

FESE response to the ESMA Consultation on MiFIR Review - CP on the RTS on reasonable commercial basis and CP on the amendment on RTS 23

27th August 2024, Brussels

1. 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.

FESE members understand that ESMA intends to set up a structured and more transparent approach to the topic of pricing of market data. While FESE members support this goal, it is important to ensure that this endeavour does not ultimately cross the line into price regulation. Consequently, caution should be the guiding principle.

In this respect, **FESE members welcome ESMA's adoption of a principle-based approach to determine the margin for market data and for cost allocation.** This is in line with the commercial approach outlined in Level 1, as well as with the fact that ESMA is not a price regulator.

We agree with ESMA on the general identified areas for trading venues where costs for market data may be incurred: the infrastructure cost for trading and production of market data (which are joint products¹ to each other and incur joint costs, a special form of shared costs); and the connectivity for the distribution of data to data users (distribution cost); as well as personnel costs, financial costs, and administrative costs incurred in the area of data production and dissemination of market data. For the avoidance of doubt, such costs usually include costs introduced through regulatory requirements (e.g. such as DORA) when affecting the relevant infrastructure. Besides, we argue that, amongst others, audit costs would be applicable due to the elusive nature of data being a digital product, the consequential need to ensure fair treatment of clients, and the fact that costs must be recovered where they are created. Please see our comments in Q38 and Q39.

Regarding cost allocation, we appreciate ESMA's recognition of multiple resources being shared with other services and products, i.e. resources that market data providers must have in place to produce and generate trading and market data. Consequently, the cost of production of market data also includes a fair share of joint costs with trading.^{2,3} Furthermore, **costs may be shared with other products and services (joint products and**

¹ Trading and market data production are a joint product to each other. The nature of joint products is that the one cannot exist without the other. This is well known and acknowledged in academic literature since decades ("What is an Exchange, Ruben Lee, Oxford Press, 1998; "Is ESMA becoming a price regulator?", Oxera, 2014).

² "Is ESMA becoming a price regulator?", OXERA, 2014

³ In this context, ESMA's reference to trading being the primary product is incorrect as data is a joint product with trading and the joint cost incurred may be shared across the two services.

non-joint products) or with shared services from different departments, such as Legal or HR. This should also be acknowledged by ESMA to allow for an orderly cost recovery of trading venues, in line with orderly market practices.

In addition, we believe that there is **room to increase the principles-based approach further and share some proposals in Q27 and Q28 to avoid an overly restrictive approach** which could impact different business models of market data providers, which are indeed quite diverse.

We also support that cost and margin disclosures must provide sufficient information to NCAs to be able to determine if the revenues obtained from the commercialisation of market data are reasonable. Nevertheless, we wonder if the currently envisaged level of detail could not be reduced to avoid revealing commercially sensitive information and help reduce the burden while keeping ESMA's objective intact. We provide some solutions to that end further below.

It is also important to bear in mind that, due to **the diversity of operating models, the legitimate allocation of costs by data providers can look very different across market operators**, as well as APAs and the CTP. ESMA should take this into account both when devising the updated RTS and, crucially, when monitoring and assessing the developments every two years as per Article 13(5) of MiFIR. Concretely, in these periodic assessments, ESMA should not conclude that such heterogeneity is reflective of a need to adjust further the methodology for cost allocation.

➤ The need for a dedicated RCB framework for a CTP

Taking note of the above, a dedicated RCB framework should be defined for the CTP. The CTP will receive underlying core market data and regulatory data for free from data contributors while substantial costs are being incurred by those data providers for the production and delivery of such data. Hence, applying the same RCB framework to the CTP as the one applicable to other data providers would create a situation in which the CTP could price its products based on incomplete costs, disregarding the production and dissemination costs incurred by data providers/contributors. This would distort the relationship between the CTP and other data distributors and to a disproportionately low pool of revenues to be shared back from the CTP to data contributors. Even the most elaborate and detailed revenue share scheme will not be able to correct this conceptual flaw of the economic model, meaning no meaningful revenue will be redistributed to European local primary and SME Growth markets.

We are therefore **calling on ESMA and NCAs to reflect on a construct whereby underlying costs incurred by data providers for the production and transmission of data are taken into account when applying RCB to the CTP.**

Concretely, one approach could be to clarify that the costs to be taken into consideration by the CTP in the RCB will include a portion of the underlying costs incurred by data providers for the production and transmission of core market data and regulatory data. Allocating a defined proportion of the data contributors' costs would allow for a more subtle consideration of the landscape and the CT's lifecycle, bearing in mind that the CT is unlikely to capture all potential client demand from day one and that the shift from feeds to CT usage is likely to be progressive. Thus, it would make sense to define various progressive ratios of data providers' costs starting at a relatively low percentage for year 1, which would be gradually increased in year 2 and again in year 3. This method could provide a more balanced approach overall that will also enable a successful launch and uptake of the CT.

Such an approach would, in our view, constitute a balanced framework, unless the perimeter of the CT scope evolves in the future; in that case, the percentage of data providers' costs to be taken into account by the CT should be reviewed.

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.

➤ Cost categories and calculation

Retaining the list of overarching cost categories defined by ESMA, as detailed as it currently is (and including audit costs), is helpful to foster transparency and further understanding. Indeed, all cost categories defined by ESMA seem very important and relevant to us. The existence of the proposed residual cost category in Art. 2(6) of the RTS is crucial, as seeking to exhaustively list all possible categories at this stage would be too complex. Furthermore, and for the avoidance of doubt, we would like to refer to our clarifying answer in Q26.

FESE would caution against any attempt to strictly define detailed cost components or cost allocations. Firstly, such an approach would cross the thin line between an increase in transparency and price regulation which would contradict a commercial approach, as ESMA rightly noted in its consultation on market data guidelines. This is further acknowledged in paragraph 194 of the CP, in which ESMA recognises that it is not endowed with a price competition mandate. Secondly, a detailed approach would also be highly complex, considering there is no one-size-fits-all model for the different structures and business models that trading venues, APAs, CTPs, and SIs apply when delivering their services. Besides, these models are continuously evolving to foster the necessary innovation in this space, and a rigid cost allocation could impose unnecessary limitations on innovation. For instance, **FESE particularly appreciates Art. 2(6), which exemplifies the flexibility required for this exercise and which we consider vital to maintain.**

Rather than pursuing a too uniform and restrictive approach, external audits could serve the core objective of ensuring that there is correct accounting, and no double counting is applied. Indeed, EU exchanges are applying international accounting standards where double-counting of costs is not possible. While it will be important for NCAs to receive sufficient information to understand the cost structures and pricing, the implementation of external audits could reduce the current level of detail envisaged and alleviate the burden for both market operators and NCAs. For example, **NCAs could be provided with overall figures of costs and margins plus a detailed audit report.**

➤ Shared/Joint costs

We appreciate that the language of paragraphs 2 to 5 of Article 2 implicitly acknowledges the existence of shared/joint costs. For the avoidance of doubt, it is our understanding that joint costs are a special form of shared costs, i.e. shared costs fully encompass the notion of joint costs, and this is a critical point.

As also elaborated in Q26 and Q28, market data and trade execution are joint products⁴ of each other and hence the joint cost base is part of the cost accounting in the context

⁴ „What is an exchange?“, Ruben Lee, Oxford Press, 1998; “Is ESMA becoming a price regulator?“, OXERA, 2014

of market data. For instance, this is very important to consider regarding the infrastructure costs, as the trading infrastructure represents a joint cost to the joint product of market data and trade execution. This also requires certain flexibility for their apportionment, which could also be revenues, and which is fully in line with academic literature⁵.

For market operators, a significant proportion of market data production and dissemination costs is directly linked to the operation of the trading platform. **This joint product nature of trade execution and market data services has clear economic implications.** With joint products, the production costs of market data and trading cannot be fully separated; some, if not all, costs are shared costs, most of which are fixed and need to be incurred to produce either product. This means that the appropriateness of cost recovery by a trading venue cannot be effectively assessed through the independent analysis of either trade execution services or market data services separately. More generally, since most of the activities undertaken by an exchange are integral to the delivery of both trading and market data, it is more efficient to recover some of the costs of operating a trading venue through trade execution fees and others through market data fees.

On a related note, we wish to underline that trading is not the primary business of exchanges as connoted within Recital 4. This could lead to an interpretation that market data is the ancillary product when, in fact, trading and market data are joint products.

Finally, we have observed that ESMA only refers to directly associated costs with market data, amongst others in Recital 3. However, **indirect or common costs such as costs shared with other departments, i.e. Legal or HR, should be applied as well, in order to allow for a fair and correct cost recovery.**

➤ Audit costs

We wish to stress, as further elaborated in Q39, the importance of customer audits for market data providers to fulfil the MiFID II regulatory obligation to apply market data fees and policies on a non-discriminatory basis, maintaining a level playing field in capital markets. **FESE considers that any costs for providers associated with audit practices are inherent to the costs of producing and disseminating market data and would encourage ESMA to reconsider the proposal and allow them to be factored into the costs for calculating the basis of the market data fees, as a direct cost.** As data is a digital and elusive product, it can easily be shared amongst data users once obtained - both intentionally and unintentionally. Without audits, there would not be an incentive to contribute fairly to the cost recovery of data providers.

➤ Proposals for amendments to Article 2

- Art. 2(1) should include a reference to the joint product nature of market data, as well as a mention to “indirect cost” in addition to direct costs, since the cost recovery must apply to all relevant shared costs within an entity: *“The cost of producing and disseminating market data, a joint product with trading, shall be calculated by market data providers and ~~only~~ include costs that are indirectly and directly associated with the production and dissemination of market data.*

⁵ “Is ESMA becoming a price regulator”, OXERA, 2014

The calculation of costs shall include ~~but not be limited to the following cost categories:~~ [...]”

