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EBF RESPONSE: MiFID II/MiFIR review report on the development in prices for pre- and post-trade data and on the consolidated tape for equity instruments

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EBF General Comments:

General remarks (new section)

EBF members share the view that the costs for market data have increased since the entry into application of MIFID 2. Despite the directive stressing that the costs of market data should be provided on a reasonable commercial basis, explicitly specified as being based on cost with a reasonable margin, the new requirement hasn't reached its objective. Overall market data costs and complexity have continued to increase whereas market data transparency and data quality have decreased. The main cost driver for market data users is not so much increase in already existing fees but the introduction of new fees related to multiple display-terminal, non-display applications, reporting and distribution licences, SI market data fee, connectivity fees etc. – in combination with unclear and complex market data policies and definitions and unreasonable audit procedures. Additionally, also regulatory requirements contribute to the increasing cost of market data. E.g. the Market Abuse Regulation require access to realtime data to ensure proper surveillance.

The increasing cost of market data is a significant and important issue for most market participants. Current requirements from trading venues - and in particular incumbent exchanges - do not protect data consumers from excessive monopoly and discriminatory pricing. This hurts competition and distort the development of efficient capital markets, which ultimately harms investors and companies, not at least SME.

The core problem, which exists in many jurisdictions around the globe, stems from multiple market structure and regulatory issues. Essentially, the issue is that the supply of market data is a monopoly as:

- Market data is a by-product of orders and trades;
- Market data is unique for each trading venue and therefore Market data cannot be substituted between venues;
- Market data contains fundamental knowledge, which is indispensable for trading, best execution, risk management purposes etc. and therefore demand is not very responsive to price increases (inelastic demand).

An incumbent exchange collects revenue from listing, trading, and market data. Fragmentation in trading due to liberalization in Europe (MiFID I and MiFID II) has created competition in trading and listing, but not in respect of market data due to the uniqueness of this information. The appearance of new trading venues created fragmentation in liquidity and an intensive competition to attract liquidity. This led to a downward pressure on trading and listing fees.

MiFID I specified that market data must be offered on a reasonable commercial basis. However, this principle has been ineffective in relation to market data as a monopoly product. Additional steps were taken under the MiFID II regime, requiring that market data prices must be based on a "reasonable commercial basis" and the more detailed rules specifies this means based on cost[1]. The phrase "reasonable commercial basis" is relevant, as it is important to stress that trading venues as for-profit companies should be able to create value through market forces. However, when regulation requires the use of data, it creates a regulatory imbalance, resulting in market failure, as the market data monopoly distorts the market and poses a threat to the development of efficient capital markets. This regulatory imbalance must be addressed and handled by the authorities. Currently,

[1] Market in Financial instruments Regulation (MiFIR), art. 13, Delegated Regulation 2017/567, art. 6-11, Delegated Regulation 2017/565, art. 84-89

even with the present regulatory framework, enforcement of existing principles and more detailed rules has been inconsistent and inadequate to address the issue.

The consequences of these problems are less informed markets, weaker competition and higher costs for end users.

Despite a low elasticity of demand, the massive price increases force many data consumers to scale back their market data purchases, keeping only the most necessary products. Less significant markets are deselected, leading to less cross-border competition and lower market integration, thereby hampering the development of a European Capital Market.

It is also shown how the increasing prices for market data affect financial market efficiency through a lower and uneven information available to different market actors – an uneven plying field – which is exactly what happens when some data consumers scale back their purchase of market data. Hereby, others will be better and faster informed, which may hurt price discovery mechanisms and the information content of prices.[2]

When the risk willingness, market liquidity and price discovery mechanisms decrease, it will have large real economic costs. The mechanisms have been widely analyzed in the academic literature, focusing on how asset prices and liquidity affect corporate budget constraints, investment decisions and managerial learning from prices.[3]

The most obvious effect arises when companies want to raise new money for investments in the primary markets. Here lower prices and lower deep liquidity will increase their cost of capital, especially in the riskier and more illiquid markets where the returns are typically higher – e.g. the small-cap equity market.[4] In general, companies are found to reduce their investments as a result of non-fundamental asset prices decline and some companies totally avoid issuing new equity when the liquidity in the markets is expected to be too low.[5] [6]

Other important channels arise through the secondary market prices, which also have large effect on real economic activity through the actions of decision makers in the real side of the economy. Bond et. al (2012) summarize in three different mechanisms: First, real decision makers learn new information from secondary market prices and use this information to guide their real decisions. Second, even if decision makers do not learn from market prices, they care about market prices because their success as leaders are partly measured by the return generated to the owners through capital gains. Third, another possibility, favored by proponents of behavioral finance, is that secondary market prices have a real effect on economic activity because real decision makers irrationally follow the price and use it as an anchor.

