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## Consultation Response

### ***ESMA CP on 'Guidelines on the MiFID II/ MiFIR obligations on market data'***

11/01/2021

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#### **Introduction**

The Association for Financial Markets in Europe (AFME) welcomes the opportunity to comment on ESMA's Consultation on the proposed Guidelines on the MiFID II/MiFIR obligations on market data that was published in November 2020.

AFME represents a broad array of European and global participants in the wholesale financial markets, its members include pan-EU and global Banks as well as key regional Banks. We advocate stable, competitive, sustainable European financial markets that support economic growth and benefit society. AFME is the European member of the Global Financial Markets Association (GFMA) a global alliance with the Securities Industry and Financial Markets Association (SIFMA) in the US, and the Asia Securities Industry and Financial Markets Association (ASIFMA) in Asia. AFME is registered on the EU Transparency Register, registration number 65110063986-76.

Our membership supports the proposed guidelines and echo ESMA's sentiments that such guidelines will ensure better and uniformed application of the MiFID II/MiFIR obligations. MiFID II/MiFIR is one of the most significant pieces of financial regulation this included the extension and alignment of trading and reporting requirements. AFME members therefore welcome the parameters introduced by these guidelines to ensure a carefully balanced oversight around the provision of data and the charges associated with it.

Within the AFME response we have suggested a small number of adaptations to some of the proposed guidelines, such additional clarifications would further enhance the proposed supervisory guidance in relation to the costs and application of market data and the consistent, efficient, and effective functioning of supervisory practices.

AFME and its members remain ready to assist with any future developments being considered in relation to access and use of wholesale market data.

#### **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?**

As ESMA highlights, under Article 84(2) of Delegated Regulation EU No. 2017/ 565 and Article 6 (2) of Delegated Regulation (EU) No. 2017/ 567, market data providers that provide data free of charge are explicitly exempted from most of the Level 2 provisions on market data. Where there is a Level 2 obligation on market data providers (i.e. where they are not exempted), AFME agrees with ESMA's proposal to apply the corresponding guidelines to such market data providers. AFME's understanding is that only the following guidelines would apply to market data providers that provide data free of charge:

- Guideline 3 – 5: which outlines the basis for providing data on a non-discriminatory basis, except where those guidelines relate to pricing and fees.
- Guideline 9: concerning data disaggregation; and
- Guideline 14 – 16: outlining the parameters for providing delayed data.

For the avoidance of doubt, it would be helpful if ESMA could specifically identify which guidelines are applicable to market data providers that provide data free of charge.

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

*Guideline 1: Market data providers should have a clear and documented methodology for setting the price of market data. The methodology should remain up to date, and hence be reviewed on a regular basis, at least annually. Market data providers may need to adjust their methodology over time and account for changes in marginal costs. For example, if a market data provider allocates a portion of investments in IT infrastructure to the cost of production and dissemination of market data, the market data provider is expected to consider the amortisation of the investments when allocating these costs... (refer to page 8, Annex IV for full guideline)*

AFME agrees with ESMA's conclusion that it is important that market data providers have appropriate accounting methodologies in order to be able to demonstrate their compliance with the provisions set out in MiFID II/MiFIR. Greater transparency relating to the allocation of direct, joint, fixed, and variable costs should bring greater transparency and ultimately understanding regarding how market data providers set the price of market data.

AFME reiterates that it is vitally important that ESMA works with National Competent Authorities (NCAs) to ensure that the draft Guidelines and the requirement to provide market data on a reasonable commercial basis are enforced. We expect that this process will become more straight forward from 1 January 2022 when ESMA becomes direct supervisor over APAs and CTPs and will be able to ensure that there is consistent application of the rules across the EU.

Given the repeated and consistent failure of market data providers, predominantly exchanges, to comply with the rules of MiFID II, AFME believes that the relevant authorities should levy the appropriate sanctions (including fines) establish the use of fines where market data providers are found to have been in breach of these requirements.

**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.**

ESMA should work with NCAs in order to ensure that market data providers adhere to the guidelines by providing a clear and accurate allocation of the costs of producing and disseminating market data.

Particular scrutiny should be placed upon the allocation of joint costs which have often been used to include the costs of running systems that are not related to the production and dissemination of market data (e.g. trading systems).

