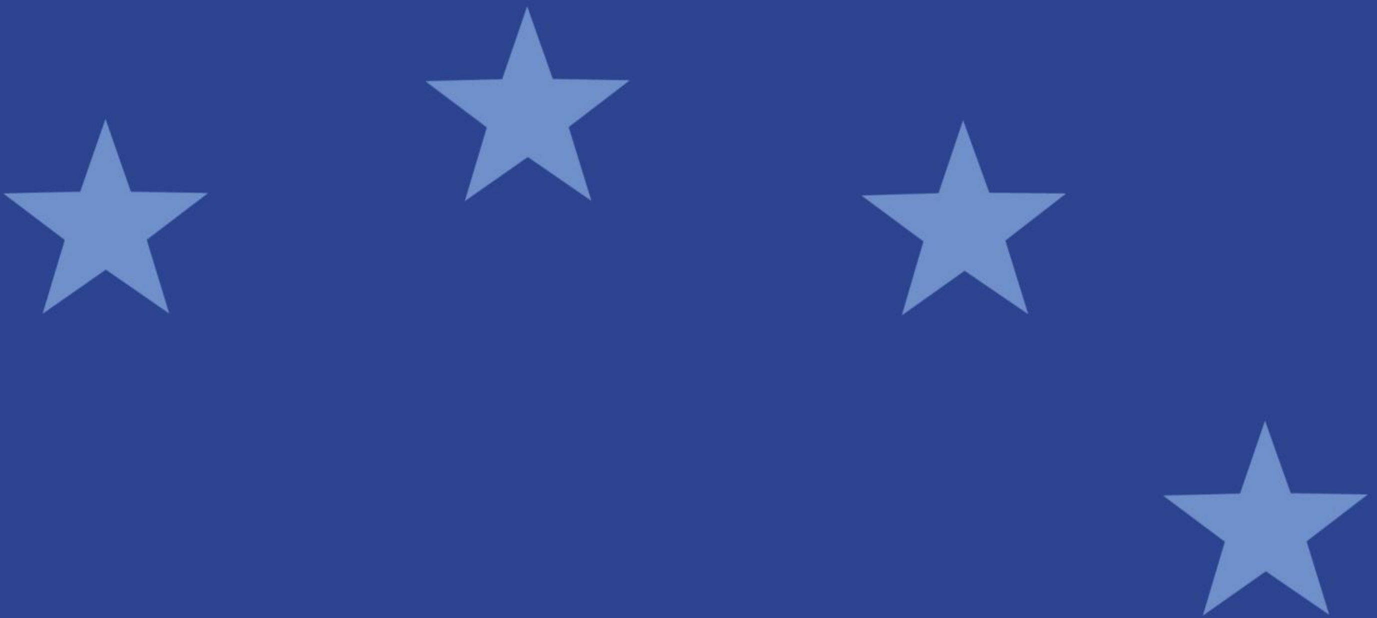
Final Report

Guidelines on the MiFID II/MiFIR obligations on market data



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1 Executive Summary

Reasons for publication

This Final Report follows the publication of the Consultation Paper (CP) on the Guidelines on the MiFID II/MiFIR obligations on market data.[1] In that CP, which was published on 6 November 2020, ESMA proposed draft guidelines on the requirement to publish market data on a reasonable commercial basis and the requirement to make market data available free of charge 15 minutes after publication. ESMA now presents its final guidelines.

Contents

In this Final Report, ESMA sets out its final guidelines on the MiFID II/MiFIR obligations on market data. By providing clarity for market participants, the guidelines will ensure better and uniform application of these MiFID II/MiFIR obligations. ESMA also believes that the implementation of these Guidelines supports consistent, efficient and effective supervisory practices.

The Report is structured as follows:

- Section 2: introduction
- Section 3.1: applicability for market data providers offering market data free of charge
- Section 3.2: clear and easily accessible market data policies
- Section 3.3: the provision of market data on the basis of costs
- Section 3.4: the obligation to provide market data on a non-discriminatory basis
- Section 3.5: the per-user fee obligation
- Section 3.6: the obligation to keep market data unbundled
- Section 3.7: the transparency obligations
- Section 3.8: the provision of market data free of charge 15 minutes after publication

The Report also includes the following annexes:

- Annex I sets out the final cost-benefit analysis;
- Annex II provides a summary of the advice that was received from the Securities and Markets Stakeholders Group (SMSG);
- Annex III sets out the final ESMA Guidelines with, in turn, accompanying annexes.

Next Steps

A translation procedure will follow after the publication of this Final Report. The regular comply or explain procedure will be carried out ahead of full application of the Guidelines.

2 Introduction

1. The provision of market data is essential for market participants to obtain a desired overview of trading activity. Therefore, MiFID II/MiFIR introduced provisions to ensure that market data is available to market participants in an easily accessible, fair and non-discriminatory manner, to decrease the average cost of the market data and to make data available to a wider range of market participants.

2. In its Report on Market Data in December 2019[2], ESMA committed to develop guidance on a number of requirements related to the requirement to publish market data on a reasonable commercial basis (RCB) and the requirement to make market data available free of charge 15 minutes after publication. As was highlighted in the 2019 Report on Market Data, ESMA would, aside from producing supervisory guidance, also still recommend a number of targeted changes to either the Level 1 or Level 2 provisions to strengthen the overall concept that market data should be charged based on the costs for producing and disseminating the information.

3. In the Consultation Paper (CP) on the guidelines on the MiFID II/MiFIR obligations on market data from November 2020[3], ESMA consulted on a number of proposed draft guidelines. The consultation phase ran from 6 November 2020 – 11 January 2021. Taking into account the feedback received during the consultation phase, including reactions to the CP, direct one-on-one interactions with stakeholders, as well as advice from the SMSG, ESMA now presents its final guidelines. These guidelines apply to national competent authorities (NCAs), trading venues, approved publication arrangements (APAs), consolidated tape providers (CTPs) and systematic internalisers (SIs). The section in relation to the provision of delayed data does not apply to SIs. The guidelines apply in relation to market data that trading venues, SIs, APAs and CTPs have to make public for the purpose of the pre-trade and post-trade transparency regime.

3 Guidelines on market data

3.1 Applicability for market data providers offering market data free of charge

3.1.1 Proposal in the CP

4. Market data providers offering market data free of charge are exempted from most of the Level 2 provisions on market data. More specifically, according to Article 84(2) of

[1] ESMA70-156-2477 https://www.esma.europa.eu/sites/default/files/library/esma70-156-2477_cp_guidelines_on_market_data.pdf

[2] ESMA70-156-1606 https://www.esma.europa.eu/sites/default/files/library/mifid_ii_mifir_review_report_no_1_on_prices_for_market_data_and_the_equity_ct.pdf

[3] ESMA70-156-2477 https://www.esma.europa.eu/sites/default/files/library/esma70-156-2477_cp_guidelines_on_market_data.pdf

Delegated Regulation (EU) No 2017/565 and Article 6(2) of Delegated Regulation (EU) No 2017/567 the requirements on providing market data on the basis of costs, on the different categories of clients under the requirement to provide data on a non-discriminatory basis, on the per user fees, on data disaggregation, and on the transparency obligations do not apply to market data providers offering market data free of charge.

5. Nevertheless, ESMA understands that a number of Level 2 requirements on the market data provision do apply to such market data providers. ESMA hence suggested that the Guidelines related to these requirements, notably the requirement to make market data available to all customers on the same terms and conditions, the requirement to have scalable capacities in place to ensure that customers can obtain timely access to market data at all times on a non-discriminatory basis, the requirement to offer unbundled market data and the requirement to provide delayed data free of charge should also apply to market data providers offering market data free of charge.

3.1.2 Feedback to the consultation

6. The vast majority of stakeholders agreed with ESMA's proposal. Some went further, adding that the business decision of some data providers to provide data without charging for it should not mean that the provider is exempt from providing the data on a non-discriminatory basis or in a disaggregated format, and they were of the opinion that these providers should also comply with all of these obligations.

7. In fact, several respondents stated that the principle of 'same business, same rules' should always apply within the EU, to not allow for a competitive advantage for the entities currently not subject to such rules, compared to those entities that comply with the rules.

8. A few participants encouraged ESMA to include all types of data providers, in particular data vendors, in scope of this regulation, although acknowledging that this would require a change of Level 1.

9. One of the respondents stated that equal regulatory treatment of trading venues, SIs, and APAs should be applied. In this context, the respondent deemed it important that, like trading venues, SIs are also legally required to provide delayed data free of charge to the public, including via their homepage, since statistics show that SI trading volumes in equity instruments represent slightly less than 20% of total equity trading in the EEA.

10. However, this position was not supported by most participants, since several emphasized that SIs should be covered only to the extent that the Level 2 requirements stipulate requirements for them and not vice versa, i.e. generally covered, unless Level 2 stipulates an exemption. Also, most stated that Level 3 requirements cannot and should not impose more requirements than the EU legislator explicitly provided for.

11. Finally, a few respondents disagreeing with ESMA's proposal stated that the term 'free of charge' should be further clarified. The respondents added that ESMA should determine whether charging administrative fees for connectivity and other technology infrastructure services that support the delivery of free data is allowed and whether the fees are set on

an RCB. Some were of the opinion that market data providers should be allowed to charge for certain forms of direct data feed infrastructure when offering free market data.

3.1.3 ESMA's assessment and final approach

12. ESMA notes that a significant number of respondents agreed with the proposal to cover in these Guidelines the market data providers offering market data free of charge for the requirements not explicitly exempted in the Level 2 requirements. In light of the feedback received, ESMA maintains its approach.

13. Regarding applying the same regulatory treatment as the trading venues and broadening the scope of these Guidelines, ESMA highlights that the Guidelines are applicable to trading venues, SIs, APAs and CTPs. Only the section on delayed data does not apply to SIs, as there are no Level 1 or 2 requirements stipulated for SIs on delayed data. Such amendments cannot be tackled through these Guidelines.

14. With regards to the further clarification of the concept 'free of charge', ESMA is of the opinion that free of charge means free of charge for both data and connectivity. In paragraph 3.4.3 below, ESMA touches upon the issue by highlighting that the cost accounting methodology should cover indirect services necessary for accessing market data, such as connectivity fees or necessary soft- or hardware.

3.2 Clear and easily accessible market data policies

15. Many respondents to the CP, in particular market data users, highlighted the complexity of market data policies, resulting in a situation which creates high administrative costs for market data users to ensure compliance with those policies and also resulting in high costs for both market data providers and market data users for performing audits. Therefore, many respondents considered that clearer and simpler market data policies would significantly contribute to address the problems that are currently observed and that ESMA aims to remedy with the Guidelines.

16. ESMA shares this assessment that less complex market data policies would improve the understanding of market data users of such policies and is likely to contribute to fewer conflicts between market data users and market data providers in the context of providing market data. ESMA also notes that the provisions in the delegated acts specifying the obligations to provide market data on a reasonable commercial basis and on non-discriminatory terms aim at achieving this via creating more transparency, thereby empowering market data users to understand and compare market data fees of different market data providers.

17. While the CP did not include a Guideline setting out general expectations on how and where market data policies should be presented, in light of the feedback received to the consultation, ESMA sees merit in adding an additional high-level Guideline setting out the guiding principles which market data policies should comply with to provide market data in a clear and easily accessible manner. The new Guideline 1 aims at reflecting the overall

spirit of the legislator's chosen approach to ensure the provision of market data on a reasonable commercial basis and on non-discriminatory terms.

18. Guideline 1 therefore requires market data providers to publish all documents that form the market data policy in an easily accessible format and in a user-friendly manner on their website. Moreover, in order to contribute to the development of simpler and easier market data policies, market data policies should present in clear and unambiguous terms all relevant market data information. Lastly, to enhance the collaboration between market data providers and market data users, market data providers should further explain their market data policy to customers, where needed.

3.3 Provision of market data on the basis of costs

3.3.1 Proposal in the CP

19. According to Article 7 of Delegated Regulation (EU) No 2017/567 and Article 85 of Delegated Regulation (EU) No 2017/565, the fees of market data should be based on the costs of producing and disseminating the data and may include a reasonable margin. The costs of producing and disseminating market data may include an appropriate share of joint costs for other services provided. ESMA proposed two Guidelines in the CP setting out its expectations how market data providers should comply with these provisions.

Cost methodologies

20. The proposed Guideline 1 in the CP (Guideline on market data costs, Guideline 2 in the final Guidelines) clarified that market data providers should have a clear, documented and up to date methodology in place for setting the price of market data. Such methodology should demonstrate how the price for market data fees is based on the cost for producing and disseminating market data as well as, where applied, a reasonable margin. Moreover, ESMA suggested that the cost methodology should clearly identify and categorise the costs when determining the overall costs of producing and disseminating market data and provide definitions of the different cost typologies, i.e. direct costs and joint costs as well as variable and fixed costs.

21. Finally, the proposed Guideline on market data costs clarified that market data providers should not allocate joint costs according to the revenues generated by the different services and activities of their company because this practice was considered contradictory to the obligation to set market data fees based on the costs of producing and disseminating market data.

Audit costs

22. The proposed Guideline 2 in the CP (Guideline on audit costs, Guidelines 3 in the final Guidelines) addressed the concern expressed by many data users that auditing practices of market data providers contribute to high costs for market data. Therefore, ESMA proposed that market data providers should only impose penalties in consequence of an

audit, where they can demonstrate that customers have not complied with the terms of the market data agreement. Moreover, ESMA suggested that the level of penalties in case of non-compliance with the terms of the market data licence agreement should be based on the recovery of revenues which would have been generated in case of compliance with the license.

3.3.2 Feedback to the consultation

Cost methodologies

23. Most respondents to the consultation were in general supportive of the Guideline on market data costs and considered that the Guideline covers the key elements. In general, market data users asked for further strengthening the requirements set out in the Guideline, whereas most market data providers recommended a less prescriptive approach allowing for more discretion.

