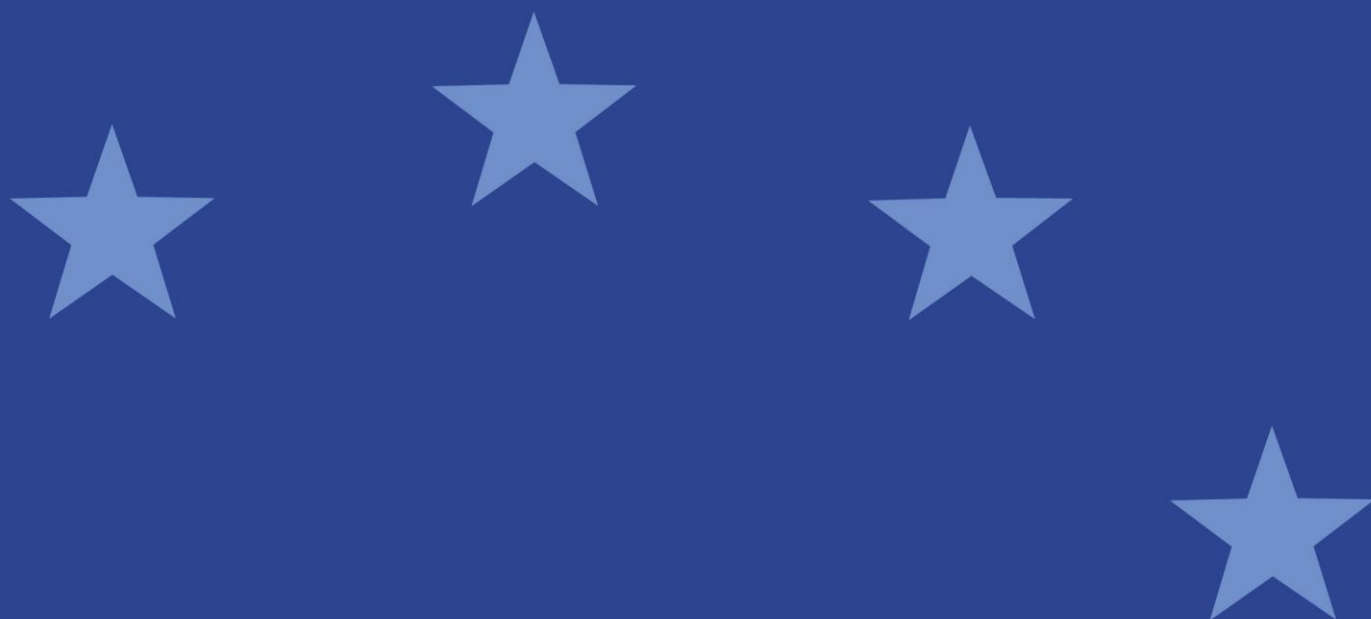


## **Reply form for the Consultation Paper on Guidelines on the MiFID II/ MiFIR obligations on market data**



## 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](http://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](http://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](http://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   | BlackRock                |
| Activity                             | Investment Services      |
| Are you representing an association? | <input type="checkbox"/> |
| Country/Region                       | Europe                   |

## Introduction

*Please make your introductory comments below, if any*

<ESMA\_COMMENT\_GOMD\_1>

BlackRock is pleased to have the opportunity to comment on ESMA's proposed new Guidelines on the MiFID II / MiFIR obligations on market data. This is an issue of critical importance to the functioning of EU financial markets: without high-quality, timely, and easily accessible market data, markets cannot function efficiently, to the ultimate detriment of the end-investor. Of importance to investors are data regarding prices and volumes of transactions in securities, which allows them to make informed investment decisions and execute trades in the most efficient manner possible.

The introduction of MiFID and MiFID II / MiFIR has significantly progressed transparency in EU financial markets. Availability of the most important market data is much more widespread today in comparison to the previous ten or twenty years. Nevertheless, there is still more to be done, particularly as the EU faces the peculiar challenge of a financial market ecosystem that remains fragmented, with component parts unevenly distributed across multiple Member States. Policymakers have recognised this and made positive steps towards fully integrating them in a single Capital Markets Union (CMU).

