21 May 2024
ESMA74-2134169708-7262

Reply form: MiFIR Review

RTS 2, RTS on reasonable commercial basis and RTS 23

Responding to this paper

ESMA invites comments on all matters in the Consultation Paper and in particular on the specific questions in this reply form. Comments are most helpful if they:

- respond to the question stated;
- indicate the specific question to which the comment relates;
- contain a clear rationale; and
- describe any alternatives ESMA should consider.

ESMA will consider all comments received by **28 August 2024.**

Instructions

In order to facilitate analysis of responses to the Consultation Paper, respondents are requested to follow the below steps when preparing and submitting their response:

- Insert your responses to the questions in the Consultation Paper in this reply form.
- Please do not remove tags of the type <ESMA_QUESTION_CP1_1>. Your response to each question has to be framed by the two tags corresponding to the question.
- If you do not wish to respond to a given question, please do not delete it but simply leave the text “TYPE YOUR TEXT HERE” between the tags.
- When you have drafted your responses, save the reply form according to the following convention: ESMA_CP1_nameofrespondent.

  For example, for a respondent named ABCD, the reply form would be saved with the following name: ESMA_CP1_ABCD.
- Upload the Word reply form containing your responses to ESMA’s website (**pdf documents will not be considered except for annexes**). All contributions should be submitted online at www.esma.europa.eu under the heading ‘Your input - Consultations’.

Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the headings 'Legal notice' and heading 'Data protection'..

1. General information about respondent

Name of the company / organisation	Deutsche Boerse Group (DBG)
Activity	Regulated markets/Exchanges/Trading Systems
Are you representing an association?	☐
Country/Region	Germany

2. Questions

CP on the amendment of RTS 2

Q1 Do you agree with the definition of CLOB trading systems proposed above? If not, please explain why.

<ESMA_QUESTION_CP1_1>
DBG disagrees with the proposed definition since we consider that Level 2 requirements should specify that, besides CLOBs and periodic auctions, other execution channels linked to those forming a holistic hybrid system of the exchange shall continue to adhere to the well-established pre-trade transparency regime. Derivatives exchanges operate complex hybrid systems covering different execution channels, including CLOB as well as trade registration services, where pre-arranged or negotiated off-book transactions are formalized by order information details being placed into the trading venue's system. The latter are designed to encourage the execution of very large and complex transactions or trading of products that do not have enough liquidity in the order book on the respective regulated venue, while at the same time attempting to process as much flow as possible through central limit order books which provide –by definition– the highest degree of transparency. In the absence of regulation, any trading venue would have the flexibility whether they want to apply pre-trade transparency/thresholds, creating potential regulatory arbitrage, and a race to the bottom in terms of transparency standards. Thus, less transparent venues might capture more trading flow, which otherwise would have been processed by more transparent venues or even in CLOBs, leading to less liquidity on the more transparent venues and in the CLOB.

Although DBG would have appreciated to keep alignment between RTS 1 and RTS 2, we understand that the changes in Level 1 texts do not allow for such alignment to remain. Equity instruments however, are not concerned with the introduction of the concept of CLOB and transparency requirements are not modified. Given the circumstances, we would then insist on the fact that changes to RTS 2 would not be mirrored in RTS 1 especially regarding definitions and any associated reporting.<ESMA_QUESTION_CP1_1>

Q2 Do you consider that the definition should include other trading systems? Please elaborate.

<ESMA_QUESTION_CP1_2>
Yes, especially when it comes to specifying hybrid trading systems not comprised by the definition proposed, as mentioned in the answer given to Q1. It is concerning that hybrid systems are not included in the definition, as the current pre-trade transparency regime risks being applied arbitrarily. It would be a step back from the original MiFIR objective to enhance and improve the pre-trade transparency in non-equity markets. ESMA should extend the definition of CLOB to other execution channels that are part of the same system as the CLOB, forming –in this way– a hybrid trading system of the exchange. Specifically, if a hybrid trading system contains parts that form a CLOB system, suitable transparency requirements should also apply to the non-CLOB-like part of the hybrid system, rather than just to the CLOB part. This would ensure that high standards of transparency remain applicable in these situations and that there is a clear legal interpretation of the new rules in the different member states.
In any case, all trading systems removed from pre-trade transparency requirements (e.g. voice trading systems, request-for-quote, etc.), shall be specified in RTS 2 in order to avoid a discretionary application of definitions by trading venues.<ESMA_QUESTION_CP1_2>

Q3 Do you agree that the description of periodic auction trading systems set out in Annex I of RTS 2 is relevant for specifying the characteristics of those trading systems in the revised RTS? If not, please elaborate.

<ESMA_QUESTION_CP1_3>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP1_3>

Q4 Do you agree to use ESA 2010 to classify bond issuers If not, please explain and provide alternatives on how clarify how to classify sovereign, other public and corporate issuers.

<ESMA_QUESTION_CP1_4>
DBG potentially sees an issue with the use of ESA 2010 for the classification of bonds issuers. Indeed DBG receives some information about the nature of the bond / nature of the bond issuer from a third-party provider and translates it into the MiFIR identifier based on an internal mapping / the ESMA mapping on CFI code-MiFIR identifier. However, as a trading venue, DBG has no access to the issuer nor information about the issuer for all instruments and in particular bonds listed on our Open Market – more than 30,000 instruments -, meaning that we would not be able to apply the ESA 2010 classification for the lack of access to information. Therefore, we would still have to rely on the ESMA guidance as to which category issuers belong to, such as the Classification of bonds issued by certain entities (here) published as part of the Q&A on the Manual for

Post-Trade Transparency (here). DBG would welcome having a similar register for information that would contain the necessary information for the purposes of the classification of bond issuers.
<ESMA_QUESTION_CP1_4>

Q5 Do you agree with the proposed LiS pre-trade thresholds for bonds? In your answer, please also consider the analysis provided in sections 4.2.1.

<ESMA_QUESTION_CP1_5>
Yes, DBG believes that the simplification of the approach to the thresholds for the LiS waiver for bonds, by adopting static thresholds, is a positive development. We would however caution ESMA against adopting thresholds which are significantly higher than the existing ones for covered bonds or sovereign bonds for instance. In general, static thresholds should be carefully calibrated, since there is always the risk that those are set by means of an incomplete or inadequate framework.
<ESMA_QUESTION_CP1_5>

Q6 Do you agree with the proposed LiS pre-trade thresholds for SFPs and EUAs? In your answer, please also consider the analysis provided in section 4.2.2.

<ESMA_QUESTION_CP1_6>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP1_6>

Q7 Do you agree with the approach taken for the illiquid waiver for bonds, SFPs and EUA? If you disagree with how the liquidity threshold is determined, please include your comments in Q11 for bonds, Q14 for SFPs and/or Q17 for EUAs.

<ESMA_QUESTION_CP1_7>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP1_7>

Q8 Do you agree with the changes to post-trade fields summarised in Table 5? Please identify the proposal ID in your response.

<ESMA_QUESTION_CP1_8>
DBG has no objection to the changes. In particular, the change for field 12 is fine for DBG. Same applies for field 6 as long as the proposed definition for CLOB remains unchanged and as long as trade registration systems / block trading systems are qualified as OTHR or HYBR.
<ESMA_QUESTION_CP1_8>

Q9 Do you agree not to change the concept of "as close to real-time as technically possible"? If not, what would be in your view the maximum permissible delay?

<ESMA_QUESTION_CP1_9>
Yes, DBG agrees with ESMA's proposal as regards the deletion of Article 7(4) a) of RTS 2. For the avoidance of doubt, the 5-minute delay as proposed in the current RTS 2 should remain the strict upper limit and only being applied in case not otherwise technically possible. Non-deferred data submissions should strive for a true real-time submission as quickly as technically possible.<ESMA_QUESTION_CP1_9>

Q10 Do you agree with the changes proposed for the purpose of the reporting of OTC transactions?

<ESMA_QUESTION_CP1_10>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP1_10>

Q11 Do you agree with the liquidity thresholds set out in Table 7 above? If not, please provide an alternative approach.

<ESMA_QUESTION_CP1_11>
Yes, DBG welcomes the proposal from ESMA allowing for a significantly higher number of bonds to qualify as liquid. In particular, we do appreciate that the number of liquid bonds increases significantly with the new thresholds which means higher transparency for this class of instruments. We have no objection regarding the bucketing of bonds and the different thresholds proposed.
We noticed that "ESMA is of the view that the bond issuance outstanding amount should be the relevant factor when assessing the liquidity of a bond" which DBG agrees with. Having however noticed of paragraph 18 in the Annex III – RTS 2 page 172 of the consultation paper, it is unsure to us where the information shall be sourced from in case ESMA were not to publish the relevant flags and thresholds. Because trading venues do not have access to this information, we would ask ESMA to ensure they provide the relevant metrics and inform of the frequency of the updates (daily, monthly, quarterly).
<ESMA_QUESTION_CP1_11>

Q12 Do you agree with the proposed thresholds specified in the above Tables? If not, please justify by providing qualitative data to your analysis and differentiating per asset class.

<ESMA_QUESTION_CP1_12>

Yes, DBG has no objection to the proposal from ESMA. Whereas we are in favour of the highest transparency, we do understand that investors also need to be protected against information leakage and market impact which justifies post trade deferrals. We do however appreciate that ESMA considers that “the great majority of trades should be subject to real time post trade transparency” and that “90% of trades should fall under this category”. This means that indeed the limited number of large size trades will benefit from a deferral justified by the need of protection against information leakage, but we also do notice the large differences in the distributions depending on the bond type. More generally, we do appreciate that the deferrals have been reduced significantly and harmonised across the EU.
<ESMA_QUESTION_CP1_12>

Q13 Do you agree with the maximum deferral period set out in the tables above?

<ESMA_QUESTION_CP1_13>
Yes, DBG does generally agree with the proposal from ESMA and we do appreciate that the deferrals have been reduced significantly and harmonised across the EU. Whereas we are in favour of the highest transparency, we do understand that investors also need to be protected against information leakage and market impact. We however question the delay of 15 minutes for all Category 1-bonds trades, in particular liquid sovereign bond trades with a size of EUR 5m – 5.5m based on the post-trade SSTI threshold; some trades would as we understand be published with a 15-minute delay, when they currently are published real time. ESMA might put all Category 1-bonds trades under the same regime as small trades.
<ESMA_QUESTION_CP1_13>

Q14 Do you agree with a static determination of liquidity and determine that all SFPs are illiquid? If not, can you suggest any alternative methodology on how to define liquidity for SFPs?

<ESMA_QUESTION_CP1_14>
Yes, DBG has no objection to the classification of all SFPs as illiquid, which avoids the step for the determination of liquidity with the same current outcome.
<ESMA_QUESTION_CP1_14>

Q15 Do you agree not to introduce changes to the threshold size currently applicable to SFPs as provided in RTS 2?

<ESMA_QUESTION_CP1_15>
Yes, DBG has no objection to the proposal from ESMA.
<ESMA_QUESTION_CP1_15>

Q16 Do you agree with the maximum duration proposed?

<ESMA_QUESTION_CP1_16>
Yes, DBG has no objection to the proposal from ESMA.
<ESMA_QUESTION_CP1_16>

Q17 Do you agree with a static determination of liquidity and determine that all EUA are liquid? If not, can you suggest any alternative methodology on how to define liquidity for EUAs?

<ESMA_QUESTION_CP1_17>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP1_17>

Q18 Do you agree with the proposed framework for the deferral regime for EUAs? If not, please suggest an alternative methodology.

<ESMA_QUESTION_CP1_18>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP1_18>

Q19 Do you agree with the classification of ETCs and ETNs as types of bonds?

<ESMA_QUESTION_CP1_19>
DBG is of the view that ETCs and ETNs are products similar to ETFs. ETCs and ETNs can track different markets, including equity and commodity, exhibiting the same properties in the cash market in terms of liquidity and trading participants as regular ETFs, which would render it reasonable to re-classify ETCs and ETNs as equity instruments. Because of their construct, those instruments are all traded under the same trading model, on both our Xetra and our Boerse Frankfurt platforms, with the same transparency requirements. We do not object to the classification of ETCs and ETNs as bonds from a legal perspective but do regret that the transparency requirements are not aligned with those applying to ETFs. The classification of ETCs and ETNs as bonds also has the very practical implication that post trade information will be reported in the future consolidated tape for bonds with the relevant deferrals whereas we are of the opinion that this information shall be reported in the consolidated tape for ETFs. In that sense, maybe ESMA could consider that despite their classification as bonds, ETCs and ETNs could be considered as ETFs for transparency requirement and reporting matters.
Furthermore, thresholds for bonds and fixed-income derivatives are calibrated to a different kind of market, resulting in much higher thresholds for Eurex ETCs/ETNs options than it should be if they were classified similarly to ETFs.

<ESMA_QUESTION_CP1_19>

Q20 Do you agree with the liquidity determination for ETCs and ETNs. If not, please suggest an alternative approach to the liquidity determination.

<ESMA_QUESTION_CP1_20>
Yes, DBG has no objection to the proposal from ESMA.
<ESMA_QUESTION_CP1_20>

Q21 Do you agree with the pre- and post-trade thresholds? If not, please suggest an alternative methodology.

<ESMA_QUESTION_CP1_21>
No, as explained in our response to Q19, DBG considers ETCs and ETNs and ETFs as similar products, because of their constructs and would consider that the maximum price and volume deferral shall be fixed at the end of the trading day and not end of T+2, to be aligned with the requirements for ETFs, notwithstanding the liquidity determination.
<ESMA_QUESTION_CP1_21>

Q22 What is your view in relation to the implementation of the supplementary deferral regime for sovereign bonds?

<ESMA_QUESTION_CP1_22>
Yes, DBG agrees with ESMA's suggestion for only the volume omission supplementary deferral to be used with respect to sovereign bonds. The aggregation supplementary deferral would be very difficult for data users to consume and for data providers to implement and manage.
<ESMA_QUESTION_CP1_22>

Q23 Do you agree not to make any changes to the temporary suspension of transparency obligations framework as it currently in RTS 2?

<ESMA_QUESTION_CP1_23>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP1_23>

Q24 Do you have any further comment or suggestion on the draft RTS? Please elaborate your answer.

<ESMA_QUESTION_CP1_24>

TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP1_24>

Q25 What level of resources (financial and other) would be required to implement and comply with the draft amended 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.

<ESMA_QUESTION_CP1_25>
The changes developed in this consultation paper, although simplifying methodologies and providing more stable parameters thanks to the static thresholds, still require significant changes in our systems from a logic perspective but also require potentially access to different external sources, changes to the management of reference data, market data fields and formats, as well as the inclusion of new transparency indicators on trade messages. We would also underline that even if the probability of very large transactions in bonds for instance on trading venues is limited, their possibility still requires that the whole deferral system is updated to the new requirements.
We would also urge ESMA to align timelines wherever possible, across all topics covered by the MiFIR Review. In the context of this consultation, we would urge ESMA to align the application date for both RTS 23 and RTS 2. Following ESMA suggestion, changes to RTS 23 and RTS 2 would both be applicable 18 months after publication of the Technical Standards, consistent with the interlinkages between the texts. Any mismatch would result in missing data for a certain period of time as fields will have been removed from RTS 2 but not yet included in RTS 23. In addition, this could lead to potential rejections in files if they are not all fully aligned. The harmonisation of the timelines would also give the relevant parties sufficient time to implement the changes.
<ESMA_QUESTION_CP1_25>

CP on the RTS on reasonable commercial basis

Q26 Do you agree to the general approach used to specify the costs and margin attributable to the production and distribution of market data? Please elaborate.

