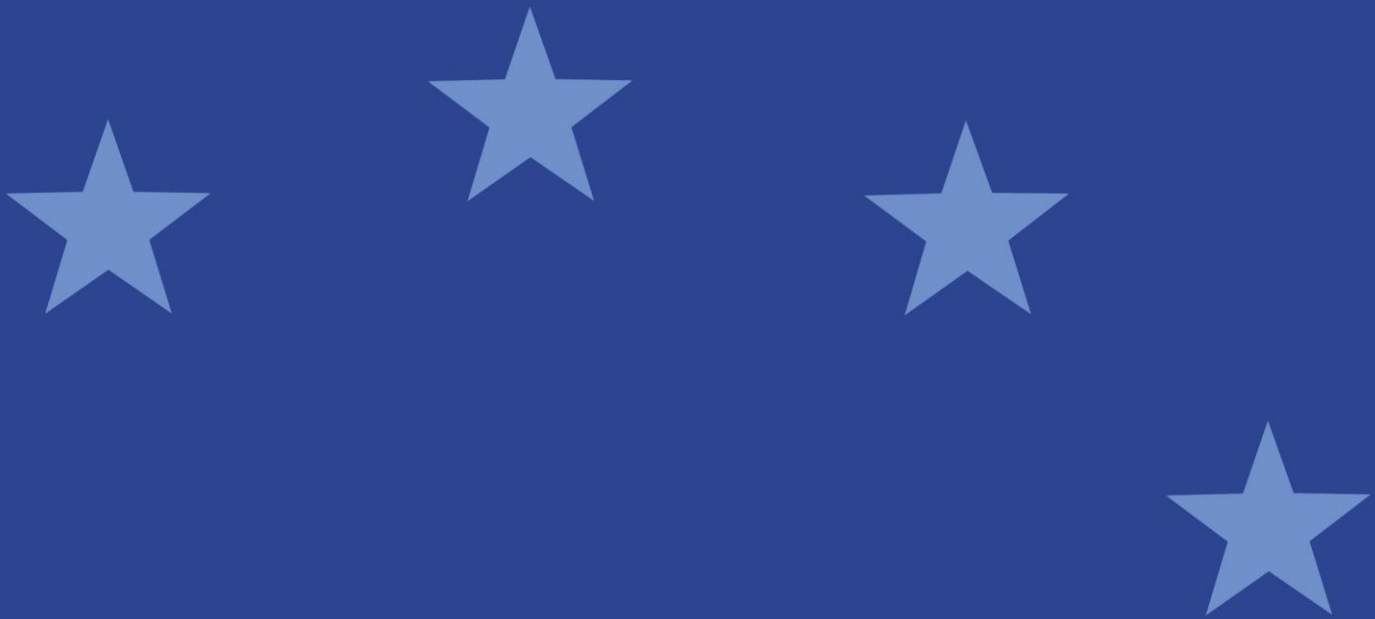




European Securities and
Markets Authority

Reply form for the Consultation Paper on Guidelines on the MiFID II/ MiFIR obligations on market data



Responding to this paper

ESMA invites comments on all matters in this consultation paper and in particular on the specific questions summarised in Annex I. Comments are most helpful if they:

- respond to the question stated;
- indicate the specific question to which the comment relates;
- contain a clear rationale; and
- describe any alternatives ESMA should consider.

ESMA will consider all comments received by **11 January 2021**.

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input - Consultations'.

Instructions

In order to facilitate analysis of responses to the Consultation Paper, respondents are requested to follow the below steps when preparing and submitting their response:

1. Insert your responses to the questions in the Consultation Paper in the present response form.
2. Please do not remove tags of the type <ESMA_QUESTION_GOMD_1>. Your response to each question has to be framed by the two tags corresponding to the question.
3. If you do not wish to respond to a given question, please do not delete it but simply leave the text "TYPE YOUR TEXT HERE" between the tags.
4. When you have drafted your response, name your response form according to the following convention: ESMA_GOMD_nameofrespondent_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA_GOMD_ABCD_RESPONSEFORM.
5. Upload the form containing your responses, in Word format, to ESMA's website (www.esma.europa.eu under the heading "Your input – Open consultations" → "Consultation on the Guidelines on the MiFID II/MiFIR obligations on market data").

Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publically disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the heading [Legal Notice](#).

Who should read this paper

This consultation paper is interesting for you if you are a trading venue, an APA, an SI or a consumer of market data.

General information about respondent

Name of the company / organisation	Deutsche Börse Group (DBG)
Activity	Regulated markets/Exchanges/Trading Systems
Are you representing an association?	<input type="checkbox"/>
Country/Region	Germany

Introduction

Please make your introductory comments below, if any

<ESMA_COMMENT_GOMD_1>

As an integrated provider of financial services and financial market infrastructures, Deutsche Börse Group (DBG) operates trading venues (Regulated Markets (RMs), Multilateral Trading Facilities (MTFs) and an Organized Trading Facility (OTF) as well as market data and index services, and furthermore Central Counterparties, Central Securities Depositories and a Trade Repository. DBG is thus subject to MiFID II/MiFIR transparency and reporting obligations and appreciates the opportunity to respond to ESMA’s consultation on its guidelines on the MiFID II/MiFIR obligations on market data.

As highlighted in our responses to the ESMA consultation on market data and the CTP in 2019 as well as to the Commission’s consultation on the priorities of the review of MiFID II/MiFIR in 2020, DBG is not supportive of strict sectoral regulation in the context of the pricing of market data, which goes beyond generally applicable rules and regulations (such as competition law) and which finally turns financial market supervisors into price regulators. Regulatory interventions may interfere with competitive forces and may lead to negative unintended consequences for EU capital markets, especially during structural changes. Therefore, they are usually kept to cases of market failure or significant barriers to entry, none of which there is proof of evidence.

While there is ample noise that trading venues such as exchanges generate too much revenue from market data to the detriment of market participants and investors, fact-based evidence indicates the contrary. OXERA neither finds any detrimental effects of recovering costs through market data fees for end users, nor any negative impacts on market efficiency nor on competition. “For example, in theory, if market data fees were very high, this could affect the viability of new trading venues that do not have their own price formation process and use market data from stock exchanges as an input. However, the significant growth in dark trading, SIs and new entrant trading venues suggests that their business models are not being undermined, and that current market data fee levels enable them to operate effectively. In sum, the economic analysis does not provide evidence that the current charging structures for market data are leading to detrimental market outcomes for investors. Although the responses

to the ESMA consultation contained analyses of market data expenditure and fees, there was no evidence of any distortionary impact on market functioning and/or poor outcomes for end-investors.”¹

The production and dissemination of market data by primary exchanges has not prevented but facilitated a very dynamic competitive environment in Europe. In addition, in light of a lack of evidence of any market failure and the non-existence of barriers to entry to EU equity markets or exchange markets data, there is no need for sector-specific regulation. In this context, OXERA clearly points out in its report to the European Commission on Primary and Secondary Markets² that there are no barriers to entry to the EU market but ample execution choices. Furthermore, ESMA’s Annual Statistical Report on EU securities markets³ provides statistical evidence of the existing competition within the EU. Overall the number of SIs within the EU has grown to 223 as of today according to ESMA’s list. Equity SIs have grown from 15 before MiFID II/MiFIR to 73 in 2019. As regards share turnover in terms of traded volume in 2019, the top ranks are covered by an MTF, followed by an SI and an exchange (all based in the UK). A study of Liquid Metrix⁴ indicates that from nine reviewed SIs, one was almost only executing at mid-point of exchanges (using exchange data), while the others used mid-point rather extensively as well.

Price regulation of the provision of market data as well as further guidelines should be considered against this background. We would like to take a step back and summarize where we already stand as of today in the regulatory chain of price regulation:

- a. **Obligation of transparency** (on products, prices and general methodologies) applies;
- b. **Obligation to non-discrimination** (as regards the provision of market data) applies;
- c. **References to and proposals on cost accounting and price setting and how it should be conducted** are included by ESMA ;
- d. **Obligation of harmonization on transparency and contractual terms** are proposed by ESMA.

