Trading data and the law – an assessment of the parties' rights

1. **Introduction**

1.1   This analysis will be of most relevance to bilateral fixed income transactions on, or off-venue, between institutional investors such as asset managers, pension funds and insurance companies, and their respective liquidity providers.

1.2   The market data comprises information on bonds (financial instruments) purchased from or sold to a financial institution by its customers. The market data includes information on the specifics of the bond which has been purchased from or sold to that institution, such as the price, size, currency, the time and date the trade was executed, the maturity date, the coupon, the venue on which the trade occurred, etc. (the **'Data'**).

1.3   Throughout this note a bank will be used as an example of such a financial institution – which can also be referred to by the term 'sell-side', meaning a party involved in the purchase or sale of financial instruments. The examples of 'buy-side' parties listed in paragraph 1.1 are referred to in this note as the bank's customers.

1.4   The Data is generated as a result of transactions (the sale or purchase of bonds) between a bank and its customers. It is not clear which party (if either) can be said to have 'created' the Data. However, it is more usual that the bank's customer will initiate a transaction - by sending a request to the bank via an electronic trading platform, or by communicating directly with the bank's staff via a chat system or telephone. Prior to initiating a transaction, it is usually the customer which will have made the relevant investment decisions - what bond to buy or sell, the size of the transaction, etc.

1.5   The specific legal rights discussed in this note are copyright, database right and rights in confidential information. Each of these are discussed in turn in the remainder of this note.

2. **Copyright**

2.1   The Data is generated as a result of transactions between the bank and its customers and, following these transactions, each of the bank and the bank's customer hold copies of the Data. Each copy of the Data is considered a database, as a database is defined as 'a collection of independent data which is arranged in a systematic or methodical way and can be accessed through electronic or other means'. Provided certain conditions are met, the database which contains the Data (the **'Database'**) will be protected by (i) copyright and (ii), as discussed in paragraph 3, database right.

2.2   In order to benefit from copyright protection, a database must be an original literary work of the author's own intellectual creation. This means that there must have been effort spent on the <u>selection and arrangement</u> of the data and sufficient judgement and skill exercised in the <u>process of creation</u>. A database will only attract copyright if the selection and arrangement of its data amounts to an original expression of the creative freedom of its author. The intellectual effort and skill (if any) put into creating the <u>data themselves</u> are not relevant for the purpose of this assessment.

2.3   Although the Database is automatically created and computer-generated as a result of a transaction between the bank and the bank's customer, of the two parties it is the customer who expends more effort with regards to the selection and arrangement of the Data. This is because it is the customer who is responsible for selecting the bond to buy or sell, the size of the trade, how the bond is traded, and with which counterparty. UK case law has set a high bar in relation to what original works will qualify for copyright protection.

2.4   The first owner of copyright in a database is its author, i.e. the person who creates it. If a database is computer-generated, the author is the person who undertakes the arrangements necessary for the

creation of the work (such as an investor) and not the person who actually creates the work (the programmer). Such a computer-generated database would find it harder to pass the originality threshold for demonstrating an author's creativity.

2.5 Crucially, copyright in a database only protects the structure of a database, not the contents of a database. Copying, extracting or re-using a substantial part of a database without the consent of the owner of the right would constitute an infringement of copyright. Aggregating transaction Data from numerous counterparties, anonymising that Data, standardising it and reformatting it, would be seen as the requisite effort to create a database, which does not copy, extract or re-use a substantial part of any Database potentially owned by the bank.

3. **Database right**

3.1 A database right exists independently of the copyright (if any) in a database and protects the compilation of the information comprising a database. Accordingly, and contrary to copyright, a database right can protect the actual data stored within a database. However, while a database right protects the contents of a database, it protects the collection of data as opposed to its constituent elements.

3.2 A database will only benefit from a database right if it is the result of 'substantial investment' in obtaining, verifying or presenting its contents.

3.3 The owner of a database is its 'maker,' i.e. the person who takes the initiative in obtaining, verifying and presenting the contents of a database, and assumes the risk of the 'substantial investment'. There may be joint ownership when these roles are carried out by different people. While the bank's investment in the creation of the Database is unlikely to be ascertainable, it is also unlikely to be substantial. The bank does not enter into trades for the purpose of generating the Database. Accordingly, the Database is not the sole or main objective of the bank's investment (which may be substantial) in trades. Further, as the bank is only half of the transaction which generates the trade, the bank could only, at best, claim joint authorship over the generated Database, with the bank's customers authoring the other half.

3.4 Copying, extracting or re-using a substantial part of a database without the consent of the owner of the right would constitute an infringement of a database right. Aggregating transaction Data from numerous counterparties, anonymising that Data, standardising it and reformatting it, would be seen as the requisite effort to create a database, which does not copy, extract or re-use a substantial part of any Database potentially owned by the bank.

4. **Confidential Information**

4.1 To be protected by the law of confidential information, information must be confidential in nature, which means it must have the 'necessary quality of confidence about it'. Merely describing a document or information as confidential will not of itself transform information which is not inherently confidential into confidential information.

4.2 To have the 'necessary quality of confidence', information must not be something which is public property or public knowledge. Where the information in question is similar to something already in the public domain, or which can, with some effort, be pieced together from what is in the public domain, consideration is given to whether a person has applied some skill and ingenuity in their treatment of the information to render it worthy of protection.

4.3 To be considered confidential information, information must be disclosed 'in circumstances importing an obligation of confidence'. An obligation to keep information confidential may either be imposed by a contract, or be implied because of the nature of the relationship between the parties involved. Based on the above, there is some doubt over whether bilateral transaction Data is information that is confidential in nature.

4.4 The strength of a claim for breach of confidence hinges on the ability to prove that:

    (a) the Data was inherently confidential in nature;

    (b) the Data was made available under circumstances which imposed a duty of confidentiality (and query whether the data can even be said to have been 'made available', given that it arises following a transaction);

    (c) there has been a disclosure of the Data;

    (d) there is a substantial and legitimate interest in maintaining the confidentiality of the Data;

    (e) both parties knew the Data to be confidential;

    (f) the party making the claim has not waived confidentiality by itself disclosing the Data; and

    (g) the terms of use used by the party making the claim are not in breach of competition law.

5. **<u>Summary</u>**

5.1 To summarise:

    (a) **Copyright** (paragraph 2) – to attract copyright, a database must be an original literary work of the author's own intellectual creation; effort must have been spent on the selection and arrangement of the data; and sufficient judgement and skill must have been exercised in the process of creation. Of the two parties to the trade, it is the customer who expends more effort in this regard as they are responsible for the investment decision and ultimate execution of the trade, and so it is more likely that the customer holds the copyright.

    (b) **Database right** (paragraph 3) – aggregating transaction Data from numerous counterparties, anonymising that Data, standardising it and reformatting it would be seen as the requisite effort to create a database, which does not copy, extract or re-use a substantial part of any other Database.

    (c) **Confidential information** (paragraph 4) – the Data (being bilateral transaction data) is unlikely to have the 'necessary quality of confidence about it' for it to qualify as confidential information.

5.2 Both parties are free to agree to contractual terms, usually in the form of one-sided terms and conditions. However, it is important to note that such contractual terms may be superseded by the principles of common law, such as those described in this note. In other words, the effects of any contractual terms should not be considered in isolation, but in the context of the wider body of common law.