<ESMA_QUESTION_CP1_26>
DBG agrees with ESMA that ESMA is not a price regulator. This understanding must remain the guiding principle for L2 overall. In this context and fully in line with the L1 requirements which are referring to commercial terms for pricing of market data as well, it is consequential that ESMA is applying principles based approaches, both for the cost accounting as well as for the determination of the reasonable commercial margin over the cost incurred for the production and the dissemination of market data. Any other, or more strict requirements, could cross the fine line to price regulation which, indeed, would as well be in strong contrast to international standards, and could steer

EU exchanges into competitively disadvantaged positions compared with their international peers. This would even be worse in the context of the newest EU debate introduced by the EU commission and discussing a consolidation amongst EU exchanges. Price regulation would typically be considered only if the issue identified had resulted in substantial harm to consumers, and other regulatory methods were insufficient to address the problem. The disadvantages of price regulation are well understood. It can result in distortions and unintended consequences, which must be avoided. It is important to ensure that EU exchanges will not be disadvantaged vis a vis their international peers, while still be in the position, both to innovate as well as to provide highly reliable services and market data to their customers in future.

In this context, it may be important to note, that in contrast to the many complaints of certain associations, that data fees had increased significantly resulting in smaller data users not being able to obtain the data they need, a recent FCA study revealed a different picture. Indeed, when investigating data users, the FCA recently found that a) anybody who needed access to data had access to that data, b) that the cost of data was rather insignificant in relation to all other costs incurred by the data users, and finally, c) that especially the buy side incurred only relative low data costs, and furthermore, that these data cost not only in relative but as well in absolute terms were surprisingly small. This finding by the FCA is of course surprising, when listening to complaints about high data cost, especially from the last-mentioned group. Furthermore, none of the entities reviewed, could even explain how such data cost would be passed on to their customers (see last FCA Wholesale Market Report, 2024). The FCAs findings finally go hand in hand with a study by OXERA, “Pricing of market data services: an economic analysis”, February 2014, which found that “the market data costs (in relation to the market data provided by stock exchanges) are relatively small compared to the total costs that investors incur in relation to trading and post-trading”, and that “annual market data cost represent less than 0,01% - 0,02% of assets under management”. Recent updates on these figures by OXERA reveal that this has not changed.

Taking note of the above, it confirms the importance, to apply a proportionate regulation and avoid any unintended negative side effects, especially for those becoming regulated. In this context we highly appreciate ESMAs upfront confirmation that data should remain a viable business for data providers, such as exchanges. In this context we would appreciate the adaption of ESMAs confirmation as regards the viable business for data providers in recital 6 of the draft RTS on RCB, which currently refers to “market participants” instead of “data providers” as noted in point 195 of ESMA’s consultation paper.

We note ESMA’s more granular approach of identifying potential cost categories in the context of producing and disseminating data compared to a general characterization of cost types only. We assume that this may provide for more transparency overall, and hence a better understanding of the relevant areas in affected legal entities. By doing so, it must be ensured, however, that a) cost components as listed are not defined or understood to be exhaustive, i.e. resulting in restrictions to affected entities with different business models (here we appreciate Article 2(6) of the draft RTS

on RCB which is essential to stay), b) does not foreclose the recovery of relevant cost incurred, by excluding cost components through regulation from the beginning, i.e. such as audit cost, c) regulate by accepting the nature of market data (which is clearly described in academic literature), which is both, a joint product with exchange trading as well as a digital product, as both characteristics are indeed affecting the cost structure and the pricing of market data of any exchange, d) that proposed requirements remain proportionate for the regulated entities. While regulation must be applicable in a sensible and proportionate way, crossing the line towards price regulation must strictly be avoided.

ESMAs proposed categories for costs, such as exchange infrastructure, including connectivity inbound and outbound where applicable, physical assets, soft- and hardware, as well as human resources and financial costs seem overall reasonable. We note however, that these are overarching categories only where costs may comprise more granular costs such as the development and implementation of market models by the exchange, testing of software, application of regulatory requirements in the context with technology used for production and dissemination of data, etc., and which hence need to be taken into account for. Cost definitions by ESMA hence must NOT be exhaustive to allow proper cost accounting for market data. We appreciate that this seems to be the understanding of ESMA as well, for example in their comments under point 178. Furthermore, like any product or service of an exchange, or any other legal entity, shared costs such as a fair share of management cost, or legal support, or compliance may be relevant in this context as well. The latter costs would be indirect costs shared across the entities, and consequentially, Article 2(1) of the draft RTS on RCB should include the word “indirectly” beside “directly”.

We do as well agree with ESMA that a clear cost accounting methodology must exist at each data provider/regulated entity (and to be shared with the supervisor on request) and no double-counting of costs across shared resources should be applied. In this context, we would like to clarify for the avoidance of doubt, that neither joint costs between trading and production of market data are being double counted. Instead, costs are and should be allocated once only, as well to any shared resources. However, it is important to note that joint costs (which are a special form of shared costs) should be possible to be attributed via a revenue key rather than any other cost allocation key due to the nature of joint products and in line with economics (Ramsey Model). Diverting from this would interfere with exchange’s right of doing business *(see as well “Is ESMA becoming a price regulator?”, OXERA, Sept. 2014)* risking to traverse into price regulation.

On a more general and overarching note the cost of producing market data is the cost of running an exchange (simple model). Market data is a joint product with trading as one cannot exist without the other. It is not an ancillary product to trading as being argued by some parties with contrasting interests. Exchange data being a joint product with trading is broadly acknowledged in academia since decades *(“What is an Exchange”, Ruben Lee, Oxford Press, 1996; “Pricing of market data services: an economic analysis”, OXERA, February 2014).* Market data is produced on exchanges

during the price formation process on exchanges. Exchanges invest significantly in their infrastructure, market models, liquidity incentivisation, trading rules, market surveillance, data quality, and services and products providing for an attractive environment for the provision of orderly trading and the production of highly reliable and trustworthy data. These investments must be ensured as well going forward, for trustworthy and transparent markets in the EU. Exchanges are depending on cost recovery through both, trading and production and dissemination of market data. As trading and data are joint products, and meaningful cost recovery via both products must remain possible. The freedom to pursue an economic activity is enshrined in Article 16 of the Charter of the Fundamental Rights of the EU. This would include the freedom to determine the price of a service or product. Excluding specificities of digital product pricing would severely curtail pricing freedom of the regulated data providers and exhaust almost any differentiated pricing.

As regards the margin applicable to market data, we appreciate ESMAs principles-based approach and the fact that the margin should be similar/equal to the margin applied to similar products, respectively to the trading venues business overall. This takes note of the fact, that ESMA is not a price regulator, and furthermore, of avoiding a price regulatory impact on trading venues, which are listed entities. Usually, margins differ across sectors. For listed entities it is important that their margins are near the margins incurred in their relevant sectors.

However, DBG does not agree with ESMA's interpretation of Recital 12 in the L1 text (point 170 ff.), though, that so called value-based pricing is not allowed anymore. Firstly, the L1 text is referring to "individual pricing" only and not to "group pricing" or "value-based pricing" per se. Secondly, due to the specific nature of data being a digital product, which indeed does require a specific way of pricing. Digital goods, such as market data, are defined by high fix costs, which are all required in order to produce a digital product. As the cost base usually is fix predominantly, cost allocation cannot be applied as with non-digital products while the attempt of a marginal pricing would result in providers not be able to recover their costs. *("Information Rules, Carl Shapiro and Hal Varian, Harvard Business Review Press, 1998; "What is an Exchange?", Ruben Lee, Oxford Press, 1996; "Pricing of market data services - An economic analysis", OXERA, Feb 2014)* However, fix cost bases must not provide for challenge, as long as, e.g. customer's abilities to contribute to the cost recovery are being taken into consideration, the customer type, and the use of data. Acknowledging the specific requirements of digital or information goods is especially important, when targeting fair and non-discriminatory access to data. Consequences resulting from neglecting this fact would be highly negative for the EU market, its participants, and especially smaller data users, as we will explain in more detail further below. It would furthermore result in an outcome which would not be in line with ESMAs mandate.

To summarize:

- DBG appreciates and strongly supports the principles-based approaches adopted by ESMA, both in the context of cost and margin definition, as ESMA is not a price regulator.

- A viable data business is of importance to exchanges in order to provide for transparent and stable markets.
- The overarching cost categories are generally fine but should not be understood as being exhaustive. Article 2(6) of the draft RTS on RCB reflecting the diverse set-up of venues is to be maintained. Joint costs of trading and market data (production costs) are a special form of shared costs. Indirect costs and audit costs must be included in the cost base.
- As trading and data are joint products, and meaningful cost recovery via both products must remain possible.
- Market data is a digital good, with a specific cost structure, and specific rules for price setting to be considered. Article 13 MiFIR and no other provision in the text dictate how the different user categories are to be established, let alone that this has to be on cost differences.
- L1 text is referring to “individual pricing” only and not to “group pricing” or “value-based pricing” per se. We recommend to maintain an open mind to group-based pricing for a widely inclusionary approach.

<ESMA_QUESTION_CP1_26>

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.

<ESMA_QUESTION_CP1_27>
While DBG generally supports ESMAs principles-based approach on the identification of different cost categories attributable to the production and dissemination of market data, we do not agree on all details as proposed by ESMA. Please find our comments below.

DBG appreciates the cost categories as defined by ESMA in Recital 3 of the draft RTS on RCB, they seem to cover the overarching categories rather well. Looking at a more granular level, however, we would consider that not only “directly attributable costs to the production and dissemination of market data” must be acknowledged, but as well a fair share of any relevant “indirect costs” (or common costs – i.e. management costs, legal support, compliance, others) which indeed must be recovered by data providers as well. Consequentially, Recitals 3, 4, 5 and ArtIcle 2(1) of the draft RTS on RCB should include the word “indirectly” besides “directly”. Otherwise, the data production and dissemination would become cross-subsidized by other products and services of the data provider affected. Furthermore, while those costs would be fully attributable to the cost base for CTP providers with only one product (the CT) as assumingly no shared costs would be incurred as the management would be a direct cost to market data provision, APAs and Trading Venues would miss out on these costs for their cost calculations, un-levelling the playing field further. Of course, in case there were any other services provided by the CTP, shared costs would be incurred as well.

On a similar note, we consider the inclusion of audit costs for market data into the cost components highly important. Data is a digital product, it has an elusive character, which allows an easy sharing of the data with others once obtained from the data source. *("Information Rules, Carl Shapiro and Hal Varian, Harvard Business Review Press, 1998)*. This not only has impact on the way of pricing data, but it makes audits by trading venues necessary, to ensure that there is an incentive to fairly contribute to the cost recovery of data providers, as others would have to pay more for those who are not fairly contributing. Taking note of the nature of the product being digital and elusive, and for a fair cost recovery, audit costs should be acknowledged as a cost component for the provision of market data. If audit costs were not included in the cost base, it would leave the question, which product or service should bear such costs in the end, and if cross-subsidization of market data by other services and products would be right way. Furthermore, in case of "free riders" there is a significant risk, that costs would have to be recovered from a reduced number of users, with the risk of comparably higher prices for those who pay, as cost recovery would have to take place across less users.

Furthermore, as regards ESMA's concrete proposals, we agree with the points summarized under points 180, 181, 183, 184, 185 of ESMAs consultation paper on RCB, where ESMA rightly shares our view that the list of costs should not be exhaustive. We fully agree with ESMA and hence Articles 2(1)(e) and 2(6) of the draft RTS on RCB, which take this into consideration must remain as they are. It is important to understand, that not only business models between Trading Venues, APAs and CTP differ from each other, but as well business models across different exchanges tend to do so, too. Please note as well, that the cost components may look different across the various trading venues in the EU, especially, once comparing small venues with larger ones. To provide just one example of many: often small venues have to outsource certain operations, which then is reflected in a different cost structure as well as different cost components. It is essential for ESMA to continue to recognise this as well, hence there is no "one-size-fits-all" model possible. While the overall cost categories generally seem suitable for all data providers from a high level, details indeed may vary.

As regards trading venues, there is one specificity on the production of market data. As regards the shared costs with other services, we would like to include a notion to the production costs of market data, the so-called joint costs with trade execution, which is a specific form of shared costs at trading venues. Joint costs are being incurred, in case two (or more than two) products are being produced together, and none of the products may be produced without the other. An example found in academic literature would be wool and lamb chops, but as well exchange trading and market data *("What is an Exchange?", Ruben Lee, Oxford Press, 1996; "Pricing of market data services - An economic analysis", OXERA, Feb 2014).* The nature of the costs being joint has an impact on the cost allocation principle of these specific costs, which we will look at in our answer to Q 28 below.

On a further note, DBG promotes a specific notion for the CTP, who will apply a revenue share mechanism in line with Article 27h(6) and (7) MiFIR with mandatory market data contributors (trading venues). This may have a special impact on the cost structure of the CTP, which should explicitly be noted by ESMA. The revenue shared with trading venues, should be able to be considered as a cost component for the CTP already in ESMA's draft RTS. In this context – but on a side note - MiFIR does contain a general revenue-sharing model with trading venues, albeit still being unclear in many respects, i.e. how the revenue share will be derived in the first making it somehow unpredictable. We would consider it important that a rule would be defined to derive such a revenue share. For a potential derivation of a revenue share "pool" we would like to refer to the proposal made by our industry association FESE in this respect.

DBG fully agrees with ESMA that a clear cost accounting methodology must exist per each data provider/legal entity (to be shared with the supervisor on request) and no double-counting of costs across shared resources should be applied, and costs including all shared costs (and joint costs) should be allocated once only.

On this note we would like to note that listed companies, such as exchanges, are externally audited on their accounting procedures, and hence, a double counting of costs would be rather unlikely. ESMA's concerns of double counting of costs (point 191 in ESMA's consultation paper on RCB) hence may be unnecessary in the first place.

Summarized:

- Recitals 3, 4, 5 and Article 2(1) of the draft RTS on RCB should include the word "indirectly" besides "directly". Otherwise, the data production and dissemination would become cross-subsidized by other products and services of the data provider affected.
- Besides "joint costs" there are other shared costs to be acknowledged, such as "indirect costs" hence cost recovery shall include directly as indirectly applicable costs. There is no reason to exclude such costs by regulation. For the avoidance of cross-subsidizations, common costs (where shared costs apply to all products and services of a legal entity alike) and data audit costs (taking note of the digital and elusive nature of data) must remain applicable to the production and dissemination of data as well in future.
- Cost structures tend to differ across different data providers and in most cases quite substantially. In consequence, there is not one cost structure that fits all data providers, and regulators need to take this into account. Consequentially, cost components must not be exhaustive, and Articles 2(1)(e) and 2(6) of the draft RTS on RCB must be pertained as is. It is important to acknowledge as well the need to innovate and the impact such innovation may have on the cost structure.

Concrete wording proposals for the draft RTS:

Recital 3. "The costs attributable to market data should be calculated by considering cost categories which are directly **and indirectly** associated with the production and dissemination of market

data. Such categories should include costs related to the infrastructure which is used for the **joint** purpose of **trading and** producing market data and **for** disseminating market data, the cost of … and of the costs including ~~administrative~~ costs for producing and disseminating market data. ….. ~~Audit costs should not be included in the allocation of costs of production and dissemination of market data, as those cost shall not be part of fees for market data.”~~

As regards Recital 4 of the draft RTS on RCB we promote the following concrete adaptions to take not of the production and dissemination of market data alike and as supported by academic literature:

“To establish fees for market data on an RCB, it is important to differentiate, for instance, the costs which are attributable to ~~the primary business of~~ **the joint cost of** trading ~~venues in terms of bringing together buyers and sellers~~ **and market data**, from the costs, ~~**directly**~~ solely attributable to the production and dissemination of **market** data.”

