

# SWEDISH SECURITIES DEALERS ASSOCIATION

2019-09-06

## **ESMA Consultation Paper on MiFID II/MiFIR review report on the development in prices for pre- and post-trade data and on the consolidated tape for equity instruments**

### **General remarks**

The Swedish Securities Dealers Association, SSSA, welcomes the opportunity to respond to ESMA's Consultation Paper "MiFID II/MiFIR review report on the development in prices for pre- and post-trade data and on the consolidated tape for equity instruments". Besides responding to the specific questions in the consultation paper the SSSA would also like to make following general comments:

As part of the upcoming MiFID review, the SSSA have asked its members (investment firms, IF) which issue they regard as the most important to address. The answer is unanimously the costs for market data. Despite MiFIDII/MiFIR states that the costs of market data should be provided on a reasonable commercial basis the new regulation has not worked. Overall market data costs and complexity have continued to increase whereas market data transparency has decreased. The main cost driver for market data users is not so much increase in already existing fees. It has been the introduction of new fees related to multiple display-terminal, non-display applications, reporting and distribution licences, SI market data fee, connectivity fees etc. – in combination with unclear and complex market data policies and definitions and unreasonable audit procedures.

The core problem, which exists in many international jurisdictions, stems from multiple market structure and regulatory issues. Essentially, the issue is that the supply of market data is a monopoly as:

- Market data is a by-product of orders and trades
- Market data is unique for each trading venue and therefore Market data cannot be substituted between venues
- Market data contains fundamental knowledge, which is indispensable for trading, best execution, risk management purposes etc. Therefore, demand is not very responsive to price increases (inelastic demand)

This is a global problem which accelerated as trading venues went from operating as utilities, to for-profit companies and securities markets were liberalized, while the regulatory handling of the market data did not sufficiently address the market imbalance in power between exchanges and data consumers.

An incumbent exchange collects revenue from listing, trading, and market data. Fragmentation in trading due to liberalization in Europe (MiFID I and MiFID II) has created competition in trading and listing, but not in respect to market data due to the uniqueness of this information. The appearance of new trading venues create fragmentation in liquidity and an intensive competition to attract liquidity. This has led to a downward pressure on trading and listing fees. At the same time, in order to compensate for lower trading fees, exchanges have increased overall market data fees. Furthermore, restrictive data usage rights are playing a role in driving up the costs of market data. There is price inelasticity in market data fees as market participants must buy the data no matter how much or little they trade. Trading venues collect an increasing part of their revenue from market data and they cross-subsidize the artificially low execution fee to attract liquidity. with high and monopolistic market data fees. This practice is not only harmful the capital markets in general, but also for smaller exchanges/trading venues, which do not have similar market data revenue streams.

The consequences of these problems are less informed markets, weaker competition and higher costs for end users.

Despite a low elasticity of demand, the massive price increases force many data consumers to scale back their market data purchases, keeping only the most necessary products. Less significant markets are deselected, leading to less cross-border competition and lower market integration, thereby hampering the development of a European Capital Market.

When the risk willingness, market liquidity and price discovery mechanisms decrease, it will have large real economic costs. The mechanisms have been widely analyzed in the academic literature, focusing on how asset prices and liquidity affect corporate budget constraints, investment decisions and managerial learning from prices.<sup>1</sup>

The most obvious effect arises when companies want to raise new money for investments in the primary markets. Here lower prices and lower deep liquidity will increase their cost of capital, especially in the riskier and more illiquid markets where the returns are typically higher – e.g. the small-cap equity market.<sup>2</sup> In general, companies are found to reduce their investments as a result of non-fundamental asset prices decline and some companies totally avoid issuing new equity when the liquidity in the markets is expected to be too low.<sup>3, 4</sup>

Other important channels arise through the secondary market prices, which also have large effect on real economic activity through the actions of decision makers in the real side of the economy. Bond et. al (2012) summarize in three different mechanisms: First, real decision makers learn new information from secondary market prices and use this information to guide their real decisions. Second, even if decision makers do not learn from market prices, they care about market prices because their

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<sup>1</sup> See Bond et al. (2012) for a review of real economic effect of financial markets, Baker, Stein and Wurgler (2003) and Chen, Goldstein and Jiang (2007).

<sup>2</sup> For example, Davis et al. (2017) shows how companies with existing illiquid debt securities have higher cost when issuing new debt. Ellul and Pagano (2006) show a similar result for equity market IPOs.

<sup>3</sup> See e.g. Foucault et al (2018).

<sup>4</sup> The classical paper of Bernanke & Gertler (1989) and Kiyotaki & Moore (1997) also shows how adverse selection or moral hazard problems will affect primary financial markets by limiting the ability of entrepreneurs and firms to raise external capital, which eventually end up reducing real economic activity.

success as leaders are partly measured by the return generated to the owners through capital gains. Third, another possibility, favored by proponents of behavioral finance, is that secondary market prices have a real effect on economic activity because real decision makers irrationally follow the price and use it as an anchor.

The question regarding a price cap for market data services is complex. Currently, market data prices are based on a monopolistic position which benefits the trading venues. Investment firms have therefore discussed a proposal that the remuneration of trading venues to provide market data services (for raw data) should be included in the price to trade at a trading venue, which most certainly will lead to lower costs for market data since trading is subject to competition.