24. Market data users suggested, in particular, the following:

- Consider providing further and stricter guidance on the requirements for setting and revising the methodology for setting prices, including public consultation, auditing of the methodology and/or approval by competent authorities, and publication of the methodology;
- Introduce a further level of scrutiny for the allocation of joint costs to avoid that unreasonable overhead costs are charged;
- Ensure the enforcement of the MiFID II/MiFIR requirements on providing market data by NCAs;
- Regularly review the application of the Guidelines and consider providing more detailed guidance on the general cost methodology to be used by all market data providers, including the introduction of a cost benchmark;
- Clarify in the Guidelines that fees for market data should be only based on marginal costs; and
- Clarify that the Guidelines also cover services needed for accessing and using market data, such as connectivity fees and colocation services. It was suggested to consider extending the Guidelines to other areas of data provision.

25. Market data providers highlighted the following in their responses:

- The cost methodology should not be made public since it could expose commercially sensitive information to competitors. Respondents though indicated willingness to share the cost methodology with competent authorities;
- The Guideline should be less prescriptive about the cost accounting methodologies, cost classifications, cost allocation and the determination of the margins. Measures specifying the frequency, content and format of information provided should respect the heterogeneity of trading venues' business models;
- Most respondents were not supportive of no longer allowing the allocation of joint costs based on revenues, stressing that this would be standard practice, that this is an

objective and easy method for allocating joint costs and that there is no one to one relationship between market data fees and market data revenues. In particular, they highlighted that market data revenues are an outcome of multiple variables such as market data fees, number of clients, unit of count, or categories of use;

- Some respondents recommended to distinguish in the methodology between direct or common costs and joint costs; and
- NCAs should focus in their work on promoting trading venue competition, a consolidated tape and on lowering regulatory barriers for utilising data providers (e.g. changing the methodology for determining the reference price waiver might result in less dependence from certain market data providers).

Audit costs

26. Concerning the Guideline on audit costs (Guideline 2 in the CP, Guideline 3 in the final Guidelines), ESMA received mixed feedback. While all stakeholders agreed that audits should be performed in a collaborative manner based on clear communication, market data providers and market data users expressed very different views on auditing practices.

27. Feedback received from market data users stressed that auditing practices contributed to higher costs of market data for customers, highlighting as the main driver the absence of concise and easily understandable market data policies, which results in a situation where the exact scope and content of those policies becomes only clear when an audit is carried out. Therefore, this group of stakeholders recommended that market data policies should be structured in a way to encourage and promote compliance rather than penalise non-compliance. Most market data users were strongly supportive of the proposal in the Guideline on market data costs to reverse the burden of proof, i.e. that market data providers need to demonstrate non-compliance with the market data licence agreement.

28. Market data providers did not concur with this view and stressed in their responses that audits are necessary to ensure that licensees pay fees and comply with the market data policies, and to recover unpaid fees, thereby maintaining a level playing field between licensees. Market data providers highlighted that audits do not exist to generate revenues but are a means to identify and recover unpaid fees and ultimately contribute to the consistent and non-discriminatory application of market data fees. The large majority of market data providers were not supportive of the proposal of reversing the burden of proof, considering that it would be difficult to enforce such a provision.

29. Moreover, market data users stressed the need for addressing further aspects around audit policies, such as:

- Audits should not exceed a standardised time period. The frequency of audits should be limited;
- Audits should be targeted and specific in scope. Measures and criteria against which an audit is conducted should be set out in advance;
- Audit rights and obligations should be reciprocal. The same efforts should be made to detect over- and undersubscription;

- Any costs for performing audits should not be directly charged to the auditees but should be included in the cost for providing and distributing market data;
- The use of third-party auditors should be limited, and it should be ensured that auditors do not have conflicts of interest;
- Further clarify overly onerous practices and extensive retroactivity in the Guidelines. Some respondents highlighted that the use of extensive questionnaires or data usage declarations gathers commercially sensitive information and creates a large administrative burden;
- Audits are used to 'find' new use cases; and
- Audit penalties do not distinguish between fraud or deceit or unintended non-compliance.

30. Market data providers stressed in their responses the following:

- Market data providers should be allowed to add a penalty to the fee to be paid after the audit;
- Retroactivity is inherent to the audit process and limiting it would only result in more audits;
- Clarify the meaning of penalties and elements included. In particular, the following should be allowed: license fee, interest on license fee, interest in case of late payment of license fee, payment of contractual penalties, payment of damages;
- Audits should not be a precondition for the permissibility of a contractual penalty; and
- Audit costs should not be considered as costs for producing and disseminating market data.

3.3.3 ESMA's assessment and final approach

Cost methodologies

31. In view of the overall strong support by stakeholders of the Guideline on market data costs (Guideline 2), ESMA maintained the general principles set out in the Guideline which appear to strike the right balance between the demands of many market data users for more stringent requirements and the requests of market data providers for less stringent requirements. ESMA is of the view that Guideline 2 sets out proportionate requirements allowing market data providers to use their own cost accounting methodologies while standardising the terms used in order to enable market data users to better understand and compare the costs disclosed by market data providers as required in Guideline 14.

32. ESMA does not consider that the current legal framework allows for the harmonisation of cost accounting methodologies or the development of a cost benchmark. ESMA will continue closely monitoring developments on the cost of market data and stands ready to suggest amendments of the legal framework should the approach set out in Guideline 2 not deliver. Moreover, ESMA expects NCAs to collect from market data providers details on the overall costs of producing and dissemination market data as well as margins applied, and to share that information with ESMA.

33. While ESMA notes the reluctance of market data providers to no longer allow the allocation of joint costs based on revenue and agrees there is no one to one relationship between market data fees and market data revenues, ESMA maintained this approach since it appears key for ensuring that market data fees are based on the costs of producing and disseminating it and avoiding a reinforcing feedback cycle where higher market data revenues result in higher market data fees, thereby increasing market data revenues. While allocating joint costs based on revenues might be the current practice and changing the approach would result in one-off costs for market data providers, other allocating methods exist (e.g. FTE working on a product, or volume based on messages). Moreover, such different cost allocation methods would also appear preferable from a competition policy perspective since it avoids the reinforcing feedback that comes with the cost allocation method based on revenues.

34. The Level 2 legislation does require market data providers to disclose information about the cost accounting methodologies used, but without having to disclose the actual costs. The disclosure requirements on the cost accounting methodologies are covered in Guideline 15. Guideline 2 covers the detailed internal cost accounting methodologies that are used by market data providers. These are hence no public documents; however, they should be subject to scrutiny by NCAs, either on a systematic or an ad hoc basis.

35. ESMA acknowledges that joint costs may not be the only type of costs falling into the category of 'costs that are shared with other services' and that common costs would also fit into that category. However, since neither Level 1 nor Level 2 recognise common costs, ESMA could not integrate the concept of common costs in Guideline 2. However, ESMA considers that common costs are a type of costs that are shared with other services, and, where market data providers incur such costs, they should be part of their cost accounting methodology and the same principles for allocating such costs via appropriate allocation keys, as highlighted in Guideline 2, should apply. Moreover, the Guideline clarifies that not all market data providers will incur joint costs (e.g. APAs or CTPs). Finally, ESMA clarified that the methodology should cover both market data fees as well as indirect services necessary for accessing market data, such as connectivity fees or necessary soft- or hardware. In that context, ESMA does not consider that colocation costs are indirect services necessary for accessing market data.

Audit costs

36. Concerning the Guideline on audit costs (Guideline 3 in the final Guidelines), ESMA largely maintained the approach in the CP. In particular, ESMA kept the requirement that the auditor should prove non-compliance with the audit terms and that it should not be for the auditee to demonstrate that it complied with the market data licence agreement. ESMA understands that this approach makes it more challenging for market data providers to detect violations of the market data licence agreement. The revised Guideline therefore clarifies that market data providers may seek information from customers on the use of the data to assess potential breaches with market data licence agreements. However, any such solicitation would be limited to the purpose of assessing the use of market data by the customers.

37. While some of the wording has changed, ESMA maintained its approach that market data providers should only apply penalty clauses in compliance with the principle of charging on a reasonable commercial basis, and that market data providers should not impose any unjustified or overly onerous penalties. ESMA has revised the Guideline to highlight 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, such as excessive interest charging or extensive retroactivity, should be excluded.

38. ESMA could not include many proposals made by market data users for further clarifying the terms and conditions of audits since Guideline 3 only covers auditing costs. However, ESMA added further details on the audit elements that need to be disclosed in Guideline 15. Furthermore, ESMA noted that there appears to be consensus between market data providers and market data users that audits should be conducted in a collaborative manner and based on clear communication between the parties involved in the audit. ESMA therefore encourages market data users and market data providers to develop jointly principles and best practices on audits to provide more clarity on the audit terms and the criteria and measures used for such audits.

3.4 Obligation to provide market data on a non-discriminatory basis

3.4.1 Proposal in the CP

39. According to Article 86 of Delegated Regulation (EU) No (EU) No 2017/565 and Article 8 of Delegated Regulation (EU) No (EU) No 2017/567, market operators and investment firms operating a trading venue and SIs shall make market data available at the same price and on the same terms and conditions to all customers falling within the same category in accordance with published objective criteria. According to the same provision, price differentials should take into account the scope and scale of the market data, and the use made by the customer of the market data.

40. In addition, according to the same Articles market data providers shall have scalable capacities in place to ensure that customers can obtain timely access to market data at all times on a non-discriminatory basis.

41. Article 89 of Delegated Regulation (EU) No (EU) No 2017/565 and Article 11 of Delegated Regulation (EU) No (EU) No 2017/567 require market data providers to disclose the price and other terms and conditions for the provision of the market data in a manner which is easily accessible to the public.

42. ESMA proposed three Guidelines in the CP setting out its expectations how market data provider should comply with these provisions.

Customer categories

43. The proposed Guideline 3 (Guideline on customer categories, Guideline 4 in the final Guidelines) took into consideration that currently market data policies do not permit to understand with a sufficient degree of certainty into which category customers are grouped, the criteria behind such categorization and the applicable fees, terms and conditions. An additional issue considered by this Guideline is that where customers categories are not wide enough to be applicable to more than one customer, they could result in the creation of an ad-hoc fee for a specific customer, which would be in contrast with the principle to provide market data on non-discriminatory basis.

44. Therefore, ESMA with this Guideline proposed to clarify that compliance with the obligation to provide data on a non-discriminatory basis requires market data providers to:

    (i) establish in their market data policy categories in which they differentiate between customers, relevant fees and applicable terms and conditions;

    (ii) publish the criteria used to define the category, which should be based on factual elements easily verifiable and pertaining to more than one customer, and explained and supported in such a manner that customers have sufficient information to understand the category they belong to; and

    (iii) explain and justify any differentiation in the fees and terms and conditions associated to each category.

Simultaneous uses of data

45. With the proposed Guideline 4 (Guideline on different simultaneous uses of the data, Guideline 5 in the final Guidelines) ESMA took into consideration the case where a customer could potentially belong to more than one customer category, with the objective to avoid customers paying multiple fees for the same data. Thus, ESMA proposed to require market data providers whose data policy entails different customer categories, to consider specifically the case where more than one category could be applicable to the same customer and to have customers classified using one category only, to ensure data is charged only once.

Technical arrangements

46. In Guideline 5 (Guideline on technical arrangements, Guideline 6 in the final Guidelines) ESMA made a proposal with the objective to avoid discrimination on the provision of data occurring through technical arrangements. To this aim, ESMA clarified with Guideline 5 that where the same terms and conditions apply, the market data providers should also offer the same technical arrangements. In addition, the Guideline specified that data providers should ensure that practices in terms of such technical arrangements are non-discriminatory. Lastly, with the same Guideline ESMA clarified that non-discriminatory principles should also apply for customers who might be part of a larger group, and that in such a case, customers should not be given an unfair advantage or favourable treatment.

3.4.2 Feedback to the consultation

Customer categories

47. Most respondents to the consultation considered the proposal contained in Guideline 3 on customer categories important to increase clarity in the application of fees and to reduce excessive fees and were therefore supportive towards the proposal.

48. Market data users suggested to add to the proposed Guideline the following elements:

- A disclosure of the percentage of customers attributed to each category to ensure that the requirement of categories to be sufficiently general is respected;
- Scale of the customer and the external use made of data as predefined criteria to set forth categories;
- An appeal procedure against the data vendor in case a user has not been qualified in the correct category; and
- A minimum 90 days notification to customers for changes to the categories.

49. Trading venues were also supportive towards the Guideline and proposed some wording amendments to the text. In particular, they suggested to describe the factual elements on which the categories are based to be “reasonably verifiable” instead of “easily verifiable”. In addition, considering that a legal entity can fall into different categories, the same respondents suggested to use the plural (categories instead of category) when referring to a category a client can belong to in point 2 of Guideline 3.

50. The part of the Guideline stating that the distinction in fees should be grounded on objective reasons and not only by the value represented by the data to the customers received opposite feedback from data users and trading venues. In particular, data users perceived a conflict between allowing fees based on value and the principle requiring the cost of market data to be based on the cost for producing and disseminating market data. On the contrary, trading venues considered that the method of charging on the basis of the value that the data represents to the customer is objective and beneficial to the correct functioning of the market.

51. The very few respondents who disagreed with the proposal argued that allowing market data providers to set up categories can hinder a comparison of fees.

Simultaneous uses of data

52. The feedback received to the proposed Guideline 4, requiring market data providers to apply one customer category only when more than one category could be applicable, was generally positive from the side of data users. According to most of the data users, the proposal is able to prevent the unnecessary multiplication of fees where data is used for different purposes, which is a practice that is perceived to be in conflict with the principle of cost of data to be based on the cost of production and dissemination. However, at the same time also the concern emerged that the applicability of one category only to all customers may put at risk the ability of small and medium sized firms to compete. The

application of one category only, when data is used for different purposes, in fact, would give an unfair advantage to larger firms who engage in different activities over smaller firms who use data for one activity only.