Already today, comprehensive regulatory requirements are being applied, while there is no fact-based evidence for a market failure or barriers to entry to EU equity markets due to pricing of exchange market data, to the best of our knowledge. Thus, we would not see any necessity, for ESMA to become more descriptive. We would like to remind that the principle of proportionality should be the guiding principle for regulators who should become active only in case of market failure or significant barriers to entry.

As regards ESMA’s proposals we would now like to highlight the following points:

Pricing methodology and margins

DBG considers that disclosing detailed cost allocation keys and the explanation around the determination of margins could go beyond the scope of the current transparency plus approach and undermine competition among market data providers. While we support the provision of comprehensive information to our supervisor, we do not think that a detailed disclosure to the

¹ OXERA, What is the data on market data? Taking stock of the debate. November 2020:

<https://www.oxera.com/agenda/whats-the-data-on-equity-trading-market-data-taking-stock-of-the-debate/>

² OXERA, Report on Primary and Secondary markets, November 2020: <https://www.oxera.com/publications/primary-and-secondary-equity-markets-in-the-eu/>

³ ESMA, Annual Statistical Report on EU securities markets, November 2020: <http://www.publicdebt.net.org/pdm/content/Report/Report-00747.html>

⁴ Yegerman, Henry, Liquid Metrix, SI’s: The Good, The Bad and The Ugly: <https://insights.issgovernance.com/posts/sis-the-good-the-bad-and-the-ugly/>

public is required. Competent authorities' insight into the cost methodology by trading venues, should provide sufficient trust to all stakeholders involved that pricing is fairly conducted by trading venues.

Joint cost

ESMA's proposal states that joint costs shall not be allocated according to the revenues generated by the trading business on the one hand and the market data business on the other hand. In this context it is important to recall that data and trading represent joint products, one cannot exist without the other⁵⁶, and as such there can be no risk of cross-subsidization. We therefore suggest that ESMA still allows the use of revenue-based cost allocation for joint cost. Any new to established methodology of cost allocation in addition to the existing carries the risk of inconsistencies. In addition, the setup of another shadow accounting with a separate RCB cost allocation methodology leads to higher costs and resources. Providing mandatory guidelines on accounting could go well beyond the scope of the current transparency plus model and might come very close to the issuance of clear price regulation. Cost allocation should therefore clearly remain at the discretion of market data providers (respectively the data sources for the avoidance of doubt). Furthermore, we recommend that there should be a clear distinction between joint and common cost which might occur as well in the context of products which are not joint products.

Definition of users / Value of market data

DBG appreciates that ESMA supports the value that data represents to the user, when defining data licenses for various user groups. This is in line with economics literature, confirming that such a behaviour indeed maximizes welfare⁷. This ensures widely spread transparency, e.g. to private investors, large institutions and third-party business entities alike, while taking note of the value the data carries for each of these customer groups/use cases.

Active user / User ID / Product netting

DBG does not support though ESMA's proposal as regards "active user" schemes, respectively the "active user" definition as the only unit of count for display usage, nor the "User ID" as the only unit of count for non-display data. Both proposals are options available to customers, but hardly used, and only by certain customers, as it is extremely complex to administer for all parties included. For the same reasons, we do not support either the full netting of product versions or use cases across data licensees as the prescribed way of accounting data fees. Netting of different product versions does exist but is no standard. The current proposals would require significant investments on trading venues side to establish direct billing systems for the customers, who would have to invest in data management tools and administrative systems at their end. Administration cost for the industry would rise. The current practice to invoice the data where the data are entitled is the currently preferred solution by many market participants.

Contract definitions

DBG generally supports ESMA's aim for a certain harmonization of contractual definitions. We would like to point out that this harmonization already implies a reduction in the contractual freedom of exchanges, and as such an interference with exchanges rights to conduct business in the EU. However, we do see value in supporting ESMA in this respect as well as market participants in the aim to have a common terminology to better understand exchanges' contracts and policies. We would suggest using ESMA's proposals as best practices and point

⁵ Lee, Ruben, What is an Exchange?: Oxford University Press 1998

⁶ OXERA, Is ESMA becoming a price regulator?, September 2014: <https://www.oxera.com/agenda/is-esma-becoming-a-price-regulator/>

⁷ Lee, Ruben, What is an Exchange?: Oxford University Press 1998

out that DBG as member of FESE supports FESE's proposals in this respect. FESE and its members are proposing harmonized definitions, which will achieve ESMA's targets, while being acceptable for exchanges. Any strict harmonization, reducing companies' right to conduct their business freely within the EU, should definitely be avoided in order to avoid unintended negative side effects.

Implementation

Finally, we would like to point to the fact that implementing the guidelines will be a time-consuming and burdensome process as it includes changing contractual relationships and will impact internal pricing and governance models for example as well as external established processes with our customers. The requirement that the guidelines should become effective immediately after introduction would not be feasible in our view because of the high technical impacts on administrative systems. We would therefore like to suggest a transition period to grant sufficient time for any required changes to existing practices – both for providers of market data as well as for customers using market data.

DBG trusts that our comments are a useful contribution to the draft guidelines on market data and remain at the disposal of ESMA for any questions and additional feedback.

<ESMA_COMMENT_GOMD_1>

Questions

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?

<ESMA_QUESTION_GOMD_1>

DBG agrees with covering in the guidelines also market data providers offering market data free of charge for the requirements not explicitly exempted in the Level 2 requirements, e.g. the requirements to make market data available to all customers on the same terms and conditions, to have scalable capacities in place to ensure that customers can obtain timely access to market data at all times on a non-discriminatory basis, and to offer unbundled market data, as well as the provisions on delayed data.

We strongly support ESMA's view as regards equal regulatory treatment of trading venues, Systematic Internalizers (SIs), and APAs. The principle of 'same business, same rules' should always apply within the EU as otherwise those entities not being subject to the rules would have a competitive advantage compared to those entities that need to comply with the rules.

In this context we would deem it important as well that like trading venues, SIs would also be legally required to provide delayed data free of charge to the public, including via their homepage. This should be seen as well in the context of the recent ESMA Annual Statistical Report on EU securities markets⁸, which shows that in 2019, SIs trading volumes in equity instruments amounted to EUR 5.7tn, representing slightly less than 20% of total equity trading in the EEA. We think that the provision of data by such large venues is just as important as the provision of data by regulated markets.

<ESMA_QUESTION_GOMD_1>

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

<ESMA_QUESTION_GOMD_2>

DBG strongly supports ESMA's recommendation in its MiFID II/MiFIR Review Report on the development in prices of pre- and post-trade data and on the consolidated tape for equity data⁹ to continue the transparency plus model. This is justified in our view as, indeed, there is no fact-based evidence of a market failure in the EU, nor are there any barriers to entry^{10 11}. In this context the current requirements introduced by MiFID II/MiFIR already go quite far. ESMA's proposed Guideline 1, however, contains several additional requirements which could go beyond proportionate measures and which would come closer to price regulation already, turning supervisors into price regulators¹². We would therefore think that some proposals require reconsideration, especially in the light of a lack of fact-based evidence.

⁸ ESMA, Annual Statistical Report on EU securities markets, November 2020: <http://www.publicdebtnt.net/pdm/.content/Report/Report-00747.html>

⁹ ESMA, MiFID II/MiFIR review report on the development in prices of pre- and post-trade data and on the consolidated tape for equity data, : <https://www.esma.europa.eu/document/mifid-iimifir-review-report-no-1>

¹⁰ OXERA, Report on Primary and Secondary market, November 2020s: <https://www.oxera.com/publications/primary-and-secondary-equity-markets-in-the-eu/>

¹¹ ESMA, Annual statistical report of securities markets, November 2020: <http://www.publicdebtnt.net/pdm/.content/Report/Report-00747.html>

¹² OXERA, Is ESMA becoming a price regulator?, September 2014: <https://www.oxera.com/agenda/is-esma-becoming-a-price-regulator/>

DBG supports methodology to be shared with supervisors

DBG generally agrees with having a clear and documented methodology in place which is used for the calculation of market data fees. We support the idea that the methodology should remain up to date (which includes both regular reviews and ad hoc reviews in case this is required). However, a comprehensive methodology should only be shared with competent authorities, not with the public, in order to avoid the disclosure of confidential information. Information disclosed to the public (and thereby to competitors) should be more generic. It is our understanding, however, that as long as competent authorities have all necessary information available, this should provide sufficient comfort to all stakeholders involved that pricing is fairly conducted by trading venues. We would agree with a reduced set of information made available to the public. Therefore, we suggest for public disclosure, a rather brief explanation of the accounting methodology for setting the fees of market data only. The explanation should provide, inter alia, a brief summary of relevant costs included in the fees of market data and some general information on allocation keys for joint costs. As set out above, DBG is of the opinion that explanations around the determination of margins and detailed allocation keys, included in standardized publication formats, could go well beyond the scope of the transparency plus approach.