The Consultation Paper does also include questions regarding consolidated tapes. The question has been raised among the investment firms that are negative. Adding a consolidated tape to the present infrastructure is expected to just add additional costs for information that is already too expensive.

Even if the investment firms are not interested in adding a consolidated tape to the present infrastructure there are a lot of comments on the present infrastructure and especially the quality of the market data. The quality of market data offered by APAs etc. is often poor and difficult to interpret. The value of this information is therefore limited. The quality of market data must be increased through standardization and more complete information. One example is if the transaction is made on an exchange which could imply that there is remaining liquidity in the market.

This response is similar to the response provided by Finance Denmark. However, there are some differences which are outlined below.

**Q1: Have prices of market data increased or decreased since the application of MiFIDII/MiFIR? Please provide quantitative evidence to support your answer and specify whether you are referring to equity and/or non-equity instruments.**

The prices of market data have increased considerably since the application of MiFID I and has continued to increase after the application of MiFIDII/MiFIR. For evidence, please see <https://www.copenhageneconomics.com/publications/publication/pricing-of-market-data><sup>5</sup> and <https://www.copenhageneconomics.com/publications/publication/response-of-copenhagen-economics-to-the-report-the-design-of-equity-trading-markets-in-europe>.

As documented in this report (and the previous ones) the increases in market data costs are materialized via trading venues' ordinary price increases (pricing policy), introduction of new products, introductions of new entities to be subject to market data fees (Systematic Internalisers), (re)bundling, changes in the definitions, complex market data policies, connectivity fees (data policy).

The market data problem seems to be widely recognized within the EU. In the Commission Working Staff Document from July 2019, it is e.g. stated that: *"In 2018, the Commission continued its antitrust investigations in the financial sector, one of the Commission's priority areas to achieve a fairer and more integrated internal market. The Commission also continued to monitor competition in capital markets, in particular focusing on the markets for equity data and equity trading where high fees/prices persist."*<sup>6</sup>

Steven Maijoor's speech from FESE's 2018 convention also addresses the issue: *"...Secondly, following the application of MiFID II, we were made aware of substantial increases in the costs of market*

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<sup>5</sup> All CE reports on market data (2013, 2014, 2018 and 2019 can be found here <https://finansdanmark.dk/boersmaeglerforening-danmark/medlemmer/publikationer/>

<sup>6</sup> Commission Staff Working Document, 15.7.2019, SWD (2019) 297 p. 68

*data, reaching at times up to 400% compared to prices charged prior to 3 January 2018. In addition, we received complaints from stakeholders that not all trading venues and APAs publish the required information in accordance with the reasonable commercial basis principles in MiFID II. As many of you will be aware we are currently gathering further information on this issue. We will assess the feedback over the summer, and in particular test the level of compliance with the rules in place. Should it be necessary, we may provide later this year further guidance on how those rules should be applied”<sup>7</sup>.*

**Q2: If you are of the view that prices have increased, what are the underlying reasons for this development?**

Essentially, the issue is that the supply of market data is a monopoly as:

- Market data is a by-product of orders and trades
- Market data is unique for each trading venue and therefore Market data cannot be substituted between venues
- Market data contains fundamental knowledge, which is indispensable for trading, best execution, risk management purposes etc. and therefore demand is not very responsive to price increases (inelastic demand)

This is a global problem which accelerated as trading venues went from operating as utilities, to for-profit companies and securities markets were liberalized, while the regulatory handling of the market data did not address the market imbalance in power between exchanges and data consumers.

As also described in the CE reports (2013, 2014 and 2018), an incumbent exchange collects revenue from listing, trading, and market data. However, in 2007 trading was liberalized via MiFID I. But market data continued as monopolies. The appearance of new trading venues created fragmentation in liquidity and an intensive competition to attract liquidity. This led to a downward pressure on trading and listing fees. At the same time, in order to compensate for lower execution fees, trading venues have increased market data fees (via various methods as described above). Furthermore, restrictive data usage rights are driving up the costs of market data as market data demand is price inelastic. Trading venues collect an increasing part of their revenue from market data and they cross-subsidize the artificially low execution fee to attract liquidity with high and monopolistic market data fees.

So, if market data had been a competitive in nature like trade execution, prices on market data would have gone down following the liberalization of the securities markets and the diminished value of each trading venues market data as a consequence of the reduced market share. This has not been the case – on the contrary as documented in e.g. the Copenhagen Economics reports. This also demonstrate the need for control of the market data pricing to replicate a competitive environment as the monopoly power of the trading venues in the market data space due to the factors mentioned above has put competitive market forces out of order.

**Q3: Following the application of MiFID II/MiFIR, are there any market data services for which new fees have been introduced (i.e. either data services that were free of charge until the application of MiFID II or any new types of market data services)?**

Yes. An example is the introduction of fees for Systematic Internalisers (SI) to provide quotes.

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<sup>7</sup> [https://www.esma.europa.eu/sites/default/files/library/esma70-156-427\\_mifid\\_ii\\_implementation\\_-\\_achievements\\_and\\_current\\_priorities\\_steven\\_maijoor\\_fese\\_convention\\_2018\\_vienna\\_21\\_june\\_1.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-156-427_mifid_ii_implementation_-_achievements_and_current_priorities_steven_maijoor_fese_convention_2018_vienna_21_june_1.pdf), p. 5-6.

