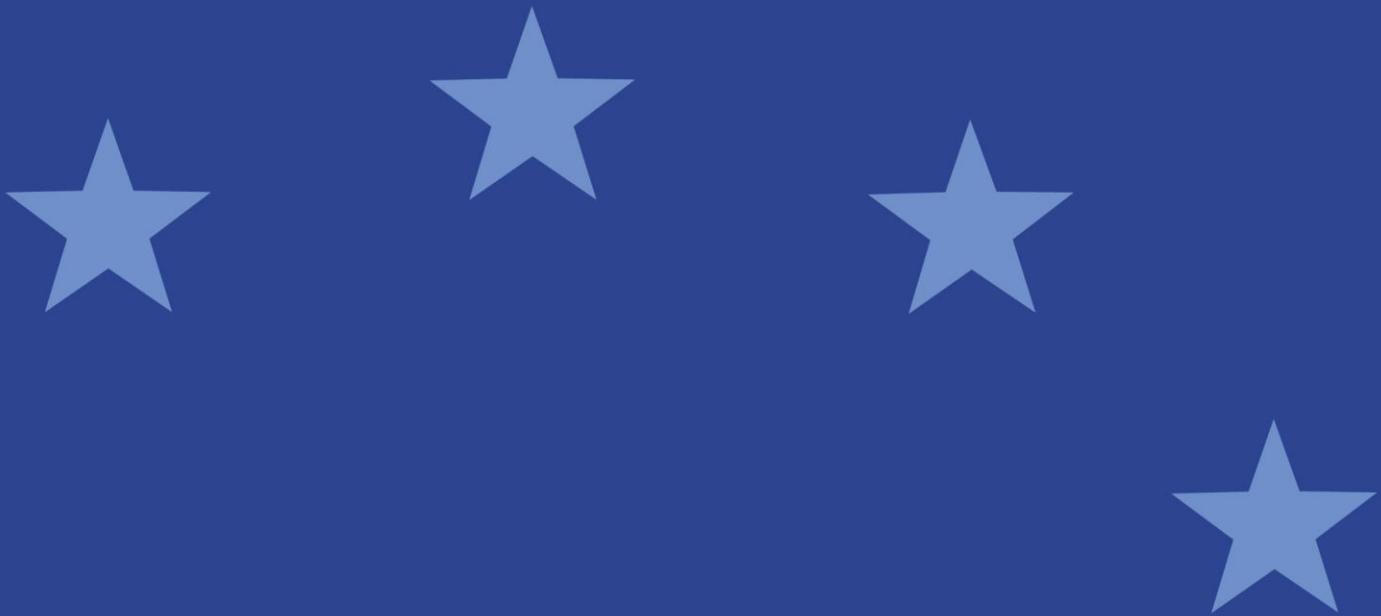




European Securities and
Markets Authority

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_FOTF_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	GBIC – German Banking Industry Committee
Activity	Banking sector
Are you representing an association?	<input checked="" type="checkbox"/>
Country/Region	Germany

Introduction

Please make your introductory comments below, if any

<ESMA_COMMENT_GOMD_1>

The German Banking Industry Committee (GBIC) is the joint committee operated by the central associations of the German banking industry. These associations are the Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR), for the cooperative banks, the Bundesverband deutscher Banken (BdB), for the private commercial banks, the Bundesverband Öffentlicher Banken Deutschlands (VÖB), for the public-sector banks, the Deutscher Sparkassen- und Giroverband (DSGV), for the savings banks finance group, and the Verband deutscher Pfandbriefbanken (vdp), for the Pfandbrief banks. Collectively, they represent approximately 1,700 banks.

We are grateful that ESMA thematizes the issue of market data and prepares guidelines. These will help to overcome uncertainties and will contribute to a more consistent understanding of the rules.

The guidelines should not only be applicable with regard to market data relevant for pre- and post-trade requirements but for all areas, where market participants have to rely on market data provided by market data providers. This covers all areas that are linked to the core business of banks, such as risk control or analysis of market data in the context of the trading, which is necessary in order to comply with applicable supervisory regulations.

Of course, with regard to these areas, provision of market data free of charge might not always be reasonable, however, standardized key terminology, transparency of calculations and cost disclosure, unbundling, or transparency of the model according to which data is offered to customers (e.g. per user model, etc.).

<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>

We would like to emphasize that systematic internalisers should be covered only to the extent that the Level 2 requirements stipulate requirements for them and not vice versa, i.e. generally covered, unless Level 2 stipulates an exemption. Level 3 requirements cannot and should not impose more requirements than the EU legislator explicitly provided for.

