

FESE Response to the ESMA Consultation Paper on Guidelines on the MiFID II/ MiFIR Obligations on Market Data

Brussels, 11th January 2021

Introductory remarks

FESE welcomes ESMA's Consultation Paper on guidelines on the MiFID II/MiFIR obligations on market data and appreciates ESMA's recommendation in its MiFID II/MiFIR Review Report No. 1 to continue the "transparency plus" model. We agree with the intention of ESMA for increased clarity, consistency, and transparency of the market data regulatory obligations. This is why, in line with some of ESMA's findings and proposals, over the course of 2020, FESE identified potential recommended reference terms (RRTs) and best practice recommendations (BPRs) for market data providers. Our response to the Consultation Paper partly draws on these RRTs and BPRs, which are annexed.

FESE is supportive of ESMA in that it pursues the "transparency plus" approach with a view on seeking more comparability and transparency. That being said, it is important to tread carefully in this complex area, since there is a fine line between requirements aimed at increasing transparency and requirements that unintentionally may be of a more intrusive nature and, as such, are unwarranted, given that there is no evidence or reason to justify a more intrusive approach.

We also wish to highlight a number of important remarks:

1. Regulators and policymakers should recognise the competitive constraints on market data provision and should acknowledge that commercial incentives are required to both offer this service and to improve on the quality of data. Trading venues work hard to develop and produce competitive, innovative, and diverse market data offerings. Several entities use these data offerings to run commercially rewarding business models, the rise of new successful trading and execution venues is clear proof of this.
2. Trading venues make available data on a reasonable commercial basis and a non-discriminatory basis. In this context, we wish to underline that market data is an intrinsic part of the price formation process and is a joint product with trade execution, i.e. it is not possible to generate one without the other, and most activities undertaken by a trading venue deliver both trading and price formation. Due to the joint product nature of trade execution and market data services, the production costs of the outputs (market data and trading) cannot be separated. The economics literature confirms that, in such cases, it is efficient to generate revenues through fees from both products¹. Indeed this is what trading venues do in practice. It is also well established that a single commercial price cannot be considered reasonable for all market data users due to the wide range in the value users derive from market data services. The current degree of differentiation is aligned with a well-functioning and efficient market and competition.
3. Trading venues are required to comply with the market data transparency requirements, disclose necessary information, and provide data free of charge 15 minutes after publication. Significant efforts are made to put in place the necessary mechanisms to

disclose relevant information and ensure compliance with the various regulatory requirements.

In order to evaluate the changes in the overall costs of market data, it is important to look at the wider market data ecosystem. “Exchange” market data can be distributed via intermediaries to brokers, asset managers, and other market participants, and is only a small part of the “overall” market data used by market participants, which also includes news, alternative data, research, ratings, valuation data, reference data, etc. Indeed, the consulting firm Oxera conducted an analysis for FESE of data from European firms which shows that exchange market data fees account for less than 10% of total sell-side market data spend and 0.5% of total buy-side market data spend. Since 2012 the market data revenues and the unit costs (calculated as the total joint revenue from trade execution and market data as a proportion of total value of trading in relevant securities) have remained stable overall.

FESE believes that a holistic approach towards assessing market data is needed. The role that trading venues play in delivering the Capital Markets Union, as well as the importance of the price formation process, needs to be considered. The market structure in which market data is produced and consumed is complex, making it challenging to assess the role and impact of regulatory intervention. In this context, regulators and policymakers should be wary of enabling free-riding or other potential unintended consequences which, if left unchecked, could ultimately threaten the quality of the price formation process and unintentionally contribute to creating an unlevel playing field in terms of competition.

FESE looks forward to continuing its cooperation with ESMA on the MiFID II/ MiFIR obligations on market data.

¹ Oxera. “The Design of Equity Trading Markets in Europe.” London, 2019.

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?

FESE agrees with 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, e.g. the requirements to make market data available to all customers on the same terms and conditions, to have scalable capacities in place to ensure that customers can obtain timely access to market data at all times on a non-discriminatory basis, and to offer unbundled market data, as well as the provisions on delayed data.

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

FESE generally considers that financial regulation is not the right place to review the pricing of market data as it would turn financial markets' supervisors into price regulators. FESE appreciates ESMA's recommendation in its MiFID II/MiFIR Review Report No. 1 to continue the "transparency plus" model with some clarifications and harmonisation, but would underline that explanations around the determination of margins and allocation keys, especially if included in standardised publication formats, may potentially go beyond the scope of this approach.

FESE agrees that market data providers should have a clear and documented methodology for setting the price of market data. We also consider that the methodology should identify the costs that are solely attributable to the production and dissemination of market data (i.e. direct costs) and the costs that are shared with other services (i.e. joint costs). We would like to stress that any communication or practice in relation to this issue should take account of competition law compliance requirements.