53. The trading venues, representing a minority of respondents, were strongly opposed to the proposal and suggested to either delete the Guideline or keep just the part requiring data providers to consider in their policies how the simultaneous application of different categories works. The main rationale behind the disagreement is the observation that the model would benefit large investments firms who perform a great set of data-related activities to the detriment of smaller data customers (a concern shared with data users as per the previous paragraph) and the need to price data on the basis of the value which the market data represents to the customers.

Technical arrangements

54. With respect to Guideline 5 (now Guideline 6), aimed at avoiding technical discrimination, most respondents to the consultation were favourable to the introduction of this Guideline. However, some of them emphasized that different technical arrangements are often due to the network used by the customers to access the data or, more in general, to circumstances not depending on the provider.

55. The trading venues disagreeing with the proposal argued that practices on latency and connectivity vary depending on the market data user and noted that not allowing differentiation of technical arrangements within customer groups would be disproportionate and distort competition between market data providers.

Discounts

56. Some respondents to the consultation also commented on the particular issue of discounts, noting that it should be specified that discounts need to stay on a reasonable basis because otherwise the initial fee calculation would be questionable. Such comments were raised mainly in relation to the concept on bundling, in response to the question on the unbundling guideline (see section 3.6). For instance, it was pointed out that the total price for the bundle should not be so much lower than the price for one of the single products.

3.4.3 ESMA's assessment and final approach

Customer categories

57. In view of the general strong support by stakeholders for the Guideline on customer categories, ESMA maintained Guideline 3 (now Guideline 4) mainly unchanged, adding a part on the change of category. With respect to this addition, ESMA took into consideration the concerns that emerged during the consultation that confusion or discrimination through categories may occur because of unilateral changes by the data providers of the categories' description in the market data policy.

58. On this point, ESMA is of the view that asking for a justification by market data providers for any amendment to be based on objective reasons would be able to avoid discretional changes in categories set up. Consistently, ESMA inserted an additional paragraph to Guideline 4 which provides for such justification.

59. With respect to the suggestions brought forward by data users, ESMA firstly notes that most of the suggestions received related more to the execution of the data licence agreement (e.g. appeal procedure for incorrect qualification or notification in case of terms of category change), rather than to the design of the categories in the market data policy by data providers. ESMA is of the view that such suggestions go beyond the scope of this Guideline, which primarily clarifies the obligation to make available data on the same terms and conditions to customers falling within the same category in accordance with published objective criteria.

60. Taking into consideration the reference contained in Guideline 4 to the use of data as a criteria to set up categories, ESMA notes that the current legal framework allows to differentiate prices according to the value of data represented to the customer, taking specifically into account the use made by customers of the data. ESMA therefore decided not to delete the reference to the use of data in describing how categories could be set up, as such reference is consistent with the legal basis of the Guideline which mentions expressly the use made by the customer of market data when addressing differentials in price charges.

61. Nevertheless, ESMA recalls that the Guideline remains to be read in accordance with the general principle of the price of market data to be based on the cost of production and dissemination, with the possibility to include a reasonable margin, contained in Level 1.

62. With respect to suggestions brought forward by data vendors, and in particular the suggestion to describe the factual elements on which the categories are based to be "reasonably verifiable" instead of "easily verifiable", ESMA recalls that the main aim of this Guideline is to permit customer classification on objective reasons and to enable customers to easily understand the category that would be applicable to them. To achieve this objective, ESMA believes criteria on which categories are based should be easily verifiable and not subject to interpretation.

Simultaneous uses of data

63. With respect to Guideline 5 (previously Guideline 4) to apply one customer category only in case more than one category could be applicable to the same customers, ESMA acknowledged the support for the proposal. ESMA however also took note of the concern expressed by both data users and data providers that the proposal may disadvantage smaller firms in comparison to firms using data for significantly different purposes.

64. Thus, ESMA considered it necessary to address this risk, whilst maintaining the principle introduced by the Guideline. To this aim, ESMA reformulated Guideline 5 to maintain the "one category only" requirement as a general rule, but introduced an exception to such

general rule to allow for some flexibility where the data is bought to perform multiple and significant different activities.

65. In particular, the new provision specifies that such exception permits only a proportionate increment of the fees applicable to the customer according to the category he belongs to.

66. In addition, the same provisions require market data providers that would make use of the exception to clearly display in their market data policies the amount of the increment, its cases of application, and provide an explanation of its compliance with the principle of the price of market data being based on the cost of producing and disseminating data, with inclusion of a reasonable margin.

67. ESMA is of the view that this amendment strikes the right balance between safeguarding that customers do not pay multiple times for the same data, whilst ensuring a differentiation is possible for larger firms who perform significant different activities.

Technical arrangements

68. ESMA acknowledges the indications contained in Guideline 5 (now Guideline 6), aimed at avoiding discrimination that may occur through technical arrangements, are well supported by stakeholders but notes at the same time that these require some clarifications.

69. First of all, ESMA would clarify that the Guideline objective is not to standardise technical arrangements, as some respondents seemed to have understood during the consultation, but to avoid discrimination through differentiation of the technical solutions offered from one customer to another. While market data providers may offer different solutions, they cannot limit discretionally the technical solutions offered to clients, i.e. making some solutions available only to some and not to others.

70. Therefore, ESMA clarified in the new text of the Guideline that there is a general expectation for market data providers to offer the same set of options in terms of technical arrangements to customers belonging to the same category, where the insertion of the term “same set of options” does not entail a required standardisation among market data providers.

71. In addition, ESMA acknowledges that different arrangements in the final solution adopted could be due to valid technical constraints. Thus, ESMA inserted an amendment in the Guideline to allow for such a differentiation if market data providers can provide a justification.

72. Lastly, as a general remark, ESMA notes that this Guideline is meant to be applicable not only where divergences in technical arrangements could create a disadvantage for the customers, but also where they may provide an unfair advantage. This could occur for example where better technical arrangements are offered to customers which are related to the market data provider by way of belonging to the same group of the data provider or having a relation other than the existence of a data licence agreement. In such a case, the

Guideline remains applicable with the objective to avoid any unfair or unjustified advantage is provided to certain entities operating on the market.

Discounts

73. While respondents used bundling as an example to explain their point of view on discounts, ESMA believes this point to be a more general issue that should be included in the guidelines. ESMA notes that the transparency requirements ask for a disclosure of discount policies, and hence also for this reason sees it fit to provide more guidance on this. As ESMA would like to avoid that discounts result in the application of different fees to customers belonging to the same category and lead to unjustified discrimination, ESMA introduced an additional guideline on the topic in the current section on non-discriminatory practices.

74. Taking into consideration some existing types of discounts (e.g. discounts for market makers or discount on the base of use) ESMA believes that a risk of unjustified discrimination would for those types of discounts already be addressed by the current Guideline 4, which requires to identify customers categories and use cases, and to provide a justification for their fee differentiations.

75. However, for all the cases not directly covered under Guideline 4 the risk of divergence in the application of fees occurring through discounts remains. In addition, ESMA acknowledges that such a concern is shared by data users as well, as emerged during the consultation with respect to data unbundling.

76. Furthermore, ESMA believes that discounts should be subject to the same requirements of client classifications in terms of transparency and justification, to avoid that discounts would decrease clarity in the application of fees or create unjustified discriminations.

77. Therefore, ESMA saw merit in introducing a dedicated guideline on discounts, with the aim to (i) ensure discounts are not used to circumvent the objective of the other Guidelines (as obligations on non-discrimination and data unbundling for example) and (ii) require clearer terms in formulating discounts, in line with the overall spirit of the Guidelines on provision of data on RCB.

78. To achieve such objectives, the newly added Guideline 7 on discounts requires market data providers to describe in their market data policy the discount policies if any, defining clearly the scope of application of the discount, the conditions for applications, and the terms of application (e.g. duration of the discount).

    Guideline 7 requires the conditions for the discount applications to be:

    (i) based on factual elements, easily verifiable and sufficiently general to pertain to more than one customer;

    (ii) explained in such a manner that customers are able to understand whether and when the discount is applicable to them.

79. With respect to the outcome of the discount application, Guideline 7 requires market data providers to ensure discount policies respect the present guidelines and their objectives and do not result in their circumvention. Such requirement is clarified through examples referring to client classification and unbundling.

80. More in detail, the Guideline states that in compliance with the principle to provide market data on a non-discriminatory basis, the application of a discount should not be used to create additional categories of customers or data use cases. Similarly, in respect of the obligation to make data available without being bundled, the discount for bundled services should not exceed the price of a service offered separately.

81. In particular, ESMA interprets the prohibition to create additional categories through discounts as the need for market data providers to ensure in their market data policy that the requirements for discounts application do not relate to the criteria used in the data policy to set up categories (e.g. type of customer or use made of data), but to additional circumstances (e.g. customer being new).

82. ESMA believes this Guideline to include an important element to increase transparency in market data policy application and to avoid the frustration of the objectives pursued by the Guidelines which may derive from discounts.

3.5 Per user fees

3.5.1 Proposal in the CP

83. According to Article 87 of Delegated Regulation (EU) No 2017/565 and Article 9 of Delegated Regulation (EU) No 2017/567, market data providers should charge for the use of market data on the basis of the use made by individual end-users of the market data (‘per user basis’).

84. To this effect, market data providers should have arrangements in place to ensure that each individual use of market data is charged only once. In case market data providers decide not to make market data available on a per user basis, because it would be disproportionate to the cost of making market data available, market data providers should provide grounds for the refusal and publish those grounds on their webpage.

85. In the CP, ESMA proposed three guidelines to clarify the interpretation and requirements to charge on a per user basis.

86. The proposed Guideline 6 in the CP (Guideline 8 in the final Guidelines) clarified the meaning of the obligation to charge on a ‘per user basis’. In particular, this Guideline clarified that the per user basis requires market data providers to use as a unit of count for display data an “active user-ID”, enabling customers to pay according to the number of active users accessing the data, rather than per device or data product, avoiding multiple billing in the case market data has been sourced through multiple data products or subscriptions.

87. The proposed Guideline 7 in the CP (Guideline 9 in the final Guidelines) defined that the market data providers should ensure that the conditions to be qualified as eligible for the per user basis require only what is necessary to make the per user basis feasible. Reducing the eligibility criteria to a minimum and to what is strictly necessary to make the per user basis feasible aims to increase the uptake of it. 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.

88. Finally, the proposed Guideline 8 (Guideline 10 in the final Guidelines) aimed to ensure that market data providers explain their decision to not adopt the per user basis. To achieve this objective, this Guideline required market data providers who do not offer the per user basis to customers, to disclose the reasons which make the adoption disproportionate to the cost of making the data available, indicating the specific features of their business model which make the adoption of the per user basis disproportionate and why these make the adoption unfeasible. It was proposed that such factors may also include excessive administrative costs.

3.5.2 Feedback to the consultation

89. The overall feedback on the three proposed guidelines was very positive. Most of the respondents agreed with the interpretation on the per user basis as proposed by ESMA, stating that it was the legislative intent of the “per user” provisions to avoid that a user is charged several times for the same data.

90. Nonetheless, almost all participants in favour of the “per user model” did not agree with the “Active User ID” definition, nor that it should be the only unit of count. Most suggested to introduce the term “Physical User” or “Active User” instead of “Active User ID”, further clarifying that the user should be a natural person, and that IDs may be easily shared.

91. Also, several participants emphasized that other units of count applied by market data providers for displayed data should be left to the discretion of data providers, since differences in unit of count derive from the diverging commercial practices that exist across trading venues. This solution would be better than prescribing the specific unit of count to be used, this way the balance between effective harmonisation and the ability for market data providers to differentiate themselves and compete is better kept by defining regularly used units of count. The availability of definitions for regularly used units of count would likely encourage and motivate market data providers to implement these, while still offering the ability for market data providers to differentiate themselves and their offering.

92. A few respondents stressed that the per user basis may not be appropriate for some customers, since it comes with a certain amount of complexities and it increases the burden for market data providers, such as, for example, crosschecking usernames across multiple platforms and providers, as these can often be generic and easily shared between users.

93. Regarding the eligibility criteria to be qualified for the per user basis, most of the respondents agreed with ESMA’s proposal.

94. Several stated that the information requested should be kept to a minimum in order to have a uniform application of the rules, to further standardise (namely on how often customers would be expected to provide user numbers to the market data providers), and to avoid any administrative burden to market data consumers.

95. Numerous participants also provided suggestions to further develop the eligibility requirements as follows:

- The customer is able to identify correctly the number of active users who have access to the data within the organisation;
- The customer reports to the market data provider the exact number of active users; and
- Introduce an initial audit by the data provider to confirm that controls are in place for (the new method of) submitting honesty declarations to help avoid future audit issues.

96. Nonetheless, several other participants raised some concerns, namely the under-reporting through mis-implementation of the count, the misuse of the guideline as a delaying tactic by introducing exhaustive measures in order for a customer to be able to prove that they can correctly identify the number of active users and the need of an operational control system to guarantee that there is no sharing of User IDs across users.

97. Many respondents stated to see no reasons for not offering the per user basis, and it should be mandatory to offer it. However, if such is not possible, most of the participants did agree with ESMA's view of disclosing the information necessary to justify why the model may be disproportionate in certain cases.

98. Several respondents raised the point that the concept of "administrative cost" should also be further explained, to avoid it becoming a catch-all criterion that can be used to diverge from the standard of the per user basis, as this leaves too much leeway for providers.

99. Most also added that if a per user basis is not offered due to this administrative costs' rationale, the costs should be explained in detail. Some respondents even went further and stated that in order to ensure an adequate level of enforcement and supervision on the conditions of data provision, the reasons for not offering the "per user basis" should also be addressed to NCAs, an audit should be performed in order to confirm the reasoning, and customers should also have the right to appeal the decision within a reasonable timeframe.

3.5.3 ESMA's assessment and final approach

100. In view of the general strong support by stakeholders of the three guidelines on the per user basis and fees, ESMA maintained the general principles set out in the Guidelines 6, 7 and 8 (correspondent to the final Guidelines 8, 9 and 10, respectively). However, ESMA has taken the feedback received into account and has amended the Guidelines accordingly.

