

27 August, 2024

By email

European Securities and Markets Authority
201-203 rue de Bercy
CS 80910
75589 Paris Cedex 12
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Re: MiFIR Review Consultation Package

Dear Sir/Madam,

Managed Funds Association (“**MFA**”)¹ appreciates the opportunity to represent the views of the global alternative investment industry in this written response to the European Securities and Markets Authority’s (“**ESMA**”) MiFIR Review Consultation Package (the “**Consultation Paper**”). We have set out our responses to the relevant questions of the Consultation Paper in the Annex hereto.

A summary of our key points is as follows:

- ESMA's proposal to adopt a liquidity assessment for bonds based on issuance size thresholds is a reasonable starting point, and is consistent with the approach being proposed by the Financial Conduct Authority in the UK.
- MFA believes that ESMA should carefully calibrate the post-trade large-in-scale (“**LiS**”) thresholds and deferral periods in order to maximize the benefits that having timely access to market data provides to all market participants with the desire to protect market participants from incurring undue risk when trading in very large sizes and/or in less liquid instruments.
- MFA supports ESMA’s proposed approach of identifying specific cost categories attributable to market data production and dissemination.
- MFA supports ESMA’s view that the price of market data must be based on the efficient costs of producing and distributing the market data (as opposed to the value market participants derive from market data, which is subjective) with a reasonable mark-up.

¹ Managed Funds Association (“**MFA**”), based in Washington, DC, New York, Brussels, and London, represents the global alternative asset management industry. MFA’s mission is to advance the ability of alternative asset managers to raise capital, invest, and generate returns for their beneficiaries. MFA advocates on behalf of its membership and convenes stakeholders to address global regulatory, operational, and business issues. MFA has more than 180 member fund managers, including traditional hedge funds, credit funds, and crossover funds, that collectively manage over \$3.2 trillion across a diverse group of investment strategies. Member firms help pension plans, university endowments, charitable foundations, and other institutional investors to diversify their investments, manage risk, and generate attractive returns over time.

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- MFA recommends ESMA take steps to simplify and standardise market data licensing practices across trading venues and data providers.
- MFA is generally supportive of ESMA's proposals regarding (i) pre-contractual information obligations, (ii) fair terms principles, (iii) market data agreement language, (iv) conformity with published policies, and (v) fees and additional costs provisions, with specific revisions as noted in the Annex.

MFA is fully supportive of ESMA's intentions to improve transparency in the non-equity markets and would encourage ESMA to continue to engage closely with the US and other international policy and regulatory leaders to ensure continued alignment of the EU market framework in a way that supports cross-border trading.

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MFA appreciates the opportunity to provide these comments to ESMA in response to the Consultation Paper. If you have any questions about these comments, or if we can provide further information, please do not hesitate to contact the undersigned Jeff Himstreet (jhimstreet@mfaalts.org) or the undersigned (jhan@mfaalts.org).

Respectfully submitted,

/s/

Jennifer W. Han

Jennifer W. Han
Executive Vice President and Chief Counsel
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ANNEX

SECTION 4.2.1 – POST-TRADE TRANSPARENCY – DEFERRAL REGIME FOR BONDS.

Q11 Do you agree with the liquidity thresholds set out in Table 7 above? If not, please provide an alternative approach.

MFA Response

ESMA's proposal to adopt a liquidity assessment for bonds based on issuance size thresholds is a reasonable starting point, and consistent with the approach being proposed by the Financial Conduct Authority in the UK.

ESMA's position that the amount of a bond issuance outstanding, rather than the initial issuance size, should be used when assessing liquidity of a given bond is reasonable provided that a reliable and up-to-date golden source for the amount outstanding exists and can be easily referenced by all market participants. MFA notes that the amount of a bond in circulation over time through can change through puts, calls, and buybacks, among others. Basing the liquidity assessment on the current amount outstanding therefore potentially provides, under normal trading conditions, a more dynamic proxy for liquidity.

More generally, MFA supports more holistic liquidity assessments based on all available, relevant market data. To that end, MFA notes that the assessment of the correlation between liquidity and issuance size for bonds has been performed by ESMA based on data submitted to it for the purpose of the current quarterly transparency calculations. MFA notes that this data is not always up to date, and this should be taken into account by ESMA.

Q13 Do you agree with the maximum deferral period set out in the tables above?