**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.**

***Guideline 2: In order to avoid that the final cost of data is increased through overly onerous auditing practices, market data providers should only impose penalties in consequence of an audit, where they can demonstrate that customers have not complied with the terms of the market data agreement. The level of penalties in case of non-compliance with the terms of the market data agreement should be based on the recovery of revenues which would have been generated in case of compliance with the license.***

***Audits should only be aimed at identifying occurred breaches with market data agreements. Overly onerous practices that 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 condition of the license should be excluded. For example, such practices would be excessive interest charging or extensive retroactivity.***

AFME welcomes ESMA's desire to address auditing practices and in general, we agree with ESMA's recommendations. However, we believe that more detailed guidance is required to prescribe what constitutes appropriate practice by auditing firms, acting on behalf of market data providers.

The audit process offers a good opportunity to address or correct errors created by unclearly stated reporting and/or payment policies for different types of usage, and, or confusing count methodologies expressed in exchange agreements. The audit process is an optimal occasion to identify and educate where errors are caused by a lack of clarity. The construction of audit processes focused on financial penalties and realising the most revenue does not serve this purpose

We would also disagree with the use of the word "penalties". The term 'penalty' implies that trading venues should be allowed to levy punitive measures, whereas in fact, the audit should be focused on identifying where a market data user has not paid the correct amount of fees. Therefore, we suggest replacing the word 'penalty' with another term such as 'revenue-true up'.

Currently, data consumers are required to undergo audits overseen by exchanges or contracted third parties who are able to exercise significant leverage through the auditing process. There are no rules, guidelines, or best practice documents governing the ways in which audits function, instead these are imposed through the contracts provided by exchanges.

AFME members have raised examples where conflicts of interest exist and objectivity in conducting these audits is lacking, for example where third-party auditors are paid a portion of the funds they

recover. Another concern relates to the fact that the same third-party auditor will be used to audit multiple data consumers. As part of the auditing process, firms are required to provide sensitive information relating to their commercial practices (sometimes including client information) meaning that an unregulated third party, with unsubstantiated data preservation capabilities, becomes responsible for the safeguarding of highly confidential information.

AFME therefore recommends that ESMA provide detailed guidance on auditing practice conducted on behalf of exchanges and that such guidance should be explicitly outlined in all market data agreements and subsequently adhered to by all parties.

AFME suggest the below recommendations for consideration:

- **Market data agreements should clearly set out the basis on which any audit is to be conducted, the notice firms will be given of an intended audit and the maximum duration of the audit.**
- **In terms of the longevity of an audit, an audit should not exceed a standardised fixed time period, further conversations with market participants are warranted to agree a reasonable lookback period.**
- **Audits should not be time-consuming or inefficient, with complex, long and expensive procedures.**
- **MDPs should not have the unilateral right to amend the terms of the auditing contract or change the fees on different terms retrospectively.**
- **The scope of the audit should be as narrow as necessary to assess customers usage of market data considering the specific basis on which the audit has been triggered**
- **Prior to the auditing process, venues should provide members with some guidelines to meet the MDP's requests.**
- **The measures and criteria against which any audit is to be conducted should be set out clearly in writing in advance of any audit commencing. This ensures firms have both clarity and certainty over the validity of the assessment and the metrics in which they are being reviewed.**
- **Any subsequent proposed changes to the scope of an audit after it has commenced should be notified in writing to the customer with an explanation of the basis for the change in coverage.**
- **Market data users must not be charged additional fees for the undertaking of audits, any such costs arising from the market data provider should be included and separately accounted for in the cost basis of the Market Data Provider; such costs must be reasonable**

and proportionate to any expected revenue recovery and should be reassessed at least annually.

- Where a Market Data Provider (MDP) employs the service of a third party to undertake audits of customers on their behalf, the MDP should ensure no conflict of interest with the customer arises through the means by which the third party is compensated. In particular, third party auditors should not be employed on a “no win no fee” basis.
- Where a Market Data Provider (MDP) employs the service of a third party to undertake audits of customers on their behalf, third-party auditors should not be paid a commission based on the number of issues they identify during the audit. Instead, they should only be paid a flat fee for conducting the audit
- Where a Market Data Provider (MDP) employs the service of a third party to undertake audits of customers on their behalf, the MDP should ensure the third-party provider has in place robust processes and controls to ensure the confidentiality of any customer data they have access to for the purpose of the audit. It should also be required that the provider does not retain or use for its own purposes any customer data gathered for the purpose of an audit.

