

Brussels, 28 August 2024

## ESMA CONSULTATION ON MiFIR REVIEW PACKAGE

### RTS BATCH 1: REVIEW OF RTS 2 ON TRANSPARENCY FOR BONDS, STRUCTURED FINANCE PRODUCTS AND EMISSION ALLOWANCES, DRAFT RTS ON REASONABLE COMMERCIAL BASIS AND REVIEW OF RTS 23 ON SUPPLY OF REFERENCE DATA

#### CP on the amendment of RTS 2

EFAMA is supportive of achieving greater transparency through reform of the bond deferral regime. We would like to offer some feedback which suggests a different calibration on both liquidity thresholds, and the determination of trade size buckets.

We are appreciative of the analysis carried out by ESMA which offers a solid basis for the review of the bond deferral regime. Nevertheless, we would like to offer some feedback on the proposed approach which we believe can be further finetuned:

- While we agree that greater transparency, particularly for smaller trade sizes within more liquid instruments, we question the starting point of '90% of trades' being subject to real-time transparency. This appears somewhat arbitrary and should be reconciled with other considerations like avoiding undue risk for liquidity providers.
- The groupings for the bond categories can also be streamlined:
  - o We believe that the 6 largest sovereign issuers (DE/IT/FR/ES/US/UK) need to be in their own grouping. The liquidity of different currencies also varies and should be reflected in the final groupings within the sovereign bond category. Putting all sovereign issuers in one basket is highly distortive and produces inadequate results when trying to determine thresholds.
  - o Therefore, we propose 2 groupings of sovereigns: the 6 largest as group1, and group2 which would be considered as more illiquid sovereign bonds, e.g. illiquid EM (emerging markets)
  - o Other public bonds should have their own grouping and not be merged with sovereigns
- One important element is missing from the proposed methodology: the notional time to trade out of risk is not taken into account. We believe that analysis of average daily volume data for the proposed bond

category can help determine if the calibrations are adequate and the resulting deferrals appropriate given the number of days required to trade out of positions.

- The AMF study on French corporate bonds also uses this ADV methodology to arrive at a quantitative measurement of trade out times. It needs to be clear, however, that quantitative measurement of trade out times only measures the status quo but not trade out times that are only reflecting the time needed to trade out of undue risk. Trade out times in practice are driven by a number of factors such as commercial profit and capital requirement considerations. Trade out times therefore could be shortened in a number of categories.
- Analysis of trade data also showed that undue risk was especially present for the illiquid instruments, again demonstrating a need for different thresholds.
- The analysis undertaken by ICMA and AFME, unequivocally points to different issuance size thresholds, and trade size thresholds. The former (liquidity thresholds) should be higher, and in many cases, the latter (trade sizes) should be higher. The one exception, borne out by the data, for smaller trade sizes, is the 6 largest sovereign issuers.
- For categories 3 and 4, it would make more sense for those large trade sizes to opt for publication on price at T+1, instead of current End of Day.
- Finally our members believe that the liquid 6 largest sovereign issuers (DE/IT/FR/ES/US/UK), especially fixed coupon and less than 11 year maturity straight bond issues, do not require a T plus 4 weeks price and volume deferral. These could be substantially shortened.

*The European buy-side is exploring an alternative model, based on the ESMA proposal. However, given the timing of the consultation over the summer, and the fact that the review of thresholds and trade sizes requires precise quantitative analysis, we are unable to include anything, though we may publish a proposal separately, in coming weeks.*

## **Q22 What is your view in relation to the implementation of the supplementary deferral regime for sovereign bonds?**

We disagree with any deferral periods for only submitting aggregated trade data as aggregated data can't be processed by the CTP until it is disaggregated on a trade by trade basis.

### **Reasonable Commercial Basis**

We are glad to be invited to provide constructive and pertinent feedback on this part of the consultation. As ESMA rightfully highlights throughout the consultation, this is an opportunity for financial legislation to address the market failures associated with monopolistic market structures for market data.

The Reasonable Commercial Basis principle is simple enough to understand. However its correct application, given the complexity and sophistication of market data providers, is much more challenging. This is why we have taken the liberty to provide detailed feedback on key provisions where we fear that while the intent of the provision is obvious enough, it can in practice be circumvented.

We believe that at this juncture, it is critical to articulate an enforceable RCB principle i) in order to avoid recourse to other parts of the law: i.e competition investigations which are costly and can take years to resolve, and ii) in light of the Consolidated Tape (CT) which should operate on an RCB principle. The accessibility and affordability of the CT is key for our industry, and we believe a key contributor to the competitiveness and attractiveness of our capital markets. Capital market participants should not be held hostage to an unfairly priced tape. A robust RCB legislation mitigates against that.

In summary, we have identified a few areas which if unaddressed, contribute to weakening the RCB:

- Recognition that market data is a by-product of trading (cost categories should reflect this)
- Value-based pricing is prohibited (recital 12)
- Margin setting under Article 3 of the draft RTS can be improved
- Unfair commercial practices, especially on audit practices.
- Content, format of data

Furthermore, we support the proposal to extend regulation to other data providers, not covered by MiFIR to ensure a level playing field.. We also take the opportunity to congratulate ESMA for specifically invalidating existing value-based provision in the level 2 texts (CDR 2017/565, 2017/567)

*223. The MiFIR Review removes the mandate for the Commission to clarify what constitutes a reasonable commercial basis<sup>24</sup>. As a result, the provisions contained in CDR 2017/565 and 2017/567, permitting the set of fees on the base of the value of the data represented to the user, will no longer be applicable once the RTS on RCB starts applying.*

## **CP on the RTS on reasonable commercial basis**

**Q26 Do you agree to the general approach used to specify the costs and margin attributable to the production and distribution of market data? Please elaborate.**

We were very pleased that the revised MiFID text called for ESMA RTS to strengthen the ESMA MD GL and to *specify the elements included in the calculation of cost*. These elements should be limited to the costs associated with *producing and disseminating* the data.

While the cost category proposal in the draft RTS is elegantly laid out, we fear that it fails the first and most critical test: providing a view on actual costs of producing and disseminating data. The proposal lays out broad categories with shared costs to be 'appropriately apportioned'.

This fatally avoids a key tenet held by all users of data, which is that data is a by-product of trading. By not answering this question, the RTS opens the way for a generous interpretation of appropriately apportioned cost, since then cost of matching trades can also be considered a cost of market data production.

We see that the UK FCA, in its 2020 report on wholesale data, had already reviewed this issue and confirmed that market data is a by-product of trading:

### *How does trading data work?*

*3.7 Many trading venues receive orders from different participants offering to buy and sell specific volumes of financial instruments (in particular more liquid asset classes) at different prices (collectively these buy and sell indications are called 'order books') via their electronic trading system. **The trading venue system then matches buy and sell orders and facilitates the execution of trades, with additional trading data being produced as a by-product of the participant interaction.** Trading data may also be generated (mostly for less liquid asset classes) via non-order book formats such as requests for quotations (RFQs).*

We urge ESMA to take one step forward and explicitly exclude from market data costs any costs associated with operating a trading platform. Failing to do so, will make the RCB principle toothless, resulting only in a reporting burden on exchanges, but not making a material difference on market data fees.

This methodology reflects our belief that in conducting a cost analysis, it is both realistic and appropriate to segregate the costs of producing market data, for example, from the costs of other general aspects of an exchange's operation, including the receiving and matching of orders for execution.