In conclusion, the unregulated monopoly positions of trading venues have several negative financial and real economic consequences. Most importantly there is a risk of lower productivity and increasing systemic risk. The effects are expected to be large, as we are dealing with core financial infrastructure in modern economies, driving corporate decisions at the highest level

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[2] See Easley et al. (2016), Cespa and Foucault (2013), Biais et al. (2015) and Huang and Wang (2009).

[3] See Bond et al. (2012) for a review of real economic effect of financial markets, Baker, Stein and Wurgler (2003) and Chen, Goldstein and Jiang (2007).

[4] For example, Davis et al. (2017) shows how companies with existing illiquid debt securities have higher cost when issuing new debt. Ellul and Pagano (2006) show a similar result for equity market IPOs.

[5] See e.g. Foucault et al (2018).

[6] The classical papier of Bernanke & Gertler (1989) and Kiyotaki & Moore (1997) also shows how adverse selection or moral hazard problems will affect primary financial markets by limiting the ability of entrepreneurs and firms to raise external capital, which eventually end up reducing real economic activity.

Q1: Have prices of market data increased or decreased since the application of MiFID II/MiFIR? Please provide quantitative evidence to support your answer and specify whether you are referring to equity and/or non-equity instruments.

Our members have clearly seen an increase in costs since the application of MiFID II/MiFIR and no price decreases so far.

It should generally be noted that price changes do not necessarily have to coincide with the date of first application of the new provisions. It is also conceivable that price changes were brought forward in the run-up to new regulations or only occurred at a later point in time.

A few studies have been ran with evidence of this increase : please see https://www.copenhageneconomics.com/publications/publication/pricing-of-market-data and https://www.copenhageneconomics.com/publications/publication/response-of-copenhagen-economics-to-the-report-the-design-of-equity-trading-markets-in-europe .

As documented in this report (and the previous ones) trading venues, the increases in market data costs are materialized via ordinary price increases (pricing policy), introduction of new products, introductions of new entities to be subject to market data fees (Systematic Internatisers), (re)bundling, changes in the definitions, complex market data policies, connectivity fees (data policy).

Q2: If you are of the view that prices have increased, what are the underlying reasons for this development?

The nature of market data is such that the data is unique for each trading venue where offers are registered so that there is no competition between trading venues on a specific piece of data. Market data users must collect data from all venues to comply with the regulation. Because of the nature of the data, users are forced to pay the price that the trading venues are asking for. In case market data would be competitive in nature, we believe that the prices of market data would not be as high as now and would have decreased significantly.

There can be multiple reasons for the price increases. The exchanges have increased their market data product prices and introduced new market data price list items/fees since MiFID II. Also MiFID II itself was a catalyst for the new disaggregated products to be created; it could be that the development and maintenance of these products were and are cross-financed by data fees from other price list items.

Q3: Following the application of MiFID II/MiFIR, are there any market data services for which new fees have been introduced (i.e. either data services that were free of charge until the application of MiFID II or any new types of market data services)?

Various exchanges have introduced new types of licenses for the usage of data in Non-Display applications leading to an increase in fees. We do not really see that the service offering itself has been enlarged, i.e. costs for creation and distribution of the data has not been increased.

An example is the introduction of fees for Systematic Internalisers (SI) to provide quotes.

According to various trading venues, an SI is fee liable if the data used is sourced from a trading venue either directly or indirectly via a data distributor/vendor. If the SI receives data from multiple sources, the SI is fee liable to all the sources and must be able to have entitlements, controls and mechanisms in place to demonstrate which specific data is utilized for pricing and quoting.

