

**ESMA CONSULTATION PAPER
GUIDELINES ON THE MiFID II/ MiFIR
OBLIGATIONS ON MARKET DATA**

AMAFI contribution

Association française des marchés financiers (AMAFI) is the trade organisation working at national, European and international levels to represent financial market participants in France. It acts on behalf of credit institutions, investment firms and trading and post-trade infrastructures, regardless of where they operate or where their clients or counterparties are located. AMAFI's members operate for their own account or for clients in different segments, particularly organised and over-the-counter markets for equities, fixed-income products and derivatives, including commodities.

AMAFI welcomes the opportunity to respond to this consultation paper (hereafter the CP) on ESMA's guidelines on market data.

Before answering the specific questions raised in the CP, AMAFI would like to highlight the following general comments.

GENERAL COMMENTS

ESMA considers that so far MiFID II has not delivered on its objective to reduce the price of market data.

From a user perspective it is observed, a continuing increase in the prices of market data in the EU, despite the introduction by legislators in the MiFID II framework of an obligation to provide data on a reasonable commercial basis (RCB). The observed increase stemmed both from the direct prices charged for data feed by market data providers and the multiplication of indirect costs linked to complex market data agreements and the intensifying need for additional resources to manage and control the use of market data by market participants.

At the same time, ESMA acknowledges that market data plays an increasingly important role in financial markets and that market participants are consuming an increased amount and variety of data, which requires innovations by trading venues and data providers for the infrastructure necessary to provide and use data.

Considering this, AMAFI welcomes ESMA's consultation paper in that it pursues some clarifications and harmonisations in keeping with the transparency plus approach.

In its response¹ to ESMA's CP of September 2019, AMAFI had made proposals with the goal to improve the enforcement of the RCB principle, notably:

- An enhanced comparability of pricing lists published by trading venues.
- A simplification and harmonisation of the fee schedules provided trading venues for their core business on market data
- A simplification of Market data agreements and a standardisation of their validity period (at least on an annual basis), allowing data users to avoid deploying unnecessary resources.
- The simplification and harmonisation of audit procedures.
- The harmonisation of high-level definitions (information/market data, derived data/other original created work/etcetera, display use, non-display use...).

Moreover, AMAFI had raised the issue of the application of the RCB rules to data vendors as highly important for levelling the playing field between market data providers and non-regulated entities. AMAFI is aware that the proposed guidelines will not apply to data vendors but considers that the extension of the RCB rules is still an important issue to be taken into consideration.

AMAFI believes that the regulatory guidance proposed by ESMA in its consultation paper addresses important issues pertaining to the practices of market data providers. Overall, we believe that the clarifications provided for the provision of market data, the obligation to provide market data on a non-discriminatory basis, increased uptake of the per user model and the obligation to keep data unbundled will play an important role in improving the contractual relationship between market data providers and users.

¹ "ESMA 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", AMAFI / 19-84

Regarding this consultation paper, the main comments voiced by AMAFI are summarised below:

AMAFI'S MAIN COMMENTS

- Auditing practices:
 - o AMAFI proposes to include in ESMA's regulatory guidance requirements regarding good practices for external auditors. E.g to ensure that payments made to external auditors by market data providers are not correlated to the penalties inflicted on users, and to guarantee that the confidentiality of the data consulted by external auditors is respected.
 - o AMAFI proposes to set a maximal threshold for retroactivity (of 36 months from the audit notification date) and interests (of EONIA rate plus 100 basis points)
- Fee policy: The overall market data fee schedule should respect RC principles (but i.e. cost based), and, although as a general principle, proportionality of market data fees to the value the data represents should not be the norm, there may be merit in clarifying that customer segmentation should allow to differentiate fees from retail vs professional users for instance
- Standardised terminology: AMAFI strongly supports the introduction of standardised terminology. However, we believe that some definitions do not reflect the operational reality of market data provision and should be amended in consultation with the industry.
- Delayed data: AMAFI believes that the use of delayed data should only be charged when a user proceeds to sell market data to other entities (when it provides a service of pure market data provisions). It is thus important to clarify that delayed data when used by customers, notably financial institutions, in the normal course of their activities to serve their own clients is not considered as an added-value service and cannot be charged even if the service (funds administration for instance) provided by financial institutions to their clients is charged.