We can suggest two potential solutions:

### **Solution 1**

1. Retaining the existing cost categories, but amending article 2(1):

#### *Article 2*

##### *Cost of producing and disseminating market data*

1. *The cost of producing and disseminating market data shall be calculated by market data providers and only include costs that are directly associated with the production and dissemination of market data. These costs shall explicitly exclude any cost associated with operating a trading platform (the matching of buyers and sellers). The calculation of costs shall include the following cost categories:*

For articles 2-4 we recommend the following amendment to be applied to all 3 sub-articles, as in the example below:

2. *Infrastructure costs which are shared with other services not directly related to the production and dissemination of market data shall be appropriately apportioned considering the usage of the relevant infrastructure by each service. When attributing costs for the production of market data, it is understood that market data is by-product of trading so that any joint production costs should be limited to the aggregation and formatting of the data but none of the costs associated with receiving and executing orders.*

Article 5 and 6 should be deleted as they allow for undefined additional costs. It is precisely this type of open-ended language that should be avoided to prevent misuse of the cost methodology.

### **Solution 2**

2. Limiting the cost elements to expenses directly associated with offering market data and connectivity. These expenses include, but are not limited to, networking equipment, servers, fiber optic network circuits, software licenses, data center space, data center power, data center security, and HR headcount. <sup>1</sup> Based on the Methodology of the IEX market data report we attach a list of cost items which can be included in the calculation. <sup>2</sup> Such a table should form part of a binding annex to the envisaged RTS.

This embodies a cost-based approach which should only reflect the cost of administering and distributing market data. Once the production, packaging, contractual framework and downstream entitled distribution setup are in place, serving each incremental consumer is not associated with many additional costs for the provider/data source. This service provision is in stark contrast to the supply of

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<sup>1</sup> This is the approach identified by IEX in their [2019 report on cost of exchange services](#)

<sup>2</sup> Attach table done by Danish Finance.

standard manufactured goods or many other services, where the cost of input is strongly correlated with the amount of output: e.g. you need to buy more coal to produce more energy.

**Q27 Do you agree with the proposed approach to cost calculation based on the identification of different cost categories attributable to the production and dissemination of market data (i.e. (i) infrastructure costs; (ii) connectivity costs; (iii) personnel costs; (iv) financial costs; (v) administrative costs)? Please elaborate.**

See our answer to Q. 26 The RTS should contain a list of the defined cost items which can be included in the calculation.

**Q28 Do you agree with the proposal of apportioning costs based on the use of resources (i.e., infrastructure, personnel, software...) for each service provided? Do you think the methodology to be used to apportion costs should be further specified? Please elaborate.**

No only the directly attributable resources (i.e., infrastructure, personnel, software...) for the production of market data should be considered cost of production. The trading venues should not be permitted to charge general overhead or cost of the trading system operation. The RTS should contain a list of the defined cost items which can be included in the calculation.

See also our answer to Q. 26

**Q29 Do you agree that the net profit as defined in Article 3 of the draft RTS can be a representative proxy of the margin applicable to data fees and would you include additional principles to define when a margin can be considered reasonable? Please elaborate.**

*On Article 3, we believe that the following amendments would be necessary:*

*Article 3*

*Principles in setting a reasonable margin for market data*

- 1. The margin attributable to the production and dissemination of market data shall be the net profit generated from the production and dissemination of market data.*
- 2. The margin attributable to the production and dissemination of market data shall :*
  - a. be set as a percentage of the costs of production and dissemination of market data;*
  - b. ~~not exceed disproportionately~~ shall only exceed the costs of market data production and dissemination by a reasonable margin in accordance with 2(c), 3 and 4 below ;*
  - c. for market data providers who offer services other than the production and distribution of market data, be reasonable when compared to the net profit attributable to the overall business conducted by the data provider. Given the low incremental cost of producing market data for trading venues, market data profit margins should be within 10% of the average profit margins as measured across the financial services industry .*
- 3. The margin attributable to the production and dissemination of market data shall be achieved by setting fees for market data which enable data access to the maximum number of market data clients. Primary data providers (trading venues) manage data that is a natural monopoly. Once the conditions under Article 3(2)b are fulfilled, providers should price market data to attract the broadest range of market participants.*

4. *The reasonable margin for market data shall be set once, and shall increase or decrease in line with the EU inflation index thereafter (Harmonised index of consumer prices HICP; available at: [https://ec.europa.eu/eurostat/databrowser/view/ei\\_cphi\\_m/default/table?lang=en](https://ec.europa.eu/eurostat/databrowser/view/ei_cphi_m/default/table?lang=en))*

**Q31 What are in your view the obstacles to non-discriminatory access to data taking into consideration the current data market data policies and agreements?**

There are several issues to be taken into account:

1. Various and overlapping fee types, different and unclear definitions, as well as restrictive and opaque market data policies
2. We would like to see an exhaustive list of definitions in the RTS, this is currently lacking. An exhaustive list would support much needed standardisation and harmonisations and would avoid the proliferation of a number of new license types.
3. Abusive contractual conditions, including lack of transparency and requirements to sign NDAs
4. Issues in relation to access to the fastest data via co-location as “the closest co-location” cannot be offered to all. It could be considered to stipulate what is the fastest access available and then this should be available to all the customers who wish to purchase this.

Cf. 1. At present complex and blurred market data policies and pricelists with unreasonable terms and conditions which differentiate between burdensome value-based user categories and in all respects dominate the market. For example, fragmentation of licenses for the use of market data occurs when an area of usage of market data, which was covered by one license in one year, requires two or multiple licenses in the following year. Furthermore, licenses overlap whereby users pay for the same data several times. I.e. non-display data license used for trading and non-display data license used for not trading related risk management handling purposes.

Additionally, when new licenses are introduced it is usually for an area of usage of market data, which previously did not require a license at all. In both cases, the license fragmentation allows the data sources and providers to raise the total costs of the use of market data for the investment firms, without necessarily raising any existing license fee, by either splitting an existing license fee into two or multiple license fees, or by introducing new license fees altogether. In some cases, the data sources and providers may argue that their practice of splitting existing licenses or introducing new licenses is unbundling rather than fragmentation.

Specifically, they may argue that they are making their system of licenses more use-case specific, i.e. aimed specifically at the needs of particular data user, which should result in cheaper licenses for those specific use-cases. **But the data sources providers are , in fact, fragmenting licenses by ensuring that each use-case requires multiple new licenses.** The fragmentation becomes indisputable when looking at the development over time of the license systems of the data providers. Here it can be seen that over time the same use-case requires many additional licenses at significantly increased cost. Hence, there was never any intention by the data provider to provide cheaper use-case specific licenses through unbundling. Rather, the intention was to increase revenue through fragmenting. Furthermore, the restrictions in usage for various license types are designed to make it impossible for data users to go without any overlapping data licenses offered by the data sources and providers.

Previously, the differentiation of licenses for the use of market data was largely articulated around display and redistribution licenses. Some years ago, non-display licenses for computer to computer data feeds came in scope. The various licenses are defined in many ways across the trading venues, which highlights

the lack of standardisation in the industry. However, display data can be generally described as data being consumed on a screen by a human user, whereas non-display data is directly fed into applications, i.e. non-displayed. However, each of those two categories have now seen the number of licenses significantly increased by new fees introduced by the trading venues. The new fees may be differentiated according to the specific use of the data, e.g. the particular type calculations performed on the data such as indices or benchmarks, or the creation of more advanced so-called derived data.

Double agreements, are commonplace for data users who receive data from data vendors. Typically, data users still have to enter into the standard agreements with the exchange, e.g. a data distribution agreement and perhaps specific agreements for particular types of data, and an agreement with the data vendor, e.g. a master agreement with schedules. This leads to a situation, where all the terms and conditions set by the exchanges that would apply, if the data user received data directly from the exchange, still apply and remain enforceable, e.g. through audits, although the data is received through a data vendor. In addition, the data user also has to comply with any additional terms and conditions set by the data vendor. In sum, receiving data through a data vendor does not lead to more flexible terms and conditions for the use of market data.