Along similar lines, FESE's RRTs and BPRs include examples of the types of costs that can be taken into account to set the price for market data and a short description of each cost item. They recommend providing clear principles according to which direct and variable joint costs are allocated and fixed joint costs are apportioned, between the production and dissemination of market data and other services provided.

However, FESE does not believe it to be reasonable to prescribe how market data providers can and cannot allocate (joint) costs: this would go beyond the goal of improving transparency and ensuring that the market data fees charged by market data providers reflect the costs of producing and disseminating market data. The cost allocation and accounting methodologies used should remain at the discretion of market data providers.

Therefore, whilst FESE agrees with Guideline 1 in principle, FESE would strongly encourage ESMA to reconsider some of the drafting contained in Guideline 1, specifically removing the restriction on allocating joint costs according to the revenues generated by the different services and activities of the company. This approach constitutes a practical and (economically) sensible manner for allocating joint costs. In a joint product there can be no cross-subsidisation but different demand structures, therefore it should be possible to use revenue-based keys as well. FESE fails to see how such cost allocation method is contradictory to the obligation to set market data fees based on costs of producing and disseminating market data.

FESE considers it a misconception that market data fees are equivalent to market data revenues. Market data revenues are the outcome of multiple variables, which include aside from market data fees, the number of clients, applicable units of count, or categories of use applicable to a diverse group of clients that is different for each market data provider. Furthermore, the actual joint costs can still remain at the basis of setting the market data fees, i.e. even if those joint costs are allocated based on the revenues generated from each joint product. Finally, we would like to stress that joint costs and common costs are different concepts. Common costs are costs merely shared between

different processes. In contrast, joint costs are incurred when production facilitates simultaneously two or more products, such that an increase in the output of one product will necessarily mean a corresponding increase in the output of the other product. Hence the apportionment of joint costs is more complex.

It is important that regulators and policymakers acknowledge the need to keep commercial incentives for market data to exist in order to ensure the proper functioning of markets, especially given that a number of entities use data provided by trading venues to run commercially rewarding business models. Measures specifying the frequency, content, and format of information provided should respect the heterogeneity of trading venues business models and take account of the diversity of commercial models. A further industry harmonisation, especially when such harmonisation would touch upon the market data provider's ability to freely determine how it prices market data on a reasonable commercial basis, would also be highly sensitive from a competition law point of view.

FESE members offer market data on a reasonable commercial basis taking into account the costs for creation and dissemination of the data, in accordance with Article 7 of Delegated Regulation (EU) No 2017/567 and Article 85 of Delegated Regulation (EU) No 2017/565. As indicated by ESMA, due to the joint product nature of trade execution and market data services, the production costs of the outputs (market data and trading) cannot be fully separated. In this context, it is important to note that market data is the outcome of a dynamic price formation process, and is a joint product with trade execution – i.e. it is not possible to generate one without the other, and most activities undertaken by a trading venue deliver both trading and price formation. The economics literature confirms that, in such cases, it is efficient to generate revenues through fees from both products¹. Indeed, this is what trading venues do in practice. The joint product nature of trade execution and market data services has important economic implications. With joint products, the production costs of the outputs (market data and trading) cannot be fully separated. This is clearly the case of trade execution and market data services where there are fixed costs that have to be incurred to produce either product. This implies that whether the recovery of costs by a trading venue is appropriate or not cannot be assessed effectively by the independent analysis of either trade execution services or market data services. Hence, FESE urges regulators to keep this reality in mind when assessing the development in prices for pre-trade and post-trade data. FESE wishes to underline that the appropriate frame of reference for the analysis of the economically efficient recovery of the costs of the secondary market activities of trading venues is at the level of combined transaction revenues and market data revenues.

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.

FESE considers that examples and descriptions of the types of costs that are taken into account to set the price for market data as well as principles according to which direct and variable joint costs are allocated and fixed joint costs are apportioned are sufficient aspects to reflect accounting methodologies. The scope of information to be disclosed should already increase the usability and comparability of the information and is included in FESE's RRTs and BPRs.

FESE believes, however, that disclosing allocation keys and explanations around the determination of margins could go beyond the scope of the current "transparency plus" approach. The current clarifications and further specifications that are included in ESMA's draft guidelines would help to further explain ESMA's expectations to market data providers. However, additional clarifications on further aspects would not be warranted and could also be highly sensitive from a competition law point of view.

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.

