European Securities and Markets Authority

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

6 November 2020 | ESMA70-156-3882

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	ICMA
Activity	Other Financial service providers
Are you representing an association?	☒
Country/Region	Europe

Introduction

Please make your introductory comments below, if any

<ESMA_COMMENT_GOMD_1>

The International Capital Market Association (ICMA) welcomes the opportunity to provide feedback on ESMA's Consultation Paper on Guidelines on the MiFID II/R obligations on market data.
ICMA is a membership association, headquartered in Switzerland, committed to serving the needs of its wide range of members. These include private and public sector issuers, financial intermediaries, asset managers and other investors, capital market infrastructure providers, central banks, law firms, and others worldwide. ICMA currently has around 600 members located in over 60 countries.[1]
This feedback is provided on behalf of ICMA and its relevant constituencies. The response was drafted and consolidated by a dedicated Market Data Consultation Paper (CP) Task Force (TF) under the umbrella of ICMA's MiFID II/R Working Group. The TF includes expert representatives from trading venues, approved publication arrangements (APAs), systematic internalisers (SIs), as well as buy-side and sell-side data consumers, all active in the European and international bond markets.
It is important to note that ICMA's response is purely in respect of the proposed guidelines as they would apply to a consolidated tape provider (CTP) for cash bonds and does not comment on how the guidelines should apply to trading venues, APAs, SIs, or other entities. The response should also be viewed within the context of ICMA's April 2020 report for the European Commission on an EU Consolidated Tape for Bond Markets, which already addresses a number of the issues raised in the CP.
Furthermore, it should be remembered that bond markets differ significantly from equity and other non-bond markets, not only in terms of the underlying asset profile, but also with respect to market structure, liquidity provision, and price formation. ICMA's response should

[1] See: www.icmagroup.org. ICMA's transparency register number is 0223480577-59.

therefore be viewed through the lens of a bond market CTP, noting that data obligations pertaining to an equity CTP may entail a completely separate set of considerations.
<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>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_GOMD_1>

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

<ESMA_QUESTION_GOMD_2>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_GOMD_7>

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

<ESMA_QUESTION_GOMD_8>

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<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>

ICMA believes that it would be helpful if ESMA clarify that the national competent authorities (NCAs) of all EU 27 member states apply a consistent deferral regime for post-trade reporting, with respect to both timing and the detail of the information being published. This is critical for facilitating the harmonized aggregation of relevant data that is required to support a consolidated tape, as well as helping to avoid the fragmentation of market liquidity and ensuring a level playing field for all EU market participants and venues. The arguments for a harmonized deferral framework, while balancing this with the flexibility provided in MiFIR to protect market liquidity, are outlined in ICMA's May 2017 position paper.

<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>

ICMA agrees with Guideline 6 and that billing should be based on the 'per user' model. However, in the case of a bond CTP, ICMA recommends that fees should be tiered, based on a differentiation of the types of use of the data. Examples of usage types provided in ICMA's 2020 report for the European Commission on an EU Consolidated Tape for Bond Markets include:

i. Ad hoc or retail use

ii. Market participant use
iii. Redistributor of raw post-trade data for reselling or client [significant proportion] servicing provision use
iv. Distributor for derived data for reselling or client [significant proportion] servicing provision use

<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>

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<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_GOMD_13>

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

<ESMA_QUESTION_GOMD_14>

ICMA agrees with Guideline 9. Raw post-trade bond data should be sold separately from derived or enriched/transformed data

<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>

TYPE YOUR TEXT HERE

<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>

ICMA disagrees with Guideline 10 from the perspective of a bond CTP, noting that the information requested in the template in Annex I would not be helpful in this context.

Firstly, the template in Annex I requires market data content information for a range of asset classes. However, where a CTP is providing comprehensive data for a single asset class (e.g. bonds) this is not applicable. Adding unnecessary complexity to the disclosure requirements of a CTP creates an additional barrier, noting that there is already little commercial incentive for a CTP.

