Consultation Response

MiFIR Review – CP on the RTS on reasonable commercial basis

Deadline: 28 August 2024

No	Question – RESPONSE LOCKED
26	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.

Response

AFME notes that the draft RTS on reasonable commercial basis ("RCB") has been drafted on the implicit assumption that prevailing conditions in the market for market data will persist. The RTS does not seem to have taken appropriate notice of the essential nature of market data as a byproduct of trading or of the diversity of market data providers. Under the RTS as drafted, value-based pricing will continue to exist, even though this is prohibited by Level 1, as many of the articles allow market data providers to set prices on the value the data has to the market data consumer.

For the reasons above, we believe that this entails the risk that the RTS will be unfit for purpose at the time of its publication, a suboptimal state of affairs that will only worsen as time goes on and the market evolves. However, despite the fact that we believe that the RTS has shortcomings, we have adopted a realistic approach to analysing and commenting on it. Discarding the existing RCB framework would not be feasible unless an alternative framework were being proposed as a replacement. Therefore, we will comment on the RTS as it has been proposed, with a view to refining it to make it more effective.

It is also important to note that market data providers are diverse by virtue of their business models. There are data providers that distribute data generated through their own software, such as trading venues ("TVs"). There is no competitive tension for this data. TVs claim that they own this data and that costs of production cannot be separated from the trading, yet they have two revenue lines. This raises a number of questions about whether there should be one or two revenue lines and where infrastructure costs for these providers should sit. There are also data providers, such as APAs and CTPs, who distribute data that is not their own, or at least do not claim rights to the data via the IP in the matching process. They may, however, add value through cleaning data or offering other services. There is little competitive tension for this data, but there is some choice about which APAs to report to and whether to use a CTP (which currently does not exist but is expected to develop in the foreseeable future). They mostly do not claim to own the underlying data and usually only have one revenue line.

AFME agrees with ESMA's general approach of separating the total cost of producing and disseminating market data into its essential components. However, AFME recommends that ESMA be mindful of the possibility that this approach could fail to foreclose opportunities for inappropriate behaviour on the part of market data providers. AFME believes that it is unlikely that the draft RTS (as currently written) enclosed with this consultation paper will fully achieve its intended regulatory objective of ensuring that the costs on which market data fees are based are limited to the costs that market data providers necessarily incur to produce and disseminate market data.

For example, article 2(1)(e) (on "other costs") and article 2(6) (on "further costs") of the draft RTS may unintentionally incentivise market data providers to include irrelevant costs as, in the language of article

2(1) of the RTS, "costs directly associated with the production and dissemination of market data". Article 2(1)(e) requires other costs to be "necessary for the production and dissemination of market data"; however, in article 2(6) the concept of "further costs" is not defined in the same way. Article 2(6) states that "market data providers shall be able to specify any further costs which they attribute to the production and dissemination of market data and provide a reasoning for the inclusion of such costs." AFME believes that paragraph is too broad – it permits market data providers to attribute any cost to production and dissemination with no guarantee that the reasoning for doing so will be robust. If article 2(6) is not removed, AFME would prefer the text to explicitly require further costs to be necessary.

Moreover, AFME interprets "other costs" and "further costs" to have identical meanings. They recommend that ESMA use the term "other costs" in articles 2(1)(e) and 2(6) and discard "further costs". Using two terms for the same concept could lead to confusion.

If, after considering all responses to this consultation paper, ESMA decides to allow market data providers to include "other" or "further" costs, AFME recommends that ESMA scrutinise these costs strictly to ensure that they are necessary. In AFME's view, certain costs should be disallowed as a matter of course. Disallowable costs should include but not be limited to the cost of running the management board, the cost of compensating members of the management board, the cost of running second-line functions (legal, compliance, and risk) and the cost of running software necessary to the operation of a matching engine. This list is not intended to be exhaustive; rather, it is based upon discussions within AFME's membership and observations of market data providers' current business practices. Despite AFME's support for the objectives of the draft RTS, we remain concerned about the risk that market data providers could exploit loopholes created by the drafting of the RTS to inflate the fees they will charge to market data clients.

Additionally, explanations of policies and justifications for inclusions of proportions of costs and cost methodologies may neither provide enough detail nor comparability for market data clients.

No	Question – RESPONSE LOCKED
27	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.

Response

As stated in our response to question 26, AFME broadly agrees with ESMA's approach of separating the total cost of producing and disseminating market data into its essential components. However, AFME re-emphasises its recommendation that ESMA be mindful of where this approach could incentivise inappropriate behaviour on the part of market data providers. Our comments in respect of articles 2(1)(e) and 2(6) of the draft RTS are also relevant to this question.

Our comments on the more general question of cost categories are as follows:

- Taking into account our comments above about the importance of the granularity of the information, it would be preferable to establish a clear cost and revenue line for the typically consumed basic data product but also to understand the cost and margin for atypical products, ensuring that these costs and revenue lines are separated. This would provide a more complete story and help to understand where the greatest potential for margin should lie.

(i) I**NFRASTRUCTURE** –

a. Noting our comments above about whether there is meant to be a separate report for the trading business versus the business of data provision, we question whether any trading venue infrastructure should be included at all. If it is intended that trading venue businesses should be accounted for separately, then no infrastructure costs for trading venues should be included because all the infrastructure is in the trading platform. If there is any reason for including a shared part of the trading platform then it should be included under apportioned costs because it is a shared cost with trading (and there needs to be transparency over how the costs are apportioned).
b. However, we recognise that other businesses such as an APA or CTP might use their infrastructure solely for the single purpose of disseminating data in which case the inclusion of the cost of infrastructure makes more sense. Where this is clear, we agree with the proposal and expect these costs to include BCP, redundancy and data storage, any regulatory reporting and monitoring, cyber security requirements etc.
c. Finally we question what is required for "dissemination" or what meets the definition of "dissemination" if it is not included in connectivity below.

(ii) **CONNECTIVITY** –

a. This should cover a basic transmission mechanism which is required for receiving orders and request for quotes, and sending out data which is a cost of being in the exchange business.
b. We would advocate that there should be one cost related to the general production and dissemination of data that is typically consumed across the whole industry
c. Costs for "exotic" connectivity or data dissemination of sophisticated products (e.g. co-location, low latency dissemination) should be broken out. The reason for this is that a data producer may be incentivised to invest heavily in a means of data dissemination/connectivity (i.e. microwave or satellite towers) that is only relevant to small portion of the market (i.e. algorithmic traders) who are willing to pay high prices for this type of product. These costs should not be averaged and passed on to the typical consumer in the price of a default market data feed. They can be (and are) recouped by a higher charge for these products. As a general test, anything that the exchange could be run without (e.g. co-location, low latency feeds) should excluded from establishing the cost of the typically consumed data product. However, it would be helpful to understand these other costs, the margins and the products they are applied to.

