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FIA response to ESMA Consultation Paper

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

1. Introduction

The Futures Industry Association ('FIA')[1] welcomes the opportunity to respond to the ESMA Consultation Paper on MiFID II/MiFIR review report on the development in prices for pre- and post-trade data and on the consolidated tape for equity instruments[2]. Whilst FIA has a very diverse membership, the views expressed in this response are those of FIA primary members (i.e. clearing firms) and may not be the views of all FIA members.[3]

Market data is a highly valuable tool that supports the efficiency of a trading eco-system as it helps firms and investors to make investment and hedging decisions and to facilitate transparency in the market.

The production of high-quality market data, delivered through reliable, timely and efficient channels to data vendors and end users, therefore makes an important contribution to market efficiency. Non-discriminatory access to market data allows for a balancing of asymmetry of information between market participants.

FIA clearing members have observed the rising cost of market data in the EU over recent years. Steven Maijoor, Chairman of ESMA, stated in a speech on 21 June 2018 that *"Following the application of MiFID II, we were made aware of substantial increases in the costs of market data, reaching at times up to 400% compared to prices charged prior to 3 January 2018."*[4] Given the importance of data access for market participants and the rising cost of this data, ESMA's review of the topic is timely and welcome.

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[1] The Futures Industry Association is the leading global trade organization for the futures, options and centrally cleared derivatives markets, with offices in Brussels, London, Singapore and Washington, D.C. FIA's membership includes clearing firms, exchanges, clearinghouses, trading firms and commodities specialists from more than 48 countries, as well as technology vendors, lawyers and other professionals serving the industry. FIA's mission is to support open, transparent and competitive markets; protect and enhance the integrity of the financial system; and promote high standards of professional conduct. As the principal members of derivatives clearinghouses worldwide, FIA's clearing firm members play a critical role in the reduction of systemic risk in global financial markets.

[2] https://www.esma.europa.eu/system/files_force/library/esma70-156-1065_cp_mifid_review_report_cost_of_market_data_and_consolidated_tape_equity.pdf?download=1

[3] FIA's response is limited to the market data fees part of the consultation as they apply to exchange-traded derivatives, and it does not cover the questions in relation to the consolidated tape for equities. We assume that the part of the consultation covering the consolidated tape does not have any impact on exchange-traded derivatives.

[4] mifid_ii_implementation_-_achievements_and_current_priorities_s.maijoor_fese_convention_21June2018.

2. Market data consumption for regulatory compliance and risk controls/mitigation purposes

MiFID II and MiFIR have increased the need to consume market data in real time to satisfy specific regulatory requirements.

For example, Commission Delegated Regulation (EU) No 2017/589 of 19 July 2016 supplementing MiFID with regard to regulatory technical standards specifying the organisational requirements of investment firms engaged in algorithmic trading, providing direct electronic access and acting as general clearing members ('RTS 6') includes a number of requirements that demand real-time market data, notably:

- Article 8, paragraph (b) – controlled deployment of algorithms requires price-based pre-trade limits. To define a price collar, we need the real-time best bid/offer.
- Article 15, paragraph 1(a) – all orders require a price collar, which requires the current best bid/offer.
- Article 16, paragraph 5 – real-time monitoring requires real-time data to compare trades to the current market conditions (whether manual or automated.)
- Article 21, paragraph 2 – DEA providers need to evaluate and manage market disruption. This is a real-time requirement and needs full market data.

Whilst Article 13 (automated surveillance) of RTS 6 does not explicitly demand real-time data, it does link through to the requirements in the Markets Abuse Regulation (MAR) and firms' internal audit and compliance teams are generally of the view that anything less than real-time monitoring for activities such as spoofing is not up to the expected compliance standard. Therefore, firms have had to implement real-time surveillance alerting systems to ensure that they meet MiFID II and MAR requirements. All those systems work on real-time data to spot patterns in trading too.

In other words, firms are unable to comply with these and other requirements if they do not have access to real-time market data, so they have no choice but to obtain the data if they wish to achieve regulatory compliance. On the other hand, trading venues are in a unique position of providing market data, as they are the only ones who have the requisite data and act as utilities in this regard. This could lead to unhealthy and uncompetitive pricing structures for market data, because demand is inelastic and guaranteed (often driven by regulation), whilst supply is limited and concentrated in individual trading venues.

3. Significance and uniqueness of derivatives clearing

The cleared derivatives industry has evolved significantly in the last couple of decades, in particular after the 2008/09 financial crisis. It is unique in that a number of market participants, when trading and clearing designated OTC contracts, are mandated to trade them on a trading venue and then clear them on a CCP. Exchange-traded derivatives are by their very nature always centrally cleared. A regulatory push to clearing of derivatives has been one of the main responses of regulators and policy-makers in the aftermath of the financial crisis. Firms no longer have a choice between entering into certain derivatives contracts on a bilateral basis and trading and clearing them on trading venues and CCPs. Instead, they are required to do the latter by regulation. Therefore, they are also mandated to obtain and use market data that trading venues make available.