MFA Response

Based on the experience of its members, MFA would encourage ESMA to adjust the LiS thresholds for corporate bonds in Categories 3, 4, and 5 as necessary to calibrate the trade size to reflect the limited liquidity of corporate bonds in those Categories.

MFA believes that ESMA should carefully calibrate the post-trade LiS thresholds and deferral periods to maximize the benefits that having timely access to market data protects market participants from incurring undue risk when trading in very large sizes and/or in less liquid instruments. At the same time, deferrals in post-trade transparency are an important component in the transparency framework. Without a sufficient delay period, market participants may be reluctant to invest in larger positions, potentially leading to reduced liquidity, wider spreads, and higher costs for investors.

MFA notes that the value of post-trade data is intrinsically linked to its timeliness. In the US corporate bond market, the immediate dissemination of post-trade data has proven beneficial for investors by providing greater price transparency, decreasing transaction costs, and enhancing market efficiency—with studies showing a savings to public investors of an estimated \$1 billion per year.² Timely and transparent trade data enhances price discovery and allows market participants to make informed decisions. While we recognize that not all post-trade data can be immediately disseminated, excessively long deferrals can lead to information asymmetries, hinder the price discovery process, and result in suboptimal investment, hedging, and valuation decisions, ultimately reducing market efficiency.

As such, MFA would strongly encourage ESMA to ensure that delays in transparency are appropriately calibrated on an ongoing basis, using current, relevant, and comprehensive market data analysis, to enable market participants to hedge their position whilst deterring the excessive and/or abusive use of deferrals.

SECTION 7. FEES FOR MARKET DATA.

Q26 Do you agree to the general approach used to specify the costs and margin attributable to the production and distribution of market data? Please elaborate.

MFA Response

MFA agrees with ESMA's general approach to specifying the costs and margin attributable to the production and distribution of market data. As MFA has previously expressed to ESMA, current market dynamics allow trading venues and, to a lesser extent, market data providers, to extract revenues from market data users that outstrip the costs involved in creating and disseminating market data. This poses a serious risk to the proper functioning of capital markets.

As such, focusing the cost calculation on the direct costs of producing and disseminating market data, with an allowance for a reasonable margin, aligns with the goal of making market data available on a reasonable commercial basis.

To aid comparability and identify outliers, MFA believes it would be beneficial for ESMA to provide a cross-exchange benchmark of the cost categories involved in data production and dissemination.

² See letter from Larry Harris, Fred. V. Keenan Chair in Finance, USC Marshall School of Business, Kumar Venkataraman, James M. Collins Chair in Finance, Southern Methodist University, and the Honorable Elisse Walter, Former Chairman, SEC, to Brent J. Fields, Federal Advisory Committee Management Officer and Secretary, SEC, dated Aug. 21, 2018, regarding Fixed Income Market Structure Advisory Committee, available at: <https://www.sec.gov/comments/265-30/26530-4268151-173129.pdf>. See also Asquith, Covert and Pathak, The Effects of Mandatory Transparency in Financial Market Design: Evidence from the Corporate Bond Market, draft dated April 4, 2019, available at: <http://home.uchicago.edu/~tcovert/webfiles/trace.pdf>.

Q27 Do you agree with the proposed approach to cost calculation based on the identification of different cost categories attributable to the production and dissemination of market data (i.e. (i) infrastructure costs; (ii) connectivity costs; (iii) personnel costs; (iv) financial costs; (v) administrative costs)? Please elaborate.

MFA Response

MFA supports ESMA's proposed approach of identifying specific cost categories attributable to market data production and dissemination. The five categories proposed – infrastructure, connectivity, personnel, financial, and administrative costs – cover key types of direct expenses data providers typically incur for market data. MFA notes the methodologies used to set the price of market data can often be opaque, giving market data providers wide latitude to determine what constitutes a 'reasonable' price. As such, requiring market data providers to break out costs into these buckets should provide much needed transparency into how data fees are derived. It should allow competent authorities to analyse if costs are reasonable and are allocated appropriately. MFA believes having this level of granularity in the cost disclosures is essential for effective oversight of the reasonable commercial basis requirement.

Q29 Do you agree that the net profit as defined in Article 3 of the draft RTS can be a representative proxy of the margin applicable to data fees and would you include additional principles to define when a margin can be considered reasonable? Please elaborate.