Joint cost of trading and market data

Prescribing market data providers how to allocate (joint) costs, in our view goes beyond achieving transparency and are rather measures of strict price regulation as seen in the Post or Telecommunication sector. Cost allocation should therefore remain at the discretion of market data providers.

We note that ESMA's proposal states that joint costs shall not be allocated according to the revenues generated by the trading business on the one hand and the market data business on the other. We understand that revenue-based allocations are not the preferred allocation keys in case of strict price regulation, however, its application is not ruled out either. In this context it is important to recall that data and trading represent joint products, one cannot exist without the other¹³, and as such there can be no risk of cross-subsidization. We therefore suggest that ESMA still allows the use of revenue-based cost allocation for joint cost.

Furthermore, ESMA proposes that "joint cost shall be cost that cannot be solely attributed to the production and dissemination of market data such as the lease of offices or salaries of administrative staff". According to economic literature¹⁴, joint cost indeed is the cost attributed to trading and production of data at the same time. While salaries of administrative staff may be subsumed under joint cost, they could be common cost as well. The joint product nature of trade execution and market data services has important economic implications. With joint products, the production costs of the outputs (market data and trading) cannot be fully separated. This is clearly the case of trade execution and market data services where there are fixed costs that have to be incurred to produce either product. This is an important difference which we recommend should be taken into account by ESMA. Not taking this difference into account would in our view contrast with current regulation as well as economists understanding.

In the light of the above arguments DBG would like to propose the following rewordings:

"Guideline 1: Market data providers should have a clear and documented methodology for setting the price of market data, **to be shared with their supervisors on request**. 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

¹³ Lee, Ruben, What is an Exchange?: Oxford University Press 1998

¹⁴ Ibid.

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 depreciation and amortization of the investments when allocating these costs.

Market data providers should explain in their methodology whether a margin is included ~~and how that margin has been determined.~~"

We recommend that ESMA abstains from the suggested cost definition as this would go too far, taking into account missing facts of market failure or barriers to entry induced by exchange market data fees, to the contrary. In case ESMA would continue to promote the guidelines on cost, we suggest the following adaptations at least, for a common understanding:

~~"In order to ensure that the allocation of costs for producing and disseminating market data reflects the actual costs of producing and disseminating market data and ultimately the fees charged to customers, the methodology should demonstrate how the price for market data is based on the costs for the production and dissemination of market data. The methodology should also identify the costs that are solely attributable to the production and dissemination of market data (i.e. direct costs) and the costs that are shared with other services (i.e. joint costs). include an appropriate justification on the costs included in the fees for market data.~~

The cost should include, but not be limited to,

- (i) the cost solely attributable to data production¹⁵;
- (ii) the cost solely attributable to data administration and dissemination; and
- (iii) common costs, which cannot be solely attributed to the production, administration and dissemination of market data, such as an adequate share of general management overheads, shared with other business verticals, including, but not limited to, premises and administrative staff.

Where relevant, further distinction should be made between ~~variable costs and fixed costs for both direct and joint costs.~~

- a. variable costs, incurred for the production and the dissemination of one additional unit of market data; and
- b. fixed costs, that do not vary with the volume of market data produced and disseminated."

~~Direct costs should be understood as costs that are solely attributable to the production and dissemination of market data such as working hours of market data staff. Joint costs should be costs that cannot be solely attributed to the production and dissemination of market data such as the lease of offices or salaries of administrative staff. Variable costs should be costs incurred for the production and the dissemination of one additional unit of market data and fixed costs should be costs that do not vary with the volume of market data produced and disseminated.~~

~~In order to ensure that the allocation of costs for producing and disseminating market data reflects the actual costs of producing and disseminating market data and ultimately the fees charged to customers, the methodology should include an appropriate justification on the costs included in the fees for market data. For example, market data providers should not allocate joint costs according to the revenues generated by the different services and activities of their company because this practice is contradictory to the obligation to set market data fees (i.e.~~

¹⁵ often referred to as "joint cost" in economic literature

~~revenues of the market data business) based on costs of producing and disseminating market data.~~

<ESMA_QUESTION_GOMD_2>

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_QUESTION_GOMD_3>

DBG considers that examples and descriptions of the types of costs that are taken into account to set the price for market data as well as principles according to which direct and variable joint costs are allocated and fixed joint costs are apportioned are sufficient aspects to reflect accounting methodologies. This scope of information to be disclosed should already increase the usability and comparability of the information. DBG believes, however, that disclosing detailed allocation keys and explanations around the determination of margins will go beyond the scope of the current transparency plus approach. Extended industry harmonization could also be highly sensitive from a competition law perspective.

<ESMA_QUESTION_GOMD_3>

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.

<ESMA_QUESTION_GOMD_4>

Licensors of market data (such as trading venues) license market data on the basis of Data License Agreements. The challenge licensors face from a legal perspective is that the licensed data cannot be tracked as other goods could be. In the moment, the licensed data is made available to the licensee, the licensor has no control over the usage of such data. From this end, (licensed) data can be qualified as an “elusive good”.

It is common market practice to contractually agree on certain contractual control mechanisms, such as (i) reporting on the usage of the licensed data and (ii) audit and information rights of the licensor.

Having said that, we would like to make the following comments on Guideline 2:

- As a general note, Guideline 2 is not sufficiently clear and in its current form will not be able to fulfil its purpose, i.e. to provide helpful guidance for the interpretation of Article 7 of Commission Delegated Regulation (EU) 2017/567.
- In particular, the meaning of the term “penalties” is unclear. From a legal perspective, the following payments must be distinguished:
 - Payment of the license fees (as one of the main contractual obligations of the licensee);
 - Payment of interest on the license fees that have not been paid on the due date;
 - Payment of interest on license fees not paid at the time of use due to the then non-compliance with the license;
 - Payment of (contractual) penalties (beyond the payment of license fees) in case of non-compliance with the terms of the Data License Agreement;
 - Payment of damages (beyond the payment of license fees) in case the licensor suffers damages as a result of the non-compliance by the licensee with the terms of the Data License Agreement.

On the one hand, the term “penalties” used by ESMA seems to indicate that Guideline 2 deals with contractual penalties. On the other hand, ESMA highlights that “[t]he 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”. However, it is the core of a contractual penalty that it has a punitive character and goes beyond the pure payment of the license fee (which the licensee will have to pay in any case based on the contractual agreement). As it would therefore not make sense to cap a contractual penalty payment at the amount of the license fees, Guideline 2 could be read as not dealing with contractual penalties.

