



## ADVICE TO ESMA

### SMSG advice ESMA on its Consultation Paper on Guidelines on the MiFID II/ MiFIR Obligations on Market Data

#### I. Background

The SMSG wishes to use the opportunity of the publication of ESMA's Consultation Paper on Guidelines on the MiFID II/ MiFIR Obligations on Market Data to provide advice on this topic.

#### II. 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"<sup>1</sup> should be maintained, and that data from all venues (trading venues and APAs<sup>2</sup>) 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.

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<sup>1</sup> The current approach to reasonable commercial basis (or "RCB").

<sup>2</sup> "Approved Publication arrangements" which publish trade reports on behalf of investment firms.

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.

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.

## **2. Provision of market data on the basis of cost**

6. The SMSG agrees that market data providers should have a clear and documented methodology for setting the price of market data. The methodology should identify the costs that are solely attributable to the production and dissemination of market data and the costs that are shared with other services. SMSG members differ on the stringency and transparency of such methodologies.
7. Data Purchasers believe that market data should be offered on a reasonable commercial basis taking into account the costs for creation and dissemination of the data. Market data providers and representatives of individual investors would agree to this only if these costs include those incurred for the adequate dissemination of such data to non-professional investors, and this is far from being the case for the majority of the equity markets data (those data from non-EU-based regulated markets). They are of the opinion that these costs should include an appropriate share of costs for other services provided.
8. Data Purchasers reason that market data is a by-product of trading activities, meaning that the marginal cost for market data providers is close to zero and the incremental cost associated with production is limited to the collection of the information and distribution to the customers.<sup>3</sup> Against that background, they consider that the concept of joint costs is misplaced and should not be a part of the regulation going forward.

Market data providers and representatives of individual investors consider that market data is a joint product with trade execution and due to this joint product nature, the production costs of the outputs (market data and trading) cannot be fully separated. They consider that this is clearly the case for

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<sup>3</sup> Copenhagen Economics, “A Guideline to a Cost Benchmark of Market Data” (Copenhagen, 2019), Regulating Access to and Pricing of Equity Market Data (2013), Pricing of Market Data (2018).

these services, as there are fixed costs that have to be incurred to produce either products under the quality and standards that is required.<sup>4</sup>

9. Data Purchasers are of the opinion that ESMA should prescribe the accounting methodologies used to determine the cost of producing and disseminating market data in the interest of ensuring consistency and comparability between market data providers. Otherwise - in the absence of common accounting standards – Data Purchasers fear that there will be a multiplicity of methodologies employed by market data providers that will render it impossible to assess compliance with the RCB principle.

### **3. Provision of market data on a non-discriminatory basis**

10. The SMSG acknowledges that the present regulation requires that market data providers should make data available on a non-discriminatory basis and describe in their market data policy the categories of customers and how the use of data is taken into consideration to set up these categories. However, Data Purchasers consider that this segmentation should not contradict the cost-based approach where cost and not demand is the determining factor.
11. Market data providers can establish different prices to different categories of users where it is objectively reasonable to do so, for example in the cases of non-professional or professional users. These categories should be based on objective criteria and not only on the value of the data to the clients. The members have various views on the application of multiple user categories.
12. Data Purchasers stress that they often find it challenging to determine which client category they belong to, severely hampering their ability to anticipate the fees, terms, and conditions applicable to them. In their view, ESMA should prescribe the criteria market data providers should use to determine client categories based on objective and easily verifiable criteria to enable customers to estimate the conditions that will apply to them. This could include having only a professional and a personal user category. These members are also of the opinion that professional customers should not be charged more than once for the same data based on use cases. The duplication of fees in this manner dramatically increases the cost of market data. Accordingly, ESMA should in their view reaffirm that client categories should serve as the exclusive basis for market data fees. As ESMA points out, the duplication of fees for market data based on multiple use cases is incompatible with the requirement that costs be based on the cost of producing and disseminating the data.

Market data providers and representatives of individual investors consider that it is crucial to take into account that it is not possible to determine professional customer categories in an exhaustive and practicable fashion since every company and business is different. There is a case to be made for basing fee schedules on the category of usage as opposed to the category of customer. Indeed, in cases where a professional customer belongs to more than one customer category, because the customer makes multiple uses of the data, it would not be appropriate to apply one customer category as this would create unfair models damaging small and medium-sized market data customers and benefiting large investment banks.

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<sup>4</sup> Oxera, "What's the Data on Market Data? The Role of Market Data in Equity Trading" (Oxford, 2019).

