

From : DACSI

Re : **Reply to the ESMA consultation on Guidelines on market data obligations**
version 1.0 (as submitted)

11 Jan 2021

What follows is the text of DACSI's response to ESMA's consultation paper "Guidelines on the MiFID II/MiFIR obligations on market data" (DACSI 20-2248).

This response is submitted on 11 January.

General remarks

We appreciate this review of MiFID/MiFIR provisions to ensure the proper availability of market data to market participants.

We also applaud the approach ESMA has chosen in the proposed Guidelines; some comments with regard to specific sections are phrased as answers to the 27 consultation questions.

There is however one element that is essential for the realisation of the overall objective – proper availability of market data – but not dealt with in this consultation: consolidated tape. Both ESMA and the European Commission have consulted the markets on the subject in 2019 and 2020. It surprised us - and even disappointed us to some extent - that the subject is not covered in this consultation: we are convinced that the introduction of a consolidated tape (provider) would shed another light on several of the issues addressed in the consultation.

Section 3 – Applicability for market data providers offering market data free of charge

Q 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?

DACSI agrees that the Level 2 requirements referred to in § 15 should also apply to the offering of market data free of charge. Data being offered free of charge and exempt from the obligations would not contribute to a fair and efficient market. Absence of transparent and non-discriminatory conditions, of standardised terminology and formats cannot be compensated by nil monetary charges. The market will not benefit from data that are offered free of charge, but under otherwise onerous conditions.

All potential impediments to an actual fair and orderly provision of market data need to be eliminated, regardless of any charges. Hence, the "other" requirements – i.e. those not referring to costs – should apply.

Section 4 – The provision of market data on the basis of costs

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

We agree with the obligation for market data providers to have a clear and documented methodology. We also agree with the requirements detailed in the Guideline.

However, we think that – for the obligation to be effective – the **methodology itself has to be published**. If publication is not mandatory, compliance with the obligation could only be monitored and the quality of the methodology could only be monitored by the providers' regulatory supervisors. The customers of the data providers are very well placed to assess and eventually challenge the required methodology; they are invoiced based on it and can simultaneously assess the methodology and its application.

NB: Annex I – the template for publishing RCB information – refers to (content of) the obligatory methodology, at least implicitly, but does not qualify as means of publishing the methodology as such. Its legal basis – article 89(2)(a) – also differs from that underlying Guideline 1 – which is article 85.

**Q 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.**

No.

**Q 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.**

Yes, we agree that placing the burden of proof on the data provider will help reducing the overall audit costs. It has to be noted that:

- these audits – in addition to the explicit costs of auditors – also bring significant (implicit) costs to the customer,
- non-compliance, if observed, is often unintended and often the result of complex rules, ambiguous definitions and diverging interpretations.

We expect that an active consolidated tape provider as de facto intermediary between market data provider and customer can absorb and solve a large part of the “non-compliance” issues.

**Q 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. In their roles of data providers, major trading venues apply aggressive audit strategies. During the years practices have changed in favour of the data vendor. It often turns out that their findings are farfetched and even implausible, and hence result in huge audit penalties.

An example of a problematic practice: audits triggered by the mere discontinuation of a customer’s license. Guideline 2 rightfully restricts audits to situations where a breach is suspected.

Section 5 – The obligation to provide market data on a non-discriminatory basis

**Q 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 agree.

In addition, we believe it will be beneficial when objective criteria are applied industry-wide, and that differentiations/categorisations are as few as possible.

**Q 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 agree.

**Q 8 Do you agree with Guideline 5?
If not, please justify.**

Yes, we agree, because technical arrangements are an essential element of the data provider's proposition.

**Q 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.**

We think further clarification is needed:

- clear definitions of non-display vs display usage. For example, during an audit it was experienced by our members that all the users in a non-display application had to be charged as "display" because they had the "possibility" to view the data but they only used it for non-display purposes.
- a framework with a fully unified taxonomy, so that from a consumer perspective the customer categories a.o. apply to all market data providers.

Section 6 – Per-user fees

**Q 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, we agree, while this is based on the Multiple Instances Single User (MISO) concept. This would be the only fair method of paying for the same data once, specifically because most additional services for specific data are provided by market data vendors.

