EFAMA

European Fund and Asset Management Association

EFAMA's REPLY TO ESMA's CONSULTATION PAPER ON THE GUIDELINES ON THE MIFID II/ MIFIR OBLIGATIONS ON MARKET DATA

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INTRODUCTION

EFAMA welcomes this ESMA initiative and we agree with the conclusions in the ESMA Report that there is an overall need to strengthen the laws applicable to data in connection with the MiFIDII/MiFIR Review, aside the implementation of a Consolidated Tape[1]. We consider that the draft Guidelines will further strengthen the MiFID level 1 and level 2 measures and will foster the establishment of a cost-based approach for market data procurement. Therefore, we would be in favour of turning the proposed guidelines into binding regulation. Furthermore, we strongly encourage increased supervision by the NCAs under a ESMA harmonized approach to ensure consistency in supervision and enforcement, also of the proposed guidelines.

Regarding the proposed Guidelines *per se*, we consider that further discipline is required, especially in the field of competition between (i) the main price data sources (the "primary exchanges", Regulated Markets (RMs) and other trading venues enjoying a reference price data monopoly), (ii) other market participants (MTF, SI) and (iii) other value-added data service competitors relying on exchange prices for their products (such as index providers). Licenses for the reuse of data by Regulated MD Providers under MIFID (MDP) should be viewed with caution because IP rights do not exist for simple data such as prices and associated MD. The GL should make sure that MD providers ensure that the same MIFID product provided directly by the regulated MD provider is provided by the MD.

Beyond the Guidelines, ESMA should support Level 2[2] regulation and address the shortcoming of the MIFID MD price setting mechanism (RCB). Without a clear cost canvas, regulated MD providers will include as much operating cost as possible in their calculation of market data cost. Furthermore, without that canvas, it is difficult to compare MD cost between venues and it is impossible for NCAs to ensure enforcement. To counterbalance this shortcoming, we support both the IEX report[3] (which contains the needed information on the relevant costs as a blueprint for EU trading venue MD production cots disclosure) and the Copenhagen Economics guideline on the creation of a cost benchmark within the present MiFID regulatory framework.[4]

In that perspective, we welcome the guidelines and any changes to applicable supervisory laws that are needed to

- close gaps in the existing MiFID legislations,
- achieve a coherent regulation and supervision in the EU of financial market data cost,
- impose cost, price and license transparency rules across the different market data providers.

Lastly, we ask ESMA to extend the Guidelines to other types of data providers, i.e. beyond MiFID (e.g. ESG data providers, index providers) as the issues we are facing are very similar in all cases of Data Providers.

More widely, the similarity of such issues would clearly justify an EU holistic Action regarding Data Providers, to set at Level 1 the same high-level principles (on price transparency, price setting, legal

[1] See EFAMA's view on Consolidated Tape.
[2] According to Delegated Regulation 2017/567, Art. 7 and Delegated Regulation 2017/565, Art. 85
[3] https://iextrading.com/docs/The%20Cost%20of%20Exchange%20Services.pdf
[4]https://www.copenhageneconomics.com/dyn/resources/Publication/publicationPDF/4/504/1592575721/copenhagen-economics_a-guideline-to-a-cost-benchmark-of-market-data.pdf

responsibility when delivering data as a paid service, etc.), to be complemented in siloed technical details depending on each area covered (Market Data, ESG Data, Index Data).

Such Level 1 holistic principles could start from existing provisions, not only included in MiFID but also in other pieces of legislation (e.g. CRAR), to be complemented by some more recent contributions from regulators, such as the joint French AMF/Dutch AMF report on ESG Data Providers. [5]

QUESTIONS

Question 1: 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?

No, we do not -support this proposal as we don't have tools or ways to require from market data providers neither to fulfil their duties especially their obligations to provide their services free of charge after 15 minutes nor to deliver the same quality, licensing terms, restrictions etc. Regulation cannot differentiate between free and other services. as there are mostly if not always combinations of free (delayed data, historical data) and payable (real time market data offerings by regulated MDPs, especially trading venues.

We also consider that the Guidelines should cover both regulated MD providers (MDP) - as defined on p. 5 DGL) - as well unregulated MDDs to the extent possible by requiring MDP. This would allow to include provisions that are in line with the MIFID requirements applicable directly to RMDP in their contracts with MDDs. In this way, including vendors in scope for this regulation could be achieved without a change of MiFID Level 1.

We disagree with ESMA, however, that 15 mins can be subject to distribution licenses. In fact, we believe that such interpretation is in contrary MiFIR, Art. 13 and MiFID II, Art. 64 and Art. 65.