(iii) **HUMAN RESOURCES** - it is not entirely clear in ESMA's statement how these resources are to be separated from those in (v) but please note our comment in (v) and further below in our note about specific exclusions.

(iv) **FINANCIAL COSTS** – we broadly agree but see our comment about Operating Profit in Q29 and the exclusion of financing costs and taxes etc.

(v) **PERSONNEL** - We believe that Personnel costs specifically associated with market data contract administration (including any costs associated with working on audits) should be excluded because some TVs/APAs have chosen to make their contracts so complex that this is their problem to manage the administration and not one to be borne by the industry. Excluding these

costs would encourage TVs/APAs to implement simpler contracts that would require fewer personnel to manage.

Additionally, it should explicitly exclude costs associated with:

1. **R&D** – There is already little evidence of R&D spend in the annual reports of exchanges and any R&D may be experimental and the costs should not be borne by the end consumer.

2. **New business lines**: Unless the more granular approach to product costing that we have advocated is is adopted, there is a risk of cross subsidisation (e.g., if a TV launches a dark pool, it should, like all commercial businesses, carefully evaluate the business case and whether it should be investing the shareholders' (not the customers') money in such a business, as opposed to believing it can fund it though higher prices in data. However, it will be important to be able to capture the establishment of new business and the margins for this business. This will help compare margins for established business versus new business and help the data producers reflect on why they may have higher margins for one product versus another.

3. **Sales and Marketing** - there is not a lot of choice about where to trade or buy market data and many data producers are dominant businesses in their home market. Where TVs are not dominant, they are likely to be giving it away to win more liquidity onto their platforms. Therefore, Sales and Marketing functions are most likely to be focused on the areas where there is competitive tension (i.e. to sell and market a new business such as a dark pool rather than to promote the established business where pricing power exists or else to help increase execution flow for a new trading venue which clearly recoups cost through executed transactions if it cannot charge for market data. These costs should not be borne by the end users.

Finally, in order to understand the full story, it will also be important to be able to match the revenues to the costs, hence, per the comments above, the revenue lines should be reported in the annual accounts in line with the way that costs are reported.

Articles 2(1)(a) and (b) respectively refer to "leased services" in the context of "physical assets and software licences … necessary for the production and dissemination of market data". AFME would argue that "leased services" could be interpreted quite broadly to include costs such as building rent and maintenance. In inflationary economic conditions, a market data provider could opportunistically inflate its costs under articles 2(1)(a) and (b), leading to unfair prices for market data clients. ESMA should note that the word "lease" covers several types of arrangements between a provider and user, as well as several types of physical assets. ESMA should consider clarifying whether "physical assets" in this context is intended to refer only to electronic and computer hardware or whether it includes other physical assets, such as buildings.

ESMA should draw a clear distinction between costs related to trading and the costs related to producing and disseminating market data. These are quite distinct cost categories, and there is no justification for intermingling them. Market data providers that operate a trading venue should not be permitted to inflate their costs in order to subsidise the operation of the trading venue through recovery of costs from market data clients.

The categories that ESMA has identified in article 2(1) should never permit the inclusion of value-added services above and beyond the standard data products offered by market data providers. The categories

should be defined and interpreted in such a way that bars market data providers from adding value-added "extras" so as to justify higher fees.

To the greatest extent possible, the costs that are included in the production and dissemination of market data – under any category identified in article 2(1) and defined in articles 2(2) to 2(6) – should be related to the specific market data that the client is buying.

No	Question – RESPONSE LOCKED
28	▪ 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.

Response

Sections 3.B and 3.C of the template in annex II of the draft RTS ask market data providers to allocate a percentage of various shared costs to the production and dissemination of market data. Allowing market data providers to allocate costs without rigorous supervision could lead to misuse of the template. To prevent misuse, AFME recommends that ESMA apply the strongest scrutiny to market data providers' self-reported percentages in keeping with Guideline 2 of ESMA's *Final Report: Guidelines on the MiFID II/MiFIR obligations on market data*, published on 1 June 2021. In summary, Guideline 2 states (emphasis added):

> Market data providers should have ***clear and documented cost accounting methodologies for setting the price of market data***. The methodologies should ***include both direct market data offerings (i.e. market data fees) as well as indirect services necessary for accessing market data*** offerings, such as connectivity fees or necessary soft- or hardware required to use and access the market data. ***The methodologies should be reviewed on a regular basis*** (e.g. annually). ***Market data providers may need to adjust their methodologies over time and account for changes in marginal costs***. For example, if a market data provider allocates a portion of investments in IT infrastructure to the cost of production and dissemination of market data, the market data provider is expected to consider the amortisation of the investments when allocating these costs.
>
> …
>
> In order to ensure that the allocation of costs of producing and disseminating market data reflects the actual costs of producing and disseminating market data, and ultimately the fees charged to customers, ***the methodologies should include a justification for which costs are included in the fees for market data and in particular a justification on the appropriateness of the allocation principles and keys for costs that are shared with other services***. For example, for the allocation costs that are shared with other services, such as joint costs, market data providers should not use the revenues generated by the different services and activities of their company as an allocation principle because this practice is contradictory to the obligation to set market data fees (i.e. revenues of the market data business) based on the costs of producing and disseminating market data.
>
> Furthermore, ***not every market data provider is likely to encounter joint costs***. For instance, the licensed activity of APAs and CTPs is limited to the collection and dissemination of market data (and

in the case of the CTP, the aggregation of such data) and does not automatically result in the production of a second product. In consequence, no joint costs are incurred.

AFME believes that Guideline 2 as a whole – but especially the segments emphasised above – gives ESMA an effective tool to interrogate market data providers' reported percentages. ESMA should conduct these interrogations regularly to incentivise market data providers to maintain up-to-date cost accounting methodologies. Effective ESMA oversight will also deter market data providers that do not incur joint costs from illegitimately adding them to the annex II template in violation of Guideline 2.

Costs should only be apportioned if they are directly linked to the creation of the infrastructure that allows data providers to operate their trading and data business and produce that specific product and category of market data or it must be justified why these costs are relevant to running a data producing platform and creating market data. For example, we would not expect costs to be added from central corporate cost centres or for general companywide administration and overheads, but if a data centre cost is shared between businesses then it would be fair to include a portion of that cost based on use of resources. It would also be useful to understand how these costs are apportioned to both typical and non typical data.

Otherwise, users may have to pick up the centralised costs of organisations that might be less efficient because, for example, they have other businesses with higher margins that may allow them to tolerate excessive cost growth or inefficiencies in the organisation.

No	Question – RESPONSE LOCKED
29	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.