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.

Please see AFME’s response to Q4.

**Members to respond to ESMA independently with specific examples.**

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.

***Guideline 3: 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. The criteria used should be:***

- (i) based on factual elements, easily verifiable and sufficiently general to pertain to more than one customer;***
- (ii) (ii) explained in such a manner that customers are enabled to understand the category they belong to.***

***Market data providers should explain the applicable fees and terms and conditions for each use. They should motivate any differentiation of fees and terms and conditions pertaining to each category of customers.***

AFME members agree that within their market data policies, market data providers should have to provide a “user friendly” break down of customer/client categories, which are based on factual elements and use accessible terms/language which ensures that customers are able to comprehend the different client categories and identify their classification. In addition, applicable terms and conditions applying to each client category type should also be outlined in terms that are clear to understand and do not create a level of ambiguity. To strengthen this guideline further, we propose that a distinction is included between retail and professional customer/client.

**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.**

***Guideline 4: Along with the description of the different customer categories, market data providers should clarify in their market data policy how fees are applied when a customer potentially belongs to more than one customer category because the customer makes different simultaneous uses of the data. In such a case, market data providers should apply the relevant fees in a way that ensures the provision of same data is charged only once by applying one customer category only***

AFME members agree with proposed guideline 4. Nevertheless, members caution that such a guideline could have unintended consequences on the use of market data by firms, particularly if employed at the parent level this may unintentionally hinder firms’ abilities to disaggregate business at an entity level.

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

***Guideline 5: When different customers fall within the same category and thus the same terms and conditions apply, the market data providers should also offer the same technical arrangements. Market data providers should ensure that practices in terms of such technical arrangements, including latency and connectivity, are non-discriminatory.***

Overall, AFME members agree with Guideline 5 that “when different customers fall within the same category and thus the same terms and conditions apply, the market data providers should also offer the same technical arrangements. Market data providers should ensure that practices in terms of such technical arrangement, including latency and connectivity, are non-discriminatory.”

**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.**

AFME members do not consider that further clarity is required.

**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.**

***Guideline 6: 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 billing in the case market data has been sourced through multiple data products or subscriptions.***

AFME members consider that a per user model could be viable, however, to opine on ESMA’s approach we request further clarity regarding the methodology behind the unit of count for display data, specifically the remit of the definition of “Active User ID”. Assuming the definition of Active User ID is limited only to consumers that utilise display data in their operations and does not include within scope users that simply have access to the system (e.g. potential access to the data by virtue of access to a system or application consuming the data). If our understanding is aligned with ESMA’s proposal, in theory AFME members consider it sensible to charge on an Active User ID basis rather than a per product/device basis.

Nevertheless, AFME members stress that it is imperative that for such an approach to work it must reflect the spirit of the MiFID II/MiFIR regulations, which seek to reduce the costs of market data. AFME members are concerned that the proposed wording still allows for trading venues to be able to charge a premium for per user data. This means market participants could still incur increased costs in order to access essential components of a trading venues service/ offerings, creating a significant barrier to entry for market participants without any repercussions to the venue. In light of this we reiterate our support for Guidelines 1,3, 12, and 16 which stipulate that market data providers clearly document methodologies for setting market data prices, this ensures market data charges are priced proportionately in relation to the costs of producing and disseminating such data.

Furthermore, AFME members note that introducing a unit of count such-as “Active User-ID” as stated above still does not alleviate any of the additional complexities that currently accompany the application of a per-user model, including the granular reporting requirements. These reporting requirements often require such meticulous detail in bespoke often complex formats established by the trading venues that it can be difficult for firms, especially smaller organisations to implement the different requirements; and particularly as a per-user model requires monthly direct reporting from the consumer to the venue, this means firms are unable to utilise the data reporting provided by the data carrier.