FESE would like to emphasise that audits do not exist to generate additional revenues. Rather, audits are meant to identify and recover any unpaid fees. In this respect, the practice of audits contributes to the consistent and non-discriminatory application of market data fees and policies and therefore contributes to maintaining a level playing field in capital markets. Therefore, any guideline that (un)intentionally limits the ability of market data providers to properly audit their clients, including placing the burden of proof, with respect to non-compliance with the terms of the market data agreement, on market data providers, could harm the basic premise of MiFID II of making market data available on a non-discriminatory basis. Any such effort seems to contradict what FESE believes ESMA is trying to achieve.

FESE agrees that market data providers should be able to charge administrative fees or interest rates following an audit when this is warranted. Audits are necessary to allow for the verification of the audited party's compliance with the relevant contractual terms and policies. When a market data agreement appears not to be respected, it is up to the party that does not respect the agreed provisions to demonstrate its compliance with the agreement. This is not an issue of burden of proof, it is a dialogue between the parties to an agreement to ensure its implementation. Moreover, the level of the settlement to be paid in case of non-compliance should not be limited to the price that should have been paid, otherwise, there will be an incentive to not implement market data agreements which will result in an unlevel playing field. A client that tries to properly implement the market data agreement would be disadvantaged compared to a client that (un)intentionally is in breach of such agreement. Furthermore, FESE would like to emphasize that retroactivity is inherent to the audit process. Market data users tend to underline to market data providers that they do not want to be audited too frequently. If retroactivity is limited too extensively, the only way to ensure a level playing field is applicable is by auditing market data users more frequently, which could unintentionally increase the (indirect) cost for market data users.

However, FESE does empathise with the concerns of market data users in respect of unreasonable auditing practices, which FESE believes constitute incidents and not any structural abuse of audit rights by market data providers in general. FESE's RRTs and BPRs provide more clarity and security (e.g., information on timing, scope of audits, audit periods and retroactivity, keeping relevant records) and some important procedural rights (e.g., reasonable objection to the auditor, provision of written comments on the result of the audit) for market data users.

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.

FESE does not consider that auditing practices contribute to higher costs of market data. FESE considers that any cost for providers associated with audit practices is inherent to the costs of producing and disseminating market data and an absolute necessity for market data providers in fulfilling the MiFID II regulatory obligation to apply market data fees and policies on a non-discriminatory basis, maintaining the level playing field in capital markets.

While aggressive audit procedures were identified by ESMA as an issue in the MiFID II/MiFIR Review Report No. 1, ESMA did not explicitly mention the need for harmonised audit policies or recommendations in this field. FESE's RRTs and BPRs, therefore, go beyond the

scope of the MiFID II/MiFIR Review Report No. 1 and provide tangible benefits to market data users by increasing transparency and harmonisation.

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.

FESE agrees that market data providers should describe in their market data policy the categories of customers and how the use of data is taken into consideration to set up the categories of customers, in line with Article 86 of Delegated Regulation (EU) No 2017/565 and Article 8 of Delegated Regulation (EU) No 2017/567. FESE's RRTs and BPRs already include definitions for professional and non-professional user, as well as for display and non-display usage.

FESE would also suggest some modifications, replacing "easily verifiable" with "reasonably verifiable", given the complexity which is inherent to market data usage. Markets and data users tend to change faster than the ability of market data providers to change their market data policies to reflect these changes and to ensure verifiability. In addition, as explained in our answer to Q7, and since in practice clients do not always fall into a single customer category, we would suggest replacing "the category they belong to" with "the categories they belong to" and we consider that motivating each difference in fees could be too onerous and go beyond the current regulation.

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.

FESE disagrees with the approach taken in Guideline 4 to apply the relevant fees in a way that ensures the provision of the same data is charged only once by applying one customer category only. FESE believes that it is crucial to take into account that it is not possible to determine customer categories in an exhaustive and practicable fashion since every company and business is different. Data providers must be allowed to determine fee schedules on the category of usage as opposed to the category of customer. Indeed, in cases where a 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 negating the reality of how certain Tier 1 clients are structured, the breadth of services they provide, and the extent of their data usage which is heterogenous by nature and therefore cannot fall into a sole customer category.

This guideline would therefore create unfair models damaging small and medium-sized market data customers and benefiting large investment banks which have very broad and diversified activities. Under this scenario, small trading venues also risk being severely undermined and would not be able to cover the costs of producing and disseminating market data. There is a concern that retail investors behind small retail brokers and smaller investment firms may, ultimately, indirectly support the market data costs of major international investment banks. In reality, an investment bank can be involved in a large variety of commercial activities. For example, a large investment bank could be both a broker and an index creator. A guideline as proposed by ESMA could run the risk of providing such large players in capital markets with an unfair advantage over smaller parties or parties that are only a broker or an index creator, i.e. that operate in a niche. In addition, as stated in FESE's RRT and BPRs, contractual terminology and market data procedures are to be applied with reasonableness and do therefore not allow for the arbitrary or exploitative practices that Guideline 4 aims to counter.