- The lack of clarity regarding the term “penalties” and ESMA’s “recovery of revenues” statement could even lead to the conclusion that ESMA intends to completely prohibit contractual penalties. This, however, would not be appropriate: The rationale of a contractual penalty is to ensure compliance by a contractual party with the terms of the contract, especially with such terms which are of particular importance for the counterparty. Market data providers have a legitimate interest that licensees use the market data only on the basis of a license that sufficiently covers the use. It is therefore common market practice to agree on a retention and reporting obligation of the licensee and on a contractual penalty payment in case of material breaches by the licensee of its obligations under the Data License Agreement, e.g. in case of incorrect or incomplete reporting by the licensee on the use of the market data. The licensor, however, in light of the “elusive good” character of market data (see above), must rely on the correctness and completeness of the reporting received from the licensee as otherwise he is not able to correctly determine the license fee.
- Guideline 2 seems to indicate that penalties can only be imposed “in consequence of an audit”. However, an audit should not be a condition precedent for the permissibility of a contractual penalty as there might be other ways to prove non-compliance by the licensee with the contract terms than by conducting an audit.
- The “recovery of revenues” wording also seems to indicate that the payment by the licensee of appropriate interest in case of late payment of license fees shall be prohibited as the interest would have to be paid *in addition to* the license fees owed by the licensee. However, penalties are an important instrument to ensure the level playing field between the licensees. Thus, we do not think that it is really ESMA’s intention to prohibit this market standard practice and that ESMA only wants to prohibit “excessive interest charging” (final sentence of Guideline 2).
- Under the standard Data License Agreements, the costs of an audit are generally borne by DBG. Only if the audit reveals that the reporting by the licensee has been materially incorrect and lead to underpayment of more than 10 percentage the costs must be borne by the licensee. ESMA’s “recovery of revenues” wording in Guideline 2 could be interpreted to prohibit such audit cost provisions as these necessarily result in an extra payment by the licensee which goes beyond the payment of the license fees. However, the costs of an audit constitute damages suffered by the licensor as a result of the non-compliance by the licensee with its reporting obligations which could be claimed already on the basis of the generally applicable civil law provisions. The claim for such damages should not be prohibited under Article 7 of Commission Delegated Regulation (EU) 2017/567.
- Finally, we do not think that interest payments for late payment, contractual penalties and payments of damages should be considered when assessing the cost of market data. It is true that licensees might in some cases have to make such additional payments to the licensor. However, all these payments are based on non-compliance by the licensee with the terms of the Data License Agreement, i.e. on an “illegal act” of the licensee. The licensee could easily have avoided these additional payments by complying with the agreement.

In light of the above, we would like to propose to ESMA to consider a clarification of Guideline 2 regarding (i) the legal terminology used in Guideline 2, (ii) the exact scope of Guideline 2, (iii) the general permissibility of contractual penalties (within the meaning described above) in cases where non-compliance by the licensee has been proven or where the licensee has not adhered to retention and reporting requirements and, thus, endangered the purpose of the Data License Agreement, (iv) the permissibility of charging of appropriate interest in case of late payment, and (v) the permissibility of audit cost recovery provisions.

- Regarding the aspect of the burden of proof, we would like to note that placing the burden of proof, with respect to non-compliance by the licensee with the terms of the Data License Agreement, on the licensor is in our opinion not justified as the licensor has no insight into the business of the licensee and the involved functions and activities within the organization of the licensee. Consequently, Data License Agreements typically contain reporting obligations of the licensee in order to enable the licensor to calculate the fees for the usage of the data by the licensee. It is our understanding that the burden of proof question and the distribution of responsibilities regarding the reporting are two sides of the same coin: A prohibition imposed on the licensor to attribute the burden of proof to the licensee via reporting obligations would create an incentive for the licensee not to comply properly with the terms of the Data License Agreement and would deprive the licensor of the opportunity to gain an understanding (without the need to audit) of the factual usage of the licensed data. The prohibition to place the burden of proof (via a reporting obligation) on the licensee would very likely lead to an increase in the number of audits as the licensor would have to demonstrate and prove non-compliance by the licensee. We therefore would like to propose to ESMA to consider a clarification of the legal terminology used in Guideline 2 regarding the distinction between “burden of proof” and reporting or information requirements; standard contractual reporting obligations should not be prohibited.
- Within the scope of an audit it is DBG’s understanding to demonstrate that the data was available for use for the licensee (the audited party). Beyond that it is the licensee’s burden to prove data was not used in a manner causing proper reporting and/or subscription to necessary licenses. Considering that the licensor has neither control over the data nor insight in the business of the licensee as well as the involved functions and activities within the licensee’s organization, it is a fair and well-balanced sharing of responsibilities.
- DBG has taken steps to decrease audits by introducing a data usage declaration in 2020, a questionnaire about data usage which has to be completed by our licensees. With this data usage declaration, DBG is aiming to lower or avoid audit findings at a later point of time. The data usage declaration includes questions which are based on the existing DBG Market Data Dissemination Agreement and allows to identify over- and under-licensing. Our goal is to actively support our licensees to be able to correctly assess the licenses required for the respective subscriber so that we can together ensure correct licensing of the contracting parties from the beginning.

<ESMA_QUESTION_GOMD_4>

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.

<ESMA_QUESTION_GOMD_5>

We understand that ESMA is involved in discussions where arguments are submitted that audits increase cost of market data. However, the notion that audits could be conducted in

order to indirectly increase market data fees is flawed. As already outlined in our response to Q4 audits may reveal incorrect or even missing licenses leading to payment of licensee fees at a later point of time and are hence costs for market data. Thus, it is not a higher cost of market data, but the cost of market data owed to the licensor. In addition, we do not think that interest payments for late payment, contractual penalties and payments of damages should be considered when assessing the cost of market data. All these extra payments are based on non-compliance by the licensee with the terms of the Data License Agreement and can be avoided by the licensee. As already outlined in our response to Q4, DBG is aiming to reduce the risk of non-compliance by introducing a data usage declaration in 2020, a questionnaire about data usage that has the goal to actively support our licensees to be able to correctly assess the licenses required and thus lower or avoid audit findings at a later point of time. We therefore recommend that “cost of market data” refers to market data fees only and does not include any additional payments which might be triggered in case of non-compliance with the terms of the Data License Agreement.

Therefore, DBG does not share ESMA’s concern that audits add to the “cost of market data”. In fact, many more – customer specific – internal “cost of market data” (and for all sorts of data used) could be added to the debate, such as costs for data specialists, contract administration, etc. In addition, there are external cost of market data, e.g. for data distributors. Exchanges are only a small puzzle piece within the data industry, and they are not the “last mile” to the data end user. In this context, we would like to point out that the share of EU exchanges in the overall financial market data cost is small: EU exchange market data represents only 0.9% of the global financial market data cost¹⁶ and on average 0.5% of the market data cost at the buy side¹⁷.

Furthermore, if audits were included in the debate to add to “cost of market data”, the high quality of exchange data should be accounted for as well, as its use is reducing cost of market data on customer site. This is due to the fact, that data are 100% reliable and trustworthy and would not require additional cleansing work, nor would there be any other costly impacts which may result from the use of bad data either¹⁸.

<ESMA_QUESTION_GOMD_5>

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.

<ESMA_QUESTION_GOMD_6>

DBG understands that ESMA intends to a) reduce the categories of customers, and b) aims to ensure that the creation of categories “is grounded on objective reasons **and not only on the value represented by the data to the customer**” (point 40 in ESMA’s consultation paper).

DBG appreciates and supports ESMA’s suggestion for a clear and verifiable definition of customer groups, which is easily accessible to the public and further supports contracting parties in their understanding of contractual requirements (point b in ESMA’s consultation paper). We as well strongly appreciate ESMA’s suggestion that data providers shall motivate any differentiations between each category of customers.. We understand and explicitly

¹⁶ see our Response Form to the ESMA Consultation paper MiFID II/MiFIR review report on the development in prices of pre- and post-trade data and on the consolidated tape for equity data, p. 5, July 2019: <https://www.esma.europa.eu/file/52632/download?token=mA4bj60e/>

¹⁷ OXERA, What is the data on market data? Taking stock of the debate. September 2014:

<https://www.oxera.com/agenda/whats-the-data-on-equity-trading-market-data-taking-stock-of-the-debate/>

¹⁸ Redmen, Thomas C., Bad Data Costs the U.S. \$3 Trillion Per Year, Harvard Business Review, September 2016

appreciate that ESMA continues to support pricing based on the value the data presents to the users, which is fully in line with economic literature in this respect^{19 20}, increasing social welfare and ensuring broad availability of data within the markets, resulting in transparent and efficient markets.

