



FIA EPTA response to the ESMA Consultation Paper on Guidelines on the MiFID II/MiFIR obligations on market data

11 January 2021

General comments

The FIA European Principal Traders Association (FIA EPTA) represents 29 independent European Principal Trading Firms (PTFs) that deal on own account, using their own money for their own risk, to provide liquidity and immediate risk-transfer in exchange-traded and centrally-cleared markets for a wide range of instruments, including shares, bonds, options, futures and ETFs. As market makers and liquidity providers, our members contribute to efficient, resilient, and high-quality secondary markets that serve the investment and risk management needs of end-investors and companies throughout the EU.

FIA EPTA members welcome the opportunity to respond to this Consultation Paper on Guidelines on the MiFID II/ MiFIR obligations on market data.

FIA EPTA has consistently supported ESMA's work on market data issues and we very much welcomed ESMA's review report from December 2019 and its draft Guidelines which build on this report. As we have shown in our response to ESMA's previous consultation in 2019, user data fees are high and have increased over the past years. As reiterated by ESMA, we also agree that new fees have been added and that market data policies and agreements are increasingly complex. In addition, existing rules and disclosures in relation to making certain market data available free of charge and the Reasonable Commercial Basis (RCB) provisions are not being fully complied with.

We greatly welcome ESMA's continued commitment to addressing the issues identified as part of ESMA's 2019 review report and support ESMA's draft Guidelines. However, we believe several of the Guidelines could be further improved, extended, or clarified in order to more effectively achieve ESMA's policy objectives for increased transparency around market data cost.

In particular, we believe it is essential for ESMA to be as prescriptive as possible with regard to the accounting methodologies related to the cost of aggregating and disseminating market data by exchanges and other market data providers. To this end, we have developed, and are making available to ESMA, a market data cost model which demonstrates how market data providers can deliver clear and unambiguous information on costs. These costs can then be simply and clearly allocated

to the revenue generating market data products in order to assess the reasonable cost basis of market data fees. We would strongly encourage ESMA to adopt such a model as an operative part of these Guidelines.

FIA EPTA members would welcome the opportunity to provide further background information to ESMA on these and the other issues raised in our response.

Section 5.2 – (Guidelines 1-2 on market data provision on basis of cost)

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

FIA EPTA members agree with the spirit of Guideline 1 but nonetheless consider it falls short on the transparency objective as the guideline does not require market data providers to make their methodology available to subscribers.

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.

FIA EPTA members do not agree with the statement in paragraph 19, that “these guidelines do not harmonise the cost accounting methods”.

We would urge ESMA to be as prescriptive as possible with regard to the accounting methodologies related to the cost of aggregating and disseminating market data. Without clearly defined standards it is likely that methodologies employed by market data providers will be as widely varied as policies and fee schedules are today. This runs contrary to the intention of comparability and assessment of the reasonable costs basis across a range of market data providers.

FIA EPTA members believe that adopting a common methodology will be crucial in examining the issue across a variety of market data providers and propose that the common methodology follows that put forth by the Investors Exchange (IEX)¹.

We have developed a model which, in the spreadsheet accompanying our response, maps this methodology onto the market data product suites for two of the larger European exchange groups. This model demonstrates that how market data providers can deliver clear and unambiguous information on costs. These costs can then be simply and clearly allocated to the revenue generating market data products in order to assess the reasonable cost basis of market data fees. We would strongly encourage ESMA to adopt such a prescriptive model as an operative component of its Guidelines.

While all market data providers vary, this model provides the flexibility required for all market data providers to adequately account for the costs to aggregate and distribute market data. Exceptions

¹ “The Cost of Exchange Services” (See page 3: Note on Cost Methodology) <https://iex-trading.com/docs/The%20Cost%20of%20Exchange%20Services.pdf>

should only be permitted with the publication of an adequate explanation as to how the model does not hold for a market data provider.