In order to make a per user model viable, AFME members suggest that prior to the agreement to introduce a per-user unit of count, consumer firms first undertake a cost-benefit analysis to ensure such an approach would be efficient, given the reporting difficulties outlined above twinned with the concern that the cost of a per-unit model is usually higher, conducting a cost-benefit analysis would help firms understand whether a per-user model fits their needs. In order to be cost-effective, a per-

user model would only be sustainable if a sufficient number of users have dual sources for the same data.

**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.**

***Guideline 7: 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 the exact number of active users.***

AFME members highlight that the majority of market data providers offer a per user model but often this option contains a number of conditions in order to qualify for this unit of count (and also for the required monthly reporting usage or access) that are often burdensome to the client. Additionally, the model generally includes an incremental cost (such as a 10% or larger uptake) resulting in higher costs for the market data that would not justify migration to the per user model. The price lists offered by some exchanges (included within this response) demonstrates that cost prohibitive nature of adopting the per-user model as the uptick in pricing payable for the adoption of the per-user model is so severe.<sup>1</sup>

Provided the per user approach is limited to active usage of data and not simply on potential access to data, AFME members welcome limiting the eligibility criteria for the per user model to the two conditions outlined by ESMA within Guideline 7 i.e. “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 the exact number of active users”.

**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.**

***Guideline 8: 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 excessive administrative costs.***

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<sup>1</sup> [MDDA Price List 10 15 \(deutsche-boerse.com\) information product fee schedule effective 1 january 2018 v2.0.pdf](#)

AFME agrees with the overall sentiment of Guideline 8, however we question the blanket reference to “excessive administrative costs.” Members suggest the deletion of the last sentence from the current wording, as it could be used as a catch-all for avoiding the per user model. We refer ESMA to our response to question 11 which expresses AFME’s views on the current conditions imposed on consumers of data in order to adopt a per-user model.

**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.**

AFME members support proposed Guideline 7 *“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 the exact number of active users.”* However, we reiterate our position in response to Question 11, that most market data providers offer a per user model but often this option contains a number of conditions that are often burdensome to the client.

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

***Guideline 9: 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.***

AFME members agree with Guideline 9, that *“market data providers should always inform customers that the purchase of market data is available separately from additional services [and that] market data providers should not condition the purchase of market data upon additional services”*.

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

AFME members acknowledge that, in some cases, unbundled data is available, however this data is often difficult to locate and is often presented in a “view only format” meaning the ability to use such data is rather limited as it cannot be easily copied or read. Furthermore, data vendors do not offer access to unbundled venue data, despite the likelihood that the venues provide data vendors with such unbundled data. As such the consumers of market data are compelled to buy data packages/additional licenses in order to obtain the unbundled data in a format that is usable and to access unbundled venue data. AFME members encourage ESMA to clarify the requirement for market data vendors to inform users of the ability to obtain unbundled data and ensure that this data is easily accessible and presented in a format that is machine readable and can be easily used and copied.

**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.**

***Guideline 10: Market data providers should publish the information required by Article 89 of Delegated Regulation (EU) No 2017/565 and Article 11 of Delegated Regulation (EU) No 2017/567 by using the template provided in Annex I.***

***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.***

***Additionally, market data providers should provide the information in a consistent manner in terms of granularity to make the disclosure meaningful (e.g. per asset class and on annual basis). Where relevant, information should be provided separately for pre- and post-trade data.***

***Additional information that is outside the scope of the transparency obligation should not be provided in the template. However, market data providers should ensure that the additional information is easily accessible by customers... (full reference found on page 11, Annex IV)***

AFME supports the use of a standardised template which should improve the transparency, timeliness, and comparability of information on market data prices and content. AFME members recommend that RCB disclosures are closely monitored to ensure that market data providers are providing information in a clear and transparent manner, particularly in relation to the cost accounting methodology. Where market data providers have been found to fail to comply with this requirement, AFME recommends that ESMA works with NCAs to take appropriate enforcement action and ensure supervisory convergence.

**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?**

AFME members are supportive of the standardised publication template set out by ESMA in Annex 1 of the draft guidelines.

AFME members consider that prescribing a standard template to market data providers to use in order to publish the required RCB information outlined in Article 89 of MiFIR will positively assist with ensuring data is presented in a user-friendly manner, which is both accessible and comparable. Currently, market data providers often include the required information within long complex documents that are difficult to navigate and to locate on their webpages.

