

WFE Response to ESMA on Guidelines for Market Data

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The World Federation of Exchanges (WFE) is the global trade association for regulated exchanges and clearinghouses. We seek outcomes that support market transparency, consumer confidence and economic growth. We represent over 250 market infrastructures, spread across the Asia-Pacific region (~37%), EMEA (~43%) and the Americas (~21%). The eight exchange groups we represent with a presence in the EU operate 26 cash equities trading venues, which (in the face of stiff competition) accounted for 62% of average daily turnover in the region in 2020.¹

With extensive experience in developing and enforcing high standards of conduct, WFE members support an orderly, secure, stable, fair and transparent environment for investors and for companies that raise capital within the EU and globally. Many of our members support not only their local economies but also compete for order flow from third-country market participants; it is important therefore that the EU business environment for exchanges and financial markets is internationally competitive.

The provision of financial market data is a well-established business including a variety of companies operating across a value chain. It is important to consider UK/EU cash equity market data—a small fraction of the overall market data industry—in its context. The 10 major banks involved in EMEA equity markets generated about \$3 billion in revenue in this market in Q3 2019.² This stands in contrast to around \$140 million earned by the major European exchange groups' market data businesses over the same period.³ These exchange revenues, annualised, furthermore represent just 1.8% of the revenues of the global market data industry.⁴ Meanwhile, the proportion of investor fund management expenses attributable to buy-side market data spend is less than 0.001%.⁵

We recognise that both the buy- and sell-side have made representations to the regulator about the costs of market data. The data often cited by market data clients in relation to market data cost increases is unreliable; it focuses on overall increased cost only and does not account for users subscribing to more data services or taking on further licences to distribute this data to a greater number of their clients. Therefore, we warmly welcome supervisors' efforts to promote transparency regarding market data costs. While it is unlikely that the global fund management and banking groups—having invested in a sophisticated, multi-year campaign—will be satisfied, we believe that this transparency will demonstrate the reasonableness of exchange data costs to policymakers and the public. We look forward to working with ESMA on these Guidelines and toward their fulsome implementation once finalised. We would furthermore welcome the opportunity to work with ESMA on meaningful reforms aimed at making the investment services available to EU retail customers and pension funds as accessible, affordable, and efficient as possible.

¹ WFE calculations based on [Fidessa data](#).

² WFE estimates based on annual reports including Bank of America; Morgan Stanley; JP Morgan; Goldman Sachs; Citigroup; UBS; Barclays; Crédit Suisse; Société Générale; and BNP Paribas.

³ WFE estimates based on annual reports including: Cboe Global Markets; Deutsche Börse Group; Euronext; London Stock Exchange Group; Nasdaq Nordic; SIX Group. These figures are likely biased upwards given that some exchanges include in this financial reporting asset classes beyond equities and information services beyond the scope of streaming market data.

⁴ Burton-Taylor, *Financial Market Data/Analysis Global Share & Segment Sizing*, 2020.

⁵ Oxera, *Pricing of Market Data Services, An Economic Analysis*, February 2014.

In considering these Guidelines and the market for market data more generally, we return to certain key principles:

- Market data is a joint product with trade execution, resulting from the overall activities of an exchange. An exchange's activities increase its value. The significant investments made by an exchange increases the value of the data that the exchange creates (e.g. through governance standards, market surveillance, pre- and post- trade risk management functionality, etc).
- The value of market data ought to be seen through the prism of the value it represents to those professionals and institutions who make commercial use of it.
- Without the ability to commercialise their data, exchanges, especially small ones, would struggle to cover their high fixed costs, further innovate in a highly dynamic sector, and successfully compete against venues with the ability to commercialise their market data.
- Exchanges are one part of a wider value chain in market data and data analytics, which includes data vendors, and investment firms among others.

With respect to ESMA's proposed Guidelines, we specifically consider that:

- The principle public policy lens through which market data ought to be considered is competition. Without a proven market failure in this market, competition remedies (e.g., de facto rate-setting) are unwarranted.
- It is appropriate and sensible that exchanges are charging differentiated prices for different types of users; to do otherwise would see smaller industry players or even retail investors subsidising the activity of global banking groups. Under uniform price regulation, retail investors and smaller institutions would see charges for data increase.

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

MiFID II / MiFIR is clear about the basis on which exchanges and regulated entities may charge for markets data: costs – including an appropriate share of joint costs – plus a reasonable commercial margin. Given the sustained campaign by consumers of market data to use regulatory tools to lower these costs, it is understandable that ESMA should respond by enhancing transparency around pricing methodology. Indeed, exchanges welcome an appropriate transparency regime regarding the commercial provision of market data to an appropriate degree, as we believe it will demonstrate exchanges' compliance with the provisions of MiFID II / MiFIR.

These issues also need to be seen through the lens of competition, not least because MiFID II / MiFIR aims to spur competition between exchanges and trading venues in the EU. Moreover, the Capital Markets Union project seeks to develop EU capital markets and ensure their global competitiveness, and the competitiveness of the EU as a destination for investment. Therefore, we believe it to be important that decisions taken in respect of market data are taken considering these wider policy objectives. It would be inappropriate to introduce a regime which applies de facto price controls on market data, or which subjects EU exchanges to commercial disadvantages vis-à-vis competitor jurisdictions and infrastructures.