According to various trading venues, an SI is fee liable if the data used is sourced from a trading venue either directly or indirectly via a data distributor/vendor. If the SI receives data from multiple sources, the SI is fee liable to all the sources and must be able to have entitlements, controls and mechanisms in place to demonstrate which specific data is utilized for pricing and quoting.

Even if the quote is not the same or similar to the equivalent quote published by a particular trading venue, the trading venue requires the SI to pay according to their derived data policy, since the SI price is seen as a substitute to the trading venues own price.

Where the quote is generated and the same as on a trading venue, the trading venue will require the usage fall within the displayed data category.

A significant problem with this is that SIs are forced to restrict access to quotes due to the market data cost to trading venues. This will limit investors access to SI quotes and is contrary to the requirement under MiFIR to make quotes publicly available.

**Q4: Do you observe other practices that may directly or indirectly impact the price for market data (e.g. complex market data policies, use of non-disclosure agreements)? Please explain and provide evidence.**

Yes. See Copenhagen Economics reports. The differences in definitions, the vague definitions and differences in usage policies across the trading venues in combination with the unreasonable audit procedures and NDAs is creating the complex data policies. All trading venues also requires members to sign NDAs. A question is why NDAs are required from the trading venues as it limits transparency considerably and harms the possibility for the trading venues' members to negotiate their terms. In practice this means that the trading venues have the absolute bargaining power when negotiating and interpreting the agreements with their members. Members must accept the trading venues terms and conditions, pricelist etc. in order to become a member. This "one-way-bargaining-power" increase the entry barriers for other potential entrants (other trading venues).

Also, please see appendix A for the SSDAs proposal for standard terms and definitions.

Examples of complex market data policies:

1) Administration of accesses:

An Investment Firm (IF) is required to get an approval from most trading venues before any data can be permissioned by the data distributor/vendor on the IF feed. For example, each time the IF changes the location of its data centers or its headquarters address, the IF is required to get a new approval, complete order forms and sign the license agreement all over again.

The IF receives several data change notifications from each data distributor/vendor every day regarding alterations to the way data is packaged, priced as well as policy amendments. Each notification needs to be investigated to estimate the impact on the IF's users and applications, as well as if the IF should expect additional market data costs, signing a new license agreement.

When a new application requires access to market data, the IF is asking to answer a long list of questions to determine if the data will be displayed or not, controlled, stored, used to calculate new data, distributed to downstream application or externally to customers, in which format, at which frequency, etc. This thorough investigation is necessary to ensure that the IFs subscribe to the right license for each trading venue.

The IF needs to regularly check that the correct number of users/departments have access to applications, to avoid paying fees for a service that is not being used – as they have employees going on maternity/paternity leave, changing positions internally or job descriptions, etc.

Each market data cost needs to be allocated at the employee level in the market data inventory, so the IF can provide a cost report to management. They are also using this inventory to reconcile invoices from trading venues and data distributors/vendors before they are paid. Each time a trading venue updates its fees, they will need to update the market data inventory.

Definitions and policies are deliberately vague, which creates uncertainties and unclear license situations.

## 2) Audits:

The auditor requires the IF to complete a questionnaire for each internal and external application having potential access to their market data.

The IF needs to provide an audit trail (3-5 years back in time – of all users permissioned to their data, which will be matched to the numbers the IF has reported to the trading venue or reported by the data distributor/vendor on the IF behalf.

The IF will need to demonstrate how the market data is controlled (entitlement system) and displayed in each application, or explain what kind of calculations are being done by the application, for what purpose, if the calculated data is distributed within the organization or externally, etc.

If the IF is not able to provide the auditor with a proper audit log of all end-users permissioned to a specific application, they will ask the IF to pay for all potential employees having access to the application itself. In some cases, it could be the IF's entire staff! The burden of proof is turned on the IF who are therefore "guilty until proven otherwise"!

It is very difficult to administer the policy terms from the market data license agreements since they do not match the reality of how the current technology allows the IF to use the market data. It is therefore very time consuming to find the "right" (non-display) license which will fit the usage per application – especially when the definition of those terms is not clear in the license agreement. The IF always must ask its account manager at the trading venue to confirm how they would categorize the application use. The IF does see in some cases an incomprehension from the trading venue of its business. The IF's account manager would therefore very often ask its audit team for confirmation, in order to avoid heated discussions during a future audit, as the IF will keep a record of the email confirmation in order to prove to the auditor that the IF ensured compliance with their license agreement, by asking for a formal confirmation.

Also, there is a limit on how far back in time the IFs are entitled to be compensated for overpaid market data fees, whereas trading venues can go back several years if the IFs underreported.

### **Q5: Do you agree that trading venues/APAs/SIs comply with the requirement of**

**making available the information with respect to the RCB provisions? If not, please explain which information is missing in your view and for what type of entity.**

The transparency requirements for trading venues and APAs on their cost calculation in the existing regulatory framework are clear. As firms make some information available – the content and quality is not in line with the requirements. Also, the information can be hard to locate and to access. As an example, none of these entities are providing any data – only verbal explanations, which makes it impossible to verify on which ground their base their extremely high mark-ups. Also, the information is difficult to access.

### **As for SIs – they do not monetize from data.**

However, as for complying with the requirements, neither the Trading Venues nor APAs comply with the present cost-based requirements.

