esma European Securities and Markets Authority

Reply form for the Consultation Paper on Guidelines on the MiFID II/ MiFIR obligations on market data

6 November 2020 | ESMA70-156-3882

Responding to this paper

ESMA invites comments on all matters in this consultation paper and in particular on the specific questions summarised in Annex I. 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 **11 January 2021.**

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input - Consultations'.

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:

1. Insert your responses to the questions in the Consultation Paper in the present response form.

2. Please do not remove tags of the type <ESMA_QUESTION_GOMD_1>. Your response to each question has to be framed by the two tags corresponding to the question.

3. 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.

4. When you have drafted your response, name your response form according to the following convention: ESMA_FOTF_nameofrespondent_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA_GOMD_ABCD_RESPONSEFORM.

5. Upload the form containing your responses, in Word format, to ESMA's website (www.esma.europa.eu under the heading "Your input – Open consultations" → "Consultation on the Guidelines on the MiFID II/MiFIR obligations on market data").

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 publically 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 heading Legal Notice.

Who should read this paper

This consultation paper is interesting for you if you are a trading venue, an APA, an SI or a consumer of market data.

General information about respondent

Name of the company / organisation	Bundesverband der Wertpapierfirmen (bwf)
Activity	Investment Services
Are you representing an association?	☒
Country/Region	Germany

Introduction

Please make your introductory comments below, if any

<ESMA_COMMENT_GOMD_1>

[bwf comment] The Bundesverband der Wertpapierfirmen e.V. (bwf) is a trade association representing the common professional interests of securities trading firms, market specialists at the securities exchanges and various other investment firms throughout Germany. In this capacity, we expressly welcome the possibility to comment on ESMA's Consultation Paper - Guidelines on the MiFID II/ MiFIR obligations on market data.

Qur responses to this consultation are partly based on an intense discussion within the European Forum of Securities Associations (EFSA), the International Council of Securities Associations (ICSA) and bilaterally with other associations. Accordingly responses to certain questions might be in part overlapping in content or even be identical to responses by other associations. However they should be still seen and weighted as individual expressions of opinion.

We would like to begin our comments with a reminder of some fundamental market structural aspects which always need to be taken into account when discussing appropriate measures to promote a fair pricing of market data and which we have already presented in our response to ESMA's CP on the MiFID II/MiFIR review report on the development in prices for pre- and post-trade data and on the consolidated tape for equity instruments (ESMA70-156-1471) of 12 July 2019.

The discussion on market data basically begins with the fundamental, legally and economically relevant question: "Whose data is it?" Here, it needs to be remembered that price-data/market-data does not arise from the activities of the trading venue, which later sells it, but from the interaction and negotiation of market participants which are active on a particular venue. While the added value contribution of market participants in generating market data is more than obvious, they are – in most of the cases – not economically

compensated but ironically might find them self in a situation where they are even "buying back" their own price-data as part of the datastream they purchase from a trading venue or another data-vendor.

Another important structural feature of the market for market data lies in the circumstance that market data providers are "natural monopolists". In other words, data streams from one trading venue cannot be substituted by streams from other venues, even when they refer to prices in the same security. Accordingly, while trading venues compete very intensively to attract liquidity, there is no efficient price competition in the field of market data. Furthermore, the market for second level distribution of market data by vendors and aggregators can be described as oligopolistic since it has been globally dominated for a long time by a very small number of large firms.

These structural problems on the supply side are now exacerbated by the fact that the supply of market data provided as described by natural monopolists – a circumstance which in itself deserves increased regulatory attention – meets an economically speaking, highly "inelastic" and therefore price-insensitive demand, whereby the lack of price sensitivity to a substantial extent derives from regulatory requirements. In other words, the demand for market data is extremely price-inelastic, not only because of the economic value represented by the data but also because data needs to be purchased by banks and investment firms in order to be legally compliant, in particular with respect to MiFID II / MiFIR provisions or for trade monitoring obligations in order to prevent or to detect market abuse according to MAR.

Furthermore, there is another aspect which illustrates the impact of regulation itself on the structural challenges in the market for market data: One of the core objectives of MiFID I was to increase competition among trading venues by breaking up hitherto existing national monopolies on the trading side by abolishing the so called "concentration rule" and allowing "multilateral trading facilities" and "systematic internalizers" (MiFID II added the "organized trading facilities") to compete with "regulated markets" in form of the established exchanges.

As desirable as the reduction in trading costs resulting from competition between the old and new trading venues may have been from an investor's point of view, the resulting fragmentation also led to the creation of a large number of new "natural monopolists" as providers of market data and consequently the market data consumers have been confronted with a much wider, more cost-intensive data universe.