As regards to ESMA's point a) and taking into account the value data provides to its user, we would like to state the following: exchange market data licensing structures reflect the complex market structure itself and are aiming towards a fair, usage orientated pricing²¹ while offering choice. A private investor checking the overall value of his portfolio obviously derives less value for the use of the data, compared to an index provider calculating indices on basis of exchange market data and as such establishing a valuable business on exchange data for the benefit of investors, or a start-up MTF using Xetra real-time market data starting at EUR 4280,- p.m. to effectively compete with one of the largest exchanges in the EU. Those licensing structures are fully in line with economic literature²² as well as regulatory requirements under MiFIR as lined out in Article 8 of Delegated Regulation 2017/567. Regulation allows market operators to distinguish between different categories of customers and to take the value into account which the market data has for the respective customers. In contrast, flat fee models might not be in line with the requirements stipulated by the above mentioned Article 8 as well as Articles 3, 6, 10,13 MiFIR and would significantly disadvantage smaller users (such as private investors) to the benefit of larger users (e.g. large professionals) and either lead to less transparency (in case of private investors to pay the same as professional investors), or to significant shortfalls in exchange revenues (in case professional investors, or index providers would pay the same as private investors). Furthermore, we deem it important as well to explicitly line out, that the way the current regulation allows price discrimination is beneficial to social welfare²³. Those companies, which are large and use data comprehensively in multiple ways and roles pay accordingly to their use, while smaller companies are paying less, and private investors, even less. We therefore need to emphasize that the connotation to pricing according to the value of data it represents to its user, is an important one under social welfare aspects as well and needs to prevail and be acknowledged by regulators. In this context, we would like to mention that other areas of law allow licensors to take the value of the licensed product into account. It has been held by the European Court of Justice²⁴ that it may constitute an abuse of a market dominant position if the price charged by an undertaking has "no reasonable relation to the economic value of the product supplied". The common interpretation of this wording is that the value of a product/service for a client may be taken into account when setting the price for the product/service. It is proportionate and in line with the legal requirement that a client who generates significant commercial value from the use of the data is priced differently from clients who only use the data for non-profit/internal purposes.

While we generally support ESMA's proposal as regards Guideline 3, DBG would like to suggest two adaptations as follows.

First, we would like to propose a small change in Guideline 3 (i) by referring to "reasonably" instead of "easily", because it is not always easy to fully describe the complex market structure within a license model. This challenge is being aggravated by the ongoing structural changes capital markets as well as the economy find themselves encountered in (Digital Agenda). Therefore, in case a licensee considers it difficult to identify the correct licenses applying to the licensee, DBG provides support to its market data customers. Dedicated personnel are

¹⁹ Lee, Ruben, *What is an Exchange?: Oxford University Press* 1998

²⁰ Shapiro, Carl & Varian, Hal, *Information Rules: Harvard Business Press* 1998

²¹ Ibid.

²² Ibid.

²³ Lee, Ruben, *What is an Exchange?: Oxford University Press* 1998

²⁴ Case 27/76, *United Brands v Commission* (1978) ECR 207

available in order support customers as well as regards the interpretation of our contracts including application of the right licenses.

Second, it is important to understand that especially large companies often operate along different roles/customer groups under one legal entity. The legal entity of an SI may be a Benchmark Administrator at the same time. This leads to the fact, that the legal entity in question may fall into various customer groups at the same time, driven by its scope and scale. Of course, data providers could cluster different use cases (e.g. SI and Benchmark Administrator) into single dedicated customer groups, and price these groups accordingly. However, the multiple iterations necessary to cover the breadth of variations would be onerous, not only for the licensor but as well for the licensees. In this context we propose the change in Guideline 3 (ii).

DBG therefore proposes the following adapted wording:

“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 reasonably** verifiable, and sufficiently general to pertain more than one customer;
- (ii) explained in such a manner that customers are enabled to understand **the categoryies** 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.”

<ESMA_QUESTION_GOMD_6>

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.

<ESMA_QUESTION_GOMD_7>

DBG does not agree with the approach taken in Guideline 4 and recommends its deletion.

Article 8(2) of Commission Delegated Regulation (EU) 2017/567 clarifies that any differentials in prices charged to different categories of customers shall be proportionate to the value which the market data represents to those customers taking into account as well as the scope and the scale of the data, inter alia, the use made by the customer of the market data. According to Article 9(1) of Commission Delegated Regulation (EU) 2017/567, market data fees shall be charged according to the use made by the individual end-users of the market data ('per user basis') and it shall be ensured that each individual use of market data is charged only once.

It is understood by DBG that ESMA proposes this guideline in order to prevent data providers from charging multiple fees/licenses for the “same data” even though the data is taken as a basis for different types of use (or different products) by the client, who may even operate in different roles.

Exchanges often offer different product versions, e.g. as regards the scope (order by order vs. best bid/offer, or aggregated vs disaggregated), depending on the need and/or use by their customers. Of course, these are different product versions with different licenses and different fees, and an alignment as proposed by ESMA across those versions is not possible without significantly interfering with market standards (across the industry, not only trading venues) and seemingly requiring the introduction of new complex administration solutions across the

market as well as all market players, including market data vendors. At the same time any such requirement would significantly favor large entities with diversified businesses above smaller entities with a rather limited business model and less purchasing power. Consequently, this could lead to rising data fees for all contracting parties, where smaller parties are paying for the larger parties which gives rise to unequal treatment of different stakeholder groups under MiFIR's non-discriminatory access regime. The impact on overall social welfare would consequently be negative.

Furthermore, Guideline 4 contradicts Article 13(1) MiFIR in conjunction with Article 8(2) of Commission Delegated Regulation (EU) 2017/567. Rationale of Article 8(2) of Commission Delegated Regulation (EU) 2017/567 is to enable licensors to apply deviations in their pricing regimes based on the value and, inter alia, the use of the market data as the market is attributing a certain value to the usage of the market data (e.g. as raw market data may be used for several different use-cases, e.g. for benchmark administrators, or for SIs, where sometimes both roles could be covered by one and the same entity), as well as allowing different products in scale and scope which may be chosen by end users according to their needs. Article 8(2) of Commission Delegated Regulation (EU) 2017/567 would become (partly) redundant if licensors are not entitled to charge based on the value and use of the market data for the licensees or the different product scopes they offer in order to serve their clients, if different customer groups would be applicable for one licensee. In addition, it would be contradictory to Article 9(1) sentence 2 of Commission Delegated Regulation (EU) 2017/567 to be obliged to charge on the basis of just one customer category although a customer falls within two or more use cases because the fee charged to such customer would not reflect the multiple uses made by the customer.

In light of the arguments set out above, we recommend deleting Guideline 4.

<ESMA_QUESTION_GOMD_7>

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

<ESMA_QUESTION_GOMD_8>

DBG generally agrees with ESMA's proposal. DBG provides a comprehensive choice of products and ways how to use data to all interested parties. This may be directly (via proprietary data feeds or internet) or indirectly (via third parties like market data vendors). However, DBG can only guarantee the non-discriminatory treatment per customer group and product in terms of technical arrangements until the data finally leaves its premises. Beyond this there are many different physical interactions involved which could slightly change the data availability to customers. However, this is out of control by DBG. Finally, the geographical distance plays a significant role, too.

<ESMA_QUESTION_GOMD_8>

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.

<ESMA_QUESTION_GOMD_9>

Data from trading venues is already made available on a non-discriminatory basis as per Article 13 of MiFIR, Article 86 of Delegated Regulation (EU) No 2017/565, and Article 8 of Delegated Regulation (EU) No 2017/567. DBG does not consider that there is anything else which would need to be considered in the context of making data available at non-discriminatory terms.

There is ample evidence available that competition is working as lined out explicitly in recent publications by OXERA and ESMA^{25 26} as alluded to in our introductory remarks as well as our answers to Q1 and Q2.

Besides DBG and other exchanges request the completion of a data usage declaration, i.e. a questionnaire about data use types of licensees. The information gained from these declarations are essential to enable the licensors to offer market data on a non-discriminatory basis.

<ESMA_QUESTION_GOMD_9>

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.