Lastly, we are of the view that there is no time-restrictions for end-of-day and/or historical data licensing. Our understanding of the text of the law does not allow any constraint, such as 24 hours deadline to access or store the data that should be free of charge.

Question 2: Do you agree with Guideline 1? If not, please justify.

We support more stringent requirements for setting methodology, transparency and review. As for the content of the guideline 1, EFAMA proposes the elaboration of the following requirements on costs[6]:

- The methodology setting and review process should include a public consultation mechanism and a feedback statement as is the case with CRA methodology changes under CRAR (Draft Guidelines DGL, p.8),
- The basis of the methodology on cost should be enforced and a pricing based on the cost of production of MD as foreseen by MiFID (and opposed to most exchanges pricing system that are based on "customer use of data value"). Therefore a reference to a cost benchmark (LRIC+) as proposed by Copenhagen Economics should be included in the GLs.
- A new detailed cost report per product /service should be developed, based on the IEX example (cf. FN9 of the GL report).

[5] See https://www.amf-france.org/en/news-publications/news-releases/amf-news-releases/french-and-dutch-financial-market-authorities-call-european-regulation-esg-data-ratings-and-related
[6] See Delegated Regulation 2017/567, Art. 7 and Delegated Regulation 2017/565, Art. 85.

The definition of the four cost categories (DGL p. 8) as well as the minimum requirements for justification of costs is also welcome. However, we urge ESMA to review frequently and in detail the implementation of the justification of the cost to make sure that RMs do not attribute general cost of the trading system and IT to data production cost.

We also disagree with the existing provision which allows the trading venues to include "an appropriate share of joint costs" when determining the market data prices as market data is a by-product of the trading activities – not a joint product. As orders in financial instruments are supplied by the market participants via bids and asks and executed in the market, the market data (pre- and post-trade data) is automatically produced. This implies that the marginal costs of producing market data is close to zero and the incremental cost of production is related to collecting the information and distributing the price feeds to users. These limited costs of production are clearly shown in the IEX report. ESMA should therefore support that the provision to include joint costs in the calculation of MD production cost is removed in the MiFIDII review expected in 4Q 2021.

Lastly, we ask ESMA to extend the definition of Market Data Providers to other types of data providers, i.e. beyond MiFID (e.g. ESG data providers, index providers) as the issues we are facing are very similar in all cases of Data Providers.

Question 3: Do you think ESMA should clarify other aspects of the accounting methodologies for setting up the fees of market data? If yes, please explain.

No, but the main requirements should be the "public transparency of pricing list" and "pricing model methodology" even if there are difficulties and structural factors that mean it may not be successful in lowering costs such as:

- regardless of accounting methodologies, data providers (exchanges) already have substantial market power which allows them to keep prices high,
- it is like to be technically difficulty to separate out costs of managing a trading venue vs. costs of disseminating market data,

best way overall to solve the market data issue is developing the consolidated tape. EFAMA believes that uniform and consistent compliance requires to specify the cost that may be included in the calculation of the market data fee, as elaborated in Chapter 2 of the Copenhagen Economics guideline[7].

Question 4: 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.

We would not agree to give data providers undue power to investigate our system or to force us to standardise our service and it could lead to competition issues. In addition, given that the MDP is the ultimate interpreter of their licenses, the burden of proof of user misconduct need to rest with the MDP in any audit.

The audit DGL is welcome (DGL p.9). ESMA itself notes that overly onerous practices that result in the generation of additional revenues on the basis of non-compliance or the inability by the customer to prove compliance with the terms and conditions of the license should be excluded. The GLs could therefore be strengthened by requiring that general audit procedures need to be consulted with the market and be

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7 https://www.copenhageneconomics.com/dyn/resources/Publication/publicationPDF/4/504/1592575721/copenhagen-economics_a-guideline-to-a-cost-benchmark-of-market-data.pdf

approved before first use by the NCA (as part of their responsibility to ensure cost based pricing). All audit rights and obligations need to be reciprocal, and the burden of proof must sit with the MDP.

Furthermore, we have the following specific observations:

- A limitation of the audit period (called Audit Term): This should not be longer than the shorter of the time from the closure of the latest audit or three (3) years. This should encourage MDPs to make the MD policy as clear and understandable as possible and the MDPs will also strive to ensure that these terms are correctly understood by the data users. At present, data users can usually not claw back overpaid license fees for more than 60-90 days from the time of the audit/today), whereas several MDPs venues can claw back revenues from under licensed users in some case up to 10 years,
- 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 MDPs request for an audit in order to enable the data user firm 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 MDP 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 MDP, if the audited party in a reasonable manner can identify elements to the 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 audit claim size.