According to Delegated Regulation 2017/567, art. 6-11 and 2017/565, art. 84-89, the price of market data shall be based on cost of producing and disseminating such data and may include a reasonable margin. Also, the cost of producing and disseminating market data may include an appropriate share of joint costs for other services.

These costs are very low (see e.g. Copenhagen Economics reports and the IEX whitepaper <https://iex-trading.com/docs/The%20Cost%20of%20Exchange%20Services.pdf>). IEX estimated this to approximately 1,5 million euro whereas Copenhagen Economics estimated these to between 3-10 million euro) – the market data prices the IFs are facing do not reflect these levels at all.

### **Q6: Do you share ESMA’s assessment on the quality of the RCB information**

**disclosed by trading venues, APAs and SIs? If there are areas in which you disagree with ESMA’s assessment, please explain.**

We agree that the quality of information is generally poor and non-comparable due to lack of figures and common understanding of what is meant by “costs”, “reasonable margin” and “reasonable share of joint costs”. The lack of specifications has opened a barn door of market data revenue for the trading venues due to the monopolistic nature of market data.

### **Q7: Do you agree that the usability and comparability of the RCB information**

**disclosed could be improved by issuing supervisory guidance? If yes, please specify in which areas you would consider further guidance most useful, including possible solutions to improve the usability and comparability of the information.**

Yes, the SSDA strongly agree that further guidance within the present regulatory framework is indeed needed. It is also our understanding from the ESMA Supervisory Convergence Work Programme 2019 page 25 and the Steven Maijoor speech as referred to initially that such guideline can be expected.

The SSDA suggest the following actions in the short term (there is a need to strengthen level 1 and 2 in the longer term):

1. Introduce a cost benchmark in order to enable verification that market data prices are set according to cost cf. existing regulatory requirements
2. Standardise definitions and audit procedures.

#### **Cf 1. Introduce a cost benchmark**

First of all, there is a need to ensure a common understanding of the cost of market data. The wording in the current regulation lacks proper definitions. However, a workable approach can be produced by developing a cost benchmark which the trading venues can use in their cost assessment. In our opinion establishing a cost benchmark is a necessity in order to comply with the existing regulatory requirement. How else will you be able to assess whether the trading venues prices are based on cost with a reasonable margin? Copenhagen Economics have produced a proposal on how such benchmark can be developed (see **attached** document). In short, the idea is the following:

The market data cost increases are not due only to increased pricing of existing products, but to a large extent also additional fees that have added to overall costs. The size and nature of these increases have been thoroughly documented in several reports.

In particular, it is clear that the underlying change in the costs of *producing* and *disseminating* market data do not justify the increase in the costs of *purchasing* market data.

**1. Collecting and verifying data on production costs:** This is a highly critical phase, which should give answers to the following questions: (1) Which market data products should be included under the regulation? The focus should be on the raw data integral to execution of trades, not derived data nor value-added services. (2) Which costs at the trading venues can be linked to production of these data? (3) Which procedures should be in place within the trading venues to ensure a uniform application of the cost assignment estimates? This step is important because the directive does not contain a precise definition of what data and what types of costs that should be used to measure whether the pricing of data is excessive. As described, the SSDA argue the costs should be defined in line with the LRIC+ model, possibly in the upcoming review of MiFID/MiFIR.

**2. Design of cost benchmark models:** Once the cost data is available, cost benchmarks can be developed. We recognize that the origination of market data is strongly linked to the execution of trade. The costs that the SSDA propose are those linked to the distribution of market data, i.e. are incremental to execution of trades. We outline how this can be done in practice and how sensitivity tests are crucial to get it right and ensure efficient regulation.

**3. Dialogue/negotiation:** Experience from other regulated industries suggests that cost benchmarks in the context of defining revenue caps should not be used in a mechanistic manner. There should be room for dialogue between parties to discuss whether identified factors should allow revenue caps to deviate from the benchmark models. Indeed, good benchmarking may imply several competing indicators.

**4. Agreement:** Optimally, the negotiations lead to an agreement and common understanding of the efficient cost level. Experiences from other regulated industries propose that it is important that both parties honor the agreement for the future collaboration.

**5. Implementation/enforcement:** Once an agreement is reached, each trading venue should implement a pricing of market data that complies with the agreed-upon cost level. It is here important that the same regulatory requirements and standard applies to all trading venues across EU in order to avoid regulatory arbitrage.

We recommend that every third year, the regulator follows the five-step regulatory wheel. After the first round, step 1 and 2 will be significantly less demanding, as the benchmarking model should only be updated and not developed from scratch.

We strongly recommend carrying out step 1 and 2 as an open process. Experience from other industries shows that a common understanding of how data is being collected and benchmarked is needed to deliver high quality and obtain acceptance among the regulator, trading venues and users.

## **Cf 2. Standardised definitions and audit procedures**

Trading venues constantly increase the variety of market data products they offer. Thus, trading venues need to be restrained in their use of vague and ambiguous market data policies, which create significant uncertainty on how market data can be used, as well as a substantial increase in reporting requirements and development in connection with access and control. Moreover, the audit procedures should be standardised and balanced, as the increased complexity in market data



policies combined with the reversed burden of proof are used to increase the trading venues financial outcome from audits.