<ESMA_QUESTION_GOMD_10>

DBG does not fully agree with Guideline 6.

ESMA proposes the concept of “active user”, which is extremely difficult to monitor and to administrate for all affected parties. This is not only the case for trading venues, but the more so for contracting parties themselves. Usernames would have to be crosschecked across multiple platforms and providers, as they can often be generic and are shared between users. It would be a very complex system and unfeasible to monitor. Consequently, only few customers would be eligible for this user definition. In addition, differences in unit of count derive from the diverging commercial practices of trading venues. Harmonizing units of count would require significant convergence in terms of business practices. It is neither possible to net licenses across different products versions either. In this context please see as well our comments to Q7.

In the light of the above we strongly suggest that ESMA adapts the Guideline 6 as follows:

Guideline 6: Market data providers should for display data use as a unit of count the “**Active Physical** 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 from data vendors~~.

<ESMA_QUESTION_GOMD_10>

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.

²⁵ OXERA, Report on Primary and Secondary markets, November 2020: <https://www.oxera.com/publications/primary-and-secondary-equity-markets-in-the-eu/>

²⁶ ESMA, Annual statistical report of securities markets, November 2020: <http://www.publicdebt.net.org/pdm/.content/Report/Report-00747.html>

<ESMA_QUESTION_GOMD_11>

DBG does not fully agree with Guideline 7 due to the reasons already lined out in our answer to Q10. ESMA proposes the concept of “active user”, which is extremely difficult to monitor and to administrate for all affected parties.

In addition, please note that in the context of this consultation we understand that market data provider refers to the original data source, i.e. the trading venue or the SI. In any case it should be clear that customers would have to report to the market data source, therefore, we cautiously adapt the wording below.

In the light of the above we strongly suggest, to adapt the guideline as follows:

Guideline 7: “Market data providers should ensure the conditions to be qualified as eligible for the per user model **in the context of display use** 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 are entitled to access to the data within the organization and ii) the customer reports to the market data **provider source** the exact number of **active** entitled users.”

<ESMA_QUESTION_GOMD_11>

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.

<ESMA_QUESTION_GOMD_12>

While DBG provides for the price per use model (PPU) we generally agree with ESMA’s proposal. We would like to point out that the per user model entails significant fixed costs and administrative burdens, e.g. due to the need to engage in an approval process to check market data user eligibility and to monitor and net users. Hence, the per user model may be appropriate for only a limited number of contracting parties.

<ESMA_QUESTION_GOMD_12>

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.

<ESMA_QUESTION_GOMD_13>

DBG sees no need for further clarification since trading venues comply with Article 87 of Delegated Regulation (EU) No 2017/565 and Article 9 of Delegated Regulation (EU) No 2017/567 and provide market data on a per user basis when this model is proportionate to the cost of making market data available.

<ESMA_QUESTION_GOMD_13>

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

<ESMA_QUESTION_GOMD_14>

DBG agrees with Guideline 9 and takes ESMA's confirmation that the provision of both unbundled and bundled data products side by side and adding choice is possible as a welcome confirmation.

As lined out in Q8 already DBG provides not only a comprehensive choice of data products but as well various ways to access the data, be it direct lines, internet or vendor. For the avoidance of doubt, technical access should not be considered bundling.

<ESMA_QUESTION_GOMD_14>

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

<ESMA_QUESTION_GOMD_15>

DBG does not think that further clarification is necessary and considers the current regulation to be more than sufficient in line with the reasons as lined out in our answer to Q14.

<ESMA_QUESTION_GOMD_15>

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.

<ESMA_QUESTION_GOMD_16>

DBG generally agrees with the proposed template solution. We consider ESMA's proposal a sensible solution to achieve a more harmonized access to transparency information. However, there are various proposals included, with which DBG cannot agree with. Please find our arguments lined out in the answers to Q17 below.

<ESMA_QUESTION_GOMD_16>

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?

<ESMA_QUESTION_GOMD_17>

We appreciate ESMA's proposals to ensure efficient and more harmonized access to transparency information in the context of Article 11 of Delegated Regulation (EU) No 2017/567. While we are generally supportive of a template as proposed by ESMA in order to display the information required by Article 11 (2) (c) (i-iii) of Delegated Regulation in order enable transparency being available in an efficient way, DBG is not supportive of all proposed details in ESMA's Consultation Paper as lined out in detail below.

ESMA Instructions

DBG agrees with ESMA's instruction 1) the reporting period of one year. We would as well suggest that the publication should be done in line with the publication of the annual report in order to ensure that all data are final data.

DBG agrees with instruction 2) Number of instruments

DBG agrees with instruction 3) Total turnover of instruments covered

DBSG agrees with instruction 4) Pre trade/post trade market data ratio – as regards the pre- and post-trade market data ratio, we understand that the number of order-messages is being calculated vs the number of trade messages on average p.a.

ESMA Template for publishing RCB information

We agree with ESMA's proposal in the context of Article 89(2)(a) of Delegated Regulation (EU) No 2017/565 and Article 11(2)(a) of Delegated Regulation (EU) No 2017/567 and understand that the description will be high-level.

We agree as well with Article 89(2)(b) of Delegated Regulation (EU) No 2017/565 and Article 11(2)(b) of Delegated Regulation (EU) No 2017/567 as regards advanced disclosure to be integrated into the template. In this context we would like to comment as follows: In point 75 of the consultation paper, ESMA assumes that the template proposed could lead market data providers such as DBG to simplify fee schedules and become more transparent. We consider that there is no direct connection as the price list depends on the business models of trading venues (e.g. DBG provides distribution services for trading venues), and the necessary licenses available to customers for choice. This is in line with economics literature²⁷ which stipulates that broad license structures allow for efficient pricing and broad transparency within markets. Please note that the requirement for data disaggregation has inflated price lists of trading venues significantly, while there is little demand for disaggregated data. In this context DBG considers it sensible to provide a direct link to current price lists made available online.

DBG does not support the detailed break down into asset classes

We cannot agree unfortunately, as regards Article 89(2)(c)(i-iii) of Delegated Regulation (EU) No 2017/565 and Article 11(2)(c)(i-iii) of Delegated Regulation (EU) No 2017/567. DBG is concerned about the additional requirements as regards the break down into asset class data. In line with regulation DBG provides data per Operating MIC disaggregated to the level of pre- and post-trade data, but not yet beyond. Disaggregation to the level of pre- and post-trade is the regulatory minimum, and enough, unless there is explicit demand for additional break down, e.g. asset classes in line with regulation. However, while demand even for disaggregated pre- and post-trade data is hardly there, ESMA now requires a further disaggregation per asset-class - at least for the information requirements. To do so is an onerous technical requirement adding to cost. It would apply to all trading venues many of which have not aggregated down to asset class level yet, such as DBG's trading venues. We recommend, to stay within the current requirement, e.g. information published per Operating MIC, and continue to focus from there on number of instruments, total turnover of instruments covered, and pre- and post-trade market data ratio.

Information on any data provided in addition to market data

DBG generally agrees with Article 89(2)(c)(iv) of Delegated Regulation (EU) No 2017/565 and Article 11(2)(c)(iv) of Delegated Regulation (EU) No 2017/567 to provide information on any data provided in addition to market data. This should be done per Operating MIC.

Date of last license fee adaption

²⁷ Shapiro, Carl & Varian, Hal, Information Rules: Harvard Business Press 1998

DBG has implemented a history of price list and announcements which provides for a comprehensive overview of any price adaptations starting 2018. This information is publicly available on DBG's homepage.

Market data revenues

DBG agrees with the proposals as regards the display of revenues per Operating MIC. In line with FESE's proposals we suggest the annual revenue and share of revenue for the most recent financial year for which the market data provider's financial statements have been finalized and audited.

Cost accounting methodology plus detailed information

As alluded to in our answer to Q2 and Q3, DBG considers that disclosing allocation keys and explanations around the determination of margins could go beyond the scope of the current transparency plus approach and undermine competition among market data providers. Of course, do we support the provision of comprehensive information to our supervisor. Furthermore, in this context we would as well like to refer to our previous comments, especially to Q3.