**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.**

***Guideline 11: Market data providers should adopt the definitions set out in Annex II of the Guidelines in their market data policies and price lists.***

AFME members consider the proposed definitions set out in Guideline 11, Annex II to be of great value in defining some of the key terminology used by market providers.

Nevertheless, members question the accuracy of the term ***“Unit of count for non-display use”***. The proposed definition infers the invoice (price charged to the client) for the use of non-display market data is calculated based on a tangible server or device, this is further defined as [any] machine that accesses and processes data automatically. AFME members caution that the proposed definition does not accurately reflect how data is utilised and would soon become obsolete, given the rapid advances in technology occurring within the industry. These advances in technology continue to result in the ever-increasing use of non-tangible processes such as cloud technology to automatically access, store and process data.

In light of the above some AFME members question whether non-display items should be considered as a unit of count. Alternatively, AFME members request that ESMA provide further clarity around the standardisation and scope of approaches that could be captured as a unit of count for “non-display data”.

The current definition of ***“Professional Customer”*** outlined in annex II this may warrant further consideration. AFME members caution that the current definition defines a professional customer at entity level not natural person which could have unintended consequences on affiliate companies of a parent firm, particularly for wholesale investment firms that encompass retail trading entities.

Regarding the definition of “Derived Data” proposed by ESMA, AFME members disagree with this definition for several reasons. Firstly, raw data is not necessarily from different sources. Secondly, members do not consider the manner in which the transformed data is used should determine whether any particular data is derived. The definition of derived data should not be usage based, the characteristics of derived data in which the industry is aligned upon is that the original data is transformed to such an extent that normal attempts (e.g., without excessive expense and/or efforts) to re-engineer the result would not expose the original or raw data provided. We propose that the current definition is modified to account for the above and as a result suggest the following definition:

***“Derived data should mean data created as a result of the transformation of the raw data originally generated by a market data provider to the extent that it cannot reasonably be re-engineered to reveal the original data or that cannot be used to materially replace or act as a facsimile of the original data.”***

**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.**

AFME members revert to Question 6 and request that ESMA provide standardised definitions of the tiers of client categories used by market data providers to ensure that customers can distinguish between the different categories and understand their classification.

Furthermore, AFME members propose that ESMA provide definitions for different types of user. Often market data providers define clients by user type e.g. “trading user, or other user”.

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

***Guideline 12: To comply with Article 11(e) of Delegated Regulation (EU) No 2017/567 and Article 89(2)(e) of Delegated Regulation (EU) No 2017/565, market data providers should make public, by using the template in Annex I of the Guidelines, a detailed explanation of the accounting methodology for setting the fees of market data. The explanation should provide, inter alia, the list of all the costs included in the fees of market data and the allocation keys for joint costs.***

***Market data providers should disclose whether they include a margin in the fees of market data and explain, where applicable, why they consider the margin reasonable and, if why the margin differs from one category of market data to another (i.e. why some categories of market data have a higher margin than other categories of market data).***

***Market data providers are not required to disclose actual costs for producing or disseminating market data or the actual level of the margin, however 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.***

The accounting methodology set out under Guideline 12 does not improve the current situation i.e. the level of clarity customers of market data will obtain via the use of this template in terms of the costs of market data remains the same, as the template only requires market data providers to outline information relating to revenues, it does not provide any explicit information relating to the quantitative costs of market data.

However, provided an adjustment to the level 1 text materialises as outlined in ESMA’s 2019 [MiFID II/MiFIR Report on the development in the prices for pre – and post-trade data and on the consolidated tape for equities](#); whereby trading venues, APAs, SIs and CTPs are required to share information with Competent Authorities (CAs) and ESMA on the actual costs for producing and disseminating market data and provide actual costs on the margins, AFME members are supportive of Guideline 12.

Members consider that private disclosure to regulators regarding actual costs of market data to be a reasonable, measured approach as it will allow CAs and ESMA to be able to oversee the setting of fees and ensure they are fixed appropriately without market data providers having to disclose commercial information to the wider public.