As regards Article 2 of the draft RTS on RCB we promote the following concrete adaptions:

Besides confirming that **Articles 2(1)(e) and 2(6) must be maintained in order to ensure acknowledgement of the different business models and cost structures emanating from this**, we would like to promote the following adaptions:

Article 2(1) should include a notion of the joint product nature of market data, i.e. “… disseminating market data, **a joint product with trading**, shall be calculated…”

Article 2(1) should include a notion to **“indirect cost”**, besides of direct cost, as the cost recovery must apply to all relevant shared cost within an entity: “… market data providers and ~~**only**~~ include costs that are **indirectly** and directly associated with the production and dissemination…”. “The calculation of cost should include **but not be limited to**: …”

Furthermore, Article 2(1) should ideally be completed for further clarification by including **new “(f) joint costs as applicable in the context of trading and market data production.”**

Article 2(1)(b). in line of the above arguments, we would like to propose: “… and software licenses and leased services **amongst others**, which ~~**ensure the connectivity**~~ **may be** necessary for the production and dissemination of market data.”<ESMA_QUESTION_CP1_27>

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.

<ESMA_QUESTION_CP1_28>
DBG fully agrees with ESMA of the necessity of clear cost accounting principles or methodologies per data provider for the identification of the relevant cost base incurred for the production and dissemination of market data as defined in Article 13(1) MiFIR. Besides relevant cost components, we agree as well that the methodology should encompass clearly defined cost allocation principles in the context of shared costs and including joint costs with trading (a special cost of shared costs).

In Recital 5 of the draft RTS on RCB ESMA proposes, that all shared costs are being appropriately apportioned by specifying how much each resource contributes towards the production and dissemination of data. While we generally agree with ESMA on clear and accurate cost apportioning, we need to caution ESMA to not become too strict and create an overly bureaucratic burden of cost accounting in the context of RCB in the EU. We urge ESMA to take a reasonable position as regards a practical implementation of cost allocation keys / principles, for costs which are mainly fix costs in nature, and where overly artificial cost allocation keys would create nothing else but a high regulatory burden for the industry, increasing costs overall with little benefit to data users, if at all. It is important, that regulatory requirements remain sensible and pragmatic and not be disproportionately granular, thus increasing costs without generating only little or no benefits at all for data users.

In this context and taking note of market data and trading being joint products to each other, the production costs of the data need to be recovered by both, trading and market data alike. For the avoidance of doubt, again, this does not mean that the costs are being double counted by trading venues. To the contrary, joint costs are fairly being apportioned to trading and the production of market data alike. Furthermore, in the case of joint costs (applicable to any exchange business model, simple or diverse), it is essential to understand that the allocation of joint costs, must remain flexible. This means that besides, i.e. according to usage these joint costs should be able to be allocated according to a “cost allocation key based on revenues”, which is fully in line with academic understanding of a joint product. Not allowing the use of a revenue-based key in this respect would cross the line towards price regulation. Hence, we strongly propose to ESMA to clarify a cost allocation based on revenues to remain possible for the joint costs of trading and market data services. In this context we take note of an incorrect wording in Recital 4 of the draft RTS on RCB, which is referring to trading as a “primary business” which, indeed, is not correct, and which should be corrected. Both trading and market data are joint products, as one cannot exist without the other, hence none is the primary business. (“What is an Exchange?”, Ruben Lee, Oxford Press, 1996; “Pricing of market data services - An economic analysis”, OXERA, Feb 2014; *Is ESMA becoming a price regulator?”, OXERA, Sept. 2014)*

Non-joint costs, such as in the area of market data distribution costs, could be allocated to the cost base according to usage, and here we generally agree with points 186, 187 made by ESMA in its consultation paper on RCB. However, it must be understood, that the allocation of costs according to usage of resources in-house, is not trivial, and may become overly complex and

costly in some cases, or even that there is no clear or stable allocation key at all, hence any requirements must remain proportionate and effective, as well as pragmatic and sensible.

In consequence, the application of fair and reasonable standards should be allowed for the definition of cost allocation keys, in order to not increase cost without any benefits. External Audit Reports shared with supervisors, could ensure that all would be reasonable and correct.

Please note as well, that the joint costs components may look different across the various trading venues in the EU, especially, once comparing small venues with larger ones. To provide just one example of many: often small venues have to outsource certain operations, which then is reflected in a different cost structure as well as different cost components. It is essential for ESMA to continue recognize this and to maintain Art 2(1)(e) and 2(6) of the draft RTS on RCB.

As regards the public disclosure of any cost allocation keys, we trust that this should not go beyond what is currently being requested (examples only) as the data may be sensitive. It seems disproportionate and incompatible with competition law to impose the publication of costs or cost allocation keys on trading platforms, for the sole reason of enabling customers to understand data pricing. Data users should trust in supervisors, who will have full transparency on costs and margins incurred, in order to proof that regulatory requirements have been followed. Again, exchanges might offer a regular external audit report to their supervisors, i.e. on a bi-annual basis in order to keep cost maintained.

Furthermore, differentiating the fees only on “how to provide the data to users”- as suggested in Recital 10 of the proposed RTS on RCB – is ambiguous and seemingly excludes the cost of data production in the first place, and hence the costs incurred by exchanges for the provision of market data. We assume that this may not have been obvious to ESMA aiming to define an RTS applicable for all data providers alike, which indeed, seems not easy to achieve.

To summarize:

- Cost allocation should remain practicable and avoid undue burden on legal entities or traversing into price regulation. As a guiding principle, and within the limits of international cost accounting standards, cost allocation should be reasonable, and not incur further costs.
- The definition of cost allocation keys must remain sensible and practical and take note of the nature of data being a digital good as well as a joint product with trade execution services.
- For joint costs, a special form of shared costs, revenue-based allocation keys must be accepted as well outside of price regulation.
- As regards the public disclosure of cost allocation keys, we trust that this should not go beyond what is currently being requested, i.e. general examples, as the data may be commercially sensitive. Furthermore, exchanges might offer a regular external audit report to

their supervisors in order to support their supervision (i.e. on a bi-annual basis in order to keep cost maintained).

Concrete wording proposals:
As regards Recital 10 of the draft RTS on RCB we promote the following concrete adaptions:

"The fees applied to users in such categories should be set at the basis of the costs sustained ~~to provide data to users~~ **by trading venues for the production and dissemination of data** and a reasonable margin~~, expressed as a percentage of cost~~."

As regards Article 2 of the draft RTS on RCB we strongly recommend including a notion to the joint cost allocation key, which is necessary in the context of joint products:

"Article 2(7) **New** "Joint costs as being incurred by trading venues for the production of market data and trading services alike, and representing a special form of shared cost, may be attributed on the basis of a "revenue allocation key"."

We would strongly appreciate if ESMA would take our clarifying wording proposals into account.<ESMA_QUESTION_CP1_28>

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.

<ESMA_QUESTION_CP1_29>
DBG strongly supports the chosen principles-based approach by ESMA. Another approach would not have been compatible with ESMA's role and neither suitable to the issue at hand. Furthermore, this decision reflects the commercial approach defined in MiFIR.

As regards the margin applicable to market data in general, we appreciate ESMAs principles-based approach and the fact that the margin should be similar/equal to the margins by the data providers in general and on their other services. This takes note of the fact, that ESMA is not a price regulator and, furthermore, avoiding a price regulatory approach on trading venues which is not in the spirit of Article 13 MiFIR, and which could have a significant impact on exchanges abilities to do business and to compete in their markets. DBG neither sees a need for the introduction of additional requirements in this respect, especially taking note of the FCA's recent findings that market data costs seem to be a rather small cost to data users, similar to the findings of an earlier OXERA report, all as referenced in in our answer to Q26 The data fees applied by DBG today, which are already being applied on a cost basis while including a reasonable margin, are moderate in absolute terms, but even more so, once being set in comparison to the overall business costs

of data users as done by the FCA. Any stricter approach would hence be unnecessary and potentially crossing the line to price regulation, which is excluded on L1, and where there is neither a need nor a legal basis for otherwise. We do highly appreciate as well ESMA's confirmation that the application of margin should ensure that data remains a viable business for data providers, while there is a need to ensure wide access to market data. DBG strongly agrees on both.

However, it is important to consider that the nature of data being that of a digital good must be considered when pricing market data. DBG unfortunately cannot agree with ESMA's proposal how to price market data by using different margins over costs incurred per users or user groups, especially while targeting a broad availability of market data to data users of all sizes at the same time. ESMAs proposal to apply different margins to different user groups, would indeed initially require allocating the costs of producing and distributing market data to single data user groups. As these costs are mainly fix costs incurred for the production and distribution of market data, though, it is unclear, how this could sensibly be done. Dividing the mainly fix cost base by the number of users, would result in a higher average cost base for some data users and a lower for others. However, even without a margin being set at the lower end of data fees, some smaller data users would not be in the position anymore to access market data, which would go against ESMA's target in the first place. As regards Article 3(3) of the draft RTS on RCB we do consider the requirement as impossible, as for the avoidance of doubt, it could require to not apply any margin at all, or at least no margin at all at the price entry points of a license structure, especially, once ESMA's proposal of pricing market data would have to be applied. However, even without a margin being set at the lower end, smaller data users would most likely not be in the position to obtain the data they need.

It is not possible to clearly and sensibly allocate a predominantly fixed cost base to single data users or user groups, due to the specific nature of the product being digital. In a nutshell: ESMA's proposal as stands is neglecting the fact that market data is a digital good, which costly to produce, and where costs of production and dissemination are usually a fix cost block, which cannot be allocated to single data users or data user groups. *("Information Rules, Carl Shapiro and Hal Varian, Harvard Business Review Press, 1998).* For a sensible solution, the specificities of data being a digital product and the consequences resulting for cost structure and allocation need to be considered, and the specific requirements to derive a fair pricing structure, which is inclusionary to smaller data users, and allows for the recovery of costs by the data provider (including data production costs), plus a margin. This is in line with economic principles as acknowledged in academic circles *(Carl Shapiro and Hal Varian, OXERA, Ruben Lee)*, and which are suitable to digital products, and as applied today internationally.

Furthermore, pricing data both, conserving its digital nature and on the basis of costs incurred, by taking into account the use and the ability of each data user group to contribute fairly to trading venue's cost recovery, results on the highest "welfare for an economy", in other words in this specific case: the broadest distribution of data to data users. *("What is an exchange?", Ruben Lee,*

OXFORD Press 1996, “The design of equity trading markets in Europe – An economic analysis of price formation *and market data services”, OXERA, March 2019).* While this way of pricing market data (a digital good) is sensible, it allows to provide widest availability of data, while recovering costs as necessary and a margin, and avoiding unnatural/unsuitable cost allocation to data users. Furthermore, leaving out the differentiation of the data scope, or types of usage, could indeed result in discriminatory pricing. Please, revert to our answer given in this respect to Q 31, Q 32 and Q 33.

Indeed, the way how market data pricing is practiced today, both in line with ESMA’s RCB Guidelines and in line with academics understanding of the nature of market data being digital, is providing for the broadest access to market data, and a fair recovery of costs to the production and dissemination of market data. In this context we would like to reiterate that Recital 12 of the Regulation (EU) No 2024/791 is objecting individual pricing only, but not group pricing.

As regards the net profit margin finally:

As regards the margin definition chosen by ESMA, we would favor the net profit margin be calculated **as a percentage of Total Sale** of Market data than as currently proposed by ESMA. The net profit margin a**s suggested by Deutsche Börse is in line with international accounting standards**, and hence comparable globally, if needed. In case the net profit margin as suggested by ESMA is preferred, this must go hand in hand, though, with the unchanged definition of “total cost” as defined in Article 1.1.e) – a definition we strongly support to remain as is, and an adaption in Art 3.2.a) including the “total cost”.

To summarize:

- DBG strongly supports the principles-based approach by ESMA, there should be no stricter requirements in order to avoid outright price regulation which would not be in line with L1.
- However, the application of different margins on costs incurred per customer category as proposed by ESMA in the draft RTS, is not suitable to digital products. For this to work, the fix cost base incurred by trading venues for the provision of trading and data services, would need to be attributable to single user categories in the first place. This is not sensibly possible in case of digital products.
- To provide for a sensible and inclusive pricing, including as well small data users, the currently applied pricing methodology must be retained. Otherwise, ESMA’s target of broad access to market data would be counteracted. We consider, that L1 is objecting individual pricing only, but not group pricing.
- We would like to note as well in this context, that Article 13 MiFIR does not refer to how the different categories of users are to be established, let alone that this should be done on the basis of cost or margin differences across user groups.

Concrete wording proposals:

As regards **Art 3.2.c.** we strongly support this article, but would prefer to see the margins calculated as percentage of Total Sales, if suitable, otherwise to remain as is.

In case ESMA wants to hold on to its definition of net profit margin, for the avoidance of doubt we strongly promote that Art 3.2.a. will be adapted to clarify that the margin is being "set as a percentage of the **total** costs of production and dissemination".<ESMA_QUESTION_CP1_29>

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.

<ESMA_QUESTION_CP1_30>
DBG supports the sharing of information as regards costs and margin with its supervisor, however, ESMA's proposed template for that purpose seems unnecessarily detailed.

Firstly, the inclusion of single cost positions, including the number of items is far too granular, besides others. Not only is the provision of such overly detailed information adding to the regulatory costs on data providers, while regulators are aiming for reducing regulatory burdens at the same time. Furthermore, the detailed information as requested by ESMA may be assumed to include business secrets as well. We wonder, indeed, if a granularity like this is necessary, or if another aggregation level would be more sensible for all, supervisors and data providers alike. For example, we would not consider the number of items to be relevant and being overly granular, while disclosing information usually not be shared with the outside. If needed, supervisors have access to any information at any time already due to national legislation but now as well due to Article 26(2)(iv) of the draft RTS on RCB. For a fact the information granularity requested on a regular basis from data providers reminds at strict price regulation, while ESMA rightly concludes that this is not ESMA's role.

Furthermore, and for the avoidance of doubt, we have realized that in point 202 that ESMA refers to the margin applied to the "dissemination of data" only. This would be highly misleading, as the margin must apply to the production and dissemination of data alike. Hence, we would like to confirm that Article 26(2)(iv) of the draft RTS which is correctly referring to "the reasonable margin applied to the cost of market data production and dissemination" should remain as is.

Alternatively, data providers could provide their supervisors with external audit reports as regards the pricing of market data besides aggregated cost information.

To summarize:

- Overall, the requested information should remain reasonable and proportionate while allowing the respective NCA to form an opinion, hence we would recommend to significantly reduce the granularity of the information to be reported.
- Indeed, if needed Art 26(2)(vii) of the draft RTS provides the NCA with the option to request additional information if and when needed.
- Alternatively, external audit reports could support an aggregated cost report.

Concrete wording proposals:

- We would like to see a wording change from “connectivity” to “data distribution” in Annex II, Section 3, 3.C under non-shared costs and shared costs alike.
- As regards shared costs, for clarity we would recommend including “shared costs, including joint costs with trading”.
- As regards the “Table on resulting costs of data”, we would prefer a clear terminology referring to “market data” instead.

As regards Section 4 – reasonable margin, we wonder what ESMA is referring to as regards “type of data”. Clarification would be helpful, while we assume that ESMA is referring to data products by exchanges.<ESMA_QUESTION_CP1_30>

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?

<ESMA_QUESTION_CP1_31>
DBG would like to use the possibility here to inform that in contrast to the many complaints of some associations, that data fees would be too high resulting in smaller data users not being able to obtain the data they need, an FCA study *FCA Wholesale Market Data Study - Report, Feb. 2024)* revealed different information which would go hand in hand with our information looking at our customer base, and as well with other information by OXERA looking at public available information. Some complaints of associations refer to price lists doubling in terms of pages, still, while this happened after the data disaggregation requirements of data products into pre- and post-trade data in line with MiFIR/MiFID II in 2018.

