



## ASSOGESTIONI'S REPLY TO ESMA'S CONSULTATION PAPER ON THE GUIDELINES ON THE MIFID II / MIFIR OBLIGATIONS ON MARKET DATA

(11 january 2021)

### Introduction

Market data plays an increasingly important role in financial markets and market participants, such as asset managers, are consuming an increased amount and variety of data. In December 2019, ESMA acknowledges that MiFID II has not delivered on its objective to reduce the price of market data and the need to act.

Assogestioni strongly supports the ESMA initiative and welcomes future regulatory actions to monitor and control the increase of cost in financial data, including market data. Further supervisory guidance as proposed in the draft guideline is going in the right direction and we are in favour of stricter requirements and/or further improvements in some areas.

- **Provision of market data on a reasonable commercial basis.** Any financial market data license cost should, in principle, be based only on the incremental/ marginal cost of providing and distributing a given data service. Driving up the costs of market data in a way not clearly linked to their costs of production and dissemination should be avoided. In this perspective a consistent understanding and methodology across the EU would be helpful and effective. Therefore, we invite ESMA in going beyond the recognition of the general principle and develop further specific criteria on the methodology and the types of costs to be considered eligible;
- **The use of delayed data.** In line with MIFIR/MIFID provision, there should be more clarity in the draft GL on the use of delayed post-trade data in a machine-readable format that must be free of charge 15 minutes after publication;
- **Market Data Providers and Data Vendors.** For various reasons, asset managers usually do not take data directly from Market Data Providers but access them through Data Vendors. The strong position of market data (re)vendors needs at least not be reinforced by the proposed guidelines. Since Data Vendors are not regulated as financial services providers and therefore fall outside the scope of the supervisory guidelines, the same rule and principle should also be extended to them.

The supervisory guidance, together with target amendment to relevant MiFID, should both strengthen the overall concept that market data should be charged based on the costs of producing and disseminating information and increase competition between all financial market data providers/distributor (regulated and unregulated). In that perspective, we welcome also changes to applicable supervisory laws that are needed to:

- close gaps between existing legislations
- achieve a coherent regulation of financial market data cost and
- impose cost transparency rules across the different data providers.

We believe that further strengthening of the MiFID level 1 and level 2 measures, in connection with the MiFIDII/MiFIR Review, will foster the establishment of a cost-based approach for market data procurement. In addition, as similar issues arise, more broadly, for all financial



market data, this approach should be extended beyond MiFID for all market data providers (i.e. index data, ESG data ...).

## **Questions**

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

The GL should cover both regulated market data providers - MDP (as defined in the draft GL) as well unregulated providers to the extent possible. In a short term, for example, by requiring MDP to include in their contracts with Market Data Distributors only such provisions that are in line with the MIFID requirements applicable directly to MDP. In this way including vendors in scope for this regulation could be achieved, without a change of MiFID Level 1.

We disagree, however that ESMA maintains the position that 15 minutes can be subject to distribution licenses and user count. Based on the wording of MIFID II and MIFIR, delayed data free of charge is not subject to a time constraint, such as 24 hours. There is no room for end-of-day and/or historical data licensing.

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

While appreciating the proposed LG n. 1, stricter requirements should be included for the setting, transparency, and revision of the methodology.

Any financial market data license cost should in principle be based only on the incremental/marginal cost of providing and distributing a given data service. We share the view of the Copenhagen Economics analysis where the cost of “production” consists of registering the pre- and post-trade data. The identification and definition in the draft GL of the four categories of costs (direct, common, fixed, variable) as well as the minimum requirements for cost justification should be reviewed in detail to ensure that the MDPs do not attribute costs that are not strictly related to production and dissemination (e.g. the overall cost of the trading system and IT are attributed to the costs of producing the data).

Indeed, we disagree with the existing provision which allows the trading venues to include “an appropriate share of joint costs” when determining the market data prices as market data is a by-product of the trading activities – not a joint product. As orders in financial instruments are supplied by the market participants via bids and asks and executed in the market, the market data (pre- and post-trade data) is automatically produced. This implies that the marginal costs of producing market data is close to zero and the incremental cost of production is related to collecting the information and distributing the price feeds to users. These limited costs of production are clearly shown in the IEX report<sup>1</sup>.

Driving up the costs of market data in a way not clearly linked to their costs of supply should be avoided. In this perspective, a consistent understanding and methodology across the EU would be helpful and effective. Therefore, we believe that there is a need to develop further specific criteria on the methodology and the types of costs to be included. A reference to a

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<sup>1</sup> <https://iextrading.com/docs/The%20Cost%20of%20Exchange%20Services.pdf>



cost benchmark (LRIC+) as proposed by Copenhagen Economics should be included in the GL. Also, a detailed cost report per product /service should be required based on the IEX example.

