

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.

The cost of producing market data is the cost of running an exchange for regulated markets.

Market data is a joint product with trading. It is inherently produced through the interactions and transactions that occur during the price formation process on exchanges. The execution process informs the market price. That market price data point then leads to execution on exchange or is used by others outside exchanges for execution and other purposes that allow others to derive significant revenue from exchange data. The pre-trade processes that help deliver execution also generate costs that should also be considered in the overall cost of production of market data.

Whilst we welcome that shared or joint costs can be allocated towards cost specification, joint cost is an economic principle identifying products and services which can only be provided together, such as market data and trading on exchange. These costs need to be recovered through both its products, trading and data. Common resources like infrastructure, technology platforms, and human expertise are used across various market data products, necessitating a flexible approach to cost allocation.

Rigid cost structures can stifle innovation by making it harder to justify investments in new products. Greater latitude in cost allocation encourages innovation by providing more leeway to absorb initial development costs. This approach allows for a balanced investment in both established and new products. As ESMA confirms, data should remain a viable business for data providers, such as exchanges. Therefore, we welcome the inclusion of Art 2.6. of the draft RTS. It is indeed important that Exchanges remain free to decide on what they need and want to investment in. For instance, if an exchange is convinced that it benefits the market it serves to have top quality technology, that is the decision of the exchange, and then that cost should flow through the 'cost + a reasonable margin' methodology. Investments should not be dictated by a pre-established list of costs determined in regulation.

When determining the margin, we welcome ESMA's recognition of relevant factors to maintain an attractive market for data providers whilst providing the broadest possible access. Accordingly, we agree that ESMA should not set explicit margins or become a rate setter, particularly as it would not foster a healthy competitive environment. We appreciate ESMA's clear confirmation that is not a price regulator and we welcome the inclusion of Art 3.2.c) of the draft RTS and ESMA's proposal on the reasonableness of the margins for market data to be in line with the margin to the overall business conducted by the data provider.

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.

The list set forth by ESMA is too narrow and only includes the most straightforward costs of producing and distributing market data.

Transaction execution and market data are complementary because market data is both an input and a joint product with the execution service, thus it is impossible to separate market data from the trade execution. Joint costs borne by trading venues to maintain a secure and scalable infrastructure and a robust market and price formation are a significant part of what makes market data valuable and hence must be included in any analysis of the cost of producing and distributing market data, as recognised by academics as well.

The approach set forth in the consultation largely ignores that one of the major contributors to the cost of producing market is the cost of running an efficient market (joint costs of trading and market data production) such as, but not limited to, investments to maintain a secure and scalable infrastructure and a robust market and price formation, market development and product design costs, liquidity incentives, surveillance, risk management and control and all other costs associated with actually having a market, and therefore, producing market data. Those two things are indivisible.

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.

The question seems to focus on dissemination issues but it is not only dissemination that affects prices in data provision. To focus solely on dissemination would leave trading venues without the possibility of cost recovery, and would not support a viable business, particularly for some smaller exchanges. The Level 1 text clearly refers to the inclusion of the data production costs into the price setting of market data.

As explained above, the cost of *producing* market data is the cost of running an exchange for regulated markets.

The cost of *disseminating* data is affected by various factors including but not limited to:

- Speed – low-latency connections are more costly than other connections
- Reliability – highly reliable connections are more costly (direct lines v.s. internet)
- Quantity – larger volumes require increased storage, processing and transmission requirements
- Frequency of update - high frequency or real-time data is more costly due to continuous processing and transmission needs
- Customisation – custom products are more expensive due to their bespoke nature

Despite ESMA' s confirmation that it is not a price regulator, we are concerned as regards ESMA's proposal to set fees, especially in the context of recital 10, parts of Article 2 (other than Art. 2.6) and Art 3 which could be considered as a form of price regulation, as they describe how prices shall be set.

The elements which would need to be taken into account at least are for pricing data on the basis of the cost of production and dissemination of data and including a reasonable margin

and while aiming for a broad market data availability to all data users, including as well small users: the number of devices and accesses to data (usage), the use of the data by the data user and ideally the value the data beholds to various data user groups.

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

We continue to maintain that the best way to price market data products is according to its market value. It is on this basis that market data are priced around the world to ensure adequate access by any interested data user. The quality of the information that exchanges create means it has an economic value. The price at which information is licensed should accordingly be a commercial matter for each individual consumer and exchange. If data are priced the same for smaller firms and very large ones, the smaller firms will be put at a disadvantage given they will proportionally pay much more than large firms which often have a more pronounced use of the data (data accesses) besides a higher purchasing power.