101. Regarding Guideline 6 (final Guideline 8), ESMA's aim is to encourage the use of charging on a per user basis. In order to so, ESMA clarified its approach to the per user fees, i.e. keeping the default unit of count as active user, but deleting any reference to "IDs" due to the technical difficulties raised by the respondents.

102. Concerning Guideline 7 (final Guideline 9) and taking into account the strong adherence to this guideline by respondents, ESMA sustained its general principle without any alteration.

103. Nevertheless, taking the stakeholders' feedback into account and the concerns raised on the real applicability of this guideline, ESMA added that market data providers may additionally request an initial check ex ante to validate the number of users and/or the eligibility of the customer. Such addition diminishes the risk of misreporting on the user count and of misuse of the guideline as a delaying tactic by introducing exhaustive and unnecessary measures.

104. Finally, regarding Guideline 8 (final Guideline 10), ESMA kept most of the guideline unaltered, since the vast majority of respondents agreed with its principle. However, in light of the feedback, ESMA added to the guideline that market data providers should clearly indicating the specific features of their business model which make the adoption of the per user basis disproportionate and why these make the adoption of the model unfeasible.

105. ESMA agreed that even though burdensome administrative costs can be an impeding factor, it cannot be accepted as a catch-all category and should not become an easy way to deflect the application of the per user basis. To avoid such, ESMA agreed to further clarify that any explanation on excessive administrative costs should include a high level and provisional indication of the costs foreseen for the implementation of the per user basis. Considering the disclosure of this explanation, a separate information request or audit by NCAs is not deemed necessary by ESMA. This does not preclude that ESMA encourages NCAs to engage with market data providers on these guidelines, including on the offering of a per user basis.

3.6 Obligation to keep data unbundled

3.6.1 Proposal in the CP

106. According to Article 10 of Delegated Regulation (EU) No 2017/567 and Article 88 of Delegated Regulation (EU) No 2017/565, market operators and investment firms operating a trading venue and SIs shall make market data available without being bundled with other services. These obligations also apply to market data providers offering data free of charge.

107. ESMA believes that compliance with the relevant provision requires market data providers to offer the option to buy market data separately from any other additional services. In this way, customers are free to choose products according to their needs, without being obliged to pay for additional services (which they do not make use of). The proposed Guideline 9 in the CP (Guideline on unbundling, Guideline 11 in the final Guidelines) hence clarified

that market data providers should always make available the purchase of market data separately from additional services and inform customers of this possibility.

108. ESMA also noted in the CP that it is of the view that the reference to 'other services" in Article 10 of Delegated Regulation (EU) No 2017/567 and Article 88 of Delegated Regulation (EU) No 2017/565 should be understood as any value-added service offered to the customer in addition to the provision of raw market data, such as pre-trade analysis and data cleaning or provision of analytical data.

109. ESMA asked in the CP whether stakeholders agreed with the proposed guideline on unbundling and whether there were any other elements in relation to the obligation to keep data unbundled that ESMA should clarify.

3.6.2 Feedback to the consultation

110. Respondents largely agreed on the general need for unbundling and on the particular guideline on this topic. Many respondents reacted to both the requirements on data disaggregation and unbundling. Whilst agreeing, several respondents from the data provider side pointed out issues with the requirements to unbundle and disaggregate data, focusing in particular on the latter (e.g. that the demand for disaggregated data is very low, and that the chain with data vendors is not set up for disaggregation).

111. Some representatives from the data users side pointed to increased fragmentation and to unbundling giving rise to profit incentives (e.g. to unbundle services previously purchased together, increasing the complexity of product offerings, and to group profit and loss for multiple exchange functions such as trading, surveillance and other technology-based services).

112. Several respondents also commented on the particular issue of discounts, noting that it should not be allowed to offer discounts on additional services while market data licenses go at regular prices, or noting that it should be specified that discounts need to stay on a reasonable basis because otherwise the initial fee calculation would be questionable. In a similar vein, it was stressed that prices for bundled and unbundled data should be clearly disclosed. Other points that were noted include that it should be required for additional services, e.g. indexing, to be offered through separate companies.

113. Amongst respondents, opinions diverged on what "other services" should entail, in particular in relation to technical access. One respondent noted this should not be seen as bundling. Another mentioned the need for a "minimal bundle", as the lowest latency data can only be achieved with the lowest latency connectivity. A third respondent noted that at least the same technical arrangements should be available for bundled and unbundled services.

3.6.3 ESMA's assessment and final approach

114. Considering the support for the proposed guideline on this topic (Guideline 11 in the final guidelines), ESMA kept this guideline largely unchanged. Some examples were added as

to what can be understood as “additional services”, and it was clarified that prices for bundled and unbundled data should be disclosed.

115. In relation to the issue of discounts, ESMA would note that it has added an additional guideline on discount policies (Guideline 7 in the final guidelines), on which more information can be found in section 3.5. Similarly, in relation to the issue of technical access, ESMA would note that in section 3.3 it was clarified that the cost methodology of market data providers should cover indirect services necessary for accessing market data, such as connectivity fees or necessary soft- or hardware.

3.7 Transparency obligations

3.7.1 Proposal in the CP

116. Article 89 of Delegated Regulation (EU) No 2017/565 and Article 11 of Delegated Regulation (EU) No 2017/567 prescribe the obligation for market data providers to “disclose the price and other terms and conditions for the provision of the market data in a manner which is easily accessible to the public”.

117. The transparency provisions in Article 89 of Delegated Regulation (EU) No 2017/565 and Article 11 of Delegated Regulation (EU) No 2017/567 contain a non-exhaustive list of aspects that should be made public. These include the current price lists, information on the content of the market data, revenue obtained from making market data available (as well as the proportion of that revenue compared to total revenue) and information on how the price was set.

118. In the CP, ESMA proposed to standardise the RCB information that market data providers have to disclose pursuant to Article 89 of Delegated Regulation (EU) No 2017/565 and Article 11 of Delegated Regulation (EU) No 2017/567. In particular, ESMA proposed to standardise key terminology and to develop a standardised publication format for disclosing the RCB information.

119. In relation to the introduction of several standardised terms, ESMA believes that this enables market data customers to understand market data fees, terms and conditions better so they can compare offers across market data providers and choose which market data service or package is most suitable for their needs. Guideline 11 in the CP (Guideline on standardised terminology, Guideline 12 in the final Guidelines) hence proposed for a number of terms to be standardised according to the definitions in Annex I of the draft guidelines.

120. The proposed Guideline 10 in the CP (Guideline on a standardised publication format, Guideline 14 in the final guidelines) referred to the use of a standardised publication template (see Annex II of the Guidelines) that market data providers should use to publish the required RCB information. The proposed standardised publication template would include all the information set out in Article 89 of Delegated Regulation (EU) No 2017/565

and Article 11 of Delegated Regulation (EU) No 2017/567 and also instructions on how to fill in the template and granularity to be used for the disclosure of the information.

121. In particular, ESMA proposed in the CP to have market data providers use this standardised template to make public a detailed explanation of the accounting methodology for setting the fees of market data, including a list of all the types of costs included in the fees of market data and the allocation keys for joint costs and their considerations on why the margin they charge is reasonable.

122. Finally, ESMA recognises that auditing is necessary for market data providers to ascertain that market data customers respect the terms and conditions of the data license. However, with Guideline 13 as proposed in the CP, ESMA aims at ensuring that market data users can understand how audits are carried out and that they have sufficient information, including on the market data fees that could be retroactively applied in consequence of an audit as well as the terms and conditions of the auditing and on how they are expected to demonstrate compliance with the market data agreements.

3.7.2 Feedback to the consultation

Standardised key terminology

123. In relation to Guideline 11 in the CP (Guideline on standardised terminology, Guideline 12 in the final Guidelines), a few stakeholders explicitly agreed with all proposed definitions. Many stakeholders however agreed with the concept of standardisation but suggested amendments as to one or more proposed definitions. These amendments related in particular to the customer, the unit of count, display and non-display data and derived data.

124. Recurring comments on the definition of customer included that this definition should refer to either a natural or a legal person, and that it should take into account the possible structures of the customer (e.g. affiliates) and reflect better the role of distributors in the chain. On the particular terms of professional and non-professional customer there were comments on refining these. Suggestions included aligning with the MiFID framework or making reference to the enterprise size and financial holdings. It was also proposed to make non-professional customer the key defined term.

125. In relation to the unit of count, many of the comments mentioned are connected directly to issues with the concepts of display and non-display data. One general comment on the unit of count was the suggestion by several market data providers to define frequently used units of counts, without prescribing a specific unit of count to be applied to exchanges.

126. For display use, a shared comment across stakeholders was that there should be no reference to an active user "ID" but only the active user itself, considering that usually a single user would need multiple user IDs. Comments diverged on whether the reference should be to a natural person or a physical user.

127. For non-display use, many questioned the accuracy of the unit of count. Some questioned whether non-display items should generally be considered as a unit of count. Others

pointed in particular to the advances of technology and the related incongruity of referring to servers and devices, which does not take into account non-tangible processes such as cloud technology. Moreover, it was noted that the combination of servers and devices depends on the IT structure of the firm. Respondents noted that a device counting methodology would lead to unjust increases in declaring devices applicable for billing.

128. A few respondents also noted that display and non-display data often have different prices while the same underlying data feed is used, and that ESMA should clarify that it is expected they are in principle equally priced and clarify on which grounds higher fees for one of those is set.

129. In a similar context, some reiterated that the concept of non-display should at all times remain linked to the cost-based approach and that there can be no pricing purely on the basis of devices without a link to the costs of production and dissemination.

130. Proposals to solve some of the issues above included:

- Allowing for segmentation based on scope (use) and scale;
- Rename server and device to “IT application” or “server-based programme”;
- State that the device’s purpose should be decision-making, to exclude feed handlers;
- Have non-display fees on an enterprise level or as a fixed-fee; and
- Remove the concepts of display/non-display and introduce concepts like “internal” use.

131. Regarding derived data, many stakeholders reacted on specific elements of the definition, such as a reference to the reverse engineering of the data. Others noted that the definition should indicate that the usage of derived data cannot be restricted, or they expressed a preference for the definition to explicitly require that the data is commercialised. Many data users commented on the concept of derived data itself, i.e. that it should not be endorsed and that a derived data licence should not be added in addition to display and non-display licences.

132. A few additional comments were also made on the definitions of delayed data, historical data as well as real-time data.

133. Respondents from the venue side noted that the process of identifying and standardising such terms should be decided in close consideration with market data providers (in terms of processes and policies) and that a number of definitions included in industry standards should be adopted.

134. Respondents suggested the following additional definitions for ESMA to consider clarifying in the guidelines:

- Aspects related to the scope of the agreement and to billing and reporting;
- Market parties such as vendor, sub-vendor, service facilitator, subscriber, affiliate, redistribution/ redistributor and concepts such as data, data feed, usage, entitlement system, device, instance, access-id, end of day data, original work, limited excerpt; and

- In relation to auditing and audit clauses in the market data agreement the terms of audit period, auditing practice, data usage declaration and statement of use.

135. Several respondents were in favour of standardising the different client categories and user types. This was suggested to be done on a general level i.e. trading user versus other user or more in detail such as automated trading, other application usage, or index calculation.

Standardised publication format

136. Respondents largely agreed with the use of a standardised publication format to publish RCB information and were either explicitly in favour of the whole guideline or agreed in general depending on some proposed adaptations. A few respondents noted that the guideline should be applicable to all market data providers.

137. A fair number of stakeholders explicitly agreed with the whole template and instructions that were set out in Annex II of the Guidelines or agreed with at least a large part of it. Comments and suggestions to the template could be split more or less according to the type of respondent.

138. Those that represent mainly data users expressed that they would like to see stricter requirements (i.e. more detailed disclosure). On a general level, these respondents noted that there should be more information required on the cost accounting methodology and the accompanying decision-making process. In particular, more detailed considerations should be incorporated in the accounting methodologies, actual costs and margins should be quantified and disclosed, and a cost benchmark should be prescribed. Respondents stated that if such detailed information is not published and only provided to NCAs, these NCAs should publish a detailed report how the providers have fulfilled their obligations. Respondents noted that there should be an enhanced focus on monitoring and enforcement.

139. It was also suggested that NCAs review the template and the methodologies annually and that ESMA include in the Guidelines that it will review the methodologies.

140. In terms of proposals for the guideline and detailed changes to the format, the following comments were made:

- All elements mentioned in Level 2 should come back explicitly in the template (display, non-display, discount policies, license conditions, etc);
- The template should be an agreed minimum, and should not prohibit market data providers to provide additional information;
- Price lists should be simplified and have a maximum length, and any changes to the lists should be thoroughly explained;
- There should be a requirement to publish price lists for at least past 5 years and based on multiyear comparison;
- There should not be an option to use “other criteria” to distinguish the type of license or data product;
- An external verification factor such as market share could be considered;

- ESMA should introduce a definition for market data revenue, and revenue should be split per fee type to verify effects of unbundling;
- ESMA should consider introducing sub-asset classes rather than "number" of instruments covered in asset classes;
- Fees should include all services necessary to use and consume data, should include colocation and connectivity fee schedules; and
- Location of the information should be centralised, e.g. establishment by ESMA of a database on RCB information.

141. Those that represent mainly data providers noted that they have significant concerns about the proposed disclosure of cost accounting methodologies and believe the disclosure of allocation keys and margin-related information to be too rigid, commercially sensitive and going beyond the "transparency plus" approach.

142. There were some concerns on disclosing revenues per operating MIC as venues sometimes have centralised operations across countries, and it would be difficult to split the market data revenues on such a detailed per country, per MIC basis. Some considered the general concept of providing information on such revenues as burdensome, considering that there are already periodic formal accounts. A few noted that the granular nature of table is too rigid and prescriptive for non-equities markets and that it is not always possible to calculate pre/post-trade market data ratios

143. Lastly, market data providers expressed that there is no explicit demand for a break down per asset class and that such a request entails additional resources, taking into account the possibility of frequent changes and the need to ensure that the information is always up-to-date.