Even if the quote is not the same or similar to the equivalent quote published by a particular trading venue, the trading venue requires the SI to pay according to their derived data policy, since the SI price is seen as a substitute to the trading venues own price.

Where the quote is generated and the same as on a trading venue, the trading venue will require the usage fall within the displayed data category.

A significant problem with this is that SIs are forced to restrict access to quotes due to the market data cost to trading venues. This will limit investors access to SI quotes and is contrary to the requirement under MiFIR to make quotes publicly available.

Best execution requirement can lead to increased exchange fees as a bank may need to access more exchanges than before (and this mostly in Realtime) to ensure the best execution for a trade. Best execution must be licensed as Non-Display use of exchange data. The license model can be different per exchange. For the German Exchanges this is covered by the newly introduced licenses for "Trading based activities".

Q4: Do you observe other practices that may directly or indirectly impact the price for market data (e.g. complex market data policies, use of non-disclosure agreements)? Please explain and provide evidence.

The differences in definitions, the vague definitions and differences in usage policies across the trading venues in combination with the unreasonable audit procedures and Non-Disclosure Agreements (NDA) is creating the complex data policies.

A question is why NDAs are required from the trading venues. Actually, it limits transparency considerably and harms the possibility for the trading venues members to negotiate their terms. In practice this means that the trading venues have a strong power when negotiating and interpreting the agreements with their members. Members must accept the trading venues terms and conditions, pricelist etc. in order to become a member. The absence of negotiation increases the entry barriers for other potential entrants (other trading venues) and harms the terms of the trading venues members

Examples of complex market data policies:

1) Administration of accesses:

An Investment Firm (IF) is required to get approval from most trading venues before any data can be permissioned by the data distributor/vendor on the IF feed. For example, each time the IF changes the location of its data centers or its headquarters address, the IF is required to get a new approval, complete order forms and sign the License agreement all over again.

The IF receives several data change notifications from each data distributor/vendor every day regarding alterations to the way data is packaged, priced as well as policy amendments. Each notification needs to be investigated to estimate the impact on the IF's users and applications, as well as if the IF should expect additional market data costs, or sign a new License agreement.

When a new application requires access to market data, the IF is asking to answer a long list of questions to determine if the data will be displayed or not, controlled, stored, used to calculate new data, distributed to downstream application or externally to customers, in which format, at which frequency, etc. This thorough investigation is necessary to ensure that we subscribe to the right license for each trading venue.

The IF needs to regularly check that the correct number of users/departments have access to applications, to avoid paying fees for a service that is not being used – as we have employees going on maternity leave, changing positions internally or job descriptions, etc.

Each market data cost needs to be allocated at the employee level in our market data inventory, so the IF can provide a cost report to management. We are also using this inventory to reconcile invoices from trading venues and data distributors/vendors before they are paid. Each time a trading venue updates its fees, we will need to update our market data inventory.

Definitions and policies are deliberately vague, which creates uncertainties and unclear license situations.

2) Audits:

The auditor requires the IF to complete a questionnaire for each internal and external application having potential access to their market data.

The IF needs to provide an audit trail (3-5 years back in time) of all users permissioned to their data, which will be matched to the numbers the IF has reported to the trading venue or reported by the data distributor/vendor on the IF behalf.

The IF will need to demonstrate how the market data is controlled (entitlement system) and displayed in each application, or explain what kind of calculations are being done by the application, for what purpose, if the calculated data is distributed within the organization or externally, etc.

If the IF is not able to provide the auditor with a proper audit log of all end-users permissioned to a specific application, they will ask the IF to pay for all potential employees having access to the application itself.

It is very difficult to administer the policy terms from the market data License agreements since they do not match the reality of how the current technology allows the IF to use the market data. It is therefore very time consuming to find the "right" (non-display) license which will fit our usage per application – especially when the definition of those terms is not clear in the License agreement. The IF always must ask our account manager at the trading venue to confirm how they would categorize our application use. The IF do see in some cases an incomprehension from the trading venue of our business. Our account manager would therefore very often ask its audit team for confirmation, in order to avoid heated discussions during a future audit, as the IF will keep a record of the email confirmation in order to prove to the auditor that the IF ensured compliance with their License agreement, by asking for a formal confirmation. Also, there is a limit on how far back in time the IFs are entitled to be compensated for overpaid market data fees, whereas trading venues can go back several years if the IFs underreported.

