**Reply** **form: MiFIR Review**

RTS 2, RTS on reasonable commercial basis and RTS 23

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Responding to this paper

ESMA invites comments on all matters in the Consultation Paper and in particular on the specific questions in this reply form. Comments are most helpful if they:

* respond to the question stated;
* indicate the specific question to which the comment relates;
* contain a clear rationale; and
* describe any alternatives ESMA should consider.

ESMA will consider all comments received by **28 August 2024.**

Instructions

In order to facilitate analysis of responses to the Consultation Paper, respondents are requested to follow the below steps when preparing and submitting their response:

* Insert your responses to the questions in the Consultation Paper in this reply form.
* Please do not remove tags of the type <ESMA\_QUESTION\_CP1\_1>. Your response to each question has to be framed by the two tags corresponding to the question.
* If you do not wish to respond to a given question, please do not delete it but simply leave the text “TYPE YOUR TEXT HERE” between the tags.
* When you have drafted your responses, save the reply form according to the following convention: ESMA\_CP1\_nameofrespondent.

For example, for a respondent named ABCD, the reply form would be saved with the following name: ESMA\_CP1\_ABCD.

* Upload the Word reply form containing your responses to ESMA’s website (**pdf documents will not be considered except for annexes**). All contributions should be submitted online at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading ‘Your input - Consultations’.

Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA’s rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA’s Board of Appeal and the European Ombudsman.

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Information on data protection can be found at [www.esma.europa.eu](http://www.esma.europa.eu) under the headings ‘Legal notice’ and heading ‘[Data protection](https://www.esma.europa.eu/about-esma/data-protection)’..

# General information about respondent

|  |  |
| --- | --- |
| Name of the company / organisation | European Fund and Asset Management Association (EFAMA) |
| Activity | Investment Services |
| Are you representing an association? |  |
| Country/Region | Belgium |

# Questions

**CP on the amendment of RTS 2**

1. Do you agree with the definition of CLOB trading systems proposed above? If not, please explain why.

<ESMA\_QUESTION\_CP1\_1>

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<ESMA\_QUESTION\_CP1\_1>

1. Do you consider that the definition should include other trading systems? Please elaborate.

<ESMA\_QUESTION\_CP1\_2>

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<ESMA\_QUESTION\_CP1\_2>

1. Do you agree that the description of periodic auction trading systems set out in Annex I of RTS 2 is relevant for specifying the characteristics of those trading systems in the revised RTS? If not, please elaborate.

<ESMA\_QUESTION\_CP1\_3>

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<ESMA\_QUESTION\_CP1\_3>

1. Do you agree to use ESA 2010 to classify bond issuers If not, please explain and provide alternatives on how clarify how to classify sovereign, other public and corporate issuers.

<ESMA\_QUESTION\_CP1\_4>

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<ESMA\_QUESTION\_CP1\_4>

1. Do you agree with the proposed LiS pre-trade thresholds for bonds? In your answer, please also consider the analysis provided in sections 4.2.1.

<ESMA\_QUESTION\_CP1\_5>

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<ESMA\_QUESTION\_CP1\_5>

1. Do you agree with the proposed LiS pre-trade thresholds for SFPs and EUAs? In your answer, please also consider the analysis provided in section 4.2.2.

<ESMA\_QUESTION\_CP1\_6>

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<ESMA\_QUESTION\_CP1\_6>

1. Do you agree with the approach taken for the illiquid waiver for bonds, SFPs and EUA? If you disagree with how the liquidity threshold is determined, please include your comments in Q11 for bonds, Q14 for SFPs and/or Q17 for EUAs.

<ESMA\_QUESTION\_CP1\_7>

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<ESMA\_QUESTION\_CP1\_7>

1. Do you agree with the changes to post-trade fields summarised in Table 5? Please identify the proposal ID in your response.

<ESMA\_QUESTION\_CP1\_8>

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<ESMA\_QUESTION\_CP1\_8>

1. Do you agree not to change the concept of “as close to real-time as technically possible”? If not, what would be in your view the maximum permissible delay?