Furthermore, prior to obtaining cost models from market data providers it would be helpful if ESMA clarified the many grey areas within the level 1 and 2 texts including, but not limited to amortization standards, and most particularly the appropriate sharing of joint costs such as:

- thresholds for allocating costs to employees who do not exclusively work in market data,
- costs for software (licensing), and
- hardware (servers, networking equipment, circuits, and data center costs)

We believe that only uniformity in the model will facilitate the aims of comparability and assessment of compliance with the reasonable costs basis provisions.

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.*

FIA EPTA members believe that market data policies and audit practices should be structured to encourage and support compliance rather than to penalize non-compliance for the financial benefit of the market data provider.

It is important to ensure that the appropriate usage-based fees are applied equally to all customers. There are, however, several key changes which can be made to improve the audit process for both customers and market data providers.

Foremost among the changes would be to limit the audit look-back period to two years. With changes to key personnel oftentimes it can be extremely difficult to illustrate decommissioned entitlements systems and reproduce usage reports especially when looking back over an extended period. We believe that excessively long look-back periods are further exacerbated by interest and penalty fees and only serve to make audits contentious and drawn out.

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.*

FIA EPTA members feel that market data costs are unnecessarily driven higher in audits owing to expansive policy (the potential access standard) and third-party auditors that are compensated on a percent recovered basis.

Under the potential access standard, a display user is considered fee-liable if they potentially had the ability to access market data from that exchange, regardless of whether or not they had actually used the data. Under this policy, if a developer had created a display application that integrated market data from a variety of exchanges but had neglected to implement permissions, an auditor could cite all employees of the firm as having “potential access” and the financial consequences could be devastating.

Even if the firm had usage data showing that only several users had actually accessed each market and the rest of the firm had not, under audit, the firm could be liable for a multimillion-dollar costs finding. FIA EPTA members believe that this standard unnecessarily increases the cost of market data for participants and that ESMA should pursue having exchanges implement an actual rather than potential usage standard.

FIA EPTA members also believe that third party auditors compensated on a percent recovery basis are overly incentivized to audit aggressively and intrusively with interpretation of market data usage agreements often diverging from that intended, or even provided by the data licensor.

We would encourage ESMA to investigate these arrangements and believe Guideline 13 should explicitly require market data providers to engage external audit only upon a fixed fee model.

Section 5.3 – (Guidelines 3-5 on non-discriminatory basis)

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.

FIA EPTA members fully endorse draft Guideline 3 on the need for market data providers to introduce clear client categories. As highlighted by ESMA in the consultation paper accompanying the draft Guidelines, customers often find it challenging to determine which client category that they belong to, severely hampering their ability to anticipate the fees, terms and conditions applicable to them. We consider that ESMA should prescribe the criteria used by market data providers to determine client categories on the basis of objective and easily verifiable criteria so as to enable customers to estimate the conditions that will apply to them.

FIA EPTA members also share ESMA's assessment that 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 for end-users and clearly contravenes the requirement that data costs be based on the cost of producing and disseminating the data.

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.

FIA EPTA members are fully in accord with draft Guideline 4. The customers of market data providers require certainty in terms of their categorisation for the purposes of market data fees, terms and conditions. A situation wherein the market data provider can charge multiple fees for market data based on different use cases or a client potentially belonging to more than one category is grossly unfair toward the customer and potentially creates inconsistencies in how different clients are treated.

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

In principle, FIA EPTA members agree with draft Guideline 5 instructing market data providers to ensure the same technical arrangements for customers belonging to the same category. However,

we recognise that there may be significant practical barriers 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 technical constraints and the capacities of their customers.

Section 5.4 – (guidelines 6-8 on per user fees)

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, FIA EPTA members agree with the interpretation of the per-user model provided by Guideline 6. Where currently investment firms may be charged, for instance, for 3 “devices” for the same end user this will result, as was expected with the introduction of MiFID II, in a 66% saving in market data fees.