Lastly, the MDP should be encouraged in the GLs to engage in an ongoing dialogue with their data user clients (“business review”) regarding the understanding of the MDP market data policies and price lists to avoid ex-ante situations of apparent under licensing. This business review dialogue between MDP and data user should remain voluntary and not lead to new contractual information rights created by the market data agreement in terms of data usage declarations (DUD), statements of use (SOU) or similar contractual documents. Such documents usually are not targeted to find out more about the users data needs but aim at getting a holistic picture of all the business activities of the user. We have examples of DUD that are anti-competitive as it enables the MDP to get information on its clients which would not be revealed in an at arms-length competitive situation.

Question 6: 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.

DGL 3 for customer categorization seems acceptable, although fairly general. Overall differentiation of database use (non-display licenses) vs. human interface (display licenses) is weak and may need to be revisited with detailed comments. A categorization of customers based on inter venue and discrimination of competing venues (MTF, OTF, SI) or business (e.g. index production) should be expressly discouraged.

As RM’s are by nature monopolies in the provision of their own market data, we believe that to provide data on a reasonable commercial basis, market data fees should have some relation to the cost of the production of the data. The existence of monopolies at the data source level is not an issue but the abuse of a dominant position by those monopolies is a problem. The issues that face market participants with respect to dominant RTVs are:

- driving up the costs of MD in a way not clearly linked to their costs of supply,
- imposing restrictions on what downstream use can be made of MD without further payments. For example many trading venues currently charge market participants new separate “created works” or “derived data” licenses based on use of trading venue data to create (e.g., through mathematical or other manipulations or processes) new data. RM’s clearly do not have any production costs

associated with a market participant's created works/derived data uses and, accordingly, we do not think such licenses meet the reasonable commercial basis test under MiFIR,

- creating a significant bureaucracy and cost around data licensing through multi-tiered licensing with variations by dataset without standardisation between vendors.

The existence of monopolies combined with the regulatory mandates (Best Ex, rating and regulatory reporting) mean that market participants have little or no leverage in negotiations with RTV's (and in fact trading venues argue they are not able to negotiate bilaterally with market participants).

Data vendors usually do not protect the end-user client through data source authorisation but enforce their policies without due consideration of the impact on the clients after an alleged incident or the claims of data sources such as exchanges, rating agencies or the CUSIP service. In the absence of market power impacting RTV practices, regulators and policymakers need to intervene to ensure the desired benefits. Therefore, the behaviour of the (perceived) data monopolies or oligopolies is facing increased scrutiny also by the competition authorities. These negative impacts of the data monopolies clearly call for detailed regulation of dominant position-backed activities and oversight on these entities.

On the consumer side, however, the market is inelastic as the buy-side cannot simply reduce data consumption in response to price increases. As a result, we support that market data providers should describe in their market data policy the categories of customers and how the use of data is taken into consideration to set up the categories of customers. We encourage ESMA to limit the client categories to only two, i.e. professional and non-professional as lack of standardisation complicates conditions for market data usage unnecessarily and increases costs. Allowing MDPs to further differentiate between clients as this contradicts with the requirements to base market data prices on costs and not on inelastic demand.

Question 7: 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.

We agree with the approach taken in DGL 4 for multiple product/service customer categorization, although fairly general. The fact that data consumers have must pay multiple use-case times for the same piece of data point does not correspond to an increase in cost for the market data provider or unregulated MDD and, hence, should not constitute a higher cost for the consumer. Overall differentiation of criteria to avoid charging more than once by applying one customer category only are needed, especially when it comes to database use (non-display licenses) vs. human interface (display licenses). Are these one client (the asset management firm or bank) or several clients (1 for x number of databases/applications plus1 for y number of employees with access to data)? Market data providers therefore need to clarify in their market data policy how fees are applied when a customer potentially belongs to more than one customer category when the customer use data simultaneously in several applications or units. In this case, market data providers should charge only once by applying one customer category only, and in line with the requirements to base market data prices on cost.

The current classification of data usage applied by MDPs, however, is often based on use cases (for example risk management, fund valuation, or trading), and therefore contradicts the requirement to base market data prices on costs (Section 4, no. 22). Secondly, the division of use-cases or customer activities are not defined in a consistent way across vendors. This is one reason for the lack of transparency how market data license prices are determined.

Question 8: Do you agree with Guideline 5? If not, please justify.

DGL 5 for technical arrangements customer categorization seems acceptable, although fairly general. When different customers fall within the same category the same terms and conditions apply, including the same technical arrangements. Overall differentiation of criteria to avoid charging more than once by applying only one customer "technical arrangements" category only may be needed, especially when it comes to database use (non-display licenses) vs. human interface (display licenses). Are these one client (e.g. real-time use) or several clients (1 for real-time, 1x for delayed, 1x for historical, 1x for end of day data-DGL p.9). Market data providers should ensure that practices in terms of such technical arrangements, including latency and connectivity, are non-discriminatory, while respecting the principle of being based on cost and not demand.