Response

AFME does not accept the definition of "net profit" in article 1(1)(f) of the draft RTS as an appropriate proxy for margin. Margin definitions are standard in accounting and the choices are:

1. **Gross profit =** Revenue – COGS
2. **Operating profit** = Gross profit – Operating expenses
3. **Net profit** = Operating profit – All other expenses including interest and taxes

However, taxes differ between countries and financing costs will differ between organisations due to different capital structures employed and tolerance towards debt versus equity ratios. Therefore, adopting net profit and associated net profit margins could cause complications. Our view is that operating profit is a better metric and would be a better benchmark to compare TVs and APAs across markets without allowing for opaque arguments about one that has higher taxes or financing costs versus another. AFME proposes that the concept of "net profit" in article 1(1)(f) of the draft RTS be replaced with "operating profit" as defined above and that article 3(1) be revised such that the margin no longer refers to the net profit, as follows:

> The margin attributable to the production and dissemination of market data shall be the ~~**net**~~ **operating** profit generated from the production and dissemination of market data.

AFME believes that article 3(2)(c) of the draft RTS could enable abusive behaviour by market data providers who offer services other than the production and dissemination of market data. This is because the subsection says that "margin attributable to the production and dissemination of market data shall … be reasonable when compared to the net profit attributable to the overall business conducted by the market data provider." AFME finds no legitimate justification for allowing market data providers to compare different business lines within the same corporate entity as a benchmark for reasonable commercial basis. Other business lines are not relevant to the production and dissemination of market data, so they offer no meaningful basis of comparison. AFME proposes that article 3(2)(c) be deleted.

AFME believes that the consultation paper and draft RTS imply that the margin should be small. Recital 6 of the draft RTS says: "The margin included in the fees for market data should be ***set to strike a balance between the need to ensure the production and dissemination of market data remains commercially viable for market participants and the need to ensure as wide as possible access to market data"***. Article 3(3) continues the same theme: "The margin attributable to the production and dissemination of market data shall be achieved by ***setting fees for market data which enable data access to the maximum number of market data clients"***. An excessive margin would violate the RTS's requirement for market data providers to set fees so as to attract the highest number of clients.

The first sentence of recital 8 of the draft RTS provides further support for the view that margin should be restrained: "The margin ***should not be disproportionate when compared to the cost sustained in the production and dissemination of market data***". Article 3(2)(b) goes on: "The margin attributable to the production and dissemination of market data ***shall not exceed disproportionately the costs of market data production and dissemination***". While ESMA recognises that it cannot set explicit margins in paragraph 194 of the consultation paper, the same paragraph emphasises the principles-based approach that the RTS intends to establish. AFME believes that one of these principles should be restraint on the quantum of the margin.

AFME recommends that ESMA adopt a comparative supervisory strategy to ensure that article 3 has its intended effect. We suggest that article 3 would be most effective if ESMA were to compare margins that all market data providers, of varying sizes and serving different client populations, earn for the provision of market data (and not any other product) across the 27 Member States of the European Union. By taking this approach, ESMA will be able to draw insights from real-time data on the state of the market for market data. This will inform ESMA's decision-making if it should ever have to consider whether a market data provider has violated the letter and spirit of article 3 – an outlying market data provider that earns a higher margin than peers is more likely to be in violation of the article. This approach becomes even more appropriate in light of the fact that market data providers' business model is to consolidate and check the quality of the data they disseminate. In AFME's view, this model does not produce an excessive amount of additional value or any new intellectual property, so margins should not be generous.

No	Question – RESPONSE LOCKED
30	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.

Response

AFME recognises the need for a template requiring market data providers to itemise and quantify their costs. Accordingly, AFME agrees that the template in annex II of the draft RTS is appropriate, both for

holding market data providers accountable and for enabling ESMA and NCAs to fulfil their regulatory obligation to supervise market data providers. However, in line with the concerns we have expressed in our response to question 26, AFME asks ESMA and NCAs to rigorously scrutinise the information that market data providers submit in sections 3, 4, 5 and 6 of the template. Within these sections, market data providers will be required disclose information on their systems architecture, cost components (including shared costs and "other costs"), reasonable margins, annual costs and margins, and fee differentials – this is subject matter that will require specialist technical knowledge to understand. Accordingly, AFME believes that these sections of the template will be the most prone to abuse, as market data operators may use nebulous language and figures to justify their costs. If this should occur and not be stopped by regulators, the template's utility as a regulatory instrument will be undermined. ESMA and NCA oversight will be essential to ensure that market data providers do not misuse the template to insert costs that are not directly associated with the production and dissemination of market data.

ESMA and NCAs should require market data providers to complete and submit this template on a periodic basis. AFME suggests that this be at least once per year. Without mandatory submission of the template on a periodic basis, ESMA and NCAs will not be as effective in holding market data providers accountable for increases in market data costs. This requirement will necessitate an amendment to article 26(1) of the draft RTS.

AFME also recommends a second amendment to article 26(1) of the draft RTS to allow ESMA and NCAs to request an updated template from any market data provider in between mandatory periodic submissions. We suggest this text for the amended article:

Article 26:

(1) Market data providers shall provide the competent authority, ~~**upon request**~~ **on a set date on an annual basis**, with the information on the cost of production and dissemination of market data, including a reasonable margin, as described in [Title II on cost] by means of the Form set out in Annex II.
(2) Notwithstanding article 26(1), market data providers shall provide the competent authority with the information required under article 26(1) upon request of the competent authority, which may make such a request at any time.

On the topic of dissemination, certain market data providers are known to have pricing policies that are based on charging for the number of market data clients' customers. This is perplexing as the providers do not bear the cost of providing any direct data dissemination to the clients' customers. These costs are all borne by the intermediary. In fact, the data providers' clients will only invest in the redistribution of data if it brings in more business and the exchange is therefore a beneficiary through increased trading flows and associated execution fees (which in turn generate more data). Logic would suggest this warrants a rebate from the provider for increasing liquidity when the disseminated data could result in further trading activities. On this basis, AFME believes that redistribution clauses should be banned by the draft RTS.

No	Question – RESPONSE LOCKED
31	What are in your view the obstacles to non-discriminatory access to data taking into consideration the current data market data policies and agreements?
Response	

In AFME's view, there are several obstacles to non-discriminatory access to data under current conditions.

Market data licences have become very expensive and multi-layered, which has facilitated the practice of concealing market data price increases. When a price increase is obfuscated behind a layer of complex licensing requirements, market data clients are less able to understand the reason for the increase.

Licensing terms have become extremely difficult to decipher, making it onerous to understand what information is included (e.g., type of data, streamlined or delayed) if the data provided is suitable for firm's business purposes and governance procedures. Additionally, certain market data providers apply different fees for different asset classes. The differentiation between, for example, data fees for equities and fixed income products is often justified on the grounds that the markets for these asset classes are different. AFME largely agrees with this and would caution that a single fee tariff across all asset classes would be detrimental.