In terms of trading patterns and strategies, market participants often enter into derivatives transactions for hedging purposes and they also use market data for trade surveillance, market abuse and risk control purposes, which are all driven by regulation and industry practices to help preserve a safe, competitive, transparent and robust market place.

4. Cost and transparency of market data

a. Cost of market data for regulatory compliance and risk mitigation purposes

FIA clearing members are of the view that the cost of market data needs to be transparent and that trading venue members should not be charged for essential market data separately from or in addition to the cost of membership, as the cost of providing the market data service is integral to the trading venue membership and is therefore already priced in the cost of that membership. Whilst members of trading venues and other data users consume market data, they first and foremost contribute their own data by e.g. submitting orders to trading venues, which then allows the trading venues to turn the data received into a data service that is made available to all market participants. If exchange members and their clients did not contribute their own data in the first place, then trading venues would not be able to offer data services at all.

To the extent that market participants require real time market data for regulatory compliance purposes or for risk controls/risk mitigation purposes, FIA clearing firms are of the view that consumption of such data should be free of charge, as they do not have a choice but to use the data from a specific trading venue. The same firms also acknowledge that market data can also be used for purely commercial, investment and speculative purposes and that such data should be available to market participants on reasonable commercial basis.

b. Market data redistribution fees

Since the primary European derivatives exchanges have only recently implemented market data fees (all in 2016), it is difficult to demonstrate significant increases in these fees, due to the short period in which they have been levied. However, exchange members and other firms have also been impacted by the extension of market data redistribution fees in order to provide this data to market participants, effectively paying to collect the user fees on behalf of the exchanges. These market data redistribution fees are not insignificant, and are in addition to exchange, clearing and market data usage fees.

c. Lack of transparency around cost of market data

Furthermore, there is very little to no visibility on the transparency of costs for the market data. Whilst most exchanges make market data fees publicly available, these are not easy to understand and there are material differences and inconsistencies among exchanges in the level of detail, format and structure of how the fees are presented. It would be desirable if there was at least some commonality introduced, for example a common template, when it comes to making prices lists publicly available. The highly concentrated nature of European derivative exchanges, driven by the concentration in open interest has resulted in firms looking to hedge their market exposures being forced to consume market data from the incumbent exchanges, and hence adhere to their pricing policies. Because the open access provisions in MiFID II have been delayed to July 2020, it is very difficult to free up competition in this market and find alternative sources of market data, which would lead to fair(er) market prices.

5. Exchange billing inconsistencies

In addition to the high cost of market data subscriptions for end users of 'display' platforms, external distribution licences and the MiFID II mandated requirements to take real time market data feeds to meet regulatory requirements, there is significant inconsistency in the billing rules that exist between exchanges. These inconsistencies generate a burdensome administration overhead both to ensure accurate reporting of billable users and to optimise usage. The difficulty in understanding the precise billing rules for each exchange increases the risk that members interpret the rules differently resulting in a playing field that is not level.

Here is a non-exhaustive list of examples of billing inconsistencies across Euronext, Eurex and NASDAQ OMX.

Eurex: External 'trader' and 'view only' users have charges waived if they have not logged on for 3 months
Euronext & OMX: External 'trader' and 'view only' users have charges waived if they have not logged on for 1 month

Eurex & OMX: New external and internal users first set-up in the last month have charges waived if they have never logged on
Euronext: There is no concession for new users set-up in the last month who have never logged on

Eurex: Charges are waived for internal users who are 'Eurex registered'
Euronext & OMX: The concept of 'exchange registered' does not exist

Eurex: Tech / Support free, with the exception of 'Trade Support', unless the user is 'Eurex Registered' in which case the charge is waived
Euronext & OMX: Tech / Support free

OMX: All internal users free
Euronext: All internal users charged, except Tech / Support who are free
Eurex: All internal users charged except Tech / Support who are free, except 'Trade / Support' (who are charged), noting that exchange registered 'Trade / Support' users are free"

Euronext charge by asset class applying a different charge for FX derivatives, Equity and Equity Index derivatives, and Commodities spanning all 3 of their segments (Amsterdam, Brussels and Paris). Certain of these asset classes are listed on more than one of the 3 Euronext segments. A user permissioned to trade Equities and Equity Index derivatives on Paris can view these asset classes without further charge on Amsterdam and Brussels. However, a Commodities user on Paris should have a different rate to a user permissioned for Paris and trading Equity and Equity Index derivatives. Similarly, a user permissioned for Amsterdam and trading FX should have a different rate to a user permissioned for Amsterdam and trading Equity and Equity Index derivatives.