

European Securities and Markets Authority
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[By online submission]

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AIMA and MFA Response: Consultation Paper: Guidelines on the MiFID II/ MiFIR obligations on market data

The Alternative Investment Management Association (AIMA)¹ and the Managed Funds Association (MFA)² are grateful for the opportunity to provide input on behalf of our members on the crucial topic of market data. AIMA and MFA members invest on behalf of pension plans, university endowments, charitable organizations, family offices, and qualified individuals, among other entities. In service to their investors, our members engage in a range of investment strategies for which access to market data is essential. We welcome ESMA's decision to issue further guidance on market data obligations under MiFID II and MiFIR.

Access to market data is critical to alternative investment funds: without it they would be unable to satisfy client investment needs or fulfil their regulatory obligations. Furthermore, over the last two decades, regulatory and technological developments have greatly reshaped the equities markets by reducing anticompetitive barriers and promoting fair access to markets and market information. These developments have led to greater market liquidity and depth, tighter bid-ask spreads and lower transaction costs—all of which ultimately serve to lower the cost of capital and enhance economic growth.

As the importance of market data increases, the costs of obtaining data have also significantly increased since the implementation of MiFID II, far outstripping not only inflation, but also the input costs attached to creating that data. As ESMA itself has noted, in some cases market data costs have quadrupled in the span of six months.³ Exchanges have 'unbundled' market data into multiple distinct products, charging significantly higher prices for the sum of the old product. In doing so, exchanges have justified the higher prices by 'bundling' portions of the old products

¹ The Alternative Investment Management Association (AIMA) is the global representative of the alternative investment industry, with more than 1,900 corporate members in over 60 countries. AIMA's fund manager members collectively manage more than \$2 trillion in hedge fund and private credit assets.

² MFA represents the global alternative investment industry and its investors by advocating for public policies that foster efficient, transparent, fair capital markets, and competitive tax and regulatory structures. MFA supports member business strategy and growth via proprietary access to subject matter experts, peer-to-peer networking, and best practices. MFA's more than 140 member firms collectively manage nearly \$1.6 trillion across a diverse group of investment strategies. Member firms help pension plans, university endowments, charitable foundations, and other institutional investors to diversify their investments, manage risk, and generate attractive returns over time. MFA has a global presence and is active in Washington, London, Brussels, and Asia, supporting a global policy environment that fosters growth in the alternative investment industry.

³ https://www.esma.europa.eu/sites/default/files/library/esma70-156-427_mifid_ii_implementation_-_achievements_and_current_priorities_steven_maijor_fese_convention_2018_vienna_21_june_1.pdf

with newer products or services that members may not necessarily want or need. Also driving up costs are market data providers' convoluted licensing agreements and complex data usage audits, which can result in steep fines for our members.

Trading venues are in the unique position of being able to provide market data (i.e., trade and order data) generated on their platform with the least latency. As such, current market dynamics allow trading venues and, to a lesser extent, market data providers, to extract revenues from investment managers that outstrip the costs involved in creating and disseminating market data. This poses a serious risk to the proper functioning of capital markets. Exchanges hold disproportionate market power over market data generated from orders and trades conducted on their venues.

Because of these monopolistic characteristics, market data costs (the market data pricing, licensing practices, definitions, audit procedures and connectivity fees) must be subject to regulatory oversight. Rigorous supervision of the entire market data business, as well as contiguous markets and products where the search for revenue could shift once there is increased scrutiny of market data sales, is crucial in order to maximize the economic benefits of financial marketplaces.

ESMA's decision to issue further guidance on market data obligations is well timed. We are broadly supportive of the proposed guidelines, which represent a step in the right direction. The issues surrounding market data cannot be solved by transparency alone. We would also stress the need for active enforcement of the guidelines. ESMA should be wary of trading venues or market data vendors interpretation of the proposed guidelines, ensuring they do not run counter to ESMA's intent.

We would like to thank ESMA for its actions on this critical issue, and we look forward to helping safeguard fair, efficient, and competitive capital markets.

Respectfully submitted,

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10.1 Annex I Summary of questions

Question 1: What are your views on covering in the Guidelines also market data providers offering market data free of charge for the requirements not explicitly exempted in the Level 2 requirements?

We would support such an action. Even if a market data provider offers data free of charge, unless they were covered by the proposed guidelines, they could still theoretically do so on a discriminatory basis. This would clearly violate the spirit of the market data regulatory framework and impair proper market function. We support any actions to ensure that the provision of market data—free or not—is regulated in an equitable and thorough manner.

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

We welcome ESMA's action on this matter. As ESMA is aware, the methodologies used to set the price of market data can often be opaque, giving market data providers wide latitude to determine what constitutes a 'reasonable' price. This also impairs the ability of investment managers to accurately compare costs between market data providers.

