Frankfurt am Main,
11 January 2021

BVI`s position on the ESMA Consultation for Guidelines on the MiFID II/MiFIR obligations on market data

We[1] strongly support the ESMA initiative as further guidance is needed to ensure compliance by the regulated market data providers (trading venues, APA ad SI) with the existing regulatory requirements under MIFIDII/MiFIR (collectively referred to as "MIFID"). ESMA documented the need for guidelines in the Final Review Report (ESMA Report) earlier this year.

We strongly agree with the conclusions in the ESMA Report that there is an overall need to strengthen the applicable cost regulation in connection with the MiFIDII/MiFIR review. We would welcome that a change of the proposed guidelines into binding laws and further strengthening of the MiFID level 1 and level 2 measures in view of establishing a valid cost-based approach for market data procurement. Furthermore, we strongly encourage increased supervision by the NCAs under a ESMA harmonized approach to ensure consistency in supervision and enforcement, also of the proposed guidelines.

Overall, we need to ensure that the Guidelines (GL) increase competition, especially between the main price data sources, e.g. the primary exchanges (Regulated Markets (RMs)) and other trading venues because RMs enjoy of their listing capacity also a (reference) price market data monopoly over other trading venues (MTF, SI). Furthermore, many value added data service competitors need listing venue prices as the basis for their products, such as index providers. Such licenses are questionable because there is no increased cost of production for the RMs to provide data which is used to produce value added services instead of using the data for trading. License requests for the reuse of data should be viewed in any case with suspicion because the IP rights usually claimed by regulated market data providers (MDP) under MIFID do per se not exist for simple data such as prices and associated market data.

Also the European database regulation does not change this situation as the protections are limited to the level of the first user. The regulated data provider therefore usually creates artificially IP rights on simple data such as prices through contracts. However, monopolistic data providers should not be allowed by regulation to create data license contracts which users would not conclude in a competitive market. This dominant position of certain market data providers is clearly visible as a number of small exchanges are not able or only on a very limited basis to charge fees for their market data offerings. Although smaller exchanges such as Madrid, Vienna or Warsaw exchange become increasingly aware of their dominant position in a few selected reference price instruments also traded by SIs and on MTF, and implement expensive SI and MTF data licenses accordingly.

1

Additionally, the strong position of Market Data Distributors (MMD) also referred to as data vendors, needs at least NOT be reinforced by the GLs. Their pricing on MIFID regulated price feeds should also be limited to charging an at cost plus reasonable margin for the technical passing through of the MD providers feeds to the customer base. Exchange groups should not be allowed to escape MiFID based market data cost rules through outsourcing or distribution agreements with MDDs, especially not within

[1] BVI represents the interests of the German fund industry at national and international level. The association promotes sensible regulation of the fund business as well as fair competition vis-à-vis policy makers and regulators. Asset Managers act as trustees in the sole interest of the investor and are subject to strict regulation. Funds match funding investors and the capital demands of companies and governments, thus fulfilling an important macro-economic function. BVI's 113 members manage assets more than 3.6 trillion euros for retail investors, insurance companies, pension and retirement schemes, banks, churches and foundations. With a share of 27%, Germany represents the largest fund market in the EU. BVI's ID number in the EU Transparency Register is 96816064173-47. For more information, please visit www.bvi.de/en.

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the group. This danger is manifest in the recent LSE and Refinitiv merger which vertically integrates a regulated market data provider, a benchmark administrator, and a MDD group.

The GLs need ensure at a minimum that the market data providers under MIFID are required that their contracts with unregulated MDD insure that the same MIFID product as provided directly by the regulated MD provider is provided by the MDD.