From an economic point of view, it is understandable that trading venues attempt to offset the eroding margins generated from trading fees due to increased competition by additional revenues generated by the sale (or "licensing") of market data. Furthermore, the provision of trading infrastructure and the supply of market data generated by trading are obviously coupled products (or better market data is a by-product of trading). Here, it should also be borne in mind that the better a venue succeeds in attracting trading volume – not least by foregoing margins on the trading side – the more valuable its own market data becomes as reference prices. Therefore, the provision of trading infrastructure and the "production" of market data cannot be seen in isolation, neither from an economic nor from a regulatory perspective.

To some extent the European legislator has already recognized in the course of the MiFID II/MiFIR legislation the dangers arising from strong imbalances in market power, which

might enable monopolistic and oligopolistic rent-seeking in particular by large trading venues and data vendors. In fact, the obligations discussed in this consultation paper were mainly intended to reduce these risks by transparency requirements and further provisions which require market data providers to take into account certain factors and principles – most notably the costs of producing and disseminating market data – in their pricing policies.

However, in practice, in many respects, these obligations have not yet fulfille their purpose. Therefore, we fully support ESMA's attempt to issue Guidelines to ensure a better and uniform application of these MiFID II/MiFIR obligations and to support a more consistent, efficient and effective supervisory monitoring and enforcement of these obligations.

Nevertheless, as desirable as this initiative might be, its effects with respect to a potential strengthening of the position of data users who have been confronted with a significant increase in costs for market data within the last years, will be necessarily limited since ESMA will not be able to address the core problem of the insufficiencies of the general concept which was already introduced with MiFID I, nmely the idea that market data should be made available at a "reasonable commercial basis" (RCB).

In our view[1] RCB is clearly a failed concept which very obviously did not address the problem of severe market imbalances in an effective way and the reason is simple: The vast majority of today's trading venues are "for-profit" enterprises, often in form of a listed company. Like with every other commercial firm, their shareholders expect the management to maximize profits and shareholder value. They are limited in doing so only by their competitors. A mechanism which has worked very effectively from an investor's point of view, resulting in declining revenues from trading fees over the past years. It is not surprising that trading venues try to push their revenues from other services to compensate the margin-pressure on the trading side. Since – as ESMA has stated itself before[2] – for market data "competitive pressure on prices for trading venues is low", market data became an important alternative source of revenue in particular for larger venues.

In other words, in a highly competitive environment for trading venues as a whole, it is completely unrealistic and "alien to the system" to expect an effective self-moderation which shall be obtained by the term RCB. There is simply no objective, let alone a mandatory and effectively enforceable criterion what "reasonable" in this context should mean. Once again, in a market economy it is not the task of a for-profit enterprise to limit its revenues but a result of competition or – where competition might be ineffective in particular because of imbalanced market structures – a result of sufficiently clear and generally binding regulatory intervention. – the RCB, very obviously, does not fulfil these criterions.

Therefore, we emphatically hope that the undeniable monopolistic and oligopolistic characteristics of the market data market[3] will encourage legislators to replace or at least complement the RCB approach by more effective measures from the regulatory toolbox in the course of the upcoming MiFID II/MiFIR review later this year.

[1] As already stated in our response to ESMA's CP on the MiFID II/MiFIR review report on the development in prices for pre- and post-trade data and on the consolidated tape for equity instruments (ESMA70-156-1471) of 12 July 2019.
[2] cf. ESMA70-156-1471 para. 19
[3] Whereby, for the sake of clarity, trading venues are neither to blame nor can they avoid to be natural monopolis with respect to their market data (if you need a feed from Euronext Paris, you cannot substitute it by a data-stream from Deutsche Börse).

<ESMA_COMMENT_GOMD_1>

Questions

Q1: What are your views on covering in the Guidelines also market data providers offering market data free of charge for the requirements not explicitly exempted in the Level 2 requirements?

<ESMA_QUESTION_GOMD_1>

[bwf comment] From a user's perspective, it is important that data offered free of charge is available on a non-discriminatory basis, that the data supply is reliable and the data-quality comparable to market-data which is sold.

At the same time, information on the costs of producing data, other transparency, unbundling and customer-classification requirements would not create additional benefits from a user's perspective, if the data is offered free of charge and therefore such information appears to be dispensable. Consequently, market data providers offering data free of charge should not be imposed with an unnecessary administrative burden.

<ESMA_QUESTION_GOMD_1>

Q2: Do you agree with Guideline 1? If not, please justify.