<ESMA_QUESTION_GOMD_17>

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.

<ESMA_QUESTION_GOMD_18>

DBG generally supports ESMA's aims for a harmonization of contractual definitions. We would like to point out that this harmonization already implies a reduction in the contractual freedom of exchanges, and as such an interference with exchanges' rights to conduct business in the EU. However, we do see value in supporting ESMA in this respect as well as market participants in the aim to better understand exchanges' policies. We would like to recommend, however, that the below proposals would be treated on a best effort basis. We would as well like to point out that DBG as member of FESE supports FESE's proposals in this respect. FESE and its members are proposing harmonized definitions, which will achieve ESMA's targets, while being acceptable for exchanges. We are confident, that the proposed definitions find ESMA's acceptance. Please see our comments to Annex II as follows in detail.

i. Customer

For clarity purposes DBG proposes to substitute the proposed definition by ESMA with the following definitions as provided by FESE exchanges:

Contracting Party

The counterparty to the Market Data Provider²⁸ under the Agreement²⁹, as specified in the Agreement.

ii. Unit of count

²⁸ This term refers to market operators other than Vendors and Sub-Vendors providing market data. This term is not a recommended reference term and is only included for legibility purposes.

²⁹ This term is not a recommended reference term and is only included for legibility purposes.

As lined out in the introduction as well as in our answers to Q10 and Q11, the proposed unit of count (“active user” ID (per human user)) as the only unit of count for display purposes by ESMA currently constitute a potential option provided and used by selected market players only, but does not represent the market standard used by many customers. Extreme administrative burden would be the consequence, e.g. in the case of User ID, mapping between technical provision (by vendors) and licensing (by market data provider) needs to be conducted as there would not be a 1:1 relationship anymore. User data, likely including data covered under GDPR, would need to be distributed between various vendors, data providers, and users. The actual Access ID (per access to information) therefore, has broad acceptance in the market as billing and access to data is concentrated in one hand. While we propose to maintain the User ID as an option for those able and willing to administer this set-up, we urge ESMA to abstain from formally applying it as the only unit of count for the consumption of data, likewise the “active user”.

DBG proposes to substitute the definition of unit of count in line with the proposals developed and submitted by FESE:

A unit for the quantification, reporting, calculation and/or billing of fees for the use of Information as set-out in the Agreement. Units of Count can, amongst others, be device-based, user-based, location-based or identification-based.

Unit of counts in Non-Display Usage are important to be able to differentiate usage of data and to be able to provide smaller market participants with entry products which reflect the lower data usage compared to larger market participants. Therefore, DBG supports the view that Unit-of-Counts within policies for non-display usage can be different across exchanges and can be based upon ways of access to the data, e.g. measured by hardware, software or other access IDs, as well as other measurable indicators like volumes or clients.

iii. Professional customer to be replaced by “Professional user”

A natural person who is not a Non-Professional User.

In line with the FESE proposal, DBG recommends changing the definition of “professional user” and “non-professional user”. ESMA’s proposed definition of Professional user indeed is not comprehensive enough and does not cover all B2B customers of trading venues, when referring to regulated entities. As the aim of harmonization lies within reduced administrative cost, we would deem that being achieved by the proposed suggestion of FESE exchanges in this context. Please see our definition as well for non-professional users.

iv. Non-professional customer to be replaced by “Non-professional user”

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

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

v. Display data to be replaced by “Display Usage”

As display data are usually the same set of data, but used in a different medium, we propose to align with the FESE proposal for Display Usage, as follows:

Accessing, receiving, processing or consuming Information for the sole purpose of the visual display of Information for Internal Use.

vi. Non-display data to be replaced by “Non - Display Usage”

As non-display data are usually the same set of data, but used in a different medium, we propose to align with the FESE proposal for Display Usage, as follows:

Accessing, receiving, processing or consuming Information for a purpose other than (i) Display Usage, or (ii) the Redistribution of Information.

vii. Market data

We agree with the proposed wording by ESMA, as lined out below.

Market Data should mean the data trading venues, SIs, APAs and CTPs have to make public for the purpose of the pre-trade and post-trade transparency regime as set out in Annex I of RTS 1 and Annex I and Annex II of RTS 2.

viii. Derived data

Any information or data which is derived in whole or in part from the Information and which: (i) cannot be readily reverse-engineered to recreate the Information; (ii) cannot be used as a substitute or alternative source for the market data; or (iii) is not substantially similar to the Information.

ix. Real-time data

Information that is available less than 15 minutes after the point in time where the Information was first disseminated by the Market Data Provider. If available, the delay period shall be determined by reference to the time/data stamp of the system concerned

x. Delayed data

Information that is available 15 minutes or more after the time where the information was first disseminated by the market data provider, up and until midnight in the time zone of the market data provider on the day the Information was first disseminated by the market data provider. In case of 24-hour trading, delayed data is information that is available 15 minutes or more after the time when the information was first disseminated by the market data provider. If available, the minute delay period shall be determined by reference to the time/data stamp of the system concerned.

xi. Historical data to be replaced by After Midnight data

We recommend, to define “After Midnight Data” instead of “historical data”, in order to remain in existing market data practices. Any changes in this respect may add to unnecessary work within the industry. Furthermore, historical market data is usually used in the context of databases, or files, as such including the technical medium used. After midnight data comprehensive as regards the data, as well as the timing.

We therefore recommend the following wording:

“Information that is available at the earliest after midnight in the time zone of the market data provider on the day the Information was first disseminated by the market data provider. In case of 24-hour trading, After Midnight Data is information that is available 24 hours or more after the time when the information was first disseminated by the market data provider.”

For the avoidance of doubt: historical market data is not covered under MiFID II/MiFIR, which is reiterated by ESMA in its Q&A 9 on delayed data.

<ESMA_QUESTION_GOMD_18>

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.

<ESMA_QUESTION_GOMD_19>

DBG generally supports ESMA’s proposal on a harmonization of contractual definitions. However, we would as well like to point out that of course definitions resemble essential parts of market data contracts of exchanges which form part of our business. Therefore, we would generally suggest keeping further adaptations within the scope of the proposals made so far. We would as well like to argue that ESMA’s proposals for harmonization of the contractual terms shall be treated as best practice, and not as mandatory requirements. We strongly expect that exchanges will stick to the best practice.

<ESMA_QUESTION_GOMD_19>

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

<ESMA_QUESTION_GOMD_20>

DBG considers that publishing examples and descriptions of the types of costs that are taken into account to set the price for market data and principles according to which direct and variable joint costs are allocated and fixed joint costs are apportioned are sufficient aspects to fulfil and enhance the ability to comply with Article 11 of Delegated Regulation (EU) No 2017/567 and Article 89 of Delegated Regulation (EU) No 2017/565. This scope of information to be published would increase the usability and comparability of the information.

We therefore propose the following adaptations to Guideline 12:

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 **brief 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 information on** allocation keys for joint costs.

Market data providers should disclose whether they include a margin in the fees of market data **or not 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.**

<ESMA_QUESTION_GOMD_20>

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.

<ESMA_QUESTION_GOMD_21>

As mentioned in our answers to Q2 and Q3 DBG considers the public disclosure of allocation keys and explanations around the determination of margins goes beyond the scope of the current transparency plus approach and further industry harmonization could also be highly sensitive from a competition law point of view. As trading venues disclose to their supervisors, this should be considered sufficient.

<ESMA_QUESTION_GOMD_21>

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

<ESMA_QUESTION_GOMD_22>

DBG generally supports ESMA's proposals and lives up to it already as of today.

<ESMA_QUESTION_GOMD_22>

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?