- In line with the above arguments, we would like to propose the following addition to Art. 2(1)(b): “[...] *and software licenses and leased services amongst others, which ensure the connectivity are necessary for the production and dissemination of market data.*”
- We strongly recommend including a reference to the joint cost allocation key, which is necessary in the context of joint products [see our response to Q28 for further rationale]: **“New Art. 2(7): “Joint cost as incurred by trading venues for the production of market data and trading services alike, and representing a special form of shared cost, may be attributed on the basis of a revenue allocation key.”**

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.

FESE fully supports having clear and documented principles for how common and joint costs are being apportioned across one entity and the respective market data products, and how costs are being allocated. However, we believe **it is sensible and feasible to allow market data providers the necessary flexibility regarding accounting methodologies and cost allocation principles**, without undermining the goal of improving transparency and ensuring that market data fees reflect the costs of producing and disseminating market data. Finally, we strongly believe that interference in how costs shall be accounted for or be apportioned in detail would cross the line to price regulation, which would not be appropriate considering Level 1 nor ESMA’s role.

For the sake of clarity, shared costs may be shared with other products and services (joint products and non-joint products) or be common to other services from different departments, such as Legal or HR. This should be acknowledged by ESMA to allow for an orderly cost recovery of trading venues, in line with orderly market practices.

As already explained in our response to Q27, joint costs are a special form of shared costs, with the notion of shared costs fully encompassing joint costs - this is critical. Joint costs occur when production facilitates two or more products simultaneously (e.g., market data and trade execution), as duly acknowledged by ESMA in the Guidelines. The generation of market data and the provision of execution services cannot be generated without the other. In general, most activities undertaken by a trading venue deliver both trading and price formation. With joint products such as market data, the production costs of the outputs cannot be fully separated (i.e. some, if not all, costs are shared costs, most of which are fixed and need to be incurred to produce either product), hence the apportionment of joint costs is more complex. **We believe that flexibility in the method of apportioning joint costs is necessary due to these complexities**, which could also be revenues, and which is fully in line with academic literature⁶. Please refer to the specific proposals for amendments included in Q27.

For example, Guideline 2 offered a useful degree of flexibility by only prohibiting market data providers from using revenues generated by different services and activities for this purpose (already questionable at that point in time in our view). As outlined in FESE’s response to the consultation of ESMA guidelines, we maintain that **using revenues is the**

⁶ “Is ESMA becoming a price regulator”, OXERA, 2014

most practical and (economically) sensible method for allocating joint costs, without conflicting with the obligation to set market data fees based on the costs of producing and disseminating market data.

Most importantly, it is key for ESMA to recognise that, due to the diversity of operating models, the legitimate allocation of joint costs by data providers can look very different among market operators. It is paramount that ESMA keeps this in mind when devising the updated RTS and when monitoring and assessing the developments in the areas of data thereafter.

Finally, any cost allocation keys must remain sensible and practical in their application to avoid creating additional unnecessary costs without a real benefit to the market, and to take into account the nature of data as a digital good, and in the case of joint costs allow for a revenue-based accounting key. In some instances, proxies or artificial keys must also be allowed, as it may be practically impossible to clearly define the use of resources, which may vary marginally from day to day, for example concerning connectivity costs.

➤ Public disclosure of cost allocation keys

As elaborated in our response to Q41, FESE is notably **concerned about the proposed disclosure of cost allocation keys in the market data policy (Annex I)**. Such disclosures could expose commercially sensitive information to the public and competitors regarding their actual apportioning of costs and how their prices have been determined. Balancing the need for users to compare pricing methodologies with the risk of disclosing sensitive information is crucial. Therefore, FESE strongly recommends that the specific allocation keys be limited to the disclosures provided to NCAs.

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 a general note, **FESE welcomes the proposal of a principles-based approach and supports ESMA's decision to reject other considered approaches as not suitable**, which would have certainly come at a cost of strict price regulation. ESMA also recognises it is not endowed with such a mandate in paragraph 194.

Regarding the specific principles, FESE believes that wording in CDR 2017/567 Recital 5 could have been maintained, allowing data providers to obtain a reasonable margin based on factors such as operating profit margin and the return on costs. Since data users can generate fair and healthy profit margins themselves, FESE sees no regulatory need for stricter margin requirements. That said, FESE is supportive the principle set in 3(2)(c) and **we believe it is essential to maintain it in the final RTS**, as it would not be acceptable to restrict a margin, which would entail rigid price regulation.

However, we wish to highlight some concerns regarding the principles in Articles 3(1), 3(1)(a), 3(2)(b) and 3(3):

➤ Principles under Article 3(1) and 3(1)(a)

We have doubts about the consideration of net profit as the margin (Art. 3(1)). In any case, we believe that, to avoid ambiguity and prevent an overly restrictive application of this principle, it is very important to at least include a clarification **in the text in Recital 10 as well as Art. 3(2)(a) that the cost base should be the 'total' cost base**, including shared cost with other services, such as trading.

➤ Principle under Article 3(3)

Whilst we understand the choice made in the third paragraph of Art. 3 to underline the importance of enabling data access to the maximum number of market data clients, we consider **there should also be some acknowledgement of the need to avoid disincentivising lit trading venue operations**, which play a crucial role in price formation and enable the funding of companies of all sizes. This consideration is partly recognised in paragraph 195 of the consultation paper, but we believe it should also be explicitly reflected in Art. 3. Recital 6 should also be corrected to refer to the viability for market data “providers” instead of “participants”. Without this, we fear other objectives pursued by the regulation would overshadow this key consideration in practice.

The notion of balance is key, and exchanges’ set-up strives to ensure and promote as wide access to market data as possible. Providing wide access to their market data has always been a priority for exchanges from a business perspective to expand their client base for market data products, and to foster further interest in the other exchange’s activities, i.e., trading activities. Hence, the way exchanges price their data today, which considers the varied purchasing powers of the vastly different customer groups, aligning with the academic literature on digital products and international standards, would indeed deliver on this objective.

In contrast, we wish to stress that **achieving this necessary balance between business viability and the widest possible access to data would be extremely challenging given ESMA’s proposals preventing the proper accounting for the distinct contents, types of usage and customer categories when setting the fees**. Besides, this would be even more problematic if a cost-based-only approach, going against the nature of digital products, would be included in the final RTS to determine the categorisation of users and the fee differentials among them. See our response to Q49 for further insights on these aspects. We urge ESMA to reconsider its stance to ensure that the principles of pricing (taking into account the nature of digital products) can achieve the crucial identified objectives of business viability and broad (non-discriminatory) access to data.

➤ Principle under Article 3(2b)

While we discuss this issue further in Q49, we wanted to reiterate some key points here. The principle that the margin “*shall not exceed disproportionately the costs of market data production and dissemination*” sounds reasonable from a theoretical perspective but, if applied without taking note of the nature of the product, poses risks when combined with other RTS provisions on setting the final fees.

It should be recalled that **market data is ultimately a digital product**: fixed costs account for the vast majority of market data production and distribution costs, and variable costs driven by connectivity and volume are negligible in proportion to total costs. As a consequence, a strict focus on the cost base could lead to very similar prices for very different customers, small and large ones alike (i.e., retail vs. professional), despite substantially different purchasing powers and significantly different usages of data. Under the new conditions resulting in similar fees, **many non-professional and/or smaller user categories may experience an increase in fees compared to current prices, to the benefit of the professional and/or bigger users**, which have more resources and often make more extensive use of data. This could hinder some users’ access to data, contradicting the RTS objective.

Overall, we advise caution in this area and **recommend maintaining a principle-based approach for cost allocation, margins, and fee establishment**. This approach should

account for differences based on the data content, type of use and customer groups to avoid inadvertently introducing unfair discrimination among data users.

Q30: 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.

Generally speaking, we agree with the proposed template for information reporting to NCAs on the cost of producing and disseminating data and on the margin applied to data. Yet, compliance with this reporting requirement will necessitate significant investments and operational costs for exchanges, as the information required is extremely granular.

We consider that the requirement to indicate the “number of items” may be problematic, as it would oblige trading venues to disclose technical elements at the individual level, not the category level. This level of detail could prove counterproductive, as it would probably make it more difficult for the NCAs to understand the technical set-up of the trading venue. Additionally, it would require trading venues to disclose industrial secrets that are not necessary for the cost assessment.

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?

FESE does not believe that there are today obstacles to non-discriminatory access to data, considering the current market data requirements and practices. However, as recognised in paragraphs 234 and 235 of the CP, non-discriminatory access to market data cannot be achieved by focusing solely on data providers regulated under MiFID II/MiFIR, with other market players also playing an important role in the value chain, such as data redistributors (which are not covered by the regulation).

FESE members act at many different levels to ensure non-discriminatory access to data. Some examples include:

- Distribution to a broad range of users and a large number of clients.
- Non-discriminatory access to data, i.e. it is based on objective criteria, which is known in advance by clients and prospective clients.
- Application of the provision of market data on the basis of cost in line with the rules applicable to the pricing of digital goods. This approach ensures a fair recovery of costs while maximizing access to data, including for small data users. In academia, it is contemplated that this pricing ensures the highest welfare effect as it allows for the broadest access to market data while recovering costs. This would be jeopardised if the ‘type of use’ could not be considered in the pricing.
- FESE members provide support to clients and prospective clients regarding product offerings and contractual and technical setups.

Notwithstanding the above, moving forward, **FESE believes it is critical, as per the current Art. 5 of the draft RTS, to enable data providers to differentiate fees based on ‘factual elements’ that are easily verifiable.** A single price would not be considered reasonable and fair for all users, given the highly intermediated competitive ecosystem and the heterogeneous nature of the market data client landscape in terms of size and market models. Any construct that effectively leads to a single price being applied to all would mean that data providers could not adapt fees to the various profiles of their clients, thus being incompatible with the notion of non-discriminatory access.