A successful CMU will be underpinned by data made available to market participants, which provides a single, comprehensive, and (at least) EU-wide overview of the marketplace. As policymakers and many other commentators have recognized, an aspect of this that needs further work is the dissemination of data on trading prices and volumes. Such data is the main concern of our response to this consultation paper: it is particularly important from the investor, consumer, and regulatory perspective as a means of understanding what price and volume activity in a given security looks like at any point in time, across the whole market. For investors, real-time trade information strengthens price discovery and optimal venue selection, in line with best execution requirements; and promotes investor confidence in quoted prices and execution quality across electronic trading venues. Trading data sits

alongside numerous other types of market data, including credit ratings, index data, and security identifiers which are provided by other commercial data vendors in competitive markets.

As ESMA's consultation paper and proposed Guidelines recognize, a problem currently facing many market participants is the increasing cost and complexity involved in acquiring and administering the data licenses necessary to gain a comprehensive view of the marketplace. While we believe the remedies set out in the proposed guidelines would represent a welcome improvement from the status quo, we believe there are two fundamental points to bear in mind:

First, the core issue to address is licensing terms rather than fees. For an efficient market structure, we stress the importance of ensuring all market data can be licensed by investors at an enterprise level for their internal use in the ordinary course of business.<sup>1</sup> Enterprise licensing enables users to fully realize the value of market data within their organization by eliminating the possibility of additional fees or reporting requirements being incurred for new use cases defined by market data providers.

Second, it is crucial that this work is not undertaken in isolation from the wider project to develop a European Consolidated Tape for equities, ETFs, and fixed income. Indeed, we believe single and authoritative Consolidated Tapes for each asset class or product would be the most effective way to reduce the complexity and cost of accessing a comprehensive view of the market for the vast majority of market participants. As we have set out in previous consultation responses, we see the Consolidated Tapes as necessary elements of a fully functioning European capital markets architecture, and the primary means of distributing market data to market participants.<sup>2</sup> Nevertheless, the questions around licensing of market data, which these Guidelines address, will also be crucial for the viability of the Consolidated Tape project itself. Given that, as currently envisaged, the Consolidated Tape provider would be both licensee and licensor of market data, it is of paramount importance that the Consolidated Tape can function without imposing excessive complexity or cost to market participants, and ultimately cost to end-investors.

<ESMA\_COMMENT\_GOMD\_1>

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<sup>1</sup> We have provided a market standard definition for an 'enterprise internal use' license below. See response to Question 18.

<sup>2</sup> For further discussion, see BlackRock's [response](#) to ESMA's July 2019 consultation on prices for pre- and post-trade data and the consolidated tape; and our [response](#) to the European Commission's February 2020 consultation on the review of the MiFID II / MiFIR regulatory framework.

## 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 agree with ESMA's reasoning that the requirement should be extended.

<ESMA\_QUESTION\_GOMD\_1>

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

<ESMA\_QUESTION\_GOMD\_2>

Yes.

<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 support the intention behind ESMA's proposal on accounting methodologies which, if carried out successfully, would represent stronger application of the MiFID II / MiFIR requirements to charge fees for market data that are proportionate to the cost of producing and disseminating it; and would provide welcome transparency around the proportion of vendors' revenue attributable to market data. However, it is unclear as to whether this measure will achieve its stated aim of ensuring data is distributed on a reasonable commercial basis. There are three primary reasons for this:

First, current market structure for trading data provides substantial market power to data providers. Data generated on each individual trading venue – which is ultimately generated by investors' own trading activity – is unique, and investors' need to gain an overview of the market that is as comprehensive as possible means their demand for it is inelastic. This means that competitive pressures which exist for other, substitutable types of market data are much weaker.