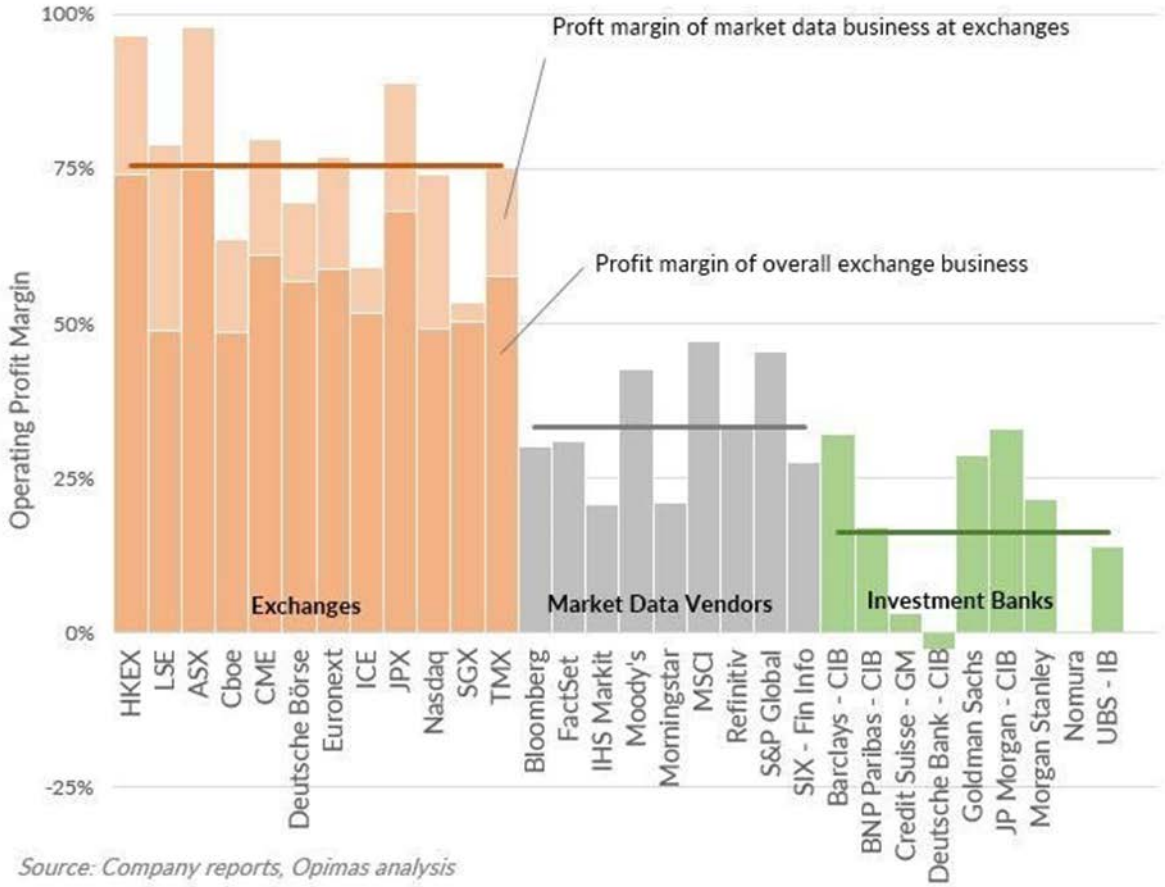
Beyond the proposed Guidelines ESMA should support level 2 regulation in the Delegated Regulation 2017/567, Art. 7 and Delegated Regulation 2017/565, Art. 85, to address the most significant shortcomings of the MIFID market data price setting mechanism (RCB) which is the lack of a cost benchmark. Without a clear cost benchmark in place, regulated market data providers will continue to include as much as possible all trading venue operating cost in their calculation of market data cost.

Furthermore, without a cost benchmark it is not easy to compare market data cost between venues and it is also not possible for NCAs to ensure enforcement of the cost-based regulation. In this respect, we support both the IEX report, which contains the needed information on relevant costs as a blueprint for EU trading venue market data production cost disclosure, and the Copenhagen Economics Guidelines on the creation of a cost benchmark within the present MiFID regulatory framework.

In sum, we welcome the guidelines and any changes to the applicable supervisory laws that are needed to

- close gaps in the existing MiFID legislations
- achieve a coherent regulation and supervision in the EU of financial market data cost and
- impose efficient cost, price and license transparency rules across the different market data providers.

The graph below clearly shows that major listing venue/exchanges enjoy a 75% operating profit margin on market data, which is indicative of a concentrated market without competition, and certainly does not evidence cost based RCB pricing.



Source: Company reports, Opimas analysis

The graph below clearly show that exchanges have a much better performance as compared with the FTSE ALL-WORLD INDEX PERFORMANCE since August 2001.

Source: Mondo Visione

We would like to make the following specific comments:

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

Given the dominant position of many market data providers the Guidelines should also cover the market data providers offering market data free of charge for the requirements not explicitly exempted in the Level 2 requirements. In this context we reject, that ESMA maintains the position that 15 mins delayed data which should by the wording of MiFID free of charge can be subject to distribution licenses and user count. Such interpretation is contrary to MiFIR, Art. 13 and MiFID II, Art. 64 and Art. 65. We believe that based on the wording of the law that delayed data free of charge should not subject to a specific time constraint, such as 24 hours. There is no room for end-of-day and/or historical data licensing.