The proposals can be found in **Appendix A**

**Q8: Do you think that the current RCB approach (transparency plus) can deliver on the objective to reduce the price of market data or should it be replaced by an alternative approach such as a revenue cap or LRIC+ model? Please justify your position and provide examples of possible alternatives.**

The present transparency plus approach is insufficient to deliver a sustainable outcome with reduced market data prices to a reasonable level as market data is subject to a market failure (due to the monopoly status of market data). It is important to notice that there is a lack of transparency and the current model is not working as intended. This is first of all due to a lack of enforcement of the existing rules. Even though the regulatory framework may lack proper definitions of costs and reasonable margins, the intention is clear and should enable ESMA as a first step to establish a workable cost benchmark as elaborated in Q7.

However, either a Revenue Cap or an LRIC+ is needed in order to replicate a competitive environment in a monopoly. Both the LRIC+ and the Revenue Cap are described in Copenhagen Economics reports and the Revenue Cap model is developed further in Copenhagen Economics guideline from July 2019 (**attached**). In case a Revenue Cap is implemented – also elements like connectivity fees (which is also an increasing problem in connection with market data costs) and other measures which are not captured by LRIC+ alone, will be addressed. Such approach would also be more future-proof.

#### **Level 1 changes**

- The phrase “reasonable commercial basis” is not meaningful when dealing with monopoly products such as market data. The level 1 text could be amended to reflect the need for a regulation of market data that handle the existing market failure. In that respect, level 1 could contain the requirement that the price of market data must be based on the cost of producing and disseminating such data and may include a reasonable margin. On level 2, the more detailed requirement such as the cost benchmark (LRIC) and a revenue cap, could be elaborated.

#### **Level 2 changes<sup>8</sup>**

- Remove art. 7.2 as cost of producing and disseminating market data will cover relevant cost. The present art. 7.2. opens a barn door for all kinds of cost with no relevance for market data production and dissemination. The trading venues will collect a revenue via the term “reasonable margin” in art. 7.1. Include a new art. 7.2 in which it is required an obligation to document that the price of market data (as defined as raw market data) is based on cost as defined in a new art. 7.3. Art. 7.3 either stipulates the cost benchmark or a reference to the relevant cost benchmark how it should be complied with.
- In case there is a wish to work for LRIC+, art. 8.1 and 8.2 should be removed as a LRIC+ implies a cap on raw market data price or revenue in order to create competition on value added data. In any circumstances, art. 8.2 should be removed as this is a barn door to create an unlevel playing field and complex data policies with considerable limitations in market data usage.

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<sup>8</sup> These changes must also be reflected in art. 84-89 in Delegated Regulation 2017/565

- In case there is a wish to implement LRIC+, art. 9 would be superfluous. In any cases for the time being there is a need to investigate the required due diligence when entering into a per user program as this at present preclude potential clients or inflict these with unproportionate burdens.
- Market data should be made available without being bundled with other services. However, disaggregated market data is in general not being requested as the disaggregated market data is relatively more expensive than bundled market data. As long as this is the case, the demand will be limited. This is a problem for smaller datausers. i.e. datausers which only need a limited amount of market data but are forced by buy bundled market data. This limits the datause and harm transparency. Therefore, art. 10.2 should be rephrased and state that prices should be at the same relative level as if the data was purchased in a bundled version.
- For transparency purpose, it appears that article 11 is not clear enough as trading venues do not comply. Also, historical price lists and market data policies must be available (at least for the past 5 years). If LRIC+ model is introduced a significant simplification will be the outcome. As for art. 11.2 (d) it should be specified more clearly, what is to be understood with market data revenue in order to ensure comparability. As for art. 11.2 (e), the CE proposed cost benchmark should serve as the basis for this information. The information should be published with figures in order to make it comparable.

**Q9: Do you consider that a revenue cap model as presented above might be a feasible approach to reduce the cost of market data? Which elements would be key for successfully implementing such a model?**

Yes – please see Q8 and the **attached** proposal for a guideline from Copenhagen Economics.

**Q10: Did data disaggregation result in lower costs for market data for data users? If not, please explain why?**

No. Disaggregated market data is in general not being requested as the disaggregated market data is relatively more expensive than bundled market data. As long as this is the case, the demand will be limited. This is a problem for smaller datausers. i.e. datausers which only need a limited amount of market data but are forced to by buy bundled market data. This limits the datause and harm transparency. Therefore, art. 10.2 should be rephrased and state that prices should be at the same relative level as if the data was purchased in a bundled version. We believe that market data should be made available without being bundled with other services.

**Q11: Why has there been only little demand in disaggregated data?**

See responses to Q10.

**Q12: Do trading venues and APAs comply with the requirement to make available data free of charge 15 minutes after publication? If not, please explain in which areas you have identified deficiencies**

To our knowledge trading venues and APAs are increasingly complying with this requirement from a **theoretical point of view**. However, from a practical point of view, there is a significant amount of creativity to enable trading venues and APAs to monetize from this requirement anyway e.g. by only allowing access to the data during a limited period of time where after any additional use would be subject to historical data fee. Another example is that some only allow access to data in non-machine-readable format, etc.

