requirements by all data providers with the possibility to strengthen the requirements and apply sanctions in case of non-compliance;
- Requirement for an entity like ESMA to supervise enforcement of data cost regulations;
- Transposition of the requirements from the revised MiFIDII/MiFIR to the remaining data EU regulatory frameworks, such as BMR, CRAR and ESG regulations.

8. Bundling of data & services

MiFID/MiFIR Delegated Regulation 2017/565 and Delegated Regulation 2017/567 provide that market operators and investment firms operating in a trading venue and systematic internalisers should make market data available without being bundled with other services.

We observe that the requirement to keep data unbundled is not present in any of the other EU regulatory frameworks for data (BMR, credit rating, or ESG), which has led data providers to condition the purchase of data on the purchase of additional services.

➔ **Suggested overarching regulatory principles:**

- Transposition of MiFIDII/ MiFIR unbundling requirements to the remaining data EU regulatory frameworks;
- Data providers should inform customers that the purchase of data is available separately from additional services;
- The storage of historical data should not be linked to the acquisition of a package of products and services. In other words, data that is older than 5 years is no longer qualitative, and users should be able to store such data for free.

9. Lack of enforcement of the non-discrimination principle

MiFID/MiFIR, the Benchmark Regulation, and the Credit Rating Agencies Regulation all stipulate that data must be made accessible without discrimination. Nonetheless, these legal requirements have not manifested themselves in the actual implementation of the non-discrimination principles. Non-discrimination should not be misconstrued by data providers as the ability to always charge the highest price to all clients.

We also note that data providers started developing ancillary services utilising their own data, linking in this way cheaper data with the purchase of specific services. This has resulted in a tendency to push service

providers out of the market due to the competitive advantage that data providers have in owning the data, e.g. exchange groups which sell market data to group index providers.

➔ **Suggested overarching regulatory principles:**

- Enforcement of non-discrimination legislation, with appropriate carve-outs to allow for discounts based on the size of the user;
- Data providers should explain in their data policy the applicable fees and terms and conditions for each use. They should justify any differentiation of fees and terms and conditions pertaining to each category of customers;
- Data providers should justify any amendment to their market data policy resulting in a change of the classification of customers on objective reasons;
- Bundling of data services should be allowed only if the bundled services and products can be purchased separately.

10. Extraterritoriality

Data users face difficulties when signing agreements with data providers outside the EU jurisdiction, as often such agreements fall under the law of the non-EU provider (USA and UK) with a light or missing EU regulatory framework comparable to MiFID/R data cost protections. In practice, in case of litigation with a non-EU data provider, EU data users would be at a disadvantage since they would only be allowed to raise a complaint in the third country jurisdiction.

➔ **Suggested overarching regulatory principles:**

- Third country data sources and vendors should be subject to the laws and courts of the country of the place of residence or business of the data user.

11. Historical data

We note that certain data sources and vendors do not allow for the use of their data (historical data) after a certain number of years. The use of historical data needs to be continuously licensed after the original data vendor contract has been terminated. It is to be noted that market participants need historical data for adherence to regulatory and accounting requirements, or when they change providers. Therefore, historical data should remain usable by consumers of the data without any constraints, and it should be free of fees and licenses as the data has already been paid for.

➔ **Suggested overarching regulatory principles:**

- Historical data should remain freely usable for regulatory/audit purposes and its delivery should be guaranteed for the required period established by the relevant regulation, without time constraints;
- Data purging requirements in case of contract termination should be prohibited, especially if historical data is necessary in order to meet its regulatory obligations. . If data is stored within the user firm, there should not be a charge for its potential use;
- Data usage related to reporting for regulatory or accounting purposes should remain free.

ABOUT EFAMA

EFAMA is the voice of the European investment management industry, which manages over EUR 28.6 trillion of assets on behalf of its clients in Europe and around the world. We advocate for a regulatory environment that supports our industry's crucial role in steering capital towards investments for a sustainable future and providing long-term value for investors.

Besides fostering a Capital Markets Union, consumer empowerment and sustainable finance in Europe, we also support open and well-functioning global capital markets and engage with international standard setters and relevant third-country authorities. EFAMA is a primary source of industry statistical data and issues regular publications, including Market Insights and the EFAMA Fact Book.

More information is available at www.efama.org

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