We understand that market data fee increases are starting to have a material impact on some firms by causing those firms to modify their strategies in order to decrease costs from proprietary market data fees. This is particularly true for small to mid-size firms as market data fees represent a larger share of these firms' operating costs, and challenge them to compete with larger firms. Furthermore, given that market participants have best execution and/or fiduciary obligations to their clients, they must obtain quotes and prices from exchanges, irrespective of cost if they want to stay in business, compliant with legal and regulatory requirements, and/or implement certain investment strategies. Data is used both to determine what order to make, when to execute, where to execute and to confirm and document best execution.

We would caution that increased transparency alone will not be enough to ensure reasonable market data costs. Trading venues effectively act as natural monopolies, and our members will often have no choice but to use their services and purchase their data. The normal dynamics of market competition do not apply, even if a member was to determine that the trading venue was not offering their data at a reasonable cost, they could not take their patronage elsewhere. It is imperative that the national competent authorities (NCAs) actively review the methodologies published by market data providers and take steps to ensure that the data are being offered on a reasonable commercial basis (RCB).

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

N/A

Question 4: With regard to Guideline 2, do you think placing the burden of proof, with respect to non-compliance with the terms of the market data agreement, on data providers can address the issue? Please provide any other comments you may have on Guideline 2.

AIMA and MFA strongly support ESMA's proposal to put the burden of proof on market data providers. Audits are often intrusive and burdensome, undertaken in a spirit of trying to find reasons to penalise customers. The contracts governing the use of market data are often overly complex, and our members can find themselves paying steep fines for unintentional technical violations. Our members can be left with no recourse for unfair findings and punitive fees as they risk exchanges disconnecting market data feeds which would jeopardize the licensee's business. This is especially problematic as exchanges use ambiguous and vague definitions in their market data licensing contracts, which allow auditors to easily cite unauthorized data usage and charge backpay and interest. Such predatory practices involving audits to extract greater market data revenue from market participants emerged with excessive pricing.

Question 5: 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.

Yes. Market data contracts tend to be highly complex, requiring investment managers to spend considerable resources ensuring they are in full compliance. This is especially problematic as exchanges use ambiguous and vague definitions in their market data licensing contracts, which allow auditors to easily cite unauthorized data usage and charge backpay and interest. We commonly hear of incidents where differences in interpretation of licensing agreements result in stiff penalties (that exceed any revenue lost on the part of the market data provider). Our members inform us that audits can often be very aggressive, with the clear intent of trying to 'catch' our members straying from the exact letter of their usage agreements. For instance, one member had a stock ticker in the lobby of their office; it served a purely decorative function. They were informed that they would need to pay additional fees for the ticker, since it could be seen by anyone in the lobby.

As firms need exchange market data, they have little choice but to sign the exchange market data licensing contracts and accept all terms as-is. There is no recourse for unfair findings and punitive fees as they risk exchanges disconnecting market data feeds which would jeopardize the licensee's business. While our members make every effort to comply with their data usage agreements, at present the opacity of those agreements, coupled with the aggressiveness of data usage audits, adds a significant resource burden for our members.

Question 6: Do you agree with Guideline 3? If not, please justify, by indicating which parts of the Guideline you do not agree with and the relevant reasons.

Yes, we welcome the move to improve clarity in terms of customer categorisation. We would also suggest ESMA consider proposing a means by which customers can appeal their classification. Ideally, customers would be given the chance to appeal within a reasonable timeframe of being informed of their classification, and market data providers would be required to provide an explanation for their decision on that appeal. This is particularly important for existing customers, who run the risk of being informed that their classification has changed mid-contract and find themselves paying higher fees than initially agreed upon.

Question 7: Do you agree with the approach taken in Guideline 4? If not, please justify, also by providing arguments for the adoption of a different approach.

Yes, we support the proposal to ensure that a single customer has a single classification.

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

Yes. Similar customers should receive similar treatment. We see no valid reason why this should not be the case.

Question 9: Do you think that ESMA should clarify other elements of the obligation to provide market data on a non-discriminatory basis? If yes, please explain.

ESMA may wish to set out the enforcement mechanics it envisages for the guideline, in order to make sure that it is applied across the market.

Question 10: Do you agree on the interpretation of the per user model provided by Guideline 6? If not, please justify and include in your answer any different interpretation you may have of the per user model and supporting grounds.

Yes. As ESMA notes, the current situation, in which the same user can be charged for the same data simply because they choose to access it on more than one device, is not reasonable. ESMA's proposal to base fees on user identifications is reasonable. Indeed, it is the standard for almost all digital services. When one subscribes to a newspaper online one does not pay for every device used to read the paper.

We also welcome ESMA's proposal to allow data usage netting. While we recognise the implementation of the proposal will require a fair amount of infrastructure, we believe that our members will find it of value. Again, we agree with ESMA that it is not reasonable for a customer to be charged multiple times for the same data.

Question 11: Do you agree with Guideline 7? If not, please justify. In your opinion, are there any other additional conditions that need to be met by the customer in order to permit the application of the per user model or do you consider the conditions listed in Guideline 7 sufficient to this aim? Please include in your answer the main obstacles you see in the adoption of the per user model, if any, and comments or suggestions.

We believe the current conditions are fair. However, we would like to see guidance on how often customers would be expected to provide user numbers to the market data providers. In order to ensure that this requirement does not become unduly burdensome, we suggest that such reports be made quarterly.