Finally, AMAFI is aware that ESMA's efforts to provide regulatory guidance for MiFID II/ MiFIR obligations on market data are strongly linked to the current efforts by the Commission to design a European consolidated tape. AMAFI is concerned that the development in market data prices is misguidedly being taken as a use case for the consolidated tape.

While we believe that there are many purported use cases to a potential consolidated tape in the EU, we also know that those use cases will not be able to cover the market data needs of engaging in algorithmic trading, market makers or other market participants requiring low latency data feeds for their activities.

ANSWERS

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

AMAFI believes that the guidelines should cover market data providers offering market data free of charge for certain requirements, notably those pertaining to access to data on a non-discriminatory basis and unbundling of market data.

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

AMAFI broadly agrees with Guideline 1.

Question 3: Do you think ESMA should clarify other aspects of the accounting methodologies for setting up the fees of market data? If yes, please explain.

AMAFI welcomes the clarifications brought by Guideline 2 regarding the fee policies followed by market data providers. However, we believe that those clarifications should be improved to address other key issues pertaining to the auditing practices, particularly in the case where the audits are performed by external entities.

AMAFI is not against the use of external entities by market data providers to perform audit procedures. However, we believe that the contractual ties between market data providers and external auditors should be included in ESMA's regulatory guidance, notably by:

- Ensuring that the payments made to these external entities are not correlated to the penalties inflicted on users who are not compliant to the market data agreements. As a matter of fact, we believe that such practices create a strong deterrent for these entities to lead impartial auditing procedures.
- Ensuring that the external auditors engage in meaningful procedures to guarantee that the data consulted when performing audits for different exchanges remains confidential. For example, it can be suggested that audits for two different exchanges cannot be carried out by the same teams.

We do not believe that additional clarifications should be made regarding other aspects of the accounting methodologies for setting up the fees of market data.

Question 4: With regard to Guideline 2, do you think placing the burden of proof, with respect to non-compliance with the terms of the market data agreement, on data providers can address the issue? Please provide any other comments you may have on Guideline 2.

AMAFI considers that It is up to the data provider to provide evidence that the audited entity has not complied with the rules. Nevertheless, However, the audited entity must cooperate in good faith with the auditor and provide the auditor with all required information.

However, we believe that ESMA should come forward with precise criteria to characterise the overly onerous practices mentioned in Guideline 2. To this end, AMAFI proposes to limit the retroactivity of penalties linked to non-compliance to a maximum of 36 months from the audit notification date. As for excessive interest charging, AMAFI proposes to set the maximum rate authorised at the EONIA rate plus 100 basis points.

Moreover, AMAFI remains interrogative as to the allocation of the penalties collected from users.

Question 5: Do you consider that auditing practices may contribute to higher costs of market data? Please explain and provide practical examples of auditing practices that you consider problematic in this context. Such examples can be provided on a confidential basis via a separate submission to ESMA.

AMAFI believes that auditing practices, along with some discrepancies in the approaches taken approaches by different market data providers, can add complexity to the contractual ties between data providers and users and in some cases result in penalties and excessive interests paid by users. The mere increased complexity of auditing procedures results in indirect costs linked to human and operational resources employed by users to control their use of market data.

Costs associated with audit practices are, on the whole, inherent to the market data industry. Clear best practices around audits could be an alternative to guide the audit process.

Regarding what AMAFI considers as problematic auditing practices, a number of AMAFI members wish to draw ESMA's attention to the "Data Usage Declaration" set up, in Q3 2020 by Deutsche Borse AG.

See : <https://www.mds.deutsche-boerse.com/mds-en/data-services/real-time-market-data/how-to-order-data/data-usage-declaration>

For a number of AMAFI members, this "Data Usage Declaration" seems to be a very comprehensive questionnaire made of 100+ detailed questions and imposed to all Deutsche Borse market data customers. Very complicated and resources consuming to try to complete. Such a questionnaire means additional market data administrative and licensing burden for customers. It can be wondered whether such additional complexity complies with MIFID2 "Reasonable Commercial Basis" objectives and could be perceived as an additional/new form of auditing practices.

Question 6: Do you agree with Guideline 3? If not, please justify, by indicating which parts of the Guideline you do not agree with and the relevant reasons.

AMAFI agrees with Guideline 3. Although the overall market data fee schedule should respect RCB principles (i.e. cost based), and, although as a general principle, proportionality of market data fees to the value the data represents should not be the norm, there may be merit in clarifying that customer segmentation should allow to differentiate fees from retail vs professional users for instance.

