

MIFIR RTS ON REASONABLE COMMERCIAL BASIS

ESMA'S CONSULTATION

AMAFI's answer

AMAFI is the trade association representing financial markets' participants of the sell-side industry located in France. It has a wide and diverse membership of more than 170 global and local institutions notably investment firms, credit institutions, broker-dealers, exchanges and private banks. They operate in all market segments, such as equities, bonds and derivatives including commodities derivatives. AMAFI represents and supports its members at national, European and international levels, from the drafting of the legislation to its implementation. Through our work, we seek to promote a regulatory framework that enables the development of sound, efficient and competitive capital markets for the benefit of investors, businesses and the economy in general.

Considering that MiFIR did not appear to deliver on the objective of a fair and transparent provision of market data, its review, which led to the publication of a revised text in the OJEU on 8 March 2024, converted the ESMA guidelines on cost of market data to legal obligations and strengthened them with the aim of ensuring that market data users have access to data on a reasonable commercial basis (RCB), including unbiased and fair contractual terms.

In this context, ESMA has been mandated to develop draft RTS specifying notably the duty for market data providers to (i) make available to the public the relevant market data on an RCB including unbiased and fair contractual terms, (ii) ensure non-discriminatory access to the relevant information and (iii) specify that the relevant data policies should be made public free of charge and in a manner which is easy to access and to understand.

ESMA is therefore consulting on several aspects of the RTS it is mandated to develop. AMAFI would like to thank ESMA for this consultation and provides hereafter its answers on this very important topic. Market data are indeed indispensable for the operation of investment firms, not only for trading and post-trade activities, but also to comply with regulatory requirements, manage risk and ensure exact accounting. Cost of access to market data is a cost of doing business that is thus unavoidable, whose fairness is indeed indispensable for the proper functioning of the capital markets.

7 – FEES FOR MARKET DATA

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.

As a general observation, AMAFI is concerned that although MiFIR clearly states that market data users must not be charged according to the value that the market data represents to them, the Consultation Paper contemplates de facto value-based rules in the draft RTS. From point 229 to 233 and 238 ESMA argues that different costs for various types of customers may result in different prices, whereby it is allowed to categorise customers and to charge different margins for each category and to charge differently for “*significant different uses made by the customer (e.g. display or non-display or different types or channels), which require the market data provider to incur extra costs to cover the users’ different needs.*”

In addition, although AMAFI agrees with ESMA’s approach of breaking down the total costs of producing and distributing market data into their essential components, we believe the current RTS may not fully achieve the regulatory goal of ensuring fees are based solely on the costs of producing and distributing market data. Provisions in articles 2(1)(e) and 2(6) regarding “*other*” and “*further*” costs might allow the inclusion of irrelevant expenses, allowing for differentiation between customers.

If article 2(6) is not removed and the RTS continues to allow “*other costs*” and “*further costs*”, AMAFI recommends these costs be strictly necessary. While article 2(1)(e) requires other costs to be “*necessary for the production and dissemination of market data*” article 2(6) lacks this stipulation for further costs. This lack of specificity is too broad and could lead to misuse.

Additionally, we interpret “*other costs*” and “*further costs*” to mean the same thing. We suggest ESMA use the term “*other costs*” consistently in articles 2(1)(e) and 2(6) to avoid any confusion.

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.

AMAFI generally supports ESMA’s approach to categorising the costs of producing and disseminating market data into infrastructure, connectivity, personnel, financial, and administrative costs, providing those are strictly and only related to the production and distribution of market data. In particular, it is important to make a clear distinction between costs related to trading activities and those associated with data production and dissemination. Providers that operate trading venues should not be allowed to cover trading venue expenses with data fees.

For example, the term “*leased services*” in articles 2(1)(a) and (b) could be interpreted too broadly, potentially encompassing costs such as building rent and maintenance. We suggest that ESMA clarify whether “*physical assets*” should refer only to electronic and computing hardware, or if it should also include other types of physical assets.