Cost disclosure

144. Concerning the Guideline on cost disclosures (Guideline 12 in the CP, Guideline 15 in the final Guidelines), the views were also split between market data users and market data providers. Many of the comments made here also came back in relation to the proposed template above as well as the cost accounting methodologies (section 3.3)

145. Respondents from the market data side included those who agreed with the proposal as well as others who find the disclosures insufficient. The latter group highlighted that the data included in the draft template will not be enough to effectively challenge the inappropriate margins and easily compare the information between providers.

146. In fact, a large number of data users argued that more standardised numerical information is needed for the analysis of disclosures and an effective comparison between offers. Some users would like this data to be provided to the public, arguing that it is not sensitive information given that the product of market data is venue specific and therefore there is no competition between the venues. Others consider it sufficient that the data is provided to the regulators. Furthermore, market data users have put forward the following proposals for additional disclosures in the template:

- Actual costs of producing data and the actual margins applied;
- Detailed methodology for calculating the price of market data on the basis of costs;
- Justification of any change in the pricing model and in particular of any increase in fees above the inflation, which should be reasonable only if resulting from changes in costs of producing and disseminating data or other material change in the market; and
- A cost benchmark as proposed by Copenhagen Economics.

147. Some respondents explained that additional elements to the guidelines could be better assessed only after its implementation.

148. Besides the public disclosures on costs in the standardised template, it was suggested that market data providers should be required to submit annually a detailed report to their clients specifying the costs per product and service. Likewise, some respondents suggested that the level of revenues generated from market data should be periodically reported to the regulators which should verify that the margins are reasonable.

149. In contrast to the feedback from users, market data providers did not concur with the proposal, since they consider it as going beyond the regulatory mandate and the agreed approach of "transparency plus". They consider any information regarding margins sensitive and believe that it will undermine competition between various market data providers.

150. The data providers explained in their feedback that providing examples of costs as well as description of the type of costs, together with the general principles should be sufficient. Moreover, some of them clarified that the detailed information regarding costs, which are commercially sensitive, could be shared with the national regulator for monitoring purposes.

Auditing practices

151. Overall, respondents were supportive with regards to the guideline on transparency on auditing practices (Guideline 13 in the consultation, Guideline 16 in the Final Guidelines). Indeed, both market data users and providers consider that the disclosures proposed are useful and fair.

152. In addition, market data users proposed further transparency requirements to be included in the guideline, for example:

- The notice period given to the customers before an audit;
- The lookback period, which should be limited;
- Details of the audit practice (remote, on-site etc.); and
- A maximum audit frequency.

153. In addition, data users highlighted that before an audit takes place, the scope of the audit should be communicated by the market data provider, and any further changes to that scope should be notified in writing. They also considered it important that the confidentiality of any customer data is ensured in the course of an audit being carried out. Moreover,

market data users highlighted that the burden of proof of the non-compliance should stay with the market data provider.

3.7.3 ESMA's assessment and final approach

Standardised key terminology/ Standardised unit of count

154. In view of the general support for the standardisation of terminology, ESMA maintains both the guideline and the annex (Annex I) with the proposed terminology. However, ESMA has taken the targeted feedback to the definitions into account and has amended some of the definitions accordingly.

155. Most importantly, considering the many reactions on the definition of the unit of count, this definition has been reconsidered. Most of the wording in the annex has been replaced by a newly added guideline (Guideline on a standardised unit of count, Guideline 13 in the final guidelines) which gives guidance as to the use of the unit of count, both for display and non-display data.

156. On display data, the reference to "ID" has been removed, and it is clarified that market data providers should always make available the option to measure by the number of active users. Considering the feedback to the consultation, market data providers may however propose an alternative unit of count if they can explain in their market data policy how the fees are applied, and in which circumstance this option is available. Market data providers should always enable the customers to choose freely the unit of count according to their preference. The above is irrespective of whether the per user basis is adopted, which enables customers to avoid multiple billing in case market data has been sourced through multiple data providers or subscriptions.

157. Since numerous respondents expressed concerns on a device counting methodology for the unit of count for non-display use, and questioned the accuracy of it, ESMA amends its approach to reflect the comments made and introduces more flexibility for the purpose of having methods that are more suitable to the customer. The new guideline (Guideline on a standardised unit of count, Guideline 13 in the final guidelines) clarifies that market data providers should clearly indicate which unit of count is used for non-display data and how it is applied, as well as explain why the method chosen is considered to be the most suitable to count the provision of non-display data to customers considering the data distribution system used.

158. Another definition that has been reconsidered after many reactions were received to it, concerns the definition of derived data. Many stakeholders were split on the concept and the approach taken on derived data. ESMA recognises that in the absence of a clear position on derived data in these guidelines, a standardised definition may legitimise practices that ESMA would not support. To avoid this, and to address concerns by data users that the concept of derived data should not be endorsed, ESMA takes out the definition of derived data from the list of terms.

159. Lastly, the definition of customer was changed to reflect that this could be either a natural and/or legal person. On the particular terms of professional and non-professional customer, ESMA would keep professional customer as the key defined term as defining the non-professional term may unintendedly narrow the scope of the latter term and its applicability. To this end ESMA would keep its approach to refer to the professional customer as a customer who uses market data to carry out a regulated financial service or regulated financial activity, or to provide a service for third parties. ESMA understands this would typically include for instance banks, data service providers and asset managers. To address concerns that the definition would not cover large corporate firms, and taking up the suggestion to refer to the enterprise size and financial holdings, ESMA proposes to add a reference to large undertakings as specified in Annex II (I)(2) of MiFID II.

160. While some respondents expressed the need for additional terminology to be taken up in the annex, the suggestions varied greatly and did not point to a single set of essential terms to incorporate. ESMA would therefore not add any of the proposals to the current key terms.

Standardised publication format

161. Considering the split between those in favour of more detailed disclosure and those in favour of less detailed disclosure, ESMA deems the current guidelines as striking a good balance between the opposing interests. For this reason, no further disclosure on margins, detailed methodologies, or other metrics (e.g. market share) is introduced in the template.

162. ESMA sees merit in taking up a couple of proposed amendments, such as that the guideline at hand should be better streamlined with the guideline on audit costs (Guideline 3 in the final guidelines) and that the template should mention all elements from Level 2. To this end, the template now refers to the price list as having to include all items as mentioned in the relevant Level 2 text.

163. Furthermore, ESMA highlights that any changes to the price list should be clearly indicated and explained, so that customers can understand how the fees have changed and how they compare to previous fees.

164. Finally, ESMA believes that explicit guidance that clarifies that market data policies, including price lists, should be simple would indeed be beneficial, and to this end has introduced a new guideline on this (Guideline on the provision of market data in a clear and easily accessible manner, Guideline 1 in the final guidelines). More information on this can be found in paragraph 3.2.

165. It should be noted that some of the comments are also taken up in other guidelines, such as the disclosure on unbundling in the guideline on unbundling (Guideline 11 in the final guidelines), and disclosure on services necessary to use and consume data in the cost methodology (Guideline 2 in the final guidelines).

Cost disclosure

166. Considering the feedback to the CP, ESMA decided to largely maintain its approach regarding disclosures on the cost accounting methodology. As with the proposed disclosure template, it appears that the guideline on cost disclosure strikes the right balance between the request of market data users for more transparency on costs and margins, and the reluctance of the market data providers to disclose any data which they consider commercially sensitive.

167. ESMA is of the view that a standardised format of the publication which will include a summary explaining how the price was set, an exhaustive list of types of costs with examples, the allocation principles and keys, as well as an explanation of the margin applied, will be a good start to compare the practices among the trading venues, and to demonstrate how they comply with regulatory requirements.

168. ESMA believes that the current approach, when taken together with all other proposals included in these Guidelines, will already have a material impact on improving the transparency and changing non-compliant practices related to market data.

169. Moreover, ESMA considers that further detailed analysis of margins, cost accounting methodologies and revenues from market data could be carried out by the NCAs as a part of their supervisory activities of the market data providers, and also encourages them to do so. To that end, the disclosure proposed will help identify where attention could be required.

170. Furthermore, sending to clients detailed periodic information regarding market data costs incurred could be a good practice of the market data providers, which would help improving the understanding of the market data policies, and thus contributing to better compliance with that policies. However, this goes beyond the mandate of ESMA and therefore market data providers could only be encouraged to undertake such initiatives requested by their clients.

Auditing practices

171. In view of the general support from both market data users and providers, ESMA maintains its approach with regards to the disclosures regarding auditing practices. It appears that a vast majority of respondents consider such information as useful and as facilitating the auditing process.

172. Nonetheless, considering the feedback provided by the market data users and in particular their concerns raised with regards to changing terms of audits, ESMA considers it useful to add in the guideline a clarification that market data providers should disclose all terms and conditions of an audit in the market data agreement. In particular, the lookback and notice periods as well as practices ensuring data confidentiality should be included in such agreements.

173. Moreover, in order to facilitate the preparation of the market data users for an audit, the guideline has been changed to clarify that the market data agreements should explain how customers are expected to prepare for an audit, i.e. what information should be stored and

for what period of time. ESMA believes that the burden of proof should be placed on the market data provider.

174. ESMA is of the view that these disclosures should have a positive impact on the auditing experience, and at the same time ESMA would encourage market data practitioners to always have in mind the need for collaboration, and develop and follow good industry practices.

3.8 Making data available free of charge 15 minutes after publication

3.8.1 Proposal in the CP

175. Pursuant to Article 13(1) of MiFIR, trading venues are required to make data available free of charge 15 minutes after publication ('delayed data'). The same obligation is imposed by Article 64(1) and 65(1) of MiFID II on APAs and CTPs.

176. The data to be published by trading venues is specified in Articles 3, 6, 8 and 10 of MiFIR, and by APAs and CTPs in Article 64 and 65 of MIFID II. Those fields are further clarified in Table 1 and 3 of Annex I of RTS 1 for equity instruments, and in Annex I and Table 2 of Annex II of RTS 2 for non-equity instruments.

177. Following many questions and complaints from market participants about the application of this provision, ESMA provided further guidance with regards to delayed data provision, that leverage on the previously issued Q&As in this area (Q&A 9 and 10 on transparency issues).

178. In the CP, ESMA proposed to clarify that the delayed data should be easily accessible to market data users, but that simple registration is an acceptable market practice. In terms of content, taking into account that some market data providers do not include information on flags in their publications, ESMA clarified that flags are an obligatory element of the delayed data publications. Moreover, ESMA proposed to limit the scope of pre-trade delayed data to the top of the order book publications. Finally, as ESMA understands that the format of data provision should be adapted to the user's needs, it sought further feedback from market data users whether there is a case to differentiate between the format of data provision of pre- and post-trade data.

179. In the CP, ESMA acknowledged that there are certain situations where it appears justified that data providers should be paid for their data provision. Those cases were defined in Guideline 16 as data redistribution and value-added services. In the CP, ESMA considered it necessary to further explain the concepts of "value-added services" and "data distribution". This was considered necessary since in practice certain data providers considered any use of delayed data by commercial users as a "value added service" for their business, and therefore subject to a fee. ESMA disagreed with this broad interpretation and suggested in the CP to limit the definition of "value-added services" to those activities where a product created on a basis of delayed data is sold for a fee.

3.8.2 Feedback to the consultation

180. A vast majority of respondents agreed with the content of the data provided free of charge 15-minutes after publication, specified in the Guideline 14 in the draft guidelines (Guideline 17 in the final Guidelines).

181. More specifically, flags are considered a very important element of the post-trade transparency and should remain a mandatory element in delayed data disclosures. Some respondents highlighted a need for further clarifications and standardisation of the use of flags.

182. Most respondents also agreed with limiting the delayed pre-trade data to only the first best bid and offer together with its volume (as opposed to the first five best bid and offers published in case of certain types of trading systems on a real-time basis). Few respondents would prefer that the pre-trade delayed data fully replicates the real-time data, however they did not provide any real-case scenario where such disclosures would be used by market participants.

183. A few stakeholders asked ESMA to reconsider its position with regards to access to the delayed data, and not allow for a registration to access the data. Furthermore, some trading venues responding to the consultation raised the point that the wording of Guideline 15 (Guideline 18 in the final Guidelines) regarding the time during which the data should be provided free of charge had been amended. They would prefer the previous requirement of 24-hours availability of data to be unchanged, for the sake of stable regulatory requirements.

184. On ESMA's request for feedback on the use cases of pre- and post-trade transparency that are relevant for data users, most respondents mentioned the below cases are very relevant for a data user:

- Monitoring of trades;
- Pre- and post-trade data analysis;
- Risk management functions;
- Research;
- Audit;
- Fund valuation.

185. With regards to the data format, most data users noted in their responses that the key element to take into account is standardisation of formats. In addition, whilst some respondents were agnostic in terms of which format to use, others were of the view that CSV files should be made available.

186. Furthermore, some respondents noted that market data providers should be required to provide clear and objective instructions on how to use and download delayed data on their websites.

187. On Guideline 16 (Guideline 19 in the Final Guidelines), the feedback received was mainly against ESMA's proposal. The arguments for the disagreement were quite opposite depending on whether the respondent was a data user or provider.

188. Data users mainly argue that the definition was too broad and that the legal text is quite clear in that all data should be free after 15 minutes regardless of the use made by data users. Therefore, these respondents disagree with ESMA in so much that no charges should apply to delayed data under any circumstances.

189. In addition, in terms of the definitions presented in the CP, in particular in relation to value added services, respondents argue that a value-added service should only be considered when the user provides a service of pure market data.

190. On the other side of the argument, market data providers, particularly trading venues, were of the view that the definition is too narrow. These respondents were of the view that the definitions should exclude, for example, revenues made by data users from advertisement. These respondents were of the view that any economic benefit, either direct or indirect, should trigger a charge on the data user.

191. Furthermore, market data providers also considered that trading venues should be able to closely monitor user accesses and control what use is made to delayed data.