Regarding the reference to “technical arrangements neither discriminate nor create an unfair advantage” in Art. 4(4), we wish to clarify that different connectivity arrangements

inherently offer different characteristics, such as latency performance, contents and throughput. For instance, market data providers may offer low latency data feeds that allow direct connection to each market segment server, and consolidated feeds that provide data from all market segments and additional data (e.g., indices or corporate actions data) through a single data flow. Latency may be the main driver for HFTs, but other data users decide to receive the data directly from the market data providers due to other drivers, such as aggregation with other market data, increased contents, different formats, etc.

We would also note that all different connectivity options are offered to all clients alike, but it will be up to them to decide which connectivity best meets their needs or even if they wish to receive the data via an indirect connection through a third party. Practices related to latency and connectivity, for instance, vary depending on the market data user due to diverse data needs, therefore a complete harmonisation would not give a favourable treatment to some market data users. Restricting the differentiation of technical arrangements between different customer groups would be disproportionate and distort competition among market data providers. Moreover, trading venues do not control the connectivity setup maintained by data redistributors for users, which is particularly important for the vast majority of market data users, who source their data through them. This is especially clear for retail investors. Overall, this differentiation should not be conflated with any sort of 'discrimination' or 'unfair advantage' - **therefore we caution against the wording of Art. 4(4) in case it prevents providing different technical arrangements to clients based on their choice.**

Q32: 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.

Prices in data provision are predominantly driven by the high fixed costs incurred by data providers to produce and distribute it. Indeed, **data is ultimately a digital product:** fixed costs account for the vast majority of market data production and distribution costs. **It is important to understand that variable costs driven by connectivity and volume are negligible in proportion to total costs incurred.**

Trading venues incur various types of costs to produce and disseminate market data, which, as mentioned in previous sections, includes a fair share of joint costs considering the joint product nature of market data and trade execution. Overall, the broader production and dissemination costs would involve infrastructure costs, connectivity costs, personnel costs, financial costs and administrative costs, among others.

Different connectivity options may imply different costs (which are recovered by separately sharing connectivity fees, unbundled from data fees), but **the bulk of the costs of producing market data, which are reflected on the rest of cost categories (and recovered through data fees), are associated to the production of the data itself.** Market data consumers have different needs (trading, index creation, redistribution...). Let's consider the example of a professional investor who accesses Spanish shares data through the display services of a data redistributor. The data redistributor is allowed to redistribute Spanish shares data to the investor thanks to the data licensing agreement it signed with the market data provider, which allows the redistribution of data to end users. The investor may choose to access the data in real-time, in which case he/she will pay the exchange fee of the source through the data redistributor (is the end user the one that pays the exchange fee, not the redistributor), in addition to the fees he/she is already paying the data redistributor for its services, other than the exchange data.

The investor, as a data consumer of Spanish shares data, contributes with her exchange fee to the recovery of the costs of producing and distributing the market data incurred by

the data source, the exchange. The investor is not accessing the contents directly from the exchange, as it is doing so through a third party (i.e. the data redistributor), but the exchange incurred costs to produce and disseminate that data. The costs of producing and disseminating the data, and the data itself, cannot be detached.

Fairness or overall level of fees may be analysed in terms of costs of producing and disseminating market data and margin, but that does not imply that each and every fee must be calculated based only on costs. **Basing the setting of each fee on costs alone would prevent trading venues from charging based on contents and use type, forcing them to charge very similar fees for all client categories alike** (as the main cost of producing the data are similar) and ultimately impede broader non-discriminatory access to the data to consumers with more limited purchasing power.

In conclusion, requiring any possible fee differentials to be based solely on connectivity, volume, or underlying costs would be artificial and highly questionable, at the very least, and contrary to international standards. It could even be misinterpreted to suggest that pricing should only be based on the connectivity itself and the data volumes distributed via these connections. However, this approach would not make sense and go against Level 1, as it would not allow cost recovery of production cost of market data. In consequence, this would represent a significant interference with the exchanges' right to conduct business and **amount to clear price regulation**, in clear contrast to ESMA's statement in paragraph 195 that production and dissemination of market data should remain a viable business. It is **critical to maintain the wording of Article 5.1 (i) of the draft RTS, which requires "criteria used to set forth [fee differentials] categories [to be] based on factual elements, easily verifiable"**.

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

➤ Maintain wording in Art. 5.1 (i) and (iii); "factual elements"

FESE generally agrees with ESMA's proposal on how to set up fee categories as drafted in Article 5.1 (i) and (iii) of the draft RTS, and calls for the existing wording in these provisions to be maintained. FESE recognises the nuance and balance that ESMA seeks in these provisions specifically, which take a workable approach to a very complex issue. FESE agrees as well that the margin should be the same for all users within the same category, in line with current practice.

Notably, **we believe it is critical to maintain the wording of Article 5.1(i) of the draft RTS:** "the criteria used to set forth categories are based on factual elements, easily verifiable and sufficiently general to be applicable to a group of clients." We would caution against consideration of any alternative wording whereby the different categories must be based on cost differentials alone.

FESE, however, believes that Article 5(1)(iv), which requires that only one fee category should apply to one client (broadly defined as the market data contracting party) presents clear challenges. Clients have multiple use cases for the data, and limiting them to one category does not fully take into account the complexity of data usage. For example, most trading firms will have display and non-display uses, many of them will redistribute real-time data to their clients, and others will also use the data to calculate and distribute derived data such as indices. This presents challenges since it could lead to cost savings for the larger global players, but result in fee increases for smaller regional participants, with more limited usage, and hence will have the opposite impact of trying to facilitate further access to data. We expand on this rationale and the potential consequences in Q49. **Notwithstanding the above, it is our view that Article 5.1 (i) and (iii) take a workable approach to a complex issue and should be maintained.**

➤ Limitation to increments on applicable fees to multiple and significantly different extra costs

FESE concurs with ESMA's rationale in paragraph 238, which states that the draft RTS "allow for an increment of fees where there are significant different uses made by the customers (e.g., display or non-display or different types of connection or channels) which require the market data provider to incur extra costs to cover the users' different needs." Nonetheless, we note that the actual transposition in Art. 5(2) refers only to "multiple and significant different extra costs for the provisions of data to the same client" and limits the increment determination to "the extra costs incurred." This wording does not sufficiently translate the "type of use" ESMA referred to in its argumentation, which FESE believes is critical, as argued above and in previous questions. It also neglects the nature of market data being a digital product and how proper cost allocation works in such a context.

Therefore, we see merit in wording closer to Guideline 5, which is in line with the paragraph's rationale.

- FESE's wording proposal: Where there are multiple and significant different uses made extra costs for the provision of the market data to by the same client, market data providers may add an proportionate increment to the applicable fee determined by the extra costs incurred.

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.

While FESE agrees that redistribution of market data is currently unregulated, **it is by no means the case that an end-user who receives the data from a redistributor does not contribute to the recovery of costs incurred by the market data provider.** All data consumers should contribute to the recovery of the costs of production and dissemination of market data, in order to keep data fees as low as possible for all data users.

To further clarify: data redistributors and end-users are consumers of market data providers' data. Data providers have a data agreement in place with the redistributor that allows the redistributor to redistribute the market data providers' data. The end-user is paying the exchange fee to the exchange (through the redistributor) which allows them to use the exchange data. Both redistributors and end-users are contributing a fair share to the recovery of production and dissemination costs through data fees and/or redistribution fees and should continue to do so.

ESMA mentions in paragraph 237 that "Parties are at liberty to design the market data redistribution model". However, **the proposed Level 2 text in contrast is very restrictive and makes it almost impossible to design redistribution models that fully comply with the regulation.** A drastic change in the billing models between exchanges, data redistributors and end clients would require the willingness of all of these contracting parties. In Europe, the indirect billing model has been prevalent to this day for a reason: it is generally deemed simpler for end clients as they only need to contract with one entity (often in their local language). This contrasts with the US environment, where the direct billing model is more widespread, facilitated by the fact that there is one single jurisdiction compared to 27 in the EU.

As further explained in Q37, **the adequate implementation of a per-user model also depends largely on data redistributors' willingness to collaborate, which do not have the regulatory obligation or incentive to do so.** Also, the deviations between the

processes and systems of providers and data redistributors make the implementation of such a billing model very complex. Therefore, imposing a per-user model without the necessary caveats may not be the best solution to address the above-described challenges.

Overall, it is **important that the Level 2 text is drafted in accordance with what is feasible regarding Level 1, and it does not put market data providers at a competitive disadvantage compared to data redistributors**, whose potential regulation will likely not happen in the next few years.

Q35: 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.

No, FESE does not believe that there are any other terms and conditions in market data agreements which are biased or unfair. FESE is supportive of initiatives aimed at making MiFID II RCB disclosures and market data policies more comparable for customers, and at ensuring that these policies are unbiased and fair.