We strongly encourage ESMA to ensure that such behavior is stopped with the new regulatory framework. However, we are concerned that i.e. the data vendors, benchmark providers, CRAs, ESG-providers are not in scope of the regulation as 1) we see those data providers are exploiting the fact that they are not in scope and 2) if they are not in scope, it would create an incentive for data providers in scope of the regulation, to direct their data business into data providers within their group, that are not in scope for the regulation. This development is already ongoing with increasing pace due to the vertical and horizontal consolidation in capital market infrastructure. The behavior of vendors, benchmark providers and CRAs is also described in UK FCAs reports , where some of the key findings related to these providers' business cases replicates the problems as these also are related to market data (although in a value-added format in contrast to the trading venues' raw market data). They face a rather similar market power and ability to acquire monopoly rent as trading venues.

Market data vendors (including CRAs and ESG providers) play a key role in the distribution of trading data and other sources of market data. Data vendors generally provide desktop or web-based products with sets of content such as order, trade and reference data from multiple exchanges, research, analysis, GDP, CRA, benchmarks and statistical data and news. Data vendors may be able to get data from third parties, while other content is developed or owned by the data vendor. There are only a few vendors, and the persistent and significant market share is concentrated around Bloomberg and LSEG (Refinitiv) limiting efficient competition. Also, the vertical integration increases this effect and limits competition and choices.

The challenges are i.e. that vendors are bundling core services with data services, which may make it difficult for users to switch to alternative data products/services and potentially sustaining higher levels of market power of data vendors. The vendors are imposing complex and restrictive terms and conditions around data usage, e.g. higher costs for users for minor variations in terms of use and not publishing price lists or methodologies. There are high barriers to entry, making it difficult to enter the data vendor market and there are high charges upon renewal of contracts. Additionally, where exchange offers are both aggregated and non-aggregated data due to requirements in MiFIR, other data providers only offer aggregated data as they are not obligated to disaggregate.

Furthermore, for access to i.e. exchange market data through a vendor, users need to contract directly with the market data source generator (the exchange) as well as with the vendor.

As mentioned, there is only very limited switching between vendors. This is not at least due to the switching costs, the request from clients to use certain vendors (network effect), the limited amount of "relevant" vendors etc. From the supply side, smaller vendors face that the client base is "sticky" which prevent these vendors from expanding their activities and gaining significant market share.

Benchmarks are used by a wide range of market participants, typically as a reference for index tracking funds, to evaluate an active manager's performance (where the fund performance is measured against a selected index), or in structured products, in which case the pay out of the product is directly linked to the performance of the index. Indices are calculated on a variety of input data and methodologies, where one way of classifying an index is by the asset class of the underlying assets (such as equities, fixed income, commodities, interest rates, foreign exchange etc.). Other approaches are geographic markets, sectors, themes such as ESG. Users mainly access benchmarks and indices either directly from providers or indirectly via vendors.

The supply of indices and benchmarks is provided by index providers or benchmark administrators. These benchmark and index providers develop, calculate and maintain a range of indices and earn revenue from licensing the benchmark/index use to clients.

A benchmark provider holding trading data have an incentive to increase prices or hinder data access to firms who could use them to design alternative benchmarks. This could create barriers to entry or expansion and reduce overall choice in the market. This market power to "nudge" the development is not the only market power benchmark providers have:

On the demand-side there are significant preference for established benchmarks and indices ("must-have"): If end clients tend to prefer products that are referenced to well established benchmarks and indices and brand recognition is key to success, strong market positions may tend to reinforce themselves. These preferences may also limit new entrants to the market.

With that in mind, we welcome the ESMA proposal to recommend the European Commission to use its legislative power to create a level playing field between the market data providers subject to MiFIR2 and those providers which are not in scope for MiFIR2 as suggested in point 235. However, we strongly recommend that the scope cover all data providers and not only vendors, but also benchmark providers, CRAs, ESG-providers, as all of these data providers exploit the fact that they are not in scope. We suggest that the regulatory framework should be created in a futureproof way so the description of data providers is generic and can embrace new kind of data providers – a recent example of a "newcomer" is ESG-data providers.

Cf. 2. The Exchanges have imposed abusive conditions in their license agreements. Conditions in the market data license agreements are, to a very high extent, biased in favour of the Exchanges, while buy-side and sell-side investment firms have no bargaining power in the agreement negotiations. In this context, the investment firms are forced to sign NDAs and there is no transparency in the negotiation. The Exchanges are able to impose such conditions due to their position as unavoidable trading partners holding the key to the market via an essential facility. In essence, these are contractual conditions that would never be accepted in a market with effective competition. The conduct of the Exchanges leads to discrimination, as dissimilar conditions are applied to similar transactions. Specifically, the underlying product sold by the Exchanges, i.e. access to the use of market data, is similar regardless of who buys access to the product and what the product is used for. This means that transactions with different investment firms or other buyers of market data, but concerning the same packages of market data, are, in fact, similar from the point of view of the Exchanges. But the Exchanges apply dissimilar, and often arbitrary, conditions to such similar transactions. The dissimilar conditions arise from special licenses for various different uses of the market data. This may, for example, entail licenses covering the use of market data for derived data, i.e. the creation of own data based on raw market data, or the use of market data for external distribution, i.e. distributing the raw market data to a client. In sum, the dissimilar, and often arbitrary treatment, of similar transactions leads to discrimination between investment firms who need the market data for different uses. This would be akin to charging different prices for eggs depending on whether the customer wanted scrambled or boiled eggs for breakfast. This will distort competition and create competitive advantages and disadvantages among investment firms and other buyers of market data in an arbitrary manner.



**Q33 Do you agree with ESMA's proposal on how to set up fee categories? Please justify your answer.**

We believe that Article 5 as it is currently expressed is flawed, as it opens a 'back-door' for value based pricing, which is so prominently prohibited in the Level 1 text.

Any categorisation should be strictly limited to professional vs non-professional clients, where there is a clear difference in both amount of data consumed, and use of data. Any further categorisation of data *within* the professional category is tantamount to value-based pricing.

The cost of producing and disseminating market data does not differ among customers. If anything, costs should have decreased during the past decade due to development in the underlying technology used in distributing the market data and the hardware.

*Article 5*

*Differentials in fees*

1. *When applying differentials in fees, market data providers may not recur to categorisation of clients other than professional vs non-professional clients as defined in (MIFID) The number of professional clients shall be determined only on the basis of the legal entity using the data. The legal entity shall be identified with the Legal Entity Identifier (LEI -ISO 17442). The non-professional client shall be identified as a single natural person. Employees of professional clients do not count as non-professional clients.*
2. *the margin, established in accordance with Article 3, is the same for all clients within a category;*
3. *Where there are significant different extra costs for the provision of the market data to the same client, because of non-standard delivery requirements, including lower latency requirements; market data providers may add an increment to the applicable fee determined by the extra costs incurred.*
4. *Discounts or any other temporary reduction of fees are allowed provided that they ~~are based on factual elements, easily verifiable and sufficiently general to pertain to more than one client.~~ pricelists are publicly available and the discounts apply to all customers.*

**Q34 Regarding redistribution of market data, do you agree with the analysis of ESMA? If not, please elaborate on the possible risks you identify and possible venues to mitigate these. In your response please elaborate on actual redistribution models.**