In any case, we appreciate the clarification in the proposed GL that MDPs should not allocate costs based on the revenues generated by their company's different services and activities because this practice contradicts the obligation to set costs for market data. The cost methodology basis must be rigorously applied (most MDPs appear to operate a pricing system based on "customer use of data value" and not a price based on the cost of manufacturing outside the MD). Therefore, we suggest that the adherence to the cost recovery principle should be explained in writing and be approved by the statutory auditor.

We also support the request to have a clear and documented methodology for setting the price of data. However, the review of methodologies and key assumptions as well as their appropriateness might not be sufficient. The proposed GL could be strengthened by requiring for example a consultation and a feedback statement (as is the case with CRA methodology changes) and a validation (for example by the NCA as part of their responsibility to ensure cost-based pricing).

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

As indicated in Q2, a consistent understanding and methodology across the EU would be more efficient. Therefore, we believe that there is a need to develop further specific criteria on the methodology and the types of costs to be admissible and included in the calculation of the market data fees.

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

In general terms, the proposed GL 2 on audit is welcome. Data sources and MDDs engage in audits, which lead to considerable fees for alleged unlicensed data usage in the past. However, due to the proliferation of data licences and price increases, it is some time difficult to ascertain which kind of data usage was licensed at any given time. The meaning of the contract it is very often only clear during the audit process. We support therefore more client-friendly market data contracts (CRISP project: 'Contracts that should be Readable, Intuitive, Standardised and Precise').

Placing the burden of proof, with respect to non-compliance with the terms of the market data agreement will be helpful but might be not sufficient. It could be strengthened for example by requiring general audit procedures to be consulted with the market and approved by the NCA (as part of their responsibility to ensure cost-based pricing) and including a principle requiring audit rights and obligations to be reciprocal (e.g. overpaid fees paid by the buy-side firm may usually only clawed back for a very short time, e.g. 90 days while auditing practices go back for several years).



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

No comments.

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

The draft GL 3 for customer categorization seems acceptable, although fairly general. A categorization of customers based on inter venue and competition discrimination should be expressly discouraged.

It would be beneficial to have more guidance with regards to the "per user fee" concept, when the data is accessed through data vendors. Even if data vendors are out of scope of the drafted GL, as indicated in our general remarks, we believe fundamental to address as much as possible also this issue.

More guidance should also be addressed for the differentiation of database use (non-display licenses) vs. human interface (display licenses).

Finally, it could be valuable also recall in the draft GL 3 that any differentiation of fees pertaining to each category of customers should always be based on the cost of production and dissemination in accordance with the draft GL 1, as commented above. The fact that data consumers must pay multiple use-case times for the same piece of data point does not correspond to an increase in cost for the market data provider or unregulated market data provider and, hence, should not constitute a higher cost for the consumer.

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

Please see our comments to question 6.

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

Please see our comments to question 6.

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

Any FMD data license cost should in principle be based only on the incremental/marginal cost of providing and distributing a given data service both for regulated and unregulated data providers.



Specifically:

- FMD providers should be required in principle to set fees only based on the cost recovery principle;
- FMD vendor should only be able to charge the incremental cost which originates from additional effort of the vendor to provide and distribute the data product or service to a (new) client. In reverse, the data provider / MDD should not be allowed to charge the cost of other business operations not directly related to data production and distribution on the user without any check on the adequacy of such cost.
- In the context of a principally cost recovery based pricing of FMD the data sources and MDD's may be allowed to charge a reasonable (inflation adjustment based) profit margin e.g. for provision of price feeds under MIFID. In addition, prices increase should also be framed to ensure that they are not excessive.

Beyond GL, these provisions should become part of Level 2 and be extended to other piece of legislation.

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

Please see our comments to question 6.

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

No comments.

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

It is worth recalling that not applying the user model to customer should be the exception, and not the new normal.

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

No comments.



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

The data unbundling draft GL 9 is welcome. In addition, data packages should not be imposed if customer only need part of such data.

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

No comments.

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

The use of a standardised publication format is welcomed; however, we disagree that the disclosure of actual costs and margins is not included in the standard template (please see our response to Q17).

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

We strongly suggest the disclosure of the actual cost for producing or disseminating market data and on the actual level of the margin. This will improve the disclosure to markets and user with meaningful information. The IEX report could serve as a benchmark for developing EU market data cost transparency standards, as is suggested by Copenhagen Economics.