Question 9: 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.

We agree with the approach taken, considering that:

- Beyond Guidelines, these provisions should become part of Level 2
- It should be extended to:
  - data vendors
  - ESG data providers
- Therefore, a holistic regulation should be set up across all Market Data and Non-Market Data Providers, as the underlying issues at stake are similar.

Any MD data license cost should in principle be based only on the incremental/ marginal cost of providing and distributing a given data service. Specifically:

- MD providers should be required in principle to set fees only based on the cost recovery principle as for example specified in the Financial Stability Board (FSB) principles for (LEI) reference data.
- Unlike in MiFID today, the MD vendor should only be able to charge the incremental cost which originates from additional effort of the vendor to provide and distribute the data product or service to a (new) client. In reverse, the data provider / MDD should not be allowed to charge the cost of other business operations not directly related to data production and distribution on the user without any check on the adequacy of such cost. For example, a RTV venue should not be allowed to charge the cost of operation of the trading systems and general exchange overhead expenditure as part of the market data costs. EFAMA supports the idea of exploring cost based revenue caps as the most efficient and easy to implement measure.
- In the context of a principally cost recovery based pricing of MD the data sources and MDD's may be allowed to charge a reasonable (inflation adjustment based) profit margin e.g. for provision of price feeds under MIFID. In addition, prices increase should also be framed to ensure that they are not excessive.

Question 10: 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.

DGL 6 for display data (human interface) provides as units of count the "Active user ID" instead of multiple data product licenses seems acceptable, although still general. Please beware that "per user" model is only relevant for access to real time data. We support that 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. 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. We therefore suggest to amend the definition of "Active User-ID" in para 55.

Charging based on “active user-id” is possible under currently licensing terms, but first requires users to submit “multiple instance, single user” (MISU) reports to avoid multiple charges, where there is no standard approach to this across data vendors, and submitting reports comes with significant difficulty and complexity, adding to the overall administrative burden associated with managing market data. If a per-user model is to be adopted, fees should be charges on a truly per-user basis, and not on a per-access point basis. Active User-ID should be understood as users who actually uses the data and not all users who may only have access to data. Such definition would ensure a reasonable and fair baseline for the cost-based approach.

In order to reduce disputes on license fees, supervisory agencies (ESA’s and NCA’s) and users should receive meaningful written information which enables the reader to recalculate the true costs based on the applicable pricing methods, including cost calculation methods as well as the guidelines on the allocation of fixed and variable cost, including the cost of third parties, of the provision and distribution of FMD offerings.

Today, for example, the cost information obligation made available by exchanges under Art 11e and Recital 5 MiFIR Supplementary Regulation (EU) 2017/567 often is limited to restating the text of the law. In contrast the market data cost report of the US based IEX trading venue details all market data cost incurred and charged by this exchange. The IEX report could serve as a benchmark for developing EU market data cost transparency standards, as is suggested by Copenhagen Economics.

Secondly, the adherence to the cost recovery principle should be explained in writing by the vendor and be approved by the statutory auditor of the company. As is the case in the LEI system overcharged profits in principle should be paid back to user.

Question 11: 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.

DGL 7 for display data (human interface) provides for rules how to count the “Active user ID seems acceptable, although still general. There may be a need to clarify use of real time intermediate database use (non-display licenses) to provide finally human interface (display licenses to end clients). Furthermore, market data providers should ensure the conditions to be qualified as eligible for the per user model require only what is necessary to make the per user model feasible. In particular, eligibility conditions should mean (i) the customer is able to identify correctly the number of active users who have access to the data within the organisation and (ii) the customer reports to the market data provider the exact number of active users. The ultimate number of end users (clients or employees) sometimes cannot be checked (e.g. the Bloomberg terminal only allows checking of 1 user (SID) not individual users (UUID)). Website visitors may not be identified individually because of GDPR. There needs to be an estimation possibility to come up with a reasonable number of clients which is also valid for audit purposes.

Furthermore, there should be a single standardised approach only which is recognized and used by all marked data providers to ease the administrative burden considerably. Ideally there should be only a single application for all market data providers as the present application procedure is extremely difficult and time consuming and different between the various MDPs. By encouraging standardization an unnecessary complex due diligence process could be avoided. At present many firms which potentially could benefit from a “Per user” model would refrain from even trying due to the initial burden.

Question 12: 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.