Regarding redistribution of market data the number of professional clients shall be determined only on the basis of the legal entity using the data. To the extent that a legal entity is redistributing the data it needs to disclose the names or number of the legal entities it is redistributing the data to in order to enable the market data provider to license these legal entities directly. To the extent that a legal entity is redistributing the data and it elects to disclose only the number of the legal entities it is redistributing the data to, the redistribution legal entity must take out the required number of license for these legal entities. The disclosure of the number of non-professional clients to which a professional client is redistributing data can be based on a reasonable estimate. Basing the professional user numbers on the number of legal entities actually using the data provides for an easy to administer and fair system of cost attribution as larger groups with multiple legal entities pay more than small groups with a single or small number of legal entities. By identifying the professional users with their LEI, there is no argument on whether a certain department or other unit of a group is a legal entity or not. For non-professional clients a reasonable fact based estimate of the number of data users should be sufficient. Establishing the exact number of natural person users is a considerable and in part futile effort because of the volatility of the numbers as well as administrative hurdles (GDPR limits / no data source on the number of TV viewers watching on screen price feeds). Already the

establishment of the number of natural person users within legal entities for the purposes of calculating today's display user licenses is a nightmare as evidenced by the administration of e.g. Bloomberg user IDs.

**With reference to paragraphs 234-235 of the consultation text, and as already explained above, EFAMA supports the proposal for the European Commission to use its legislative power to create a level playing field between the market data providers subject to MiFIR2 and those providers which are not in scope for MiFIR2. A new legislative proposal in this area should take care to cover all data providers and not only vendors, but also benchmark providers, CRAs, ESG-providers. These currently do not fall in scope of the Reasonable Commercial Basis principle. This would capture relatively new data types like ESG data providers, where we find similar issues of natural monopolies, poor data quality and very high margins for regulatory-mandated data. The matter is urgent as already today non-EEA based trading venues providing market data to EEA based users are not subject to the user protection requirements of MiFID/MiFIR**

#### **Questions 35-40 - What constitutes unbiased and fair contractual terms**

- We support all of the provisions introduced by ESMA while proposing some changes to articles 14-16 as per the below.
- Some aspects that still need to be taken into account:
  - o In practice, data providers establish the business contracts in non-EU law (usually US law). There is a difference in how non-EU law and EU law deal with the burden of proof: even if ESMA introduces a reverse in the burden of proof to favor data users, we fear that the contracts being established in US law, the burden of proof would still fall on data users in those jurisdictions.
  - o For the same reasons, the legal fees being extremely high in the US, data users usually never go to court to challenge a contract with a data provider.
  - o Consequently, unless the contracts with EU data users are not mandatorily established in EU law, the provisions introduced by ESMA might have limited impact.
  - o ESMA's state of play missed clauses under which data providers require data users to delete all of the historic data if they were to terminate the business relationship. This is an abusive clause that should be dealt with by ESMA under those RTS.
  - o We reiterate the importance of unbundling.

**Q37 According to your experience, has the per-user model been inserted in the market data agreements as an option for billing? If yes, do you have experience in the usage of this option? Is the proposed wording of this option in the draft RTS useful? What are in your views the obstacles to its use?**

Yes, most exchanges offer the "per Natural User" option (per physical user) – however, each customer has to go through a very cumbersome process to get pre-approved to participate in the netting program. This is why investment firms would only request to report as a per-user (instead of per user ID) if they can see a considerable benefit (especially looking at the resource intensive procedure to meet all requirements.

(insert example from Nasdaq Nordic, DBAG and Euronext)

It is a process which deeply lacks transparency since each data vendor will report the investment firm's users accesses directly to the exchange and the investment firm will report its users directly to the exchange. It is then the exchange which tries to match all the different reports to verify that they are

providing identical information. This is why this per-user process must be simplified. We suggest the following approach for reporting each real time accesses per physical users using the “per-user model”:

The situation today can be described as the following (will be formalized with figures):

- Today: The exchanges are performing the “per-user model” meaning the netting reconciliation (matching) based on the information from the data user (an investment firm) and one or more data vendors. The data user collects each real-time subscription from different internal entitlement systems and reconciles those into a single internal inventory system. Each vendor has its own entitlement system which may contain divergent information due to technical registration issues or miscommunication with the data user (requesting to cancel accesses), the data vendor registers the data user’s with different client ids and their registrations may be done on an uneven, period way compared to the data-users. This leads to different reporting to the exchanges and therefore problems with the netting reconciliation. There is no transparency in the process, since as data-users we have no access to view the data vendor’s registration of their users in their internal systems. Each exchange has its own “per-user” reporting procedure, where some might use an Excel Sheet to be sent by email while others have their own reporting website.
- Proposal: There should be one centralized “per-user” reporting platform where each market data user connects using its unique identifier and would have access to view the information that each data vendor holds regarding their users for each exchange, and thereafter be able to compare with its own inventory of subscriptions. Each data vendor connects using its unique identifier and would have access to view the information that each of its customers holds, and thereafter be able to compare with its own registration of subscriptions. Each exchange connects using its unique identifier and would have access to view the information that each customer of theirs and each data vendors of theirs have respectively – and thereafter be able to view the reconciliation (netting) report as prepared by the data user (since it is the responsibility of the data user to report, as part of the signed exchange agreement).

The respective market data users, the relevant data vendors and exchanges should be able to connect their internal entitlement system using an API in order to upload user subscription files (instead of having to enter users manually). The data users will also need to include their “single data user key” (in order to identify each physical user by using a single ID – or have the platform generate such unique key for each physical user, to avoid breaches with GDPR) to make the link between the vendors various user ids for this single physical user). All three parties would have then access to the same information (note: data vendors should not be able to view accesses from other data vendors). The systems should have a matching facility (netting reconciliation) and when there is a mismatch the data user can investigate where this reconciliation failed and ask the data vendor to correct the information or amend its own reported information if incorrect. The netting reconciliation must be based on both entitlement and active usage reports. There is a need for an audit trail to prove access to data use (usage file) and also as to what what corrected (including an explanation). This tool should have a communication function, in order to avoid a lot of emails back and forth between the different parties – and it could serve as explanation as part of the audit trail. This proposal will provide the needed transparency, a simple process compared to today and a possibility to act instantaneously in case of different/wrong information provided.

**Q39 Do you agree with ESMA's proposal on audits? Please elaborate your answer.**

We mostly agree with ESMA's proposal, and believe that audit rights for any licensor should be subject to reasonable customer requirements, which include:

- No more than one audit per year
- A minimum 30 day's prior written notice of any licensor's intent to audit
- Subject to customer's staff availability
- Conducted at the licensors expense
- Compliance with client visitor policy
- Not direct access to client systems (client employees can pull data logs for auditors)
- Inability of licensors to remove any records from the client premises
- No disruption of business operations
- No disclosure of any confidential client information
- Assurances any identified audit breach is subject to notice & cure

One key area of concern, however, relates to how ESMA might contemplate the implementation of audits for breach. Specifically, it is unclear how such a pre-audit breach might be substantiated, without the requirement for clients to provide additional reporting that could prove costly and operationally burdensome. To avoid any unintended consequences of audit obligations being moved from licensor to client, we suggest introducing "sample audits" where clients share a report about data usage for a specific period (i.e 1 month or a maximum of 1 quarter), which the vendor can review to validate compliance or suggest objections. We believe this would be a far more efficient method of sharing information which would benefit both licensor and client.