MFA Response

MFA supports ESMA's view that the price of market data must be based on the efficient costs of producing and distributing the market data (as opposed to the value market participants derive from market data, which is subjective) with a reasonable mark-up. MFA agrees that expressing the margin as a percentage of direct costs can serve as a representative proxy for assessing whether market data fees are reasonable.

SECTION 8. INFORMATION TO BE PROVIDED TO THE COMPETENT AUTHORITY.

Q30 Do you agree with the proposed template for the purpose of information reporting to NCAs on the cost of producing and disseminating data and on margin applies to data? Please elaborate, including if further information should in your view be added to the template.

MFA Response

MFA supports ESMA's proposed template for trading venues and market data providers to report their market data costs and margins to national competent authorities ("**NCAs**"). Requiring data providers to disclose and justify their cost categorisations, shared resource allocations, margin calculations, and fee differences should enable NCAs to better understand the pricing of market data and to assess whether market data is provided on an RCB.

In particular, MFA believes the requirement for market data providers to give details (a) on any system components shared between their market data and other businesses in Section 3B of the template, and (b) on shared costs, in Section 3C of the template, is particularly important. This reporting should help prevent improper shifting of costs to the data side of the data provider's business.

Additionally, MFA welcomes the requirement for data providers to confirm if they apply differential pricing for the use of the market data they offer, and the rationale for such pricing differences. Such a requirement should enable NCAs to monitor for opaque and duplicative pricing structures.

MFA notes that it is not uncommon for market data providers to require data consumers to accept duplicative fees for use of the same data in different circumstances (e.g., on and from multiple devices) or for different use cases (e.g., profit and loss calculation, risk management and portfolio valuation).

SECTION 9. NON-DISCRIMINATORY ACCESS TO DATA.

Q31 What are in your view the obstacles to non-discriminatory access to data taking into consideration the current market data policies and agreements?

MFA Response

As noted in MFA's response to ESMA's 2018 consultation on market data fees³, market participants have faced a range of issues with respect to accessing market data on fair and non-discriminatory terms, including:

- frequent and non-transparent changes to fee schedules and licensing terms;
- complexity of licensing agreements and lack of standardisation across data providers;
- tying and bundling practices that force firms to purchase unneeded data or services;
- restrictions on data usage through overly broad definitions and categorisations;
- auditing practices that result in retroactive fees and unfair penalties; and
- pricing structures that discriminate against smaller firms and new entrants.

Taken together, these practices make it difficult for data users to understand and compare the costs of different data products, to efficiently purchase only the data they need, and to budget effectively amid risks of retroactive billing. This complexity and opacity hinders competition by discouraging firms from purchasing data from multiple data providers. In short, the main obstacles to truly non-discriminatory access to market data are overly complex fee structures, onerous audit requirements, and the need to purchase bundles of unwanted data in order to get essential data.

To address these issues, MFA recommends ESMA take steps to simplify and standardise market data licensing practices across trading venues and data providers. To that end ESMA should:

- require trading venues to publish simple, clear, and easily accessible fee schedules;
- mandate that base prices for market data be based on a straightforward per-instrument volume metric;

³ Available at: <https://www.mfaalts.org/wp-content/uploads/2020/04/EU-ESMA-Market-Data-Fees-Joint-AIMA-MFA-Response-2.pdf>

- specify that market data users should only need a single licence for all internal uses of the data at the firm, regardless of the number of users or applications;
- prohibit additional fees for “display” vs “non-display” usage of the same data; and
- eliminate requirements to pay for separate licences for individual business units, geographic locations, or user types.

Q32 What are the elements which could affect prices in data provision (i.e. connectivity, volume)? Do they vary according to the use of data made by the user or the type of user? Please elaborate.

MFA Response

The key elements that should determine market data pricing are the volume of data provided and the speed at which it is delivered. For example, a user requiring a large amount of data on a microsecond basis may reasonably pay more than a user who needs a smaller subset of instruments on a second-by-second basis.

However, MFA strongly believes that data prices should not vary based on how an individual user intends to use the data or the user's business model. Charging different customers different prices for the same data is inherently discriminatory. The value of market data to a user is highly subjective and not an appropriate metric for pricing. Market data users should pay the same objective, cost-based price for the same data.

Q33 Do you agree with ESMA's proposal on how to set up fee categories? Please justify your answer.

MFA Response

MFA generally supports ESMA's proposed approach to fee categories for market data customers. MFA agrees that any categories should be based on objective, factual, and easily verifiable criteria, and not bespoke to individual users. MFA also agrees with the proposal under Article 5 of the draft RTS that only one category should be applicable per client to avoid duplication of fees for the same data provided.