Second, from a technical perspective, it may be challenging to separate out the costs - fixed or variable – associated with producing and disseminating market data from the costs incurred in carrying out the core business of the market data provider – i.e. the trading venue. Trading venues will have a basic level of computing and data processing infrastructure required to conduct its core business of intermediating transactions, which will in turn be used to support its additional business of disseminating data as a product to market participants. It is difficult to see what objective criteria could be used to allocate production costs between each business area, and therefore how Reasonable Commercial Basis information published by different vendors could be easily compared. It is therefore likely that these disclosures would require intensive oversight by National Competent Authorities and ESMA to ensure they are additive to the stated objective.

Third, as we set out in our response to the [consultation](#) preceding this one, we believe the fundamental reason for rising market data cost is increasingly complex licensing terms, which are subject to variation and regular changes in agreements and policies. Subscribers are often asked to pay for data on the basis of both the number of individual users and the usage category, which in turn drives up costs. Put differently, while the 'per-license' fees for market data (such that there are such fees) may be reasonable, the increasing number of and variation in licenses is causing costs to be driven up. Further, investors' administrative overhead costs to comply are substantial and divert resources. We therefore believe the core issue to address is licensing terms rather than fees.

<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>

As suggested under question 3, the primary issue is not that investors bear the burden of proof in audits. Rather, the issue is the proliferation of complex licensing policies. By charging for data in complex and layered manner, data providers are motivated to monitor and audit the use of their data to increase fees. Placing the burden of proof on data providers may marginally reduce the cost to investors, but the effects would be negligible. Licensing terms for the various other types of market data other are not, in our experience, subject to auditing requirements. Indeed the standard for other data types is only to audit for external use (defined below), in order to confirm that external data recipients are authorized to receive the data. So, while we do not oppose this proposal, we believe the issue is better tackled by specifically addressing licensing 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>

As indicated under questions 3 and 4, auditing practices contribute to higher market data costs primarily as a function of current licensing practices. The various permutations and conditions of licensing agreements mean there is significant administrative overhead associated with monitoring and complying with different license terms that continuously change, which diverts significant resources from more value-additive activities that would benefit end-investors.

<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.**

&lt;ESMA\_QUESTION\_GOMD\_6&gt;

Guideline 3 would represent an improvement on the status quo, in as much as it would provide some structure and boundaries around the types of licensing agreements that are permissible for market data, and would also delimit its various use cases. However, it should be recognized that some users will likely fall into multiple categories, and it is important that this should not lead to multiple, complex licensing agreements (as discussed under Guideline 4 / Question 7): instead, enterprise-level licenses which capture all relevant use cases within the enterprise should be standard practice. This is a typical arrangement for the vast majority of other types of market data (such as indexes or security identifiers).

&lt;ESMA\_QUESTION\_GOMD\_6&gt;

**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.**

&lt;ESMA\_QUESTION\_GOMD\_7&gt;

As mentioned in response to Guideline 3 / Question 6, we believe the optimal way to license market data is via enterprise-level agreements. If designed correctly, such license agreements would cover all potential use cases within the enterprise, and would preclude the need for complex sub-division of licenses.

&lt;ESMA\_QUESTION\_GOMD\_7&gt;

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

&lt;ESMA\_QUESTION\_GOMD\_8&gt;

Yes.

&lt;ESMA\_QUESTION\_GOMD\_8&gt;

**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.**

&lt;ESMA\_QUESTION\_GOMD\_9&gt;

Yes. Specifically, this should mean that licensees should not be discriminated based on factors such as enterprise size or elasticity of demand for data. Instead, as suggested in our broader response to this consultation, fees should be payable on the basis of costs of production with simplified licensing terms. One of the benefits of enterprise-level licensing should be that users with unique or bespoke uses cases can make use of the data without the risk of incurring additional fees or compliance costs. If ESMA does undertake to clarify the 'non-discriminatory' obligation, it will be important that this does not lock in a 'levelled-down' model whereby all users are subject to licensing models that curtail the value that can be derived from market data.