3.8.3 ESMA's assessment and final approach

192. Considering the feedback received, ESMA broadly maintains its approach with regards to the content of the delayed data provision. Flags will remain obligatory, pre-trade delayed data can be limited to only the first best bid and offer, and there will be no differences with regards to different types of trading systems. The need for further clarifications and standardisation of the use of flags will be considered by ESMA in a different workstream related to the RTS 1 and 2 review.

193. Furthermore, ESMA is sympathetic with market data users who faces difficulties accessing the delayed data due to complex registration requirements. At the same time, ESMA understands that there may be a need for the market data providers to maintain some control of users accessing its systems. Therefore, ESMA does not consider such a registration should be prohibited but highlights instead in the guideline that the data should remain easily accessible to any user.

194. Considering the feedback provided by the market data providers on the time during which the delayed data should be made available, ESMA would like to clarify that the intention was for the new wording to ensure that the provision of data is operationally simple. Indeed, ESMA is aware of the unfortunate developments of some trading venues making available fragmented hourly files that have to be merged by data users, or a technically complex solutions of constantly updated file, in order to cover exactly 24-hours period. This was not the intention of the ESMA Q&A which specified that the data should be available for at least 24 hours.

195. Given that the most common industry practice is to create a file covering the trading taking place during a given trading day in one file (for all instruments, or certain class thereof, depending on the volumes), ESMA believes that its current approach is fit for purpose. At the same time, such a daily file is only complete at the end of the day, therefore ESMA sees a need for it to remain available at least during the following trading day to allow users to access it easily.

196. ESMA concluded to take the approach of requiring a machine-readable format from any market data provider. This is very relevant since it allows the data to be easily consolidated. ESMA understands that the delayed data, according to the MiFID II and MiFIR framework, should in principle imitate the data provided on a reasonable commercial basis, but 15 minutes after the initial publication. Since such data is provided in a machine-readable format, it is logical that such format remains for the delayed data provision.

197. With regards to Guideline 16 (Guideline 19 in the Final guidelines), ESMA maintains its view that the definition of "value-added services" should be limited to those activities where a product created on the basis of delayed data is sold for a fee. Only those value-added services which are sold as a product for a fee to third parties should be subject to charges from the data provider.

198. Taking into consideration the feedback received, both in the context of data redistribution and creation of value added services, ESMA further clarified in the Guideline that where a company distributes delayed data internally or makes use of delayed data for its internal purposes there should be no charges from the data provider. ESMA provided a non-exhaustive list of examples of such use cases.

199. On data redistribution, ESMA maintains that any charges from the data provider can only apply where the data user generates a direct economic benefit via the selling of that data.

4 Annexes

4.1 Annex I Cost-benefit analysis

MiFID II/MiFIR introduced a number of requirements with regards to market data, including requirements to provide market data on a reasonable commercial basis (RCB) and to make data available free of charge 15 minutes after publication. In its Final Report on the development in prices for pre- and post-trade data and on the consolidated tape for equity instruments, ESMA concluded that it was necessary to develop guidelines regarding the above provisions on market data.

Impact of the draft ESMA guidelines

The assessment of the expected benefits and costs of the proposed guidelines is set out below.

Benefits

ESMA believes that the benefits of the guidelines are threefold. The introduction of the proposed guidelines will:

a) support market data providers in the application of market data provisions by giving clarity on the applicable regulatory requirements, as well as provide a resource against which they can assess the effectiveness and appropriateness of their existing policies and practices;

b) reduce the risk that data users face increasing market data prices or pay excessing fees for their access to market data, and to allow them to benefit more easily from the market data provided free of charge 15 minutes after publication; and

c) reduce the risk of arbitrage through enhanced regulatory and supervisory convergence across competent authorities.

For market data users the guidelines may lead to a reduction in fixed costs with market data products. In addition, market data users may be able to reduce their FTE as it will be less challenging to check and comply with market data policies.

Costs

Market data providers will be required to assess the guidelines against their existing policies and processes and may need to review them. Some technical implementations may be necessary in case of some entities. The execution of changes introduced by the guidelines may require market data providers to increase the number of FTE to implement the necessary changes.

Following any changes market data providers would be required to inform and update all relevant staff as to the changes in the internal policies and processes, providing training where necessary. These changes may increase fixed costs and require implementation time.

Conclusions

In light of the above, ESMA believes that the overall compliance costs associated with the implementation of the guidelines will be fully compensated by the benefits arising from the enhanced framework.

MiFID II/ MiFIR is prescriptive in the area of market data provisions because the demand for market data and its value has been increasing in an environment driven by technological development and increased competition. MiFID II/MiFIR has as an objective to make market data available to all users in an easily accessible, fair and non-discriminatory manner. As such, guidelines which ensure that market data providers are better able to meet this objective are justified on the basis that the costs of implementation will be limited to compliance costs.

4.2 Annex II Opinion of the Securities and Markets Stakeholder Group (SMSG)

In the context of ESMA's Consultation Paper on Guidelines on the MiFID II/ MiFIR Obligations on Market Data publication, the SMSG was invited to provide advice on this topic.

For the full document of the SMSG's advice, please find the link here.

A summary of the SMSG's opinion can be found below:

Summary of SMSG Views on ESMA Consultation Paper on Guidelines on the MiFID II/ MiFIR Obligations on Market Data

1. General

1. The SMSG welcomes the opportunity to provide feedback to ESMA in the context of its Guidelines on the MiFID II/ MiFIR Obligations on Market Data. It is crucial that improving the clarity, consistency, and transparency of the market data regulatory obligations is of primary consideration to ESMA. In the SMSG's view, further standardisation (for example in reporting formats and terminology) would be very valuable to address structural issues. The SMSG also agrees with ESMA that the "transparency plus model"[4] should be maintained, and that data from all venues (trading venues and APAs"[5]) should be easily available for free maximum 15 minutes after publication, and within one minute for post trade data (last price).

2. Representatives of individual investors however regret that the ESMA CP tends to ignore the specific needs and constraints of non-professional users of market data, in particular individual investors, which is unfortunate given the overall "CMU that works for people and businesses" policy framework. Individual investors are still "market participants", and even more so in the small and mid-caps equity markets which are so crucial for the EU economy. Moreover they believe the obligations on market data cannot be assessed in isolation of the other services rendered by EU-based regulated markets to the real EU economy (individual investors and SMEs in particular) and of the much more dominant duopoly currently providing consolidated market data. Rules on market data must ensure a level playing field for the whole market data business.

3. It is of the utmost importance to seek a transversal approach to the regulation of market data providers. The SMSG considers that 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 is a step in the right direction.

4. SMSG members have different views on reasonable commercial basis and non-discriminatory access considerations, and technical arrangements of the market data providers. Those differences in approach are outlined throughout the paper.

[4] The current approach to reasonable commercial basis (or "RCB").
[5] "Approved Publication arrangements" which publish trade reports on behalf of investment firms.

Representatives of several financial intermediaries and asset managers (below referred to as "Data Purchasers") see this as a debate limited to reasonable commercial basis, with the aim of lowering the cost and increasing the availability of data.

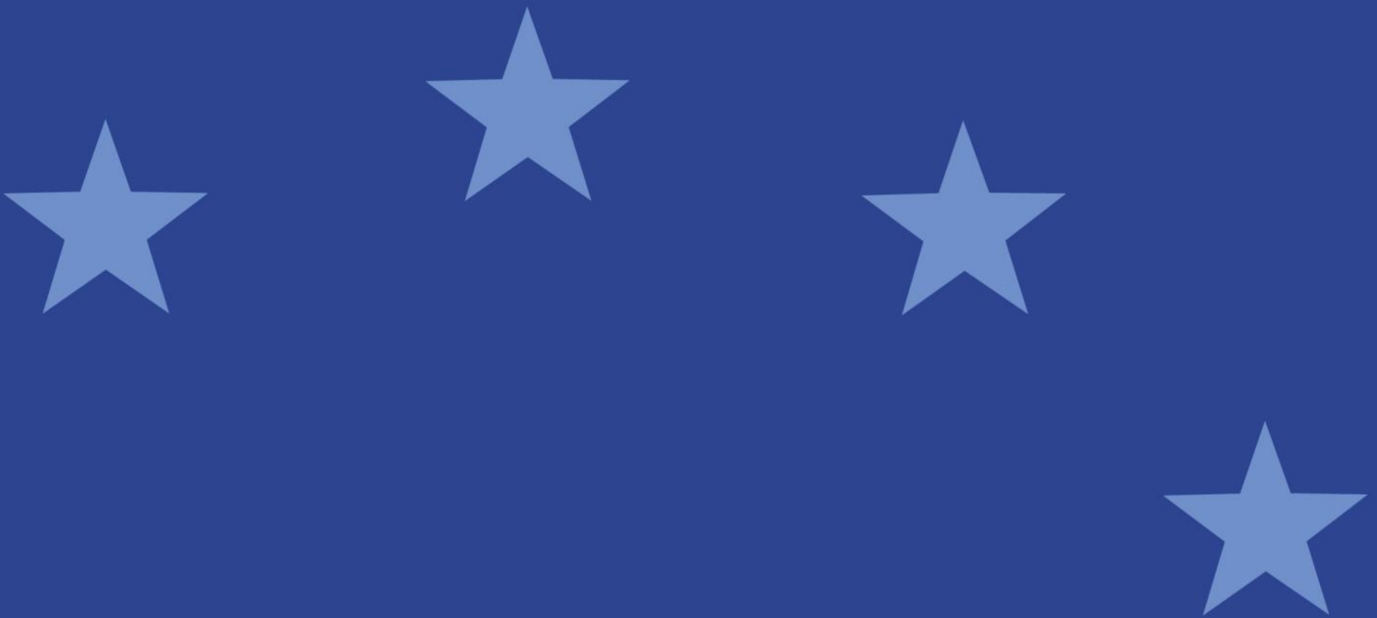
Representatives of certain market data providers and individual investors see this as a wider debate, since they believe there is an unlevel playing field in the trading landscape. They note that regulated markets provide high quality data and consequently price discovery for the use by all market participants.

5. This advice should not be seen as an endorsement of the existing market structure which is outside the scope of this advice. This advice exclusively relates to the draft guidelines.

4.3 Annex III Final guidelines

Final Guidelines

On the MiFID II/ MiFIR obligations on market data



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1. Scope

Who?

1. These guidelines apply to national competent authorities (NCAs), trading venues, approved publication arrangements (APAs), consolidated tape providers (CTPs) and systematic internalisers (SIs). Section 5.8 in relation to the provision of delayed data does not apply to SIs.

2. From 2022 onwards, the European Securities and Markets Authority (ESMA) will carry out supervision on APAs and CTPs, as stipulated in Regulation (EU) No 2019/2175. As of that time, references to NCAs should be read as references to NCAs supervising trading venues, SIs, and those carrying out supervision on their national APAs and CTPs exempted from ESMA supervision. While the guidelines are not addressed to ESMA, APAs and CTPs for which ESMA will be the responsible competent authority from 2022 onwards will themselves be subject to the guidelines.

What?

3. These guidelines apply in relation to Articles 13, 15(1) and 18(8) of MiFIR as further specified in Articles 6 to 11 of Delegated Regulation 2017/567 and of Articles 64(1) and (2) and 65(1) and (2) of MiFID II[6] as further specified in Articles 84 to 89 of Delegated Regulation 2017/565. The guidelines apply in relation to market data that trading venues, SIs, APAs and CTPs have to make public for the purpose of the pre-trade and post-trade transparency regime.

When?

4. These guidelines apply from 1 January 2022.

5. These guidelines do not apply to NCAs which are no longer responsible for the supervision of APAs and CTPs as of the date following that on which ESMA has taken over the supervision of those APAs and CTPs.

2. Legislative references, abbreviations and definitions

Legislative references

ESMA Regulation	Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and

[6] As of 1 January 2022, reference to these provisions should be read as a reference to the new MiFIR provisions as specified in Regulation (EU) No 2019/2175, and as further supplemented by relevant Level 2 acts. Please also see the correspondence table in Annex III.

	Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC[7]
MiFIR	Regulation (EU) No 600/2014 of the European Parliament and of Council 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012[8]
MiFID II	Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU[9]
Delegated Regulation (EU) No 2017/567	Commission Delegated Regulation (EU) No 2017/567 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to definitions, transparency, portfolio compression and supervisory measures on product intervention and positions[10]
Delegated Regulation (EU) No 2017/565	Commission Delegated Regulation (EU) No 2017/565 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive[11]
RTS 1	Commission Delegated Regulation (EU) No 2017/587 of 14 July 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments with regard to regulatory technical standards on transparency requirements for trading venues and investment firms in respect of shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments and on transaction execution obligations in respect of certain shares on a trading venue or by a systematic internaliser[12]
RTS 2	Commission Delegated Regulation (EU) No 2017/583 of 14 July 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments with regard to regulatory technical standards on transparency requirements for trading venues

[7] OJ L 331, 15.12.2010, p. 84.
[8] OJ L 173, 12.06.2014, p. 84.
[9] OJ L 173, 12.06.2014, p. 349.
[10] OJ L 87, 31.03.2017, p. 90.
[11] OJ L 87, 31.03.2017, p. 1.
[12] OJ L 87, 31.03.2017, p. 387.

	and investment firms in respect of bonds, structured finance products, emission allowances and derivatives[13]
Regulation (EU) No 2019/2175	Regulation (EU) No 2019/2175 of the European Parliament and of the Council of 18 December 2019 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority), Regulation (EU) No 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority), Regulation (EU) No 600/2014 on markets in financial instruments, Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds, and Regulation (EU) 2015/847 on information accompanying transfers of funds[14]

Abbreviations

ESMA	European Securities and Markets Authority
RCB	Reasonable Commercial Basis
NCAs	National Competent Authorities
EU	European Union
APA	Approved Publication Arrangement
CTP	Consolidated Tape Provider
SI	Systematic Internaliser

Definitions

The definitions set out in MiFID II and MiFIR apply.

market data	market data should mean the data trading venues, SIs, APAs and CTPs have to make public for the purpose of the pre-trade and post-trade transparency regime. Therefore, market data

[13] OJ L 87, 31.03.2017, p. 229.
[14] OJ L 334, 27.12.2019, p. 1.

delayed data	includes the details set out in Annex I of RTS 1 and Annex I and Annex II of RTS 2 delayed data should mean market data made available 15 minutes after publication
market data provider	a trading venue as defined in Article 4(1)(24) of MiFID II, an approved publication arrangement (APA) as defined in Article 4(1)(52) of MiFID II, a consolidated tape provider (CTP) as defined in Article 4(1)(53) of MiFID II or a systematic internaliser (SI) as defined in Article 4(1)(20) of MiFID II
market data licence agreement	an agreement between the market data provider and the customer for licensing market data and reflecting the information and prices disclosed in the market data policy
market data policy	one or more documents from the market data provider, listing relevant information on the provision of market data, including a price list for both market data fees as well as indirect services to access and utilise market data, and the main terms and conditions of the market data licence agreement

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.