Trading venues charge different prices to different categories of users where it is objectively reasonable to do so, for example based on customer group, such as non-professional or professional user and use case. This is consistent with Article 8 of Delegated Regulation (EU) No 2017/565. Trading venues make market data available at the same price to all customers falling within the same category in accordance with

published objective criteria and any differentials in prices charged to different categories of customers are proportionate to the value which the market data represents to those customers.

It is well established that a single price cannot be considered reasonable for all market data users due to the wide range in the value users derive from market data services. The current degree of differentiation is aligned with a well-functioning and efficient market and competition. In particular, value-based charging can be fair and efficient, and leads to different charges across user groups and use types. This diversity and granularity is reflective of competitive commercial conditions. Competition law precedents also recognise that product differentiation is reflective of competition in the market¹ and that even dominant undertakings may apply different commercial conditions to their customers (and are even required to do so if there are different objective circumstances).² Fees charged by trading venues are publicly available and have not hindered competition considering the number of competing venues that have emerged based on high-quality data provided by trading venues on a non-discriminatory basis.

¹ See Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5.2.2004, para. 45. (“It is also easier to coordinate on a price for a single, homogeneous product, than on hundreds of prices in a market with many differentiated products”). See also Communication of the Commission - Guidance on the Commission's enforcement priorities in applying Art. 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45 of 24.2.2009, para. 13 (“the Commission will interpret market shares in the light of the relevant market conditions, and in particular of the dynamics of the market and of the extent to which products are differentiated.”).

² See for example Judgment in AKZO Chemie v Commission, Case C-62/86, ECLI:EU:C:1991:286, paras. 119-120 (“It should next be pointed out that there was no abusive policy of discrimination between the individual mills in the Allied group and the 'large independents', as these two categories of customers are not comparable”). See also Judgment in United Brands v Commission, Case C-27/76, ECLI:EU:C:1978:22, para. 228 (“differences in transport costs, taxation, customs duties, the wages of the labour force, the conditions of marketing, the differences in the parity of currencies, the density of competition may eventually culminate in different retail selling price levels according to the Member States”) and Judgment in Clearstream v Commission, Case T-301/04, ECLI:EU:T:2009:317, paras. 172 and 179.

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

FESE disagrees with Guideline 5 as it would extend non-discriminatory basis obligations to the technical arrangements of market data providers. 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 favorable treatment to some market data users and 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.

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.

FESE would like to underline that data from trading venues is already made available on a non-discriminatory basis as per Article 13 of MiFIR, Article 86 of Delegated Regulation (EU) No 2017/565, and Article 8 of Delegated Regulation (EU) No 2017/567.

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.

Whilst FESE believes that the “Active User-ID” should be clearly part of the offering, it should not be the default. The reason for this being that this model is appropriate for some, but not all, customers since the per user fee model comes with a certain amount of complexities for the market data provider but also for the customer. Usernames would

have to be crosschecked across multiple platforms and providers, as they can often be generic and are shared between users. There would have to be an onerous and regular process of reconciliation and a large burden would be put on market data providers. This would constitute a complex system with a need to coordinate between data user, data vendors and, data providers, something that is not in the interest of all data users. As such the data user should be able to opt-in for a per user unit of count.

It should also be noted that providing market data on a per user basis is not always possible for all customers, especially when considering display and non-display usage. Hence the per user model should only be available to all provided that reasonable eligibility criteria are met.

In respect of the definition of “Active User-ID”, FESE would propose amending the definition to “an ID that corresponds to a natural person who can access the displayed data”. Though FESE fully supports ESMA’s efforts to introduce some harmonised terms, we would like to emphasize that definitions lie at the basis of not just the contracts and commercial models, but also the operations, of market data providers. As such, definitions should be clear, feasible, and not disproportionately impact market data providers. FESE appreciates the ability to provide input and share its expertise with ESMA at any stage of this process.

Lastly, FESE emphasizes that other units of count applied by market data providers for displayed data should be left to the discretion of data providers. Differences in unit of count derive from the diverging commercial practices that exist across trading venues. Rather than by prescribing the specific unit of count to be used, FESE believes that the balance between effective harmonisation and the ability for market data providers to differentiate themselves and compete is better kept by defining regularly used units of count. The availability of definitions for regularly used units of count would likely encourage and motivate market data providers to implement these, while still offering the ability for market data providers to differentiate themselves and their offering.

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.