<ESMA\_QUESTION\_CP1\_9>

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<ESMA\_QUESTION\_CP1\_9>

1. Do you agree with the changes proposed for the purpose of the reporting of OTC transactions?

<ESMA\_QUESTION\_CP1\_10>

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<ESMA\_QUESTION\_CP1\_10>

1. Do you agree with the liquidity thresholds set out in Table 7 above? If not, please provide an alternative approach.

<ESMA\_QUESTION\_CP1\_11>

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:
  + 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.
  + 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)
  + 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.*

<ESMA\_QUESTION\_CP1\_11>

1. Do you agree with the proposed thresholds specified in the above Tables? If not, please justify by providing qualitative data to your analysis and differentiating per asset class.

<ESMA\_QUESTION\_CP1\_12>

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<ESMA\_QUESTION\_CP1\_12>

1. Do you agree with the maximum deferral period set out in the tables above?

<ESMA\_QUESTION\_CP1\_13>

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<ESMA\_QUESTION\_CP1\_13>

1. Do you agree with a static determination of liquidity and determine that all SFPs are illiquid? If not, can you suggest any alternative methodology on how to define liquidity for SFPs?

<ESMA\_QUESTION\_CP1\_14>

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<ESMA\_QUESTION\_CP1\_14>

1. Do you agree not to introduce changes to the threshold size currently applicable to SFPs as provided in RTS 2?

<ESMA\_QUESTION\_CP1\_15>

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<ESMA\_QUESTION\_CP1\_15>

1. Do you agree with the maximum duration proposed?

<ESMA\_QUESTION\_CP1\_16>

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<ESMA\_QUESTION\_CP1\_16>

1. Do you agree with a static determination of liquidity and determine that all EUA are liquid? If not, can you suggest any alternative methodology on how to define liquidity for EUAs?

<ESMA\_QUESTION\_CP1\_17>

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<ESMA\_QUESTION\_CP1\_17>

1. Do you agree with the proposed framework for the deferral regime for EUAs? If not, please suggest an alternative methodology.

<ESMA\_QUESTION\_CP1\_18>

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1. Do you agree with the classification of ETCs and ETNs as types of bonds?

<ESMA\_QUESTION\_CP1\_19>

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<ESMA\_QUESTION\_CP1\_19>

1. Do you agree with the liquidity determination for ETCs and ETNs. If not, please suggest an alternative approach to the liquidity determination.

<ESMA\_QUESTION\_CP1\_20>

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<ESMA\_QUESTION\_CP1\_20>

1. Do you agree with the pre- and post-trade thresholds? If not, please suggest an alternative methodology.

<ESMA\_QUESTION\_CP1\_21>

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1. What is your view in relation to the implementation of the supplementary deferral regime for sovereign bonds?

<ESMA\_QUESTION\_CP1\_22>

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.

<ESMA\_QUESTION\_CP1\_22>

1. Do you agree not to make any changes to the temporary suspension of transparency obligations framework as it currently in RTS 2?

<ESMA\_QUESTION\_CP1\_23>

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<ESMA\_QUESTION\_CP1\_23>

1. Do you have any further comment or suggestion on the draft RTS? Please elaborate your answer.

<ESMA\_QUESTION\_CP1\_24>

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<ESMA\_QUESTION\_CP1\_24>

1. What level of resources (financial and other) would be required to implement and comply with the draft amended RTS and for which related cost (please distinguish between one off and ongoing costs)? When responding to this question, please provide information on the size, internal set-up and the nature, scale and complexity of the activities of your organisation, where relevant.

<ESMA\_QUESTION\_CP1\_25>

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<ESMA\_QUESTION\_CP1\_25>

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

1. 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.

<ESMA\_QUESTION\_CP1\_26>

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 basis24. 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.*

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:

1. *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**

1. 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. [[1]](#footnote-2) Based on the Methodology of the IEX market data report we attach a list of cost items which can be included in the calculation. [[2]](#footnote-3) 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 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.

<ESMA\_QUESTION\_CP1\_26>

1. 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.