&lt;ESMA\_QUESTION\_GOMD\_9&gt;



**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>

This is not our preferred approach. All other types of market data – for example credit ratings, market intelligence, index data, identifiers, and investment research – are in our experience licensed on an enterprise basis, with the data permitted for internal use, and do not come with the obligation to count and pay for individual users or applications of the data within the enterprise. The only exception is where data is delivered through terminals or other desktop products, which provide users with some added value – for example through analytics – and come with a built-in entitlement system through login credentials.

Nevertheless, if a per-user model were to be adopted, it is crucial that licenses should be structured such that a charge is only imposed for each individual user (such as a trader, for example) of the data, even if it is accessed via different applications or vendors. At present, it is possible that the same data feed from one trading venue can incur separate charges if it is viewed through multiple applications or terminals. While most vendors allow users to apply to report on a per-user basis to avoid multiple charges, there is no standard approach to this across data vendors, and submitting reports comes with significant difficulty and complexity, adding to the overall administrative burden associated with managing market data. If a per-user model is to be adopted, the default approach should be charges on a truly per-user basis, and not on a per-access point basis.

<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>

See response to Guideline 6 / Question 10. Under present arrangements, customers are already often required to identify the number of active users within the organization and report them to the vendor. This is a highly complex process requiring significant resources and operational overheads. As stated previously, enterprise-level licensing would be a preferable arrangement, and would preclude the need for conducting such counting, reporting and audits.

<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>

See responses to Questions 10 & 11.

&lt;ESMA\_QUESTION\_GOMD\_12&gt;

**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.**

&lt;ESMA\_QUESTION\_GOMD\_13&gt;

See responses to Questions 10 & 11.

&lt;ESMA\_QUESTION\_GOMD\_13&gt;

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

&lt;ESMA\_QUESTION\_GOMD\_14&gt;

Yes.

&lt;ESMA\_QUESTION\_GOMD\_14&gt;

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

&lt;ESMA\_QUESTION\_GOMD\_15&gt;

No comment.

&lt;ESMA\_QUESTION\_GOMD\_15&gt;

**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.**

&lt;ESMA\_QUESTION\_GOMD\_16&gt;

Yes, notwithstanding comments made under Question 3. It is not clear that more stringent RCB disclosures will reduce the cost of market data, due to a) the structure of the market in which data is disseminated; b) that it will likely be technically challenging to accurately measure the unit cost of disseminating market data; and c) the fact that a large portion of the costs associated with procuring market data stem from licensing terms rather than the fees themselves.

&lt;ESMA\_QUESTION\_GOMD\_16&gt;

**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?**

&lt;ESMA\_QUESTION\_GOMD\_17&gt;

Yes, notwithstanding comments made under Question 3.

&lt;ESMA\_QUESTION\_GOMD\_17&gt;

**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.**

&lt;ESMA\_QUESTION\_GOMD\_18&gt;

We have several comments on the proposed definitions, as follows:

i. Customer: Definition of Customer should include Customer's Affiliates, where Affiliates mean a person that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person specified. Otherwise, users can be required to pay multiple times for the same data. While specific legal entities are established for regulatory and tax purposes, these entities are not relevant to the whole enterprise's data use.

ii. Unit of Count: The distinction between display (human use) and non-display (application use) is artificial, does not feature in other market data agreements, and should be removed. Instead, data should be licensed for "internal use", meaning the enterprise and its affiliates are permitted to access, use, or store the data for internal business purposes, including research, analysis, modeling, portfolio valuation, and the creation of Derived Data. The standard for licensing all types of data should be to make data available for internal use without discriminating between human and application use.

v. Display Data / vi. Non-Display Data: it is important to draw a distinction between the concept of 'display' for trading data, and 'display licenses' for other types of market data. For the former, a distinction is made between human and application use (display vs non-display). For other types of data, a standard 'display license' refers to permission for the onward distribution of data externally to third parties – this can either be direct displaying of the data, or displaying the data after it has been processed or manipulated through analytical tools. By contrast, an 'internal use license' allows the licensee to access, use, or store the data for internal purposes only – including research, analysis, modelling, and the creation of other derived data more generally – with some limited permissions to redistribute limited excerpts to third parties. As such, we strongly believe licensing data for either internal or external use is a more appropriate distinction than display / non-display; and is indeed this is the standard for other market data types.