FESE overall supports Guideline 7. Market data providers need to assess the eligibility of customers for the per user model in order to confirm that it is a feasible model for the customer in question taking into account the value chain (the role played by data vendors and intermediaries) and the administrative process. This is not always a simple process for both data providers and data users, but it is necessary and ultimately helps the customer to understand what will be expected. Furthermore, it is necessary to ensure that the provider in question is appropriately compensated and that a level playing field is maintained.

The eligibility process presents a benefit to end-users as it gives users an improved understanding of how the model works and is administered, thus preventing them from unknowingly building up liability. In general, providers and users work on this together. Most providers have a clear policy or guideline in place outlining the eligibility criteria and application process for the purpose of transparency.

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.

FESE agrees that, as per Article 87 of Delegated Regulation (EU) No 2017/565 and Article 9 of Delegated Regulation (EU) No 2017/567, market data providers should provide grounds for the refusal to make display market data available on a per user basis and publish those grounds on their webpage. We would like to point out that the per user model has significant fixed costs and administrative burdens, e.g. due to the need to engage in an approval process to check market data user eligibility and to monitor and net users. Hence, the per user model may be appropriate for only a limited number of market data users.

Furthermore, the per user model requires trading venues offering it to incur excessive administrative costs. From the market data provider's perspective, the per user model significantly increases the administrative burden. Therefore, some market data providers would not be in a position to offer the model to their customers for the reasons outlined above. As such, it makes sense that the guidelines maintain the possibility for some market data providers to not offer the per user model provided that this is done in a transparent way and is justified.

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.

FESE would like to underline that trading venues comply with Article 87 of Delegated Regulation (EU) No 2017/565 and Article 9 of Delegated Regulation (EU) No 2017/567 and provide market data on a per user basis when this model is proportionate to the cost of making market data available.

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

FESE agrees that market data providers should make available the purchase of market data separately from additional services.

Against this background, FESE would like to express that, while the requirements to provide pre-trade and post-trade data in a disaggregated fashion aim to reduce costs for market participants, market data providers have registered very little demand for disaggregated data. This splitting out of data packages by the criteria set out in the legislation drastically increases the number of data products to be offered by trading venues thus increasing both technical and administrative costs. In this context, while accessing selected data might become cheaper, the overall cost of producing and providing market data increases.

Furthermore, there have been complaints from some market data users that market data policies have become too complex, more granular, and difficult to understand. In such a context, it is important to note that the obligation to provide market data in disaggregated formats has inevitably contributed to increasing the complexity and granularity of data fee grids and costs to maintain them. For example, disaggregation is required by asset class, country of issuance, currency, and trading mode on request by customers. Furthermore, while trading venues have borne the costs of implementing these requirements, it is important to note that the benefits will not necessarily flow to market data users unless all key participants in the value chain, including those outside of the regulatory scope, adapt their infrastructure and pricing models to support disaggregation. The vast majority of users source their data indirectly from non-regulated intermediaries and most of those do not support granular data disaggregation. In general, data vendors will only offer unbundled data when it is demanded by their customers. The substantial investment made by trading venues to support data disaggregation is consequently of limited use for most market data users.

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

FESE would like to underline that trading venues comply with the provisions under Article 12 of MiFIR, Article 10 of Delegated Regulation (EU) No 2017/567, and Article 88 of Delegated Regulation (EU) No 2017/565 in relation to the obligation to keep data unbundled.

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.

FESE generally agrees that the provisions on market data transparency defined in Article 89 of Delegated Regulation (EU) No 2017/565 and Article 11 of Delegated Regulation (EU) No 2017/567 would be strengthened with a standardised publication format. Accordingly, FESE's RRTs and BPRs include a template document to harmonise the disclosure of information pursuant to Article 11 of Delegated Regulation (EU) No 2017/567. Such a template would foster the harmonisation of data providers' publication of RCB information. FESE's RRTs and BPRs provide that this MiFID II Transparency form should be published on the website of the trading venue and should be updated when necessary.

FESE does not agree though, with the requirement to provide disclosure by asset classes nor by Operating MIC. A further disaggregation within such information down to the asset class level is not foreseen and would add to costs. FESE does not agree either that the current regulatory requirements are being extended further by ESMA proposing to include additional information on margins.

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?

FESE agrees with the spirit of the standardised publication template set out in Annex I of the Guidelines and the accompanying instructions. FESE's RRTs and BPRs include virtually the same elements regarding the price list and market data content information. However, as explained in our answers for Q2 and Q3, FESE has concerns about the cost account methodology section. We believe that disclosing allocation keys and explanations around the determination of margins could go beyond the scope of the current "transparency plus" approach.

FESE would also underline that including the total market data revenues per operating MIC could present challenges for certain data distributors that operate across various jurisdictions.

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.