On a side note, FESE considers that this question should open the possibility for respondents to comment on the issues identified in paragraph 244. Our comments are as follows:

- i. **“Onerous administrative obligations on data users, for example through frequent and detailed requests on the use of data”:** The data provider and the data user are in a contractual agreement for the provision of data (data provider) and the use of data (data user/contracting partner). The data user agrees to use the data according to the contractual terms, including the declaration of usage. Requests for the use of data are usually made before the signature of the data agreement, during the client’s declaration of usage, or when a breach has been detected. Regular alignments as regards data usage by the customer may help avoid multiple audit findings in the future and ensure compliance with the contract in the first place.
- ii. **“Ambiguous language in the agreement”:** While exchanges aim for clear language in their contracts, questions may remain on the customer side. In such cases, data providers actively support customers by providing any needed clarifications upon request. Furthermore, most exchanges have adapted their contracts/agreements according to the ESMA Guidelines of 2021 in close alignment with their local NCAs to mitigate any possible source of confusion for clients. Ideally, there are no frequent changes to such terms, although we acknowledge that the current Consultation paper proposes further amendments.
- iii. **“Frequent unilateral amendments to the agreement”:** Changes may not in all cases be bilateral because agreement amendments must apply to all clients and are usually not frequent. Most contractual changes in the last few years by FESE members have been motivated by regulatory adaptations of the agreements, with the following one pending due to changes to RCB. Data agreements may stipulate that any unilateral changes in the agreement must be announced to clients with sufficient notice to allow them to evaluate the implications and decide if they wish to continue with the contractual relationship with the market data provider.
- iv. **“General lack of transparency on terms and conditions”:** All terms and conditions are made public on exchanges’ websites, in line with ESMA’s Guidelines.

Beyond actual documents, some FESE members even display previous versions of the most important documents, such as price lists, for full transparency.

- v. **“Excessive fees”**: Exchange data fees are rather moderate in both absolute and relative terms. Earlier this year, an FCA Report concluded that any party who needs access to market data has access to it and that the data cost to these users is relatively small in relation to their overall costs and even very small in absolute terms for some data users, i.e. buy side. This reiterates the findings of OXERA studies in this respect, which in 2014 found that “annual market data cost represent less than 0,01% - 0,02% of assets under management”⁷.
- vi. **“Increase of fees through penalties”**: Penalties are very rarely applied. In any case, their aim is to make compliance more appealing than non-compliance, which is important to ensure a fair share of cost recovery by all data users alike. In case some data users would not comply by significantly underreporting their data usage, the cost recovery would be shouldered more by those who do comply with their contracts.
- vii. **“Overly burdensome audits”**: As explained in our response to Q39, audits contribute to the consistent and non-discriminatory application of market data fees and policies, thereby promoting a fair share of cost recovery through each data user while maintaining a level playing field amongst data users. In the absence of audits, players unduly accessing market data at no cost or at significantly reduced costs (through underreporting) would unfairly compete against those who duly pay for the data they use.

Q36: 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.

FESE welcomes ESMA’s proposals, with which exchanges already comply. That said, we would like to bring ESMA’s attention to the provision of fees (Art. 11 and Recital 15).

As elaborated in our response to Q33, FESE believes it is essential to retain the option of considering the distinct use of market data when explaining fee differentials and customer categorisation. This should not be mistaken for the “*double application of fees for the same market data*” referenced in Recital 15. Rather, it involves clients paying for their specific data usage, ensuring fairness and a level playing field among customers, who need the data for different purposes and to a different extent.

In this regard, **Art. 11 in the draft RTS would also benefit from clarification to ensure that provisions addressing the implications of significantly different use cases of market data are permitted in market data agreements.** This would be critical in terms of transparency for the customer.

While FESE acknowledges that this pricing approach may entail interactions with clients, we do not believe these result in overly “*frequent or detailed requests*”, ultimately burdening market data clients with “*onerous administrative obligations*”. It is also worth acknowledging that data providers are often at a disadvantage, lacking control over data

⁷ “Is ESMA becoming a price regulator?”, OXERA, 2014

usage and insight into licensee operations, which sometimes makes it difficult to verify the correct implementation of the agreement. Therefore, **we suggest rewording Recital 11 to address its current one-sided perspective.**

FESE concurs with the reasoning of Art. 8(2) regarding the necessity of avoiding “unjustified practices [...] not necessary for the correct execution of the contract”. However, based on the aforementioned rationale, we do not view these current requests from market data providers as fitting this description.

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?

Experience shows that the per-user model, when incorporated into market data agreements, has only generated very limited interest among clients. Today, it is increasingly unlikely that a user will rely on multiple sources of real-time data or even multiple redistributor solutions. This model was more widespread in the past; ten years ago, users commonly accessed real-time data from multiple providers, such as a direct connection to data providers and connections to two redistributors.

FESE is concerned about the oversimplification of the proposed Article 12 on the per-user model, as it omits two important elements from the previous RTS: the eligibility process of the customer and the conditionality regarding the proportionality to the costs of making the data available, as reflected in previous Guidelines 9 and 10. We believe that reflecting these provisions is essential to address the inherent obstacles of this model, with their absence adding substantial new challenges and significantly undermining the position of market data providers.

➤ Need for the eligibility process

It should also be noted that **providing market data on a per-user basis is not always possible or attractive for all customers.** For the per-user model to work, companies opting for it must ensure they can accurately identify and report to the market data provider the exact number of users accessing the data within their organisation. This can be challenging for market data providers to administer and difficult for customers, as it requires detailed knowledge and technical controls to track who within the company uses the data and through which sources (e.g., directly from the provider or via a data vendor).

Market data providers need to assess whether customers are eligible for the per-user model to ensure it is feasible for them. **This eligibility process is essential as it helps customers understand what is expected.** It benefits end-users by clarifying how the model works and is administered, thus preventing them from unknowingly building up liability. Typically, providers and users collaborate on this. Most providers have clear policies or guidelines outlining the eligibility criteria and application process for the purpose of transparency.

The implementation of a per-user model impacts the entire market data value chain, including data redistributors. Data redistributors, and their (administrative) processes and systems, play a crucial role in administering data usage and, therefore, in implementing the per-user model. **However, data redistributors do not have the regulatory obligation, nor the incentive (they lose revenues by applying this model), to actively collaborate in the application of the per-user model.** Meanwhile, market data providers also have their own standard processes and systems for efficiency purposes. Given that multiple parties are involved in administering the per-user model for a single customer, even

though market data providers strive to be flexible when applying the eligibility criteria, this is not always feasible without deviations from the current efficient processes and systems of providers and data redistributors. Consequently, this may sometimes lead to the costs of offering the model outweighing its benefits.

➤ Subject to consideration of potential cost disproportionality

The per-user model entails significant fixed costs and administrative burdens for all affected parties. These include executing additional contractual and operational requirements and processes between market data providers, users and data redistributors. Therefore, the per-user model may only be suitable for a limited number of market data users.

Moreover, the considerable increase in administrative costs on the market data provider side may be unaffordable to smaller market data providers. **Therefore, it is reasonable for the RTS to uphold the provisions in Guideline 10, permitting some market data providers not to offer the per-user model, provided this decision is transparent and well-justified.**

Q38: Do you agree with ESMA’s proposal on penalties? Please elaborate your answer.

No, FESE does not agree with ESMA’s proposal on penalties.

As a general remark, FESE Members do not believe that the existing penalties for demonstrated infringements of market data license agreements are ‘unjustified’ (Recital 18). We wish to emphasise that “penalties” are not meant to generate additional revenue but to identify and recover unpaid fees and to avoid any incentive to free-riding at the expense of other data users or the data provider in the first place. In this sense, the wording of “penalties” by ESMA is questionable in the first place.

The current wording of Article 14 states that penalties shall not unreasonably exceed the fees the client would have paid if they had complied with the market data agreement. However, **if the settlement for non-compliance is limited to the price that should have been paid, this would actually create an incentive for non-compliance**, resulting in an unlevel playing field both vis-à-vis other data users and the data provider. **Clients who properly implement the market data agreement would be disadvantaged** compared to those clients who (un)intentionally breach it, and thus contribute less to the cost recovery of exchanges than they should according to their contract. We also suggest that Recital 18 be better calibrated to reflect this concern.

In addition, **we would not support a strict time limit to the application of the penalties**, as ESMA seems to suggest in the consultation paper. Such a limit would overlook the time required to complete audit procedures and risk encouraging an increase in the frequency of data requests. Furthermore, FESE suggests refraining from linking the start of the time period to the infringement occurrence. To claim a penalty due to an infringement, one must have knowledge of said infringement. Therefore, **we suggest a clarification by linking the start of the time period in which penalties can be claimed to the knowledge (or a need to know) of the infringement.**

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

No, FESE does not agree with ESMA’s proposal on audits. **It is neither realistic nor feasible to place the burden of proof on the data provider**, as this will significantly affect the

data provider's capacity to audit and ability to treat all clients equally regarding compliance with data agreements.

FESE empathises with the concerns of market data users regarding unreasonable auditing practices. However, we need to reject the claim that there is a systematic abuse of audit rights by exchanges. For a fact, FESE Members have committed significant efforts to further enhance audit practices for the benefit of market data users.

The practice of audits contributes to the consistent and non-discriminatory application of market data fees and policies, thereby maintaining a fair and level playing field in capital markets. Since only clients have insights into their data usage, they contractually consent to declare, through their data agreements with market data providers, that they have the necessary arrangements in place to control the access to the data and the ability to readily demonstrate the compliance of their activities with their declared usage in the data agreement. This is part of a well-balanced distribution of responsibilities between the contractual parties. Information providers accept such declarations in good faith. **Any provision (un)intentionally limiting market data providers' ability to properly audit clients could undermine the fundamental premise of MiFIR/MiFID II to make market data available on a non-discriminatory basis.**

Hence, audits are essential for verifying compliance with relevant contractual terms and policies agreed upon by the parties to a contract. Given the digital nature of the services, unauthorised uses of data are usually impossible to demonstrate from the outside by a market data provider. When a market data agreement appears not to be respected, it is up to the potentially breaching party to demonstrate compliance. **If the ability of market data providers to audit clients is limited to instances where the market data providers have proof of non-compliance, it would benefit clients who are able to hide their unauthorised use of data, and at the cost of those data users who correctly comply with their contractual duties.** This is not about the burden of proof, but rather about a collaborative dialogue between the parties of the agreement to ensure its correct implementation. Considering licensors lack control over data and insight into licensee's operations, the now-drafted restrictions endanger this fair and well-balanced sharing of responsibilities, which in conclusion contradicts the aim in Art. 8(1) draft RTS.