Indeed, when investigating data users, the FCA recently found that a) anybody who needed access to data had access to that data, b) that the costs of data were rather insignificant in relation to all other costs incurred by the data users, and finally, c) that especially the buy side incurred only relatively low data costs, and that furthermore, these data costs were not only surprisingly small in relative terms but as well in absolute terms.

The FCA findings confirm exchanges arguments that indeed, cost of market data as levied by exchanges is not too high, especially not when set into context, and especially not in the case of

buy side customers. Furthermore, none of the entities reviewed, could even explain how such data costs would be passed on to their customers with a significant effect on them.

These findings by the FCA are of course particularly interesting, when listening to complaints about high data costs, especially from the associations of the last group mentioned above. Costs cannot be the relevant factor as regards the buy side's small data use in order to be very clear. This becomes obvious, as another FCA study on Asset Management (in the context of closet indexing) found operating margins of 35% on average in the asset management area. *(FCA, Asset Management Market Study Final Report, point 6.4.).* Indeed, there are PWC studies which speak about margins of up to 70% in the asset management space.

However, the FCAs overall findings are not the only ones. They finally go hand in hand with a study by OXERA *("Pricing of market data services: an economic analysis", February 2014)*, which found that "the market data costs (in relation to the market data provided by stock exchanges) are relatively small compared to the total costs that investors incur in relation to trading and post-trading", and that furthermore, "annual market data costs represent less than 0,01% - 0,02% of assets under management". Those figures have been more or less confirmed in another study by OXERA in 2022. *('What's the data on market data?', Oxera 2022).*

In context of the above, but as well independently from the above, we would like to point out why we do not see any obstacles to non-discriminatory access to exchange market data, be it on the technical or on the commercial level, to the contrary, data is available in a widely inclusive way, accessible to very small, small, medium, large and very large data users as they need it and as they can afford it, which is highly important especially for the small users. Indeed, market data fees are low in absolute terms and relative terms for all.

Furthermore, below we have summarized additional points, to support our opinion that indeed there are no obstacles to non-discriminatory use of exchange market data:

- Market data contracts have been harmonized as much as possible (taking note that competition law is a restricting factor here, as are venue's specificities) in line with global market standards, the need to co-operate across the value chain of serving data users, and the recent ESMA RCB Guidelines;
- Every interested data user today has access to data via multiple potential options and accesses, being it directly with the exchanges or via a set of diverse third parties, such as market data vendors;
- All customers within the same category are being offered identical terms and conditions as regards their data licenses, in line with ESMA Guidelines 4, 5, 6;
- Every data user usually has access to all market data, services, accesses offered by an exchange (i.e. the case at DBG, no restrictions by the exchange applied, all services are offered to any interested customer), while there are natural choices by data users based

on different needs and abilities. While in principle all services are available to any interested party, there may be natural choices according to specific needs by the data users;
- Timely access to data: exchanges can only control the equal access for each data user, unless the data leaves the premises of the exchange and will be depending on the following value chain, and its own technical set-up;
- Pricing of market data is already based on costs and including a reasonable margin, and more so being fair and inclusive, allowing as well small data users to obtain access to market data (please see as well our answers to Q32, Q 33 and Q34).
- This inclusive approach is beneficial for all involved: all data users, who will have access to exchange market data regardless of its size, the exchange which will receive cost contributions as well from new customer groups of small data users, which are contributing to exchange's cost recovery (and a margin), and hence beneficial for all data users alike, as recovering costs via more data users, even small ones, will contribute to keep data fees stable or lower overall compared to scenarios where less data users would have to shoulder the cost recovery, and finally, the CMU benefitting from transparent markets.

Today, market data is made available to any interested data user including small data users, and hence in a non-discriminatory way. Exchanges' data fees are typically based on a high level of fixed costs and projected revenues to recover the costs (including a margin), while considering a group-based fee structure which takes into account the various data user groups and their ability to contribute to cost recovery in order to derive data fees (this is in line with academic views for market data, and digital goods). Furthermore, data users who use more data than other data users (legal entities) do contribute more to exchanges' cost recovery than those who use less data (retail or small legal entities). If exchanges disregarded the type of usage by data users, costs would not be recovered efficiently. Only because those who generally can be expected to benefit the most pay their fair share towards exchanges' cost recovery, do those with lower purchasing power have access to market data. This approach allows for fees that "enable data access to the maximum number of market data clients", including the smallest ones, as required in Article 3(3) of the RTS. The new proposal to base data fees on costs only (plus a margin) neglects that fact the production costs are predominantly fix in nature, and thus a sensible cost allocation to various user groups cannot be made. This fact is broadly acknowledged by various academics alike as being common to digital products, and specifically, in the context of exchange market data by Ruben Lee *("What is an Exchange?", Ruben Lee, Oxford Press, 1996).* In case there was one price only applying to all user group alike, smaller data users would most likely not be in the position to obtain data anymore. Hence, the current proposal by ESMA as regards the pricing seems to lead to a discriminatory set-up, discriminating smaller data users.

It is important to understand that besides the costs incurred, and besides the use of data, the type of data user is relevant for a non-discriminatory access to market data. The type of user indicates on the general ability of a user group to fairly contribute to cost recovery (i.e. retail user vs index provider) and hence contributes to the goal of inclusive data access to market data. And only if each data use is being included (i.e. display use, non-display use, redistribution) can costs be

recovered in a fair way keeping data fees as low as possible for the non-discriminatory access as well for small data users. Please see as well our answer to Q29.

As regards the wording of the draft RTS on RCB we would like to make the following comments:

- As regards Article 4(2), ESMA's proposal would benefit from wording adaptions. We generally agree that the "same schedule of fees and the terms and conditions to access market data should apply to every client". However, the wording remains somehow ambiguous as the schedule of fees does not include a link to "usage". We Hence would suggest a wording adaption accordingly.
- As regards Article 4(5), the meaning is unclear to us, while we assume that it may recur to Article 4(4) of the draft RTS. As regards Article 4(4) it is important to understand that various options are available for different customer groups, how to access exchange data. While no restrictions are being made for the benefit of free choice, there are natural fits when customers freely choose from the offer.

<ESMA_QUESTION_CP1_31>

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.

<ESMA_QUESTION_CP1_32>
DBG understands that ESMA is looking for an alternative of defining differentials in fees for different customer categories.

Against claims by various associations, already today, exchanges price their data fees on the basis of costs incurred for the production and distribution of market data (plus a reasonable margin over the costs incurred). Usually, predominantly fix costs are being incurred for the production and distribution of market data. In consequence, a direct cost allocation to different customer groups in a sensible way is not possible. This is well known by economists (data being a digital product) and hence suitable ways to derive fees for digital goods are a necessity *("Information Rules, Carl Shapiro and Hal Varian, Harvard Business Review Press, 1998; "Is ESMA becoming a price regulator?", OXERA, Sept. 2014).* The recommended pricing, which ensures that the so-called highest welfare effect is being achieved is the one which takes into consideration the different abilities on the data users to contribute to the cost recovery of the data provider.

DBG does not consider that a focus on a small part of data distribution, i.e. connectivity, transmission channels, or volume of data, will be suitable to identify differentiating factors for market data fees. A direct connection may lead to display data use, or non-display data use, the same applied in case data has been soured via a redistributor. Furthermore, in point 221 of the Consultation Paper as regards to RCB, ESMA proposes that fee differentials may only be applied according to

cost differentials. Different connectivity options may indeed imply variable costs, however, compared to the costs of producing and distributing market data this is hardly relevant.

Furthermore, looking at transmission channels, connectivity, data volumes as decisive factor for fee differences will not solve the issues at hand. In their Guideline 2 ESMA makes a clear distinction between market data fees and the indirect services for accessing market data offerings such as connectivity. The predominantly fix costs incurred for the production and distribution will still have to be allocated in a sensible way, the “new license structure” would be set-up likely in a way not being compatible with the global industry, nor with the current market data vendor models, where still most data users access exchanges market data from, and it will impact data users themselves as again once new contracts and policies will need to be adopted and different to global standards applied today.

Instead of the way of sourcing market data, it is useful, respectively necessary, to apply other means in order to ensure the common goal of broad market data availability. The use is relevant per user within the contracting parties. Besides the use of data, the type of data user is supporting variables as well in this respect. The type of user indicates on the general ability of a user group to contribute to cost recovery (i.e. retail vs index provider) and hence contributes to the same goal of overall inclusive availability of market data. Only if each data use is being included (i.e. display use, non-display use, redistribution) can costs be recovered in a fair way keeping data fees as low as possible for the benefit of smaller data users.

Besides the customer categories, important measures of data use are „user-access“ and „device access“.

To summarize:

- Connectivity, transmission channels or similar in the context of data distribution only are not sensible elements be used for the purpose of market data pricing.
- Instead, ESMA should look at the usage of data, the customer category, and the unit of count, which should be „user-access“ and „device access“.

<ESMA_QUESTION_CP1_32>

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

<ESMA_QUESTION_CP1_33>
DBG strongly supports the differentiation of user groups. Especially Articles 5(1)(i) and 5(1)(iii) of the draft RTS on RCB are strongly supported by us. As regards Article 5(1)(ii) we have certain concerns, which we line out below. While Articles 5(1)(iv) and 5(2) need to be rejected in their current form.

We strongly support Articles 5(1)(i) and 5(1)(iii) and highly recommend ESMA to keep these paragraphs as are, as Article 5(1)(i) ensures clear and understandable customer groups for all parties while Article 5(1)(iii) ensures clear understanding possible for data users and is a clear minimum to keep.

We would generally be supportive of Article 5(1)(ii) as well, as it is in essence a sensible requirement for non-discrimination of data users within one user group. However, due to its link to Article 3, we cannot support in its current form, and as lined out further above in our answer to Q29 and Q32. Article 5(1)(ii) directly refers to Article 3 of the draft RTS which requires to differentiate data fees solely on the basis of different margins within a user group. As pointed out in our answers to Q31, we consider this to be a difficult endeavour, as ESMA's RCB proposal does not consider the peculiarities of pricing digital products. Hence, we propose to delete the reference to Article 3 in Article 5(1)(ii) or the article itself.

As regards Article 5(1)(iv) we like to argue again in the favour of inclusionary pricing again, and the need of users to fairly contribute to the recovery of costs incurred by data providers. Taking into account that a) data should be accessible to any interested data user including small data users, and b) costs need to be recovered by data providers, it is sensible to recover costs in a way, which is looking at the use made of market data by data users (and ideally their ability to contribute to cost recovery). It is a minimum requirement, that smaller respectively less intensive data users should not pay the same fees as large and extensive data users. Hence, we would not be supportive of Article 5(1)(iv), as it would be in strong contrast with an inclusionary pricing of market data.

Furthermore, and due to the same reason as above, we are highly concerned as regards Article 5(2) which only allows incremental price adaptions on the sole basis of multiple and significant extra costs, which is impossible due to the digital nature of the data products. This would make Article 5(2) impossible to be implemented and hence highly irrelevant. Hence, as regards Article 5(2) we propose amendments in line with ESMA's Guidelines due to the fact, that a pure cost-based pricing is neither sensible nor fair or inclusionary. In this context we would like to note, that L1 seemingly does not task ESMA to define how prices are being set for market data, and hence the inclusion on Art 5(2) of the draft RTS on RCB seems to contradict ESMA's mandate.

Article 5(1)(iv) and Article 5(2) would lead to the establishment of one uniform price for all market participants, irrespective of the situation whether they are retail investors, small-, mid- or large-size enterprises. This uniform price would discriminate against retail small- and mid-size enterprises (as the fees could be higher as before) and would be of an advantage for large-size enterprises (as the fees could decrease). This could be considered as a discrimination in light of the standing principles of the European Union to provide for the freedom of service provision (Article 56 TFEU) and to strengthen competition (Articles 101 et seq. TFEU). In this context, we would like

to make reference to ESMA's *Final Report on Guidelines on the MiFID II/MiFIR obligations on market data, 2021* and the introduction of standardised units of count for both display and non-display data. The concept of standardized units of count is sensible to the factual use of the data as it targets the exact needs of small-, mid- or large-size enterprises. That it is intended to withdraw from that concept for the introduction of a uniform pricing concept leading to a discrimination of small- and mid-size enterprises should be reviewed from the perspective of the aforementioned guiding principles of the European Union. Furthermore, it is recommended apply the requirements of Article 5 of the draft RTS on RCB within the categories of display data, non-display data and onward dissemination (which are the common types how market data is being put in use by market participants).

It is also worth highlighting that the RTS on RCB targets the sources of the market data (e.g. trading venues, certain data reporting services providers under MiFID II) leaving aside further intermediaries such as data vendors. There is a high risk that ESMA's approach will not have a practical impact as the data vendors with their license and pricing models are not subject to the RCB requirements and will therefore not change such models. As market participants factually receive the market data from such data vendors (and not directly from the sources), this will have an impact on the regulatory implementation.

To provide further nuance to ESMA, roles in the market today are blurring significantly, especially within the larger investment firms. Large and well diversified data user firms, are using market data extensively, be it in form of display, non-display, or redistribution, and the context of trading, index creation and/or others, often all under one roof. In order for a fair market, extensive users of data need to provide a fair share of cost recovery directly related to their extensive use. Consider a set of fix cost which need to be recouped by the data provider (leaving out margin here for a moment and which is derived on the overall costs incurred), and a set amount of small and large data users. In scenario 1) everybody would pay according to their usage and their ability, this would allow for a fair and inclusive transparency provision. In scenario 2) all users would pay the same fee, regardless of their ability to pay or of the extensiveness of use. It is clearly to be expected that in scenario 2 small customers would most likely not be in the position anymore to obtain access to market data. In order to ensure a fair recovery of costs across a rather diverse set of data users, and in order to allow for a low entry level of fees, it is highly important to recover costs across as many data users and uses as possible, as everybody who is contributing to cost recovery is helping to t keep stable or even to lower data fees overall, in consequence, and everything else equal. Please note as well, that instead of a higher single fee for all data users alike (at least for those who can afford it), dedicated fees per license / use are a fairer model to apply.

Consequentially, as regards Art 5(2) of the draft RTS on RCB we would like to propose to ESMA to revert back to the original wording as applied by ESMA in Guideline 5: "as an exception, market data providers may add a proportionate increment of the relevant fee, where there are multiple

and significant different uses made by the customer of the data. Market data providers should clearly display in their market data policies the amount of the increment of the relevant fee."

Finally, we take note of the accusations of certain associations summarized by ESMA in point 218, that exchanges set up multiple different user categories resulting introducing an unjustified increase of data costs, or that data user groups may contain single users only with the aim to generate revenues. For a fact, in the case of exchanges, user groups are generally rather standardized globally, due to the fact that exchanges are part of a larger value chain, including redistributors to serve data users. However, exchanges have to adapt to changing market and data needs, and hence this may be reflected within the licence structure. The overarching aim of adapting license structures (only when necessary) is to mirror the changes in the markets, in order to ensure that all data users alike contribute fairly to cost recovery and a reasonable margin, and to allow for an inclusionary data license.

To summarize:

- In this context we would like to note, that L1 seemingly does not task ESMA to define how prices are being set for market data.
- Article 5(1)(i) and (iii) of the draft RTS on RCB are highly relevant and need to remain as are. Article 5(1)(ii) of the draft RTS is referring to Article 3 of the draft RTS which is referring to cost based pricing, not suitable for digital products like market data.
- Overall, we would like to recommend that ESMA diverges not too far from the current ESMA Guidelines and the pricing model applied within the industry, as this is not in opposition of the avoidance of "individual pricing" as mentioned in Recital 12 MiFIR.
- Taking note of the difficulties of a cost-based pricing approach only, this would finally lead to a situation where the largest and most diverse data users would contribute relatively less to data provider's cost recovery compared to smaller, less diverse customers, and with the effect that data fees will likely need to be higher on average in order to recover cost.
- Finally, in the same context Recital 10 of the draft RTS needs adaptions as well.