This complexity, already a barrier by itself, has been exacerbated by the fact that several market data providers use different terminology and definitions in their licensing contracts and when changing market data fees. This has created a situation where market data clients have found it increasingly difficult to understand each market data policy and data use type.

Prohibitions on the creation and distribution of derived data by market data clients (without further licensing, charging or reporting to the market data provider) is an unreasonable restriction. In modern market conditions, data analysis is an essential component of market data clients' service offering. Obstacles to the creation and distribution of derived data, whether they are imposed by regulators or market data providers, potentially limit innovation as they prevent the creation of new products and services such as evaluated pricing services.

Market data contracts are often composed of multiple tranches of pricing/fees, and fee policy and terminology differ by market data provider. For example, contracts will contain provisions in relation to underlying data costs, delivery costs, storage costs and rights to use (including non-display fees, MTF and SI licences and derived data fees) and redistribution fees. This approach to the drafting of contracts leads to a duplication of costs and makes it more challenging for market data clients to access to real-time data.

Increasing restrictions around usage rights within licence terms unreasonably inhibit and create uncertainty around market participants' practical uses of market data. Understanding and complying with data pricing/licensing terms requires significant resource; for example, the pricing frameworks differ significantly between market data providers and have become an unnecessary burden to both buy- and sell-side firms.

Market data providers are increasingly licensing data for narrowly defined use (based on corporate entity, business divisions, named users, location and/or usage type). Market data clients are then required to agree amendments or separate agreements for relatively minor changes in scope. This includes providers licensing separately for systematic internaliser requirements (separate and distinct from non-display fees already paid for) resulting in clients being required to pay twice for the same data (we discuss this in more detail in the final paragraph of this response).

Over the past decade, certain market data providers have routinely and unilaterally modified contractual licensing agreements, without offering market data clients any time to consider whether to agree to the modified terms and conditions. More recently (specifically, over the past two years), in terms of market data

requirements, many of the modifications to licence agreements relate to "non-measurable" activities, such as types of usage based on instrument type and/or client/subscriber type. Market data clients note that such licensing terms are becoming more common even though they are impractical for investment firms to adhere to, as the information requested is simply unreasonable for firms to obtain despite their best efforts. Market data clients find that they must dedicate extensive resources to complying with these nuanced obligations, which were not specified at the time the contractual agreement was confirmed.

Market data clients have also experienced challenges relating to usage rights within the licences of market data providers that provide consolidated feeds from multiple trading venues and APAs. In these situations, clients must ensure that they comply with the contractual terms of each trading venue and also with those of the solution providers, who often adopt different pricing models from trading venues. Market data clients in these situations find it difficult to undertake meaningful cross benefit analysis/comparisons.

Certain market data providers require separate licences for systematic internaliser requirements. These licences are separate and distinct from the licences that give market data clients access to the non-display data for which they have already paid. AFME is concerned about this practice because it results in market data clients being required to pay multiple times over the previously accepted rate for the same data. Given that being an SI represents an additional regulatory status and not an additional use of data, AFME does not believe that these fees can be justified. It is worth noting that if their activities meet the definition of being an SI, firms do not then have a choice about the fees. This practice also minimises consumers' flexibility to use data, adds significantly to the time and cost of agreeing market data contracts (for both parties) and makes compliance and control more difficult.

No	Question – RESPONSE LOCKED
32	▪ 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.

Response

It is not clear from the text of article 5(2) of the draft RTS why the rule refers to "multiple and significant different extra costs". AFME does not see why "multiple and significant different extra costs" would be incurred by market data providers who, it is reasonable to presume, will be offering a suite of standardised data products to their clients. In AFME's view, multiple and significant different extra costs are likely to be incurred only if a market data provider is providing a bespoke, non-standardised market data product for a specific market data client – a situation that we expect to be uncommon. We do not think that elements such as connectivity or volume would result in extra costs.

If ESMA's intention is to allow market data providers to charge differentiated fees for bespoke, non-standardised products created for specific clients, AFME believes that the market data provider should be required to offer the bespoke product to all clients. AFME proposes the following amendment to article 5(2):

> Where there are multiple and significant different extra costs for the provision of the market data to the same client **as a result of producing a bespoke market data product for that client**, market data providers **may ~~add an increment to the applicable fee determined by the extra costs incurred~~ attempt to recover these costs by offering the bespoke product to all market data clients.**

AFME believes that this amendment appropriately balances the providers' right to offer bespoke products (and recover any extra costs resulting from the creation of such products) with clients' need to access a diverse range of products to meet their needs.

Regarding article 5(3), AFME agrees that discounts should be permitted provided they are offered to all clients on the terms identified in the article – "based on factual elements, easily verifiable and sufficiently general to pertain to more than one client" – which we believe are fair. AFME considers that incentive schemes to attract new clients to market data providers can be offered in accordance with this article.

No	Question – RESPONSE LOCKED
33	Do you agree with ESMA's proposal on how to set up fee categories. Please justify your answer.

Response

AFME endorses the goal of converting the existing Guidelines on the concept of reasonable commercial basis into legal obligations as outlined in Recital 13 of Regulation (EU) 2024/791 because these Guidelines have not been applied across the EU in an effective or harmonised manner. Even after the Guidelines were published, AFME found that several problems persisted: market data policies and price lists were still so complex that they were difficult for clients to understand; fee increases were often imposed without justification; market data providers' cost accounting methodologies were unclear and often undocumented, and whatever information about them that was published was often of poor quality; client categorisations and discount policies were not based on objective factors, so they were unfairly and inconsistently applied to clients; market data providers applied excessive due diligence to their clients; key terminology was not standardised; audits procedures were not explained to clients in an understandable manner; "unit of count" was unworkable; information from market data providers was not readily available to market data clients. These examples are by no means exhaustive. The conversion of the guidelines into legal obligations will strengthen them by giving them the force of law and will more effectively ensure that market data providers adhere to the requirements related to reasonable commercial basis.

AFME also endorses the restriction on creating user categories based on the value that market data represents to these users as described in recital 10 of the draft RTS: "In the past years, the possibility to apply differentials in fees proportionate to the value which the market data represent to the user led to the creation of multiple customer categories which were applied simultaneously with consequent duplication of fees. To ensure market data is provided on an RCB, market data providers may set up categories of users based on factual elements."

AFME believes that there can be legitimate reasons, based on factual elements, for certain client types to be charged different fees for market data. For example, market data providers should be allowed to charge different fees to professional and non-professional clients. Additionally, a fee category for retail clients could, if implemented correctly, have the positive effect of encouraging more retail participation in EU capital markets. However, there should be no new fee categories for the same product unless a market data provider can demonstrate that they have borne additional costs to produce data for these categories.

No	Question – RESPONSE LOCKED
34	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.