DGL 8 for display data (human interface) provides for rules not to apply how to count the "Active user ID seems too weak. Not applying a unit of count should be the exception, and not the "new normal" (cf. DGL p10). When market data providers do not offer the Per User model to customers, and when they disclose the reasons which make the adoption of the model disproportionate to the cost of making the data available, market data providers should indicate the specific features of their business model which make the adoption of the per user model disproportionate and why these make the adoption of the model unfeasible. The factors could include justification of excessive administrative costs. It is important that the reasons for a refusal to offer Per user model are well documented and reviewed by the NCA.

Question 13: 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 should define requirement/factors which ensure consistency when MDP and MDD do not apply the "Per User" model. If not, we risk ending up in a situation where each market data provider comes up with their own definition/reason for why their business model does not need to adopt the Per User model.

Question 14: Do you agree with Guideline 9? If not, please justify.

We think that ESMA should go beyond Guideline 9, to oblige data providers or data vendors not to impose the purchase of " Data Packages" if we only need part of such data.

The data unbundling DGL 9 is welcome (DGL p.10). Market data providers should always inform customers that the purchase of market data is available separately from additional services. Market data providers should not condition the purchase of market data upon additional services. RMs should not be allowed to offer discounts on additional services to obtain MD licenses at regular prices. Additional services, e.g. indexing, should be in separate companies (DGL p.10).

Question 15: Do you think ESMA should clarify other elements in relation to the obligation to keep data unbundled? If yes, please explain.

ESMA should clarify the definition of "unbundled". Does unbundling only concern for example data and some technical platform? Or does unbundling also concern different data types, say bundling of USD and EUR swap data?

Fragmentation of licenses for the use of market data occurs when an area of usage of market data, which was covered by one license in one year, requires two or multiple licenses in the following year. Alternatively, when a new license is introduced for an area of usage of market data, which previously did not require a license at all. In both cases, the license fragmentation allows the market data providers to raise the total costs of the use of market data for the investment firms, without necessarily raising any existing license fee, by either splitting an existing license fee into two or multiple license fees, or by introducing new license fees altogether. Market data providers may argue that their practice of splitting existing licenses or introducing new licenses is unbundling rather than fragmentation. Specifically, they may argue that they are making their system of licenses more use-case specific, i.e. aimed specifically at the needs of particular investment firms, which should result in cheaper licenses for those specific use-cases. But the market da-ta providers are, in fact, fragmenting licenses by ensuring that each use-case requires a new license. Hence, there are rarely, if ever, any intention by the market data providers to provide cheaper use-case specific licenses through unbundling. Rather, the intention was to increase revenue through fragmenting.

Bundling of data should be avoided or at least optional and require explicit justification as it makes pricing and price development of the individual products opaque. Each product must always have a specific unbundled cost for the sake of transparency. In this context it is relevant for the authorities to ensure that the price of bundled data does not exceed the price of the sum of the unbundled data included in the bundled dataset. In short, measures should be made to ensure that unbundling does not lead to increased profit.

Question 16: 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.

The data standardised publication format DGL 10 is welcome (DGL p.11), including a separate description of margin calculation. We do not support the part, starting with: "When market data providers use other criteria (e.g. level) to distinguish the type of licenses (other than professional/non-professional) or data product (other than display/non-display data), they should provide a definition of these criteria in the market data policy or price list." Standardization is crucial to facilitate transparency and comparability so 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.

We strongly oppose the fact that MD providers are not required to disclose the actual cost for producing or disseminating market data or the actual level of the margin. If this information is only available to NCAs we expect a public detailed report by the respective NCA detailing that and how the MD provider has fulfilled the various MIFID obligations. Without access to this information data users cannot negotiate prices, licenses or engage in meaningful audit. We also urge simplification of the pricelists in accordance with the proposed guideline 11 and our comments below. Any changes in products must be thoroughly explained in the pricelists and 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.

Question 17: 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?

We call for detailing of Appendix 1 with a requirement of publication of pricelist from at least the past 5 years (and preferably longer) as well as pricelists based on multiyear comparisons including explanations for changes in products. Furthermore, with a reference to our comments to guideline 12 below, we strongly oppose the rather vague requirements on the cost accounting methodology. More detailed requirements are necessary: When IEX can do a full market data cost of production transparency report, all other trading venues can too. Actual costs must be disclosed as well as the level of margin included. a detailed definition of what is included in the market data revenue is necessary. In order to verify effects of unbundling, the revenue should be split per fee type. This will not reveal sensitive information as there is little to no completion between the Exchanges (you cannot buy a license for Nasdaq data at the Deutsche Börse). Similar on the cost side - each license fee must be justified by the incremental cost of offering such a license. It is unclear if the proposed standards will enable the reader to calculate total profits from Market data (revenue – cost), which must be a requirement. We urge, ESMA to prepare a standardized definition of market data revenue to enable comparison.