Nevertheless, we are pleased that ESMA is supportive of the principle of fee categories. The entire marketplace benefits from the ability of data providers to define different user categories. This ensures that customers can choose from an a la carte menu of data products that fit their individual needs.

On the other hand, we are concerned that the rhetoric in ESMA's consultation paper differs from the draft RTS language, which provides that categories can be created based on "verifiable" "factual elements" that are "sufficiently general." If costs were the only consideration for defining categories and data providers were then forced to consolidate user categories, market data fees would likely rise for most consumers of data, not reduce. Notably, the smaller users.

The cost to *produce* market data is the same for a small data user as it is a large data user. This is because the cost of producing market data is the cost of running an exchange for regulated markets.

If our members are only allowed to charge data users based upon cost alone as proposed by ESMA (plus a margin), then large firms and a small firms will pay almost the same (plus margin) for the use of market data, albeit at a higher data fee entry level, and hence most likely excluding smaller data users from data consumption in the first place. Currently, the large data users pay more for market data and according to their usage compared to the small data users which allows to recover cost of data broadly from all interested parties.

We are of the view that it is preferable that market data is broadly available to all interested data users, retail investors and professional investors, and that small data users do not pay the same level of fees / costs as large data users, such as investment banks, asset managers or high-frequency traders. This ensures broad availability of the data to any interested user and cost recovery for the data producers.

Additional Comments

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

We do not agree with ESMA's proposal for several reasons. Firstly, recovering underpaid fees should not be mixed with implementing penalties. Recovering underpaid data revenues, helps to ensure that cost recovery by exchanges is done in a fair way, ensuring that data fees remain as low as possible to all. Secondly, our members cannot identify potential infringements from the outside. It is indeed necessary, that both contracting parties are engaging in order to verify the contractual agreement between them.

Thirdly, we note that ESMA has proposed a time limit of three years in the application of penalties with respect to the moment where the breach occurred (para 268). If a breach of a market data agreement has occurred, the market data provider's legal rights should not be prejudiced and they should be able to be compensated for the revenues that would have been generated if the client had complied with the applicable contract and the market data provider's right to recover the underpaid revenues plus potential penalties and that this right should not be limited to a three year timeframe.

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

We are supportive of ESMA's proposal that auditing practices should be proportionate. However, we would request, that ESMA not mix the recovery of underpaid market data fees with implementing penalties, which is something different. Furthermore, we need to reject as well ESMA's proposal that our members shall identify potential infringements from the outside as a pre-requisite for an audit – this is not possible (see answer to question 38).

We observe that the draft RTS further requires that an audit process should not exceed three years, to limit excessive burdens and lengthy audit practices (para 272). We are of the view that a strict imposition of a three-year timeframe to the audit process may result in market data providers conducting more frequent audits and reviews being initiated to ensure compliance with market data agreements and market data policies.

This may result in an ineffective audit and additional costs to both market data providers and the data users as more resources and efforts may be needed to be deployed by both parties to meet the three-year timeframe. In our view, this would run contrary to the policy objective of reducing onerous administrative obligations and prohibiting overly burdensome practices which ESMA has noted in para 256.

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

We do not recognise the assertion that the provision of delayed data is not performing as intended by the co-legislators. We would question the decision to make public policy decisions off the back of "complaints from data users concerning the lack of compliance with delayed data provisions by trading venues and APAs" without further investigation. We note that ESMA investigated issues related to APAs but understand that ESMA did not further investigate this with regards to trading venues. Nevertheless, we are content with ESMA's proposals in this space.

We do not agree with the reference in Art 23 of the draft RTS, that delayed data should be made available to any data user for free 15 minutes after publication. Delayed data still contains significant value. Production and distribution costs are also incurred by exchanges. The regulation should not unnecessarily interfere with regulated entities' businesses and remain proportionate besides being effective. Hence delayed data license fees for redistributors such as Market Data Vendors at least should continue to apply. Data Vendors besides providing delayed data to data users on account of exchanges and at no exchange fee, use exchange data for developing their vendor proprietary services, too, and hence, there is no reason why they should not contribute to the cost recovery of exchanges as well and in order to allow for less cost recovery by data end users such as retail investors or small market data users.

Furthermore, we question the requirement for delayed data provision "from all the systems operated" in Article 24. Besides being very unclear it is highly disproportionate. Hence, we recommend deleting the notion accordingly. Furthermore, we need to question ESMA's decision to not apply a simple registration anymore, when using the delayed data from the website