Response

AFME welcomes ESMA's proposal to recommend that the European Commission use its legislative power to create a level playing field between market data providers subject to MiFID/R II and those providers not in scope, such as market data vendors, as suggested in paragraph 235 of the consultation paper. We recommend that the additional scope cover not only vendors but also benchmark providers, credit rating agencies and ESG providers.

AFME wishes to highlight that several sell-side institutions redistribute data as part of their standard product offering to clients. At the present time, this involves a heavy administrative burden because market data providers require these institutions to provide a significant amount of information before allowing data to be redistributed. These requirements seem more appropriate to market data vendors and should not be applied to the sell side.

These requirements also create a barrier to entry for new market data vendors. The cost of meeting the market data providers' requirements is the same for a small, new entrant market data vendor as it is for a large, established vendor. This has the second order-effect of reducing competition in a market that may realise significant benefits, in the form of reduced market data costs, from more competition.

Accordingly, AFME believes redistribution clauses should be banned for two reasons:

1. First, their application is leading to conservative dissemination of data and could be restricting innovation; and
2. Second, because they do not have logical foundation. (All the costs are borne by the intermediary that wishes to onward distribute the data. As previously stated, logic would dictate that this deserves a rebate to the redistributor from the data provider, rather than additional charges, as the data providers [in the event that it is TV] should win extra trading activity as a result.)

On the issue of ensuring fair cost recovery for data providers, the providers bear no cost for onward redistribution of data and so there are no costs to recoup. Firms that redistribute data do so for a reason (because they believe it is good for their business). If their customers wanted to buy the data direct from the data producer, then they would do so, but if they are buying it from the intermediary, it is because of the value-added services offered by that intermediary.

On the issue of pricing power, these services are offered by multiple intermediaries that compete on multiple value add models with some competitive tension. As ESMA notes, there are multiple types of redistribution models and, as a concrete example, Euronext's Annual Accounts state they have approx. 500 distributors of data, which supports the fact that there should be no pricing power at any single redistributor.

We also believe that "creative works" and derived data licenses should be eliminated. Such licences are unrelated to the cost of producing the data. There should be no ability to go back and apply charges on this sort of innovation retrospectively and it should not result in new categories of product unless the TVs and APAs can demonstrate that they have borne additional production costs for this data usage.

No	Question – RESPONSE LOCKED

35	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.

Response

AFME believes that there are several examples of unfair terms and conditions.

Market data providers introduce new fee categories on a regular basis. Communication about these fees is poor. Some market data clients report that market data providers will allege that fees are due in arrears, sometimes for as long as several years, and will attempt to collect retroactively. Retroactive fee collection tends to result from market data agreements and unilateral policy changes that are complex, unclear and poorly communicated to market data clients.

Certain market data providers require market data clients to provide an excessive amount of information on their use of market data. Some of the information that providers request has no material connection to clients' of market data. For example, some providers ask for the names of clients' systems and software applications. Clients can provide this information, but it rapidly becomes dated because of regular upgrades to their technological systems. A provider that asks a market data client about the technology and software products it uses will receive little meaningful information, but many providers will still insist on requesting this information before providing access to market data.

These information requests come in the form of large templates or questionnaires that market data clients are required to access via an electronic portal. At times, there will be no defined end point to the questionnaire, so a client will respond to set of questions only to be required to answer another set. In these circumstances, clients find it difficult, if not impossible, to tell how much progress they have made toward completing the information request. This results in a heavy administrative burden, but clients comply to maintain access to market data.

No	Question – RESPONSE LOCKED
36	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.

Response

AFME has no comment on articles 7, 9 or 10.

With respect to article 8, AFME would caution ESMA and NCAs to be mindful that words such as "proportionate", "legitimate" and "unjustified" are subjective. Accordingly, AFME would underline ESMA's role as a standard setter, as this article, already open to several interpretations, will only be effective if ESMA enforces it fairly and rigorously.

AFME believes that article 11 will be difficult to enforce. The first sentence states that market data providers "shall not add in the market data agreement any clause which results directly or indirectly in an increase of the fees for the same data." This will only prohibit fee increases for as long as an agreement between a market data provider and market data client remains in force.

However, article 11 does not prohibit a market data provider from unilaterally cancelling an agreement (conceivably, an agreement could be written to contain a unilateral cancellation clause in the providers' favour) and replacing it with a new agreement with higher fees in pursuit of the same outcome. Replacement with this intent would clearly violate the spirit of article 11, so AFME recommends that ESMA should treat any such action the part of a market data provider as an actionable breach of the draft RTS. To solidify the legal position against this behaviour, AFME proposes that article 11 be amended as follows:

> Market data providers shall not add in the market data agreement, **or cancel and reissue an agreement for the purpose of adding**, any clause which results directly or indirectly in an increase of the fees for the same data. Additional fees shall only be admissible in case of infringements of the obligations and shall be clearly identified in the agreement. Terms and conditions whose application may result in additional fees shall be aggregated in the market data agreement to allow the client to understand the cumulative effects on the market data cost in case of the occurrence of the additional fee.

We have suggested this amendment with the intention of ensuring that clients are treated in a fair and equal manner by providers. While we recognise the fact that market data agreements will need to be updated from time to time in response to changing commercial conditions, we believe that this amendment is justified to prevent providers from selectively cancelling and reissuing agreements for some clients while leaving other clients' agreements unchanged. AFME's view is that when agreements need to be updated – for example, to account for increases in the cost of doing business – they should be updated for all clients at the same time.

No	Question – RESPONSE LOCKED
37	▪ 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 view the obstacles to its use?

Response

Yes, this model is inserted into market data agreements where market data providers offer a per-physical-user option.

We note that the framework for the RTS seems more targeted towards the exchange traded data and we recommend that ESMA does further analysis on the impacts for asset classes, like FI and FX. In such asset classes certain market data clients that have been consuming data through enterprise models historically were not required to count the constituents of what is the enterprise scope (users/applications/devices etc). In recent years, some providers have introduced a per-user fee for accessing their data available on "enterprise" contracts, creating a burdensome and costly access for clients.

We recommend that ESMA also be mindful of the fact that per user models place high administrative costs on market data clients, as it can be challenging to track client employees who are hired into the business as well as those who quit. Under a per user model, the client must report staff changes to the provider, who must then authorise new users to access market data. It is also possible that seasonal staff, such as summer interns, will need to be added and then removed from a client's user base, which only increases costs further.

In situations where market data has been sourced through multiple market data providers, market data vendors usually use netting agreements to avoid requiring clients paying twice for the same data. This would appear to satisfy the article 12(1) requirement for "arrangements [to be] in place to ensure that each provision of market data is charged only once" and the article 12(2) requirement for "market data providers [to] offer the possibility to charge fees only once for the same data (per user model)." However, in order to obtain this benefit, market data clients will need to provide a great deal of information and pay additional fees before a netting agreement can be finalised. This means that the implementation of article 12 may not result in significant cost reductions for market data clients, as they will still need to undergo the costly and time-consuming process of finalising netting agreements.