FESE generally agrees with the harmonisation of certain contractual terminology. Nevertheless, FESE believes that some of the proposed definitions are impractical, do not sufficiently take into account market data processes and policies and the evolving nature of this industry, and as such are too restrictive. There is also a concern that some of the proposed definitions could go somewhat beyond the transparency plus approach. In contrast, FESE's RRTs and BPRs on contractual terminology propose harmonised reference terms to be used in market data agreements and policies (regarding the relevant parties, the scope of the agreement, and billing and reporting) that would reduce the divergence and complexity of market data agreements and should considerably reduce the burden for market data users.

In relation to the customer, FESE believes this should be the natural and/or legal person who signs the market data agreement with the market data provider and is invoiced for the market data fees. As a customer is not always a natural person, it can also be a legal entity.

FESE supports having different units of count for display and non-display use however it believes that the list that ESMA provides should be non-exhaustive. Prescribing specific units of count for display and non-display use would be impractical considering the value chain, impacting the operations of Exchanges. FESE would note that the approach proposed by ESMA here seems to deviate too much from the transparency plus approach. As an alternative, FESE would suggest defining frequently used units of counts, without prescribing a specific unit of count to be applied to exchanges. This would constitute an important step towards harmonisation of approaches without the disruption that such an exhaustive list would cause. Any efforts that unintentionally prescribe how market data providers can charge market data fees seem to cross the line between the “transparency plus” approach and price regulation for which there is no legal basis.

FESE considers that the proposed definitions for professional and non-professional customers are broad, leaving margins of openness and uncertainty. The definition should contain sufficient objective elements such as the reference to enterprise size and financial holdings, to clearly distinguish non-professional from professional users. Once again, FESE would underline that oversimplification of harmonised terms could be a step in the wrong direction if they are simplified to an extent that they will be difficult to use. FESE would suggest to define a Non-professional User as:

(i) a natural person (a) not accessing, publishing or distributing Information in the course of a trade, business, profession, or other economic activity and (b) not acting as a principal, officer, partner, employee or agent, neither of any business, nor on behalf of any other natural person;

(ii) an undertaking qualifying as a micro-sized enterprise as defined in Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (2003/61/EC), (a) having a general commercial or industrial purpose, (b) holding financial instruments with an aggregate market value of less than EUR 500,000 or the equivalent thereof in another currency, and (c) not performing a regulated financial service or financial activity.

FESE would suggest defining a Professional User as a natural person who is not a non-professional user as outlined above.

In relation to derived data, FESE believes that the proposed definition of derived data would benefit from further clarifications. There is a risk that as currently drafted, the proposed definition would be impractical and not cover all cases. Derived data should be defined as any information or data which is derived in whole or in part from the information and which: cannot be readily reverse-engineered to recreate the information; cannot be used as a substitute or alternative source for the market data; or is not substantially similar to the information.

In relation to historical data, FESE considers that the proposed definition would be too broad. Historical data should be defined as data that is available at the earliest after midnight in the time zone of the market data provider on the day the information was first disseminated by the market data provider. In case of 24-hour trading, historical data should be information that is available 24 hours or more after the time when the information was first disseminated by the market data provider. Furthermore, rather than referring to historical data, FESE strongly suggests that ESMA refers to after midnight data, which is current industry practice, to not confuse market participants or introduce undue complexity. In the market data industry, the notion of historical data is used to refer to specific, often file-based, data products offered by market data providers, including data vendors.

In general, definitions can have a major impact on the operations of market data providers. With this in mind, we strongly believe that FESE or venue-led recommendations would be more effective than the current definitions proposed in these regulatory guidelines. There is a risk that this process is made more political than practical and it is important to ensure that the definitions will be workable for trading venues as harmonisations in this area if they are not thoroughly thought through can have significant impacts on market data processes, policies, and contracts.

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.

FESE considers that the process of identifying and standardising such terms should be decided in close consideration with market data processes and policies. We believe that a number of additional contractual terminology definitions included in FESE's RRTs and BPRs would help reduce complexity and increase consistency and transparency of market data policies. These reference terms would refer to the relevant parties of market data contracts, the scope of the agreement, and billing and reporting, and include but not be limited to the definition of vendor, sub-vendor, subscriber, affiliate, redistribution, data feed, entitlement system, or device.

Above all, FESE would note that the key issue at this stage is to get the definitions to be defined appropriately to avoid inherent ambiguities that would make it more difficult to achieve the desired outcome.