vii. Market data: should also include Inter-Bank Offer Rate (IBOR) data and rates.

viii. Derived Data: As stated in the CP, the definition defines derived data as a contractual limitation rather than an eponymous definition. Whether or not derived data is a substitute for the original data is a matter of opinion and a highly negotiated contractual restriction. A market-standard definition of derived data means all data created by the licensee – via calculations, manipulations, analyses and / or other processes applied to the data, such that the data is not identifiable and may not be readily extracted or reverse engineered – and that such data represents the intellectual property of the licensee, who own all rights therein, and do not face restrictions on the use or distribution of the data.

ix. Real-time Data: this definition should be applied to IBORs and rates which are treated as Real-time for 12-24 hours.

<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>

Per earlier comments we believe it will be important to ensure enterprise-level licensing is the standard model for disseminating market data. An “internal use” license grants Licensee and its affiliates a worldwide, non-exclusive, royalty-free, non-transferable license to use, access, modify, and display the Data, solely for internal use in the ordinary course of its business, which includes the right to incorporate the Data into Licensee’s internal systems, create derived data, and to redistribute Limited Excerpts.

Another additional term that should be standardized is ‘Limited Excerpt’: Sometimes called a de minimis excerpt, a limited excerpt is an insubstantial portion of data that is disseminated in the ordinary course of business to clients, prospective clients, trading counterparties, regulators, custodians, fund administrators, fund accountants. A general mailing, advertisement or other mass communication will not be considered a limited excerpt.

<ESMA\_QUESTION\_GOMD\_19>

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

<ESMA\_QUESTION\_GOMD\_20>

Yes, notwithstanding comments made under Question 3.

<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>

No comment.

<ESMA\_QUESTION\_GOMD\_21>

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

<ESMA\_QUESTION\_GOMD\_22>

Yes, however further clarification is needed. Specifically:

- Audit frequency and lookback periods should be limited; they should be no longer than the statute of limitations in the relevant jurisdiction and should take place no more than once annually.

- Third-party auditors should be required to sign non-disclosure agreements with the licensees before accessing their records.
- Licensees should retain the right to object to the vendor's choice of auditor if that auditor has audited the licensee in the prior year; given the implications for the auditors' confidentiality obligations to either party.
- The vendor or auditor must provide all relevant agreements and policies in effect during the audit period.
- The licensee must provide access to all books and records relevant to evidencing their compliance with the terms of the agreement, and access to any systems should be 'over the shoulder' of licensee's employees – i.e. not direct access.
- Auditors may not audit previously audited periods.
- Vendors are not permitted to conduct an onward audit of the licensee's clients / third parties. Doing so would require a direct agreement between the vendor and the client / third party.

<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>

We do not believe there should be any difference between the data provided on a real-time basis and data provided on a free, delayed basis. Users who opt to use delayed data (which may include retail investors, for example) should have the access to the same amount of information and transparency. We do not see justification for reducing the number of bids / offers published or for omitting the publication of flags. If the requirements for delayed data were lowered accordingly, it could force some market participants into purchasing non-delayed data – not due to its timeliness but due it being the only complete source.

<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>

It is important that any data is provided in machine readable format. If that is not the case then it creates a hurdle for consumers to be able to use the data. The ease of accessibility, the quality of the data format and its machine readability should be the same for delayed and non-delayed data. If delayed data does not meet the same quality standards, it reduces its usability

and it creates pressures to purchase non-delayed data – not due to its timeliness but simply due to artificially better quality.

<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>

Yes. However with regard to data distribution, some vendors require both the redistributor and the end recipient to have a license to the data (also called downstream distribution). Therefore, redistributors should not be charged a redistribution fee where the end recipient is also paying to access and use the data.

<ESMA\_QUESTION\_GOMD\_25>

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

<ESMA\_QUESTION\_GOMD\_26>

No.

<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>

Response to be sent privately.

<ESMA\_QUESTION\_GOMD\_27>