**Q 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, we agree.

Any additional condition, such as the obligation to administer and report all devices of a user, would create such an administrative burden for market data consumers that per device pricing would be less costly. The essence is that the administrative responsibility and burden are on the customers.

Q 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.

We partly agree only.

The per user model is by far the preferred one and should indeed be regarded as “mandatory, unless there are very convincing reasons for not offering it”. In our view, the threshold for providers intending not to offer per user pricing should be high. The mere argument of excessive (administrative) costs for the provider should not be described as sufficient. The Guideline rightfully elaborates on proportionality, which brings the (implicit or opportunity) costs for the customer into the picture. The last sentence “The factors could include excessive administrative costs” could be explained as “not mandatory if excessively costly for the provider”; such explanation would be in contradiction with the carefully drafted first part of the Guideline. Hence, this sentence has to be deleted.

In addition, if a market data provider does not offer the per user model based on Guideline 8, such justification should be updated periodically, e.g. annually.

Q 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.

Yes; there should also be more clarity on multi-charging by data-vendors.

For example, our members are being charged multiple times by a data provider for consuming the same data through different data vendors, while the data is identical through each channel.

Section 7 – The obligation to keep market data unbundled

Q 14 Do you agree with Guideline 9?

If not, please justify.

Yes.

Q 15 Do you think ESMA should clarify other elements in relation to the obligation to keep data unbundled?

If yes, please explain.

Yes.

We welcome this Guideline in particular; in current experience, data and services are provided as a bundle on a large scale.

Section 8 – Transparency obligations

Standardised publication format

**Q 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.

Q 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?

Yes, we agree.

Standardisation of key terminology

**Q 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 agree with the proposed definitions.

In addition, we suggest including a definition for “End of Day”: at the closing of the same business day.

**Q 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.**

Audit clauses used in market data agreements should be standardised as well. We note that most data-vendors use different definitions in their policies, e.g. for the audit period.

Cost disclosure

**Q 20 Do you agree with Guideline 12?
If not, please justify.**

Yes, we agree.

**Q 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.**

Yes, see also our answer to question 2.

Annex I provides a useful tool to assess whether and to analyse how the market data provider complies with his obligation under article 89(2)(a) of 2017/565. However, we think that – for the obligation under article 85 of 2017/565 to be fully effective – the methodology itself has to be published. If publication is not mandatory, compliance with the obligation could only be monitored and the quality of the methodology could only be monitored by the providers’

regulatory supervisors. The customers of the data providers are very well placed to assess and eventually challenge the required methodology; they are invoiced based on it and can simultaneously assess the methodology and its application.

Auditing practices

**Q 22 Do you agree with Guideline 13?
If not, please justify.**

Yes.

Section 9 – Guidelines on the provision of market data free of charge 15 minutes after publication

Q 23 Which elements for post- and pre-trade data publication should be required? In particular:

- i. **are flags a useful element of the publication?**
- ii. **should there be any differences between the different types of trading systems?**
- iii. **is the first best bid and offer sufficient for the purpose of delayed pre-trade data publication?**

With regard to iii : yes, indeed, because we use depth of order book only in real time applications.

**Q 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?**

Use cases differ significantly across members.

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

No, we have some difficulties with this Guideline.

The concept of the framework is that delayed data is brought to the public domain for free. We cannot envisage that a clear distinction can be drawn between using these delayed data for own purposes without adding value (could only apply to an end investor), (re)distributing the data without adding value and providing services building on the data (and hence adding value) otherwise. In addition, we envisage that third parties who are not contractual counterparties to market data providers will use the delayed data after publication and repackage/enrich it or provide a service using it. In practice, it will be very difficult - if not impossible – for data providers to charge such third parties, who may not operate under the regular EU supervisory or legislative framework. The result would be a competitive disadvantage for the customers of the data providers. We suggest to stick to the adage: delayed data can, once brought in the public domain, be re-used or re-distributed for free.

**Q 26 Do you have any further comment or suggestion on the draft Guidelines?
Please explain**

No.

Q 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.

For a typical member bank implementing the new regime may require a few fte, but the will be outweighed by structural cost reductions. Members cannot provide quantitative indications yet.