<ESMA_QUESTION_GOMD_2>

[bwf comment] Our general impression is that the guiding principle that the provision and pricing of market data should be based on the costs of the production and dissemination is still not given the necessary attention by many market data providers and that market data is de facto rather priced on a profit maximizing basis, in other words, on the basis of the highest attainable price. We also agree with ESMA's assessment that the level of cost-transparency is still insufficient.[4] We therefore encourage a stricter enforcement of the obligations stipulated by Article 85 of Delegated Regulation (EU) No 2017/565 and Article 7 of Delegated Regulation (EU) No 2017/567 that the provision of market data should be based on costs as it is intended by proposed Guideline 1.

We not only agree with the "clear and documented Methodology" requirement but also with the obligation to explain "whether a margin is included and how the margin has been determined".

However, we are critical with respect to the possible inclusion of "joint costs". The inclusion of joint- or overhead costs should only be allowed to the extent that it can be convincingly demonstrated that they result from the production of market data itself. In other words, costs which also would occur, without the production and dissemination of market data should not be allowed to be included.

As desirable it is in general to have a better information basis with respect to the basis of cost, it should also be taken into account that from a user's perspective, the value of this information varies, depending on, how much he has to pay for the data, whereby the price is usually positively correlated with the size and the importance of the trading venue which

[4] Cf. ESMA70-156-2477, para 19

supplies it. It also needs to be anticipated that from a market data provider's perspective, an ongoing cost analysis means an additional administrative burden which also depends on the sophistication of the methodology applied.

We therefore think that an element of proportionality should be included in Guideline 1, which would require that the complexity and accuracy of the methodology for setting the price of market data should reflect the size of the market data provider/venue as well as the relative and absolute amount of revenue generated from market data business. E.g., it might be clearly disproportionate to expect the implementation of a long run incremental cost (LRIC) based cost-analysis model by a comparably small trading venue, while it could be an appropriate methodologic approach for a large market data provider/venue.

<ESMA_QUESTION_GOMD_2>

Q3: Do you think ESMA should clarify other aspects of the accounting methodologies for setting up the fees of market data? If yes, please explain.

<ESMA_QUESTION_GOMD_3>

[bwf comment] While we are of the opinion that there should be some flexibility in choosing an appropriate methodology by the market data provider and we therefore would reject a mandatory methodology and a "one fits it all" approach, in particular because of the the proportionality considerations discussed in question 2, we also think that for the larger venues[5], an appropriate, early and continuous institutionalized involvement of the users (e.g., in the form of an ex ante consultation requirement and the establishment of a consultative "user committee") in the decision making process of choosing a cost-analysis methodology should be applied, on a mandatory basis and the responsible NCA should approve the appropriateness of the methodology chosen.

<ESMA_QUESTION_GOMD_3>

Q4: With regard to Guideline 2, do you think placing the burden of proof, with respect to non-compliance with the terms of the market data agreement, on data providers can address the issue? Please provide any other comments you may have on Guideline 2.

<ESMA_QUESTION_GOMD_4>

[bwf comment] We fully share ESMA's concern as expressed in the proposed Guideline 2 that the current audit practices could often be described as "overly onerous" and that THEY could contribute to increased final costs of data. In fact, currently observed audit practices, but also the relatively new phenomenon of requesting detailed so called "data usage declarations" (DUD) or "statements of use" SOU), are one of the best examples of the severe imbalances between market data providers and users in the market-data market.

[5] We suggest that > 25 million EUR revenues from market data sales p.a. could be used as a threshold, which would effectively avoid an disproportional administrative burden for the smaller and mid-size venues and data market data providers.

From our point of view there are considerable doubts as to whether the depth and scope of the often business sensible information requested during an audit or in a DUD/SOU are reasonable and necessary for the claimed purpose of verification of the compliance with a data-usage license agreement. In this respect, we also have concerns as to whether such practices are permissible at all under European competition law:

While article 102 paragraph 2 a) of the Treaty on the Functioning of the European Union (TFEU) expressly prohibits "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions", which includes the enforcement of unreasonable terms and conditions, article 102 paragraph 2 d) prohibits. "making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts", which includes in the context discussed the request of any information which is not objectively necessary for the monitoring of the compliance with the license agreement. The crucial question therefore is, whether users could be reasonably assumed that they would provide the requested sensible information also under non-monopolistic but competitive conditions, which we think, can be clearly denied.

Regarding the burden of proof, it should clearly rest with the market data provider who has to be able to convincingly demonstrate that the user intentionally breaches the contracted license agreement. In this context, it needs to be noted that the increasing complexity of data licensing agreements has become a severe problem with respect to the different utilization of data and users, acting in good faith, often see themselves confronted with the risk of unintentionally breaching a licensing agreement.

Insofar, we expressly welcome the intention of the proposed Guideline 2. However, we are afraid that undetermined terms like "excessive interest charging" or "extensive retroactivity" in praxis will offer only very limited protection from exaggerated claims.