<ESMA_QUESTION_GOMD_23>

Delayed data is being made available in a disaggregated format, meaning that pre- and post-trade data are being made available separately in line with Article 12 MiFIR. While we apply a clear labelling of the respective data sets on our website, the respective data sets themselves contain the relevant data fields for identifying pre- or post-trade information and any other data content / data fields as well as required under MiFIR. This includes all RTS 1/RTS 2 required information, including flags where applicable. Delayed data provided on DBG's website contains all relevant pre- and post-trade information in line with MiFID II/MiFIR requirements and reflecting all trading activities on the respective trading venue. Please note that globally data volumes are constantly increasing impacting data producers as well as data providers in various ways. While trading venues usually adapt their processing capacities on a constant basis accordingly, not all data users do so as well. Especially, pre-trade data is usually very voluminous representing approximately 90% of data volumes. We therefore appreciate that ESMA intends to require a reduced scope of pre-trade data to be provided via the trading venues homepage going forward.

<ESMA_QUESTION_GOMD_23>

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?

<ESMA_QUESTION_GOMD_24>

Delayed exchange data still holds significant value for data users and commercial third parties, while it is adding to market transparency and stability. DBG generally distinguishes between end users (e.g. retail investors, or investment firms using the data, but do not further onward-distribute the original delayed data) and third parties/vendors, who onward-distribute delayed data generating direct or indirect revenues otherwise not possible without provision of DBG's data. In line with regulation DBG provides access to delayed data for those users free of charge, who use the data other than for operating a commercial data distribution business with this data. End users may be retail users as well as professional users, using the data exclusively for own purposes as well electronically, i.e. for purposes of risk calculation, portfolio evaluation, creating new derived data work such as indices and analytics, best execution verification, back-office use. This may, e.g. encompass portfolio valuation by the delayed data user for a third party as well, as long as the delayed data itself is not further onward distributed. Only the operation of a commercial delayed data vending business, i.e. the onward dissemination of DBG delayed data to third parties, is subject to a monthly flat fee of such vendor. One example could be operators of search engines, offering delayed exchange data free of charge to end users while receiving advertising revenues due to the traffic generated by delayed pre-and post-trade data from an exchange. Another example is the use by market data vendors, who use delayed data to build or enhance their product offerings (e.g. use delayed data in charting, analytics, news) and in return only has to pay a monthly flat fee, i.e. the Distribution License Fee. Users of respective product/service offerings, however, can use DBG's delayed data in a streaming mode free of any exchange data fees.

Furthermore, DBG strongly appreciates ESMA's general support as regards a simple registration or simple agreement by the user of delayed data, and we suggest that ESMA explicitly mentions this within their Guidelines. DBG strongly suggests that this should include a brief clarification of rights and liabilities in a light fashion. This registration / agreement should as well include the acknowledgement, that the delayed data taken from the website will be used exclusively for own purposes. The disclaimer as such refers to rights and liabilities in the context with using the data provided by DBG.

Guideline 14: The access to the delayed data should be provided to both professional and non-professional customers. It is acceptable for market data providers to require a simple registration **or agreement** for the purpose of monitoring who has access to the data **as well as the clarification of rights and liabilities**. The delayed data publications should cover all the ~~trading systems operated by the trading venues~~ **relevant information as defined within the regulation**. The post-trade data should contain all the **content of the** relevant fields for the purpose of post-trade transparency, including flags, as specified in RTS 1 and 2. For pre-trade delayed data, given the operational challenges resulting from high volumes of pre-trade data on one hand, and the requirements of data users on the other hand, it is considered sufficient to only include the first current best bid and offer prices available.

<ESMA_QUESTION_GOMD_24>

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

<ESMA_QUESTION_GOMD_25>

ESMA's Q&A 10 significantly expands the provision of delayed data from a streaming set of data to an ad interim database, which publishes and holds the data for up to 24 hours. This way, regulators ask for more compared to what otherwise would be understood as delayed data: one set of data published 15 minutes after its creation and immediately being replaced by the next set in a sequential row of information. In this context as well in the context of better

use by end users, we appreciate that at least in the area of pre-trade data ESMA considers adapting the requirements accordingly. We trust that trading venues would be free to change the current delayed data provision compared to ESMA's proposed solution at any time on their discretion, once the guidelines are being implemented. Of course, we understand that this option should only apply in case the trading venue in question does not provide less than the required transparency before the adaption required by the guidelines. In case that was not the case, we kindly ask ESMA to consider that technical adaptations usually require sufficient time for orderly and reliable implementation. Please note that we at least recommend three quarters of a year at minimum to be on the safe side. In this context, please see our comments as well to Q23.

Furthermore, high quality data is costly to produce, and valuable for investors but as well for all different users including commercial third parties. This applies of course as well for 15 minutes delayed data. Making data available on DBG's homepage further adds to the cost of producing and disseminating market data. Therefore, delayed data should be free of charge only for end users for the purpose of investor protection, rather than privileging professional business entities building viable market data vending businesses based on such data. The latter would clearly be disproportionate in our view.

"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", second paragraph of draft guideline 16. From a legal perspective, we are concerned that this statement allows for a circumvention of the entire regime established by the ESMA Q&As on transparency issues. Q&A 9 b specified that trading venues, APAs and CTP may not impose redistribution fees on redistributors or third parties, unless where redistributors/third parties charge for the distribution of data and or commercialize value-added services created from such data. If a new entity interposes itself between market data vendor and the redistributor resulting in the situation that the market data provider is not entitled any longer to charge for the data if the redistributor also charges its client for the data, but argues that the data was obtained by an independent entity which is interposed between the two, the regime can be circumvented.

In this context, we strongly appreciate ESMA's Q&A 9 allowing trading venues to charge third parties who are using the data for operating a commercial data vending business (e.g. onward dissemination of delayed data in services for commercial benefits of such third parties). We strongly suggest that ESMA maintains the spirit of Q&A 9, or better strengthens it further, by clarifying that delayed data are free of charge for the purpose of investor protection and the avoidance of information asymmetries within the EU while any vending business as lined out above remains fee liable (Distribution License Fee). We would consider that both, direct as well as indirect revenues generated (e.g. the latter by reversed business models such as internet advertising), should be fee liable and miss this conformation in ESMA's suggested guidelines. We therefore suggest complementing the new guidelines accordingly, with the indirect business model.

In the context of the above, and taking note of the recent published ESMA Annual Statistical report on EU securities markets, we would like to express our concern that only trading venues and APAs (as well as CTPs) are being required to publish their market data 15 minutes delayed on their web-site. Taking into consideration that the number of SIs has not only significantly increased since the introduction of MiFID II /MiFIR, but that a significant and persistent amount of trading activities are executed via SIs, we deem it difficult to see a level playing field in the EU as regards the provision of delayed data. In addition, we think that the market has a tremendous interest in 15 minutes delayed market data of SIs because of the significant and persistent amount of trading activities executed on SIs (as outlined in our answer to Q1). Therefore, the MiFID II/MiFIR transparency regime should likewise apply for SIs, thus,

publication of 15 minutes delayed market data on their websites. We therefore recommend reviewing L1 in this respect during the MiFID II/MiFIR review.

Finally, DBG takes note that ESMA intends to withdraw its Q&A 9 and 10 immediately after publication of the new Guidelines. There are important clarifications, within these Q&As, which are currently not included in the Guidelines, e.g. the clarification that historical data is not affected by regulation. We encourage ESMA to keep this clarification within the Q&As in future.

<ESMA_QUESTION_GOMD_25>

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

<ESMA_QUESTION_GOMD_26>

N/A

<ESMA_QUESTION_GOMD_26>

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.

<ESMA_QUESTION_GOMD_27>

For an estimation of costs, a detailed impact analysis has to be conducted dependent on the final ESMA guidelines. However, we cannot confirm ESMA's moderate cost estimate on their proposed guidelines at all. In case ESMA's proposed guidelines would be transposed 1:1, we expect a significant cost impact not only on data providers but as well to the industry overall. Especially adaptations which impact the Unit-of-Count might lead to a change of the current billing systems, accounting systems and customers management system & order tools. Taking into account that ESMA's proposed unit of counts are currently only used by a few and often rather large data users, adaptations would most likely impact a high number of smaller data users especially. These costs would need to be taken into account as well besides the cost occurred by data providers themselves. In a nutshell, for DBG, all changes of the contractual framework entail initial and ongoing costs as well as human resources needed, dependent on the extent of changes, which are at this stage not finally defined.

<ESMA_QUESTION_GOMD_27>