13. With regard to non-discriminatory treatment of customers in terms of technical arrangements - in principle, the SMSG believes that market data providers should ensure the same technical arrangements for customers belonging to the same customer category. However, there may be significant practical limitations to ensuring the same level of latency and connectivity for a customer base that may be widely dispersed geographically. As a result, any discrepancies in latency or connectivity should be justifiable by the market data provider based on valid technical constraints.
14. Market data providers and representatives of individual investors consider that practices on latency and connectivity, for example, vary depending on the market data user due to the high variety of market data needs. These practices do not give favourable treatment to some market data users. Not allowing differentiation of technical arrangements within customer groups would be disproportionate and distort competition between market data providers. In addition, trading venues do not control the connectivity setup that data redistributors maintain for users. The vast majority of market data users source their data indirectly via data redistributors. This is particularly clear for retail investors.

#### **4. Per user fees for professional users**

15. Data Purchasers agree that market data providers should provide grounds for the refusal to make market data available on a per user basis and publish those grounds on their webpage. The per user model can imply significant administrative costs. Data Purchasers think that market-data providers should authorise same-source netting, i.e., netting of data fees when an individual user retrieves the same data via several connections to the same source.
16. There are different views as to the interpretation of “Active User-ID” for the purposes of the per user model. Data Purchasers welcome the usage of the term, as it enables market data users to pay per actual usage even if market data is received through multiple data products or subscriptions.

Market data providers believe that using the “Active User-ID” as a unit of count would be extremely burdensome for market data providers. Usernames would have to be crosschecked across multiple platforms and providers, as they can often be generic and are shared between users.

#### **5. Obligation to keep data unbundled**

17. Data purchasers consider that market data providers should make available the purchase price of market data separately from additional services. They consider that the discussion about unbundling must be considered together with the fragmentation taking place when an area of market usage which was once covered by one license requires two or more licenses, or where a new license is introduced in an area of usage that did not exist before. However, representatives of individual investors are concerned about the negative impact of unbundling and of any measure trying to reduce the price of market data on the back of the other key and unique services rendered by the EU- based Regulated Markets to the real economy: full and free transparency of market data for non-professional investors, SME financing on both primary and secondary markets, contribution to EU jobs and taxes etc. More generally, any EU rules on market data must not hurt a level playing field between market venues.
18. Also, EU-based regulated markets and representatives of individual investors consider that these rules cannot be looked at in isolation, as currently a duopoly is already providing consolidated pre and post trade data but for very high prices that exclude de facto non-professional and small professional investors.

## 6. Transparency obligations

19. The SMSG acknowledges that the provisions on market data transparency would be strengthened with a standardised publication format like that set out in Annex I of the Guidelines and the accompanying instructions. Elements included in the template like the price list and market data content information are a positive step. However, the members differ on the granularity of such disclosures, specifically on the methodology for setting the price of market data.

20. Data Purchasers oppose the fact that market data providers are not required to disclose the actual cost for producing or disseminating market data or the actual margin. They believe that without access to this information, professional market data users cannot negotiate prices and licenses, or engage in meaningful audits. Furthermore, those members believe that there should be a requirement to publish pricelists, with explanatory notes for any changes as pricelists are often lengthy and complex, giving a history of changes for the previous 5 years.

Regulated Markets and representatives of individual investors point to the extremely uneven enforcement of transparency obligations between the “lit” EU-based Regulated Markets and the other equity market venues, in particular the leading ones. Non-professional investors do not even know their names and that they exist. Fixing this severe lack of transparency from the EU equity market leaders and other venues should be a priority and a prerequisite for EU policy makers, considering the CMU priorities. Those members consider that disclosing allocation keys and explanations on the determination of margins could go beyond the scope of the transparency plus approach and be sensitive from a competition law point of view. These members also believe that a requirement to publish historical price lists for the previous five years would be too onerous.

21. The SMSG agrees that there is a need for harmonisation of contractual terminology that the Guidelines cover. However, a number of additional contractual terminology definitions connected to the scope and parties of market data agreements would help reduce complexity and increase the consistency and transparency of market data policies.

22. The SMSG is of the opinion that Market data providers should be explicit in the market data agreement with respect to the market data fees that can be applied retroactively, the terms and conditions of the auditing, and how customers are expected to demonstrate their compliance with the agreement.

23. There are different views on auditing practices and the burden of proof concerning non-compliance with the terms of the market data agreement. Data Purchasers consider that audits can add complexity and boost revenues for market data providers. They also believe that they impose an unfair burden of proof on the users. The practices employed ensure that market data costs are often arbitrarily inflated following audits due to the excessive scope that auditors are granted. Third-party auditors are also given a conflicting incentive to penalise market data customers since they are often compensated on a percent-recovered basis. Hence, they believe that audits should be appropriately regulated: In order to address these concerns ESMA should develop audit standards to avoid conflicts of interests and ensure appropriate confidentiality and should consider whether auditors should be required to be independent. There should be a cap on retroactive fees and interest-charges, and general audit procedures should be consulted with the market and approved by NCAs.