We therefore suggest, that similar to our proposal with respect to the chosen methodology for calculating the basis of costs[6], that an appropriate, early and continuous institutionalized involvement of the users (e.g., in the form of an ex ante consultation requirement and the establishment of a consultative "user committee") in the process of designing and reviewing audit policies as well as DUDs and SOUs should be ensured and that audit policies as well as DUDs and SOUs need the approval of the responsible NCA.

In this context, we further propose the following provisions to be included in Guideline 2:

– Rights and duties arising from audit policies should be reciprocal to the highest degree possible.

– The same efforts should be made to detect over- as well as under-subscriptions.

– Periods of possible retroactive claims (which are currently often heavily imbalanced with the market data provider being able to claim underpaid fees for several (in some cases up to ten years) years and users being restricted to claim overpaid fees usually only for a few month), should be harmonized and provisions which intend to extend beyond the regular

[6] Cf our answer to question 3

statutory period of limitations should be prohibited and considered a violation of the RCB-requirement.

– The audit period (the time window under review), the frequency of audits, DUD and SOU reviews as well as the harmonized periods of retroactive claims should be set in coordination with the users, in particular with the involvement of the before mentioned user committee.

– Prior to the commencement of any audit it shall be the obligation of the MDP to make available to the auditee all applicable versions of contracts, terms and policies for the audit term.

– The audited party shall have a right to postpone the audit twice for three months after having received the market data provider's request for an audit in order to enable the data user to prepare for the audit in a planned way.

– The audited party shall have a "right of first refusal" to the auditor, e.g. if the market data provider has delegated the audit to a third party firm as is often the case. More generally, the auditee should be allowed to refuse the audit process as proposed by the market data provider, if the audited party in a reasonable manner can identify elements that needs a separate resolution prior to the commencement of an audit.

– Any "conflict of interest" with the (third party) auditor shall be disclosed to the audited party. Including but not limited to; employment status and/or compensations based on the size of claims resulting from an audit.

<ESMA_QUESTION_GOMD_4>

Q5: Do you consider that auditing practices may contribute to higher costs of market data? Please explain and provide practical examples of auditing practices that you consider problematic in this context. Such examples can be provided on a confidential basis via a separate submission to ESMA.

<ESMA_QUESTION_GOMD_5>

[bwf comment] We assume that audits can result in higher costs of market-data because of the fundamentally imbalanced situation of negotiation. Not only because of the extremely high complexity and resulting "opacity" of today's data licensing agreements from a user's perspective but also because of the economical severe risks of retroactive claims, users might find themselves under pressure during and after the audit process and might therefore accepting a renegotiation/extension of their market data agreements.

<ESMA_QUESTION_GOMD_5>

Q6: Do you agree with Guideline 3? If not, please justify, by indicating which parts of the Guideline you do not agree with and the relevant reasons.

<ESMA_QUESTION_GOMD_6>

[bwf comment] We agree with the proposed Guideline 3 in principle. However, the wording is very generic. In order to provide a minimum level of harmonisation, we think that the customer categorisation should be set up based on the basic client categorisation of retail- and professional clients (of which eligible counterparties are subset) as stipulated by MiFID.

Furthermore, we think it is paramount to clarify and to state clearly in the Guideline that any differentiation based on customer/client categories or how customers/clients use the data (display, non-display-use etc.) must not be used as an undue circumvention of the guiding principle that market data should be generally priced based on the costs of production and dissemination. Accordingly, market data providers should be required to be able to demonstrate that price-differentiations based on categories of customers and use-cases are still coherent with the requirement that market data pricing is based on costs.

<ESMA_QUESTION_GOMD_6>

Q7: Do you agree with the approach taken in Guideline 4? If not, please justify, also by providing arguments for the adoption of a different approach.

<ESMA_QUESTION_GOMD_7>

[bwf comment] We agree with the wording of the proposed wording of Guideline 4, in particular with the clear requirement that customers who fall in several categories and make different simultaneous uses of the data might be charged only once and that the market data provider has to make a decision which customer category he wants to apply.

<ESMA_QUESTION_GOMD_7>

Q8: Do you agree with Guideline 5? If not, please justify.

<ESMA_QUESTION_GOMD_8>

[bwf comment] We agree with the wording of the proposed Guideline 5.

<ESMA_QUESTION_GOMD_8>

Q9: Do you think that ESMA should clarify other elements of the obligation to provide market data on a non-discriminatory basis? If yes, please explain.

<ESMA_QUESTION_GOMD_9>

[bwf comment] It should be clarified that a trading venue might not charge higher prices for the same data and which is disseminated with the same technological effort (e.g. with a similar latency) when the user is a competitor, e.g. an operator of a MTF, an OTFs or a SIs.