Nonetheless, MFA would encourage ESMA to provide additional guidance on and examples of the “factual elements” that data providers should use to categorise market data users, including more specificity on the number and types of categories that would be considered reasonable. Absent such guidance, market data providers may take an expansive approach to user categorisation which may in turn encourage opaque pricing structures to persist.

Separately, MFA objects to ESMA's proposal (set out in paragraph 238 of the Consultation Paper, and reflected in Article 5(2) of the draft RTS) to allow market data providers to add an increment of fees where there are significant different uses made by the customer (e.g., display or non-display or different types of connection or channels) which require the market data provider to incur extra costs to cover the user's different needs.

MFA believes that the only factors that should allow for incremental fees are volume and speed of data; whether the user is classified as “display” or “non-display” should be irrelevant. As such, MFA would caution against permitting market data providers to charge incremental fees on that basis.

SECTION 10. WHAT CONSTITUTES UNBIASED AND FAIR CONTRACTUAL TERMS.

Q35 Are there any other terms and conditions in market data agreements beyond the ones listed in this section which you perceive to be biased and/or unfair? If yes, please list them and elaborate your answer.

MFA Response

Some market data agreements require users to delete data at the end of the contract. MFA considers that such provisions are based on a fiction that this deletion is possible, whereas in practice it is almost impossible. MFA also considers that per-location charges and charges for affiliates are unfair. To address these issues, MFA recommends ESMA consider requiring market data providers to standardise their licensing approach to an enterprise model. Users should only need a single licence for all affiliates and offices, not separate agreements for each entity within the broader firm. Simplifying the licensing structure in this way should significantly reduce administrative burdens for users.

Q36 Please provide your view on ESMA's proposal in response to (i) the obligation to provide pre-contractual information, (ii) general principle on fair terms, (iii) the language of the market data agreement, (iv) the market data agreement conformity with published policies and (v) the provision on fees and additional costs.

MFA Response

MFA is generally supportive of ESMA's proposals regarding (i) pre-contractual information obligations, (ii) fair terms principles, (iii) market data agreement language, (iv) conformity with published policies, and (v) fees and additional costs provisions.

However, MFA has some concerns with the specifics of the proposals:

- On (i), while pre-contract disclosure is helpful, it will only be useful for users if the information is standardised to allow for like-for-like comparisons across market data providers. As such, ESMA should mandate a consistent template and terminology.
- On (ii), MFA supports prohibiting unfair terms and conditions in market data agreements. This is critical to address the imbalance in negotiating power between market data providers and data users. However, MFA would encourage ESMA to clearly define, and provide examples of, unfair practices.
- On (v), MFA does not believe a 2-month notice period for unilateral contract changes is adequate. For such a critical service, users need more time to evaluate the impact and consider alternatives.
- Finally, while MFA supports prohibiting any clause whose application would result in a direct or indirect increase of fees, it is unclear how this would be enforced without a strict audit system.

Q37 According to your experience, has the per-user model been inserted in the market data agreements as an option for billing? If yes, do you have experience in the usage of this option? Is the proposed wording of this option in the draft RTS useful? What are in your view the obstacles to its use?

MFA Response

In the experience of MFA members, market data from trading venues is typically user-billed on Terminal. However, the main cost for access to real-time data for MFA members is typically exchange-wide and not per-user.

Q38 Do you agree with ESMA's proposal on penalties? Please elaborate your answer.

MFA Response

MFA supports ESMA's goals of making the penalty process more transparent and objective. MFA agrees that trading venues should specify in advance which user actions could incur penalties and base the size of the fine on the actual revenues the venue would have received if the user was compliant.

MFA considers a 3-year statute of limitations on penalty enforcement to be reasonable. However, MFA cautions that reforming the penalty process will only be impactful if the underlying market data licensing agreements are made more reasonable. As highlighted elsewhere in this Consultation Paper, MFA members consider current data licence agreements complex, vague, and restrictive; they allow market data providers wide latitude to allege infringements, and require investment managers to devote substantial resources to ensure their compliance.

As such, MFA believes ESMA should focus on simplifying market data contract terms and making the terms themselves more reasonable as a precondition to establishing a fair penalty process.

Q39 Do you agree with ESMA's proposal on audits? Please elaborate your answer.