<ESMA\_QUESTION\_CP1\_27>

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

<ESMA\_QUESTION\_CP1\_27>

1. 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.

<ESMA\_QUESTION\_CP1\_28>

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

<ESMA\_QUESTION\_CP1\_28>

1. 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.

<ESMA\_QUESTION\_CP1\_29>

*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 :* 
   1. *be set as a percentage of the costs of production and dissemination of market data;*
   2. *~~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 ;*
   3. *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)

<ESMA\_QUESTION\_CP1\_29>

1. Do you agree with the proposed template for the purpose of information reporting to NCAs on the cost of producing and disseminating data and on the margin applied to data? Please elaborate, including if further information should in your view be added to the template.

<ESMA\_QUESTION\_CP1\_30>

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<ESMA\_QUESTION\_CP1\_30>

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

<ESMA\_QUESTION\_CP1\_31>

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 though 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 scopeof 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 buyside and sellside 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.

<ESMA\_QUESTION\_CP1\_31>

1. What are the elements which could affect prices in data provision (e.g. connectivity, volume)? Do they vary according to the use of data made by the user or the type of user? Please elaborate.

<ESMA\_QUESTION\_CP1\_32>

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<ESMA\_QUESTION\_CP1\_32>

1. Do you agree with ESMA’s proposal on how to set up fee categories. Please justify your answer.

<ESMA\_QUESTION\_CP1\_33>

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 (MIFIDThe 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 the~~y~~ ~~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.*

<ESMA\_QUESTION\_CP1\_33>

1. 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.

<ESMA\_QUESTION\_CP1\_34>

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 f 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 viwers watching on screen price feeds). Already the establishment of the number of natural person users with in legal entities for the purposes of calculationg 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

<ESMA\_QUESTION\_CP1\_34>

1. Are there any other terms and conditions in market data agreements beyond the ones listed in this section which you perceive to be biased and/or unfair? If yes, please list them and elaborate your answer.

<ESMA\_QUESTION\_CP1\_35>

* 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:
  + 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.
  + 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.
  + Consequently, unless the contracts with EU data users are not mandatorily established in EU law, the provisions introduced by ESMA might have limited impact.
  + 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.
  + We reiterate the importance of unbundling.

<ESMA\_QUESTION\_CP1\_35>

1. Please provide your view on ESMA’s proposal in respect to (i) the obligation to provide pre-contractual information, (ii) general principle on fair terms, (iii) the language of the market data agreement, (iv) the market data agreement conformity with published policies and (v) the provision on fees and additional costs.

<ESMA\_QUESTION\_CP1\_36>

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<ESMA\_QUESTION\_CP1\_36>

1. 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?

<ESMA\_QUESTION\_CP1\_37>

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 vendors 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 mis-communication 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.

<ESMA\_QUESTION\_CP1\_37>

1. Do you agree with ESMA’s proposal on penalties? Please elaborate your answer.

<ESMA\_QUESTION\_CP1\_38>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP1\_38>

1. Do you agree with ESMA’s proposal on audits? Please elaborate your answer.

<ESMA\_QUESTION\_CP1\_39>

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.*

1. *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.*
2. *An audit shall cover a reasonable period of time*, not exceeding two years.
3. 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.*

<ESMA\_QUESTION\_CP1\_39>

1. Would you adopt any additional safeguards to ensure market data agreements terms and conditions are fair and unbiased? Please elaborate your answer.

<ESMA\_QUESTION\_CP1\_40>

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<ESMA\_QUESTION\_CP1\_40>

1. Do you agree with the standardised publication template set out in Annex I of the draft RTS? Do you have any comments and suggestions to improve the standardised publication format and the accompanying instructions? Please elaborate your answer.

<ESMA\_QUESTION\_CP1\_41>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP1\_41>

1. Do you agree with the proposed list of standard terminology and definitions? Is there any other terminology used in market data policies that would need to be standardised? If yes, please give examples and suggestions of definitions.

<ESMA\_QUESTION\_CP1\_42>

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<ESMA\_QUESTION\_CP1\_42>

1. Do you consider that the “user-id” and the “device” should still be considered as “unit of count” for the display and non-display data respectively? Do you think (an)other unit(s) of count can better identify the occurrence of costs in data provision and dissemination and if yes, which?