Currently, a number of regulated markets offer unit of count netting for display data but have a cap with regards to the number of devices that each user can use. Although this translates in a lower charge in comparison to the un-netted model, it is still resulting in multiple billings per user. This guideline will provide the clarity to market data providers to ensure that users are only charged once for display data and is expected to address the current inappropriate outcomes for impacted FIA EPTA members.

In addition, FIA EPTA members operating execution management systems (EMS) are aware of exchanges approaching clients who subscribe to those EMS with issues around data licensing. The exchange informs the EMS client that they need a non-display data license to use the FIA EPTA members’ EMS *despite* the EMS operator already paying c. £80,000 p.a. for the non-display data license.

When the auditor of the exchange was challenged by the EMS operator (FIA EPTA member) and the subscribing client, the exchange stated that ‘use of an execution management system constitutes the need for a non-display data license by each subscriber to the EMS.’ The EMS operator already pays the license for the non-display data and does not distribute the data outside of its own firm. Therefore, EMS subscribers should not be required to also pay the license.

This is a further example of unfair charging practices by dominant exchanges and should be enumerated as an example of poor behaviour in the guideline above.

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

Yes, FIA EPTA members agree with Guideline 7 and do not believe that there are any other conditions that should need to be met by the customer in order to permit the application of the per user model.

We consider the conditions listed in Guideline 7 sufficient to this aim with FIA EPTA members able to correctly identify the number of active users who have access to the data, through facilities such as market data entitlement control systems, and report the exact number to market data providers.

However, we believe it is worth noting our concern that market data provider may use this 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 (please refer to our response to question 13 for our suggestion on how to counter this).

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, FIA EPTA members agree with Guideline 8 but would like to highlight that it is expected that all market data providers will be able to offer the per user model and that this would be an extremely unusual case. The majority of EU regulated markets already offer PPU (Per Physical User) programs, also known as netting programs, the issue experienced by FIA EPTA members is that these RMs make it extremely hard to be accepted into these programs.

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.

FIA EPTA members believe that ESMA should provide guidance to market data providers with regard to the turnaround time from the point at which a client requests entry onto a per user model and acceptance onto that model. At the current time one of the main barriers to entry into this program is the length of time of the approval process.

For example, FIA EPTA members have experienced that it has taken up to two years to be accepted onto a program with what has been seen by some as delaying tactics, such as lack of communication during the process, to minimise the number of members availing of the program.

Given Guidance 7, it seems reasonable for a market data provider to be required to provide a written response to a client within three or six months with full reasons set out in the response if approval is denied.

Section 5.5 - (guideline 9 on keeping data unbundled)

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

FIA EPTA members agree with guideline 9. Market data providers should make the data available to purchase separately from additional services and should not condition the purchase of market data upon additional services.

Section 5.6 – (Guidelines 10-13 on transparency obligations)

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.

FIA EPTA members agree that market data providers should contribute their data in a standardized format.

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?

As mentioned in our response to Question 3, FIA EPTA members consider that standardised publication formats can only be comparable in a meaningful way if the accounting methodology used to aggregate the published data is also standardized.

As we will cover in our response to Question 20, it is impossible to assess the reasonability of the commercial basis for market data fees without either the cost to aggregate or the margin applied also being disclosed.

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.

FIA EPTA members note that the definitions in Guidelines 11 push for 1) display user netting and 2) derived data (with no distinction between monetized externally and unmonetized, no reverse engineerable clause).

FIA EPTA members consider that some of the proposed definitions included are too broad and should be modified to provide more clarity.

As per the drafting suggestions below, we suggest that the Unit of count for display purposes should explicitly provide for the netting of user use across multiple vendors. The Unit of count for non-display should explicitly only include devices which utilise the data for the specific purpose of the data subscriber.

ii. Unit of count

- *for display use: the Active User ID should be the unit of count to quantify the level of use of display market data to be invoiced to the customer.²¹ The Active User ID shall be the ID associated to each human user who can actively access the display data **AND***

SHALL BE NETTED ACROSS DIFFERENT VENDORS OR METHODS OF DELIVERY OF THE DATA.