Costs corresponding to the various categories should be related to data production and dissemination only and correspond directly to the specific data products purchased by the customer, ensuring transparency and fairness in pricing.

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.

AMAFI acknowledges that some market data providers (but not all, e.g. CTPs or APAs) may have joint costs when producing and disseminating market data. In these cases, the “attribution of costs” approach is, in our view, the right one, based on the principle that each data user should pay for its share in the average cost that the exchanges incur to produce and disseminate market data. However, not only should the RTS require market data providers to allocate a proportion of shared costs to the production and dissemination of market data, but also to substantiate, document and review regularly the assessment. This should allow for demonstrating not only that the costs are only included once but also that they are commensurate to the service provided.

It is indeed difficult in practice to ascertain which percentage of the cost of an existing trading infrastructure is attributable to market data and hence, what is the margin of the trading activities versus the one of the dissemination of data, the latter having to be “comparable” (point 196 says that the margin must “reasonably compare to the overall margin of the business”, which entails a comparison with trading activities).

To help ascertain the accuracy of the cost attribution performed by concerned market data providers, it could be useful to also consider the marginal cost of increasing the trading activity (data production and dissemination remaining unchanged) versus the one of increasing the activity of producing and disseminating data (in terms of volume of data and number of clients). This would help verifying that the percentage of total costs attributed to each activity is indeed consistent with its weight on the activities of the market data provider, and hence its cost.

To ensure such accuracy and fairness, it is paramount that ESMA oversees the self-reported percentages of market data providers. This should be done in line with Guideline 2 of ESMA’s Final Report on MiFID II/MiFIR obligations on market data, published on 1 June 2021 and article 13 of MiFIR but also considering the marginal cost described above. In addition, in order to carry out this supervision, ESMA will likely need to establish comparisons between market data providers having shared costs. This should be explicitly stated, including some thinking on the use and limits of such comparisons.

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.

AMAFI acknowledges that “net profit” as defined in Article 1(1)(f) of the draft RTS could be a reasonable measure for determining the margin applicable to data fees.

Nevertheless, we have concerns regarding Article 3(2)(c), which allows for the margin to be deemed reasonable in relation to the overall margin of the other businesses of the data provider. This is

problematic, as it involves comparing margins of different business activities within the same entity, including those unrelated to the production and dissemination of market data. Such comparisons may not provide a relevant or fair benchmark for evaluating the margin's reasonableness.

While AMAFI acknowledges the fact that ESMA cannot set specific margin levels, we respectfully suggest to include, as a core principle of the RTS (see paragraph 194), that margins should be kept within reasonable limits to strike a balance between ensuring broad access and commercial viability, as stated in recital 6 and Article 3(3) of MiFIR, which call for margins to be set in a way that maximises client access to data. This could be detailed further by specifying, like in recital 8, that margins "should not be disproportionate when compared to the cost incurred in the production and dissemination of market data" or, like in Article 3(2)(b) that "margins should not excessively exceed the costs associated with data production and dissemination".

8 – INFORMATION TO BE PROVIDED TO THE COMPETENT AUTHORITY

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.

AMAFI acknowledges the importance of having a detailed template for reporting costs associated with the production and dissemination of market data. This will be an important tool for ensuring accountability of market data providers and for enabling ESMA and National Competent Authorities (NCAs) to effectively oversee them. AMAFI recommends that ESMA and NCAs mandate the periodic submission of this template, ideally on an annual basis. This level of oversight is indeed crucial to prevent market data providers from including unnecessary or irrelevant costs that do not directly relate to the production and dissemination of market data.

The template outlined in annex II of the RTS would in our view need to be amended as regards Section 3 on Costs. In 3B, ESMA calls for an "*indication*" of the components taken into account to determine the cost of data: not only an "*indication*" should be required but rather a detailed description. Together with Section 3C and Section 4, "*Reasonable margin*", the information provided should be substantiated enough to allow ESMA and NCAs to assess the appropriateness of the approach taken by the market data provider.