<ESMA_QUESTION_GOMD_9>

Q10: Do you agree on the interpretation of the per user model provided by Guideline 6? If not, please justify and include in your answer any different interpretation you may have of the per user model and supporting grounds.

<ESMA_QUESTION_GOMD_10>

[bwf comment] With respect to the proposed wording of Guideline 6, which is based on Article 87 of Delegated Regulation (EU) No 2017/565 and Article 9 of Delegated Regulation (EU) No 2017/567, our verdict is divided.

To our understanding, it was the legislative intent of the "per user" provisions to avoid that a user is charge several times for the same data. Therefore, we fully agree with the proposed wording that "the per user model should enable customers to avoid multiple billing in the case market data has been sourced through multiple data products or subscriptions."

However, as mentioned earlier, the "per user" provisions must not be used to circumvent the general principle that market data should be priced on the basis of costs. Unfortunately, in praxis, this is often the case. Possibly the most prominent example is the joint use of a display data terminal (either for life or for historical data) by several employees of an investment firm, bank or UCIT-company. Very obviously, the costs for set up and operating the terminal remain the same, no matter it is used by one or several users. Nevertheless, data vendors regularly try to charge data users based on the number of employees which have access to the terminal even when there is only one active user at a time. In our view, this is a clear violation of the imperative that market data should be priced based on the costs of production and dissemination.

This is why, we are somewhat concerned about ESMA's proposed wording "Market data providers should for display data use as a unit of count the "Active User-ID" that enables customers to pay according to the number of active users accessing the data, rather than per device or data product." We think that the sentence should be reedited in a way which avoids the impression that the "per user" rule would allow market data providers to maximise their revenue by charging several users, even in situations where it is clear that emerging costs remain the same. In so far, we also would like to see some clarification of the term "active user" in a way that in situations where there can be only one active user who is using a device, there should be no multiple licencing/billing just because several users are "actively" using the device on an alternate basis.

<ESMA_QUESTION_GOMD_10>

Q11: Do you agree with Guideline 7? If not, please justify. In your opinion, are there any other additional conditions that need to be met by the customer in order to permit the application of the per user model or do you consider the conditions listed in Guideline 7 sufficient to this aim? Please include in your answer the main obstacles you see in the adoption of the per user model, if any, and comments or suggestions you may have to encourage its application.

<ESMA_QUESTION_GOMD_11>

[bwf comment] We do not agree with the proposed wording of Guideline 7 for the reasons described in our answer to question 10. At a minimum, Guideline 7 should be amended by a clarification that the "per user" approach follows the legislative intent to avoid multiple billing for the same data and must not be used to circumvent the general principle that market data should be priced based on the costs for producing and disseminating it. - In reverse, the wording proposed by ESMA seems to be appropriate for situations in which the emerging costs vary, depending on the number of active users.

<ESMA_QUESTION_GOMD_11>

Q12: Do you agree with Guideline 8? If not, please justify also by indicating what are the elements making the adoption of the per user model disproportionate and the reasons hampering their disclosure.

<ESMA_QUESTION_GOMD_12>

[bwf comment] We agree with the proposed wording of Guideline 8 in principle, even though it is pretty generic and unspecific. However we suggest that it should be amended by requiring – at least for larger venues with significant revenues from market data[7] and data vendors – an appropriate, early and continuous institutionalized involvement of the users (e.g., in the form of an ex ante consultation requirement and the establishment of a consultative "user committee")[8] in the decision whether the adoption of a "per user" model would be disproportionate.

<ESMA_QUESTION_GOMD_12>

Q13: Do you think ESMA should clarify other elements of the obligation to provide market data on a per user fees basis? If yes, please explain.

<ESMA_QUESTION_GOMD_13>

[bwf comment] As already mentioned above, we consider it to be paramount to clarify that the legislative intent of the "per user" approach is the avoidance of multiple billing for the same data and its application must not lead to a violation of the guiding principle that market data pricing shall be based on costs.

<ESMA_QUESTION_GOMD_13>

Q14: Do you agree with Guideline 9? If not, please justify.

<ESMA_QUESTION_GOMD_14>

[bwf comment] We agree with the proposed wording of Guideline 9.

[7] From our point of view > 25 million EUR revenues from market data sales p.a. could be used as a „significance"- threshold, which would effectively avoid an disproportional administrative burden for the smaller and mid-size venues and data market data providers.
[8] Simmilar to our proposal in our answers to question 3 (cost analysis methodology) and question 4 (audit policies, DUDs and SOUs).

<ESMA_QUESTION_GOMD_14>

Q15: Do you think ESMA should clarify other elements in relation to the obligation to keep data unbundled? If yes, please explain.