Question 18: 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.

We support the proposed definitions in Guideline 11 with the comment that it would be operationally easier if the pro/non-pro user definition matches the criteria "retail" Private/Eligible counterparty definition of MiFIDII/MiFIR or to refine the definition of Professional Customer in order to avoid misunderstanding to "Professional Customer" that should mean a customer who uses market data to carry out a regulated service or a regulated investment activity or a regulated service for third parties".

Having a non-standard definition means that for each end user, an investment firm needs to keep a category and furthermore explain this to the user. This is in-appropriate when there already are regulated categorisations (retail, professional, eligible counterparties) under MiFIDII/MiFIR which clarifies the sophistication of the user. Should the option to require MiFIDII/MiFIR categorisation be discarded, then there is an urgent need to refine the definition of Professional Customer in order to avoid misunderstanding.

Furthermore, it is important to be more specific to the definition of data and to include "Usage" (for example Non-Display Usage and not only Non-Display) for all definitions in order to make it workable towards the market data providers' policies and price lists.

For Display Usage it is important to add to the present proposal that Display Usage of data is applicable to both snap-shot and streaming of market data as this is not clear from the present definition.

Also it is important to add in relation to Non-Display Usage of data, it is important to add that it is only applicable to real time streaming data. Non-Display Fees can only be charged as an enterprise-wide license, and not on a per use case purpose.

There is also missing a definition of "Original Work", which is unique data created in a way where it cannot be re-verse engineered back to the MDP market data used in the production process and do not materially replace the MDP market data.

Finally, we do not support that market data providers may use Derived Data licenses as this content is already included in the Non-Display Usage. Derived data is a good example of a fragmentation. It is not possible to derive a value without using an application. The application attracts a non-display license and most likely also a Display license as user needs to monitor the data flow. The MDP does not incur additional cost from the fact that an output is produced from the usage.

Question 19: 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.

Please see Q 18 above.

Additional terms could also be standardised:

- Customer: Definition of Customer should include Customer's Affiliates, where Affiliates mean a person that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person specified. Otherwise, users can be required to pay multiple times for the same data. While specific legal entities are established for regulatory and tax purposes, these entities are not relevant to the whole enterprise's data use.

- Unit of Count: The distinction between display (human use) and non-display (application use) is artificial and does not feature in other market data agreements and should be eliminated. Instead data should be licensed for "internal use", meaning the enterprise and its affiliates are permitted to access, use, or store the data for internal business purposes, including research, analysis, modelling, portfolio

valuation, and the creation of Derived Data. The standard for licensing all types of data should be to make data available for internal use without discriminating between human and application use.

- Display Data / Non-Display Data: it is important to draw a distinction between the concept of 'display' for trading data, and 'display licenses' for other types of market data. For the former, a distinction is made between human and application use (display vs non-display). For other types of data, a standard 'display license' refers to permission for the onward distribution of data externally to third parties – this can either be direct displaying of the data, or displaying the data after it has been processed or manipulated through analytical tools. By contrast, an 'internal use license' allows the licensee to access, use, or store the data for internal purposes only – including research, analysis, modelling, and the creation of other derived data more generally – with some limited permissions to redistribute limited excerpts to third parties. As such, we strongly believe licensing data or either internal or external use is a more appropriate distinction than display / non-display; and is indeed this is the standard for other market data types.

- "Internal Use" license: grants Licensee and its affiliates a worldwide, non-exclusive, royalty-free, non-transferable license to use, access, modify, and display the Data, solely for internal use in the ordinary course of its business, which includes the right to incorporate the Data into Licensee's internal systems, create derived data, and to redistribute Limited Excerpts.

- Limited Excerpt: Sometimes called a de minimis excerpt, a limited excerpt is an insubstantial portion of data that is disseminated in the ordinary course of business to clients, prospective clients, trading counterparties, regulators, custodians, fund administrators, fund accountants. A general mailing, advertisement or other mass communication will not be considered a limited excerpt.

Question 20: Do you agree with Guideline 12? If not, please justify.

We do not agree with the requirement to publish verbal explanations only, let alone to provide in practice, information beyond a qualitative justification of the fees. When IEX can provide detailed explanation with actual figures as they have done in their report, other exchanges and MDPs can and must do it too. We cannot support that market data providers are not required to disclose actual costs of producing and or disseminating market data or the actual level of the margin to the public. We understand that the MDPs argue that the information is "commercially sensitive". We do not agree – there is nothing sensitive in publishing such information for non-competing, unique products such as market data. Also this is a regulated business and therefore commercial considerations only come second.

At a minimum, the information provided on costs and margin should enable users to understand how the price for market data was set and compare the methodologies of different market data providers.