We can also recommend the following amendments to the current text:

*Article 14*

*Penalties*

1. *Market data providers shall clearly indicate in the market data agreement the infringements to which penalties are applicable.*

*The amount of penalties shall not unreasonably exceed the fees the client would have paid in case of compliance with the market data agreement.*

2. *A penalty payment request shall be made only within a reasonable time, **not exceeding two years**, from the infringement occurrence, and shall be based on clear evidence of the infringement occurrence.*

*Article 15*

*Audit*

1. *Audits may be requested by market data providers in case of serious indications of infringement of the market data contract to ascertain whether a breach occurred. An infringement of the market data agreement cannot be presumed but needs to be established on the basis of clear evidence (no reverse burden of proof). During an audit, information requests shall be limited to what is strictly necessary to collect evidence in respect of the alleged infringement.*
6. *An audit shall cover a reasonable period of time, not exceeding two years.*
7. *An audit shall not take place later than six months after the termination date of the agreement.*

#### *Article 16*

##### *Market data agreement amendment*

*The market data provider shall give notice to the market data client of any unilateral change to the terms and conditions of the market data agreement, including terms and conditions relating to fees, at least **one year** in advance of the relevant amendment entering into force. Where the amendment results in a change of the fees or **may have significant impacts on the client**, the market data agreement shall foresee the right of withdrawal for the client **without additional fees or penalties**.*

## **RTS BATCH 2: TECHNICAL STANDARDS RELATED TO CONSOLIDATED TAPE PROVIDERS AND DRSPS, AND ASSESSMENT CRITERIA FOR THE CTP SELECTION PROCEDURE**

### **Section 3 – RTS on input and output data of CTPs:**

**Q8 Do you agree with the proposed definition of “transmission of data as close to real time as technically possible”? If not, please explain.**

Art 7da (2) € and 27h (19 (d) MiFIR require the CTP to disseminate core market data and regulatory data to users as a continuous electronic data stream on non-discriminatory terms as close to real time as technically possible. Article 27h (2) (b) says that CTPs shall adopt, publish on their website, and regularly update service level standards covering ...modes and speed of delivery of consolidated market data to users. EFAMA has maintained throughout the MiFIR debate that the buy-side can accept a latency of up to one 1 second for the dissemination of the equity and ETF CTP data and a longer period up to 1 minute for the bond and derivative CTP data after the data is received as close to real time as technically possible from the data contributors.

As we have consistently maintained, the buy-side does not expect the equity/ETF consolidated tape to replace direct data feeds used by buy-side traders. The CT will be a valued complement to facilitate trades, and help inform trading decisions. As such, we do not favour a very low latency tape. The buy-side believes that a very low latency tape will needlessly drive up costs, without adding value or increasing the attractiveness of the tape. In fact buy-side systems are not even set up to ingest data that is faster than 250milliseconds.

On the bond CTP side, we are sure that competition by APA/ARMs will lead the CTP to disseminate core market data and regulatory data to users as close to real time as technically possible, especially as bond data needs to be made available after 15 minutes for free by the CTP competitors which forces the bond CTP to distribute high quality data as fast as possible if it wants to make a viable offer.

We are not in a position to comment on the speed of data from the data contributors, and that of the CT itself, but we can comment on the overall speed of delivery. We do believe that the time from the trading venue matching engine (or OTC equivalent) to publication by the CT can be between 250 milliseconds to 1 second, both for pre-trade and post-trade data.

#### Questions 10-12

- Q10** Do you agree with the baseline proposal of adopting JSON as standards and format of data to be transmitted to the CTPs, or do you prefer alternative proposals? Please justify your answer and, if needed, provide additional advantages and disadvantages related to each proposal.
- Q11** Do you believe that the proposed standards and formats (baseline and any alternatives) are coherent with other CTP requirements (transmission protocols, real-time transmission and presentation of output data)? Please justify your answer.
- Q12** Do you find more suitable to prescribe one single format across the 3 CTPs (equity, derivatives, bonds) or to prescribe distinct formats according for different asset classes?

Given the different properties of shares, ETF, bonds and derivative instruments, and the likelihood that there will not be a single CTP provider for all three CTs, we agree to more than one “format” for the data exchange between the data sources and the CTPs. However, we propose that the CTP does not establish one “format” but establishes one or more joint data transmission standards that refer to lists of properties rather than any specific data transmission or schema and taxonomy formats for several reasons. Firstly, any data transmission or schema and taxonomy format data standards with all the properties of the CTP standards would satisfy all the CTP processing requirements. Second, data transmission or schema and taxonomy formats that have these properties are likely to be interoperable with each other. Interoperability is an important consideration for the CTP operation. Finally, under this approach, the CTP could take in new open-source file formats as they are developed, and maintain consistency with the CTP joint standards, provided that the new formats have the listed properties; the CTP data transmission rules would not need to be amended to specify new formats.

### Section 7 – Criteria to assess CTP applicants

- Q51** What are in your view the most important elements that should be taken into account when defining the governance structure of the CTP?

The final MiFIR text provides a coherent framework for the development of viable and meaningful tapes operating as true utilities in both asset classes. Our preliminary observations at this stage premised on these key principles:

- This is an opportunity to introduce a new market infrastructure utility provider which operates on the RCB principle. As a new entrant, it should be much easier to optimise the legal framework for a data provider that charges fees based on cost recovery and a reasonable margin. There is no existing data revenue model to ‘defend’ nor are there legacy licensing and fee models to perpetuate. As a recent IOSCO report highlighted that “the costs, accessibility, fairness, and consolidation of market data continue to be a major barrier to fair and efficient markets”. This is an opportunity to get the right framework in place, it should not be wasted.
- Europe’s capital markets need consolidated tapes that are a viable success operating as a market utility for all. Profit maximisation should be discouraged. Adequately priced consolidated tapes, combined with a simple fee and licensing model are key to making the tapes an attractive proposition.
- Future proofing the tapes - the tapes will go through various growth phases where data quality improves, user base expands, technology evolves, and regulatory requirements change. It is critical

that the CTs are legally and factually equipped to navigate through these changes, without impacting the relevance of the tape for data users, and without bringing about market distortion and reducing competitiveness. We suggest that a robust, broad-based governance framework including data contributors and data users can best 'future-proof' the CTs.

A previous version of the MiFID/R regulation laid out provisions for a Consolidated Tape. However, no CT provider emerged under those conditions, leaving Europe's fragmented markets without a much needed investor tool to attract capital into Europe. As we are going into this process, again, with our eyes wide open, it would be reckless not to include in the founding structure a **water-tight governance structure**. We believe that the surest and only way of mitigating against fundamental conflicts of interest, is through a well thought-out governance structure. With a broad and empowered representation, the governing body will only be able to act in the interests of investors at large, and European capital markets more broadly.

This should be the over-riding mission of the CTP, and only a carefully balanced governance structure can help it deliver on these goals.

Given some of the well-documented disadvantages that European capital markets face vis-à-vis the United States, it is imperative that the CT deliver on its objectives and that the CT become and remain a critical source of data for the well-functioning of our capital markets. This means that the CT should continue to evolve, always responding to the needs of a broad cross section of participants.

Looking forward, the consolidated tapes will go through various growth phases where data quality improves, user base expands, technology evolves, and regulatory requirements change. It is critical that the CTs are legally and factually equipped to navigate through these changes, without impacting the relevance of the tape for data users, and without bringing about market distortion and reducing competitiveness. With trading venues and exchanges involved in the delivery of the tape, **there is always the risk that the sale of proprietary market data is given priority over the more fundamental and broad-reaching objectives of the tape**. Conflict of interest policies are important, but ultimately only a well-balanced governing body can grow the CT into a success story.