Market data providers argue that audits do not exist to generate additional revenues. Rather, audits are meant to identify and recover any unpaid fees. They contribute to the consistent and non-discriminatory application of market data fees and policies and therefore ensure a level playing field. A client

that tries to properly implement the market data agreement would be disadvantaged compared to a client that unintentionally is in breach of such agreement. These members believe that concerns around auditing practices originate from incidents and not from any structural abuse of audit rights by market data providers. They also point out a trade-off between the frequency of the audits and the retroactivity.

## **7. Provision of market data free of charge 15 minutes after publication**

24. The SMSG considers that compliance with the obligation to provide data free of charge 15 minutes after publication requires that the relevant delayed data is accessible, complete, provided in a useful format, and for a sufficient period of time. In addition, representatives of individual investors are of the opinion that:

- pre and post trade data should be freely and easily accessible and understandable on all the main equity market venues via public websites
- post trade data (last price) should be available there within one minute
- pre trade data within 15mn maximum with at least the last five bids and last five ask offers.

This is a prerequisite for EU citizens as individual investors in the spirit of “a CMU that works for people”. Currently the top three equity markets in Europe (CBOE, Goldman Sachs SI and LSE according to ESMA) provide absolutely no market data to non-professional investors (except for the LSE, but only post trade and after more than one hour).

25. Certain Market data providers (the EU-based Regulated Markets) have made significant efforts to comply with this obligation and provide the data in a machine-readable format that can be understood by the average user. However, there are different views on the guidelines for data-distribution and value-added services and the possibility to charge for delayed data under some circumstances.

26. Data Purchasers disagree with market data being available only for a limited (“sufficient”) time period. They believe that there is no legal room for end-of-day and historical data licensing. In consequence, no data redistribution fees may apply in case of delayed data. Delayed and derived data should as a starting point be easily accessible and provided free of charge, as derived data is not adding costs to exchanges as raw data has already been paid for. As a consequence, market data providers should not use Derived Data as a license form as this content is already included in the Non-Display Usage.

Market data providers disagree with limiting the definition of value-added services to those activities where a product created on a basis of delayed data is sold for a fee. This definition would exclude, for example, commercial value-added services like advertising.

27. The SMSG further highlights that the worst shortcomings in terms of the provision of market data for free 15 minutes after publication are encountered in the non-equity space – particularly in relation to market data provided by trading venues and APAs.

While trading venues and APAs may charge for real-time data on a “reasonable commercial basis,” these providers are prohibited from charging for market data after a delay of 15 minutes, as explicitly

stipulated in Article 13(1) of MiFIR for trading venues, and Article 64(1) of MiFID II for APAs. In addition, under Commission Delegated Regulation (EU) 2017/571, trading venues and APAs are expressly required to publish data in “machine readable” format that facilitates the usability and consolidation of the information with similar data from other sources.

Unfortunately, some non-equity trading venues and APAs are still not complying with their legal obligations regarding the publication of transparency data. There are a range of practices that market data providers engage in that suggest that they circumvent their market data obligations. For example, data is published as an “image file” that is not machine readable, with ‘search’ and ‘copy’ capabilities disabled. Alternatively, data is deleted shortly after publication and/or the data is published in a far less usable manner than the data provided in return for a fee. ESMA has already acknowledged the use of such practices and clarified that they are non-compliant.<sup>5</sup>

28. While the SMSG welcomes ESMA’s additional efforts to clarify market data obligations through these draft guidelines, the problem remains one of enforcement rather than an issue of clarity. The requirements applicable to equity and non-equity trading venues and APAs and other market data providers are clear and explicit. Nevertheless, despite being highlighted repeatedly by industry and non-professional stakeholders, there has been limited apparent effort to meet unambiguous legal requirements applicable to trading venues and APAs that have been made clear at Level 1, Level 2, and Level 3. This has been particularly detrimental to the emergence of transparent equity and non-equity markets.

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

30. Finally, while ESMA has clarified that market data provided for free 15 minutes after publication should be available for at least 24 hours from the publication – Data Purchasers believe that this period should be lengthened significantly so as to enhance access to market data and mitigate information asymmetries.

Market data providers and representatives of individual investors consider that a requirement to make delayed data available for more than 24 hours would be disproportionate and that some national competent authorities subscribe to this logic. 24-hour data should constitute historical data and therefore could be charged.

31. For post-trade data, all elements included in the Level 1 and 2 texts, including price, volume, transaction and publication time, instrument identifier and venue of execution, and transaction flags, should be subject to the publication.

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<sup>5</sup> Q&A 10 of the ESMA [Q&As](#) on MiFID II/MiFIR transparency topics, updated in July 2020.

This advice will be published on the Securities and Markets Stakeholder Group section of ESMA's website.

Adopted on 11 January 2021

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