**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.**

Presently, AFME members have not identified any further details that may be of benefit for market data provider to disclose to improve transparency in relation to market data costs and pricing. Members continue to analyse this question and may raise additional items for consideration at a later stage.

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

***Guideline 13: 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.***

AFME and its members strongly support Guideline 13, that market data providers should be explicit in the market data agreement with respect to market data fees that can be applied retroactively. AFME members note that historically the period for applying fees retrospectively was based on a 1-3-year lookback period only. However, in recent years AFME members have experienced auditing processes with lookback periods of 10 – 16 years.

As highlighted under our response to Q4, AFME members understand the purpose of audits is to confirm that market data recipients understand the policies and are paying fairly and according to contract for data usage. Nevertheless there are no rules, credentials, guidelines, or best practice documents governing the way audits function, instead audits are required by contract and are conducted under subjective rules imposed by exchanges. The ambiguity that often surrounds the audit process, combined with increasing review periods and exchanges abilities to routinely and unilaterally modify contractual licensing agreements (without users of market data being offered a period of reflection in relation to the modified terms and conditions) has led to the process of market data audits evolving into instruments that increasingly recover additional revenues, via auditors without any particular oversight and whom could potentially be motivated to recover additional revenues based off their audit findings.

As a result, audits often create conflict between market data providers and market data consumers. Thus, AFME members propose developing a set of industry standard guidelines covering the application of retrospective market data fees and the terms and conditions of the auditing process. Such guidelines should be explicitly outlined in all market data agreements and subsequently adhered to by all parties.

AFME propose the below recommendations:

- **Market data agreements should clearly set out the basis on which any audit is to be conducted, the notice firms will be given of an intended audit and the maximum duration of the audit.**
- **In terms of the longevity of an audit, an audit should not exceed a standardised fixed time period and further conversations with market participants are warranted in order to agree a reasonable lookback period.**
- **The scope of the audit should be as narrow as necessary to assess customers usage of market data considering the specific basis on which the audit has been triggered**
- **The measures and criteria against which any audit is to be conducted should be set out clearly in writing in advance of any audit commencing. This ensures firms have both clarity and certainty over the validity of the assessment and the metrics in which they are being reviewed.**
- **Any subsequent proposed changes to the scope of an audit after it has commenced should be notified in writing to the customer with an explanation of the basis for the change in coverage.**
- **Market data users must not be charged additional fees for the undertaking of audits, any such costs arising from the market data provider should be included and separately accounted for in the cost basis of the Market Data Provider; such costs must be reasonable and proportionate to any expected revenue recovery and should be reassessed at least annually.**
- **Where a Market Data Provider (MDP) employs the service of a third party to undertake audits of customers on their behalf, the MDP should ensure no conflict of interest with the customer arises through the means in which the third party is compensated. In particular, third party auditors should not be employed on a “no win no fee” basis.**
- **Where a Market Data Provider (MDP) employs the service of a third party to undertake audits of customers on their behalf, the MDP should ensure the third-party provider has in place robust processes and controls to ensure the confidentiality of any customer data they have access to for the purpose of the audit. It should also be required that the provider does not retain or use for its own purposes any customer data gathered for the purpose of an 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?**

AFME members consider that the elements of pre-trade and post-trade data considered the most advantageous depends on the use case the data is required for. However, we would consider that a minimum, the data that is currently set out in MiFID II for real time data publication should also be kept for delayed data, for example, it should not be limited to end-of day data.

In terms of flags, those published for real-time data sets should also be replicated in the publication of delayed data sets as outlined in MiFID II/MiFIR. While the current MiFID II rules prescribe the use of flags such as for technical and non-price forming trades for equity instruments, these are not being accurately and consistently applied by trading venues and APAs. We suggest that there needs to be greater adherence to the current rules to ensure convergence across the EU and to ensure that market participants are able to form an accurate view of addressable liquidity at any point in time.

On whether the first best bid and offer is efficient for the purpose of delayed pre-trade data publication, AFME assumes the question should be read as the best bid and offer, not the first best bid and offer, as the first bid received is not necessarily the best bid/ offer. The term 'best bid and offer' would be a more accurate description of current market practices.