- *for non-display use: the server or device should be the unit of count to quantify the level of use of non-display market data to be invoiced to the customer. The server or device should be any machine that accesses and ~~processes~~ **UTILISES** the data automatically **FOR THE INTENDED PURPOSE OF THE SUBSCRIBER, IT SHOULD NOT INCLUDE FEED HANDLERS THAT ONLY CONVERT THE FORMAT OF THE DATA.***

Further, we note that the definition of derived data makes no distinction between derived data which is used internally by a market data subscriber or that which is intended for commercial exploitation. FIA EPTA members believe that the original intention of derived data licenses was to capture only the latter use case but has been used to derive additional fees from members. The definition should explicitly require that the derived data is to be commercialised in some way. We suggest, therefore, the amendment below:

viii. Derived Data

- *Derived Data should mean data which is created **FOR COMMERCIAL PURPOSES**, as a result of the transformation or combination of the raw data originally generated by market data providers with other data provided by different sources that cannot be used to materially replace or substitute the original data.*

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.

FIA EPTA members contend that the category of use “Non-display other” is being used as a catch-all to generate additional usage charges from market data subscribers. The use of non-specific usage categories should be explicitly excluded from market data policies.

More generally, the various categories of usage for market data bears no correspondence to the cost to aggregate and distribute market data. It more closely reflects the perceived value in the use of market data which is contradictory to the RCB provisions in the level 1 text.

Usage categories result in our members unduly paying multiple subscriptions for the same set of market data. We recommend that *categories of data usage* should be prohibited, so that all subscribers of a given user category will be treated in a non-discriminatory fashion and with *only the unit of count* used to differentiate between the amount of use of a given data set.

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

FIA EPTA members strongly disagree with the statement that: “[m]arket data providers are not required to disclose actual costs for producing or disseminating market data or the actual level of the margin”.

We note that the lack of transparency and disclosure of the actual cost to aggregate market data makes it impossible for participants to have confidence in a reasonable commercial basis (RCB) for

market data charges. This is especially so in an environment of ever-increasing fees paid to market data providers and vendors by FIA EPTA members as demonstrated in our response to the previous consultation on the development of prices for data².

While we understand the commercial sensitivity of this information for market data aggregators, this should not be a shield against accountability for compliance with the RCB provisions of the regulation. It is imperative that NCAs, and ESMA as the European regulator, should be able to confirm that an appropriate, standardised accounting methodology such as the one proposed in our response to Question 3, is correctly applied to derive a cost to aggregate market data.

It is only with disclosure of the revenues generated from market data licensing and sales, as contained in the model proposed in our response to Question 3, that the RCB provisions can be assessed. This information should be provided annually to NCAs so that changes to the cost basis and revenues can be tracked across time.

Any increase above a suitable index in the cost to aggregate and distribute, or the revenues generated from market data should trigger an audit of the disclosures and an RCB assessment by the NCA which should be publicly disclosed to ensure confidence that the regulatory framework is operating effectively. We would urge that it is incumbent upon ESMA to ensure that these RCB provisions are applied consistently across the Union.

While market data is not subject to the usual competitive forces which moderate prices, an adequate outcome will ensure that the RCB is comparable across market data providers and that the requirement to provide market data on an RCB is enforced.

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

Please see our response to Question 20 above

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

As mentioned in our response to Question 5, the period for which market data fees may be applied retroactively should be limited to two years. Otherwise, FIA EPTA members agree with Guideline 13.

Section 5.7 – (guidelines 14-16 on providing data free of charge after 15min)

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

² https://www.fia.org/sites/default/files/2019-12/FIA%20EPTA_ESMA%20Consultation_Market%20Data_CT_FINAL_09_06_2019%20FINAL_0.pdf

of trading systems? Is the first best bid and offer sufficient for the purpose of delayed pre-trade data publication?

FIA EPTA members consider that flags are a crucial element of the market data publication and should be maintained.