The Guidelines should also to the extent possible cover both regulated market data providers (MDP)- as defined on p. 5 of the Draft Guidelines (DGL)) as well unregulated MDDs by requiring MDP to include in their contracts with MDDs only such provisions that are in line with the MIFID requirements applicable directly to MDP. In this way including vendors in scope for this regulation could be achieved without a change of MiFID Level 1.

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

We support more stringent requirements for methodology setting, transparency and review. As for the content of the guideline 1, we welcome the elaboration of present requirements of provision of market data based on costs as stipulated in Delegated Regulation 2017/567, Art. 7 and Delegated Regulation 2017/565, Art. 85. The methodology setting and review process should include a public consultation

mechanism and a feedback statement as it is the case for CRA methodology changes under CRAR (Draft Guidelines DGL, p.8). The methodology on cost needs to be stringently enforced as most exchanges (regulated markets -RM) currently seem to operate a pricing system based on the "customer use of data value" and not a pricing mechanism based on the cost of production of MD as foreseen by MiFID. Therefore, a reference to a cost benchmark (LRIC+) agreed by the industry and the NCAs as proposed by the Copenhagen Economics should be included in the GLs.

Also a detailed cost report per product/service should be required based on the IEX exchange market data cost report example (cf. FN9 of the GL report). The definition of the four cost categories (DGL p. 8) as well as the minimum requirements for justification of costs is welcome. However, this needs to be reviewed in detail to make sure that regulated market data exchanges do not attribute to much of the general cost of the trading system and IT to data production cost.

We also disagree with the existing provision which allows the trading venues to include "an appropriate share of joint costs" when determining the market data prices as market data is a by-product of the trading activities – not a joint product. As orders in financial instruments are supplied and placed by the market participants via bids and asks and executed in the market, market data (pre- and post-trade data) is automatically produced. This implies that the marginal costs of producing market data is close to zero and the incremental cost of production is related to collecting the information and distributing the price feeds to users. These limited costs of production are clearly shown in the IEX report.

ESMA should strongly support that the provision to include joint costs in the calculation of market data production cost is removed in the MiFIDII/MiFIR review expected in 4Q2021.

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.

We believe that a uniform and consistent compliance requires to specify the cost that may be included in the calculation of the market data fee as they are defined and elaborated in Chapter 2 of the Copenhagen Economics guideline.

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.

The audit DGL are welcome (DGL p.9). We applaud that ESMA notes that overly onerous audit practices result in the generation of additional revenues on the basis of non-compliance or the inability by the customer to prove compliance with the terms and conditions of the license should be excluded.

The GLs should clearly be strengthened by requiring that general audit procedures set by the MDP need to be consulted prior with the market and be approved by the NCAs ((as part of their responsibility to ensure cost based pricing) before such audit rules are used for the first time by the users (e.g. Buy-Side- firms). All audit rights and obligations need to be reciprocal, and the burden of proof of misconduct of the data user must sit with the MDP.

Furthermore, we have the following specific observations:

- A limitation of the audit period (called Audit Term). This should not be longer than the shorter of the time from the closure of the latest audit or three (3) years. This should encourage MDPs to

make the market data policy as clear and understandable as possible and the MDPs will also strive to ensure that these terms are correctly understood by the data users.

- Audit periods and rights need to be the same on both sides. At present, data users can usually not claw back overpaid license fees for more than 60-90 days from the time of the audit, whereas several MDPs venues can claw back revenues from underlicensed users in some case up to 10 years.
- Prior to the commencement of any audit it shall be the obligation of the MDP to make available to the auditee all applicable versions of contracts, terms and policies for the audit term.
- The audited party shall have a right to postpone the audit twice for three months after having received the MDPs request for an audit in order to enable the data user firm to prepare for the audit in a planned way.
- The audited party shall have a "Right of First Refusal" to the auditor, e.g. if the MDP has delegated the audit to a third party firm as is often the case. More generally, the auditee should be allowed to refuse the audit process as proposed by the MDP, if the audited party in a reasonable manner can identify elements that needs a separate resolution prior to the commencement of an audit.
- Any "Conflict of Interest" with the (third party) auditor shall be disclosed to the audited party. Including but not limited to; employment status and/or compensations based on audit claim size.

Furthermore, the MDP should be encouraged in the GLs to engage in an ongoing dialogue with their data user clients ("business review") regarding the understanding of the MDP market data policies and pricelists to avoid ex-ante situations of apparent underlicensing.

