

ICMA response to the ESMA MiFIR Review Consultation Package

Draft RTS on Reasonable Commercial Basis (page 64)

28 August, 2024

Introduction:

ICMA welcomes the opportunity to respond to the ESMA MiFIR Review Consultation Package – Draft RTS on Reasonable Commercial Basis and related questions hereunder.

ICMA promotes well-functioning cross-border capital markets, which are essential to fund sustainable economic growth. It is a not-for-profit membership association with offices in Zurich, London, Paris, Brussels and Hong Kong, serving over 620 member firms in nearly 70 jurisdictions globally. Its members include private and public sector issuers, banks and securities dealers, asset and fund managers, insurance companies, law firms, capital market infrastructure providers and central banks. ICMA provides industry-driven standards and recommendations, prioritising three core fixed income market areas: primary, secondary and repo and collateral, with cross-cutting themes of sustainable finance and FinTech and digitalisation. ICMA works with regulatory and governmental authorities, helping to ensure that financial regulation supports stable and efficient capital markets.

Executive summary:

ICMA welcomes ESMA's proposals to improve the provision of, and access to, market data in the European Union, following the latest amendment of the Markets in Financial Instruments Regulation (MiFIR) which entered into force on 28 March 2024.

The response to this consultation is referring to the market data in bond markets and has been composed within the remit of ICMA's MiFID Working Group, notably secondary trading desks, investors, exchanges and data providers across the international bond markets.

Key points:

- ✓ ICMA welcomes ESMA's proposals in the Consultation on the Draft RTS on Reasonable Commercial Basis, aiming to improve the provision of market data and related requirements
- ✓ ICMA members agree that there should be a cost-based approach, that terms should be simple and non-discriminatory, that a duplication of fees should be avoided, and that further work needs to be done in the field of market data redistribution
- ✓ ICMA members welcome that 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 a viable business for data providers and the need to ensure as wide as possible access to data for market participants.
- ✓ Furthermore, ICMA welcomes the removal of burdensome practices with respect to market data agreements, penalties and audit.

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

ICMA response:

ICMA members welcome that ESMA in its proposals is seeking to put more structure in the cost calculation, however in Chapter II Article 2 (6) in the draft RTS (as mentioned on page 308 of this Consultation Paper) item e. “other costs,...” should not give room for a wide interpretation of what such additional costs could constitute, which would be of concern to members from a data user perspective.

Members highlighted what some of such costs could consist of (such as a sharp increase in compliance costs, inflation for example) but ultimately it is for the regulator/ESMA to decide whether/which costs should be accepted to fall under this category and that this would be reviewed regularly by ESMA.

ICMA would like to highlight that the data provider should not be allowed to charge users for multiple use of data (as is the case now, see also our response to Q31 for further details).

The RCB control element is very important also with respect to the upcoming Consolidated tape regime and with respect to the CTP business model, where ICMA would like to refer to the draft RTS on RCB Article 3 (3) on page 309 of this CP, specifically the aim to “enable data access to the maximum number of market data clients”.

From a user perspective, ICMA members would also like to suggest that all market data could be licensed by customers at an enterprise level for their internal use in the ordinary course of business. This would enable customers to make use of market data within their organization, without the possibility of additional fees or reporting requirements.

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.

ICMA response:

ICMA members welcome the approach, which looks comprehensive and already very detailed. See also our response to question 26.

Q28: Do you agree with the proposal of apportioning costs based on the use of resources (i.e., infrastructure, personnel, software...) for each service provided? Do you think the methodology to be used to apportion costs should be further specified? Please elaborate.

ICMA response:

ICMA members agree with the proposal.

Q29: Do you agree that the net profit as defined in Article 3 of the draft RTS can be a representative proxy of the margin applicable to data fees and would you include additional principles to define when a margin can be considered reasonable? Please elaborate.

ICMA response:

Members agree.

Q30: Do you agree with the proposed template for the purpose of information reporting to NCAs on the cost of producing and disseminating data and on the margin applied to data? Please elaborate, including if further information should in your view be added to the template.

ICMA response:

ICMA agrees with the proposed template.

With that in mind, the proportionality principle should be applied, in order to protect smaller market players, who will be facing huge costs with the new regime, and so that the requirements do not become too cumbersome. Members understand it is not the main goal to target the smaller players.

Q31: What are in your view the obstacles to non-discriminatory access to data taking into consideration the current data market data policies and agreements?

ICMA response:

ICMA welcomes ESMA's proposals in order to ensure non-discriminatory access.

Furthermore, and in reference to the response to Q26, a situation should be avoided whereby multiple service users can be charged multiple times. This has also been highlighted in the ESMA proposal and hence members welcome the proposal.