Question 7: Do you agree with the approach taken in Guideline 4? If not, please justify, also by providing arguments for the adoption of a different approach.

While AMAFI agrees in principle with the aim stated by the Guideline 4 to simplify the application of market data providers' fees, there is a need to consider that every market data user operates a different scale or scope of activities and that Guideline 4 in its current form could have the potential to damage the ability of small and medium sized market data customers and market data customers that operate in a niche to compete. In reality, some corporations can be involved in a large variety of commercial activities. For example, a corporation could act as a proprietary trader, broker and index creator, another as a broker and trading platform etc. A guideline that does not fully take this into account runs the risk of providing certain players in capital markets with a broad range of activities through which they recover their costs an unfair advantage over others or would require the introduction of additional/more granular customer types further increasing complexity.

Of course, it does not mean that market data fees should be value based, but that for some licenses (such as a non-display license) they can be linked to a number of activities for instance. See AMAFI answer to question 18, section "for non-display use".

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

Technical arrangements of market data providers may make guideline 5 difficult to implement from a practical perspective.

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

AMAFI believes that Guidelines 3, 4 and 5 address the issue of market data provision on a non-discriminatory basis with an approach only based on categories of customers. We believe that this approach can lead to extensive price lists that contribute to complexify the fee schedules of the market data providers, who are also asked to simplify their fee policies.

On the other hand, simplified fee schedules result in a very limited choice offered to users regarding the available products for the use of market data, and ultimately to an increase in prices for many users only interested in limited uses that might not be proposed by the market data provider.

Question 10: Do you agree on the interpretation of the per user model provided by Guideline 6? If not, please justify and include in your answer any different interpretation you may have of the per user model and supporting grounds.

AMAFI considers that the interpretation provided by Guideline 6 of the per user model is not good.

The unit of count should not be the "per Active User-ID" but the per Active User" considering that an active user could have more than one User-IDs. Moreover, it should be clarified that the per user counting is only done for active users that have effectively accessed or used the data over a given period and not those who are permissioned for the data but have neither accessed nor used them.

Besides that, AMAFI would like to point it out that two models should be considered.

Direct reporting and netting

Most market data providers offer the possibility to pay market data fees for display usage on a per user basis. However, in practice, it is indeed very difficult to benefit from such "per user" model as it requires that a direct reporting is put in place by the customer with each market data provider to report all accesses across all data redistributors (data vendors, trading platforms and direct feeds accesses...) in order to properly count unique users.

AMAFI believes that such "Direct Reporting and Netting" model should be made available on a more flexible way by ensuring that market data vendors facilitate this by allowing partial scope (some country/regions, some data redistributors, some entities...) to be included into such a model and not impose a complex full "Direct Reporting and Netting" model (or nothing).

Single source netting

Moreover, market data providers should also propose by default a per Active User unit of count on a per source basis (i.e per data redistributor) for market data received via data feeds.

On a per source basis, it is possible and easy to properly identify and control that a user is an unique "Active User" and not charge him/her several times for the same display usage on the same source (same data redistributor on same infrastructure) without the need to change existing reporting processes or the need put in place a complicated direct reporting with the market data provider.

Within Guideline 6, ESMA should make sure that this is "single source netting" is proposed by default by all market data providers. The proposed "Active User" unit of count should not be restricted to avoid multiple billing across multiple market data sources (market data redistributors) via direct reporting and netting but

be also available to avoid multiple billing for the same Active User on a single source as well (without requiring complex or change of reporting processes).

AMAFI strongly believes that both the "Direct Reporting and Netting" and "Single Source Netting" models should be proposed by all market data providers based on the clarified "Active User" definition. This does not obviously prevent data providers to offer other kind of arrangements.

Question 11: Do you agree with Guideline 7? If not, please justify. In your opinion, are there any other additional conditions that need to be met by the customer in order to permit the application of the per user model or do you consider the conditions listed in Guideline 7 sufficient to this aim? 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.

AMAFI agrees with Guideline 7, we consider that the conditions set for eligibility to the per user model are sufficient to this end.

Question 12: Do you agree with Guideline 8? If not, please justify also by indicating what are the elements making the adoption of the per user model disproportionate and the reasons hampering their disclosure.

AMAFI agrees with Guideline 8.

Question 13: Do you think ESMA should clarify other elements of the obligation to provide market data on a per user fees basis? If yes, please explain.