<ESMA\_QUESTION\_CP1\_43>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP1\_43>

1. Do you foresee other types of connectivity that should be defined beside “physical connection” to quantify the level of data consumption? Please elaborate your answer.

<ESMA\_QUESTION\_CP1\_44>

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<ESMA\_QUESTION\_CP1\_44>

1. Do you think there is any other information that market data providers should disclose to improve the transparency on market data costs and how prices for market data are set? If yes, please provide suggestions.

<ESMA\_QUESTION\_CP1\_45>

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<ESMA\_QUESTION\_CP1\_45>

1. Do you agree with the approach on delayed data proposed by ESMA? Please elaborate your answer.

<ESMA\_QUESTION\_CP1\_46>

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<ESMA\_QUESTION\_CP1\_46>

1. Do you agree with the proposal not to require any type of registration to access delayed data? Please elaborate your answer.

<ESMA\_QUESTION\_CP1\_47>

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<ESMA\_QUESTION\_CP1\_47>

1. ESMA proposes the RTS to enter into force 3 months after publication in the OJ to allow for sufficient time for preparation and amendments to be made by the industry. Would you agree? Would you suggest a different or no preparation time? Please elaborate your answer.

<ESMA\_QUESTION\_CP1\_48>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP1\_48>

1. Do you have any further comment or suggestion on the draft RTS? Please elaborate your answer.

<ESMA\_QUESTION\_CP1\_49>

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<ESMA\_QUESTION\_CP1\_49>

1. What level of resources (financial and other) would be required to implement and comply with the RTS and for which related cost (please distinguish between one off and ongoing costs)? When responding to this question, please provide information on the size, internal set-up and the nature, scale and complexity of the activities of your organisation, where relevant.

<ESMA\_QUESTION\_CP1\_50>

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<ESMA\_QUESTION\_CP1\_50>

**CP on the amendment of RTS 23**

1. Do you agree with the proposal for a daily reporting of reference data for both transaction reporting and transparency purposes?

<ESMA\_QUESTION\_CP1\_51>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP1\_51>

1. For the purposes of both equity and non-equity transparency, do you prefer to retain the MiFIR identifier as currently defined or to rely on other fields for classification purposes? If latter, please outline the proposed solution.

<ESMA\_QUESTION\_CP1\_52>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP1\_52>

1. Is in your view, the granularity level of the MiFIR identifier adequate for the purposes of MiFIR transparency in the equity and non-equity space? If not, how should it be adjusted?

<ESMA\_QUESTION\_CP1\_53>

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<ESMA\_QUESTION\_CP1\_53>

1. How do you expect the change in scope of instruments subject to transparency to impact transparency reference data? Would you agree to maintain the current whole set of reference data for non-equity instruments, currently in RTS 2, in RTS 23? If not, please specify which reference data should not be retained in the view of the revised scope.

<ESMA\_QUESTION\_CP1\_54>

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<ESMA\_QUESTION\_CP1\_54>

1. Do you agree with deleting Field 5 of RTS 2, Annex IV, and use the CFI code for the purposes of derivatives’ contract type classification?

<ESMA\_QUESTION\_CP1\_55>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP1\_55>

1. Do you agree with the proposed alignment between RTS 23 and RTS 2 as set out in this section? Please provide details on which alignment is (not) feasible and why, considering the impact in terms of comprehensiveness and consistency of the reported information.

<ESMA\_QUESTION\_CP1\_56>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP1\_56>

1. As it concerns “underlying type” classification, do you agree with the proposed reliance on CFI and other reporting fields? With specific regards to Field 27, do you have proposals on how that field may be streamlined?

<ESMA\_QUESTION\_CP1\_57>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP1\_57>

1. Do you see additional room for simplification and/or alignment of reference data for transaction reporting and transparency purposes? What would be the impact in terms of one-off and ongoing costs, benefits and change management of such simplifications, in particular with respect to reducing and consolidating data flows to ESMA that exist currently?