FESE agrees with the ESMA approach in Art. 15(6) of the draft RTS of not setting a strict time limit for the audits. A strict - unilaterally determined - time limit for audits would place an inappropriate burden on the auditing party and in consequence, would negatively interfere with the balance of contractual responsibilities.

Lastly, as also referred to in Q27, **FESE believes any costs associated with audit practices are inherent to the costs of producing and disseminating market data and should be factored into calculating market data fees** in line with the above arguments. Especially the nature of market data, which is a digital product and easy to be shared amongst data users who do not fairly contribute to cost recovery by the data providers, requires that audits may be pursued further. These costs should be part of the cost base of market data distribution.

Q40: Would you adopt any additional safeguards to ensure market data agreements terms and conditions are fair and unbiased? Please elaborate your answer.

Conditions of market data agreements are already fair, as they apply equally to the same client groups, and are compliant with ESMA Guidelines on market data.

Q41: 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.

➤ Disclosures of cost allocation keys

FESE is notably concerned about the proposed disclosure of cost allocation keys in the market data policy (Annex I). FESE Members are willing to provide information on how they determine their cost bases or prices to their national regulators and are fully supportive of increasing transparency and comparability in market data costs to the extent possible, but especially to their supervisors. However, **disclosing such specific cost details as proposed by ESMA could expose commercially sensitive information to the public and competitors** regarding their actual apportioning of costs and how their prices have been determined.

This would unintentionally contradict ESMA’s intention stated in paragraph 287, which discourages market data providers from disclosing actual costs or margins. Balancing the need for users to compare pricing methodologies with the risk of disclosing sensitive information is crucial. Therefore, **FESE strongly recommends that the specific allocation keys be limited to the disclosures provided to NCAs.**

FESE believes that the existence of a methodology, transparency to regulators, and limited public transparency should be sufficient to ensure the credibility that data fees are fairly set. Additionally, customers have the option to compare these fees with those charged by other exchanges, both within the EU and globally. Therefore, **FESE also suggests the removal of Article 22(4).**

Q42: 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.

FESE supports the harmonisation of certain contractual terminology but notes that the ESMA’s 2021 Final Guidelines on the MiFID II/ MiFIR obligations on market data methodology already provided the required level of clarity and granularity regarding key terms. **Changing the terminology again could provide little, if any, benefit to end clients whilst it will create additional implementation costs (change costs) for data providers and clients.** Besides, an oversimplification of harmonised terms could be counterproductive if they become too vague.

As regards the new proposals and further harmonisation, please see our comments below:

- **“market data client” change to “contracting party”:** It would allow for clearer contractual wording and avoid ambiguities: *“Contracting party means the natural and/or legal person who signs the market data agreement with the market data provider and is invoiced for the market data fees”;*
- **“market data fees”:** *“fees charged for the right to use the Information. They may include Distribution Licence Fees, Data Fees, Non-Display Fees, amongst others”.*
- **“display data” / “non-display data”:** Data is the same, regardless if consumed via a display or via non-display. Hence we recommend including “usage” in both terms:
 - “display data usage” shall indicate the market data usage through the support of a monitor or a screen and that is human readable;
 - “non-display data usage” shall indicate the usage other than display usage.
- **“delayed market data”:** It is important that the data is made available to the user, while “delivered” could be misunderstood: *“delayed market data means market data made available with a delay of 15 minutes after publication”;*

- **“physical user ID”**: *“per user model means a model of charging fees for display data which enables clients to avoid multiple billing in case market data has been sourced through multiple third parties”*;

Q43: 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?

Yes, whilst it makes sense for the “user-id” and the “device” to still be considered as “unit of count” for the display and non-display data respectively, **FESE supports having different units of count for display and non-display use on top of “user-id” and “device”**. Thus, **FESE believes that ESMA’s list should be non-exhaustive**. This is because terminology across the market data value chain differs, e.g. Bloomberg employs the term “Access ID” instead of “User ID”. Therefore, the definitions need to be flexible to encompass all participants.

FESE supports maintaining a distinction according to the type of use by the customer, including **different units of count for display and non-display use or specific customer categories**. Prescribing specific units of count would be impractical considering the implications for the value chain. The technical implementations for data provision via display tools (e.g., terminals, front-end solutions) are usually based on entitlement systems that manage user access based on user-IDs. For the delivery of data to automated systems (non-display use), similar entitlement systems based on technical access-IDs are also quite common. However, in many cases and within complex IT infrastructures, operating such entitlement systems and managing and reporting technical access-IDs is cumbersome. For many data consumers, it would require additional efforts and constant capacities to set up data lineage processes to manage a prescribed new and solely-to-use unit of count, such as “technical access.”

Additionally, the data industry is moving towards other units of count, like data volume or categorisation of fees based on use cases, especially with recent developments in new technologies like cloud or blockchain. **Flexibility in units of count is therefore necessary**. This includes the possibility of using categories based on use cases instead of a specific number of access-IDs only. It is much easier for data consumers to place themselves in a “based on factual elements” category rather than continuously managing, counting, and reporting a specific unit of count, including setting up systems to maintain that.

In order to determine the “Access fee”, a unit of count related to the characteristics of the physical connection should be considered. Fees based on accesses are the market standard unit of count and are widely accepted and globally used. However, an access fee cannot per se be solely based on the costs for that specific access. The costs mainly occur for the generation and production of the data, with marginal costs for providing additional access to another customer being minimal and usually only occurring for the vendor, not the data source.

In conclusion, FESE supports having different units of count for display and non-display use and thus believes that ESMA’s list should be non-exhaustive. For instance, User-ID and device can be options for display and non-display use, respectively, but prescribing specific units of count for these uses would be impractical considering the implications for the value chain. **As an alternative, FESE suggests defining frequently used units of count, which would be a significant step toward harmonising practices and would avoid the disruption an exhaustive list would cause**. This approach will allow market data

providers to continue to differentiate themselves and compete based on harmonised, clear, and feasible definitions.

Q44: 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.

Yes, FESE foresees that other types of connectivity should be defined to quantify the level of data consumption.

Physical connections are not indicative of the level of data consumption by the user. For instance, clients that operate in several locations may require a physical connection for each if they are not able to redistribute internally the data from a single location, but the level of data consumption would be the same in both cases. Also, most clients do not have a physical connection, which does not entail that they are not consuming data. Hence, the existence of a physical connection or the number thereof is not a valid proxy for data consumption.

The number of devices, terminals and display units are more accurate proxies to quantify the level of data consumption. Therefore, we believe the approach should be adjusted to bear this in mind. We recommend that Article 20(1) also allow data providers to display their fees by the number of devices, terminals and display units.

Q45: 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.

No, FESE does not think there is any other information that market data providers should disclose to improve transparency on market data costs and how prices for market data are set. The current proposals drafted by ESMA are exhaustive and will already provide significantly more transparency on market data costs and price setting.

Q46: Do you agree with the approach on delayed data proposed by ESMA? Please elaborate your answer.

FESE believes that the delayed data, as it is currently provided, sufficiently complies with the proposed regulation. Providing a delayed market data feed would imply additional IT development, with the corresponding associated cost, for the data sources. Also, the physical connection to a data feed, as opposed to web access, shall necessarily involve connection costs as well as the need for any client accessing data through a feed to duly register with the source.

In terms of content, FESE agrees with ESMA’s approach to maintaining the same requirements included in the ESMA guidelines. Specifically, this includes the fields in the Level 1 and 2 texts for post-trade transparency for delayed post-trade data), and only the first current best bid and offer prices, along with the depth of trading interest at those prices, for pre-trade data.

Regarding the format, FESE considers that requiring delayed data to be available for more than 24 hours is disproportionate and **suggests limiting the availability to the whole trading day.**

Additionally, **FESE disagrees with ESMA’s proposal to make all delayed data available to data users in a single file, updated every minute.** Providing for this technical requirement would be highly complex, and FESE suggests maintaining the current status quo.

Furthermore, FESE does not support the reference to providing access to “any user” in the current wording of Article 23. FESE expects that trading venues, APAs, and SIs can continue to charge for delayed data in certain instances, in accordance with existing Guideline 19. These instances include cases where a delayed data user redistributes the data for a fee (including a general fee for accessing its services) or creates value-added services using this data, which are then sold for a fee.

Q47: Do you agree with the proposal not to require any type of registration to access delayed data? Please elaborate your answer.

FESE disagrees with ESMA’s proposal to remove the registration processes for accessing delayed data. **These registration processes are important for trading venues** to monitor and verify users accessing market data and their proper use of delayed data, including for commercial purposes. A minimum degree of interaction with users is necessary to that end, and this is currently facilitated by the registration system. Control of data access should not be prohibited since it could create an unlevel playing field between data sources and, for example, those redistributing the data on a commercial basis. Furthermore, current registration allows market data providers to have contact details to inform users about potential updates relevant to their use, such as possible changes in formats.

A simple registration should remain possible. It is also worth noting that it does not preclude the possibility of setting up automated downloads for the delayed data. **FESE proposes transposing the provisions related to access as they stand in Guideline 17.** FESE Members are committed to facilitating simple registration and data accessibility for users. Additionally, Guideline 17 does also not preclude effective supervision on the matter or require additional regulatory clarification, as ESMA argued in the consultation paper on the Guidelines.

Q48: 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.

No, FESE does not agree with the proposed timeline for implementation.