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

FESE agrees that market data providers should have a clear and documented methodology for setting the price of market data. We also consider that the methodology should identify and disclose the costs that are solely attributable to the production and dissemination of market data (i.e. direct costs) and the costs that are shared with other services (i.e. joint costs). In view of this, FESE's RRTs and BPRs include publishing examples of the types of costs that are taken into account to set the price for market data and providing a short description of each cost item. They recommend publishing clear principles according to which direct and variable joint costs are allocated and fixed joint costs are apportioned, between the production and dissemination of market data and other services provided. FESE considers that the disclosure of this information in a template form would fulfil and enhance the ability to comply with Article 11 of Delegated Regulation (EU) No 2017/567 and Article 89 of Delegated Regulation (EU) No 2017/565.

As explained in our answer to Q2, FESE believes, however, that publishing an exhaustive list of all the types of costs included in the fees of market data, explanations around the determination of margins and margin differences, and especially allocation keys for joint costs could go beyond the scope of the current "transparency plus" approach and undermine competition among market data providers.

Moreover, FESE would like to underline that trading venues offer market data on a reasonable commercial basis taking into account the costs for creation and dissemination of the data, in accordance with Article 7 of Delegated Regulation (EU) No 2017/567 and Article 85 of Delegated Regulation (EU) No 2017/565.

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.

FESE considers that publishing examples and descriptions of the types of costs that are taken into account to set the price for market data and principles according to which

direct and variable joint costs are allocated and fixed joint costs are apportioned are sufficient aspects to fulfil and enhance the ability to comply with Article 11 of Delegated Regulation (EU) No 2017/567 and Article 89 of Delegated Regulation (EU) No 2017/565. This scope of information to be published would increase the usability and comparability of the information and is included in FESE's RRTs and BPRs.

FESE is supportive of ESMA in that it pursues the transparency plus approach with a view on seeking more comparability and transparency on market data costs. That being said, it is important to tread carefully in this area since there is a fine line between requirements aimed at increasing transparency and requirements that unintentionally may be of a more intrusive nature and as such are unwarranted. It is important to take care that guidelines in this area do not depart from the transparency plus approach.

FESE would also add that in general, trading venues are willing to provide information on how their cost bases or prices are set to their national regulators. However, FESE would take issue with cost disclosures that would lead to the distribution of commercially sensitive information about costs and how prices have been determined to the public in general, and competitors specifically.

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

FESE agrees 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. FESE's RRTs and BPRs provide more clarity and security on precisely these elements, as well as others (e.g., information on timing, scope of audits, audit periods, keeping relevant records, reasonable objection to auditor, provision of written comments on the result of the audit).

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?

FESE agrees 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. Trading venues have made significant efforts to comply with this obligation and provide the data in a machine-readable format that can be understood by an average reader, pursuant to Article 13 MiFIR and Article 14 of the Delegated Regulation (EU) No 2017/571.

As a general remark, FESE appreciates ESMA's effort to establish the guidelines in regard to making market data available for free to the public 15 minutes after publication. Clarifications are indeed necessary in this respect since changing, or contradictory, Q&As do not facilitate the implementation of these requirements. FESE also agrees with ESMA that, for pre-trade data publication, the delayed data should not include more than one current best bid and offer, given the high volume of data at the order level and the limited added value for market data users. For pre-trade data, FESE believes that a snapshot approach is much more useful for the average user than a full file service and would work better due to the nature of the data.

FESE considers, however, that the requirement to make delayed data available for more than 24 hours is disproportionate and strongly suggests limiting the availability of data to the whole trading day. Feedback received suggests that national competent authorities also subscribe to this logic. The requirement to make delayed data available for more than 24 hours would require additional investments in the development of such solutions, while such change is difficult to justify considering the limited added value to users of those

few extra hours. This would place an additional burden on those exchanges that have already implemented a solution to make data available for 24 hours with significant costs. FESE agrees with ESMA that, in the case of 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. At the same time, FESE is of the view that OTC, SI, and trading venue data should reach the same level of quality in post-trade reporting in order to be easily consolidated as per the MIFID II / MIFIR objective and level the playing field. While APAs do provide value as regards standardisation and aggregation of data, and usually have comprehensive data quality checks in place, they cannot prevent all data quality issues once they occur directly at the source. The current trade flags for trading venue executions are fully consistent but issues can be observed with trade categorisation of OTC and SI trade reports. For instance, some SI and OTC trade reports contain errors such as reporting off-venue trades as on-venue and fail to state the nominal value of a trade or are simply duplicates.¹

In order to address these issues, FESE considers that all trading, execution, and reporting venues should be required to adopt a harmonised set of trade reporting standards, such as the industry-led Market Model Typology (MMT) model. MMT is an operational solution that effectively supports trade flagging requirements raised in RTS 1 and RTS 2 and which is fully protocol-agnostic. FESE believes that it is necessary to look at a broader implementation of MMT as part of a joint industry and regulatory course of action to enhance SI and OTC data quality and would support further ESMA guidance on standards in this area. However, it needs to be understood as well that the application of MMT alone will not solve the problem of inferior OTC and SI data quality, rather MMT is one step in the direction of improved data quality.