We do not support the addition of any further conditions, as doing so would perforce restrict the value of the proposed Guideline.

Question 12: Do you agree with Guideline 8? If not, please justify also by indicating what are the elements making the adoption of the per user model disproportionate and the reasons hampering their disclosure.

Yes, although we believe that customers should have the right to appeal the decision within a reasonable timeframe. Additionally, market data providers should be required to give a written explanation of their decision based on that appeal.

Question 13: Do you think ESMA should clarify other elements of the obligation to provide market data on a per user fees basis? If yes, please explain.

N/A

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

Yes. Product bundling, the act of requiring customers to pay for data they do not want in order to access data they need, is not a reasonable practice. It adds undue costs to investment managers, limiting the resources they can devote to such matters as risk management, investment due diligence, and investor relations. We would note there are also clear profit incentives for exchanges to unbundle services previously purchased together, increasing the complexity of product offerings, and to group (for public and regulatory reporting purposes) profit and loss for multiple exchange functions such as trading, surveillance and other technology-based services. This forces our members to buy new products to access the same data they were already using. We strongly support venues and vendors offering data products better tailored to market participants specific needs.

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

N/A

Question 16: Do you agree with Guideline 10 that market data providers should use a standardised publication format to publish the RCB information? If not, please justify.

Yes. Standardisation will promote transparency. We would caution ESMA, however, that such transparency will not by itself change the dynamics of the market. Trading venues possess natural monopolies on the data they produce. Even if our members were to disagree with their RCB calculations, they may not be able to purchase the data they need from another supplier. We believe the price of market data and connectivity must be based on the efficient costs of producing and distributing the market data (as opposed to the value market participants derive from market data) with a reasonable mark-up. Therefore, we would urge ESMA to see Guideline 10 as simply a first step in ensuring that market data is provided on an RCB.

Question 17: Do you agree with the standardised publication template set out in Annex I of the Guidelines and the accompanying instructions? Do you have any comments and suggestions to improve the standardised publication format and the accompanying instructions?

At present we have no objections to the proposed template.

Question 18: Do you agree with the proposed definitions in Guideline 11? In particular, do they capture all relevant market uses and market participants? If not, please explain.

We have no objections to the proposed definitions. We believe contract definitions, terms, and policies should be specific and avoid overly broad or general terms.

Question 19: Is there any other terminology used in market data policies that would need to be standardised? If yes, please give examples and suggestions of definitions.

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

N/A

Question 21: Do you think there is any other information that market data providers should disclose to improve the transparency on market data costs and how prices for market data are set? If yes, please provide suggestions.

N/A

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

We strongly support this proposal. The processes around data usage audits should be as transparent as possible, and customers should be informed of them at the first possible instance. We found that it is not uncommon for licensees to have incorrect understandings of the license agreements due to the divergence in licensing practices and vagueness in terms, and to be asked to pay fees retroactively along with monthly interest fees (at sometimes non-market rates) on retroactive payments. Based on a small sample of members, firms spend an average of 30 business days of employee time per audit in relation to addressing and responding to a market data licensing audit. These are resources better spent in other areas rather than attempting to comply with convoluted audit requirements.

Question 23: Which elements for post- and pre-trade data publication should be required? In particular, are flags a useful element of the publication? Should there be any differences between the different types of trading systems? Is the first best bid and offer sufficient for the purpose of delayed pre-trade data publication?

N/A

Question 24: Which use cases of post- and pre-trade delayed data are relevant to you as a data user? What format of data provision is necessary for these use cases, and especially for pre-trade delayed data?

We agree with ESMA that any data provided should be in a standardised, machine-readable format.

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

We have no objection for data providers charging fees, so long as they are demonstrably adding value by creating new products from the delayed data.

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

As a general manner, we urge ESMA to replicate the existing Q&As on this topic insofar as possible, in order to avoid inadvertently creating confusion regarding the publication requirements. To the extent ESMA intends to make any substantive changes to the existing Q&As, those changes should be clearly stated and supported.

Several key concepts from the existing Q&As appear to be omitted in the draft guidelines, including (a) requiring the data published free of charge to replicate the data published on a reasonable commercial basis, (b) requiring data to be made available in a format that can be easily read, used and copied through computer software that is not only widely available, but also free of charge, and (c) clearly requiring trading venues to publish all such data in a machine-readable format.

Question 27: What level of resources (financial and other) would be required to implement and comply with the Guidelines and for which related cost (please distinguish between one off and ongoing costs)? When responding to this question, please provide information on the size, internal set-up and the nature, scale and complexity of the activities of your organisation, where relevant.

MFA and AIMA members are some of the most sophisticated investors in the world and consume significant amounts of data in pursuit of earning returns for clients such as pensions and endowments. Alternative investment management firms range in size and strategy, with many firms managing less than USD 1 billion. Market data costs can be particularly onerous and function as a deterrent for new market participants. We believe the proposed guidelines have the potential to lower the costs incurred by our members and benefit financial markets as a whole.