Aside from the non-discriminatory aspect, there is also a competition aspect as the new regime should not lead to unfair competition (SIs should not be put in a competitive disadvantage). ICMA therefore agrees with ESMA's recommendation in paragraph 235 on page 75 that "the European Commission should use its legislative power to create a level playing field between the market data providers subject to MiFIR and those entities that redistribute market data but are currently not subject to MiFIR."

In addition to the above, ICMA would like to highlight that whilst ESMA's proposals in Section 9 of the CP are useful and constructive, there could be some more concrete guidance to ensure that any question on interpretation can be rapidly answered, and that any abusive interpretation

can be effectively challenged. As such, there could be value in putting in place a permanent dispute resolution mechanism which could help solve issues that arise, for example around the duplication of fees, and other subjects of dispute. ESMA should be the key point of contact for this. A list of FAQs by ESMA on this topic would also be of interest, which could provide examples that can be referenced. Stronger supervisory and enforcement mechanisms would also be welcome from a user perspective.

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.

ICMA response:

The provisions look valid in the ESMA proposal and are valid across all asset classes. Members agree to paragraph 229 though with respect to HFT.

ICMA agrees that different costs in the transmission protocols (such as API vs CSV) could affect fees.

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

ICMA response:

In general, ICMA supports simple and standardized fee categories, and access to data on a non-discriminatory basis

Under the draft RTS on RCB as outlined in the Annex of this CP in Chapter III Article 5 (3) (page 310), ICMA would suggest the following changes, in order to provide an example of how discounts could be given in the form of volume discounts, as follows:

- **From:** "Discounts or any other temporary reduction of fees are allowed provided that they are based on factual elements, easily verifiable and sufficiently general to pertain to more than one client."
- **To:** "Discounts or any other temporary reduction of fees (*such as for example as per the volume of data which is provided*) are allowed provided that they are based on factual elements, easily verifiable and sufficiently general to pertain to more than one client."

Furthermore, In the draft RTS on RCB (as outlined in the Annex of this CP in Chapter III Article 4 on page 309), ICMA would like to propose a slight change as follows:

- **From:** "Market data providers shall apply the same schedule of fees and the same terms and conditions to access market data to all clients requesting access to market data."

- To: “Market data providers shall offer the same **standard** schedule of fees and the same **standard** terms and conditions to access market data to all clients requesting access to market data.”

Finally, in Chapter III Article 4 (5), ICMA would like to propose to change the wording as follows:

- From: “Market data providers shall be able to justify any divergence in the final solution arrangement adopted on the basis of valid technical constraints.”
- To: “Market data providers shall be able to justify *to regulators* any divergence in the final solution arrangement adopted on the basis of valid technical constraints.”

Q34: Regarding redistribution of market data, do you agree with the analysis of ESMA? If not, please elaborate on the possible risks you identify and possible venues to mitigate these. In your response please elaborate on actual redistribution models.

ICMA response:

Please see our response to Question 31 where we have responded in parts to this question already.

With respect to the ESMA analysis around redistribution, further differentiation between types of redistribution and re-selling seems necessary.

Furthermore, and in relation to the current ESMA Consultation Package on the RTS on CTPs and DRSPs, it will also be of interest for data users to see what the redistribution model will look like for the CTP.

Q35: Are there any other terms and conditions in market data agreements beyond the ones listed in this section which you perceive to be biased and/or unfair? If yes, please list them and elaborate your answer.

ICMA response:

Given that with respect to future price changes there is currently a 90 day notice period (as per Article 89(2)(b) of Delegated Regulation (EU) No 2017/565 & Article 11(2)(b) of Delegated Regulation (EU) No 2017/567), ICMA would like to propose that the notice period in the case of change of terms of conditions of the market data could be 90 days here again (or 3 months) instead of 2 months. In this sense, ICMA would like to propose to amend the draft RTS on RCB Chapter IV Article 16 (page 314 in this CP) in the first paragraph as follows:

- From: “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 in advance of the relevant amendment entering into force.

Where the amendment results in a change of the fees, the market data agreement shall foresee the right of withdrawal for the client.”

- To: “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 *three* months in advance of the relevant amendment entering into force. Where the amendment results in a change of the fees *or may have significant impacts on the client*, the market data agreement shall foresee the right of withdrawal for the client *without additional fees or penalties*.”
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Q36: Please provide your view on ESMA’s proposal in respect to (i) the obligation to provide pre-contractual information, (ii) general principle on fair terms, (iii) the language of the market data agreement, (iv) the market data agreement conformity with published policies and (v) the provision on fees and additional costs.

ICMA response:

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

ICMA response:

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

ICMA response:

ICMA members are of the view that the maximum timeline on penalties should be two years instead of three years (as was proposed by ESMA in this consultation). Three years is considered a too long period in terms of risk exposure to possible penalties.