FESE wishes to stress the importance of ESMA allowing sufficient time for implementation once the RTS is officially published. The suggested 3-month period would be insufficient, considering the efforts required from Trading Venues, APAs, and SIs to ensure compliance with the new provisions, some of which substantially diverge from existing guidelines, if implemented. In their current form, the draft RTS would notably impact market data contracts and business processes across the industry, making implementation within a few months unreasonable. Unless some new provisions end up aligning more with the original guidelines, we believe that a **minimum of 12 months would be necessary for the implementation period.** On top of this, the need to account for additional time and resources that clients may require to adapt to and test the new scenario should be considered.

In addition, it should be noted that market data providers often have contractual obligations to notify clients in writing prior to changes in standard market data policies or technical adjustments. In many cases, this notice period extends to 90 days or more, benefiting clients. Furthermore, some entities in the market data chain operate on a quarterly basis, meaning changes implemented in the middle of a quarter could significantly disrupt processes for providers and end-users alike.

Q49: Do you have any further comment or suggestion on the draft RTS? Please elaborate your answer.

Without diminishing the value of all our proposals across the previous responses, we want to use this question to emphasise three points we consider essential for the final RTS:

1. **Maintaining points (i) and (iii) of Art. 5(1) of the RTS.** Notably, retaining the wording in Art. 5(1)(i) is critical, particularly its reference to “factual elements”, and in no case increasing the restrictiveness by limiting the establishment of different categories to cost differentials. [See responses to Q31-33]
2. **Retaining all cost categories in Art. 2,** including the residual cost category under Art. 2(6). We appreciate the language in Arts. 2(2) and 2(5) **recognising the existence of shared costs (for the avoidance of doubt, it is our understanding that shared costs fully encompass the notion of joint costs, which is critical).** The existence of varying business models must be taken into account. Detailed disclosures that could jeopardise commercially sensitive information should be avoided. [See responses to Q27, Q28, and Q41]
3. **Maintaining the principles-based approach for establishing a reasonable margin.** Notably, Art. 3(2)(c) should be kept. Clarification should be included in Art. 3(2)(a) and Recital 10 to use the percentage of “total” costs (incl. shared/joint costs) of production and dissemination of market data. [See response to Q29]

These elements are core. In addition to the above, we wish to take this opportunity of this question to further elaborate on the benefits of certain elements we deem relevant.

➤ Market data landscape

At FESE, we firmly believe that the EU should foster a globally competitive data economy to ensure that investors benefit from state-of-the-art data and analytics as the backbone of sound investment decisions. Overregulation in market data could, inter alia, risk deterring investments in the data ecosystem and increase Europe’s existing reliance on third-country data providers for many forms of data.

The exchange community has consistently supported the CMU and is actively contributing to the development of a CT. A fundamental goal of the CMU is integration; however, overregulation in market data pricing risks creating a two-tier structure. **It is important that it be understood that market data is integral to the exchange’s business and operations.** Regulated markets are characterised by high fixed costs and low marginal costs. Exchanges recover their high fixed costs through both trading fees and market data fees. Therefore, there is a significant risk that a regulatory overreliance on the cost element to define pricing strategies will deprive exchanges of the second revenue stream, seriously affecting their continued ability to run, maintain, and develop a full suite of operations critical for both primary and secondary markets. This is especially true for smaller trading venues with modest earnings, often less than EUR 1 million, where market data represents an important source of funding.

Additionally, market data providers face increasing competitive pressure from new entrants, alternative unregulated sources of data, and changing customer demands. It should also be considered that this pressure will soon intensify with the introduction of the CT and its impact on the substitution of exchanges’ market data products. Consequently, **exchanges will soon be subject to simultaneous pressures from both commercial and regulatory angles.**

In this context, FESE has commissioned a study to provide an updated overview of the evolution of exchanges’ revenues and fees in the market data landscape, with several

FESE Members providing data. We will share the study with ESMA. Some of the key figures and features include:

- Market data revenues from stock exchanges have remained fairly stable over recent years, registering an average annual increase of 3% from 2018 to 2023, which is broadly consistent with average EU inflation.
- The share of joint revenues (market data and trade execution) attributable to market data has also remained relatively stable over time.
- The overall fees for market data have not increased significantly. For display fees, which account for the largest proportion of market data revenues, the increase has been less than 5% per year over the last ten years. In terms of non-display fees, some exchanges have introduced changes for different customer categories. For example, for principal and brokerage, the non-display fee increase has ranged from 1% to 8% over the last ten years, depending on the FESE member. For redistribution fees, the increases have been between 1% and 4%.
- When considering the overall value chain, the cost of exchange data for end investors is relatively small. The results provide a consistent picture with the analysis conducted in 2018 by Oxera, which indicated that exchange market data fees account for around 1% of the fees typically charged by a large broker and less than 0.015% for a typical fund management firm⁸.

In conclusion, **market data revenues and fees have not increased much overall, and the latter represent a small portion to the end-investor.** Hence, we do not agree with the claim in the consultation paper that the applicability of different categories based on distinct uses of the data has resulted in an “unjustified” increase in data prices. While costs have been rising significantly during the last years due to, for example, increasing regulation, inflation and the battle for talent, several exchanges have buffered these increased costs to avoid burdening their customers further, thereby accepting a reduction in their own margins.

We encourage ESMA to consider our comments and suggestions throughout the consultation, including both the consequences already outlined and those we discuss further below. We recognise the complexity of this market, making it difficult to fully anticipate the potential implications of the draft RTS. Therefore, in the following subsections, we aim to provide additional clarity on this matter.

➤ Making market data available

FESE members act at many different levels to ensure non-discriminatory access to data. Some examples include:

- Distribution to a broad range of users and a large number of clients.
- Non-discriminatory access to data, i.e. it is based on objective criteria, which is known in advance by clients and prospective clients. In addition, FESE members do not apply a success fee to market data clients; the usage of the data is taken into account, not the revenue or other commercial success (including assets under management) that clients may derive from their use of the data or overall operations.
- Application of the provision of market data on the basis of cost in line with the rules applicable to the pricing of digital goods. This approach ensures a fair recovery of costs while maximizing access to data, including for small data users.

⁸ “What’s the data on market data?” OXERA, 2022

- FESE members provide support to clients and prospective clients regarding product offerings and contractual and technical setups.

We wish to note that FESE fully agrees with the need to prohibit individualised pricing, i.e., licensing data to each user at a different price, which we understand both Recital 12 in MiFIR and Recital 10 in the draft RTS refer to when mentioning “*the value that the market data represents to individual users.*” Thus, we welcome that the draft RTS addresses the potential risk of this approach. However, considering the content of the draft RTS, we are concerned that this prohibition has been extended to certain unrelated elements of the existing models of exchanges, which were also designed to ensure that data is provided on a “non-discriminatory basis”, in alignment with Arts. 8(2) of CDR 2017/567 and 86(2) of CDR 2017/565.

Exchanges’ data fees are typically based on a high level of fixed costs and projected revenues to recover the costs (including a margin), while considering a group-based fee structure which takes into account the various data user groups and their purchasing powers in order to derive data fees for cost recovery. Furthermore, data users who use more data than other data users (legal entities) do contribute more to exchanges’ cost recovery than those who use less data (retail or small legal entities). **If exchanges disregarded the type of usage by data users, costs would not be recovered efficiently.** Only because those who generally can be expected to benefit the most pay their fair share towards exchanges’ cost recovery, do those with lower purchasing power have access to market data. This approach allows for fees that “enable data access to the maximum number of market data clients”, including the smallest ones, as required in Article 3(3) of the RTS.

Our response to Q33 elaborated on the notion of usage and its importance to ensure that the final RTS do not lead to an establishment of fees that would benefit larger global players, which have broad and diversified activities, at the expense of smaller data users with more limited usage. To further illustrate such a case, we can use the example of a global bank using market data for multiple usage applications: (i) providing display data in real-time for traders; (ii) algorithmic trading engines for customer trading; (iii) pricing securities when operating an SI; (iv) providing real-time data to all customers through their wealth management arm, acting like a market data redistributor; (v) creating new instruments, e.g., contracts for differences, and providing the data to its customers; (vi) creating its own index family, etc. **It would not be sensible to charge the same or a very similar fee to such a large bank as for smaller data users with more limited usage.**

➤ Consequences of restrictive approach in draft RTS

Data is ultimately a digital product, where fixed costs account for the vast majority of market data production and distribution costs. It is important that it is understood that variable costs driven by connectivity and volume are negligible in proportion to total costs. Therefore, it is strongly advisable for ESMA, when considering fee differentials, to consider factors beyond the elements considered by ESMA (margin and costs), and to maintain the wording of Article 5(1) of the draft RTS.

FESE appreciates that, at least, the draft RTS allows for the possibility of providing different margins among categories of customers. In theory, this should avoid a strict one-size-fits-all pricing model with severe consequences to the market and its participants. However, in practice, the restrictiveness in certain elements of the draft RTS, which represents a significant deviation from the current Guidelines and CDRs, as well as from the way digital products should be priced to ensure they are widely and inclusively available, would not allow to prevent many of these consequences.

Since allocating costs sensibly to different customer categories is not possible, the current draft RTS could result in very similar prices for different customers, small and large ones alike (i.e., retail vs. professional), and for substantially different usage of data. Under these new conditions, a professional user category might have to pay similar fees to a non-professional user category, despite the latter having more limited resources and different needs. **Non-professional and/or smaller user categories would likely experience an increase in fees compared to current prices, to the benefit of the professional and/or bigger users.** To put it further into perspective, ESMA’s proposal would equate to cost-savings only for the largest and most complex customers around the world - while a vast group of data users could experience a fee increase. This could even make it difficult or impossible for some users to access the data which directly contradicts the objective of Article 3(3) of the RTS to “enable data access to the maximum number of market data clients”.