This business review dialogue between MDP and data user (e.g. Buy-Side firms) should remain voluntary and should not lead to new a contractual information rights created under the NCA approved general market data agreement in terms of data usage declarations (DUD), statements of use (SOU) or similar contractual documents. Such documents usually are not targeted to find out more about the users concrete data needs but aim at getting a holistic picture of all the business activities of the user, in view of obtaining a competitive advantage over other MDP and MDD and to enable cross-selling opportunities for other MDP, MDD or index data providers within the group, e.g. STOXX and Qontigo with Deutsche Börse group or FTSE/Russell, Turquoise, and Refinitiv within LSE group.

The new DUD of Deutsche Börse dated July 2020 is a case at point which inter alia asks questions on the systematic internaliser and index offerings of the data user firm. Such DUD is clearly anti-competitive as it enables the MDP to get information on its clients which would not be revealed in an at arms-length competitive situation.

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.

Audits contribute to higher cost of market data because of the lack of concise and easy to understand market data policies. The MDP/auditor is able to fix the meaning of the contract during the audit process. The user is under pressure because of the looming risks of premature termination of the MDP contract and subsequent business interruption, or of a clawback of supposedly unpaid fees for many back years. The user is therefore more likely to accept a renegotiated market data agreement at a somewhat higher price to avoid a too high audit bills.

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.

DGL 3 for customer categorization seems acceptable, although it is created fairly general. Overall differentiation of database use (non-display licenses) vs. human interface (display licenses) is weak and may need to be revisited in ESMA FAQs. A categorization of customers based on venue and discrimination of competing venues (MTF, OTF, SI) or business (e.g. index production) should be expressly discouraged as these client differentiations are not based on cost of production and delivery of MDP services but only on the value creation outside trading by the user, which is not recognised by MiFID.

As RM's are by nature of their listing monopoly also monopolies in the provision of their own market data, we believe that to provide data on a reasonable commercial basis, market data fees should have a strong relation to the cost of the production of the data. The existence of monopolies at the data source level is not an issue but the abuse of a dominant position by those monopolies is the problem faced by the data user community whether large or small. The issues that face market participants with respect to dominant regulated trading venues are:

- driving up the costs of MD in a way not clearly linked to their costs of supply.
- imposing restrictions on what downstream use can be made of MD without further payments. For example many trading venues, including the London Stock Exchange, Borsa Italiana and Wiener Börse, currently charge market participants new separate "created works" or "derived data" licenses based on use of trading venue data to create (e.g., through mathematical or other manipulations or processes) new data. RM's clearly do not have any production costs associated with a market participant's created works/derived data uses and, accordingly, we do not think such licenses meet the reasonable commercial basis test under MiFIR.
- creating a significant bureaucracy and cost around data licensing through multitiered licensing with variations by dataset without standardisation between vendors.

The existence of monopolies combined with the regulatory mandates (e.g. Best Execution and regulatory MiFIR transaction reporting) means that market participants have little or no leverage in negotiations with regulated trading venues, and in fact trading venues usually argue they are not able to negotiate bilaterally with market participants because of the FRAND principle in MIFID.

MDDs and other data vendors usually do not protect the end-user client through data source authorisation but enforce their policies without due consideration of the impact on the clients after an alleged incident or the claims of data sources such as EU-MDP and other exchanges, rating agencies or the CUSIP service. For example, Bloomberg routinely threatens clients with US-ISIN data of cut-off at the request of S&P without requiring any check or proof of insufficient licensing.

In the absence of market power impacting RTV practices, regulators and policymakers need to intervene to ensure the desired benefits. The negative impacts of the data monopolies clearly call for detailed regulation of the dominant position-backed activities and oversight on these entities.

Therefore, the behaviour of the data monopolies or oligopolies is facing increased scrutiny also by the competition authorities, imcluding BaFin, Hessische Börsenaufsicht, FCA, US-SEC, and IOSCO to mention a few current examples.

Most recently it was reported that DG Competition is looking into the market data offerings of both for Nasdaq and BME. The additional competition authority involvement is important as on the consumer side the market is inelastic as the Buy-Side cannot simply reduce data consumption in response to price increases, while the MDP supply side enjoys a monopoly position.

As a result, we support 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. We encourage to limit the client categories to only two, i.e. professional and non-professional as lack of standardization complicates conditions for market data usage unnecessarily and increases costs. Allowing MDPs to further differentiate between clients as this contradicts with the requirements to base market data prices on costs and not on inelastic demand or the possibility of "value creation".

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.

DGL 4 for multiple product/service customer categorization seems acceptable, although fairly general and may need to be revisited in ESMA FAQs. The fact that data consumers have to pay multiple use-case times for the same piece of data point does not correspond to an increase in the cost of production for the market data provider or unregulated MDD and, hence, should not constitute a higher cost for the consumer.