<ESMA\_QUESTION\_CP1\_58>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP1\_58>

1. Do you have suggestions on how the fields mentioned above may be improved and streamlined?

<ESMA\_QUESTION\_CP1\_59>

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<ESMA\_QUESTION\_CP1\_59>

1. Do you agree with the above assessment of the necessary adjustments to be made in the RTS 23 to accommodate for the identifying reference data?

<ESMA\_QUESTION\_CP1\_60>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP1\_60>

1. Do you see a need to specify the ‘date by which the reference data are to be reported’ different from the date of application or have other comments with regards to the proposed timeline? If so, please specify.

<ESMA\_QUESTION\_CP1\_61>

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<ESMA\_QUESTION\_CP1\_61>

1. Are there any other international developments or standards agreed at Union or international level that should be considered for the purpose of the development of the RTS on reference data?

<ESMA\_QUESTION\_CP1\_62>

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<ESMA\_QUESTION\_CP1\_62>

1. Do you agree with the changes proposed in the tables above? Should any other changes be considered to align the MiFIR reporting specifications with the international standards, EMIR and / or SFTR?

<ESMA\_QUESTION\_CP1\_63>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP1\_63>

1. Do you foresee any challenges with the proposed approach under which the CSDR publications would be integrated in FIRDS?

<ESMA\_QUESTION\_CP1\_64>

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<ESMA\_QUESTION\_CP1\_64>

1. Do you have any comments with regards to the inclusion of additional fields in the instrument reference data published by ESMA to indicate whether the instrument is in the scope of CSDR and to specify which MIC corresponds to a venue with the highest turnover or the most relevant market in terms of liquidity?

<ESMA\_QUESTION\_CP1\_65>

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<ESMA\_QUESTION\_CP1\_65>

1. Do you support inclusion of the new fields listed above?

<ESMA\_QUESTION\_CP1\_66>

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<ESMA\_QUESTION\_CP1\_66>

1. Do you agree with the amendment listed above for the existing fields?

<ESMA\_QUESTION\_CP1\_67>

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<ESMA\_QUESTION\_CP1\_67>

1. With regards to monitoring of de-listing and re-admission, which option is preferable in your view: (i) reporting by the trading venue of all previous trading periods in the repeatable fields 10, 11 and 12 or (ii) implementing adequate reporting logic of events impacting the instrument (new, modification, termination etc) in order to enable ESMA to reconstruct all trading periods?

<ESMA\_QUESTION\_CP1\_68>

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<ESMA\_QUESTION\_CP1\_68>

1. Do you support suppressing the reporting of the fields listed above?

<ESMA\_QUESTION\_CP1\_69>

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<ESMA\_QUESTION\_CP1\_69>

1. Do you foresee any challenges with the use of JSON format comparing to XML? Please provide estimates of the costs, timelines of implementation and benefits (short- and long term) related to potential transition to JSON.

<ESMA\_QUESTION\_CP1\_70>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP1\_70>

1. In addition to including a field to identify the DPE, are there any other adjustments needed to enable comprehensive and accurate reporting of reference data by the DPEs?

<ESMA\_QUESTION\_CP1\_71>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP1\_71>

1. With regards to the categorisation of classes of financial instruments for the purpose of the DPE register, how such classes should be designated in the register? Is there any further information that should be included in the register to ensure its usability and interoperability with other relevant systems? Do you foresee any practical implementation challenges, and if so, how they could be mitigated?

<ESMA\_QUESTION\_CP1\_72>

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<ESMA\_QUESTION\_CP1\_72>

1. Are any other adjustments needed to enable comprehensive and accurate reporting of Article 8a(2) derivatives under RTS 23?

<ESMA\_QUESTION\_CP1\_73>

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<ESMA\_QUESTION\_CP1\_73>

1. This is the approach identified by IEX in their [2019 report on cost of exchange services](chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https:/finansdanmark.dk/media/mstbpq23/iex-and-market-data-cost-2019.pdf) [↑](#footnote-ref-2)
2. Attach table done by Danish Finance. [↑](#footnote-ref-3)