**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?**

As data users, AFME members consider the ability to use pre-and post-trade delayed data to assist with market share analysis, market liquidity analysis and for trading algorithms to be of utmost importance. Other uses cases for the data (also reflected by the European Commission in the Market Structure partner report study on the creation of an EU consolidated tape) include:

- In flight monitoring of trades
- Pre/Post-Trade analysis
- Middle & back office processes and valuations
- Risk management – optimise capital usage
- Market surveillance
- Performance measurement
- Regulatory Oversight
- Audit

AFME members recognise the progress made since the implementation of MiFID II to improve data quality. However, more work is required to improve the completeness of MiFID II data. Within fixed income markets there are still several data quality issues that need to be addressed to ensure an accurate picture of the trading market; for example, members have highlighted discrepancies in the reporting of sub-classes of bonds e.g. instruments within the same sub-asset class have been incorrectly classified and reported as both corporate and covered bonds by different entities. In addition, there have been instances of divergence in the reporting of instruments between asset

classes, with the same instruments inconsistently reported as bonds, structured finance products or securitised derivatives.

Currently data is shared, as required, with APAs/vendors who disseminate some of this data accordingly. Under Article 64 (5) of MiFID APAs are required to have systems in place that can effectively check trade reports for completeness, identify omissions and obvious errors and request re-transmission of any such erroneous reports, AFME members propose that such a data verification processes is extended to trading venues via the MiFID review in 202, this will improve the accuracy of the information before disseminating data publicly and, or, to ESMA.

We note that market stakeholders have been addressing these issues in industry working groups such as FIX Protocol.

In terms of how this data is presented to the market AFME members urge ESMA to ensure the data is standardised and machine readable both in definition and practical application (i.e. the format of the data can be easily read, used, and copied and that the data is accessible in a systematic/machine readable format in the same way as the corresponding real-time data). Previously, members have experienced publication of delayed data that is only available in a “view only” format. In terms of approach, AFME members stress that a “one size fits all” may be impractical given the range of use cases the data is applied to. Furthermore, members note that within some data providers terms and conditions they prohibit consumers of the market data from accessing the data through customers own automated systems which can significantly limit the usability of the data.

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

***Guideline 16: Without prejudice to the legal provisions prohibiting market data providers to charge the use of delayed data, where a delayed data user re-distributes the delayed data for a fee (including a general fee for accessing its services), a charge to those data re-distributors may apply. Likewise, where a delayed data user creates value-added services which are sold for a fee to third parties, trading venues, APAs and CTPs may charge that user.***

***Data-redistribution should be understood as a business model of selling the data in unchanged form to third parties, either directly by access to that data, or via a general access fee. Where a delayed data user publishes delayed data on its website, but does not charge for that access, it should not be considered as data re-distribution for the purpose of this guideline. Likewise, where the delayed data is used for the internal purposes of the delayed data user, e.g. portfolio valuation, it is not considered data-redistribution.***

***Value-added service should be understood as creation of a product made on a basis of raw delayed data, e.g. though aggregating data sets across different sources or creating historical series, or combining it with other information, and offering it as a product to third parties. Only those value-added services which are sold as a product for a fee to third parties should***

*be considered a value-added service. That is, where a company makes use of delayed data, e.g. to value its portfolio, or provide information to its clients on the basis of delayed data free of charge, it should not be considered as a value-added service for the purpose of this guideline.*

AFME members consume level 1 and level 2 data for both display and non-display usages from numerous trading venues at an inflated price when compared to the cost of the production and dissemination of that trading data.

Members agreed that there is merit in clarifying the concept of value-added services by elaborating on the concept in Level 2 rules, however, for AFME to provide an informed opinion on this question, we request that ESMA further clarify the concept of data-redistribution and value-added service given there is no evidence any Member/delayed data user of the FOC (Free of Charge) delayed data can generate income from the same. Even if a Member/delayed data user could, there is no way to determine their cost in monetising the FOC delayed data. Therefore, for a data provider to charge a fee may be far in excess of the actual costs the delayed data user has incurred and make the service they are providing (trying to provide) to their clients cost prohibitive. Further, there is no way to determine what element of their service charge relates to the delayed data.