With this in mind, we have concerns about Guideline 1, which intrudes into sensitive commercial prerogatives of data providers in certain areas. In particular:

- Transparency with respect to granular aspects of exchanges' investment plans – as in the example provided concerning the amortisation of IT investments – goes beyond what is required by financial reporting and may put exchanges at a competitive disadvantage in relation to non-EU infrastructures
- Strategy in respect of margin-setting goes to the heart of commercial strategy; it is inappropriate for regulators to require exchanges to reveal how they set margins to their competitors

- Not allowing for value-based (revenue-based) cost accounting in the case of joint cost, seems to contradict the concept of joint cost for the provision of joint products, and strays into the arena of price regulation

European authorities have not identified any market failures in the market for market data. While the provision of a methodology for market data charges to supervisors is acceptable; however, intrusive and granular requirements for public disclosure are not justified in the absence of a market failure determination. Furthermore, we believe it is appropriately competition authorities who ought to make such determinations and apply related remedies.

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

While this guideline is generally acceptable in spirit, it is potentially ambiguous and therefore likely to give rise to vexatious challenges to data providers' activities that are necessary to ensure the performance of contractual terms.

The consumers of financial market data are sophisticated institutions; meanwhile, market data is a digital product which may easily be forwarded and used in contravention of licensing agreements. Consumers of market data have the ability and incentive to misuse their licence in the absence of effective means of enforcement and penalties that reasonably disincentivise such behaviour. This is not a theoretical problem; it is one that is frequently observed by data providers, amongst others. Therefore, we ask that the guideline makes clear that data providers may, according to the terms of their contracts, take reasonable and proportionate actions to ensure compliance and that data clients have a responsibility to abide by the terms of their contracts.

It would be inappropriate to rely on data providers to unilaterally meet a full 'burden of proof' standard to establish misuse of market data. In the event of any contractual dispute between commercial parties, the two contracting parties would typically work towards an understanding of the facts and an amicable resolution should that be required. The instances of contractual disputes concerning market data that result in legal proceedings are de minimis. So, while recognising that "burden of proof" is not included in the text of the Guideline text, we wish to highlight its inappropriateness in the context. Such a standard would generally be applied in making a case before the courts, and be relevant following a process of disclosure/discovery, or a judge's investigation of facts. For exchanges to understand whether there has been a contractual breach in the absence of such proceedings, it is necessary that contractual arrangements include the possibility of audit and the production of documentary evidence from data clients.

Any Guideline reducing the ability of exchanges to enforce contractual terms aimed at ensuring compliance would complicate these contracts and likely give rise to more formal legal disputes. Furthermore, the removal of penalties as a disincentive for misrepresenting data usage would likely lead to more widespread misrepresentation of data usage by data clients.

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

While Guideline 3 is broadly acceptable, we have concerns about how it is characterised in the consultation, notably the clause "grounded on objective reasons and not only on the value represented by the data to the clients." While we appreciate ESMA's acknowledgement of the salience of "value represented by the data to the clients" to client classification, we continue to believe such value to be an objective criterion, which can be grounded in objective standards—in contrast to the suggestion in the consultation paper. Indeed, the extent to which competing alternative equity trading venues and broker internalisation mechanisms derive substantial value from the licensing of prices formed on-exchange (i.e., free-riding on the exchange price-formation process) is highly relevant to the pricing of market data. Furthermore, we believe that the dynamic described

here ought to be a matter of public policy concern to the extent to which it exacerbates the relative lack of transparency and coherency in EU secondary markets.

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

While Guideline 4 may have relevance to display data, we fundamentally disagree with it given its implications for non-display data (which is licenced to a legal entity rather than a natural person). Applying the Guideline to legal entities would give rise to economic distortions in the market for market data that run counter to the intention of public policy in this area.

One potential scenario arising from the Guideline would be a proliferation of client categories reflecting all possible permutation of client use cases. However, this would clearly add a substantial amount of complexity to market data pricing. More likely would be a move from à la carte pricing based on use cases to undifferentiated client categories.

As opposed to à la carte licensing of market data for different purposes (e.g.: portfolio evaluation; onward data distribution; off-exchange trade execution; etc.), undifferentiated licensing is likely to result in many institutions inhabiting a 'catch-all' category that allows for a wider variety of data uses, some of which may not be applicable to the data client. As such, undifferentiated licensing is incoherent with the policy objectives of the unbundling of data services which MiFID II / MiFIR seeks to achieve. Undifferentiated licensing is further likely to be economically distortive; it will give the largest, most complex institutions with multiple business lines involving the use and re-use of market data an advantage compared to specialised or smaller competitors. Data providers should be able to differentiate and charge for data licensing in line with use cases, so long as this is done on a reasonable commercial basis.

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

We do not believe that Guideline 5 is an appropriate measure given the diversity of market participants, even within a client category. Different clients have different needs and requirements as regards technical connectivity. Harmonising connectivity types would reduce client choice and stifle what is currently a diverse and innovative ecosystem of market participants, whose different investment strategies and time horizons add quality to the market.

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

While we welcome the intention of the proposed Guidelines to increase transparency in the market for market data, we are concerned that they may amount to de facto rating-setting and operate to the detriment of smaller data clients and smaller exchanges. Some of the policies proposed – including the public disclosure of margin setting methodologies – are more akin to competition remedies than transparency guidelines. As such, they are inappropriate in the absence of a market failure determination. In this context, we would note the recent study by Oxera for the European Commission which fails to identify barriers to entry in EU equity markets but rather finds robust competition.⁶ This seems to be confirmed by ESMA's 2020 Annual Statistical Report on EU Securities Markets.

As the global representative body for exchanges, we are acutely aware that equity markets are global, and that EU exchanges face strong competition. The global competitiveness of EU exchanges supports the EU as a destination for investment and facilitates the efficient investment of EU investors' assets.

We believe that strengthening the transparency of EU equity markets – transparency provided by exchanges – to be central to the goal of Capital Markets Union. We look forward to working with the European institutions to enhance this transparency, and to assist in other meaningful reforms aimed at making the investment

⁶ Oxera, *Primary and secondary equity markets in the EU*, November 2020.

services available to EU retail customers and pension funds as accessible, affordable, and efficient as possible.