No	Question – RESPONSE LOCKED
38	Do you agree with ESMA's proposal on penalties? Please elaborate your answer.

Response

AFME has no comment on article 14(1).

On article 14(2), AFME believes that some market data providers apply excessive interest to penalty charges. Interest rates are written into standardised agreements, so market data clients have no latitude to object or negotiate a more reasonable level of interest. To ensure that article 14(2) is properly applied, AFME recommends that providers be required to periodically disclose their penalties to ESMA along with a written justification. This information should be supplied to ESMA in a standardised format, such as the template in annex II of the draft RTS. AFME accepts that penalties may rise with inflation. We propose that article 14(2) be amended as follows:

> The amount of ~~**penalties**~~ **a penalty** shall not unreasonably exceed the fees the client would have paid in case of compliance with the market data agreement. **Any interest applied to the value of the penalty shall not exceed the value of the consumer price index prevailing in the European Union on the date the penalty was levied.**

On article 14(3), AFME believes that market data providers' right to levy penalties on market data clients should be subject to a time limit of 36 months. Accordingly, AFME proposes that article 14(3) be amended as follows:

> A penalty payment request shall be made ~~**only within a reasonable time**~~ **no more than 36 months** from the ~~**infringement occurrence**~~ **date the infringement occurred** and shall be based on clear evidence ~~**of the infringement occurrence**~~ **that the infringement actually occurred**.

AFME also notes that some providers currently allow only 30 days for a client to settle a penalty charge. AFME recommends allowing more time – such as 90 days from the time of the infringement occurrence – for a charge to be paid. The extra margin of time will allow a client who owes a penalty charge to complete the necessary internal processes, including legal review and invoice processing, to settle the charge without incurring interest. Accordingly, AFME proposes that a fourth paragraph be added to article 14:

> **A market data provider shall allow a market data client against whom a penalty has been levied at least 90 days to settle the penalty. A market data provider shall not apply interest**

to the amount of the penalty unless the market data client fails to settle the penalty within 90 days.

AFME believes that article 14 should include requirement for penalties to be subject to due process, including an appeals process. AFME proposes adding a fifth paragraph to article 14:

Any market data client against whom a penalty has been applied shall have the right to appeal. Market data providers shall develop policies and procedures to govern the penalty appeals process. No interest shall be applied to a penalty for the duration of the appeals process.

No	Question – RESPONSE LOCKED
39	Do you agree with ESMA's proposal on audits? Please elaborate your answer.

Response

At the present time, market data providers may conduct audits of their market data clients on a periodic basis. AFME's view is that periodic audits of market data clients should be disallowed.

Article 15(1) of the draft RTS suggests that audits will be restricted to instances in which a market data provider suspects that a market data client has committed a serious contractual infringement. This interpretation of the article is further supported by recital 19: "In particular, audits should start ***only on the basis of a notification detailing the facts to be audited*** and documents that may be requested to the party should be identified in advance" (emphasis added). AFME would endorse the approach of allowing audits only on condition that they are justified by demonstrable facts indicating the possibility of a serious infringement of the contract between a market data provider and a market data client. To achieve this aim, AFME proposes that article 15(1) be amended to prohibit periodic audits and that article 15(2)(i) specify the types of contractual infringement that will be considered serious enough to justify an audit. Further, AFME interprets the final sentence of article 15(1) – "During an audit, information requests shall be limited to what is strictly necessary to collect evidence in respect of the alleged infringement" – as a necessary restriction on audit scope. The scope of the audit should be in proportion to the suspected infringement.

In contrast to an audit initiated after a contractual infringement, a periodic audit may have a broader scope, resulting in a more onerous process for the market data client. A market data client that is fully compliant with the terms of its contract with the market data provider will be subject to the same degree of scrutiny as a non-compliant client. In AFME's view, this approach consumes valuable time and resources for limited benefit. Therefore, it would be preferable to disallow periodic audits in favour of ad hoc audits only where the market data provider can establish indications of contractual infringement "on the basis of clear evidence (no reverse burden of proof)", as article 15(1) requires.

AFME proposes that article 15(1) be split into two paragraphs, with amendments, as follows:

(1) Market data providers shall not conduct periodic audits of market data clients. A market data providers may not conduct an audit unless there are grounds that the market data client in question has committed a serious infringement of the market data contract as outlined in paragraph 2.

(2) Audits may be requested by market data providers in case of serious indications of infringement of the market data contract to ascertain whether a breach occurred. An infringement of the market data agreement cannot be presumed but needs to be established on the basis of clear evidence (no reverse burden of proof). During an audit, information requests shall be limited to what is strictly necessary to collect evidence in respect of the alleged infringement.

In connection with ESMA's proposals on audit length, AFME would like to draw ESMA's attention to an apparent discrepancy between the text of the consultation paper and draft RTS. Paragraph 272 of the consultation paper states: "In order to avoid excessively lengthy audit practices, the draft RTS further require that an audit process should not exceed three years, as to limit excessive burdens." Article 15(6) of the draft RTS does not specify a maximum time frame of three years; it requires only that an audit "shall cover a reasonable period of time." AFME proposes that article 15(6) be amended to include the three-year maximum, as follows:

> An audit shall cover a reasonable period of time, **which may not exceed 36 months from the date the audit is initiated.**

To ensure the security of clients' data during an audit, AFME proposes the addition of a seventh paragraph:

> Auditors shall not connect to market data client's internal systems in the course of conducting an audit. Auditors shall rely on data, information and/or other resources and materials requested from the market data client as permitted under article 15(1).

To ensure that the provisions of article 15 apply to auditors employed directly by market data providers as well as third-party auditors, AFME proposes that an eighth paragraph be added to article 15:

The provisions of this article shall apply to any auditor who conducts an audit on a market data client irrespective of whether the auditor is an employee of the market data provider, an employee of a third-party audit provider or employed under any other type of arrangement.

No	Question – RESPONSE LOCKED
40	Would you adopt any additional safeguards to ensure market data agreements terms and conditions are fair and unbiased? Please elaborate your answer.

Response

In relation to the amendment of market data policies, AFME acknowledges the rigour that ESMA is seeking instate through mandating a specified notice period in article 16. Notifications in relation to amendments to their market data agreements can be made frequently and throughout the year. Notifications are received in various formats, which do not allow for an automated processing of such policies. Multiple changes to agreements consume resources and, when not delivered around the middle of the year, the time required to account for any required additional costs, can often fall outside of market data clients' budget cycles (usually ending around September).

Market data clients do not always receive notifications directly from market data providers; instead, the notifications may come by way of a third-party market data vendor. In these situations, it can take some time for market data vendors to pass notifications on, and this will usually only occur after the vendor has used some of the time in the notice period to conduct its own analysis of the amendments to the agreement.