As an example: Currently, Members send good quality formatted trade data to the APAs who really only redact the names of the parties and then in real time, sell the data. There is a cost to the Members in providing this data to the APAs and no charge is made by the Members in its provision. The APA does not own the data that is provided by the Members and there is no (or very minimal if any) additional work for an APA to carry out over and above the real time data they provide for a fee, to provide the delayed data. For some parity and equality, as the Members provide their data FOC to the APAs who monetise, for the Members to then be charged a fee should they be able to monetise the delayed data what is in effect their own data, is inequitable.

MIFID II OTC pre-trade transparency data can be made available on proprietary websites of investment firms. In addition to the difference of treatment it would create depending on whether the data comes from an APA or a firm, it could push firms using APAs to set up their own publication mechanism and fragment even more the public disclosure of MIFID II data, therefore not being in the interest of regulators and investors.

Members are strongly of the opinion delayed data, be it related to MIFID II or in respect of any other use for any purpose should be just that, FOC.

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

It is paramount that any market data published is accurate and complete. AFME members recognise the progress made since the implementation of MiFID in 2018 to improve data quality. However, more work is still required to improve both the completeness and validity of the data. Within fixed income markets there are still several data quality issues that need to be addressed to ensure an accurate picture of the trading that takes place within this market; for example, members have highlighted discrepancies in the reporting of sub-classes of bonds e.g. instruments within the same sub-asset class have been incorrectly classified and reported as both corporate and covered bonds by different entities. In addition, there have been instances of divergence in the reporting of

instruments between asset classes, with the same instruments inconsistently reported as bonds, structured finance products or securitised derivatives.

Currently data is shared, as required, with APAs/vendors who disseminate some of this data accordingly. Under Article 64 (5) of MiFID APAs are required to have systems in place that can effectively check trade reports for completeness, identify omissions and obvious errors and request re-transmission of any such erroneous reports, AFME members propose that such a data verification processes is extended to trading venues via the MiFID review in 202, this will improve the accuracy of the information before disseminating data publicly and, or, to ESMA.

AFME members recognise that exchanges do provide some of the possible price formation mechanism, however, we disagree with the view that providing a pricing mechanism makes a trading venue the owner of price formation. Further additional measures should be considered including but not limited to reviewing the intellectual property rights and licenses on quotes provided by and trades executed by investment firms and corporates.

Market Data Providers (MDPs) that operate trading venues have the ability to collate and utilise direct inputs such as quotes, and prices provided by members/participants of the venue within their own data products/broadcasts. AFME members maintain that MDPs should be obligated to clarify how any charges the MDP requests for their product is reflective of the venue's own costs and value add. Furthermore, MDPs should justify any proposed increases to costs through a clear explanation detailing whether the cost increase is attributed to an increased value add being provided, the adaption of a service or an increase in the cost base.

We reiterate our agreement with ESMA's recommendations to strengthen the concept that market data should be charged based on the costs of producing and disseminating data and that pricing should not be proportionate to the perceived value of its usages. Therefore, AFME proposes the following definition of derived data "Derived data should mean data created as a result of the transformation of the raw data originally generated by a market data provider to the extent that it cannot reasonably be re-engineered to reveal the original data or that cannot be used to materially replace or act as a facsimile of the original data."

AFME would also like to highlight market data providers' capacity to unilaterally change fees and introduce new fees without the consent of the customer/ participants of the venue. Within contractual agreements between market data providers and clients there is no legal framework defining the extent to which a data provider can amend fees and contractual terms relating to data charges without negotiating with participants. Members consider that a notification outlining new, and/ or increased fees is both unreasonable and unjust. From a practical perspective, the contractual terms between members and data provides such as trading venues are extremely complex. Therefore, even just identifying how changes in the contract terms will impact participants is time-consuming and challenging and possibly result in higher charges being passed through to the end client.

AFME members are also mindful, that in an era of modernisation, as an industry we should anticipate the potential or increased mergers or acquisitions of firms offering similar products and, or services and should pre-empt the impact this could have on market data usages and rights by developing a framework that provides parameters on the usage and costs of market data in such cases.

Finally, given that the provision and price of market data is a recurring theme internationally, we suggest that ESMA and competent authorities in the EU should engage in international discussions such as on the IOSCO consultation paper on equity market data.

**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.**

AFME is not responding to this question.