Also, here a cost benchmark is highly relevant to allow the MDP to demonstrate compliance with the requirements. A benchmark would also support a movement towards a reasonable cost basis: When an MDP includes unreasonable costs, it would be revealed in the cost benchmark and be subject to further scrutiny.

Question 21: 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.

Please see Q13 above, including the Copenhagen Economics guideline to a cost benchmark.

Question 22: Do you agree with Guideline 13? If not, please justify.

The audit practice disclosure DGL 13 is welcome (DGL p.11). However, our comments above (DGL 2) apply too. MD providers use audits regularly as a third revenues source besides price hikes and license

proliferation across each part of the value chain of asset management. Market data providers should be explicit in the market data agreement with respect to the market data fees that can be applied retroactively, the terms and conditions of the auditing (e.g. frequency) and how customers are expected to demonstrate their compliance with the market data agreement.

Overall, we support a simpler approach where long declarations are not needed as well as a move away from complex use case licenses. An user firm should be licensed per active users and for streaming real time data to an application.

Question 23: 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?

The data access and content DGL 14 is welcome (DGL p.12). Details need to be revisited, e.g. why is registration of delayed data users can be required, if the data is for free after 15 min. We support the present requirement for pre- and post-trade data publication as specified in RTS 1 and RTS 2.

Question 24: 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?

The data format and availability DGL 15 is welcome (DGL p.12). Details need to be revisited. Pre- and Post-trade compliance could be done on (15min) delayed data without much issue. The format in this case (if by individual feed or a consolidated tape) is of concern. We also propose the following use case categories relevant to us:

- Fund valuation, Advisory analytics,
- Research,
- Risk monitoring,
- Reporting incl. regulatory,
- Counterparty risk calculation, Best ex and Market Abuse monitoring.

However, we disagree completely that the data is available only for a limited ("sufficient") time period. The law is clear – data is free after 15 minutes. There is no legal room for end-of-day and historical data licensing. Data needs to be really fee and license free after 15 minutes.

Question 25: Do you agree with the definitions of data-distribution and value-added services provided in Guideline 16? Please explain.

The data redistribution and value added DGL 16 is welcome (DGL p.12). We do not support the ESMA stance that 15 mins delayed data which should be free of charge. Such interpretation is in contradiction with MiFIR, Art. 13, MiFIDII, Art. 64 and Art. 65, where is it clearly stated that market data must free of charge after 15 minutes. Consequently, no data re-distribution fees may apply at all in case of delayed data (all data after 15min). Therefore, passing on of such data is always free for the down streamed direct data.

However, in case of MD use downstream to create value-added products (e.g. indices) also these should be in principle fee and license free. Because no IP rights for simple (delayed) data exist under EU and international laws, and because the European database regulation limited the protections of the database provider to the level of the first user, the EU database MD provider may at best charge a cost based license only to the first level user of the MD provider products who produces value-added data.

EFAMA stresses that the worst shortcomings in terms of the provision of market data for free 15 minutes after publication are encountered in the non-equity space – particularly to trading in OTC derivatives.

Regrettably, some trading venues and APAs are still not complying with their legal obligations regarding the free publication of delayed market data – particularly in the case of OTC derivatives transactions. Indeed, there are a number of practices that market data providers engage in that suggest a deliberate attempt to avoid compliance with their market data obligations. For example, data is published as an "image file" that is not machine readable, with 'search' and 'copy' capabilities disabled. Alternatively, data is deleted shortly after publication and/or the data is published in a far less usable manner than the data provided in return for a fee.

ESMA has already acknowledged the use of such practices and clarified that they are non-compliant. In Q&A 10 of the ESMA Q&As on MiFID II/MiFIR transparency topics, updated in July 2020 – *"ESMA considers that any practice designed to circumvent the provisions in Article 13(1) of MiFIR and Articles 64(1) and 65(1) AND (2) of MiFID II is not compatible with the requirement to make market data available free of charge 15 minutes after publication . . . "* and; *"ESMA does not consider that publishing data as an image (i.e. in such a way that the user cannot copy the data in a format that can be read by a computer) or requiring the purchase of a specific software for downloading, processing or reading the information meets the requirement of making data available free of charge."* ESMA continues – *"The data made available free of charge should* ***replicate*** *the information published on a reasonable commercial basis but with a 15 minutes delay. ESMA is of the view that the information should be available for any party to initiate a retrieval of the data for a period of* ***at least*** *24 hours from the publication."* (emphasis added)

While EFAMA welcomes ESMA's efforts to clarify market data obligations through these draft guidelines, the problem remains one of enforcement rather than an issue of clarity. The requirements applicable to trading venues and APAs and other market data providers are clear and explicit. Nevertheless, despite being highlighted repeatedly by industry stakeholders, there has been limited apparent effort to ensure proper enforcement of unambiguous legal requirements. This has been particularly detrimental to the emergence of a transparent market in OTC derivatives.