Overall differentiation of criteria to avoid charging more than once by applying one customer category only are needed, especially when it comes to database use (non-display licenses) vs. human interface (display licenses). Are these one client (the asset management firm or bank) or several clients (1 for "x" number of databases/applications plus "y" number of employees with access to data)?

Market data providers therefore need to clarify in their market data policy how fees are applied when a customer potentially belongs to more than one customer category when the customer use data simultaneously in several applications or units. In this case, market data providers should charge only once by applying one customer category only, and in line with the requirements to base market data prices on cost.

The current classification of data usage applied by MDPs, however, is more often based on use cases (for example risk management, fund valuation, or trading), and therefore contradicts the requirement to base market data prices on costs (Section 4, no. 22). Secondly, the division of use-cases or customer activities are not defined in a consistent way across vendors. This is one reason for the lack of transparency how market data license prices are determined.

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

DGL 5 for technical arrangements customer categorization seems acceptable, although fairly general and may need to be revisited in future ESMA FAQs. When different customers fall within the same category the same terms and conditions apply, including the same technical arrangements. Overall differentiation of criteria to avoid charging more than once by applying only one customer "technical arrangements" category only may be needed, especially when it comes to database use (non-display licenses) vs. human interface (display licenses). Are this one client (e.g. real-time use) or several clients (1 for real-time, 1x for delayed, 1x for historical, 1x for end of day data, etc -cf. DGL p.9)?

Market data providers should ensure that practices in terms of such technical arrangements, including latency and connectivity, are non-discriminatory, while respecting the principle of being based on cost and not demand or the potential for "value creation".

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

Any market data license cost should in principle be based only on the incremental/marginal cost of providing and distributing a given data service. Specifically:

- MD providers should be required in principle to set fees only based on the cost recovery principle as for example specified in the Copenhagen Economics guidelines, and /or the Financial Stability Board (FSB) principles for cost charging for (LEI) reference data.
- Unlike in MiFID today, the MDP or MDD/vendor should only be able to charge the incremental cost which originates from additional effort of the vendor to provide and distribute the data product or service to a (new) client. In reverse, the data provider/MDD should not be allowed to charge the cost of other business operations not directly related to data production and distribution on the user without any check on the adequacy of such cost. For example, a regulated trading venue should not be allowed to charge the cost of operation of the trading systems and general exchange overhead expenditure as part of the market data costs. We support the idea of exploring cost based revenue caps as the most efficient and easy to implement measure.
- In the context of a principally cost recovery based pricing of MD the data sources and MDD's may be allowed to charge a reasonable (inflation adjustment based) profit margin e.g. for provision of price feeds under MIFID. In addition, prices increase should also be framed to ensure that they are not excessive.

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.

DGL 6 for display data (human interface) which provides as units of count the "Active user ID" instead of multiple data product licenses seems acceptable, although still general, and may need to be revisited in future ESMA FAQs. Please be aware that per user model is only relevant for access to real time data. We support that market data providers should for display data use as a unit of count the "Active User-ID" that enables customers to pay according to the number of active users accessing the data, rather than per device or data product.

The per user model should enable customers to avoid multiple billings in the case market data has been sourced through multiple data products or subscriptions. We therefore suggest to amend the definition of "Active User-ID" in para 55. Active User-ID should be understood as users who actually uses the data and not all users who may only have access to such data. Such definition would ensure a reasonable and fair baseline for the cost-based approach.

In order to reduce disputes on license fees, supervisory agencies (ESMA and NCA's) and users should receive meaningful written information which enables the reader to recalculate the true costs based on the applicable pricing methods, including cost calculation methods as well as the guidelines on the

allocation of fixed and variable cost, including the cost of third parties, of the provision and distribution of MD offerings.

Today, for example, the cost information obligation made available currently by exchanges under Art 11e and Recital 5 MiFIR Supplementary Regulation (EU) 2017/567 often is limited to restating the text of the law. In contrast the market data cost report of the US based IEX trading venue details all market data cost incurred and charged by this exchange. The IEX report could serve as a benchmark for developing EU market data cost transparency standards, as is suggested by Copenhagen Economics.

Secondly, the adherence to the cost recovery principle should be explained in writing by the MDP and other data vendor and be approved by the statutory auditor of the company. As is the case in the LEI system overcharged profits in principle should be paid back to the users.

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?

The DGL 7 for display data (human interface; e.g how to count the “Active user ID) seems acceptable, although fairly general and may need to be revisited in future ESMA FAQs.