Secondly, while ICMA agrees that the costs and pricing structure should be fully transparent, the cost accounting methodology disclosures set out in the template in Annex I is largely irrelevant from the perspective of a CTP. For a CTP to be commercially viable, there needs to be a consideration of the value of the data to the user (i.e. a 'tiered-fee' model), rather than purely focusing on the costs of producing and providing that data (i.e. a 'cost-plus' model). As outlined in the response to Question 10, as well as in ICMA's 2020 report for the European Commission on an EU Consolidated Tape for Bond Markets, a CTP fee model should be based on a minimum cost and then a tiered per-user fee framework determined by differentiated data uses.

<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>

ICMA disagrees with some of the disclosure requirements in the template in Annex I which are unhelpful or irrelevant from the perspective of a CTP. Please refer to the response to Question 16.

<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>

ICMA see no issues with definitions provided, however it does not believe that the terms 'display data' and 'non-display data' are widely used in the context of the bond market.
<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>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_GOMD_19>

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

<ESMA_QUESTION_GOMD_20>

As explained in the response to Question 16, ICMA does not agree with the disclosure requirements set out in the template in Annex I with respect to the cost accounting methodology. There appears to be an inconsistency between the requirement to publish the costs involved in producing and providing the data (to evidence RCB), and the value that is derived by the data user. The suggestion seems to be that a purely 'cost-plus' model would apply uniformly to all data consumers on a per-user basis. However, this overlooks two fundamental issues from the perspective of a CTP.

Firstly, there is no simple way for a CTP to attribute costs to the sourcing, processing, aggregation, production, and provision of data, particularly where these costs are already embedded in other commercial activities. Secondly, the proposed model does not differentiate for the value of the data derived by the end user. For a CTP to be commercially viable, it is therefore important that a tiered-fee framework be applied, based on the uses of the data (as also outlined in ICMA's 2020 report for the European Commission on an EU Consolidated Tape for Bond Markets). Furthermore, the publication of costs, even where these can be meaningfully derived, does not help to provide the market with any meaningful transparency into the classification of data usage and the associated fees.

ICMA believes that what is important is that the fees charged to users are fully transparent. Attempting to establish a complex cost allocation model is not helpful and, in the context of a CTP, potentially counterproductive.

<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>

ICMA believes that fee structures for end users of data should be fully transparent, while attempting to establish a complex cost allocation model is not helpful and, in the context of a CTP, potentially counterproductive (see response to Question 20).
<ESMA_QUESTION_GOMD_21>

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

<ESMA_QUESTION_GOMD_22>

The Taskforce disagrees with guideline 13 in relation to bond CTP. ESMA should have oversight (i.e. auditing) of the CTP contract, monitor for any breach of contract, and that supervision should start as of January 2022 or as soon as the CTP commences service. However, in regard to licensing arrangements involving data ownership, the Taskforce considers trading venues, APAs, and self-reporting firms should not retain any claim or ownership for the raw post-trade data and therefore should not be able to 'license' the reported post-trade raw data to the CTP (as outlined in ICMA's 2020 report for the European Commission on an EU Consolidated Tape for Bond Markets).
It should be noted, however, that was not a consensus Taskforce view, and that some APA and trading venues did not support an approach that excluded the possibility for the licensing of raw post-trade bond data provided to the CTP.

<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>

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<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>

ICMA's members point out that MiFIR pre-trade transparency in bond markets is not particularly helpful in and of itself. Far more important to investors is knowing how their dealer banks are 'axed': that is, how they are positioned in a particular bond, or would like to be positioned (say in response to or in anticipation of a client order). This information, which is often provided bilaterally (or through electronic hub-and-spoke networks or order management systems) on the basis of dealer-client confidentiality, helps investors know where to go with a request-for-quote (or where not to go), as well as giving them the ability to consider alternatives when seeking out a particular bond or credit. This is also reflective of a market that is as much axe-driven as price-driven. While pre-trade quotes can be helpful in terms of informing price discovery, good quality post-trade data is considered to be far more useful.

Regarding use cases for post-trade delayed bond data, ICMA's Taskforce members would like to highlight that shortcomings in the terms of the provision of (no cost) market data 15 minutes after publication are still being experienced in bond markets. Market participants, including technology providers, raise concerns about the difficulties in accessing raw post-trade bond data. This problem of access to raw post-trade bond data 15 minutes after publication is one of the primary reasons why a bond consolidated tape has not yet emerged, and that the aggregation of available post-trade data is proving difficult to overcome for any potential consolidated tape provider.