As a general observation, AMAFI considers that significant changes should be made in terms of supervision to ensure the fairness of market data costs and implement a consistent approach amongst NCAs. As mentioned several times in our response, the cost of market data remains a complicated matter, involving specialised expertise and raising important interpretation issues. It is likely that even with a detailed RTS based on fair principles, differences and issues will remain. Considering the importance of market data as a pillar for the good functioning of EU capital markets, AMAFI respectfully encourages ESMA to consider setting a permanent "dispute" resolution mechanism where ESMA could provide concrete answers on concrete cases. This would help establish common functional and technical interpretations of the rules.

9 – NON-DISCRIMINATORY ACCESS TO DATA

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?

Several obstacles currently make it difficult to achieve non-discriminatory access to market data:

- **Complex Licensing Costs:** Market data licensing is very complex and expensive. Different market data providers use various terms and fee structures, making it hard for users to understand what they are paying for. This complexity hides the true cost and makes it difficult to know if the data fit their needs. Whereas the CP calls to “*avoid duplication of fees for the same data provided*” (paragraph 238), market data providers currently sell market data licenses, not data: licenses cover specific uses (display, non-display, brokerage, derived data...) but it is actually the very same data being used, most of the time via the same channel. This means that there is currently duplication of fees for the same data being used. There may be merit in ESMA looking at this matter, at least from a supervisory standpoint.
- **Multiple Fees:** Data contracts often include several types of fees, such as charges for data access, delivery, and storage. This leads to duplicate costs and complicates getting real-time data.
- **Restrictive Usage Rights:** The terms of data licenses often include restrictions on how the data can be used, which creates legal risk, can limit innovation and make it hard for firms to comply with the rules.
- **Frequent Contract Changes:** Market data providers change their licensing agreements without giving firms enough time to review or adapt to switch to another provider (when available). These changes are often about aspects of the activities which are hard to measure, making it impractical for firms to meet. AMAFI suggests to add a requirement that changes should be subject to a review period of at least nine months, for investment firms to have time to switch when possible.
- **Complex Service Providers:** When using data from service providers who gather data from multiple sources, firms must comply with various terms from each source, which complicates understanding and comparing costs.

These issues restrict how data can be used, increase the time and cost of negotiating contracts, make compliance more challenging and make data access more expensive. Simplifying and standardising data licensing could help make access fairer and more straightforward.

As for article 4, we believe it should be amended in the following way:

- Art. 4.1. "... shall ensure equal access to the same data."
- Art. 4.2. "... requesting access to the same market data."

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.

AMAFI finds Article 5(2) confusing. It is unclear why market data providers would have "*multiple and significant extra costs*" for standardised data products. If the intention is to allow different pricing for customised data, we think this should be handled differently. Otherwise, this provision would de facto create the possibility to price data according to its value for the buyer. We suggest removing Article 5(2).

For Article 5(3), AMAFI agrees that discounts should be clear and available to all clients under the same conditions—based on verifiable and general criteria. This seems fair and supports offering incentives to attract new clients.

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

As mentioned in the preamble of its answer, AMAFI supports preventing the practice of setting data fees based on the perceived value to individual users, which can lead to unfair and complex pricing. We therefore support the idea of restricting fee categories that are based on the value of data to users. In this respect, the proposed categories leave room for value-based pricing despite the attempts in the explanatory memo to prohibit this.

However, we think it could be reasonable to have different fees for professional and non-professional clients due to the fundamental differences in the underlying data need for these two customer groups. This would be justified by the amount of data they purchase and not the value of the data to them. Additionally, a separate fee category for retail clients could potentially boost participation in EU capital markets, provided it is designed and implemented fairly.

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.

AMAFI supports ESMA's recommendation for the European Commission to create a level playing field between market data providers under MiFIR and those outside its scope, such as market data vendors. Regulating the activity of market data vendors is all the more important that (i) they are key players in the dissemination of market data and (ii) they are very often global players with dominant positions. In that context, such extension is needed to ensure the objectives of fairness in access to market data is achieved regardless of the channel of distribution. We believe this should also extend to benchmark providers, credit rating agencies, and ESG data providers.