There may be a need to clarify the use of real time intermediate database use (non-display licenses) to provide finally human interface (display licenses to end clients). Furthermore, market data providers should ensure the conditions to be qualified as eligible for the per user model require only what is necessary to make the per user model feasible. In particular, eligibility conditions should mean i) the customer is able to identify correctly the number of active users who have access to the data within the organisation and ii) the customer reports to the market data provider show the number of active users.

The ultimate number of end users (clients or employees) sometimes cannot be checked (e.g. the Bloomberg terminal only allows checking of the general user ID (SID) and not the user ID of the individual looking at the screen (UUID)). Website visitors anyway may not be identified individually because of GDPR. Therefore, we need an estimation possibility to come up with a reasonable number of users which is also valid for audit purposes. Furthermore, there should be a single standardized approach which is recognized and used by all marked data providers to ease the administrative burden considerably.

Ideally, there should be only a single application for all market data providers as the present application procedure is extremely difficult and time consuming and different between the various MDPs. By encouraging standardization an unnecessary complex due diligence process could be avoided. At present many firms which potentially could benefit from a single user model would refrain from even trying due to the initial additional setup burden.

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.

DGL 8 for display data (human interface) provides for rules not to apply how to count the “Active user ID seems rather weak.

Not applying a unit of count should be the exception, and not the “new normal” (cf. DGL p.10). When market data providers do not offer the per User model to customers, and when they disclose the reasons which make the adoption of the model disproportionate to the cost of making the data available, market data providers should indicate the specific features of their business model which make the adoption of the per user model disproportionate and why these make the adoption of the model unfeasible. The factors could include justification of excessive administrative costs. It is important that the reasons for a refusal to offer per user model are well documented and reviewed by the NCA.

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.

ESMA should define requirement/factors which ensure consistency when MDP and MDD do not apply the per User model. If not, we could end up in a situation where each market data provider comes up with their own definition/reason for why their business model does not need to adopt the per user model.

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

The data unbundling DGL 9 is welcome (DGL p.10). Market data providers should always inform customers that the purchase of market data is available separately from additional services. Market data providers should not condition the purchase of market data upon additional services. RMs should not be allowed to offer discounts on additional services to obtain MD licenses at regular prices. Additional services, e.g. index products, should be offered by separate companies (DGL p.10).

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

ESMA should to clarify the definition of “unbundled”. Does unbundling only concern for example data and technical platforms usage? Or does unbundling also concern different data types, say bundling of USD and EUR swap data?

Fragmentation of licenses for the use of market data occurs when an area of usage of market data, which was covered by one license in one year, requires two or multiple licenses in the following year.

Alternatively, when a new license is introduced for an area of usage of market data, which previously did not require a license at all. In both cases, the license fragmentation (slicing and dicing) allows the market data providers to raise the total costs of the use of market data for the investment firms, without necessarily raising any existing license fee, by either splitting an existing license fee into two or multiple license fees, or by introducing new license fees altogether.

Market data providers may argue that their practice of splitting existing licenses or introducing new licenses is unbundling rather than fragmentation. Specifically, they may argue that they are making their system of licenses more use-case specific, i.e. aimed specifically at the needs of particular investment firms, which should result in cheaper licenses for those specific use-cases.

But the market data providers are, in fact, fragmenting licenses by ensuring that each use-case requires a new license. Hence, there are rarely, if ever, any intention by the market data providers to provide cheaper use-case specific licenses through unbundling. Rather, the intention was to increase revenue

through fragmentation, for example by requiring a separate trading room risk management license besides the license for the trading room (and independent of any license for general riks management purposes). As stated above, unbundeling of product and service licenses should not be based on usage cases based the possibility of value creation by the data user, such as e.g. index production besides trading, but be based strictly on the user count.

However, also the bundling of both required (real time or historical "raw" prices) and not needed data (e.g trade price analytics) should be avoided or at least optional and require explicit justification as it makes pricing and price development of the individual products opaque. Each product should always have a specific unbundled cost disclosure for the sake of transparency. In this context it is relevant for the authorities to ensure that the price of such bundled data does not exceed the price of the sum of the unbundled data included in the bundled dataset. In short, measures should be made to ensure that unbundling does not lead to increased profit.

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.

The data standardised publication format DGL 10 is welcome (DGL p.11), including a separate description of margin calculation. We do not support the part, starting with: *"When market data providers use other criteria (e.g. level) to distinguish the type of licenses (other than professional/non-professional) or data product (other than display/non-display data), they should provide a definition of these criteria in the market data policy or price list."*

Standardization is crucial to facilitate transparency and comparability. Other criteria should not be allowed. Additional definitions may be allowed in the market data policies and price lists (Guideline 11, not Guideline 10) if properly defined with an explanation of why these additional definitions are needed and for which purpose. However, details of the template (Annex I, p. 14) need to be revisited in future ESMA FAQs.