Concrete wording proposals:

We strongly propose the following adaption of Recital 10 of the draft RTS on RCB in the light of the above arguments to this consultation paper. Neither is this explanation given correct, nor is it necessary for the regulation. It would provide for a misinformation in a regulatory text, and hence should be deleted:

~~" 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 feeds.~~ To ensure that data is provided on an RCB, market data providers may set up categories based on factual elements. For example … The fees applied ~~in such categories~~ should be set on the basis of costs sustained ~~to provide data~~

~~to users and a reasonable margin, expressed as a percentage of costs, which should be homogenous amongst users to the same category~~ **for the production and distribution of market data**".

As regards **Art 5(2) of the draft RTS on RCB** we propose amendments due to the fact, that a pure cost-based pricing is neither sensible nor fair. We would like to propose to revert back to the original wording:

"as an exception, market data providers may add a proportionate increment of the relevant fee, where there are multiple and significant different uses made by the customer of the data. Market data providers should clearly display in their market data policies the amount of the increment of the relevant fee."
<ESMA_QUESTION_CP1_33>

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.

<ESMA_QUESTION_CP1_34>
DBG appreciates ESMAs considerate analysis but does not fully agree. Hence, we would like to provide further clarity in this respect.

DBG highly appreciates ESMA's concern that data users who source their data via redistributors such as Market Data Vendors, or any other third parties, should be contributing to the cost recovery like any other data user as well. We do fully agree and consider this to be a very relevant and important guideline by ESMA and to be kept in mind in future and in context of the CTP as well as this could lead to lower data fees for data users in general. Indeed, only if all market participants who do use market data provide their fair share to the cost recovery of data providers, will data fees stay as low as possible per single user. In case some evade their fair share of cost contribution, the same costs as before will still have to be recovered by data providers but from less data licensees, and hence at a higher fee including the smallest users as well. This makes it so important, that data fees are fairly paid by all users, and in line with the extent of usage, and that indeed, exchanges or data providers in general are being allowed to audit data users. Please see as well our comments to Q38 and Q39 in this respect.

Nevertheless, in contrast to ESMA's concerns pointed out in points 236 but as well 234 from ESMA's consultation paper on RCB, there are functioning models applied today, how data users - sourcing the data from data redistributors - are contributing their fair share to the cost recovery of trading venues. Indeed, by contract with the redistributor, data users are being billed by the data redistributor on behalf of the exchange and based on the price list of the exchange which is publicly available on exchange's web sites. The fee is applied, i.e. for display (eye-ball use via a vendor terminal) per single user, or as a non-display licence in case the data is being used electronically.

However, the market data vendor may apply a mark-up which is out of control by the exchanges, and which the vendor retains. For a fact, a redistributor, i.e. a market data vendor pays a fee to the data provider as well, as the redistributor usually uses the data obtained for a few value-adding data provisions to his customers. Only in a few cases do data users obtain data directly from the exchanges, which makes ESMA's proposal for cost recovery based on physical access/ or lines, highly unsuitable.

Again, the broader the user base contributing to the cost recovery of exchange market data, the lower data fees overall may be per user, which in the end is especially beneficial for those data users with smaller pockets, i.e. lower purchasing powers.

In the same spirit it would be beneficial for all, indeed, if exchanges could charge significantly different usages with an increment of fees, other than only on the basis of cost, as this cannot be applied (see our comments in Q29 above). It is unclear to us, why a small private investor, or a small legal entity, which are just using prices for investing, should pay the same or very similar fees to what a large index provider, or a large IF pays. This would be double discrimination, both on the side of trading venues as well as the users.

Hence, we recommend, to not move too far from today's model of pricing market data, as the impact may be negative on smaller data users, especially. However, as regards redistribution, the industry currently is well set-up already, a model which needs to be preserved for fair markets, with low costs for market data.

To summarize:

- Only fair contributions to data providers cost recovery by all data users who use exchange market data and in line with their actual data use allows data providers to keep data low as possible and for an inclusive approach towards small data users.
- Data users sourcing exchange market data via redistributors do pay exchange data fees supporting cost recovery by exchanges today. This must be ensured as well in future and across all data providers alike, be it trading venues, APAs or CTPs.
- In case data would be onwards disseminated, without contributions to data providers' cost recovery data fees for those paying would increase, or data providers would not be in the position to serve their customers anymore (Risks of digital products).

<ESMA_QUESTION_CP1_34>

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.

<ESMA_QUESTION_CP1_35>

DBG is not of the opinion that there are any terms and conditions in market data agreements which are biased or unfair. To the contrary, DBG makes every effort to service its customers as good as possible and often goes beyond what is being required by regulation. Hence, we want to take the opportunity to comment on some of the issues as identified by ESMA in their point 244 of the Consultation Paper:

"Onerous administrative obligations on data users, **for example through frequent and detailed requests on the use of data**": The data provider and the data user are in a contractual agreement for the provision of data (data provider) and the use of data (data user/contracting partner). The data user agrees to use the data according to the contractual terms, including the declaration of usage. Requests for the use of data are usually made before the signature of the data agreement, during the client's declaration of usage, or when a breach has been detected. Regular alignments as regards data usage by the customer may help avoid multiple audit findings in the future and ensure compliance with the contract in the first place.

"Ambiguous language in the agreement": While exchanges aim for clear language in their contracts, questions may remain on the customer side. In such cases, DBG actively supports customers by providing any needed clarifications upon request. Furthermore, most exchanges have adapted their contracts/agreements according to the ESMA Guidelines of 2021 in close alignment with their local NCAs to mitigate any possible source of confusion for clients. Ideally, there are no frequent changes to such terms, although we acknowledge that the current consultation paper proposes further amendments.

"Frequent unilateral amendments to the agreement": Changes cannot be bilateral because agreement amendments must apply to all clients and are usually not frequent. Most contractual changes in the last few years have been motivated by regulatory adaptations of the agreements, with the following one pending due to changes to RCB. Data agreements stipulate that any unilateral changes in the agreement must be announced to clients with sufficient notice to allow them to evaluate the implications and decide if they wish to continue with the contractual relationship with the market data provider. Here, DBG aims for better than the current 90 days as stipulated in ESMA's Guidelines, while recognizing that ESMA has reduced the minimum announcement period from 90 days to 40 days in the draft RTS.

"General lack of transparency on terms and conditions": All terms and conditions are made public on DBGs websites, in line with ESMA's Guidelines. Beyond actual documents, some DBG even display previous versions of the most important documents, such as price lists, for full transparency.

"Excessive fees": Exchange data fees are rather moderate in both absolute and relative terms. Earlier this year, an FCA Report concluded that any party who needs access to market data has access to it and that the data cost to these users is relatively small in relation to their overall costs and even very small in absolute terms for some data users, i.e. buy side. This reiterates the find-

ings of an OXERA study in this respect, which in 2014 found that “annual market data cost represents less than 0,01% - 0,02% of assets under management”. Given the significant increase in Assets under Management since then, we would not be surprised to see an even lesser impact today.

“Increase of fees through penalties”: Penalties are very rarely applied. In any case, their aim is to make compliance more appealing than non-compliance, which is important to ensure a fair share of cost recovery by all data users alike. In case some data users would not comply by significantly underreporting their data usage, the cost recovery would be shouldered more by those who do comply with their contracts.

“Overly burdensome audits”: As explained in our response to Q39, audits contribute to the consistent and non-discriminatory application of market data fees and policies, thereby promoting a fair share of cost recovery through each data user while maintaining a level playing field amongst data users. In the absence of audits, players unduly accessing market data at no cost or at significantly reduced costs (through underreporting) would unfairly compete against those who duly pay for the data they use.

DBG of course stands ready in case ESMA would like to discuss further issues identified by them.
<ESMA_QUESTION_CP1_35>

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.

<ESMA_QUESTION_CP1_36>
DBG supports ESMA’s proposals in the context of unbiased and fair contractual terms. However, we do not fully agree with certain wordings in the draft RTS, both in the context of Recital 15, and as regards Article 11 of the draft RTS on RCB.

Recital 15 in the context of *“double application of fees for the same market data”* needs clarification in our view. While we are not aware about any clauses inducing hidden costs or indirect or direct fee increases, we are concerned as regards the ambiguity provided in Recital 15 of the draft RTS. Indeed, DBG considers it important to apply and differentiate fees according to their usage, e.g. display or non-display use. Assume that data user A and data user B, both working for firm C, are consuming Xetra data via a display each, display fees will have to be recouped from A and B alike, for an orderly cost recovery, as prices have been set per display use per person in the first place. It must be clear that the above should not be considered as a “double application of fees for the same market data”. If that was the case, however, it must be understood that where the costs would need to be recovered across an artificially reduced number of data users, the average costs to be recovered per customer would have to be (significantly) higher than today. While we do not

assume that this was ESMA's intention, we would recommend to clarify this accordingly in the recital.

On a similar note, we would like to point ESMA's attention to Article 11 of the draft RTS on RCB which is unclear as well. Indeed, this article would benefit from further clarification as well to ensure that provisions addressing the implications of significantly different use cases of market data are being permitted in market data agreements and transparent for market data users to understand. This would as well be relevant for the data user to understand, and hence an adaption is being required.

To summarize:

- DBG generally supports ESMA's proposals for unbiased and fair contractual terms.
- We propose, however, an adaption to Recital 15, and Article 11 of the draft RTS on RCB for further clarity.

It is important to avoid any misunderstandings in the context of double application of fees, in order to not destroy the basis for an inclusionary cost recovery by artificially reducing the data usages by data users.<ESMA_QUESTION_CP1_36>

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?

<ESMA_QUESTION_CP1_37>
DBG understands that ESMA is referring to the previous ESMA Guidelines 8, 9 and 10. While DBG provides such a model already today, it is important to understand that this requires investments both at the exchange offering such a model and most likely as well on the data user side. Taking note of the costs involved in doing so – across the whole value chain: data user, data provider (and market data vendor/ redistributor) – the proportionality principle is seemingly missing in the new draft, which would highly benefit from its re-inclusion.

The price per user model according to Guideline 8 applies to the display usage of market data products via multiple data vendors at the same time and the same data user (i.e. one and the same person sourcing Xetra data via two different market data vendors). In order to be in the position to charge only once, the exchange needs to become a direct billing exchange, and the customer needs a direct contract with the exchange and must be able to both, clearly identify the access and report them to the exchange. Especially, smaller data users and smaller exchanges would lack the capital and capacity for such a model, and hence requesting this unconditionally, would not be proportionate in our view. On top, while DBG is offering this model since years now, we would like to note that it experienced only moderate interest during the last years.

Concrete wording proposals:
Hence, besides the re-inclusion of the proportionality requirement as lined out the Guidelines, we recommend adapting the following text in the draft RTS on RCB by ESMA, as the wording is ambiguous:

Article 12 draft RTS, “Per user fees”:

Art 12(1) “Market data providers shall put arrangements in place to ensure that each ~~provision of data is~~ **market data product is being** charged only once, when sourced via multiple market data vendors.”

Art 12.3. “To this aim, where market data **products ha~~s~~ve** been sourced through multiple ~~market data providers or~~ redistributors, market data providers shall offer the possibility to charge fees only once for the same data **per user** (per user model)”.<ESMA_QUESTION_CP1_37>

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

<ESMA_QUESTION_CP1_38>
DBG does not agree to ESMA’s proposal. The rationale of a contractual penalty is to ensure compliance by a contractual party with the terms of the contract, especially with such terms which are of particular importance for the counterparty. Market data providers have a legitimate interest that licensees use the market data only on the basis of a license that sufficiently covers the use. It is therefore **common international market practice** to agree on a retention and reporting obligation of the licensee and on a contractual penalty payment in case of material breaches by the licensee of its obligations under the Market Data License Agreement, e.g., in case of incorrect or incomplete reporting by the licensee on the use of the market data. In the moment, the licensed data is made available to the licensee, the licensor has no control over the usage of such data anymore. This results in the fact that (licensed) data is generally qualified as an **“elusive good”, i.e. a digital good, which can be easily shared with other users once obtained**.

Having said that, DBG appreciates ESMA’s suggestion to further maintain the common market practice to contractually agree on a contractual penalty payment in case of material breaches. From a legal perspective, we want to reiterate the necessary distinctions of the term “penalties” to other terms used by ESMA in the draft RTS on RCB, according to German Civil Law:

- Payment of the license fees (as one of the main contractual obligations of the licensee);
- Payment of interest on the license fees that have not been paid on the due date or due to non-compliance with the license;
- Payment of (contractual) penalties (beyond the payment of license fees) in case of non-compliance with the terms of the Data License Agreement (e.g. gross negligence);

- Payment of damages (beyond the payment of license fees) in case the licensor suffers damages as a result of the non-compliance by the licensee with the terms of the Data License Agreement.

Therefore, the listed issue in Nr. 244 (Chapter 10.2. of the Consultation Paper) that there is an increase of fees through penalties is incorrect and leads to a wrong narrative. Rather, it needs to be clear, that contractual penalties can be prevented by being compliant with the terms of the market data agreement. Contractual penalties are an important instrument to ensure the level playing field between the licensees. Thus, we do not think that it is really ESMA's intention to prohibit this international market standard practice and that ESMA only wants to prohibit "excessive interest charging".

Therefore, we want to recommend amending Recital 18 accordingly, as it gives a wrong impression of ESMA's intentions. Hence, we suggest the following adaptions of the draft RTS:

*(18) To avoid unjustified penalties, they should be imposed only on the basis of clear evidence of infringement of the market data agreement. Furthermore, they should not be onerous, and their amount should generally be based on what the client would have paid in case of compliance with the market data agreement**, additionally the market data provider can claim a reasonable interest rate**. […]*

Lastly, there is no need for the drafted time limit on imposing a contractual penalty, as the statute of limitation already guarantees that claims can only be asserted in a reasonable time period after obtaining knowledge of the occurred infringement.

For further clarification and to comply with the legal body statute of limitation, we suggest the following amendments in Art. 14 para 3 and Recital 18 (last sentence) of the draft RTS on RCB:

Article 14

3. *A penalty payment request shall be made only within a reasonable time from **knowledge of** the infringement occurrence and shall be based on clear evidence of the infringement occurrence.*

***

*(18) […] In addition, to enable the client to make timely arrangements to avoid the repetition of infringements of the market data agreement, the market data provider should impose the penalty only within a reasonable time from the **knowledge of the** infringement occurrence.*

As explained at other occasions, DBG has taken steps to further promote and support correct licensing from the beginning by introducing the data usage declaration in 2020, a questionnaire about data usage which has to be completed by our licensees. With this data usage declaration,

DBG is aiming to lower or avoid non-compliance by licensees building up over time. The data usage declaration is based on the existing DBG Market Data Dissemination Agreement and allows to identify over- and under-licensing by our licensees. Our goal is to actively support our licensees to be able to correctly assess the licenses required for the respective subscriber so that together we can ensure correct licensing of the contracting parties from the beginning.<ESMA_QUESTION_CP1_38>

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

<ESMA_QUESTION_CP1_39>
DBG understands that some audit practices may represent a burden for clients, so we welcome ESMA's aim to establish some general requirements regarding audit-practices. However, we would like to take this opportunity to explain the fundamental necessity of market data audits, which are well-established international market practices. We would like to further point out the risks that may arise should the implementations take place as now proposed in Article 15 of the draft RTS on RCB.

Licensors of market data obtain market data based on a Market Data License Agreement. The challenge licensors face from a legal perspective is that the licensed data once received by data users, is easily duplicated, and transferred without paying the relevant license fee to the data provider, and without the licensor's knowledge. The licensor, however, in light of the "elusive good" character of market data (see above), hence must rely on the correctness and completeness of the reporting received from the licensee as otherwise the license fee cannot be determined. It is common market practice in the international market data business to contractually agree on certain contractual control mechanisms, such as reporting on the usage of the licensed data, audit, and information rights of the licensor. To interfere with this market practice ESMA unilaterally displaces responsibilities, protected rights, and economic interests.