<ESMA_QUESTION_GOMD_15>

[bwf comment] We would suggest a clarification, either as an amendment to Guideline 9 or a separate Guideline, that the data disaggregation provision, to make data available separately for different asset classes as stipulated in Commission Delegated Regulation (EU) 2017/572 should be understood in a financial rather than a technological way. In other words a market data provider who, in order to avoid additional IT- costs, gives data users access to his entire data universe but bills the user only for the data he actually uses, fully complies with Commission Delegated Regulation (EU) 2017/572.

Furthermore, ESMA should clarify that market data providers should not discourage data users from buying disaggregated data by making disaggregated data disproportionally more expensive. In other words, the price of the sum of unbundled data sets should not exceed the price of bundled data in a significant way.

<ESMA_QUESTION_GOMD_15>

Q16: Do you agree with Guideline 10 that market data providers should use a standardised publication format to publish the RCB information? If not, please justify.

<ESMA_QUESTION_GOMD_16>

[bwf comment] We are supportive to the standardised publication format proposed in Guideline 10. However we are not critical with respect to the degree of freedom provided by the "other creteria" escape clause. Since standardization is crucial to facilitate transparency and comparability. Therefore other criteria should not be allowed. Additional definitions may be allowed in the market data policies and price lists (Guideline 11, not Guideline 10) if properly defined with an explanation of why these additional definitions are needed and for which purpose.

Furthermore, we strongly oppose that market data providers shall not be required to disclose the actual costs for producing or disseminating market data or the actual level of the margin. Without this information, any meaningful assessment whether market data is priced on a "reasonable commercial basis" is de facto impossible.

In case this information shall only be made available to NCAs, they should disclose to the public on a regular basis a detailed report which sufficiently demonstrates how an individual market data provider has fulfilled the various MIFID obligations. Without access to this information data users cannot negotiate prices, licenses or engage in audits in a meaningful and effective way.

We also urge simplification of the pricelists in accordance with the proposed Guideline 11. Any changes in products must be thoroughly explained in the pricelists and in the market data

policy. Furthermore, we call for an extension of Guideline 10 as it should be a requirement to publish pricelists for at least the past 5 years (and preferably longer) as well as pricelists based on multiyear comparisons.

<ESMA_QUESTION_GOMD_16>

Q17: Do you agree with the standardised publication template set out in Annex I of the Guidelines and the accompanying instructions? Do you have any comments and suggestions to improve the standardised publication format and the accompanying instructions?

<ESMA_QUESTION_GOMD_17>

[bwf comment] We principally agree with some but not all aspects of the proposed standardised publication template.

As mentioned before, a requirement to publish comprehensive and detailed pricelists from at least the past five years should be included in Annex I.

Furthermore, the information requested with respect to the cost accounting methodology seems to be too high level and generic. There should be a requirement (within the Annex, not only in Guideline 12) for a sufficiently detailed description of the cost accounting methodologies and how they are applied in practice in a verifiable way. It would be also helpful to understand, how the cost accounting methodologies where selected, in particular, if there has been any user involvement, e.g. in form of an ex ante consultation process or a user-committee involvement. This "decision making process" could be described in a separate field.

Just like the revenues from market data, the costs should be quantified. Furthermore, it should be clarified that "joint costs" are only attributable, if it can be demonstrated that they are caused by the market data business and not simple overhead costs, which would also occur independently from the market data business.

When the price includes a margin, the margin should also be quantified.[9] ESMA itself proposes that market data providers shall explain "why they consider the margin reasonable". In fact, this would remain a highly esoteric exercise, if the margin in question remains unknown and as mentioned before, the compliance with the RCB-requirement cannot be meaningfully assessed, as long as this quantitative information is not made available.

<ESMA_QUESTION_GOMD_17>

Q18: Do you agree with the proposed definitions in Guideline 11? In particular, do they capture all relevant market uses and market participants? If not, please explain.

<ESMA_QUESTION_GOMD_18>

[9] Even though the margin could be easily calculated, in case that not only revenues but also costs are quantified.

[bwf comment] We are not completely satisfied with the proposed standardisation of terminology proposed in Annex II.

To the extent that the "unit of count" shall be the "measure the level of use of market data to be invoiced to the customer" we urgently ask ESMA to include a clarification that any invoicing based on the "unit of count" must still comply with the general principle that market data pricing must be based on the costs of producing and dismantling such data and might not be used to circumvent the cost based approach.

With respect to the "Active User ID", it must be remembered that the legislative intent of the "per user" approach clearly is to avoid that the same user is billed several times for the same data and not to enable market data providers to easily multiply the number of billable accounts as it is current praxis.[10]

It should be further clarified that an "active user" is somebody who actually "does" (not only "can") access the display data, otherwise he can hardly be described as "active".