MFA Response

MFA supports ESMA's proposed audit reforms. In particular, MFA supports prohibiting the "reverse burden of proof" standard that requires users to affirmatively demonstrate compliance with usage agreements (rather than requiring market data providers to prove a breach) and limiting information requests to what is strictly necessary to collect evidence in respect of the alleged infringement.

Q40 Would you adopt any additional safeguards to ensure market data agreements terms and conditions are fair and unbiased? Please elaborate your answer.

MFA Response

MFA believes standardising key licensing terms, definitions, and pricing models across market data providers would significantly streamline the process and reduce administrative costs for data users.

SECTION 11. CONTENT, FORMAT AND TERMINOLOGY OF THE MARKET DATA POLICIES.

Q41 Do you agree with the standardised publication template set out in Annex I of the draft RTS? Do you have any comments and suggestions to improve the standardised publication format and the accompanying instructions? Please elaborate your answer.

MFA Response

Subject to the response to Question 42 below, MFA believes the proposed standard publication template in Annex I of the draft RTS covers the essential information that market data providers should disclose. Breaking out policy terms, product types, fee schedules, and cost details in clear categories should allow data users and NCAs to readily review and compare each data provider's offerings, which support harmonised and consistent application of the RCB regime.

Q42 Do you agree with the proposed list of standard terminology and definitions? 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.

MFA Response

MFA generally supports ESMA's proposed list of standardized terms and definitions for market data policies. Establishing a consistent vocabulary is important to make fee schedules and market data policies more transparent and comparable across providers.

In particular the concepts of "professional client" and "non-professional client" are useful, although the meaning of "researcher" should be clarified. For instance, MFA would wish to know whether this category covers economists working at a macro fund, or (by contrast) academics.

MFA strongly opposes codifying the distinction between "display data" and "non-display data". This bifurcation is a root cause of many issues with current market data policies. As ESMA acknowledges, these terms are not defined consistently today and have been interpreted expansively by trading venues e.g. classifying anything beyond a traditional terminal as "non-display"). In practice, it is common for the same data to be used in both display and non-display applications by the same user.

Finally, MFA questions the need to define "physical connection" in this context. Market data fees should be based on the content itself, not the mechanism by which it is provided. Firms should not be charged more for the same data based on their delivery method.

Q43 Do you consider that the "user-id" and the "device" should still be considered as "unit of count" for the display and non-display data respectively? Do you think that (an)other unit(s) of count can better identify the occurrence of costs in data provisions and dissemination and if yes, which?

MFA Response

MFA does not believe user-IDs or device counts are appropriate units of count for modern market data licensing, for either display or non-display use cases. These metrics do not accurately reflect the true operational expenses incurred by market data providers in collecting and disseminating market data to data users.

Q45 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.

MFA Response

MFA agrees with the proposal for market data policies to be made available in a single location of the market data providers' websites, on a free and non-discriminatory basis, to streamline the process of accessing and understanding the complete set of policies governing market data provision. MFA also agrees with the proposal to require market data providers to provide explanatory information that would be beneficial to users to compare pricing methodologies across different providers.

However, MFA would caution that increased transparency alone will not be enough to ensure reasonable market data costs. Trading venues effectively act as natural monopolies, and our members will often have no choice but to use their services and purchase their data. The normal dynamics of market competition do not apply, even if a member was to determine that the trading venue was not offering their data at a reasonable cost, they could not take their patronage elsewhere. It is imperative that ESMA and NCAs actively review the cost methodologies reported to them and published by market data providers and take steps to ensure that the data is being offered on a reasonable commercial basis.

SECTION 12. ACCESS AND CONTENT OF DELAYED DATA.

Q47 Do you agree with the proposal not to require any type of registration to access delayed data? Please elaborate your answer.

MFA Response

MFA supports ESMA's proposed approach to delayed data. MFA agrees it is critical that trading venues and APAs provide delayed data in a consistent, standardised format within the prescribed 15-minute delay period.

MFA notes the current patchwork of delayed data licensing practices is inconsistent with the requirements of MiFID II. As ESMA notes, data users continue to report issues accessing delayed data on a timely basis and in a usable format, particularly for non-retail use cases. Trading venues routinely impose registration requirements, restrictive usage terms, and fees that make it difficult to use delayed data for commercial purposes.

MFA believes requiring delayed data to be published in full after 15 minutes, in an accessible machine-readable format, and without any registration process or licence agreement will ensure the data is truly "free" as intended by MiFID II.