**Q13: Do you consider it necessary to provide further supervisory guidance in this area (for instance by reviewing Q&As 9 and/or 10) Please justify your position and explain in which area further guidance may be needed? Please differentiate between pre- and post-trade data.**

SSDA propose the following wording

**A proposal on how to ensure that the requirement of 15-minutes delayed data free of charge, is truly free of charge:**

[https://www.esma.europa.eu/sites/default/files/library/esma70-872942901-](https://www.esma.europa.eu/sites/default/files/library/esma70-872942901-35_gas_transparency_issues.pdf)

[35\\_gas\\_transparency\\_issues.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-872942901-35_gas_transparency_issues.pdf) (page 24-25)

MIFIR Q&A

Question 9 [Last update: 15/11/2017]

a) Are trading venues, APAs and CTPs required to make data available free of charge for any length of time 15 minutes after publication?

b) Does MiFID II/MiFIR prevent trading venues, APAs and CTPs to apply usage restrictions, licensing and redistribution fees, including fees for deriving and/or manipulating data in automated applications for internal or external distribution, and non-monetary costs to market data – such as requirements on registrations, subscriptions and usage reporting – on data which they make available free of charge 15 minutes after publication?

Our Proposal for a revised response:

a. Yes, information made available free of charge after 15 minutes of its publication should replicate the real-time information published on a reasonable commercial basis but with a 15 minutes delay. The information can be made available directly to end-users. Where the trading venues makes the data available via third parties, this should not impose restriction on access to that data to end-users or Financial institutions.

b. Trading venues, APAs and CTPs may not impose redistribution fees or other restrictions on redistributors/third parties/Financial institutions making available free of charge 15 minutes after the initial publication.

Furthermore, trading venues, APAs and CTPs may not charge fees or impose other restrictions on added-value services created by redistributors/third parties/Financial Institutions from data provided free of charge. As MiFIDII/MiFIR ~~only~~ requires data to be published after 15 minutes free of charge and therefore, trading venues, APAs and CTPs may not charge fees for the use and redistribution of historic data including data published after 15 minutes free of charge.

**Q14: Do you agree that the identified reasons, in particular the regulatory framework and competition by non-regulated entities, make it unattractive to operate an equity CT?**

In principle yes.

There is presumably not an incentive to create a competitive CT solution. If that has been the case, we would have seen it already.

One fact is that with the existing price levels and market data policies from the trading venues, the cost of creating a viable CT would be extremely high and it will not be affordable for users.

**Q15: Do you consider that further elements hinder the establishment of an equity CT? If yes, please explain which elements are missing and why they matter.**

Yes. The regulatory framework is not adequate to ensure a well-functioning CT which can add value and contribute to lower market data costs.

However, several investment firms are in favor to start with a simple and cheap model and limit the CT's activities to the collection and redistribution of 15 minutes old and free of charge data. Trading venues and APAs should actively via standard FIX protocol send 15 minutes delayed data without any charges to the CTP. For this kind of data there is an obviously demand and you do not have to compete with pre trade and real time data which the investment firms and clients anyhow have to buy directly from the trading venues to have the lowest possible latency. With this solution, latency is no issue, the technical demands are low and there is no need to have administrative burdens to transfer fees to trading venues and APAs. However, this step forward is on the strict condition that there will be no additional costs for market data. To insure this such kind of activities must be based on commercial conditions and can't in any way be mandatory.

If this model is found workable the next step with pre- and real time data could be considered.

**Q16: Please explain what CTP would best meet the needs of users and the market?**

See the response in Q15

**Q17: Do you agree that real-time post-trade data is available from both trading venues and APAs as well as data vendors and that the data is currently not covering 100% of the market, i.e. including all equity trading venues in the EU and all APAs reporting transactions in equity instruments? If not, please explain.**

Yes, However, the margin costs to reach 100% of the market is probably not proportionate to the value or benefit.

The requirement for an equity CT to always reach 100.00% of trading venues and APAs market data can be questioned. A greater degree of freedom should be considered as it inhibits the ability to start and operate a CT.

**Q18: Do you agree that post-trade data is provided on a timely basis and meets the requirements set out in MiFID II/MiFIR and in the level 2 provisions? If not, please explain.**

Yes.

**Q19: Do you agree with the issues on the content of data and the use different data standards identified or do you consider that important issues are missing and/or not correctly presented?**

To enhance the quality of collected and redistributed market data, it should be considered to consistently require the Market Model Typology, cf. Q15.

**Q20: Do you agree that the observed deficiencies make it challenging to consolidate data in a real-time data feed? If yes, how could those deficiencies best be tackled in your view?**

Yes. Standardising data more (e.g. using the MMT typology consistently) and producing a guideline for publishing data as also done on transaction reporting.

**Q21: What are the risks of not having a CTP and the benefits of having one?**

The risk of having a CTP, especially if it is mandatory, is increased costs for market data.

**Q22: Would you be supportive of an industry-led initiative to further improve data quality and the use of harmonised standards or would you prefer ESMA guidance? Please explain.**

We see a need for increased data quality, standardized definitions and audit procedures as described in appendix A. As for those definitions, Ideally, the proposals should be included as regulation. However, a guideline or a market practice could also be a way forward.

**Q23: In addition to the standardisation of the reporting and format, as described before, did you identify any further relevant data quality issue to be considered for the successful establishment of CTPs?**

As mentioned above, the quality of the market data provided today is quite poor and must become much better. We believe that a Market Model Typology should be introduced. It must be possible to compare information from different APAs and trading venues. Historical information must be reachable as well. There is a lot of information that could be questioned. Some information is in practice hidden as the intention seems to follow the demand to publish the information and not to make the information understandable for the receiver, etc.