The technical ability to receive, consolidate and disseminate, applicable, pre-trade and post-trade data for shares and ETFs and post-trade data for bonds and OTC derivatives is key for the CTP applicants. We suggests a governance model along the following lines:

The CT should be governed in such a way that it reflects the interests of all stakeholders (data contributors and users)

- Broad representation on a dedicated governance body/board, including data users (buy-side, sell-side and other users), data contributors, and vendors.
- Advisory body/board representation should be proportionate, i.e no segment dominates (different communities such as data contributors and data users have equal voting rights).
- A permanent voting rights representation for EC and ESMA.

The advisory body/board should have voting rights on decisions relating to:

- Pricing policies/fees
- Revenue sharing scheme (if applicable)
- Simple, easy to use licensing policies
- Data content, standardisation
- Data quality
- Speed and connectivity
- Futureproof the tape- it needs to continue to meet market demand to grow.

A robust Conflict of Interest Policy should be supporting the governance scheme.

One aspect which should not be overlooked at is the long-term financial viability of the CTPs. The CTPs will constitute a long-term infrastructure which provider we would not expect to change every five years. A tender with unclear or uncommitted funding or firms making losses is less acceptable than a profitable, well capitalized firm. On this basis the CTPs should be founded as essentially not-for -profit or limited-profit organizations which are strongly based on a cost of production plus reasonable margin (RCB) principle (Art.13), see also our answer to Q 52. Application of the RCB principle does not prevent that certain stakeholder such as the data providers get a fair share of revenues through distribution of revenues which have not been used for cost recovery, especially the margin-based revenues allowed by Art13.

We suggest the wording below to support this outcome:.

#### *Article 4*

##### *Corporate governance*

*(Articles 27da(2)(d) of Regulation (EU) No 600/2014)*

*1. A selected applicant seeking authorisation to operate a consolidated tape shall include in its application for authorisation information on the internal corporate governance policies and the procedures which govern its management body, senior management, and, where established, committees. Without prejudice to the provisions of Article 7, the interests of investors are best served through a broad and meaningful representation on the governing body of the CT.*

*2. The information set out in paragraph 1 shall include:*

*a. a description of the CT governing body, which shall be composed of the CTP itself, trading venues, broker-dealers, institutional investors, retail investor and issuers. Each category of stakeholder shall have a single seat on the board of the CT, with voting rights and a right of veto on the following matters:*

- i. data standards and data quality,*
- ii. distribution model used by the CT*
- iii. revenue sharing scheme (if applicable)*
- iv. pricing policies and fee structures*
- v. Simple, easy to use licensing policies .*
- vi. Future development of the tape*

*b. a description of the processes for selection, appointment, performance evaluation and removal of senior management and members of the management body;*

*c. a description of the reporting lines and the frequency of reporting to the senior management and the management body;*

*d. a description of the policies and procedures on access to documents by members of the management body.*



**Q52 Should the CTP include representation of other stakeholders within their governance structure?**

Yes, see our response to question 51

Inspiration on the set-up of a dedicated governance body/board besides any board required by company law could be drawn from existing organizations such as GLEIF; DTIF, and ANNA DSB. In these three cases there is a private operating company / foundation which is subject to oversight by either a pure regulatory (GLEIF) or a mixed product committee (DTIF/ DSB) representing the market participants. We strongly believe that all CTPs will gain most support from most market participants if they are construed as much as possible as open public-private partnerships based on the model of the Global Legal Entity Identifier Foundation GLEIF which is issuing the LEI identifier, or the Digital Token Identifier Foundation (DTIF) and the Derivative Service Bureau (DSB) which issue the DTI, the OTC-ISIN and UPI, respectively. Established by the Financial Stability Board in June 2014, the Global Legal Entity Identifier Foundation (GLEIF) is tasked to support the implementation and use of the Legal Entity Identifier (LEI). The foundation is backed and overseen by the Regulatory Oversight Committee, representing public authorities from around the globe that have come together to jointly drive forward transparency within the global financial markets. GLEIF is a supra-national not-for-profit organization headquartered in Basel, Switzerland.

<https://www.gleif.org/en/about/this-is-gleif>

The model of a not-for-profit foundation is also possible in a purely private environment. An example is the DTI Foundation for token identification. The DTI Foundation (DTIF) is a non-profit division of Etrading Software, a financial technology firm with a mission of solving market-wide problems by building market infrastructures for the new digital economy. As Registration Authority (RA) for the ISO 24165 standard, the DTIF's mission is to provide the golden source reference data for the unique identification of digital tokens. DTIF issues and maintains DTIs on a non-profit, cost-recovery model, to increase transparency in the digital asset space through the creation of a core reference data set based on open data principles and available as a public good. The Product Advisory Committee of DTIF represents a broad range of market participants and stakeholders. <file:///C:/Users/siebel/Downloads/FAQ%20on%20DTI.pdf>

If a not-for-profit entity / foundation is not be required by ESMA, good governance including all stakeholders is possible through an appropriate structure based on committees protected by the statutory documents of the CTP. An example is the Derivatives Service Bureau which is a global numbering agency for OTC derivatives serving the needs of market participants through the allocation of International Securities Identification Numbers (ISIN), Unique Product Identifiers (UPI), the Classification of Financial Instruments (CFI) and Financial Instrument Short Name (FISN). These are globally recognized and adopted ISO standards for identifying, classifying and describing financial instruments. In 2019, the Financial Stability Board (FSB) designated the DSB as both the service provider for the UPI system for OTC Derivatives and the operator of the UPI reference data library. The UPI is used for identifying OTC Derivative products in Transaction Reporting data and to help assess systemic risk and detect market abuse.

<https://www.anna-dsb.com/about-us/> .

Focusing on the governance of DSB, the Product Committee (PC) is an industry group that works beside the Board of the Derivatives Service Bureau. The PC oversees the definitions of a broad range of OTC derivatives and how they translate into data requirements for allocation of identifiers. They also support the development and inclusion of descriptive taxonomies used to identify OTC derivatives. The PC is made up of voting members (Buy-Side Institutions (Max. 3), Sell-Side Institutions (Max. 3), Custodians (Max. 3), Trading Venues (Max. 3), Vendors (Max. 3)), Non-Voting Members (able to attend meetings and contribute but not vote - trade associations (Max. 5: representing a broad constituency of asset classes member roles),

and Observing Members (able to attend meetings and contribute but not vote -regulators and / or policy makers): [https://www.anna-dsb.com/download/dsb-pc-charter-revision-for-term-3-2021-23\\_final/](https://www.anna-dsb.com/download/dsb-pc-charter-revision-for-term-3-2021-23_final/)

In the three cases mentioned above there is a private operating company / foundation which is subject to oversight by either a pure regulatory (GLEIF) or a mixed membership product committee (DSB/DTI) representing all the market participants. On such product committee, obviously ESMA should be directly represented beside market participants stakeholders.