The imposed restriction in para 1 of Article 15 of the draft RTS on RCB that audits should only be carried out "in case of serious indications of infringement of the market data contract" is (i) highly impractical as it leaves a broad room for interpretations and (ii) does not reflect the common practice of an any audit process, which is common practice across various industries. Audits are conducted to determine if a violation has occurred, not to confirm an existing suspicion. To now demand that audits may only be carried out if there is a "serious indication" of a breach of contract is inconsistent.
In fact, it would be comparable to a ticket inspector on the train who would only be able to check passengers based on serious indications that passengers do not have a valid ticket. Such a restrictive measure would be difficult to apply in practise and would promote the incentive not to buy a ticket beforehand. Building on this analogy, if passengers are checked and found not to have a valid ticket, the consequence would be having to pay the regular ticket price (which leads to the

necessity of contractual penalties, see Q38). In this simplified scenario the inconsistency is obvious, but there are some parallels to market data audits (and the resulting penalties):

- It remains **impossible to determine** a "serious indication" of an infringement. ESMA must be aware that there will be completely different interpretations of this question, which in our view contradicts the declared objective to establish a level playing field for all market participants. Considering that the market data provider has neither control over the data once provided nor insight into the business of the licensee including accesses and usages within the licensee's organization a "serious indication" of an infringement is impossible to prove prior to an audit. In fact, it is the main reason to conduct an audit (see above), to be able to identify that the data user is fairly and correctly paying its license fees.
- There will be **no incentive to remain compliant** for licensees. From a legal perspective it is crucial that those that comply with the Market Data License Agreement continue to have an incentive to behave accordingly. But if the proposed restriction on audit practices in Article 15(1) draft RTS will not be altered there will be a massive injustice and unfair practice in the data licensing market. Audit practices help to ensure uniform and consistent application of the Data License Agreements, which leads to a non-discriminatory application of market data fees and policies across data users. This will be counteracted as soon as the licensor lacks the necessary tools to detect non-compliant behaviour, which logically increases such behaviour as there would be no incentive to remain complaint. Without audits, the contribution to maintain a level playing field in capital markets will be lost.
- For those licensees that stay compliant with the market data agreements the now proposed constraint on market data audits leads to **competitive disadvantage**. The first aspect is the obvious one, as the compliant licensee will then pay more for data compared to those that (un)willingly report less data and accesses. In addition, market participants evading fees reduces the cost coverage of data providers and then leading to higher prices or disruption of services and/or quality. The second aspect is that conducting an audit based on "serious indications" (which remains unclear how to determine) could mean a stigma for the audited licensee. Any such impact is clearly contradicting what DBG believes ESMA is trying to achieve. In the end the proposed Article 15(1) of the draft RTS could harm the basic premise of MiFIR of making market data available on a non-discriminatory basis.
- In addition, the proposals massively interfere with the **entrepreneurial freedom of decision** and **contract** of any market data licensor. It is not convincing to interfere with the sharing of responsibilities and to establish the **burden of proof** unilaterally. Within the scope of an audit, according to DBG's understanding, is the need to demonstrate that the data was available for use for the licensee (the audited party). Beyond that, it is the licensee's burden to prove that the data was used and reported accordingly to the Data License Agreement. Considering that the licensor has neither control over the data nor insight in the business of the licensee (see above), it is a fair and well-balanced sharing of respon-

sibilities that corresponds to a very common legal balancing. Furthermore, the now proposed amendments regarding the burden of proof contradict the provision in Art. 8 para 1 draft RTS, as it would place an unproportionate burden on the licensor.

In consequence we want to recommend that ESMA abstains from the drafted restrictions in the audit procedures as this goes too far and suggest the following adaptions in Article 15 of the draft RTS on RCB:

3. *Audits may be ~~requested~~ **conducted** by market data providers ~~in case of serious indications of infringement of the market data contract~~ to ascertain whether a breach **of the market data contract** 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~~ **audit**.*

4. *Market data providers shall provide in the market data agreements clear and comprehensive information on audits and in particular specify:*

   ~~(i) the infringements of the market data agreement for which an audit can be requested;~~

   (i~~i~~) the document and the information the client is requested to provide in case of an audit;

   (ii~~i~~) the procedure foreseen for the audit;

   *(i**ii~~v~~**) the notice period;*

   *(**i**v) how data confidentiality would be ensured during the audit.*

5. *Prior to initiating an audit, the market data provider shall notify the market data client of the ~~alleged infringement~~ **scope** and the ~~grounds for suspecting its occurrence~~ **expected timeframe**.*

[…]

Lastly, we want to highlight that there is no need to further restrict the period of time of an audit and the now found provision in Article 15(6) of the draft RTS on RCB is appropriate.<ESMA_QUESTION_CP1_39>

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

<ESMA_QUESTION_CP1_40>

DBG considers that its existing market data agreements, terms and conditions are already fair and unbiased. In various areas DBG already voluntarily provides more transparency compared to regulatory requirements, i.e. such as access to historical price lists for a full transparency, or information on contractual changes being provided even before the current 90 days request by regulation. In respect of the latter, we wonder, why ESMA is intending to reduce the minimum announcement time to 40 days. However, while we understand that this is a minimum time request, we may continue to inform earlier for the benefit of our customers.
<ESMA_QUESTION_CP1_40>

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.

<ESMA_QUESTION_CP1_41>
DBG takes note that Article 22 of the draft RTS on RCB as well as the template, especially as previously requested by ESMA have changed in wording in some areas. While overall we generally consent with ESMA to the requirements we would like to propose some minor adaptions. Before doing so, however, DBG, welcomes ESMA's proposals to use hyperlinks to the relevant documents as this is highly efficient. Furthermore, we would refer to our detailed comments to this consultation paper as regarding respective issues displayed in the Template set out in Annex I.

Regarding the information requested in the template in Annex I in context of Articles 5 (Unit of count) and 20 (Differential in Fees) of the draft RTS we do not agree with ESMA's proposal, and we would like to ask ESMA to consider our comments made in the respect especially in Q31, Q32 and Q33. In consequence, we would recommend introducing a hyperlink for the price list as well.

Art 22(4) of the draft RTS on RCB refers closely to ESMA Guideline 15. However, we are missing an essential explicit reference in the proposed text, namely, that market data providers are not required to disclose any actual costs for producing and disseminating data or the actual margin to the public, respectively, data customers. However, we do of course appreciate that Art 22(2) of the draft RTS is referring to "examples of such costs as well the allocation principles" and ask for this to be pertained. Public disclosure of cost information is incompatible with the fundamental legal principles of competition law. It would be disproportionate and incompatible with competition law to impose the publication of costs on trading platforms, for the sole reason of enabling customers to understand data pricing.

Indeed, Annex I referring to Article 22 of the draft RTS on RCB is less clear, and we would kindly ask to clarify the Annex in the spirit of the above, referring to examples only.<ESMA_QUESTION_CP1_41>

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.

<ESMA_QUESTION_CP1_42>
DBG supports a harmonized terminology across market data providers to the extent possible and has implemented the new terminology provided in the ESMA Guidelines, accordingly. We take note that ESMA proposes new definitions, especially in the context of the market data contracts. In this context, we would like to highlight, that such changes will not only impact the respective data provider such as DBG, but indeed the overall chain of parties consuming such data, in one or the other way. While we will take this opportunity to adapt the wordings where sensible, we would like to point out that we would favour the new definitions to remain stable for a longer time, in order to avoid further impacts on our customers, who will have to implement them as well.

DBG proposes the following adaptions and one addition to the proposed definitions by ESMA within Article 1 of the draft RTS on RCB:

“market data”
DBG would like to clarify the difference as regards data to be provided by the CTP, and data to be provided by trading venues, APAs, and systematic internalisers. We strongly recommend to adapt the terminology within the whole RTS accordingly.

‘market data’ means the information market operators and investment firms operating a trading venue, APAs, and systematic internalisers have to make available to the public in accordance with Articles [3, 4, 6 to 11a, 14, 20, 21], **as applicable, and for CTPs in accordance with Articles 2 (1)(36b),(36c) and 27h (1)(d) of MiFIR**;

“market data provider”

We take note that ESMA has generalized the terminology of a market data provider. However, we consider that **this uniform definition comes short to recognize the different roles, cost structures applicable to the respective entities, and the different data provided by these entities.** We would hence like to strongly suggest to revert back to the granular **differentiating definitions similar as applied so far under ESMA’s Guidelines.**

“joint costs” – include for clarification, based on ESMA’s Guidelines for RCB

“joint costs should be understood as costs that occur when the processing of a single input resource results simultaneously in two or more different products, e.g. trade execution and the dissemination of market data.” For further clarification the following could be added: “They represent a special form of shared costs”.

“total costs”

“total costs” means all the costs sustained by the market data provider for the production and dissemination of market data. Such expenses shall include operational costs and financial costs, including taxes, depreciation, amortization and cost of capital **amongst others**;

“net profit margin”

DBG proposes that ESMA adopt the definition of net profit margin as **margin calculated as a percentage of Total Sales of Market Data products**. International Accounting Standards also define the Net Profit Margin in the same way as proposed by DBG. In order to comply with International Accounting Standards and ensure comparability across geographies, it is prudent to stick to the internationally set definition.

In line with the above, please adapt as well Article 3 (2)(a) of the draft RTS on RCB:

Article 3 (2)(a) “be set as a percentage of ~~the costs of production and dissemination~~ **total sales** of market data;”

DBG proposes the following adaptions and one addition to the proposed definitions by ESMA within **Article 18 of the draft RTS on RCB**:

“display data” / “non-display data”

DBG would like to point out that the data remains the same data content, regardless if consumed via display or via non-display. Hence, we recommend including “usage” in both terms to avoid any confusion.

“display data usage” shall indicate the market data usage through the support of a monitor or a screen and that is human readable;

“non-display data usage” shall indicate the usage other than display usage.

“delayed market data”

It is important that the data is made available to the user, while “delivered” could be misunderstood. Therefore, we propose the following amendments:

“delayed market data” means market data **made available** with a delay of 15 minutes after publication

“unit of count”

In the context of Article 18(1)(i) of the draft RTS on RCB DBG would appreciate additional text inclusion for clarity purposes and in line with the current definitions applied within ESMA Guidelines Annex I as follows:

"Unit of Count" shall indicate the unit used to measure the level of market data to be invoiced to the market data client and that is applied for fee purposes. **It distinguishes between the type of use, e.g. display use and non-display use.**

"professional client"

DBG would like to slightly adapt the definition of professional client, in order include all professional data users appropriately, regardless if they carry out a regulated financial profession or not.

"Professional Client" shall indicate a client who uses market data to carry out a regulated financial service or regulated financial activity or to provide a service for third parties, **or any other financial activity conducted within a legal entity**;

"physical connection"

DBG considers it important to provide further clarity as regards the difference of direct connection / reception of data and indirect reception of data (i.e. though redistributors). Hence the following clarification:

"Physical connection" shall indicate the physical connection through optical fiber or other technologies which shall be established between the Client and the data provider to **enable the direct** reception of data by the Client;<ESMA_QUESTION_CP1_42>

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?

<ESMA_QUESTION_CP1_43>
While DBG still considers that ESMA should take into account the nature of data being a digital good, and in consequence the issues entailed to this fact, we will answer the question as lined out below. However, we would like to side reference here again our answer provided to Q32.

DBG continues to support the "user-id" and the "device" as the Unit of count for Display and Non-Display respectively. Indeed, DBG supports keeping a distinction according to the "type of use" by the customer, including different "units of count" for display and non-display use or for specific customer categories. Please see as well our answer to Q32.

However, prescribing specific units of count may be impractical considering the implications for the data users and along the data value chain. The technical implementations for data provision via display tools (e.g. terminals, front-end solutions) are usually based on entitlement systems, that manage the accesses of users based on user-IDs. For the delivery of data to automated systems (non-display use) the usage of similar entitlement systems based on technical access-IDs is also quite common.

Regarding the unit of count “device” it is important to note that a device in general needs to be defined and a metric on how to count devices is essential and depends on the definition. If a device could include servers as well as applications, there could be the case that three applications run on one server so what is the number of devices? Instead of the unit of count “device” for non-display use it makes more sense to count the total number of technical accesses via which one or more devices get access to the data. This should be clear and distinct and independent of the definition of a device. The unit of count for non-display should be “the number of login credentials (e.g. technical access ID) that enables a Device access to the Information”. Nonetheless, it should be possible to apply lump-sums or other unit of counts (enterprise licenses or category based fees) to prevent customers from the burden to track and report the accesses constantly in case of many accesses across an entity.

Additionally, we want to highlight in this respect, that fees based on accesses are the market standard unit of count and – apart from the above mentioned conditions for non-display use – widely accepted and globally used. However, an access fee can per-se and individually in practice not be based on costs for that specific access. Costs occur mainly for the generation and production of the data, while the cost for data distribution is comparably small, and only represents a small fraction of the cost to be recovered.

Finally, as part of recent development on new technologies like cloud or blockchain, the data industry in general (including the market data industry globally) is broadly moving towards other units of count like data volume or a categorization of fees based on use-cases. Flexibility in case of units of count is therefore necessary in order to allow for a broad availability of data across different technologies and systems, while markets develop and innovate. This includes as well the possibility of using categories based on use-case instead of a specific number of access IDs only.

To summarize:

- DBG supports keeping a distinction according to the “type of use” by the customer, including different “units of count” for display and non-display use for specific customer categories. The “user-id” should continue to the unit of count for the display data.
- Instead of the unit of count “device” for non-display use it makes more sense to count the total number of technical accesses via which one or more devices get access to the data. This should be clear and distinct and independent of the definition of a device. The unit of

count for non-display should be “the number of login credentials (e.g. technical access ID) that enables a Device access to the Information”.

- Nonetheless it should be possible to apply lump-sums or other unit of counts as well, taking note of the diverse industry set-up
- Market data fees based on accesses are the market standard unit of count and – apart from the mentioned above conditions for non-display use – widely accepted and globally used.

<ESMA_QUESTION_CP1_43>

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.

<ESMA_QUESTION_CP1_44>
DBG does not agree with ESMA’s proposals in the context of the identification of the level of data consumption through types of connectivity. Data consumption cannot be quantified or even be identified by the type of connections. While direct connections between the exchange and a data provider may exist, in most cases, indeed, data is being consumed via redistributors, third parties, such as Market Data Vendors, who may provide access to exchange, APA or SI data via terminals (display usage) or data feeds for electronic use by the customer (non-display usage). In all cases of course will data fees apply. In this case only one connection between the exchange and the redistributor may exist, while the redistributor onwards disseminates the data to any interested data user. Indeed, the types of connectivity would i.e. not be in the position to quantify at all the level of consumption of display data, neither per a single data user or user firm, nor across all data users or user firms.

The number of devices, terminals and display units are more accurate identifiers to quality the level of data consumption. In consequence we recommend that ESMA’s approach needs adjustment accordingly. We strongly recommend that Article 20(1) of the draft RTS on RCB also allows data providers to levy their fees by the number of user IDs, devices and accesses at least. The “user-id” should continue to be the unit of count for the display data. The unit of count for non-display should be “the number of login credentials (e.g. technical access ID) that enables a Device access to the Information”. Please see our comment to Q43 as well.
<ESMA_QUESTION_CP1_44>

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.