We strongly oppose the fact that market data providers are not required to disclose the actual cost for producing or disseminating market data or the actual level of the margin. If this information is only available to NCAs we expect a public detailed report by the respective NCA detailing that and how the MD provider has fulfilled the various MIFID obligations.

Without access to this information data users cannot negotiate prices, licenses or engage in meaningful audits. We also urge simplification of the pricelists in accordance with the proposed guideline 11 and our comments below. Any changes in products must be thoroughly explained in the pricelists and market data policy. Furthermore, we call for an extension of guideline 10 as it should be a requirement to publish pricelists for at least the past 5 years (and preferably longer) as well as pricelists based on multiyear comparisons.

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?

We call for detailing of Appendix 1 with a requirement of publication of pricelist from at least the past 5 years (and preferably longer) as well as pricelists based on multiyear comparisons including explanations for changes in products.

Furthermore, with a reference to our comments to guideline 12 below, we strongly oppose the rather vague requirements on the cost accounting methodology. More detailed requirements are necessary: When IEX can do a full market data cost of production transparency report, all other trading venues can too.

Actual costs must be disclosed as well as the level of margin included. A detailed definition of what is included in the market data revenue is necessary. In order to verify effects of unbundling, the revenue should be split per fee type. This will not reveal sensitive information as there is little to no competition between the exchanges (you cannot buy a license for Nasdaq data at the Deutsche Börse).

Similar on the cost side - each license fee must be justified by the incremental cost of offering such a license.

It is unclear if the proposed standards will enable the reader to calculate total profits from Market data (revenue – cost), which must be a requirement. We urge ESMA to prepare a standardized definition of market data revenue to enable comparison.

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

We support the proposed definitions in Guideline 11 with the comment that it would be operationally easier if the pro/non-pro user definition matches the definition of MiFIDII/MiFIR or to refine the definition of Professional Customer in order to avoid a misunderstanding. “Professional Customer” should mean a customer who uses market data to carry out a regulated service or a regulated investment activity or a regulated service for third parties.”

Having a non-standard definition means that for each end user, an investment firm needs to keep a category and furthermore explain this to the user. This is inappropriate when there already are regulated categorisations (retail, professional, eligible counterparties) under MiFIDII/MiFIR which define the sophistication of the user. Should the option to require MiFIDII/MiFIR categorisation be discarded, then there is an urgent need to refine the definition of Professional Customer in order to avoid misunderstanding going forward.

Furthermore, it is important to be more specific to the definition of data and to include “Usage” (for example Non-Display Usage and not only Non-Display) for all definitions in order to make it workable towards the market data providers’ policies and price lists.

For Display Usage it is important to add to the present proposal that Display Usage of data is applicable to both snapshot and streaming of market data as this is not clear from the present definition.

Also it is important to clarify in relation to Non-Display Usage of data, it is important to add that it is only applicable to real time streaming data. Non-Display Fees can only be charged as an enterprise-wide license, and not on a per use case purpose.

There is also missing a definition of “Original Work”, which is unique data created in a way where it cannot be reverse- engineered back to the MDP market data used in the production process and do not materially replace the MDP market data.

Finally, we do not support that market data providers may use Derived Data licenses as this content is already included in the Non-Display Usage. Derived data is a good example of a fragmentation. It is not possible to derive a value without using an application. The application attracts a non-display license and most likely also a Display license a s user needs to monitor the data flow. The MDP does not incur additional cost from the fact that an output is produced from the usage.

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.

Please see Q. 18 above.

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

We do not agree with the requirement to publish verbal explanations only. When IEX can provide detailed explanation with actual figures as they have done in their report, EU based MDPs should also publish such information. We cannot support that market data providers are not required to disclose actual costs of producing and or disseminating market data or the actual level of the margin to the public.

We understand that the MDPs argue that some of the information is “commercially sensitive”. We do not agree – there is nothing sensitive in publishing such information for non-competing, unique products such as market data. Also MDP is a regulated business and therefore commercial considerations only come second.

At a minimum, the information provided on costs and margin should enable users to understand how the price for market data was set and compare the methodologies of different market data providers.

Also, here a cost benchmark is highly relevant to allow the MDP to demonstrate compliance with the requirements. A benchmark would also support a movement towards a reasonable cost basis: When an MDP includes unreasonable costs, it would be revealed in the cost benchmark and be subject to further scrutiny.