Flags are a useful element of publication in the case of post-trade data. However, it does not make sense to include this in Level 3 guidelines given that the flagging of trades is neither mandatory nor harmonized. Flags would present value in a scenario where 100% of data sources use the same trade flagging mechanism. This is unfortunately not the case for the time being. FESE believes that trade flagging should be part of a separate discussion.

¹ See also ESMA, “MiFID II/ MiFIR Review Report on the Transparency Regime for Equity and Equity-like Instruments, the Double Volume Cap Mechanism and the Trading Obligation for Shares” (Paris, 2020).

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?

CSV files are an appropriate format for the provision of the post-trade data since they can be read by a lot of users using free of charge, open-source software. For the pre-trade delayed data, FESE believes that a snapshot display service would work better due to the nature of the data.

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

FESE disagrees with the definitions of data redistribution and value-added services in Guideline 16 as those should not be the only situations where it appears justified that data providers can charge for their data provision. More concretely, FESE disagrees with limiting the definition of value-added services to those activities where a product created on the basis of delayed data is sold for a fee. This definition would exclude, for example, commercial value-added services like advertising. FESE believes that this guideline does

not reflect the full reality with respect to the commercialisation of data. Technological giants and news websites, for example, can commercialise delayed market data by using it to attract users to their platforms. They derive revenues from advertisements viewed or by selling data to the users of their solutions. There is, in addition, a business case to capture granular historical tick data, normalise it on a cross-market basis, and resell this value-added product to large financial institutions. Normalisation of granular tick data is not aggregation, but it is a clear value-added service that can be sold at a premium. In reality, commercialisation of delayed data will not just occur through fees charged and is not limited to the aggregation of delayed data. Therefore, this guideline should capture any form of commercialisation of delayed data for external purposes and acknowledge that non-traditional models for the commercialisation of delayed data exist alongside more traditional models.

FESE believes that the Guidelines should also ensure the capability of trading venues to monitor users accessing market data in order to verify that they do not redistribute the data. In order to monitor, track, and control the use of delayed data and allow that the use for commercial purposes can be identified, trading venues generally need to have a minimum degree of interaction with users. This is consistent with the spirit of Guideline 14. Control of data access should not be prohibited since it would have the effect of creating an unlevel playing field between data sources and those redistributing the data on a commercial basis.

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

FESE would like to remark that, as a follow-up to the MiFID II/MiFIR Review Report No. 1, a survey of potential areas where harmonisation of certain contractual terms could be envisaged taking into account competition compliance requirements was conducted. The responses to the survey, which were provided by FESE members on a confidential basis to a law firm, have allowed for the identification of the RRTs and BPRs put forward by FESE. In line with ESMA's findings and proposals, the following areas are covered in the RRTs and BPRs annexed to this response:

- Contractual terminology and procedures: proposals for harmonised reference terms to be used in market data licensing agreements and policies; and best practice recommendations to harmonise certain procedural aspects for the provision of market data;
- MIFID transparency obligations: a template document to harmonise the disclosure of information;
- Audit policies: best practice recommendations to harmonise audit policies which could, at a later stage, serve as a basis for an industry-wide code of conduct.

The proposed RRTs and BPRs address the key concerns identified in the MiFID II/MiFIR Review Report No. 1 as well as the Consultation Paper and provide concrete benefits to data users:

- The RRTs and BPRs reduce complexity of market data policies by providing harmonised terms and practices;
- The RRTs and BPRs increase consistency of market data policies by providing clear definitions and terminology that can contribute to convergent practices;
- The BPRs increase transparency and accessibility by providing standardized formats and procedures which enhance the availability and accessibility of information;
- The BPRs provide procedural and information rights to data users which facilitates audit procedures.

Importantly, in addition to the areas raised in the MiFID II/MiFIR Review Report No. 1 and the Consultation Paper, this opportunity was also used to explore a harmonised approach on audit policies which could further benefit data users.

The RRTs and BPRs put forward by FESE aim to strike a delicate balance between sufficiently diverse commercial practices allowing for innovation and flexibility, on the one hand, and consistency and transparency for data users on the other. The reference terms are not intended to be legally binding but seek to offer market data users a transparent and coherent framework.

In order to prevent the rapid obsolescence of the RRTs and BPRs, FESE believes that these should be subject to periodic revision in light of technological advancements and business practices. This format of best practices would also allow for an efficient and flexible review and adaptation to new issues or changed practices compared to a legislative or quasi-legislative process.

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.

N/A