However, this should not apply to investment firms who redistribute market data to their clients as part of their regular services. Financial institutions in their ordinary course of business when redistributing data (as part of a financial service and not selling data services as such) should be not classified as market data providers.

On redistribution, we would like to point out that market data providers do not bear the costs of the redistribution carried out by investment firms to their customers nor by vendors to their customers. For each of its direct users, the market data provider supports only one connection, regardless of the number of final users to whom the data is redistributed, and regardless of the fact that the data are used for display or non-display purposes. It therefore does not incur any additional cost. Therefore, market data providers should not charge for redistribution costs.

10 – WHAT CONSTITUTES UNBIASED AND FAIR CONTRACTUAL TERMS

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.

See AMAFI's answer to Q31 and in particular, the suggestion that changes should be subject to a review period of at least nine months, for investment firms to have time to switch market data provider when possible.

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.

AMAFI is concerned with Article 9 introducing definitions for concepts already defined in MiFIR: using other definitions or other terms would result in additional complexity, lack of standardisation and harmonization, which again leads to higher costs.

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

Yes, the per-user model is an option for billing, but the operational process around it is currently not efficient, with investment firms, data vendors and exchanges having possibly differing information and no centralised way to resolve the discrepancies. In this context and to the extent that a great deal of information is required from investment firms to implement such agreements, it could actually be preferable for an investment firm not to ask for the benefit of netting.

AMAFI suggests that ESMA devise rules to ensure the process is clear and streamlined, with a centralised platform accessible to exchanges, data vendors and investment firms enabling reconciliation of information between them (such as user IDs, entitlements and usages) to determine with certainty the resulting fees to be paid.

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

No. AMAFI finds it inadequate that the interest rate applied to penalties is not defined in relation to inflation and that the fine is in addition to the audit fee. With respect to Article 14 (2), ESMA should be in a position to collect the penalties charged by exchanges in order to exercise its supervision.

In Article 14 (3), 30 days to settle a penalty charge seems short considering the need to verify the penalty and the fact that such billing can cover three years or more.

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

AMAFI has not assessed this aspect.

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

See AMAFI's answer to Q35 and 31.

11 – CONTENT, FORMAT AND TERMINOLOGY OF THE MARKET DATA POLICIES

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.

AMAFI has not examined this question.

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.

AMAFI has not examined this question.

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?

AMAFI has not examined this question.

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.

AMAFI has not examined this question.

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.

AMAFI has not examined this question.

12 – ACCESS AND CONTENT OF DELAYED DATA

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

The actual gratuity of delayed data is indeed a matter that should be strengthened since this principle that was already enshrined in Article 13.1 of MiFIR is in fact not fully applied:

- Either because the format of publication makes the use of these data not possible for investment firms (no streaming possible, hence the need for the firms to stream delayed data produced by market data aggregators from real time data, ie with a cost),
- Or because the ESMA’s Guideline 19 which states that “*Without prejudice to the legal provisions prohibiting market data providers to charge for the use of delayed data, there may be limited instances where data providers may impose a charge*” is interpreted to mean that most services using delayed data are « added-value services », and hence exceptions.

ESMA should help address these issues. In particular, with regard to the format of delayed data which should be “*in a machine-readable format, which in particular should allow the automatisisation of the data extraction*” (paragraph 297 of the CP), it could be further specified that delayed data be made available in a streaming mode via an API. Distributing delayed data in a streaming mode is a pre-requisite for retail web sites and many non-professional or non-front-office users. On delayed data, a machine-readable flat file (that does not stream updates) is not sufficient and does not make delayed data truly usable. An API allows the automatisisation of the data extraction.

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

AMAFI has not examined this question.

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.

AMAFI agrees.

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

No.

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.

AMAFI has not examined this question.