As explained during the consultation response, **an overreliance on the cost base alone to calculate the fees – whether in actual cost allocation (Art. 2), establishing the margin (Art. 3(2)(b)), or establishing the fee differentials (Art. 5(2)) – is problematic. The outcome would be compounded if the establishment of different categories of customers was only possible on the basis of cost differentials,** instead of retaining the current draft RTS on “factual elements.” Indeed, FESE notes that paragraph 229 of the CP states that the use made out of the data by the user may call for different arrangements for the data provisions in terms of connectivity, transmission channels, volume of data - all of which can justify different pricing of market data. Whilst interesting as a concept, as explained above, requiring any possible fee differentials to be based solely on connectivity, volume, or the features listed in paragraph 229 would be artificial and/or inefficient.

➤ Concerns regarding the introduction of price regulation and contradictions to principles of freedom of commerce and proportionality

We have focused our response on providing considerate feedback to the proposals under consideration, highlighting several provisions in the draft RTS that there is definitely merit to maintain, as well as those which would necessitate finetuning. That said, we are concerned that some of the proposals embedded in the draft RTS, especially when their effects are combined, could verge on price regulation and/or contradict the principles of freedom of commerce and proportionality. We would therefore like to call for reflection on the approach taken and reiterate the need to account for the necessary flexibility.

As a point of departure, we consider that if the legislator had intended to introduce price regulation, it would have expressly stated its intention in a specific and explicit provision, similar to past instances when it sought to introduce price regulation in certain sectors

like interchange fee payments⁹, in the electronic communications sector (with regard to roaming charges¹⁰ and access¹¹) or even in the field of banking and financial services¹².

Neither Article 13 nor any other MiFIR provision defines precise, explicit and exhaustive criteria for establishing prices for trading data. Article 13(5)(e) only mandates ESMA to “specify” certain elements of the notion of reasonable commercial basis, i.e., the calculation of cost and reasonable margin, but does not refer more broadly to “other contractual conditions”. In this context, as argued in previous questions, excluding specificities of digital product pricing would severely curtail the pricing freedom of the regulated data providers and exhaust almost any differentiated pricing.

Furthermore, the freedom to pursue an economic activity, including free competition and freedom of contract, is enshrined in Article 16 of the Charter of Fundamental Rights of the EU. This would include the choice of economic partner and the freedom to determine the price of a service¹³. The principle of proportionality also requires that EU measures must be appropriate for achieving the objective pursued and must not exceed what is necessary to achieve it. Established case law dictates that, when several measures are available, the least restrictive must be chosen¹⁴. Regarding price controls, AG Poiares Maduro confirmed they “*are one of the most intrusive forms of intervention in the market*” and legislators should only act in this way “*as a last resort*”¹⁵.

According to the CJEU, a price is excessive when “*it has no reasonable relation to the economic value of the product supplied*”. In *United Brands*, the Court established a two-fold test for excessive pricing: “*[t]he questions therefore to be determined are whether the difference between the costs actually incurred and the price actually charged is excessive, and, if the answer to this question is in the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products*”.

This ruling implies that the determination of an excessive price requires proving that the price exceeds the product or service’s economic value, which includes more than just the accumulation of costs borne by the company. According to the Commission, economic value may also include other factors unrelated to costs, such as demand, as illustrated by the *Sundbusserne v Port of Helsingborg* decision.

⁹ Article 3, Regulation 2015/751 of 29 April 2015 on interchange fees for card-based payment transactions: sets the level of the interchange fee.

¹⁰ Article 4 et seq., Regulation 2022/612 of 6 April 2022 on roaming on public mobile communications: sets the maximum charges for calls, texts and downloading data.

¹¹ Article 68 and 74, Directive 2018/1972 of 11 December 2018 establishing the European Electronic Communications Code: contains an explicit provision regarding cost accounting and cost orientation obligations.

¹² Article 19(2), Regulation No 513/2011 of 11 May 2011 amending Regulation No 1060/2009 on credit rating agencies: sets forth the criteria to be applied by the Commission to determine, by way of a delegated regulation, the amount of the fees to be paid by CRAs to ESMA. Although these fees relate to the CRAs’ contributions to the ESMA budget, and which therefore do not regulate customer prices, this example shows that even in a less intrusive scenario, the basic legislation contains an explicit and specific provision limiting the scope of the delegation of powers.

¹³ Judgment in *Sky Österreich*, C-283/11, ECLI:EU:C:2013:28, para. 43. See also judgment in *Polkomtel*, C-277/16, ECLI:EU:C:2017:989, para. 50.

¹⁴ See, for instance, judgment in *Afton Chemical*, C-343/09, ECLI:EU:C:2010:419, para. 45.

¹⁵ Opinion of Advocate General Poiares Maduro in Case C-58/08 *Vodafone e.a.*, paras. 38 and 39. Emphasis added.

Q50: 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.

2. CP on the amendment of RTS 23

Q51: Do you agree with the proposal for a daily reporting of reference data for both transaction reporting and transparency purposes?

FESE supports the proposal for a common daily reporting frequency for all reference data defined under RTS 23.

Q52: 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.

We believe it makes sense to retain the MiFIR identifier. We would however underline that indeed, as mentioned by ESMA, for a number of instruments, trading venues have to rely on external sources besides the CFI code to identify correctly the instrument. For instance, for instruments with a CFI code beginning with 'EY****', the CFI code-MiFIR mapping is not sufficient to distinguish between derivatives, securitised derivatives, or ETCs/ETNs, requiring additional information from other sources. ESMA might be in the position to improve its mapping at this stage to ensure trading venues would not have to rely on different sources and increase the probability of errors in classification.

If the MiFIR identifier were to be maintained, and given it will now be incorporated in the RTS23 file, there is a concern that any misalignment with the CFI code will result in rejections. Such rejections in the RTS23 file will have more significant implications than was the case with the RTS2 file. Therefore, we suggest considering whether, instead of a full rejection, such misalignments between the two classifications should only generate warnings. This would mean they would still need to be corrected, but the file could still be accepted, avoiding an impact on admission to trading, among other things.

In addition, we suggest there needs to be a much stronger process to correct CFI codes, with very strict timelines for incorrect classifications to be corrected by the NNA (see our response to Q53).

We ask ESMA to confirm that it will update the guidance on mapping CFI codes to MiFIR identifiers, including setting out which fields are mandatory and optional. It would be helpful to gain clarity on how the CFI fields outside of the transparency scope will be managed in RTS23, as they do not have MiFIR identifiers. Therefore, we suggest that it should be possible to leave the field empty, and this should not result in a rejection message (RJCT).

Q53: 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?

FESE believes the current granularity level is sufficient. More granularity could result in more issues regarding the alignment of classification, among other concerns.

We want to draw ESMA's attention to ongoing issues with CFI code attribution and matching with MiFIR identifiers. The most common data problem we encounter is the

incorrect assignment of CFIs by National Numbering Agencies (NNAs). In some occasions, NNAs do not assign CFI codes, create invalid ones, or amend them after listing. This leads to different trading venues having different CFI codes, resulting in incorrect CFIs in ESMA reference data. We believe these issues need to be addressed and a stronger correction process established with strict timelines for NNAs to ensure data quality.

The Association of National Numbering Agencies (ANNA) should provide the correct CFI codes as soon as an incoherence is detected between the NNA and the Prospectus/Final Terms, ensuring this is done before the very first listing occurs. For example, there are instances where the first trading venue reports a new instrument with DB****/DT****, but the Final Terms define the instrument as RW****, yet ANNA still displays the incorrect CFI as DB****/DT****.

Ideally, the original CFI code on the Association of National Numbering Agencies should not be modified during the listing period to mitigate reporting problems and inconsistencies.

Q54: 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.

Yes, FESE agrees to incorporate the reference data from RTS2 into RTS23 but please see our comments in Q52 & 53 regarding issues of misclassification of CFI codes.

Q55: 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?

Yes, FESE agrees, but please see our comments in Q52 and Q53 regarding issues of misclassification of CFI codes.

Q56: 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.

Yes, FESE supports the approach.

Q57: 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?

Yes, FESE supports the approach, but please see our comments in Q52 and Q53 regarding issues of misclassification of CFI codes.

Q58: 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?

We support the approach of trying to streamline the reference data reporting requirements wherever possible. Despite the obligation that it must be harmonised at EU level since 2018 under MiFID II and MAR for trading venues to report financial instrument reference data to ESMA, some National Competent Authorities continue to require trading

venues to daily report reference data directly to them. One of the reasons given is the absence of certain data necessary for their mission in the RTS23. To simplify this reporting and establish common reference data, we believe that the NCAs and ESMA should define an exhaustive list of the data necessary for their mission and include it in RTS23. This would ensure that only one reporting process is required, reducing the costs associated with duplicative reporting requirements.

It should also be highlighted that for any changes to these data flows that ESMA proposes in this and other consultations related to the MiFID/R Review, it is critical to allow sufficient time and to adopt a consistent approach for implementation once the final details are published. It would be extremely helpful to know the specific timelines envisaged for the applicability of the various technical standards as soon as possible, so market participants can incorporate these into their planning projects.

Q59: Do you have suggestions on how the fields mentioned above may be improved and streamlined?

Q60: 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?

Q61: 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.

We do not see the need for a distinction between the application date and the date by which the reference data is to be reported, hence we would agree with the proposal to align both. We fully support ESMA's proposal to establish that the application date should be 18 months after the publication of the technical standards, as this should provide market participants with sufficient time to implement all the required system changes. A lead time of at least 18 months would be more suitable than 12 months for the sake of data quality and a smooth industry transition.