If a CTP is established all venues and APAs must distribute market data in a non-discriminatory way to the CTP (The contributions from trading venues and APAs to a CTP are at present voluntary.) It should be mandatory in order for the CTP to work.)

**Q24: Do you agree that the mandatory contribution from trading venues and APAs to a CTP would favour the establishment of CT?**

Yes indeed. This is a required prerequisite. Another prerequisite is that a CT must contribute to overall lower market data costs. If not there is no value in a CT.

**Q25: Do you have preferences between the option of (i) requiring trading venues and APAs to contribute data to the CT, or, in alternative (ii) setting forth criteria to determine the price that CTPs should pay to TVs and APAs for the data? If so, please explain why.**

It should be a requirement to contribute and since the CTP is also cost based in its pricing policy (Delegated Regulation 2017/565, art. 84-89), revenue sharing could be relevant.

Another model could be to establish a CT which is only based on "free-of-charge data" (15 minutes delayed data), whereby trading venues and APAs would not receive any payment. Whether there is any true value in such CT data should be investigated further.

**Q26: Do you agree that the mandatory consumption could favour the establishment of a CT? If not, please explain your concerns associated with the mandatory consumption.**

Mandatory consumption is questionable. If the CT is not adequate, data consumers will be required to continue to buy existing data as well and the problems are not solved; instead new problems are created.

Only by making the consumption voluntary can you ensure that the supply of CT services eventually meet the markets' needs. Any other solution inhibits development, becomes inefficient and unnecessarily costly.

**Q27: Would mandatory consumption impact other rules in MiFID II and if yes, how?**

**Q28: Do you consider it necessary that the CT covers all trading venues and APAs and the whole scope of equity instruments or would you be supportive of limiting the coverage of the CT? Please provide reasons for your preference and explain your preferred approach.**

An equity CT should, according to MiFIDII/MiFIR cover 100% of trading venues and APAs. This requirement, while there are no benefits of being a CT, the requirement for financial compensation to trading venues and that there are no obligations for trading venues or APAs to provide market data are likely the explanations for why there is no CT being established. Lowering the requirement for 100% coverage, like for a CT for Non equity, would probably increase the chances of a CT being established.

**Q29: Do you agree with ESMA's preferred model of real-time CT? If you consider that, on the contrary, the delayed or tape of record CT are preferable, please indicate the reasons of your preference.**

The proposed model will probably lead to higher costs for market data which is not acceptable.

**Q30: Are there any measures (either technical or regulatory) that can be taken in order to mitigate the latency impacts?**

No! There has been a discussion about introducing speed bumps. However, this is of course, not acceptable as it would have other unintended consequences.

**Q31: Do you agree that the CT should be operated on an exclusive basis? To what extent should other entities (e.g. APA or data vendors) be allowed to compete with the CTP?**

Competition is nearly always good for the development of services, costs and in the end for the consumer. Restricting competition must therefore be avoided.

The fact that data vendors have developed their services and that a CT has not been established is a confirmation that the conditions for a CT do not make its services sufficiently attractive. Forcing someone to buy services that are not attractive is not a good solution.

To prohibit APAs or data vendors and create a new monopoly is not the way to move this issue forward. The preferable solution should involve the establishment of several CT:s acting in competition. It must therefore become more attractive to become a CT.

**Q32: Should the contract duration of an appointed CTP be limited? If yes, to how many years?**

**Q33: Please indicate what would be, in your view and on the basis of your experience with TVs and data vendors, a fair monthly or annual fee to be charged by a CTP for the real-time consolidation per user?**

One of the major problems with today's market data infrastructure is the eternal discussions with trading venues about how many clients can access market data and what information they receive. This administration is costly, heavily processed and involves a lot of conflicts with trading venues and as a consequence back billing (since it is trading venues that reserve the interpretative preference of

the market data agreements). It must therefore be easier and cheaper to pass on information to the clients.

**Q34: Would you agree with the abovementioned model for the CT to charge for the provision of consolidated data and redistribute part of the revenues to contributing entities? If not please explain.**

**Q35: How would Brexit impact the establishment of a CT? Would an EU27 CTP**

**consolidating only EU27 transactions be of added value or would a CT that lacks UK data not be perceived as attractive?**

**Q36: In your view, how would an EU27 CT impact the level playing field between the EU27 and the UK? Please explain.**

## Appendix A

### Standard market data Terms

These standard terms to Trading Venues's market data license agreements are drafted for the purpose of ensuring:

- I. Comparable Product/ Price lists across Trading venues
- II. Aligned and reasonable Documentation and Audit terms for the licensees

Ideally, the proposals should be included as regulation. However, a guideline or a market practice could initially also be a way forward.

### Contents

#### Fundamental Pricelist Terms

- Non-pro vs. Pro User
- Display vs. Non-Display Usage
- Realtime, Delayed, EOD and Historical Data
- Derived Data

#### Audit Terms

- Obligation to present contractual foundation
- General audit principals, Reasonable commercial basis and conflict of interest
- Right to postpone audit
- Right to first refusal

### Fundamental Pricelist Terms

#### 1. Non - Pro vs. Pro User

##### **Purpose:**

The Trading venues do not hold the same user definition which in return causes a lot of unnecessary administration of market data access rights to these.

This is one clear and simple definition to the user types across the Trading Venues.