<ESMA_QUESTION_CP1_45>

DBG does not consider that any further information should be necessary besides the requested information by ESMA so far. We are aware that indeed, some associations regularly request more detailed insight, however, as the data contains business secrets and the public disclosure of cost information is incompatible with the fundamental legal principles of competition law, we consider it to be sufficient to share such details with our supervisors.
<ESMA_QUESTION_CP1_45>

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

<ESMA_QUESTION_CP1_46>
DBG does not recognise that the provision of delayed data is not performing as intended by the co-legislators and question the decision to make public policy decisions of the back of "complaints from data users concerning the lack of compliance with delayed data provisions by trading venues and APAs." We note that ESMA investigated issues related to APAs but understand that ESMA did not further investigate this with regards to trading venues.

Recital 33 MiFIR explains that fifteen minutes delayed data must not be made available free of charge by the CTP, as data users may want to wait for the delayed data, rather than becoming (paying) users of the CTP with a negative impact on the CTPs ability to recover costs. Trading venues, and APAs still have to make available fifteen minutes delayed data free of charge at own costs and to every interested party now. Taking note of this rather unbalanced requirement in the L1 text, we would like to remind ESMA to remain prudent as regards their request of free access for every data user alike, including large business entities such as Market Data Vendors. DBG does not agree with ESMA's proposal in the context of Article 23 of the draft RTS. This proposal completely neglects the fact that regulation should not unnecessarily interfere with regulated entities' businesses and remain proportionate, besides being effective. Fifteen minutes delayed exchange data is still of high value to any interested party, including business entities developing own services on top. If data for those entities was for free, we would speak about a pure revenue transfer from one business entity to another, but not about a regulatory necessity. Delayed data licenses for redistributors such as Market Data Vendors (redistributors) at least, should continue to apply. Data Vendors (or other redistributors) besides providing delayed data to data users at no exchange fee, use exchange data for developing own professional services at the side for which they charge. Hence, there is no reason why they should not contribute to the cost recovery of exchanges as well in order to allow for less costs to be recovered from data end users including small data users. We would like to suggest that ESMA maintains Guideline 19 in this respect.

In terms of content, DBG agrees with ESMA's approach to maintain the same requirements as in the ESMA Guidelines on RCB. This includes the data fields as defined within the L1 and L2 text for delayed post-trade data, and only the first current best bid and offer prices with the depth of trading interests at those prices for pre-trade data.

DBG would prefer to stay with the current technical provision of data. Adapting to new technical requirements again would increase cost and the attached benefits seem to be nimble.

DBG would like to encourage the following adaptions in the draft RTS on RCB:

As regards **Art 23(1)** of the draft RTS, we would like to encourage a small clarification: "… shall provide access to delayed data **via their website** to ~~any~~ data users …".

This is due to the fact, that delayed data from exchanges is only available via their website or via data vendors. For a fact, it is market standard that delayed exchange data is being used via a redistributor. Direct connections to the exchange exist, in order to get access to data at lowest latency, not though for delayed data.

As regards **Art 24(1)** of the draft RTS, we question the notion of **"delayed market data from all the systems operated"**. This request is both unclear and confusing. Hence, we recommend to delete the notion accordingly.

As regards **Art 25(1)** of the draft RTS, this article should refer to trading venues' websites, as indeed trading venues have no control over market data vendor displays, for example. However, it should be sufficient for data users to get the access in the described way directly from the website of the trading venue.

Finally, we need to question the proposal to provide the data in one single file, since so far trading venues have invested in setting up the service as requested by ESMA originally. Constantly changing these set-ups, is both costly, resource absorbing for both, the trading venues as well as the data users. Trading Venues would prefer to not change the current set-up if possible, especially taking into account the amount of technical regulatory changes and necessary implementation works emanating from this L2 review on RCB, RTS 23, RTS 1+2, CTP mandatory contributions, on so on. At the very least ESMA should allow for sufficient implementation times.
<ESMA_QUESTION_CP1_46>

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

<ESMA_QUESTION_CP1_47>
DBG does not agree with ESMA's proposal as regards data usage from exchange's websites, that a simple registration should not be possible anymore. We need to question the reason of doing so. Indeed, by registering, it is ensured, that the exchange is aware about their data users, and, in case of changes or disruptions of the service, may reach out to the registered users. Furthermore, a simple registration is not overly complex and does not go beyond what is needed if a

private person signs on to a newsletter. Hence, we suggest that ESMA does not pursue their request as regards the abolishment of the registration process.
<ESMA_QUESTION_CP1_47>

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.

<ESMA_QUESTION_CP1_48>
DBG does not consider three months to be reasonable, taking into account the current proposal at hand. Changes would most likely have to be implemented in H1 2025. Depending on the final RTS, there may be significant impacts, both on exchanges but as well on the industry as a whole. Adaptions to an existing and functioning system / market value chain could become necessary, while questions are prevailing. We would consider that at least 12-15 months would be requested in order to adapt to changes diverting significantly from the current ESMA Guidelines on RCB. This is due to the fact, that changes will not only affect us, but potentially as well the full value-chain behind.

We have taken note as well, that ESMA has reduced the standard time needed to inform data users on any planned changes in the context of RCB. While we wonder why this is being done – as DBG and other exchanges rather tend to inform with even more time for customers to plan, it would be even detrimental sufficient in the scenario as lined out above.
<ESMA_QUESTION_CP1_48>

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

<ESMA_QUESTION_CP1_49>
Without diminishing the value of all our proposals across the previous responses, we want to use this question to emphasise three points we consider essential for the final RTS:

1. **Maintaining points (i) and (iii) of Art. 5(1) of the RTS**. Notably, retaining the wording in Art. 5(1)(i) is critical, particularly its reference to “factual elements”, and in no case increasing the restrictiveness by limiting the establishment of different categories to cost differentials.
2. **Retaining all cost categories in Art. 2**, including the residual cost category under Art. 2(6). We appreciate the language in Arts. 2(2) and 2(5) **recognising the existence of shared costs (for the avoidance of doubt, it is our understanding that shared costs fully encompass the notion of joint costs, which is critical).** The existence of varying

business models must be taken into account. Detailed disclosures that could jeopardise commercially sensitive information should be avoided.

3. **Maintaining the principles-based approach for establishing a reasonable margin**. Notably, Art. 3(2)(c) should be kept. Clarification should be included in Art. 3(2)(a) and Recital 10 to use the percentage of "total" costs (incl. shared/joint costs) of production and dissemination of market data.

These elements are core. In addition to the above, we wish to take this opportunity of this question to further elaborate on the benefits of certain elements we deem relevant.
While DBG fully agrees with the need to prohibit individualised pricing, i.e., licensing data to each user at a different price, which we understand both Recital 12 in MiFIR and Recital 10 in the draft RTS refer to when mentioning "*the value that the market data represents to individual users*." Thus, we welcome that the draft RTS addresses the potential risk of this approach. However, considering the content of the draft RTS, we are concerned that this prohibition has been extended to certain unrelated elements of the existing models of exchanges, which were also designed to ensure that data is provided on a "non-discriminatory basis", in alignment with Arts. 8(2) of CDR 2017/567 and 86(2) of CDR 2017/565.<ESMA_QUESTION_CP1_49>

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.

<ESMA_QUESTION_CP1_50>
DBG can only provide rough estimates at this point in time. The cost will vary depending on the final RTS on RCB and the requirement addressed by it.

As regards implementation of new RCB requirements which could be significantly different compared to the current application of RCB, we would foresee for DBG alone costs of up to Euro 1 – 1,5 mn. Costs would imply one-off costs in the area of license structure and contract adaptions, legal support, changes to accounting one off-and ongoing, and include cost for a potential external audit report to be shared with supervisors, plus it would include additional costs in the context of delayed data, both one-off as well as ongoing.

We would expect significant costs as well for other market participants along the value chain, however, we cannot provide any data in this respect.<ESMA_QUESTION_CP1_50>

CP on the amendment of RTS 23

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

<ESMA_QUESTION_CP1_51>
Yes, DBG does agree with the proposal from ESMA. We would expect that the common daily reporting frequency will actually minimise the occurrence of rejection feedback for records from the transparency report under RTS 2. Rejections indeed occur because of the current data consistency validation between the reporting under RTS 2 and under RTS 23; for trading day T, the RTS 23 reference data report is submitted on the same day (T), whereas the RTS 2 transparency report is only submitted a day later, on T+1. Since on T+1 the FIRDS files may not have been updated yet with the most recent records from the RTS 23 reference data submitted on T, it does happen that occasionally, records from reports under RTS 2 on T+1 receive a rejection feedback. Consequently, we expect a reduction of rejections thanks to the alignment of reporting frequency and that by merging RTS 2 reference data into RTS 23, reporting consistency and accuracy will be significantly enhanced.<ESMA_QUESTION_CP1_51>

Q52 For the purposes of both equity and non-equity transparency, do you prefer to retain the MiFIR identifier as currently defined or to rely on other fields for classification purposes? If latter, please outline the proposed solution.

<ESMA_QUESTION_CP1_52>
DBG operates the Frankfurter Wertpapierbörse (FWB, the Frankfurt Stock Exchange) including Xetra and Boerse Frankfurt. On the latter, a large variety of instruments are listed, from shares to structured finance products, through ETFs, ETCs, ETNs or securitised derivatives and bonds. In the case of non-equity instruments, we do concur with ESMA that determining the MiFIR Identifier for the relevant instrument on the basis of the CFI code alone is often not possible. For instance, instruments with a CFI code beginning with 'EY****' could represent derivatives, securitised derivatives, or ETCs/ETNs, as per the mapping provided by ESMA; but the exact classification of the relevant instruments depends on additional characteristics not explicitly indicated in the CFI code itself. Consequently, trading venues have to rely on additional data sources to accurately derive the MiFIR identifier for such financial instruments. In the case of DBG we are using for instance an external reference data provider which is able to identify precisely ETCs and ETNs. The combination of the CFI code and this field appears sufficient in our case, however necessary. On this basis, we would retain and integrate the MiFIR identifier field into the RTS 23 reference data report, but do acknowledge that it is not sufficient.<ESMA_QUESTION_CP1_52>

Q53 Is in your view, the granularity level of the MiFIR identifier adequate for the purposes of MiFIR transparency in the equity and non-equity space? If not, how should it be adjusted?

<ESMA_QUESTION_CP1_53>

Following our response to Q52, while the granularity of the MiFIR identifier is not problematic, we reckon that there is a need for more detailed instructions from ESMA regarding the selection of the correct MiFIR Identifier for specific financial products and the mapping of CFI codes against the MiFIR Identifier. As highlighted above, we are lacking elements to classify properly ETCs/ETNs, structured finance products, and securitised derivatives. For commodities, especially energy and gas, the additional specification of the "settlement location" (EIC code) is essential for the detailed calculation of the annual transparency results.<ESMA_QUESTION_CP1_53>

Q54 How do you expect the change in scope of instruments subject to transparency to impact transparency reference data? Would you agree to maintain the current whole set of reference data for non-equity instruments, currently in RTS 2, in RTS 23? If not, please specify which reference data should not be retained in the view of the revised scope.

<ESMA_QUESTION_CP1_54>
Yes, as alluded in our response to Q51, DBG does agree with merging the set of reference data for non-equity instruments in RTS 2 and in RTS 23 as we believe it would avoid duplicates and over-lapping data as well as improve consistency and accuracy.
<ESMA_QUESTION_CP1_54>

Q55 Do you agree with deleting Field 5 of RTS 2, Annex IV, and use the CFI code for the purposes of derivatives' contract type classification?

<ESMA_QUESTION_CP1_55>
Yes, DBG agrees with the proposals from ESMA.
<ESMA_QUESTION_CP1_55>

Q56 Do you agree with the proposed alignment between RTS 23 and RTS 2 as set out in this section? Please provide details on which alignment is (not) feasible and why, considering the impact in terms of comprehensiveness and consistency of the reported information.

<ESMA_QUESTION_CP1_56>
As per our response to Q51, overall DBG welcomes the alignment between the RTS 23 and RTS 2 reporting for simplification purposes and we mostly find the proposals in this section feasible in terms of comprehensiveness and consistency. However, we would have the following comments:

- **324.Reporting day:** This field already exists in RTS 23 as part of the DATINS file delivery in the message header. If the "timestamp" field would apply the same definition in RTS 23, we assume same definition applies here.

For derivatives:

- **330.Maturity of the underlying:** The merger of the two fields for maturity date of the underlying (18 and 21, for underlying bond and swap) as a new field of RTS 23 is welcome.
- **331.Issuer of the underlying:** We do not see any issue regarding the deletion of field 17 (issuer of the underlying bond) of RTS 2 provided that the field 27 of RTS 23 requires the reporting of the LEI of the underlying issuer applicable to all asset classes. However, the issuer of the underlying and ISIN or index name are currently mutually exclusive. This means it is technically not allowed to make entries in one of these fields if the other field is already filled out. In case of reporting of bond futures and options, we must fill out ISIN information. This means that if we fill in the ISIN information, we are technically unable to make an entry for the issuer of the underlying field for bonds. ESMA would need to adapt the validation rule impacting this mutual exclusion and make both fields available for entries. Provided this is done, we welcome the proposal.

<ESMA_QUESTION_CP1_56>

Q57 As it concerns "underlying type" classification, do you agree with the proposed reliance on CFI and other reporting fields? With specific regards to Field 27, do you have proposals on how that field may be streamlined?

<ESMA_QUESTION_CP1_57>
Yes, a move to using the CFI-based classification is welcomed by DBG. Field 27 could be further streamlined, by aligning the underlying classification schema with the categories from the CFI codes. Especially for exchange traded derivatives with index underlyings, it is currently not always possible to accurately reflect this product type in the underlying asset class and underlying type schema outlined in RTS 2. For example, bond index futures are not equity index futures and would currently fall into underlying type interest rates. It looks like in general terms; the diversity of underlying types of indices and other derivative products are not sufficiently represented. This causes many of the issues in the CFI mapping sheet. If these shortcomings would be addressed, RTS 2 field 27 could also become obsolete. Aligning the asset class of the underlying with the possible underlying classes as provided by CFI codes would open more opportunities for simplifications.<ESMA_QUESTION_CP1_57>

Q58 Do you see additional room for simplification and/or alignment of reference data for transaction reporting and transparency purposes? What would be the impact in terms of one-off and ongoing costs, benefits and change management of such simplifications, in particular with respect to reducing and consolidating data flows to ESMA that exist currently?

<ESMA_QUESTION_CP1_58>
Yes, DBG sees other simplifications possible:

- Removing Field 30: in the current RTS 23, Field 30 covers the Option type for derivatives and securitised derivatives and informs whether the derivative contract is a call, a put or cannot be determined. This information is however provided by the CFI code and should not require an additional specific field in RTS 23. In more detail, for listed options (CFI code starting with 'O*****'), 'OC****' indicates call options and 'OP****' represents put options; in the case of warrants (CFI code starting with 'RW****'), the third attribute would classify between a put or a call option; for non-listed options (CFI code starting with 'H*****'), the second attribute indicates the option style. We would hence ask ESMA to consider removing the 'option style' field from RTS 23.
- Merging RTS 2 Field 25 "Term of the underlying interest rate" into RTS 23 field 29 as ESMA already requires these fields to be consistent between RTS 2 and RTS 23. Thus, it makes sense to also merge these two fields. If they are not consistent, we would receive an "NCV-001" error from ESMA.
- Merging RTS 23 field 41 into RTS 23 field 29 in line with what is proposed in chapter 14.6.3 section 369. With regards to the field 40 Reference rate, it is considered duplicative with the field 28 Underlying index name because we report exactly same data in each field, but these fields are asked to be filled out more than once every time for different type of instruments.
- Renaming "Field Notional Currency 2" as currently there are two fields that are named like this and might cause confusion.