However, these notifications are typically provided with 90 days' notice and, therefore, ESMA's proposed notification period would, without basis, shorten a current market practice and unnecessarily constrain clients' capability to respond to such notifications.

Therefore, taking into account a minimum period that is required for data user firms to respond and to avoid the burdensome frequency of amendments to market data agreements, AFME proposes the following amendment to article 16:

> The market data provider shall give notice to the market data client of any unilateral change to the terms and conditions of the market data agreement, including terms and conditions relating to fees, at least ~~**two months**~~ **90 days** in advance of the relevant amendment entering into force, **and not more than annually**. Where the amendment results in a change of the fees, the market data agreement shall foresee the right of withdrawal for the client.

We would also propose that ESMA add these safeguards:

1. A market data provider should not be able to tie its fees to the number of clients' customers (redistribution fees).
2. There should not be clauses that likely prohibit innovation i.e. derived data and creative works licences.
3. A data provider should not be able to change fees for the same data more than once per annum.
4. There should be a Service Level Agreement in place between the Data Provider and its Customer.

No	Question – RESPONSE LOCKED
41	▪ 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.

Response

AFME supports the intent to standardise some content and terminology in market data policies in order to improve compatibility for market data clients. We refer to our response to question 42 below on specific terminology. We believe that article 17 and annex I may have some effect but regarding format we do not expect that these provisions will fully realise the aim to achieve comparability between different market data policies. AFME would recommend that market data providers make public standardised market data policies but recognise that the development of a suitable template will take time.

While AFME supports the implementation of article 17 as written in the draft RTS, we take the view that it should be treating as the starting point for ESMA's ongoing supervision of the development of market data policies. We recommend that ESMA revisit market data policy information requirements in a future consultation paper, with a view to seeking industry opinion on whether the template in annex I of the draft RTS is still fit for purpose.

Market data policies should be publicly available for five years from the date they are first published. Requiring market data policies to be readily available will be very helpful to users of market data in the event they are audited. Additionally, when a market data provider updates its market data policy, it should be required to provide a detailed comparison of the former policy and the updated policy.

AFME proposes three amendments to article 17 to embed these changes. First, a third paragraph as follows:

> **Market data providers shall make their market data policies publicly available for at least five years following the date of their entry into force.**

Second, a fourth paragraph as follows:

> **When a market data provider updates its market data policy, the provider shall provide a detailed comparison of the previous policy with the updated policy. The comparison will show which provisions of the market data policy were amended and provide a summary of each amendment. The market data provider shall make the comparison publicly available for at least five years following the data that the amended policy entered into force.**

Third, a fifth paragraph as follows:

> **Market data providers shall provide at least 90 days' advance notice before any changes to a market data policy come into effect.**

AFME would add that, in our view, there should be no difference between the pricing of display and non-display data. However, if ESMA should choose to allow price differences between display and non-display data to persist, then ESMA should scrutinise the rationales given for such differences.

No	Question – RESPONSE LOCKED
42	▪ 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.

Response

The inclusion of standardised definitions in the draft RTS will address the problems caused when market data providers use different definitions of these terms. This inconsistency has caused difficulty for market data clients, who find analysing and adapting to the varying definitions time-consuming.

With respect to the proposed definition of "unit of count", AFME notes that this measure should be applicable and relevant only to physical, and therefore countable, users of display data. We elaborate further at our response to question 43 below that it is not appropriate to apply a unit of count measurement to non-display data and particularly that using "device" is an impractical measurement. While many larger market data clients may prefer that non-display data fees fall under an "enterprise" charge, we note that such arrangements may be too costly for smaller firms.

AFME believes that the definitions of "professional client" and "non-professional client" are appropriate. While this differentiation of client types may at first appear to apply a segmentation of clients based on their use of the data (and therefore contrary to the exclusion of the charging value-based fees), in this context, we believe this distinction relates to the ***amount*** of data provided rather than to its use. Given that we expect retail clients to qualify as non-professional clients, we would like to emphasise the importance of maintaining the advantage of lower cost market data to encourage retail client participation in EU markets.

AFME questions the inclusion of "access fee" as a defined term in article 18, as it introduces a fee that does not currently exist. It is not clear whether a definition for an access fee is necessary, nor is it clear whether the definition is intended to cover direct connectivity, indirect connectivity or both. On this basis, AFME regards any ability to charge an "access fee" as duplicative to a "physical connection" fee. If the "access fee" definition is included in the RTS when it comes into effect, then either an access fee or a physical connection fee but not both may be charged only to clients that have a physical connection.

AFME notes that article 18(2) could be misused as a loophole by market data providers to insert new terminology into their market data agreements beyond the scope of the words and phrases defined in articles 1 and 18(1) of the draft RTS. This does not fit with the intention to standardise format, content and terminology of market data policies and will likely disadvantage market data clients.

No	Question – RESPONSE LOCKED
43	▪ 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?

Response

AFME opposes any unit of count based on device numbers. The concept of a "device" for the purpose of charging for market data is opaque and outmoded. There are several different definitions of the term in use today; in fact, different market data providers each seem to define the term uniquely.

AFME agrees that counting "devices" would produce inaccurate measurements of market data usage. For example, a market data client may have several devices on site for use in the event of a systems failure. These devices would not be in regular use for accessing market data, so a simple tally of the device number would result in an unjustifiably inflated charge to the client.

AFME considers it more appropriate to charge market data clients on an active user ID basis rather than a per-device basis. Nevertheless, AFME stresses that for such an approach to work it must reflect the MiFIR Review's intention to reduce the cost of market data. ESMA will note the concerns that AFME has raised in connection with the drafting of certain sections of the draft RTS – sections that clients believe create opportunities for the costs attributable to the production and dissemination of market to be inflated without justification (see our response to question 30). This means market data clients could still incur increased costs in order to access essential components of a market data provider's product suite, creating a significant barrier to entry for market participants without any repercussions to incumbent providers.

In light of this possibility, we reiterate our statement that vigilant supervision on ESMA's part will be essential to ensuring that the draft RTS produces its intended effect of ensuring that market data charges are priced proportionately in relation to the costs of producing and disseminating such data.

No	Question – RESPONSE LOCKED
44	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.