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 Q1-3 above, including the Copenhagen Economics guideline to a cost benchmark.

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

The audit practice disclosure DGL 13 is welcome (DGL p.11). However, our comments above (DGL 2) apply too. MD providers use audits regularly as a third revenue source besides price hikes and license proliferation across each party in the value chain of asset management. 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 (e.g. frequency) and how customers are expected to demonstrate their compliance with the market data agreement.

Overall, we support a simpler approach where long declarations are not needed as well as a move away from complex use case licenses. A user firm should be licensed once for its active users and for streaming real time data to an application.

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

The data access and content DGL 14 is welcome (DGL p.12). Details need to be revisited, e.g. why is registration of delayed data users required, if the data is for free after 15 min. We support the present requirement for pre- and post-trade data publication as specified in RTS 1 and RTS 2.

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?

The data format and availability DGL 15 is welcome (DGL p.12). Details need to be revisited with future ESMA FAQs. Pre- and Post-trade compliance could be done on (15min) delayed data without much issue. The format in this case (if by individual feed or a consolidated tape) is of little concern. We also propose the following use case categories relevant to us:

- Fund valuation
- Advisory analytics
- Research
- Risk monitoring
- Reporting incl. regulatory
- Counterparty risk calculation, Best ex and Market Abuse monitoring

However, we disagree completely that the data is available only for a limited (“sufficient”) time period. The law is clear – data is free after 15 minutes. There is no legal room for end-of-day and historical data licensing. Data needs to be really fee and license free after 15 minutes.

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

The data redistribution and value added DGL 16 is welcome (DGL p.12). We do not support the ESMA stance that 15 mins delayed data which should be free of charge - can be subject to distribution licenses and user count. Such interpretation is in contradiction with MiFIR, Art. 13, MiFID II, Art. 64 and Art. 65, where is it clearly stated that market data must free of charge after 15 minutes. Therefore , no data re-distribution fees may apply at all in case of delayed data (all data after 15min). Also reuse in form of passing on of such data is always free for the down streamed direct data. In case of MD use downstream to create value-added products (e.g. indices) these historical data use case should be also fee and license free. Because no IP rights for simple (delayed) data exist under EU and international laws, and because the European database regulation limited the protections of the database provider to the level of the first user, the EU database MD provider may at best charge a cost based license only to the first level user of the MD provider products who produces value-added data.

Finally, we strongly encourage ESMA to revisit its permission allowing distribution licenses as well a user count. In this context, we also strongly disagree with the proposal to only allow the “free of charge data” to be available for a limited period of time. There is no legal room for any licensing or registration, including additional end-of-day and historical data licensing.

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

Missing are GL for pricelists, in particular availability of historic price lists, as well as pricelists based on multiyear comparisons, to allow to see price and product or service changes between the current year and the past year(s). The simplification of price list e.g. with the proposed user definition is welcome.

Finally, all NCAs should be encouraged to apply the GLs (para 10,11, p.6 draft GL).

Date users are currently not informed about the results of enforcement actions of the existing regulatory MD requirements, we believe therefore, that there need to be minimum requirements on the documentation the NCAs shall collect and review. The GLs should also allow for a detailed NCA information reports to users on each MDP at approximately the same level of content as the IEX report. The NCAs should also include in the report a statement on the verified level of compliance of each MDP with the MIFID rules.

We consider that it should also be considered to limit certain high impact data license practices which have significant negative consequences for end clients and financial markets discourage in MiFID/MiFIR,

- Data cut-offs before a binding court or arbitration decision in data license disputes should be prohibited in financial markets supervisory laws at least in situations in which the data cut-off would harm the stability of financial services firms, markets and/or end user clients. In practice data users may not enforce their rights as the data provider / vendor will usually unilaterally terminate the contract in case of dispute and the user has no right of continuation of service. The data user, however, very rarely may not accept the loss of data provided by dominant data providers without endangering business continuity. Therefore most data users will accept even excessive price increases without engaging in a legal dispute with the data provider.
- Sector specific rules should ensure that MDP and other regulated data providers are not be allowed to escape their regulatory obligations through outsourcing of MD business on unregulated (group) companies. In case of credit rating agencies ESMA tried without success to get detailed rating cost and product information from the unregulated ratings data companies within the CRA groups. Similar situations may arise with data companies associated with regulated MDPs or benchmark providers.

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

For our members the guidelines if implemented with our suggestions, would lead to a significant decrease in the amount of resources used for administration of the complex and opaque market data

policies as well as a decrease in the direct market data costs. An estimated 20-40 % of resources is spend on managing non-standard terms of MDPs.