<ESMA_QUESTION_GOMD_1>

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

<ESMA_QUESTION_GOMD_2>

We, as GBIC, generally agree. For joint costs an addition level of scrutiny should be applied to avoid that unreasonable overhead costs are charged to market data customers, e.g. by setting of proportion ratios for overhead cost.

As a general point, we would like to emphasize that the guidelines should not only apply with regard to market data relevant for pre- and post trade requirements but for all areas, where market participants have to rely on market data provided by market data providers. This covers all areas that are linked to the core business of banks, such as risk control or analysis of market data in the context of the trading, which is necessary in order to comply with applicable supervisory regulations.

Of course, with regard to these areas, provision of market data free of charge might not always be reasonable, however, standardized key terminology, transparency of calculations and cost disclosure, unbundling, or transparency of the model according to which data is offered to customers (e.g. per user model, etc.).

<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>

We don't see the necessity for a general review. However, there are certain aspects, which could be clarified. In any case we still see a quite divergence of market data costs, in particular across regulated markets.

This implies that the terms "costs of producing and disseminating market data" and "appropriate share of joint costs for other services provided" are still interpreted in an inhomogeneous way. As long as this difference persists, it seems advisable that ESMA clarifies details on the calculation in order to prevent arbitrary interpretation.

<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>

Yes, the burden of proof should be with the market data provider. However, in this respect, guideline 2 and 13 seem to contradict each other: it is not clear, who has to demonstrate compliance with the terms of the market data agreement. In addition, the terms of the market data agreement and what exactly “is” the entire market data agreement in practice are often not clear. The market data agreement is generally not one document, but several documents linked to each other, some provided on the web-site of the market data provider and subject to constant change. It is overly burdensome – if not often even impossible - for customers to keep track of the currently applicable version of the “market data agreement” and the further relevant terms to comply with.

Furthermore, from GBIC’s point of view, the guidelines should clearly stipulate, that in case an audit reveals non-compliance with the terms of the market data agreement to clearly and in a transparent way explain to the customer (i) where such non-compliance stems from and (ii) how the customer can amend its use in order to comply with the relevant terms.

<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>

An auditing practice that is leaving licensing conditions ambiguous so that only when audited incompliance is uncovered, needs to be prevented. Some firms charge a fee for the audit itself, or additional penalties / interest. This should all be prohibited.

In addition, it happens very often, that market data provider “find” new use cases when auditing their customers, i.e. by finding out, how customers use their data (which the customers were correctly licenced for) the market data providers develop new licences in order to additionally charge their customers in the future.

<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>

The definition of the categories of customers should be aligned in order for the customers to be able to compare fees and terms and conditions of the different market data providers. If each market data provider defines its own categories, no comparison of fees would be possible.

Besides that, fee schemes should not be linked to the revenues of market data customers, nor be specified by a rule discriminating customers departments by revenues (e.g. cost for trading departments differ from cost for risk departments).

<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>

We, as GBIC, agree to Guideline 4.

<ESMA_QUESTION_GOMD_7>

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

<ESMA_QUESTION_GOMD_8>

We, as GBIC, agree to Guideline 5 as well.

<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>

No

<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>

We suggest to introduce the term "Physical User" instead of "Active User ID" as it is already practice to define a model avoiding charging the same user multiple times.

<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.

<ESMA_QUESTION_GOMD_11>

In general we agree. In addition, it should be not allowed that the Display fee per Physical user differs from the one per technical access, as this would contradict the “Cost +-approach” of Copenhagen Study of 2018 principle for setting up fees.

When setting the per user model as standard, it is of paramount importance that the calculation of the per user fee is made transparent. We fear that the costs of the per user fees will rise, once multiple access fees are no longer allowed.

<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>

If a per user model is not offered by administrative costs rationale, the costs shall be explained in detail and why they should block to offer such model to the client. Furthermore, the exemptions set forth in Guideline 8 should not avail themselves to an extensive use.

<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>

We would welcome standardised reporting requirements. Currently, each market data provider uses a different format for the reporting of the user (web-site application, excel sheet, etc.), which makes the reporting on the part of the customers very onerous.

It should be addressed that current Display unit of counts are based on the theoretical ability to access the vendor data, not on proven usage.

<ESMA_QUESTION_GOMD_13>

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

<ESMA_QUESTION_GOMD_14>

We very much support Guideline 9, which is of utmost importance. In general data should be available unbundled from other market data or from other services. When giving discounts on bundled products including market data, the discounts need to stay on a reasonable basis – otherwise the initial calculation of fees would be questionable. A potential check could be that the total price of a bundle must not be lower than the price for one of the single products.