Therefore, we would like to propose to amend the draft RTS Article 14.3 (page 313) to:

- A penalty payment request shall be made only within a reasonable time, *not exceeding two years*, from the infringement occurrence, and shall be based on clear evidence of the infringement occurrence
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Q39: Do you agree with ESMA's proposal on audits? Please elaborate your answer.

ICMA response:

Similar to our response to question 38, the maximum timeline for audits should be two years instead of three years (as was proposed by ESMA in this consultation). Three years renders the process still too onerous, as providing the material for audits entails a huge operational cost to data users.

Moreover, there should be a time limit to how long after a contract has been terminated the audit can take place. This time limit should be six months.

Therefore, we would like to propose to amend the draft RTS Chapter IV Article 15.6 (and add a point 15.7) as follows:

6. An audit shall cover a reasonable period of time, *not exceeding two years*.
 7. *An audit shall not take place later than six months after the termination date of the agreement.*
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Q40: Would you adopt any additional safeguards to ensure market data agreements terms and conditions are fair and unbiased? Please elaborate your answer.

ICMA response:

- NA
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Q41: Do you agree with the standardised publication template set out in Annex I of the draft RTS? Do you have any comments and suggestions to improve the standardised publication format and the accompanying instructions? Please elaborate your answer.

ICMA response:

- NA
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Q42: Do you agree with the proposed list of standard terminology and definitions? Is there any other terminology used in market data policies that would need to be standardised? If yes, please give examples and suggestions of definitions.

ICMA response:

- NA
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Q43: Do you consider that the “user-id” and the “device” should still be considered as “unit of count” for the display and non-display data respectively? Do you think (an)other unit(s) of count can better identify the occurrence of costs in data provision and dissemination and if yes, which?

ICMA response:

- See ICMA response to question 44.
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Q44: Do you foresee other types of connectivity that should be defined beside “physical connection” to quantify the level of data consumption? Please elaborate your answer.

ICMA response:

Aside from “physical connection”, there should be a distinction made between trading protocols that are session-based, point-to-point protocols, where the session needs to be kept actively open, and other protocols that are cheaper to support.

Q45: Do you think there is any other information that market data providers should disclose to improve the transparency on market data costs and how prices for market data are set? If yes, please provide suggestions.

ICMA response:

- NA

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

ICMA response:

ICMA agrees with the approach on delayed data proposed by ESMA.

ICMA would like to note that there is a distinction to be made between equity and bond markets when it comes to latency, as also highlighted in ICMA's response to the [ESMA Consultation on the RTS on CTPs and DRSPs](#). 15 minutes in equity markets is a lifetime, whereas in bond markets, 15 minutes are more similar to real-time, due to the fact that bonds trade on an irregular basis. Therefore, in the equity markets, it is expected that data users will still have to connect to data providers directly to obtain the real-time data, whereas on the bond side, it will be possible to wait 15 minutes for the data to become available for free. It is therefore particularly important in the bond markets to improve the accessibility of delayed data for market participants.

In addition to the above, ICMA members would like to see a clearer definition of what is machine-readable, given that at present, it is noted that the data is often presented in a non-machine-readable way. The RTS should clarify this further so that it is guaranteed it can be used for automation.

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

ICMA response:

- ICMA agrees.
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Q48: ESMA proposes the RTS to enter into force 3 months after publication in the OJ to allow for sufficient time for preparation and amendments to be made by the industry. Would you agree? Would you suggest a different or no preparation time? Please elaborate your answer.

ICMA response:

Concerns were raised that three months could potentially be quite short, given that data providers would need to come up with new contracts (for existing relationships) and in case there was a two month notice period for clients to cancel the contract. Assuming the contract would need to be drafted after publication in the OJ, this would only give data providers one month to come up with a new contract. Also, Annex I) on page 320 of this CP refers to the data set of the (past) calendar year, which according to ICMA members will not be achievable for this initial past calendar year, once the RTS enters into force.

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

ICMA response:

As mentioned previously under question 46 and also in ICMA's response to the CP on RTS on CTPs and DRSPs, ICMA does not agree with the "one size fits all" approach, as there is a distinction to be made between bond and equity markets, especially when it comes to latency. What works for the equity tape will be very different from what can work for the bond markets.

Q50: What level of resources (financial and other) would be required to implement and comply with the RTS and for which related cost (please distinguish between one off and ongoing costs)? When responding to this question, please provide information on the size, internal set-up and the nature, scale and complexity of the activities of your organisation, where relevant.

ICMA response:

Some ICMA members suggested that there could be a high cost expected for implementation of new RTS.