A reduction and consolidation of data flows is welcomed and would reduce long term maintenance costs. This can be seen as an investment of one-off costs, provided simplifications are included in the final RTS to make reporting less burdensome and more meaningful.<ESMA_QUESTION_CP1_58>

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

<ESMA_QUESTION_CP1_59>
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<ESMA_QUESTION_CP1_59>

Q60 Do you agree with the above assessment of the necessary adjustments to be made in the RTS 23 to accommodate for the identifying reference data?

<ESMA_QUESTION_CP1_60>
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<ESMA_QUESTION_CP1_60>

Q61 Do you see a need to specify the 'date by which the reference data are to be reported' different from the date of application or have other comments with regards to the proposed timeline? If so, please specify.

<ESMA_QUESTION_CP1_61>
Yes, DBG would agree with the proposal to align the date by which the reference data are to be reported and the date of application of the revised RTS 23. We would however be cautious of the lead time necessary for reporting entities to adjust their systems and would consider that 12 months is the minimum required for this. We would also link this response to the one we provided to Q25, regarding consistency and alignment of timelines between the different application dates.<ESMA_QUESTION_CP1_61>

Q62 Are there any other international developments or standards agreed at Union or international level that should be considered for the purpose of the development of the RTS on reference data?

<ESMA_QUESTION_CP1_62>
No, DBG would not have other international developments or standards to suggest.
<ESMA_QUESTION_CP1_62>

Q63 Do you agree with the changes proposed in the tables above? Should any other changes be considered to align the MiFIR reporting specifications with the international standards, EMIR and / or SFTR?

<ESMA_QUESTION_CP1_63>
DBG has no objection to the changes proposed in the tables but have some suggestions for improvement as follows:

- 30. Option type: As per our response to Q58, the information on the option type can be derived from the CFI Code, hence we would advise ESMA to remove this field for the sake of simplification of the reports.
- 31. Strike price: DBG has no objection to the changed description and data types but we assume that this field possibly only allows for monetary and percentage strikes. We have several index products whose strikes are given in index points. We would ask ESMA to make sure that index points would be still included in "monetary" definition.
- 41. IR term of contract: This field might be merged with 29 (Term of the underlying index – time period)
- 42. Notional currency 2: Either this field or field 47 (exactly the same name) can be renamed not to create confusions.
- 47. Notional currency 2: Same suggestion as above (42).

We would like to point out that the changes described in the table must also be reflected 1:1 in the annex (Table 2 "Classification of commodity and emission allowance derivatives for Table 3 (fields

35 to 37)") of the document. This applies, for example, to the new "OTHR" values in the sub-product column for freight.
We would also ask ESMA to be mindful of the time and the resources needed to adjust our systems and to account for those in the setting for the date of application of the amended RTS 23.
<ESMA_QUESTION_CP1_63>

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

<ESMA_QUESTION_CP1_64>
DBG cannot identify specific challenges to the proposed approach as we would understand that the integration would be managed by ESMA. However, from a CSD perspective, we see no benefits to integrate such data in FIRDS as the demand to have ALL relevant reference data needed for penalties calculation available in a single central database is not fulfilled by this incremental change, hence, there is no use going beyond the CSDR REFIT requiring “to publish a list of financial instruments”.
<ESMA_QUESTION_CP1_64>

Q65 Do you have any comments with regards to the inclusion of additional fields in the instrument reference data published by ESMA to indicate whether the instrument is in the scope of CSDR and to specify which MIC corresponds to a venue with the highest turnover or the most relevant market in terms of liquidity?

<ESMA_QUESTION_CP1_65>
DBG would understand that the additional information concerning instruments published pursuant to CSDR is available to ESMA; indeed the identification of the instruments in scope of CSDR publications can be done by ESMA as well as the calculations to determine the most relevant market in terms of liquidity or the venue with the highest turnover. If that were not to be the case, information would be difficult to obtain for the trading venue submitting RTS 23 data since it would involve obtaining information from external sources/companies. From a CSD perspective, it is not clear if CSDs would need to consider the new ESMA flag in future or continue to apply CSDR SDR penalties for any ISINs listed in FIRDS unless for shares subject to Short Selling Regulation exemption. In general, the addition of any new data fields to be considered by CSDs for penalties calculations requires sufficient lead time to make the functional changes, however, we see no benefits to integrate such data in FIRDS as it falls short of the concrete demand to have ALL relevant reference data needed for penalties calculation available in a single central database – this demand is not fulfilled by this incremental change, i.e. causes costs with no benefits associated. In more detail, we wonder why the new information should be added to FIRDS instead of FITRS (as it is the case for shares), more concretely the “FITRS non-equity file”.
<ESMA_QUESTION_CP1_65>

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

<ESMA_QUESTION_CP1_66>
DBG would have some comments about the different new fields proposed by ESMA:

#1: LEI of an administrator of benchmark: we understand that as per the Benchmarks Regulation (Regulation (EU) 2016/1011), ESMA compiles and publishes benchmark reference data, including some information about benchmarks and their administrators, through the 'Benchmarks Reference Data System'. As a consequence, we would ask ESMA to check if it would be possible for them to retrieve the relevant information from their own systems for the purpose of RTS 23 rather than for trading venues to set up an entire new channel linking their systems and the ESMA's Benchmarks Reference Data System or any other system with the relevant information. Besides the costly aspect of the additional link, DBG would also have difficulties finding the information: in the case of our Open Market, where we are not in relation with the issuer of the relevant instrument, DBG does not have access to such information.

#5: New field identifying the venue of admission to trading: DBG very much welcomes this new field which will allow to identify which trading venue is the most relevant market in terms of liquidity (MRMTL) for new listings. However, we would alert ESMA on the fact that the logic they propose to implement as described in the paragraphs 66 and 67 from ESMA's Third consultation Package (CP 3) on equity transparency (RTS 1 and CDR 2017/567), volume cap (RTS 3), circuit breakers (new RTS), SI (new ITS on SI notification), the equity CTP (new RTS on input / output data of the pre-trade and post-trade equity CTP) and the flags for non-equity transparency (RTS 2) is incorrect and will lead to errors and leave aside a number of first admissions to trading if implemented. Indeed ESMA indicates that "the venue where the instrument is first admitted to trading or first traded should be selected among regulated markets". IPOs, to only name those, can actually take place on any trading venue, including MTFs. On the Frankfurt Stock Exchange, IPOs do take place on our Prime Standard or General Standard segment, part of our Regulated Market, as well as on our Scale segment which is our EU SME Growth Market, an MTF. The sentence "Only if the instrument is not admitted to trading or traded on a regulated market, the MRMTL shall be determined among the MTFs on which it is made available for trading as per data provided to FIRDS" is hence not correct. To support the adequate definition of the field, we would like to develop below three major aspects which we believe shall be taken into account for the new field "venue of admission":

- From the current consultation paper, ESMA indicates that the new field would be used among other to support the identification of the MRMTL in conjunction with Field 11 (date and time of admission to trading) in case of multiple listings. We believe this field should be systematically used to identify the initial venue of admission and not only in the case of multiple listings. We've had in the past years numerous examples of IPOs taking place on a regulated market and "simple admissions to trading" or secondary listings taking place

on another regulated market with total confusion due to an incorrect record in Field 11; a first admission to trading at 1am on one market compared to 8am on another market is enough currently for the first one to be selected, even if the trading venue is not the primary market for the relevant instrument. Hence it is crucial that this field is systematically used for all cases explained in the next point;

- ESMA in the consultation paper CP 3 on RTS 1 refers to IPOs only (paragraph 67). Focusing only on this way to raise capital is reductive and excludes other means being for example private placement and direct listings. Moreover, some corporate actions could imply the creation of a new ISIN and it is crucial that the transparency calculations are based on the metrics assessed from the trading venue where the corporate action is initiated. Consequently, ESMA would need to list all occasions where capital is raised on a capital market or where there is a corporate action as events involving the selection of the ”venue of admission”. We would suggest ESMA to follow the list provided in our response to Q18 in our response to the ESMA MiFIR Review Consultation Package on Technical Standards related to Consolidated Tape Providers and DRSPs, and assessment criteria for the CTP selection procedure.
- The new field has to be available to all trading venues in general, not only to regulated markets. An IPO for example can take place on a regulated market or an MTF. In order to distinguish between an IPO, a private placement or a direct listing or a dual listing, ESMA could provide a list of all relevant operations and add for example as a criterion the necessity that the listing or the corporate action did take place “at the request of the issuer” which would guarantee that “sole admissions to trading” where no capital is raised and no issuer request was submitted are excluded.

We believe that the new field would improve the process for the determination of the MRMTL and for the correctness of the transparency calculations for new listings and do very much encourage ESMA to pursue this proposal; knowing that the field would also be used for the purpose of the revenue distribution mechanism for the CT, we also believe our proposals are consistent with the Art 27h of MiFIR and actually would support an adequate definition of the relevant criterion on “initial admissions to trading”.

#6: New field to flag the action type such as new, modification, termination, error: DBG would consider that this field relates to the history/life cycle of an instrument but does not refer to the nature of the entry in the file which is submitted to FIRDS. In other words, when the value in the action type is “termination” then the instrument is delisted; it is a “modification” of the entry in the file however this value must not be selected since the field action type is about the state of the instrument. In that sense it is very important that ESMA provides a clear description of the field and for all possible values, that ESMA does list all the possible states of an instrument. Moreover, it remains unclear how the different action types would align with the requirement from paragraph 308 in Chapter 14.1.1 of the present Consultation Paper regarding daily reporting. Indeed, under the assumption that the action type field reflects the status of the instrument, the field would still need to be filled in case a daily full file delivery is expected and there would be a need for the action type to include

a value in case of unmodified reference data or this field could also to be left empty. We would really appreciate if ESMA guides us with further detail on how the action type should be used to support the instrument life-cycle and how it can be implemented. In relation to the use of the field, as developed in our responses to Q67 and Q68 further, this new field would be DBG's preferred approach against the option of having reporting entities providing (hence storing) all the history of the relevant instrument in terms of listing.

#7: We welcome ESMA's consideration to add this new field. However, it seems to us that market participants are not fully able to work adequately with the ESMA register. We therefore recommend optimising not only the collection of data from the exchanges, but also the provision of data to market participants side.

<ESMA_QUESTION_CP1_66>

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

<ESMA_QUESTION_CP1_67>

DBG has some comments on the amendments proposed by ESMA:

- Proposal #2 - Need of monitoring cases when an instrument is delisted and subsequently readmitted to trading: DBG does not support this proposal by ESMA. We would in any case consider that multiple entries should not be allowed for reference data records; multiple entries increase the risk of errors and for the data to be misread/misinterpreted/misunderstood. Moreover, technically, our systems currently do not generate this type of information and it is unknown what logic we should adopt and how it would be implemented in our systems. Our current assessment given the information in the ESMA document is that the introduction of an instrument's history built and stored in our systems would 1. add too much complexity to those systems as each new record needs to contextualise the full history of all previously submitted records, and 2. affect the system performance significantly. Indeed, maintaining multiple admission dates for readmitted instruments would require substantial modifications to our existing infrastructure. In addition, in case of any change or update in the fields for the relevant instrument, only the updated value would have to be taken. The increased complexity would impact system performance, especially when dealing with large volumes of data for the daily reporting. Indeed, managing and reconciling multiple admission dates across millions of records daily would strain our operational resources and ensuring data consistency and accuracy would become more challenging. DBG would also assume that the possibility to have multiple entries is an alternative to the new action type field: we believe that this new field would contain all relevant information allowing ESMA to build the instrument's history (see our response to Q68). Lastly, we can also suggest ESMA to consider re-using already reported data by trading venues in its database, if it keeps any repository, to get the information regarding the re-admitted instruments. The information about the admitted instruments i.e., when this instrument is terminated and re-admitted to trading is already available to ESMA.

- Proposal #3 - Clarification for field 11: it would be our understanding that if the option (ii) developed in Q68 is chosen then field 11 would not have to be modified. Indeed, in that case, ESMA would have all the relevant dates and the history on the relevant instrument. We do reiterate that our systems currently do not support the logic of having the history of the instruments stored and for the reasons developed above, we would very much support option (ii) without amendment to fields 10, 11 and 12.
- Proposal #5 – Field 17: DBG does not have an objection to divide the information on the minimum trading value and the nominal value per unit into separate fields for RTS 23.

<ESMA_QUESTION_CP1_67>

Q68 With regards to monitoring of de-listing and re-admission, which option is preferable in your view: (i) reporting by the trading venue of all previous trading periods in the repeatable fields 10, 11 and 12 or (ii) implementing adequate reporting logic of events impacting the instrument (new, modification, termination etc) in order to enable ESMA to reconstruct all trading periods?

<ESMA_QUESTION_CP1_68>
As already partially explained in our responses to Q66 and Q67, DBG is very much in favour of option (ii) namely “implementing adequate reporting logic of events impacting the instrument (new, modification, termination etc) in order to enable ESMA to reconstruct all trading periods”. Indeed the option (i) where trading venues would report all previous trading periods in repeatable fields 10, 11, 12 would require immense development effort in both the upstream trading system, as well as the reporting system, since they are currently not designed to maintain multiple validity periods for one record and keep all historically submitted records in relation to any new record. Every new record would need to be contextualised with the whole history of previously uploaded submissions for the relevant instrument and any update in fields 10,11, and 12 would need to be considered as well. We would also reiterate that in any case we consider that multiple entries should not be allowed for reference data records; multiple entries increase the risk of errors and for the data to be misread/misinterpreted/misunderstood.
DBG believes however that the new field ‘Action type’ would be an adequate recipient of all changes in the history of an instrument and that ESMA would have all relevant information from this field to build the life of all instruments reported under RTS 23. This would allow trading venues also not to engage into very costly changes in their systems due to a change in their logics affecting about 500,000 instruments in the case of Eurex and 1,000,000 instruments for FWB for instance, all reporting having to be checked and updated on a daily basis. We would repeat that for this it is essential that ESMA identifies all possible values for the field and provide sample information on those.<ESMA_QUESTION_CP1_68>

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

<ESMA_QUESTION_CP1_69>
Yes, DBG agrees with the proposal from ESMA.
<ESMA_QUESTION_CP1_69>

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

<ESMA_QUESTION_CP1_70>
Whereas DBG does not disagree with the adoption of the JSON format in the non-real-time space, we want to make ESMA aware that the change in format will be a long and costly process for all reporting entities. Hence, we would demand that the changes in RTS 23 reporting with the merging of RTS 2 fields and the transition to JSON are made at the same time (see also our response to Q25). This synchronisation would avoid additional costly development efforts, which would necessarily occur with a staggered implementation. We would ask ESMA to account for this lead time for the set-up of the application date of RTS 23. Moreover, even if we anticipate a smooth transition to JSON thanks to its lightweight and flexible structure, JSON's inherent features – such as simplicity and the absence of standardized schemas – require careful handling to maintain data quality. Hence, it would be beneficial for ESMA to create a robust data validation framework for the data provided in the JSON format. This framework would ensure the accuracy and reliability of data submitted by various reporting entities, promoting consistency and adherence to regulatory requirements while maintaining overall data integrity.

As pointed out above and for the avoidance of doubt, we would like to reiterate that we do not consider JSON as being suitable for real-time data distribution due to better alternatives, i.e. binary formats.
<ESMA_QUESTION_CP1_70>

Q71 In addition to including a field to identify the DPE, are there any other adjustments needed to enable comprehensive and accurate reporting of reference data by the DPEs?

<ESMA_QUESTION_CP1_71>
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Q72 With regards to the categorisation of classes of financial instruments for the purpose of the DPE register, how such classes should be designated in the register? Is there any further information that should be included in the register to ensure

its usability and interoperability with other relevant systems? Do you foresee any practical implementation challenges, and if so, how they could be mitigated?

<ESMA_QUESTION_CP1_72>
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Q73 Are any other adjustments needed to enable comprehensive and accurate reporting of Article 8a(2) derivatives under RTS 23?

<ESMA_QUESTION_CP1_73>
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