3) "Pay per user" program

Some exchanges are restricting the access to "Pay per user" programs, that would allow to reduce fees for users having access to the same data over various channels (terminals, applications).

Examples:

- BME: The Fee Per User scheme is offered only at exceptional and discretionary basis

- Deutsche Börse: The allowance to participate in their "PPU" scheme is only given when the full company conglomerate is taking part. Previously it was possible to choose per legal entity which scheme is cheaper.

In general, the Unit of Count policies vary significantly across exchanges, indeed they evolve creatively within the same exchange across time, are not standardized in their individual outlay leaving room for interpretation and potential under-licensing. So-called "Audit" 3rd parties are then engaged by the exchange to inspect the compliant usage, which may lead to back bills.

Such practices lead to financial risks for the market data customers and could easily be avoided e.g. by a uniform rule that user accesses are always paid per "physical" user and multiple display usage by the same person are always counted as one access.

With some vendors, e.g. FTSE belonging to London Stock Exchange, we are observing additional usage restrictions like the need for a dedicated licensing for the storage of end-of-day values even when a license for real-time data is already acquired. This is worrisome as it opens a playing field for others, restricting the usage rights to dedicated timing aspects.

Last, special attention needs to be given to licensing components that go beyond user fees, e.g. a license for using the data in an SI activity should not be used to prevent competition, but only to prevent direct re-use of a quality assured price by another MTF.

Q5: Do you agree that trading venues/APAs/SIs comply with the requirement of making available the information with respect to the RCB provisions? If not, please explain which information is missing in your view and for what type of entity

The regulations require that the market data price should be:

a) based on costs of producing and disseminating such data and may include a reasonable margin (Article 85 of CDR 2017/565 and Article 7 of CDR 2017/567),

b) offered on a non-discriminatory basis to all clients (Article 86 of CDR 2017/565 and Article 8 of CDR 2017/567),

c) charged according to the use made by the individual end-user (Article 87 of CDR 2017/565 and Article 9 of CDR 2017/567), and

d) available without being bundled with other services (Article 88 of CDR 2017/565 and Article 10 of CDR 2017/567).

We have checked trading venues "reasonable commercial basis" document available online and it only contains general comments. There are no statements how prices for different licenses were derived nor is the "reasonable margin" defined.

As the process of producing and disseminating data is mostly identical for all exchanges, costs should be comparable. Either way, the whole process would benefit from a thorough definition of "costs of producing and disseminating such data" as well as a comprehensive guideline as to what constitutes a "reasonable margin".

Q6: Do you share ESMA's assessment on the quality of the RCB information disclosed by trading venues, APAs and SIs? If there are areas in which you disagree with ESMA's assessment, please explain.

We agree with ESMA's assessment that the quality is not sufficient. We are particularly concerned that trading venues do not seem to fulfil the „Obligation to provide market data on a non-discriminatory basis" and "based on costs of producing and disseminating such data".

The requirement for a reasonable commercial basis requires that the fees are based on the cost of producing and sharing that data. Exchanges should transparently separate costs for trade execution and creation of data. The latter could then be the cost base for the products sold as market data. Exchanges should disclose their increased cost base when they place new licenses in the market.

ESMA providing detailed guidance on both terminology and categorization of users, as well as cost ratios and the allocation key for allocating costs would go a long way to solve our problems.

We have to accept that the exchange's main interest is to use their position to increase revenue for their shareholders and to grow further which is visible in their yearly reports and their announced targets.

Q7: Do you agree that the usability and comparability of the RCB information disclosed could be improved by issuing supervisory guidance? If yes, please specify in which areas you would consider further guidance most useful, including possible solutions to improve the usability and comparability of the information.

A tighter control on the information published may support the commitment to provide transparency, e.g. the Euronext webpage does not seem to be kept up to date. However, it is worth stressing that transparency as to the intent to charge for data based on the value perceived for the user only flags the potential abuse of pricing power and does nothing to constrain such excesses. Further standardization of the information published may support as well e.g. a product calculation sheet that explains per product the pricing applied in detailed numbers.