Post-Trade

For post-trade data the price, volume, transaction, published time, institution ID and venue ID flags are all critical elements of the data which should be maintained. There should be no difference between the different types of trading system.

Pre-Trade

For pre-trade data it is important to consider the impact on users if they were required to move their systems to using delayed data. Pre-trade data is often used for aiding compliance queries and best execution examinations amongst other uses. For most of these use cases the Level 1 (first best bid and offer) data would not be sufficient. Level 1 data does not provide a depth of information necessary to fulfil these use case obligations.

As a compromise, it may be sufficient if there was an amalgamation of the first 5 levels of data. This would cover most use cases without being overly burdensome on the data provider.

A further suggestion is to make the delayed data available in the same format and via the same infrastructure as the live data, just delayed by 15 minutes. That way we could also ensure consistency, accuracy and format of data.

As to the question of operational challenges in having to store sufficient pre-trade data, we envisage that exchanges are already storing that data for compliance and reporting reasons so do not consider it too onerous.

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?

FIA EPTA members note that market data are used throughout the value chain of securities business from research, trading, advice, portfolio management to securities administration and custody. For example, securities services in banks, investment firms or asset managers provide services to institutional investor in various areas such as Net Asset Value (NAV) computation, compliance checks, clients & regulatory reporting, fund administration and custody to name a few all of which require the production of all kinds of reports.

In the exchange space, delayed market data from other trading venues is being used for offering various market models to customers, for brokers to implement the Best Execution, for regulatory supervision, to operate regulatory reporting services, or for index calculations.

We would like to see the data available both real-time delayed (delayed data available in the same format and via the same infrastructure as the live data, just delayed by 15 minutes) and available to download for up to one week after creation.

It is important to note that delayed data cannot be used to make trade decisions and is not a substitute for real time data in the same way as a consolidated tape is not a substitute for post-trade data.

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

FIA EPTA members agree with the definitions set out in Guideline 16.

Data redistribution generally is understood as the process of moving data replicates from one data site to other sites or distributing from one party to another without altering the data. The redistribution, or just distribution, fee is paid to the exchange when market data, display or non-display, is delivered to a system, person, or business other than the one that initially purchased the data.

Most commonly, redistribution fees are incurred when a broker shows market data to a client or a vendor sells the market data information to a third party. Depending on factors like what exchange the data is from, what data provider is used, and if it is display or non-display data, the cost of redistribution can vary. Redistribution fees are paid whenever market data is redistributed. The definition of the business practice is therefore accurate.

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

Firstly, FIA EPTA members would like to confirm whether it is ESMA's intention to update the existing Transparency Q&As following the adoption of these Guidelines. In particular, FIA EPTA members note that as it stands the Transparency Q&As, such as Q10, provide more granular guidance on aspects covered under Guidelines (in particular Guidelines 14 and 15). Consequently, FIA EPTA members would urge ESMA to either update the Guidelines to adopt the additional detailed guidance contained within the current Q&As, or alternatively to update this detailed guidance and maintain it as a Q&A to supplement the new ESMA Guidelines.

Secondly, FIA EPTA members would reiterate that the increasing complexity of market data policies, price schedules and terms and conditions was one of the main areas of concern raised by respondents to the 2019 ESMA Consultation on the Cost of Market Data and the Consolidated Tape. FIA EPTA members note that while these draft guidelines help to address some of these concerns, through the use of standardised definitions and simplified customer categorisation, they do not go far enough and do not explicitly call for market data providers to take steps to make their documentation less complex.

FIA EPTA members would recommend, therefore, that ESMA go further and incorporate a new guideline, requiring that market data providers take steps to reduce the complexity of their market data policies, price schedules, terms and conditions and any other associated documentation. One

possible option for this guideline would be to borrow from the standard required from MiFID's Conduct of Business obligations around client communications and require that market data documentation be "clear, fair and non-complex".

(FIA EPTA did not provide answers to Questions 1, 9, 15 and 27).