Should information only be available to NCAs, we assume that a public detailed report detailing that and how the MD provider has fulfilled the various MIFID obligations will be provided to the market.

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

In general, we support industry definition to be used across the market.

With reference to “delayed data” and “historical data”, please see our response to Q24. Data needs to be really license free after 15 minutes.

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



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

**Q19: Is there any other terminology used in market data policies that would need to be standardised? If yes, please give examples and suggestions of definitions.**

No comments.

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

In line with our comments to questions 16 and 17 we disagree that the disclosure of actual costs and margins is not included in the standard template.

**Q21: Do you think there is any other information that market data providers should disclose to improve the transparency on market data costs and how prices for market data are set? If yes, please provide suggestions.**

In line with our comments to questions 16 and 17, the disclosure of actual costs and margins should be made in the standard template.

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

The audit practice disclosure in the drafted GL 13 is welcome. Please, see also our comments above to Q4.

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

No comments.

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

We have some observations on the drafted GL 15. Among the various provision introduced to lower the cost of market data there is the requirement to make pre-and post-trade data





available free of charge 15 minutes after publication (Article 13 of MiFIR, and Articles 64 and 65 of MiFID II). The provision of data 15 minutes after publication in a machine-readable format free of charge remains a problem for professional users. There is usually a charge for delayed data in the form of either end-of-day (EoD) or historical data licenses after a certain period has passed. EoD license may apply e.g. at 23:59h of the trading day.

While recognising some improvements with the drafted GL 15, we disagree with the part where suggests that data should be available only for a limited (“sufficient”) time period. Indeed, the draft GL states that “The delayed data should be [...] available for a sufficient period of time. [...] ... in case of delayed post-trade data [...] The data should be available at least until midnight of the following business day to initiate the data extraction by user”.

The MIFID II/MiFIR provision are clear – data is free after 15 minutes. There is no legal room for end-of-day and historical data licensing. Data needs to be really free and license free after 15 minutes. We strongly ask for a revision of the drafted GL.

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

We welcome the data redistribution and value-added services definitions provided in draft GL 16. However, no data re-distribution fees may apply at all in case of delayed data (all data after 15min) which is free after 15 minutes per the law (see also our previous comment to question 24). Therefore, also reuse in form of passing on of such data should always be free for the down streamed direct data. However, in case of MD use downstream to create value-added products (e.g. indices) also these should be in principle free and license free. Because no IP rights for simple (delayed) data exist under EU and international laws, and because the European database regulation limited the protections of the database provider to the level of the first user, the EU database MD provider may at best charge a cost based license only to the first level user of the MD provider products who produces value-added data.

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

The GL should also consider certain high impact data license practices which have significant negative consequences for end clients and financial markets discourage in MiFID/MiFIR (but also CRAR, BMR).

- Data cut-offs before a binding court or arbitration decision in data license disputes should be prohibited in financial markets supervisory laws at least in situations in which the data cut-off would harm the stability of financial services firms, markets and/or end user clients. In practice data users may not enforce their rights as the data provider / vendor will usually unilaterally terminate the contract in case of dispute and the user has no right of continuation of service. The data user, however, very rarely may not accept the loss of data provided by dominant data providers without endangering business continuity. Therefore most data users will accept even excessive price increases without engaging in a legal dispute with the data provider.





- Sector specific rules should ensure that regulated data providers are not be allowed to escape their regulatory obligations through outsourcing of FMD business on unregulated (group) companies.

In addition, we believe that the availability of historic price lists, as well as price lists based on multiyear comparisons, could be helpful to see price and product or service changes between the current year and the past year(s) and if fragmentation of licenses for the use of market data occurs. The license fragmentation allows the market data providers to raise the total costs of the use of market data, without necessarily raising any existing license fee, by either splitting an existing license fee into two or multiple license fees, or by introducing new license fees altogether.

We also suggest including minimum standard requirements on the documentation the NCA shall collect and review (for example the same level of content as the IEX report). This might be helpful in the collection of the information and in the supervision of the GL.

**Q27: What level of resources (financial and other) would be required to implement and comply with the Guidelines and for which related cost (please distinguish between one off and ongoing costs)? When responding to this question, please provide information on the size, internal set-up and the nature, scale and complexity of the activities of your organisation, where relevant.**

The guidelines, if implemented with our suggestions, would lead to a significant decrease in the amount of resources used by market data consumers for administration of the complex and opaque market data policies as well as a decrease in the direct market data costs.