Also with respect to "non-display" data, the pricing mechanism must be compliant with the guiding principle of cost based pricing, while the wording used by ESMA could be easily understood in a way which suggests that pricing on a machine by machine basis should be the rule. To our understanding this would not be in accordance with the RCB-requirements and in cases where non display data is delivered via a single interface and further distributed within the firm by using a customer's own the technical infrastructure and at the customer's costs, the norm should be an enterprise-wide non display license. Even though this might not be common practice, the efforts of implementing these guidelines would be in vain from the outset, if they were not convincingly aimed at bringing the current practice more in line with the original legislative intent.

Furthermore, as already proposed in our answer to question 6, we would suggest the basic customer categorisation in line with the MiFID client classification. Therefore, we would prefer "Retail Customer" instead of "Non-Professional Customer".

We are at least critical about the definition of "derived data" and think that it is not made sufficiently clear under which conditions simple data (which always needs to be handled in one or the other way) shall become "derived data".

Finally, we clearly reject the differentiation between "Delayed Data" and "Historical Data", which is obviously aimed to enable market data providers to sell "Historical Data" while pursuant to Article 13(1) of MiFIR, trading venues are required to make data available free of charge 15 minutes after publication and not only for a certain period of time after 15 minutes but permanently. In other words, to our understanding, it was the legislative intent that after 15 minutes, market data becomes a "public good".

<ESMA_QUESTION_GOMD_18>

[10] Cf. the example discussed in our answer to question 10.

Q19: 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_GOMD_19>

[bwf comment] We would like to see a standardized terminology for the terms “auditing practice”, “data usage declaration” and “statement of use”, in order to insure that the information requested in such contexts might be solely used to monitor the compliance with an existing data usage agreement and not for other purposes, e.g. the development of new products or the optimization of a market data provider's pricing strategy.

<ESMA_QUESTION_GOMD_19>

Q20: Do you agree with Guideline 12? If not, please justify.

<ESMA_QUESTION_GOMD_20>

[bwf comment] We only partly agree with the proposed wording of Guideline 12. As already mentioned in our answer to question 17, not only a sufficiently detailed description of the cost accounting methodologies should be required but also a verifiable description how they are applied. Furthermore, it would be also helpful to understand, how the cost accounting methodologies where selected, in particular, if there has been any user involvement.

We completely disagree with the proposal that on the one hand market data providers shall neither have to disclose actual costs nor margins while on the other hand, they shall provide a list of all costs and explain why they consider their margin reasonable. As already explained in our answer to question 17, any discussion of costs and margins would remain a highly esoteric exercise without quantitative information and furthermore, the compliance with the RCB-requirement cannot be meaningfully assessed, as long as these quantitative information are not made available.

<ESMA_QUESTION_GOMD_20>

Q21: 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_GOMD_21>

[bwf comment] As already mentioned in our answer to questions 17 and 20, market data providers should disclose their actual costs for producing and dismantling market data as well as – where applicable – their profit margin added. Without the disclosure of quantitative information, any discussions whether the RCB-requirement is met, must necessarily remain a purely speculative exercise, where the market data providers assure in ornate language, but ultimately without contestable evidence that they comply with the legal provisions.

<ESMA_QUESTION_GOMD_21>

Q22: Do you agree with Guideline 13? If not, please justify.

<ESMA_QUESTION_GOMD_22>

[bwf comment] We principally agree with Guideline 13 insofar as all relevant terms and conditions of the market data agreement and related contractual arrangements should be formulated as in sufficiently detail way and as clear as possible. We suggest an amendment that in reverse, unnecessary complexity which could result in legal uncertainty from a user's perspective, should be avoided.

We disagree with the term "how customers are expected to demonstrate their compliance with the market data agreement", which could be misunderstood in the way that the burden of proof of compliance with the market data agreement should be with the user which we strongly object.[11]

Finally, with respect to market data fees that can be applied retroactively, we would welcome a note that this is not a one way street and periods of possible additional claims by the market data provider and possible requests for refunds by the market data users should be set in a reciprocal, harmonized way. The contractual partners should be also encouraged to limit the periods for retroactive claims in a reasonable way in order to avoid undue legal uncertainty and economic risk. In any case, provisions which extend the period for retroactive claims beyond the regular statutory period of limitations should be prohibited and regarded as a violation of the RCB-requirement.

<ESMA_QUESTION_GOMD_22>

Q23: Which elements for post- and pre-trade data publication should be required? In particular, are flags a useful element of the publication? Should there be any differences between the different types of trading systems? Is the first best bid and offer sufficient for the purpose of delayed pre-trade data publication?

<ESMA_QUESTION_GOMD_23>

[bwf comment] We are not aware of any indication that the legislator did intend that content and/or format of the market data which providers are required to make available free of charge 15 minutes after the original publication should differ from the information which before was made available on a "reasonable commercial basis". In other words, the complete data-set should be made available not only in form of a webpage display but also in an easy accessible, machine-readable format which can be used for display and non-display applications – We suggest that this should be clarified.