<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>

See 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>

As stated in the introductory remarks, this Guideline should generally apply to all market data providers – not only within the limited scope of the cited MiFID II / MiFIR objectives.

<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>

Yes in general. By the tight timeline we have not been able to run a deeper evaluation on the template.

<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>

We – as GBIC - recommend the following changes:

i. Customer should be the natural and/or legal person.....

We see the development by providers that they intend to make the individual employee liable for their actions, e.g. by imposing honesty statements on the individual person. Such behavior cannot be accepted. Instead in case of doubts, the provider should demand an authorization document (e.g. power of attorney).

ii.

Unit of Count – for display use: The term “Physical User” should replace “Human user”

Unit of Count – for non-display use: Use “IT application” or “Server-based program” as unit of count, not the number of machines (as sometimes one application is spread over various

machines or devices

viii. Derived Data should mean data created as a result of any algorithmic operation that cannot be reconciled backwards i.e reversely engineered to the original source.

<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>

Currenty not.

<ESMA_QUESTION_GOMD_19>

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

<ESMA_QUESTION_GOMD_20>

In general yes. Specifically, the transparency given should not only allow to compare providers with each other, but to prevent onerous fee structures by regulatory intervention – e.g. like the SEC in the US has a veto right on fee schedules.

<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>

It should be made transparent which is the ratio of revenues by market data in relation to other revenues (like trading / transaction fees) in order identify if market data revenues are actually subsidizing other businesses of the data provider.

<ESMA_QUESTION_GOMD_21>

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

<ESMA_QUESTION_GOMD_22>

We see such regulation as a step in the right direction, however the current audit practices require additional regulation, e.g.

- a) whether outsourcing of auditing at the expense of the customer shall be allowed (we suggest not)
- b) that audits need to follow a transparent and unified schedule (e.g. only every 5 years)
- c) that physical, on-site inspections are prohibited as this should only be allowed to regulatory or law enforcement bodies
- d) that there is a “right of 1st refusal” when an audit is announced and that the timeframe between announcement and execution of the audit shall not be smaller than 3 months
- e) that proactive “self-audits” or “soft audits” as part of the declaration obligation may not lead

to economic impact but just have “educational” meaning
f) that the amount of audit revenues is made transparent as a total in comparison to other market data fees, to support that audits are not a substantial part of revenue generation and follow more an education and feedback principle

Overall as food for thought it should be evaluated whether instead of detailed inspections on the reported figures of the past should be replaced with an explanatory approach of the client’s processes – i.e. the client is demonstrating by documentation that his internal procedures and controls are suited to report correct figures. So audits may be reduced to mere sample checks.

<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>

Best bid / offer are sufficient for pre-/post trade transparency as long as the connected size is in line with the minimum size requirements for firm quotes.

Important is that pre/post trade transparency is also clean. There is no benefit that post trade transparency on shares is required for transactions which do not contribute to the price transparency (e.g. derivative package transactions where the share hedge is executed at a fixed price rather than market price).

In practice this means that for share transactions which do not fall under the trading obligation there should be an exception also for post trade transparency as they do not contribute to market transparency.

The cleaner the data (e.g. only considering levels which contribute to market price transparency), the less flags are needed. Obviously, flags become very important if this is not the case.

<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>

Real-time data is considered being very valuable information by exchanges and is priced accordingly. Those prices and the risk of arbitrary price increases by data providers prevents certain use-cases. Amongst others, we can think here about providing delayed price information to retail users for the purpose of evaluating their portfolios rather than relying on end of day data.

Important is that this post-trade data is protected from any other agreement a data provider might impose, e.g. free right of use apart of the reasonable provision fees by a provider. We’ve seen that market data vendors can be very creative in charging, and this effectively reducing the use-cases for such data.

<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>

We agree with ESMA's suggestions to limit the definition of "value-added services" to those activities where a product is created on a basis of delayed data is sold for a fee. Internal usage of any data for e.g. portfolio valuation that does not lead to Display, should not be regarded as re-distribution.

<ESMA_QUESTION_GOMD_25>

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

<ESMA_QUESTION_GOMD_26>

Currently not. It remains to be seen, whether the "value added service" (Guideline 16) will serve as a loophole.

<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>

Driven by the tight timeline we have not been able to run a deeper evaluation on this question. In general we see by the implementation of the guidelines that market data administration on our side would gain efficiency.

<ESMA_QUESTION_GOMD_27>