In addition, given that the MiFIR Review covers many other aspects relevant to trading venues, it is critical, from a project implementation point of view, that timelines are aligned wherever possible. In this instance, since it is proposed that the changes to RTS23 will be applicable 18 months after the publication of the technical standards, we strongly urge ESMA to take the same approach for changes to RTS1 and RTS2. Given the interlinkages between these RTS and the fact that fields are moving from RTS1 and RTS2 into RTS23, we believe the timelines need to be the same - otherwise, this will result in missing data for a period of time, as fields will have been removed from RTS1 and RTS2 but not yet included in RTS23, which makes no sense. Additionally, this could lead to potential rejections of files if they are not all fully aligned. Therefore, a harmonised approach seems to be the most practical and appropriate solution, providing the market with sufficient time to implement the changes, thus minimising potential problematic issues and additional risks.

Q62: 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?

Q63: 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?

FESE supports the general approach to aligning the reporting requirements to achieve greater consistency.

In terms of specific fields, for field 33 (Option Style): in cases where a specific instrument (Ex Corporate Warrant CFI start with RW*) cannot use the values EURO/AMER/BERM, there is the risk of rejection. We suggest it should be possible to maintain the value OTHR.

Q64: Do you foresee any challenges with the proposed approach under which the CSDR publications would be integrated in FIRDS?

Q65: 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?

FESE would support the proposal from ESMA under the assumption that the additional information concerning instruments published pursuant to CSDR will be processed by ESMA itself, as ESMA can identify the instruments within the scope of CSDR publications and perform the calculations necessary to determine the most relevant market in terms of liquidity or the venue with the highest turnover. If this were not the case, it would be difficult for the trading venue submitting RTS 23 data to obtain the information, as it would involve sourcing data from external entities or companies so would not be workable.

Q66: Do you support inclusion of the new fields listed above?

➤ Optional vs mandatory & application date

In terms of general points, FESE seeks clarification from ESMA on which fields are optional and which are mandatory.

In addition, it should be made clear that these new fields will only be required as of the date these new requirements become applicable. There should be no retrospective application of these fields, as trading venues can only start sourcing this data for new admissions, and not for securities that are already admitted to the markets. It is critical that this is taken into account in the operational development of the relevant files.

➤ Venue of first admission to trading (field 6b) and the CTP revenue-distribution scheme

ESMA hinted in the parallel CTP consultation paper that the new 'venue of first admission to trading' field could also help identify the 'trading venue that provided initial admission to trading of shares or ETFs' for the revenue-distribution scheme (criterion under MIFIR 27h(6)(b)). We wish to emphasise that this should include (i) IPOs (ii) private placement, (iii) direct listing (i.e. initial admission to trading with no capital raise), (iv) M&As, (v) cross-listings and dual-listings, and (vi) capital increases along with their trading volumes, from qualifying for this criterion, as long as they have a new ISIN and are requested by the

issuer (i.e. as opposed to admission to trading at the initiative of the venue operator for already listed instruments).

These listings constitute valuable operations of primary markets for capital-raising and increased liquidity and transparency in EU markets, aligning with Level 1 objectives. Hence, we propose adding relevant flags for their consideration in RTS 23 reports. Additionally, as alluded to above, we wish to clarify that the sole ‘admission to trading’ by secondary venues should be excluded from this criterion under the revenue-distribution scheme of the CTP, as these purely technical operations do not contribute to corporate financing but solely entail importing companies previously admitted to other markets onto trading systems.

On a side note, we would like clarification on whether the new field ‘venue of first admission to trading’ will be limited to shares and ETFs, or if it will also encompass non-equity instruments. If it applies to non-equities as well, we would appreciate additional guidance on how to accurately define this field, particularly in cases involving double listings.

➤ Action type (field 4b)

We would like clarification on whether the new field ‘Action type’ will apply only if ESMA decides to proceed with the alternative option mentioned in paragraph 366 of the CP, i.e. cases where reported instruments are terminated and subsequently readmitted to trading.

Moreover, and related to the point above, it is unclear if the new field refers to the history of the instrument itself or the record submission. In the first case, a comprehensive list of events would need to be identified and “modification” would need to be replaced by the terms delisting, termination, etc., to allow for ESMA to reconstruct the history of the instrument based on this field and the fields 10, 11 and 12 which would only contain a single entry - not multiple entries. Overall, the alternative option whereby ESMA would retrieve and publish the information on the past trading periods is highly favoured by FESE members. We do appreciate and support the proposal from ESMA, which would require less extensive adjustments than the option where trading venues reconstitute and check on a daily basis the entire history of each instrument, thereby significantly impacting our systems’ performance.

➤ Maturity of underlying (field 26c)

We are wondering whether the new field 26c in the Derivatives and Securitised Derivatives related fields regarding the ‘Maturity of underlying’ bond or swap will be optional. FESE Members have concerns about how to retrieve this information.

➤ LEI of fund managers and BMAs (fields 5a and 20b)

The collection of LEIs for fund managers and benchmark administrators presents challenges. While Prospectuses and Final Terms may mention the names of these entities, sometimes along with their addresses, they do not provide the LEI codes. This also raises the question whether all fund managers and benchmark administrators have a LEI code by default. In any case, searching for LEIs in GLEIF is a manual process, with no guarantee of accuracy. Therefore, we are wondering whether these fields will be made optional.

➤ LEI in case of delisted ISINs

On a general note regarding LEIs, if there is a reporting issue (such as a rejection) that necessitates retroactively resending a previously delisted ISIN in the context of RTS 23 reporting, it would be appreciated if the reporting entities could use the inactive LEI that was valid during the relevant reporting period. This approach is also justified by the fact that, in many cases, there is no new LEI available for resubmission.

Q67: Do you agree with the amendment listed above for the existing fields?

FESE generally supports these amendments, but would like clarity in relation to cases where the FISN for the same Instrument is different across various MICs. It is not clear if we would expect a rejection or a warning, as is the case today.

We agree with ESMA's intention to achieve alignment in this regard and consider that the best option would be to do so via the FISN code provided by ANNA. However, the actual means to achieve this are limited and would require significant time and/or economic resources from exchanges: either (a) through manually consulting ANNA's website, or (b) through possible automation linked to ANNA's website. We would seek clarification on how ESMA expects this to be achieved.

Q68: 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?

As alluded to in our response to Q66, FESE members are in favour of option (ii) suggested by ESMA, whereby ESMA would retrieve and publish information on the past trading periods based on the events reported by trading venues which would be provided in the new Action type field - provided this field is really about the instrument history and not about record status. Indeed, trading venues would expect significant impact on their systems' performance in the case where they would need to store the whole history of each listed instrument combined with a new logic that is not necessarily compatible with the existing one, based on the correct information at the current date only.

Moreover, FESE wishes to underline that there are other operations, which do not involve an actual delisting and re-admission of shares, that may be worth signaling for ESMA to properly reconstruct all trading periods. This is the case for 'capital increases', which do not require a change in ISIN and currently lack a designated field in RTS 23.

Signalling 'capital increases' is notably important to enable ESMA and the CTP to identify them as qualifying for the 'initial admission to trading' criterion under the revenue distribution scheme of the CTP [criterion MIFIR 27h(6)(b)]. The subsequent capital increases following the listing play a central role in financing the real economy, with raised capital volumes often surpassing those from the initial listing. These operations are therefore fully aligned with the objectives of the Level 1 text to reward valuable operations that primary markets undertake to finance the EU economy. We therefore suggest adding an additional field to RTS 23 to signal capital increases, allowing them to be accounted for in the revenue distribution scheme of the CTP. In the case of a capital increase, the whole share should fall under the revenue scheme distribution.

The current RTS 23 already covers other relevant operations via new ISINs, such as IPOs, private placements, direct listings, cross-listings, dual listings, as well as M&A, spin-offs, and business combinations. These operations should also qualify for the 'initial admission to trading' criterion of the revenue-distribution scheme, and we propose adding the relevant flags in RTS 23. In particular, their eligibility should be subject to: (i) being based

on issuer request (except for M&A, spin-offs, and business combinations where this is not indicated) and (ii) not involving sole technical ‘admission to trading’ by secondary trading venues, which does not contribute to the financing of these corporations and hence is contrary to the objectives of Level 1 text.

Q69: Do you support suppressing the reporting of the fields listed above?

Yes, we support these proposals.

Q70: Do you foresee any challenges with the use of JSON format compared to XML? Please provide estimates of the costs, timelines of implementation and benefits (short and long term) related to potential transition to JSON.

We note that ESMA is considering the use of JSON format for reporting in a number of areas (i.e. RTS3, RTS21, RTS23). It is critical that any approach ESMA decides to take in relation to reporting formats must be holistic and seek to progressively extend to all areas and reporting layers; otherwise, it will not produce benefits and instead will lead to additional complexity and unnecessary costs. It is critical that a thorough cost / benefit analysis is carried out by ESMA before proceeding with such a significant change.

Fundamentally, any evolution towards the JSON format must, as a prerequisite, receive full endorsement from all NCAs and a commitment that they will also adjust their practices and requirements in favour of this new unique format. FESE Members have experienced inefficiencies linked to NCAs that currently sometimes require and request different reporting formats for operational reasons for the same reporting purposes. A broader evolution towards JSON can only be meaningful and successful if such discrepancies can be dismantled in favour of a unique format that is used by all.

Lastly, given that this would be a significant structural change, it is important that sufficient implementation time is provided for this transition (between 6 - 12 months at a minimum) and it is necessary that any evolutions towards this are only taken in a context where it can be confirmed to the industry by ESMA that JSON would be the go-to format for the foreseeable future and that, at a minimum, no new reporting format would be introduced or required in the coming 5 to 8 years.

Q71: 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?

FESE wish to stress the importance of giving regulators a complete view of reference data of the European trading landscape, including off-venue trading, to improve the accuracy of the FIRDS database and ensure a level playing field.

Q72: 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?

Q73: Are any other adjustments needed to enable comprehensive and accurate reporting of Article 8a(2) derivatives under RTS 23?

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