We believe Guidelines 6, 7 and 8 provide sufficient clarifications on the per user model.

AMAFI is fully aligned with ESMA's proposal to provide a single interpretation and guidance for the enforcement of the per user model. We consider that it is an important advance that will allow to align this notion with the reality of market data use by clearly identifying individual data users instead of limiting it to a specific device as it was previously done by market data providers.

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

AMAFI considers that the issue of unbundling is not fully relevant to regulated markets who already comply with this obligation. The issue of unbundling is more specific to other market data providers who distribute data on a different level of granularity than that of regulated markets.

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

We believe that ESMA's clarifications are sufficient for that matter.

Question 16: Do you agree with Guideline 10 that market data providers should use a standardised publication format to publish the RCB information? If not, please justify.

AMAFI agrees with Guideline 10.

Question 17: Do you agree with the standardised publication template set out in Annex I of the Guidelines and the accompanying instructions? Do you have any comments and suggestions to improve the standardised publication format and the accompanying instructions?

AMAFI agrees with the template set out in Annex I of the Guideline.

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

AMAFI welcomes the introduction of standardised terminology for market data provision. However, we believe that some of those definitions do not reflect the operational reality and should be amended as follows:

- Unit of count:

Please also see our answer to question 10

- o For display use: the use of the “Active User ID” as a unit of count in this case can lead to misleading interpretations, that would limit the use of a unique user to a single application or screen. As a matter of fact, a single user usually needs multiple “User IDs” all related to the data use authorised by the licence. AMAFI proposes **to replace “Active User ID” with “Active User”** in order to lift all ambiguity on this matter and allow market data providers and users to agree on methods to identify individual users.
- o For non-display use: AMAFI strongly disagrees with the choice of “the server or device” as a unit of count. The combination of servers or devices chosen by a firm to access and process the data depends on its IT structure, meaning that firms with a similar use of data will be charged differently due to the specific features of their respective IT structures. AMAFI proposes to allow for segmentation of the non-display use of market data based on scope, i.e. specific fields of use. For example, market data providers can propose licences for buy-side use, sell-side use, etc. Furthermore, AMAFI proposes to allow for segmentation of the non-display use of the market data based on scale.

- Derived data:

AMAFI notes that the definition proposed by ESMA is too restrictive and proposes the following definition instead. Derived data should mean: data derived from Market Data created as a result of manipulation of the market data and / or combination of the Market Data with other data and that cannot be used to restore the Market Data and/or materially replace the Market Data.

AMAFI would note that, derived Data can be created as the result of the transformation or combination of data from a single market data provider with NO other data provided by other sources and that cannot be used as a substitute to the original data.

There are many business cases where genuine Derived Data are created with data from a single market data provider. Transaction cost analysis indicators (such as VWAP, Volumes Weighted Average Price) is a good example of such Derived Data made from data from a single market data provider. Many other examples could be provided if need be.

Question 19: Is there any other terminology used in market data policies that would need to be standardised? If yes, please give examples and suggestions of definitions.

We believe that the set of definitions provided by ESMA is sufficient. AMAFI would note that the key issue at this stage is to get the definitions that are to be defined right to avoid inherent ambiguity of certain definitions which would ultimately make it more difficult to achieve the desired outcome.

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

AMAFI broadly agrees with Guideline 12.

Question 21: Do you think there is any other information that market data providers should disclose to improve the transparency on market data costs and how prices for market data are set? If yes, please provide suggestions.

We believe the information required by Guideline 12 is sufficient.

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

AMAFI agrees with Guideline 13.

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

We are in line with ESMA's proposition to include all the fields specified in RTS 1 and 2 for the purpose of post-trade data publication. We also believe that flags are a useful element, and that there should be no difference between the different types of trading systems. Finally, we believe that the first best bid and offer is sufficient for the purpose of delayed pre-trade data publication.

Question 24: Which use cases of post- and pre-trade delayed data are relevant to you as a data user? What format of data provision is necessary for these use cases, and especially for pre-trade delayed data?

AMAFI is not in a position to answer this question.

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

AMAFI agrees with the definition of data-redistribution set out in Guideline 16.

However, the definition provided for value added services is ambiguous and can still lead to a broader interpretation than intended. The internal use of the market data cannot be charged for except in cases where the data is used to create derived data and where derived data is commercialised.

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

AMAFI is not in a position to answer this question.

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

AMAFI is not in a position to answer this question.