4. Compliance and reporting obligations

Status of the guidelines

8. In accordance with Article 16(3) of the ESMA Regulation, NCAs and financial market participants must make every effort to comply with these guidelines.

9. Subject to paragraph 2 of Section 1, NCAs to which these guidelines apply should comply by incorporating them into their national legal and/or supervisory frameworks as appropriate, including where particular guidelines are directed primarily at financial market participants. In this case, NCA should ensure through their supervision that financial market participants comply with the guidelines.

Reporting requirements

10. Within two months of the date of publication of the guidelines on ESMA's website in all EU official languages, NCAs to which these guidelines apply must notify ESMA whether they (i) comply, (ii) do not comply, but intend to comply, or (iii) do not comply and do not intend to comply with the guidelines.

11. In case of non-compliance, NCAs must also notify ESMA within two months of the date of publication of the guidelines on ESMA's website in all EU official languages of their reasons for not complying with the guidelines.

12. A template for notifications is available on ESMA's website. Once the template has been filled in, it shall be transmitted to ESMA.

13. Financial market participants are not required to report whether they comply with these guidelines.

5. Guidelines on the MiFID II/MiFIR market data obligations

5.1 Introduction

14. Articles 13, 15(1) and 18(8) of MiFIR and 64(1) and 65(1) and (2) of MiFID II set out requirements for trading venues, APAs, CTPs and SIs ('market data providers') to provide market data on an RCB and ensure non-discriminatory access to that information. Articles 6 to 11 of Delegated Regulation (EU) No 2017/567 and Articles 84 to 89 of Delegated Regulation (EU) No 2017/565 further specify these requirements.

15. The requirements in Delegated Regulation (EU) No 2017/567 and Delegated Regulation (EU) No 2017/565 set out the principle to provide market data on the basis of the cost of producing and disseminating it and require market data providers to comply with a number of disclosure requirements aiming at enabling market data users to understand how market data is priced, to compare market data offers and to ultimately assess whether market data is provided on a reasonable commercial basis.

16. Furthermore, Article 13(1) of MiFIR requires trading venues to make data available free of charge 15 minutes after publication (delayed data). The same obligation is provided by Articles 64(1), 65(1) and (2) of MiFID II in respect to APAs and CTPs.

17. According to Article 84(2) of Delegated Regulation (EU) No 2017/565 and Article 6(2) of Delegated Regulation (EU) No 2017/567 several requirements and transparency obligations do not apply to market data providers offering market data free of charge.

18. However, some of the provisions on market data in these regulations apply also to market data providers offering market data free of charge, notably the requirement related to making market data available to all customers on the same terms and conditions, the requirement to have scalable capacities in place to ensure that customers can obtain timely access to market data at all times on a non-discriminatory basis and the requirement to offer unbundled market data are applicable to such market data providers. Therefore, Guidelines 4, 6 and 11 apply to those market data providers.

19. Market data providers should not charge for indirect services necessary for accessing market data when providing data free of charge.

20. In order to ensure that the requirements on market data deliver against their objectives, these guidelines set out further ESMA's expectations on how market data providers should comply with the provisions on market data. In particular, the guidelines elaborate on the requirement to provide market data on the basis of cost, on the requirement to ensure non-discriminatory access to data, on the disclosure obligations and on the requirement to provide delayed data free of charge.

21. While the legal requirements provide for the same approach for trading venues (regulated markets, MTFs, OTFs), APAs, CTPs and SIs, it is important to highlight that the scope of the market data requirements is different for these four types of entities. For instance, trading venues have to provide pre- and post-trade market data on an RCB, whereas the RCB requirements for SIs are limited to pre-trade market data and for APAs and CTPs to post-trade market data. Furthermore, SIs are not subject to the requirements on delayed data. In consequence, not all requirements apply to all entities to the same extent. Where relevant, this is highlighted in the guidelines.

22. ESMA acknowledges that it is important to take the different nature, scale and complexity of market data providers into account when specifying the expectations on the market data provisions. In accordance with Articles 1(5) and 8(3) of the ESMA Regulation, ESMA has taken into account the principle of proportionality when drafting these guidelines. For example, considering the different operating models and cost structures of market data providers these guidelines do not harmonise the cost accounting methods but rather require market data providers to have a clear and documented methodology for setting the price of market data. Similarly, to avoid that market data providers operating continuous auction order book trading systems face a high operational and administrative burden when disclosing delayed pre-trade data, and given the limited added value of users of very granular pre-trade data, these guidelines clarify that for such systems the obligation to provide delayed pre-trade data are met when providing access to the best bid and offer only.

23. The guidelines start with the requirements on RCB and non-discriminatory access (sections 5.2-5.7) and closely follow the structure of the delegated acts further specifying the RCB requirements. Section 5.8 covers the provisions on delayed data.

5.2 Clear and easily accessible market data policies

Guideline 1 clarifies Article 13 of MiFIR, Articles 64(1), 65(1) and 65(2) of MiFID II, as further specified in Articles 84 to 89 of Commission Delegated Regulation (EU) No 2017/565 and Articles 6 to 11 of Delegated Regulation (EU) No 2017/567.

Guideline 1: Market data providers should publish their market data policy in an easily accessible format which is user-friendly on their website. Where the market data policy consists of more than one document, market data providers should clearly indicate this and make all documents of the market data policy accessible via a single location on their website.

The market data policy should present in clear and unambiguous terms all relevant market data information, including the price list for market data offerings as well as any indirect services necessary for accessing and utilising the market data offerings, to enable customers to understand the fees and the terms and conditions applicable to them. In this respect, market data providers should be ready to further explain their market data policy, where needed.

5.3 Provision of market data on the basis of cost

Guidelines 2 and 3 clarify Article 85 of Delegated Regulation (EU) No 2017/565 and Article 7 of Delegated Regulation (EU) No 2017/567.

Guideline 2: Market data providers should have clear and documented cost accounting methodologies for setting the price of market data. The methodologies should include both direct market data offerings (i.e. market data fees) as well as indirect services necessary for accessing market data offerings, such as connectivity fees or necessary soft- or hardware required to use and access the market data. The methodologies should be reviewed on a regular basis (e.g. annually). Market data providers may need to adjust their methodologies over time and account for changes in marginal costs. For example, if a market data provider allocates a portion of investments in IT infrastructure to the cost of production and dissemination of market data, the market data provider is expected to consider the amortisation of the investments when allocating these costs.

Market data providers should explain in their methodologies whether a margin is included and how that margin has been determined.

The cost accounting methodologies should demonstrate how the price for market data is based on the costs of the production and dissemination of market data. To this end, each methodology should also identify the costs that are solely attributable to the production and dissemination of market data (i.e. direct costs) and the costs that are shared with other services, such as joint costs. Where relevant, further distinction should be made between variable costs and fixed costs.

Direct costs should be understood as costs that are solely attributable to the production and dissemination of market data such as dedicated staff working on the production and/or dissemination of market data or the costs for performing audits. Joint costs should be understood as costs that occur when the processing of a single input resource results simultaneously in two or more different products, e.g. trade execution and the production and dissemination of market data.

Costs that are shared with other services should be apportioned on the basis of appropriate allocation keys. Variable costs should be costs incurred for the production and the dissemination of one additional unit of market data and fixed costs should be costs that do not vary with the volume of market data produced and disseminated.

In order to ensure that the allocation of costs of producing and disseminating market data reflects the actual costs of producing and disseminating market data, and ultimately the fees charged to customers, the methodologies should include a justification for which costs are included in the fees for market data and in particular a justification on the appropriateness of the allocation principles and keys for costs that are shared with other services. For example, for the allocation costs that are shared with other services, such as joint costs, market data providers should not use the revenues generated by the different services and activities of their company as an allocation principle because this practice is contradictory to the obligation to set market data fees (i.e. revenues of the market data business) based on the costs of producing and disseminating market data.

Furthermore, not every market data provider is likely to encounter joint costs. For instance, the licensed activity of APAs and CTPs is limited to the collection and dissemination of market data (and in the case of the CTP, the aggregation of such data) and does not automatically result in the production of a second product. In consequence, no joint costs are incurred.

Guideline 3: Market data providers should only apply penalty clauses in compliance with the principle of charging on a reasonable commercial basis. In particular, market data providers should not impose any unjustified or overly onerous penalty clauses.

To ensure penalties are justified, market data providers should impose penalties only where an infringement of the market data licence agreement has been demonstrated, for instance as a result of an audit which established that customers have not complied with the terms of the market data licence agreement.

The level of penalties in case of non-compliance with the terms of the market data licence agreement should generally be based on the recovery of revenues which would have been generated in case of compliance with the license.

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 condition of the license should be excluded. For example, such practices would be excessive interest charging or extensive retroactivity.

In addition, market data providers should ensure that audit practices do not create unnecessary costs to data users, for example by enlarging the scope of the audit beyond what is strictly necessary to detect the occurred breaches with market data licence agreements.

In order to gather the necessary information to assess potential breaches with market data licence agreements, market data providers may, for this purpose only, seek information from customers to provide information on the use of the data.

5.4 Obligation to provide market data on a non-discriminatory basis

Guidelines 4 to 7 clarify Article 86 of Delegated Regulation (EU) No 2017/565 and Article 8 of Delegated Regulation (EU) No 2017/567.

Guideline 4: 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. The criteria used should be:

(i) based on factual elements, easily verifiable and sufficiently general to pertain to more than one customer;

(ii) explained in such a manner that customers are enabled to understand the category they belong to.

Market data providers should explain in their market data policy the applicable fees and terms and conditions for each use. They should justify any differentiation of fees and terms and conditions pertaining to each category of customers.

In addition, market data providers should justify any amendment to their market data policy resulting in a change of the classification of customers on objective reasons.

Guideline 5: Along with the description of the different customer categories, market data providers should clarify in their market data policy how fees are applied when a customer potentially belongs to more than one customer category, for instance, when the customer makes different simultaneous uses of the data. In such a case, market data providers should charge for the provision of data only once by applying one customer category only. As an exception, market data providers may add a proportionate increment of the relevant fee, where there are multiple and significant different uses made by the customers of the data.

Market data providers should clearly display in their market data policies the amount of the increment, its cases of application, and provide an explanation of its compliance with the principle of the price of market data being based on the cost of producing and disseminating data, with inclusion of a reasonable margin.

Guideline 6: Market data providers should offer to customers who fall within the same category the same set of options with respect to technical arrangements. Market data providers should ensure that technical arrangements, including latency and connectivity, neither discriminate

nor create any unfair advantage. Market data providers should justify any divergence in the final solution adopted on the basis of valid technical constraints.

Guideline 7: When market data providers disclose discount policies, they should describe clearly the scope of application of the discount, the conditions for applications, and the terms of application (e.g. duration of the discount).

The conditions for the discount applications should be:

(i) based on factual elements, easily verifiable and sufficiently general to pertain to more than one customer;

(ii) explained in such a manner that customers are able to understand whether and when the discount is applicable to them.

In compliance with the principle to provide market data on a non-discriminatory basis, the application of a discount should not be used to create additional categories of customers or data use cases. Similarly, in respect of the obligation to make data available without being bundled, the discount for bundled services should not exceed the price of a service offered separately. (see also Guideline 11)

5.5 Per user fees

Guidelines 8 to 10 clarify Article 87 of Delegated Regulation (EU) No 2017/565 and Article 9 of Delegated Regulation (EU) No 2017/567.

Guideline 8: The per user basis should be understood as a model of charging fees for display data which enables customers to avoid multiple billing in case market data has been sourced through multiple data providers or subscriptions. Market data providers should use for display data the unit of count of the active user, that enables customers to pay according to the number of active users accessing the data, rather than per device or data product.

Guideline 9: Market data providers should ensure that the conditions to be qualified as eligible for the per user basis require only what is necessary to make the per user basis feasible. In particular, eligibility conditions should mean i) the customer is able to identify correctly the number of active users who will have access to the data within the organisation and ii) the customer reports to the market data provider the number of active users. Market data providers may additionally seek an initial check *ex ante* to validate the number of users and/or the eligibility of the customer.

Guideline 10: When market data providers consider the per user basis as disproportionate to the cost of making the data available and are not able to offer it to customers, they should disclose the reasons by clearly indicating the specific features of their business model which make the adoption of the per user basis disproportionate and why these make the adoption of the model unfeasible. When impeding factors entail excessive administrative costs, market data providers should include in their explanation on disproportionality a high level and provisional indication of the costs foreseen for the implementation of the per user basis.

5.6 Obligation to keep data unbundled

Guideline 11 clarifies Article 88 of Delegated Regulation 2017/565 and Article 10 of Delegated Regulation (EU) No 2017/567.

Guideline 11: Market data providers should always inform customers that the purchase of market data is available separately from additional services ('data unbundling'). Such additional services should be understood to include the provision of data other than pre- and post-trade transparency data (e.g. ESG data, data analytics). Market data providers should not condition the purchase of market data upon additional services.

Prices for bundled and unbundled data should be clearly disclosed in the market data policy.