Charging for market data once it has been delayed for 15 minutes as explicitly stipulated in Article 13(1) of MiFIR in the case of trading venues, and Article 64(1) of MiFID II in the case of APAs is prohibited, with the exception of question 9 in Q&A 10 of the ESMA Q&As on MiFID II/MiFIR transparency topics, updated in July 2020. In addition, under Commission Delegated Regulation (EU) 2017/571, trading venues and APAs are expressly required to publish data in 'machine readable' format that facilitates the usability and consolidation of the information with similar data from other sources.

For example, data is often published as an 'image file' that is not machine readable, with 'search' and 'copy' capabilities disabled. Alternatively, the 15-minute post trade bond data is deleted shortly after publication. In short, market participants have found that some trading venue and APA's post-trade data is published in a far less usable manner than the post-trade bond data provided for a fee.

ESMA has previously acknowledged the use of such practices and clarified that they are non-compliant. In Q&A 10 of the ESMA Q&As on MiFID II/MiFIR transparency topics, updated in July 2020 – "ESMA considers that any practice designed to circumvent the provisions in Article 13(1) of MiFIR and Articles 64(1) and 65(1) AND (2) of MiFID II is not compatible with the requirement to make market data available free of charge 15 minutes after publication . . . " and; "ESMA does not consider that publishing data as an image (i.e. in such a way that the user cannot copy the data in a format that can be read by a computer) or requiring the purchase of a specific software for downloading, processing or reading the information meets the requirement of making data available free of charge." ESMA continues – "The data made available free of charge should replicate the information published on a reasonable commercial basis but with a 15-minute delay. ESMA is of the view that the information should be available for any party to initiate a retrieval of the data for a period of at least 24 hours from the publication."

ICMA recommends regulators ensure that all trading venues and APAs are fully compliant with their obligations to provide market data for free, 15 minutes after publication – particularly where that data relates to post-trade raw bond market data.

Market participant ('users', which includes investors, liquidity providers, and technology providers) provide the following use case examples:

i. Non-compliant T&Cs in many user agreements:

"USERS OBLIGATIONS" - Users agree not to: Modify, copy, alter, translate, disasemble, reproduce, distribute or otherwise change in form, format or substance the Service and its contents, or create derivative works basis on the Service and its contents. The challenge to market participants is, if one cannot copy the data, it cannot be used. Downloading the data is 'copying' the data.

ii. Requiring user account creation and <login+password> to access the data which can be rescinded at any time, without due cause and remedy. It has been reported, some trading venues disable accounts, often not reinstating accounts, despite multiple requests.

iii. Market participants have reported a use case regarding machine-readable access for 15-minute delayed raw post trade bond data from a trading venue. Delayed 15-minute bond data files are only accessible by a human clicking a link (after a login process which requires ReCaptcha). This nullifies 'machine readability'.

iv. Similarly, at another trading venue, 15-minute delayed raw post-trade bond data files can be downloaded for a limited period of time only after a human has recently logged in and passed the resultant secure token to a machine-reader. There is no reasonable option for a machine to access the data unless it can imitate a human.

<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>

ICMA agrees with Guideline 16. Furthermore, ICMA's data distribution/redistribution model, as set out in ICMA's 2020 report for the European Commission on an EU Consolidated Tape for Bond Markets, complements guideline 16. This recommends that firms and/or vendors (including the CTP) will be permitted to purchase the (intraday, one week or full historical) raw post-trade data at a reasonable price and, for certain user types, possibly at a discounted price, in order to repackage/enrich the raw data for client use or to sell as a value-added service. Tiered pricing based on usage (or proportion of usage) will apply.

The bond consolidated tape should have differentiated/tiered fees, based on various usage types such as:

i. Ad hoc or retail use
ii. Market participant use
iii. Redistributor of raw post-trade data for reselling or client [significant proportion] servicing provision use.
iv. Distributor for derived data for reselling or client [significant proportion] servicing provision use.

<ESMA_QUESTION_GOMD_25>

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

<ESMA_QUESTION_GOMD_26>

TYPE YOUR TEXT HERE

<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>

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<ESMA_QUESTION_GOMD_27>