Response
AFME recommends that the definition's reference to "other technologies" be interpreted to include wireless methods of data transmission. One such example is microwave data transmission, which is presently more prevalent in the United States than the European Union but may become a more common feature of EU financial markets infrastructure given the inevitability of technological change. By interpreting the definition such that it includes wireless transmission methods, ESMA will reduce the risk of the draft RTS becoming outdated as new technologies are adopted. To ensure that the definition is interpreted in this manner, ESMA may consider making an amendment to the definition: "Physical connection" shall indicate the physical connection through optical fibre or other technologies **(including but not limited to wireless methods of data transmission)** which shall be established between the Client and the data provider to enable reception of data by the Client;

No	Question – RESPONSE LOCKED
45	▪ 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.
Response	
The explanations required by article 22 of the draft RTS may be difficult to compare. The express purpose of requiring explanations of costs and margins is given in article 22(4): "Market data providers shall provide clients with explanatory information on costs and margins ***to enable clients to understand how the level of fees for market data is set and to compare the methodologies of different market data providers***" (emphasis added). However, with no standardisation of the content or level of detail that will need to be in these explanations, market data clients will find it difficult to make like-for-like comparisons between different market data providers. Article 22 should take into consideration: • the requirement for granularity of cost information for every element of the fee schedule • the requirement for data providers to make an accompanying statement with their cost disclosures • the requirement for data providers to establish external benchmarks approved by their Boards for margin comparison • The absence of any requirement for timeliness of this information which we should be mandated to be available immediately after the annual financial results of the data provider are published To improve the comparability of explanations, ESMA should offer guidance to NCAs on how to interpret, supervise and require amendment to the cost disclosures required by article 22. In the context of interpreting disclosures and as noted in our responses to questions 26 and 27 above, it is important to recall that articles 2(1)(a) to 2(1)(d) and articles 2(2) to 2(5) already provide a comprehensive list of allowable cost categories, which must be quantified in the annex II template. We caution that articles 2(1)(e) and 2(6) regarding "other" and "further" costs, risks opening a catch all door for market data providers to declare miscellaneous and non-comparible costs irrelevant to the production and dissemination of market data. AFME finds that for all costs that market data providers include under article 2, a detailed justification for its inclusion should be published under article 22, alongside the explanation of the cost accounting methodology.	

No	Question – RESPONSE LOCKED
46	Do you agree with the approach on delayed data proposed by ESMA? Please elaborate your answer.

Response

AFME agrees with article 23's removal of registration processes (this should include registration via a third party).

To build upon the improvements made by article 23, AFME recommends that the article be amended to state explicitly that delayed data will be provided free of access, administrative, distribution, display, non-display and derived data fees. Display and non-display fees should only apply to real-time streaming of data. AFME proposes the following:

> Market operators and investment firms operating a trading venue, APAs and systematic internalisers shall provide access to delayed market data to any user on a non-discriminatory basis without requiring any type of registration. **Delayed market data shall be provided to any user (including market data providers) in a machine-readable format free of all charges no matter how it is disseminated or used (including via third-party entities).**

In this context, we recommend that the term "any user" be interpreted to include academic researchers and other users who are not involved in financial markets on a commercial basis.

AFME expects that some market data providers will simply publish delayed data in a machine-readable format on their websites (we recommend that delayed data be published in a machine-readable format to enable easier ingestion by firms). Data users may not receive delayed data free from market data providers in this case.

With respect to article 25, that the word "machine" in the term "machine-readable format" should be interpreted to include artificial intelligence ("AI"). The deployment of AI across financial services institutions is likely to become more common in the future, so ESMA and NCAs should take account of its use in the interpretation of the draft RTS.

No	Question – RESPONSE LOCKED
47	Do you agree with the proposal not to require any type of registration to access delayed data? Please elaborate your answer.

Response

As noted in our response to question 46 above, AFME agrees with the provision not to require any type of registration to access delayed data. In our view, this allows a market data provider to request, ***on a strictly voluntary basis with no exceptions,*** a contact name, email address and/or telephone number from any person who wishes to access delayed data, but refusal to provide contact information should not be grounds for refusing access to delayed data.

Clients understand that some market data providers may require a particular product coding in order to access delayed data, but do not consider this is "registration" in this context. Market data providers should

not attach any conditions or steps (such as lengthy questionnaires or justifications for use) to the process of obtaining such data.

The drafting of article 23 presents a potential problem in situations where the delayed data is consumed by market data providers. Market operators and investment firms operating a trading venue can satisfy their regulatory obligations under article 13(2) of MiFIR by publishing delayed data files free of charge on their websites. However, in instances where delayed data is consumed directly from a market operator or trading firm operating a trading venue by a market data provider ***without recourse to the published delayed data files***, the market operator or investment firm may seek to apply a charge for the delayed data. For this reason, AFME re-emphasises that article 23 should include text to indicate no charges will be applied to persons who attempt to access delayed data. AFME would also suggest that the term "any user" be amended to say "any user (including market data providers)".

No	Question – RESPONSE LOCKED
48	▪ 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.
Response	
AFME agrees with the proposed time frame for entry into force of the RTS for RCB.	

No	Question – RESPONSE LOCKED
49	Do you have any further comment or suggestion on the draft RTS? Please elaborate your answer.
Response	

Firstly, AFME welcomes the approach taken in the draft RTS to apply rules to market data providers and clients proportionately. This is especially evident in article 15's rules in relation to audit.

Secondly, although the term "derived data" is not defined in the draft RTS, AFME recommends that ESMA use this definition (if not within the RTS, then when scrutinising the behaviour of market data providers):

> **"Derived data" shall indicate market data used in the creation, settlement, maintenance or support of derivative works by a market data client for commercial purposes connected to sale or use of those derivative works by third parties, including in relation to indices or financial products. It shall not include use of market data by the market data client for internal purposes including risk management and accounting functions.**

Note that the definitions of "display data" and "non-display data" in article 18(1) of the draft RTS will need to be adjusted if ESMA used the definition we have suggested.

AFME believes that a commonly applied definition of "derived data" will facilitate standardisation of this concept. Many market data providers currently require users to pay for an additional license for derived data which is typically costly and expansive in scope, such that it can capture simple modifications made to core market data for internal purposes including application of a simple formula for profit and loss calculations. Nevertheless, AFME acknowledges data providers have a valid commercial interest in derived

data when used to create products for sale and distribution to third parties for commercial purposes which justifies an exception to the principle that users pay the same fee regardless of what the data will be used for.

Furthermore, market data providers charge their market data clients for distributing derived data products, even though the clients own the intellectual property rights to the derived data after it is created. Charging for redistribution of derived data has become a new source of revenue for providers.

This also risks putting the burden of payment on the wrong party. It is possible for a third-party purchaser of derived data to reverse engineer the derived data to produce an approximation of the market data purchase from the provider by a client (however, it is important to recognise that the reverse-engineered data will not be of the same detail or quality as data purchased from the source). The third party does not pay the provider for obtaining data to reverse engineer; instead market data clients are the ones who are charged by the provider.

Increasingly, providers have been charging for market data based on the business activities for which the that client uses the data. AFME believes that this is a form of charging for data based on its value to the client that should be disallowed when the draft RTS comes into force.

No	Question – RESPONSE LOCKED
50	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.

Response

AFME has no comment on the one-off or ongoing costs required to implement and comply with the RTS.

We defer to member firms to comment individually on this question.