Q8: Do you think that the current RCB approach (transparency plus) can deliver on the objective to reduce the price of market data or should it be replaced by an alternative approach such as a revenue cap or LRIC+ model? Please justify your position and provide examples of possible alternatives.

We consider that the currently proposed "transparency plus" approach is insufficient to deliver the appropriate objective to control market data prices.

Some of our members support a revenue cap approach while others don't.

Q9: Do you consider that a revenue cap model as presented above might be a feasible approach to reduce the cost of market data? Which elements would be key for successfully implementing such a model?

Some of our members support a revenue cap approach while others don't.

Q10: Did data disaggregation result in lower costs for market data for data users? If not, please explain why?

Disaggregated market data is in general not being requested as the disaggregated market data is relatively more expensive than bundled market data. As long as this is the case, the demand will be limited. This is a problem for smaller data users. i.e. data users which only need a limited amount of market data but are forced to by buy bundled market data. This limits the data use and harm transparency. Therefore, art. 10.2 should be rephrased and state that prices should be at the same relative level as if the data was purchased in a bundled version. We believe that market data should be made available without being bundled with other services.

Q11: Why has there been only little demand in disaggregated data?

Please see answer to question 10

Q12: Do trading venues and APAs comply with the requirement to make available data free of charge 15 minutes after publication? If not, please explain in which areas you have identified deficiencies

There are trading venues and APAs that comply with the requirement to make data available free of charge 15 minutes after publication. Unfortunately, several data providers make data available in a format that cannot be collected by data users because the format is not machine-readable. Also some data providers make the data free of charge for a specific period of time and after that period the users must again pay for the data to be able to see it.

Q13: Do you consider it necessary to provide further supervisory guidance in this area (for instance by reviewing Q&As 9 and/or 10) Please justify your position and explain in which area further guidance may be needed? Please differentiate between pre- and post-trade data.

We propose the following change of the wording:

A proposal on how to ensure that the requirement of 15-minutes delayed data free of charge, is truly free of charge

MIFIR Q&A https://www.esma.europa.eu/sites/default/files/library/esma70-872942901-35_qas_transparency_issues.pdf

Question 9 [Last update: 15/11/2017]
a) Are trading venues, APAs and CTPs required to make data available free of charge for any length of time 15 minutes after publication?

b) Does MiFID II/MiFIR prevent trading venues, APAs and CTPs to apply usage restrictions, licensing and redistribution fees, including fees for deriving and/or manipulating data in automated applications for internal or external distribution, and non-monetary costs to market data – such as requirements on registrations, subscriptions and usage reporting – on data which they make available free of charge 15 minutes after publication?

Our Proposal for a revised response:

a. **Yes,** information made available free of charge after 15 minutes ~~after~~ of its publication should replicate the **real-time i**nformation published on a reasonable commercial basis but with a 15 minutes delay. The information ~~should~~ **can** be made available directly to end users. Where the trading venues makes the data available via third parties, this should not impose restriction on access to that data to end users **or Financial institutions**. ~~Trading venues are~~

~~not required to make any further replication of already published information available free of charge.~~

b. Trading venues, APAs and CTPs may not impose redistribution fees or other ~~similar~~ restrictions on redistributors/third parties making available free of charge 15 minutes after the initial publication. ~~Where a redistributor/third party charges fees for the distribution of data – including a general fee for accessing its services – trading venues, APAs and CTPs may impose a similar redistribution fee s or other similar restrictions on this redistributor/third party.~~

Furthermore, trading venues, APAs and CTPs may not charge fees or impose other similar restrictions on added-value services created by redistributors/third parties from data provided free of charge. ~~Where a redistributor/third party charges for added-value services created from such data, trading venues, APAs and CTPs may impose fees or other similar restrictions to this redistributor/third party.~~
~~However,~~ **As** MiFIDII/MiFIR ~~only~~ requires data to be published after 15 minutes free of charge and therefore, trading venues, APAs and CTPs may **not** charge fees for the use and redistribution of historic data **including data published after 15 minutes free of charge** ~~that is considered as an added value service.~~

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About the EBF

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