With respect to the "first best bid and offer" which is mentioned in the proposed wording, it needs to be urgently noticed that in accordance with RTS 1 and 2, the requirement to publish best bids and offers is depended on the market model and in particular for market models falling in the catch all classifications of "any other trading system" in RTS 1, respectively "trading system not covered by first 5 rows" in RTS 2, the requirement is restricted to the condition that "the characteristics of the price discovery mechanism so permit". We urgently suggest that the cited restricting condition should be included in the wording of Guideline 14

[11] Cf. our answer to question 4

as long as any reference to the publication of best bids and offers is made, in order to avoid any misunderstanding.

<ESMA_QUESTION_GOMD_23>

Q24: Which use cases of post- and pre-trade delayed data are relevant to you as a data user? What format of data provision is necessary for these use cases, and especially for pre-trade delayed data?

<ESMA_QUESTION_GOMD_24>

[bwf comment] Use cases vary across firms, depending on the specific business models, in particular between buy- and sell-side firms and generalizing remarks therefore would be of limited value.

As mentioned already in our answer to question 23, we think that there can be no doubt that it was the legislative intent that content and format of the data which is made available free of charge after 15 minutes should be simmilar to the data which was made available under RCB conditions before.

Furthermore, as we have already pointed out in our answer to question 18, we clearly reject the differentiation between “Delayed Data” and “Historical Data”. Pursuant to Article 13(1) of MiFIR, trading venues are required to make data available free of charge 15 minutes after publication and not only for a certain period of time and there is no indication, neither in the level I nor the level II text that the data should not be made available free of charge on a permanent basis. To our understanding, as mentioned before, it was the legislative intent that after 15 minutes, market data becomes a “public good”.

<ESMA_QUESTION_GOMD_24>

Q25: Do you agree with the definitions of data-distribution and value-added services provided in Guideline 16? Please explain.

<ESMA_QUESTION_GOMD_25>

[bwf comment] We do neither agree with central parts of the proposed wording of Guideline 16 nor with the underlying assumptions.

We do not support the ESMA's consideration that 15 minutes delayed data which should be free of charge – could be subject to distribution licenses and user count. Such interpretation, as mentioned before, is in contradiction with MiFIR, Art. 13, MiFID II, Art. 64 and Art. 65, where is it clearly stated that market data must free of charge after 15 minutes. Therefore, no data redistribution fees may apply at all in case of delayed data (all data after 15minutes of first publication). This includes the reuse and any passing on of data which – as mentioned before – to our understanding has become a “public good”.

<ESMA_QUESTION_GOMD_25>

Q26: Do you have any further comment or suggestion on the draft Guidelines? Please explain.

<ESMA_QUESTION_GOMD_26>

[bwf comment] We are of the opinion that it should also be considered to prohibit or at least to strongly discourage certain data license practices currently observed which can have significant negative consequences for users and financial markets as a whole, in particular:

– Data cut-offs in case of license disputes should be prohibited before a binding court or arbitration decision has been obtained. Not only because we consider such practices unfair with respect to the individual user but also because data cut-offs could harm the stability of investment firms, banks, markets and/or end-investors. In practice data users may not enforce their rights as the data provider/vendor will usually unilaterally terminate the contract in case of dispute and the user has no right of continuation of service. The data user, under threat of being disconnected, cannot effectively challenge the position of dominant data providers without endangering its business continuity. Therefore most data users will accept even excessive price increases without engaging in a legal dispute with the data provider.

– Sector specific rules should ensure that regulated data providers are not allowed to escape their regulatory obligations through outsourcing of market data business on unregulated (group) companies. In case of credit rating agencies ESMA tried without success to get detailed rating cost and product information from the unregulated ratings data companies within the CRA groups. Similar situations may arise with data companies associated with regulated market data or benchmark providers.

<ESMA_QUESTION_GOMD_26>

Q27: What level of resources (financial and other) would be required to implement and comply with the Guidelines 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_GOMD_27>

[bwf comment] Unfortunately, there are no quantitative estimates available from bwf member firms yet regarding the expected possible reduction of the amount of resources used for the administration of market data agreements as well as with respect to a possible decrease in the direct market data costs – if any – as a result of the implementation of the proposed guidelines.

We hope that the Guidelines will signifficantly increase transparency and migt help to reduce the administrative burden and legal uncertainty on side of the users but – as already mentioned in our introductory remarks – will, most likely, not be able to effectively address – let alone to solve – the fundamental problems resulting from the RCB-approach.

<ESMA_QUESTION_GOMD_27>