##### **Proposed Wording:**

A "Non-Pro" is a user who does not hold a license to act as financial institution, hereunder but not limited to: investment firms, credit institutions, insurance companies, investment management companies and management companies, and pension funds and their management companies and who is not a representative of a financial institution;

A "Pro" shall mean a user who does not qualify as a Non-Pro.

##### **Legal Reference:**

This is an alignment of the Trading Venue User definitions to be aligned with the Retail versus Eligible Counter Party definition found in Directive 2004/39/EF



## **2. Display vs. Non – Display Usage**

### **Purpose:**

Over the past decade, the SSSA have seen an inexplicable increase in Trading Venue market data licenses based on the use of market data outside the Display to end user format. This type of usage is commonly referred to as “Non-Display”, however sometimes quite confusing as also labelled as “Other application use” or similar by the Trading Venues.

This is one clear and simple definition to market data usage categorized as either Display or Non-Display usage to be implemented across the Trading Venues.

### **Proposed Wording:**

“Display Usage” is usage of market data made by one or more physical persons who benefits from having (at minimum) visual usage access to the data.

Display Usage of data is applicable to both snap-shot and streaming market data.

“Non-Display Usage” is defined as any type of data which is not Display Usage.

Non-Display Usage of data is only applicable to real time streaming data.

## **3. Realtime, Delayed, EOD and Historical Data**

### **Purpose:**

In order to ensure that there is a clear definition of what market data is in use, it is important to have clear cut definitions to the difference between Realtime data, Delayed data, End Of Day (EOD) data and Historical data.

### **Proposed Wording:**

“Delayed data” is streaming market data delivered with a delay of minimum 15 minutes af the official publication.

“Realtime data” is streaming market data delivered in real-time or with a delay of less than 15 minutes.

“End Of Day (EOD) data” is the official closing prices of the current trading day.

“Historical data” is all market data generated prior to the End Of Day of the previous trading day. The Trading Venues waive all claims and right to the Historical data.

## **4. Derived Data**

### **Purpose:**

The situation where a market data set is used in whole or in part to make other data values is quite common across not only the financial industry, but also the research community and society in general.

Therefore, it is a problem not to have an industry wide definition applied across all Trading Venues.

Another problem to address is the ownership of the derived data regarding when the Trading Venue can claim some right or entitlement as opposed to when the deriving party is creating its own new original work. Ownership of markets data is also analyzed in legal opinion from Danowsky and Partners (2018).

**Proposed Wording:**

“Derived Data” is market data derived from the Trading Venue most commonly achieved using mathematical, logical, or other type of transformation, hereunder arithmetic formula, composition, aggregation.

“Original Work” is unique Derived Data created in a way where it cannot be reverse engineered back to the Trading Venue market data used in the production process and do not materially replace the Trading Venue market data. Page Break

**Audit Terms****1. Audit Term****Purpose:**

The term of the Trading Venue audit should never have such historical length that (in itself) carries a burden to document for year back in time. Therefore, a clearly defined upper limit is necessary.

**Proposal:**

The “Audit Term” is the period which the audit will cover.

The Audit term can be no longer than the shorter of the time from the closure of the latest audit or three (3) years, calculated from the time of the audit notice reception.

**2. Obligation to present contractual foundation****Purpose:**

The historical nature of the audit imposes a problem for either side in documenting what terms and conditions of the Trading Venue policies were applicable in relation the relevant time of the audit period. As the party drafting the terms and controlling changes there must be a clearly defined obligation for the Trading Venues to present the complete contractual foundation with updates and changes as imposed from start to end of the audit term.

**Proposal:**

“Prior to the commencement of any audit it shall be the obligation of the Trading Venue to facilitate to the auditee any and all applicable versions of contracts, terms and policy for the audit term.”

**3. General audit principals, Reasonable commercial basis and Conflict of Interest****Purpose:**

It important that the audit is carried out in adequate and reasonable manner. In order to ensure this, these general principals should be established.

**Proposal:**

These “General Principals” must be applied in the performance of any market data audit:

- a) Objective
- b) Competent
- c) Performed with Due Care, and

d) Respect Confidentiality.

The audit shall happen in a “Reasonable Commercial Manner”, therefore either party (or representative thereof) to a contract is under the obligation to act in good faith and commercial reasonable manner.

Any “Conflict of Interest” with the auditor shall be disclosed to the audited party. Including but not limited to; employment status and/or compensations based on audit claim size.

#### **4. Right to postpone audit**

##### **Purpose:**

In order to cope with the requirements, the audited party is consistently required to focus its resources entirely on the burdensome audit process. Therefore, it should be possible for the audited party to request for the audit to be postponed ensuring a well-executed and mutually satisfactory audit process.

##### **Proposal:**

The audited party shall have the “Right to Postpone” twice for three months after having received the Trading Venue’s proposal of an audit start date.

#### **5. Right of first refusal**

##### **Purpose:**

From practice it has been observed that the audit process can be quite conflicted based on the behavior of the parties involved or flaws to the audit scheme. With the aim of preventing reoccurrences of such incidents, the audited party must have a right of first refusal to one of more audit participants or scheme elements that are conflicted.

##### **Proposal:**

The audited shall have a “Right of First Refusal” to the audit process in whole or in part as proposed by the Trading Venue, if the audited party in a reasonable manner can identify elements to the audit or concerning the audit that are conflicted or needs a separate resolution prior to the commencement of an audit.