Accordingly, regulators should ensure that all trading venues and APAs are fully compliant with their obligation to provide market data for free 15 minutes after publication – particularly where that data relates to OTC derivatives transactions. Accordingly, Guideline 14 should include an explicit reference to APAs and the particular issue of non-compliance with their data obligations in relation to OTC derivatives transactions. The finalized Guidelines 14 and 15 should also reflect the fact that ESMA has already clarified these obligations and, accordingly, that there is a need to proceed with stricter enforcement of applicable legal requirements.

Finally. we strongly encourage ESMA to revisit its permission allowing distribution licenses as well a user count. In this context, we also strongly disagree with the proposal to only allow the "free of charge data" to be available for a limited period of time. There is no legal room for any licensing or registration, including additional end-of-day and historical data licensing.

Question 26: Do you have any further comment or suggestion on the draft Guidelines? Please explain.

Missing are GL for pricelists, in particular availability of historic price lists, as well as pricelists based on multiyear comparisons, to allow to see price and product or service changes between the current year and the past year(s). The simplification of price list e.g. with the proposed user definition is welcome.

Finally.all NCAs should be encouraged to apply the GLs (para 10,11, p.6 draft GL).

Date users are currently not informed about the results of enforcement actions of the existing regulatory MD requirements. We believe therefore, that there need to be minimum requirements on the documentation the NCAs shall collect and review. The GLs should also allow for a detailed NCA information reports to users on each MDP at approximately the same level of content as the IEX report. The NCAs should also include in the report a statement on the verified level of compliance of each MDP with the MIFID rules.

We consider that it should also be considered to limit certain high impact data license practices which have significant negative consequences for end clients and financial markets discourage in MiFID/MiFIR, as:

- Data cut-offs before a binding court or arbitration decision in data license disputes should be prohibited in financial markets supervisory laws at least in situations in which the data cut-off would harm the stability of financial services firms, markets and/or end user clients. 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, however, very rarely may not accept the loss of data provided by dominant data providers without endangering 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 be allowed to escape their regulatory obligations through outsourcing of MD 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 MDPs or benchmark providers.

Specific comments on Draft Guidelines:

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Definitions

The definitions set out in MiFID II and MiFIR apply unless further specified.

market data provider	a trading venue as defined in Article 4(1)(24) of MiFID II, an APA as defined in Article 4(1)(52) of MiFID II, a CTP as defined in Article 4(1)(53) of MiFID II or an SI as defined in Article 4(1)(20) of MiFID II

Data Providers: SHOULD BE EXTENDED TO OTHER TYPES OF DATA PROVIDERS, i.e. beyond MIFID, data vendors, ESG data providers, index providers, to extend the proposed Guidelines to the whole set of Data Providers - as the whole set of Questions raised is meaningful for that whole set of Data Providers.

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3 Purpose

6. These guidelines are based on Article 16(1) of the ESMA Regulation. The objectives of these guidelines are to establish consistent, efficient and effective supervisory practices within the European System of Financial Supervision (ESFS) and to ensure the common, uniform and consistent application of the provisions in Articles 13, 15(1) and 18(8) of MiFIR and Articles 64(1) and 65(1) and (2) of MiFID II.

7. These guidelines aim to ensure that financial market participants have a uniform understanding of the requirement to provide market data on a reasonable commercial basis (RCB), including the disclosure requirements, as well as the requirement to provide the market data 15 minutes after publication (delayed data) free of charge. These guidelines also aim to ensure that NCAs will have a common understanding and develop consistent supervisory practices when assessing the completeness, comprehensibility and consistency of the RCB and delayed data provisions.

7. The first point should be to ensure that national competent authorities already apply the existing obligations.

Question 27: 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.

For our members the guidelines if implemented with our suggestions, would lead to a significant decrease in the amount of resources used for administration of the complex and opaque market data policies as well as a decrease in the direct market data costs. An estimated 20-40 % of resources is spend on managing non-standard terms of MDPs.

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About EFAMA

EFAMA, the voice of the European investment management industry, represents 28 Member Associations, 57 Corporate Members and 23 Associate Members. At end Q3 2020, total net assets of European investment funds reached EUR 17.6 trillion. These assets were managed by more than 34,200 UCITS (Undertakings for Collective Investments in Transferable Securities) and almost 29,400 AIFs (Alternative Investment Funds). At the end of Q2 2020, assets managed by European asset managers as investment funds and discretionary mandates amounted to an estimated EUR 24.9 trillion.

More information is available at www.efama.org.

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