5.7 Transparency obligations

Guidelines 12 to 16 clarify Article 89 of Delegated Regulation (EU) No 2017/565 and Article 11 of Delegated Regulation (EU) No 2017/567

Standardised key terminology

Guideline 12: Market data providers should adopt the terminology in Annex I of the Guidelines in their market data policy and price list. When market data providers use other terms, they should provide a clear definition of these terms in the market data policy or price list.

Standardised unit of count

Guideline 13: To facilitate price comparison, market data providers should display the price of display data by number of active users in their market data policy and in the template.

Market data providers should always make available to the customer the option to measure access to display data by the number of active users. In addition, they may set forth in their market data policy an alternative unit of count for display data (e.g. the number of display applications granted to the customer to access the data as desktop applications, mobile devices, wallboards). In such a case they should explain in their market data policy how the fees are applied by using a unit of count other than the number of active users and the circumstance in which this option is available. Market data providers should always enable the customers to choose freely the unit of count according to their preference.

Market data providers should also clearly indicate in their market data policies the unit of count for non-display data, its application and an explanation on why the method chosen is considered to be the most suitable to count the provision of non-display data to customers considering the data distribution system used (e.g. devices, servers, IT or cloud applications). The unit of count used by a market data provider for non-display data should be unique, meaning two or more units of count cannot be combined to count the extent of access.

Standardised publication format

Guideline 14: Market data providers should publish the information required by Article 89 of Delegated Regulation (EU) No 2017/565 and Article 11 of Delegated Regulation (EU) No 2017/567 by using the template provided in Annex II.

Market data providers should provide the information in a consistent manner in terms of granularity to make the disclosure meaningful for customers to compare between offers (e.g. per asset class and on an annual basis). Where relevant, information should be provided separately for pre- and post-trade data.

Additional information that is outside the scope of the transparency obligation should not be provided in the template. However, market data providers should ensure that the additional information is easily accessible by customers (e.g. by inserting a reference to the relevant publication containing information and justification for additional criteria used to distinguish data product and licenses or set customer categories as indicated in Guidelines 4 to 7).

Cost disclosure

Guideline 15: Market data providers should publish a summary, by using the template provided in Annex II, of how the price was set and a more detailed explanation of the cost accounting methodology used in order to comply with Article 11(e) of Delegated Regulation (EU) No 2017/567 or Article 89(2)(e) of Delegated Regulation (EU) No 2017/565.

The explanation should provide, inter alia, the list of all the cost types included in the fees of market data with examples of such costs as well as the allocation principles and allocation keys for joint costs or other costs that are shared with other services. Market data providers should disclose whether they include a margin in the fees of market data and explain how it is ensured that the margins are reasonable.

Market data providers are not required to disclose the actual costs for producing or disseminating market data or the actual level of the margin, however the explanatory information provided on costs and margins should enable users to understand how the price for market data was set and compare the methodologies of different market data providers.

Auditing practices

Guideline 16: Market data providers should provide all the terms and conditions of their auditing practices in the market data licence agreement (frequency, lookback period, notice period, data confidentiality etc). The market data licence agreement should be explicit as to whether the market data fees can be applied retroactively. It should also clearly explain how customers are expected to prepare for an audit (which information needs to be stored and for what period of time etc.). Any audit should be carried out having in mind the need for collaboration between market data providers and users.

5.8 Obligation to make market data available free of charge 15 minutes after publication

Guidelines 17 to 19 clarify Articles 64 and 65 of MiFID II and Article 13 of MiFIR

Data access and content

Guideline 17: The free access to delayed data should be provided to any customer, including professional customers. Market data providers may require a simple registration for the purpose of monitoring who has access to the delayed data, provided that the data remains easily accessible to any user.

The delayed data publications should cover all the trading systems operated by the trading venues. The post-trade data should contain all the relevant fields for the purpose of post-trade transparency, including flags, as specified in RTS 1 and 2. For pre-trade delayed data, given the operational challenges resulting from high volumes of pre-trade data on one hand, and the requirements of data users on the other hand, it is considered sufficient to only include the first current best bid and offer prices available and the depth of trading interest at those prices.

Data format and availability

Guideline 18: The delayed data should be provided in a format adapted to the users' needs, and available for a sufficient period of time.

Pursuant to Article 14 of the Delegated Regulation (EU) No 2017/571, in case of delayed post-trade data, the data should be provided in a machine-readable format and available in commonly used programs. It should be possible for a user to automatize the data extraction. The data should be available for all instruments traded combined (or a class of instruments), but not on a single instrument basis only. In order to ensure that the data can be easily consolidated as per MiFID II / MiFIR objectives, it is necessary that all market data providers provide data in a machine-readable format. The data should be available at least until midnight of the following business day to initiate the data extraction by a user.

The pre-trade delayed data should be made available in a machine-readable format. Given that the data is not provided for the purpose of consolidation, it should be available until the next more recent quote is available (i.e. a snapshot view, without historical information), or in case of lack of such update, until midnight of the following business day.

Data redistribution and value-added services

Guideline 19: Without prejudice to the legal provisions prohibiting market data providers to charge for the use of delayed data, there may be limited instances where data providers may impose a charge. One such instance is where a delayed data user re-distributes the delayed data for a fee (including a general fee for accessing its services), then a charge to that user may apply. Likewise, where a delayed data user creates value-added services using that data which are then sold for a fee to third parties, trading venues, APAs and CTPs may charge that user.

In this context, data redistribution should be understood as a business model of selling the delayed data in unchanged form to third parties, either directly by charging when giving access to that data, or via a general access fee. Where a delayed data user publishes delayed data on its website, but does not charge for that access, it should not be considered as data re-distribution for the purpose of this guideline, including where the data user generates indirect revenue (for example via advertisement). Any charges from the data provider with relation to data redistribution can only apply where the data user generates a direct economic benefit via the selling of that data.

Value-added service should be understood as the creation of a product made on a basis of raw delayed data, e.g. through aggregating data sets across different sources or creating historical series, or combining it with other information, and offering it as a product to third parties. Only those value-added services which are sold as a product for a fee to third parties should be considered a value-added service and subject to charges from the data provider.

In both the context of data redistribution and the creation of value added services, where a company distributes delayed data internally[15] or makes use of delayed data for its internal purposes, including but not limited to value its portfolio, provide information to its clients on the basis of delayed data free of charge, pre- and post-trade analyses, risk management or research, it should not be subject to any charges for the purpose of this guideline.

[15] Internal distribution in this context should be understood as data being shared, either enhanced or in its raw format, within the same institution or group, for any purpose other than creating and subsequently selling data products.

Annex I – Standardisation of terminology

i. Customer

The Customer should be the natural and/or legal person who signs the market data licence agreement with the market data provider and is invoiced for the market data fees.

ii. Unit of Count

The Unit of Count should be the unit used to measure the level of use of market data to be invoiced to the customer and that is applied for fee purposes. It should distinguish between the type of use, i.e. display use and non-display use.

iii. Professional Customer

Professional Customer should mean a customer who uses market data to carry out a regulated financial service or regulated financial activity or to provide a service for third parties, or who is considered to be a large undertaking, i.e. meeting two of the following size requirements on a company basis: (i) balance sheet total of EUR 20 000 000 (ii) net turnover of EUR 40 000 000 (iii) own funds of EUR 2 000 000.

iv. Non-Professional Customer

Non-Professional Customer should mean a customer who does not meet the definition of Professional Customer.

v. Display Data

Display Data should mean the market data provided or used through the support of a monitor or a screen and that is human readable.

vi. Non-Display Data

Non-Display Data should mean all the market data which does not meet the definition of Display Data.

vii. Market Data

Market Data should mean the data trading venues, SIs, APAs and CTPs have to make public for the purpose of the pre-trade and post-trade transparency regime. Therefore, market data includes the details set out in Annex I of RTS 1 and Annex I and Annex II of RTS 2.

viii. Real-time Data

Real-time Data should mean market data delivered with a delay of less than 15 minutes after publication.

ix. Delayed Data

Delayed Data should mean market data made available 15 minutes after publication.

Annex II – Template for publishing RCB information

Please find beneath the template instructions for filling in the template.

<table>
<tr><th>Legal basis</th><th colspan="4">Contents</th></tr>
<tr><td rowspan="2">Article 89(2)(a) of Delegated Regulation (EU) No2017/565 and Article 11(2)(a) of Delegated Regulation (EU) No 2017/567</td><td colspan="4">Price List: year XXXX</td></tr>
<tr><td colspan="4">[Insert a high-level summary of the fees offered and a hyperlink to the full price list. The price list should include the following items as mentioned in the relevant Level 2 text:
(i) fees per display user;
(ii) non-display fees;
(iii) discount policies;
(iv) fees associated with licence conditions;
(v) fees for pre-trade and for post-trade market data;
(vi) fees for other subsets of information, including those required in accordance with the regulatory technical standards pursuant to Article 12(2) of Regulation (EU) No 600/2014;
(vii) other contractual terms and conditions;

Any changes to the price list should be clearly indicated and explained.]</td></tr>
<tr><td>Article 89(2)(b) of Delegated Regulation (EU) No 2017/565 and Article 11(2)(b) of Delegated Regulation (EU) No 2017/567</td><td colspan="4">Advance disclosure with a minimum of 90 days' notice of future price change will entry into force on the DD/MM/YYYY
[Insert the hyperlink to the future price list with the date of entry into force]</td></tr>
<tr><td rowspan="6">Article 89(2)(c)(i-iii) of Delegated Regulation (EU) No 2017/565 and Article 11(2)(c)(i-iii) of Delegated Regulation (EU) No 2017/567</td><td colspan="4">Market Data Content Information
Period covered: 01/01/yy - 31/12/yy</td></tr>
<tr><td><u>Asset Class</u></td><td>1) Number of instruments covered</td><td>2) Total turnover of instruments covered</td><td>3) Pre-trade/post-trade market data ratio</td></tr>
<tr><td>Equity instruments (shares, ETFs, DRs, certificates, other equity-like financial instruments)</td><td></td><td></td><td></td></tr>
<tr><td>Bonds</td><td></td><td></td><td></td></tr>
<tr><td>ETCs ETNs</td><td></td><td></td><td></td></tr>
<tr><td>SFPs</td><td></td><td></td><td></td></tr>
</table>

	Securitised derivatives			
	Interest Rate Derivatives			
	Credit Derivatives			
	Equity derivatives			
	FX derivatives			
	Emission allowances derivatives			
	C10 derivatives			
	Commodity derivatives			
	CFDs			
	Emission allowances			
Article 89(2)(c)(iv) of Delegated Regulation (EU) No 2017/565 and Article 11(2)(c)(iv) of Delegated Regulation (EU) No 2017/567	**Information on any data provided in addition to market data**		*[List]*	
Article 89(2)(c)(v) of Delegated Regulation (EU) No 2017/565 and Article 11(2)(c)(v) of Delegated Regulation (EU) No 2017/567	**Date of the last licence fee adaption for market data provided**		*[DD/MM/YYYY]*	
Article 89(2)(d) of Delegated Regulation (EU) No 2017/565 and Article 11(2)(d) of Delegated Regulation (EU) No 2017/567	**Total Market Data Revenues (EUR)**		*[Per operating MIC]*	
	Market Data Revenues as a proportion of total Revenues (%)		*[Per operating MIC]*	

<table>
<tr><td rowspan="2">Article 89(2)(e) of Delegated Regulation (EU) No 2017/565 and Article 11(2)(e) of Delegated Regulation (EU) No 2017/567</td><td colspan="2">Information on cost accounting methodology: year YYYY</td></tr>
<tr><td>Information on how the price was set, including the cost accounting methodologies used and information about the specific principles according to which direct and variable joint costs are allocated and fixed joint costs are apportioned</td><td>Please provide a summary of how the price was set, including:

1) An exhaustive list of types of costs included in setting the price, including direct and joint and common costs and examples of each cost type

2) Allocation principles and allocation keys (%) for joint and common costs

3) An explanation of any margin used in setting the price and how it is ensured that such margin is reasonable

Please insert a hyperlink with more detailed information on the cost accounting methodology, where necessary.</td></tr>
</table>

Instructions for filling in the template:

1) Reporting period

Information should be reported for a full period of 12 months except for the first reporting period where the period may be shorter or longer.

2) Number of instruments

The Average number of reporting or tradable instruments for the period covered should be provided. For derivatives, the average number of contracts should be considered.

3) Total turnover of instruments covered

For the calculation, the Average of the Daily Total Turnover should be considered and provided. The volume measure should be confirming table 4 of Annex II of RTS 2 for bonds instruments.

4) Pre trade/post trade market data ratio

Market data providers should calculate and publish the ratio of orders per transactions. Orders should include all input messages published in accordance with Articles 3, 4, 8, 9, 14 and 18 of MiFIR and including messages on submission, modification and cancellation sent to the trading system of a trading venue, relating to an order or a quote. However, these should exclude cancellation messages sent subsequently to: (i) uncrossing in an auction; (ii) a loss of venue connectivity; (iii) the use of a kill functionality. Transactions should mean a totally or partially executed order subject to the requirements under Articles 6, 7, 10, 11, 20 and 21 of MiFIR. The number of unexecuted orders should be calculated taking into account all phases of the trading session, including the auctions. Please note that SIs and APAs do not have to disclose the pre-trade/post-trade data ratio. SIs do not have to provide information on fees for post-trade market data and APAs do not have to provide their fees for pre-trade market data.

Annex III – Correspondence table

As of 1 January 2022, certain MiFID II provisions should be read as a reference to new MiFIR provisions as specified in Regulation (EU) No 2019/2175, and as further supplemented by relevant Level 2 acts. Please see the correspondence table below:

Correspondence Table	
MiFID II	MiFIR (new)
Article 4(1)(52)	Article 2(1)(34)
Article 4(1)(53)	Article 2(1)(35)
Article 64(1)	Article 27(g)(1)
Article 64(2)	Article 27(g)(2)
Article 65(1)	Article 27(h)(1)
Article 65(2)	Article 27(h)(2)