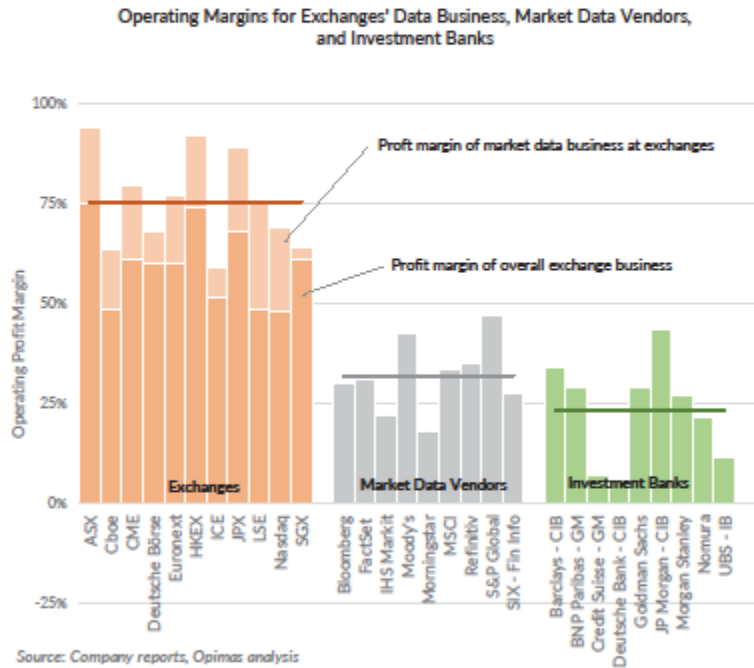
**Q55 To score the applicants on their development expenditure and operating costs, ESMA intends to look at the costs the applicant will need to cover on an annual basis. Do you agree with this approach? If not, which alternative approach would you deem more appropriate?**

The proposed approach seemed reasonable and seemed to accommodate for newer entrants who may have higher upfront costs, but similar running costs in the future to a more established player. (think EuroCTP vs Adamantia). Nevertheless, one aspect which should not be overlooked at is the long-term financial viability of the CTPs. The CTPs will constitute a long-term infrastructure which provider we would not expect to change every five years. A tender with unclear or uncommitted funding or firms making losses is less acceptable than a profitable, well capitalized firm or sponsor of the CTP applicant. On this basis the CTPs should be founded as essentially not-for -profit or limited-profit organizations which are strongly based on a cost of production plus reasonable margin (RCB) principle (Art.13), see also our answer to Q 52. Application of the RCB principle does not prevent that certain stakeholder such as the data providers get a fair share of revenues through distribution of revenues which have not been used for cost recovery, especially the margin-based revenues allowed by Art13.

The CTP should regularly publish reports on the data quality of the various data contributors to increase public pressure on them to improve data quality at each contributor. Additionally, both the obligatory (equity and ETF CTP) and voluntary (Bond CTP) revenue distribution schemes should exclude any data contributor with identified data quality issues from receiving any part in the CTP revenues.

Considering also the applicable RCB principle (Art 13 MiFIR) the CTP may charge the cost to develop the consolidated tape and the costs of operating the consolidated tape on an ongoing basis towards the user basis. This could include funding costs (loan interest) and taxes borne by the CTP. Additionally, under Art 13 MiFIR the CTP could charge a reasonable margin. Consultant Opimas established operating profit margins for market data providers (in 2019) as follows: "Disentangling exchanges' financial reports is no mean feat, as they are not designed to allow revenues and profits from market data to be readily extracted. the level of profitability of market data at exchanges is remarkably high, hovering around 76%. This is more than twice what market data vendors, such as Bloomberg or LSEG (Refinitiv) earn, and more than three times major investment banks."

The market data businesses at exchanges have profit margins more than twice non-exchange data providers and more than three times investment banks...



Contents

Source: Opimas, *Exchanges and Market Data How Much Money Is Being Made?*, February 2020

The operating profit margin calculation is the percentage of operating profit derived from total revenue. A 76% operating profit margin for exchange market data operations is equal to EUR 0.76 operating profit for every EUR 1 of revenue obtained from data users. We are of the opinion that the stated operating margins of 76% on average within the exchange market data segment are excessive and clearly point to a monopoly situation and a distortion of competition. Therefore, we suggest establishing at the outset a basis for the reasonable margin under Art 13 MiFIR for CTPs based the level of margins within a competitive industry, e.g., the non-exchange data industry such as ESG data. For example, the common industry platform for sharing ESG data, Dataland, must operate on a fixed “cost+ 15%” basis to allow that data gets cheaper the more parties use it. After the initial setting of the Art 13 MiFIR margin any increase / decrease of the reasonable margin the CTP may charge shall change in line with inflation only. Revenues exceeding the RCB cost plus reasonable margin basis not needed for revenue sharing should be redistributed to the CTP users through direct paybacks or discounts on future prices.

**Q56: The simplicity of the fee structure and licensing models can be scored by taking into account the number of tiers, fee types and licensing models. Does this accurately reflect simplicity? If not, would you propose a different approach to assess simplicity? Please elaborate.**

There should be a very simple fee structure and license model based on non-professional (natural persons other than employees of professional users) and professional users (based on legal entity), see Q34.

As stated above the level of fees as established by the pricing policy of the CTP should be strictly based on the RCB principle under Art 13 MiFIR. Fees should be set based on a simple system and not be based on multiple terms. Especially, any pricing based on the value created using CTP data should be discouraged, cf. recital to Art 13 MiFIR. The CTP pricing policy needs to set fees only for professional subscribers because free access to retail investors, academics, civil society organizations and competent authorities is provided for in the law, cf. Art 27h (1) (b) MiFIR. For simplicity reasons we suggest preferring pricing policies which provide for fees based on the legal entity of the user (enterprise license fee). A preferable single – one size fits all - enterprise fee should not be considered discriminatory. If fees are linked to the legal entity, then groups with many companies automatically pay more than the groups with fewer firms, and thereby smaller firms will pay ultimately pay less than larger firms.

The simple fee should ideally cover both human and computer CTP data usage and should be set in a simple fashion at the enterprise level. In this case, display data redistribution of CTP prices to retail clients by a broker should not count separately as it facilitates retail participation in EU capital markets. A special fee may, however, apply in other cases where a data vendor user replicates and redistributes the whole CTP database, and is becoming essentially a competitor to the CTP. We expressly urge ESMA not to encourage the usage of the human users and device count methods in display / non-display fee situations as this metrics are very difficult to administer in practice and usually lead to an excessive cost burden for the user company.

On the license side, CTPs should be preferred which disallow complicated value creation-based licenses in favor of license models which allow for the free use of the CTP data paid for by the user for all internal and external applications and business cases thereby supporting increased visibility, trading, and attractiveness of EU capital markets. The Creative Commons Organization (CCO) license is the global standard for such data usage licenses. Creative Commons is a nonprofit organization that enables the sharing and use of creativity and knowledge through free legal tools. For example, the GLEIF makes all data available under the CCO license and endorsed the International Open Data Charter. The Charter defines open data as “digital data that is made available with the technical and legal characteristics necessary for it to be freely used, reused, and redistributed by anyone, anytime, anywhere”.

<https://www.gleif.org/en/about/open-data>

The data contributors may be demanding that their license models should be applied by the CTP when dealing with its users. We strongly urge ESMA not to follow such demands. ESMA should not allow CTP licenses or disclaimers as on the ESMA operated ERP ratings platform which suggest that the data contributors may retain any IP rights in the data provided to the CTP. It is well established that so-called simple data that lack creative value such as numbers as in individual prices / market data as such are not protected by copyright under the Berne convention.

This is noted in the European Commission’s 2011 decision in the Standard & Poor’s case (ref: COMP/39.592) in which an EFAMA member was complainant. It involved the charging of licensing fees for US International Securities Identification Numbers (ISINs). Standard & Poor asserted that they owned copyright over both the ISIN databases and the individual numbers. An ISIN is essentially a reference number. There is some structure and rationale to the numbering system, but the number assigned to a security is built from a country code, the issuer code, the issue code, and then a final check digit applicable

to the entire sequence. In paragraph 39 of the decision, the European Commission "took the preliminary view that S&P does not own copyrights in respect of US ISINs, either as a database or in respect of the individual numbers". Also, in paragraph 42, the Commission cited several examples and said: "Relevant national precedents found that individual numbers are too trivial or not original enough to constitute material that can be subject to copyright". Therefore also (exchange closing) prices, which are a record of fact or are the product of a mathematical adjustment to a fact, are not protected by copyright in the EU. Data contributors may, however, rely on or IP protection of their TV, ARM or APA operated market data database under the following conditions:

“(a) Copyright – to attract copyright, a database must be an original literary work of the author’s own intellectual creation; effort must have been spent on the selection and arrangement of the data; and sufficient judgement and skill must have been exercised in the process of creation. Specifically looking to the two parties to the bond or share trade, it is the buy-side customer who expends more effort in this regard as they are responsible for the investment decision and ultimate execution of the trade, and so it is more likely that the buy-side customer holds the copyright.

(b) Database right – aggregating transaction data from numerous counterparties, anonymising that Data, standardising it and reformatting it would be seen as the requisite effort to create a CTP database, which does not copy, extract or re-use a substantial part of any other TV, APA or ARM Database”, cf. Witherstech; Trading data and the law – an assessment of the parties’ rights (**attachment 1**). Looking specifically at EU closing prices, another study says: “(court) decisions set a high bar for database protection in EU member states. It is unlikely that any extraction of closing prices from a stock exchange site will infringe rights under the EU Directive and applicable domestic legislation because:

- There is no originality in the selection and arrangement of closing price data in any stock exchange database.
- Only minimal investment is incurred in identifying and obtaining closing price data, and any subsequent compilation and related technology investments are irrelevant.
- Dissemination of closing prices is an activity undertaken primarily to meet the exchange's core mandate, and that makes it unlikely that the investment tests for database protection can be sustained.
- The sui generis database right can only be enforced when unauthorized extraction and redistribution seriously prejudice the exchange's investment, but the investment in a content licensing business operated by an exchange in addition to its core mandate is not relevant to that determination”, cf. EDI Closing Prices and Other Stock Exchange Data: Copyright and Competition Law Issues (**attachment 2**).

A similar assessment should apply to the EU based contributor databases. It also needs to be considered that all data contributors are required by law to deliver the required market and reference data for free to the CTP. This rule should not be impaired by IP right claims of the data contributors to the CTPs.

Finally, any value added services of the CTP such as index production ( EU all shares index) or providing in depth liquidity and market research which are clearly separate from the core mandate of CTPs to receive, consolidate and disseminate, applicable, pre-trade and post-trade data for shares and ETFs and post-trade data for bonds and OTC derivatives should be priced and licensed in a similar way like the CTP core service. From our point of view variations of the legally required CTP services, e.g., labelled descriptions of bonds or making data available on mobile phone are part of the core service to receive, consolidate and disseminate trade data, and therefore should not be priced separately.

Regarding redistribution of market data, the number of professional clients shall be determined only based on the legal entity using the data. To the extent that a legal entity is redistributing the data it needs to disclose the names or number of the legal entities it is redistributing the data to in order to enable the market data provider to license these legal entities directly. To the extent that a legal entity is redistributing the data, and it elects to disclose only the number of the legal entities it is redistributing the data to, the redistribution legal entity must take out the required number of licenses for these legal entities. The disclosure of the number of non-professional clients to which a professional client is redistributing data can be based on a reasonable estimate. Basing the professional user numbers on the number of legal entities using the data provides for an easy to administer and fair system of cost attribution as larger groups with multiple legal entities pay more than small groups with a single or small number of legal entities. By identifying the professional users with the LEI, there is no argument on whether a certain department or other unit of a group a legal entity is or not. For non-professional clients a reasonable fact-based estimate of the number of data users should be sufficient. Establishing the exact number of natural person users is a considerable and in part futile effort because of the volatility of the numbers as well as administrative hurdles (GDPR / no data source on the number of TV viewers watching on screen price feeds). Already the establishment of the number of natural person users within legal entities for the purposes of calculating today's display user licenses is a nightmare as evidenced by the administration of e.g. Bloomberg user IDs.

**Q59: The proposed approach to data quality would reward additional commitments and measures that CTP applicants intend to put in place. Do you agree with this approach ? What additional commitments and measures would you consider appropriate?**

Beyond Art 27da (2) Art 27h (f) MiFIR requires CTP to have systems in place that can effectively check the completeness of the data provided, identify obvious errors, and request the re-submission of data. An important part of data quality will be standardization of the post trade bond tape will be using the FIX Trading Community's "MMT" typography. The importance of accurately identifying addressable liquidity and accurately showing what has traded, with no duplications or omissions is critical in reducing systemic market risk. Asset managers use this data to calculate liquidity and calculations, and it is essential this data is correct. We ask ESMA to consider only tender bids which indeed ensure a focus of the CTP on improving data quality by additional voluntary measures. The GLEIF offers insights how such a data quality program could look like at

<https://www.gleif.org/en/lei-data/gleif-data-quality-management/proactive-management> .

For example, the GLEIF publishes monthly the following data quality reports on the overall level of data quality achieved in the Global LEI System as well as data contributors (LEI issuer) data quality reports: which analyze the level of data quality achieved by the individual LEI issuing organizations.

<https://www.gleif.org/en/lei-data/gleif-data-quality-management/quality-reports> .

The same way as GLEIF the CTP should regularly publish reports on the data quality of the various data contributors to increase public pressure on them to improve data quality at each contributor. Additionally, both the obligatory (equity and ETF CTP) and voluntary (Bond CTP) revenue distribution schemes should exclude any data contributor with identified data quality issues from receiving any part in the CTP revenues.

Especially the bond CTP needs to ensure that SIs and investment firms improve today's still bad data quality of bond data. The data issues associated with bond data have been identified and described in sufficient detail to address them in general terms in six FINBOURNE CTP white papers.

<https://www.finbourne.com/insights/category/reports-and-whitepapers>

Furthermore, CTPs shall be encouraged to provide for a Data Challenge Facility that provides any user of CTP data with the opportunity to substantiate doubts regarding the integrity or the accuracy and completeness of the CTP data. It should also allow for the indication of possible duplicate entries or any lack of timely response (deferrals) similar to the GLEIF challenge facility existing already today.

<https://www.gleif.org/en/lei-data/gleif-data-quality-management/challenge-lei-data#>

Please refer also to our answers above for the revenue sharing system for the shares and ETF CTP according to Art 27h (5) MiFIR. We urge ESMA not to support tenders which require overly complicated revenue distribution schemes which may be based on the value created by the data user. We are specifically concerned by requests of some market participants in favour of “value creation recognition” revenue sharing schemes at the ESMA workshop.

**Q60 The proposed approach to modern interface and connectivity is grounded on the assessment of the interface technology in terms of reliability, scalability, low latency and security. Do you agree with this approach, or would you consider additional elements to be assessed?**

Yes, if the additional criteria mentioned in our answers above are considered. The CTP should provide for both display / GUI i.e., human on screen usage of CTP data as well as non-display / API i.e., computer to computer data feeds to the user company. On operational and cyber reliability, it should be sufficient to state that the CTP is governed by DORA as any other ICT provider. It may be that the CTP itself could be deemed a critical ICT provider which would increase the administrative and financial burden and put the CTP under DORA supervision. On the other hand, each CTP user needs to decide whether the CTP ICT service used is “important” for the firm concerned or not. We can see a situation where firms will say that the CTP is used only as an add-on to other data providers and therefore is not considered as providing an “important” function under DORA. This decision will reduce the administrative burden in the user firm side.



## ABOUT EFAMA

EFAMA is the voice of the European investment management industry, which manages around EUR 28.5 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 authoritative EFAMA Fact Book.

More information is available at [www.efama.org](http://www.efama.org)

### **Susan Yavari**

Deputy Director, Capital Markets and Digital  
[Susan.yavari@efama.org](mailto:Susan.yavari@efama.org) | +32 2 548 26 55