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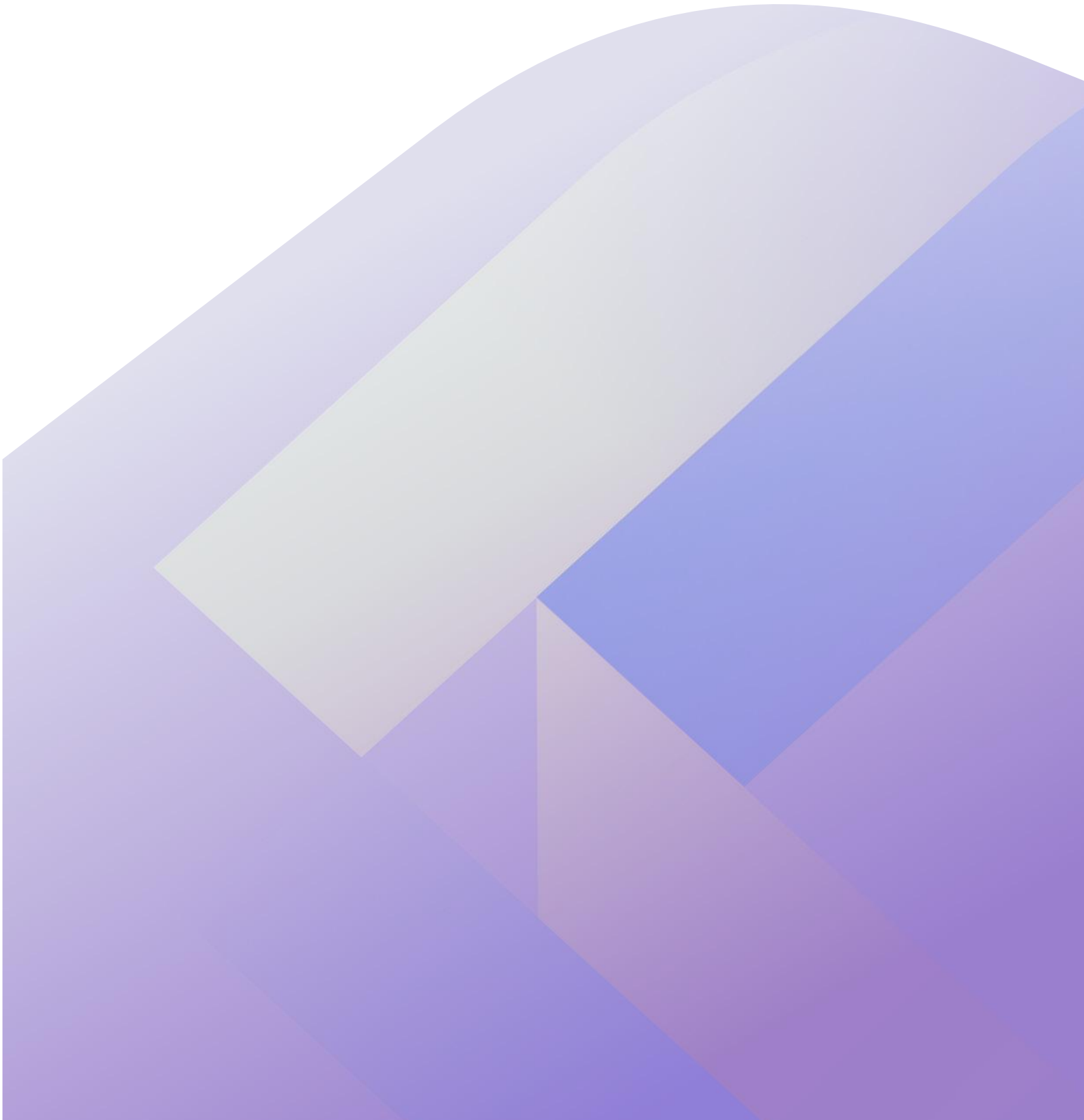
Opinion

On ESMA's Opinion on the Trading Venue Perimeter



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Acronyms and definitions used

CJEU	Court of Justice of the European Union
CP	Consultation Paper
EMS	Execution Management Systems
EU	European Union
ESMA	European Securities and Markets Authority
ISVs	Independent Software Vendors
MiFID I	Markets in Financial Instruments Directive – Directive 2004/39/EC of the European Parliament and Council
MiFID II	Markets in Financial Instruments Directive (recast) – Directive 2014/65 of the European Parliament and of the Council
MiFIR	Markets in Financial Instruments Regulation – Regulation 600/2014 of the European Parliament and of the Council
MTF	Multilateral Trading Facility
NCA	National Competent Authority
OMS	Order Management Systems
OTC	Over the counter
OTF	Organised Trading Facility
Q&A	Question and answer
RFQ	Request for quote
RTO	Reception and Transmission of Orders
RTS	Regulatory Technical Standard
SFTs	Security Financing Transactions
SI	Systematic Internaliser

ESMA
European Securities and Markets Authority

OPINION

On multilateral systems and the trading venue perimeter

1 Legal basis

1. ESMA's competence to deliver an opinion to national competent authorities (NCAs) is based on Article 29(1)(a) of Regulation (EC) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority)[1] (ESMA Regulation).

2. Pursuant to Article 29(1)(a) of the ESMA Regulation, ESMA shall provide opinions to NCAs for the purpose of building a common Union supervisory culture and consistent supervisory practices, as well as ensuring uniform procedures and consistent approaches throughout the Union.

3. In accordance with Article 44(1) of the ESMA Regulation the Board of Supervisors has adopted this opinion.

2 Background

4. There are three types of trading venues under Directive 2014/65/EU on markets in financial instruments[2] (MiFID II):

    a) Regulated Markets (RM): "'regulated market' means a multilateral system operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments – in the system and in accordance with its non-discretionary rules – in a way that results in a contract, in respect of the financial instruments admitted to trading under its rules and/or systems, and which is authorised and functions regularly and in accordance with Title III of this Directive".

    b) Multilateral Trading Facilities (MTF): "'multilateral trading facility' or 'MTF' means a multilateral system, operated by an investment firm or a market operator, which brings together multiple third-party buying and selling interests in financial

[1] Regulation (EU) 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15. 12.2010, p. 84).
[2] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349).

instruments – in the system and in accordance with non-discretionary rules – in a way that results in a contract in accordance with Title II of this Directive".

c) Organised Trading Facilities (OTF): "'organised trading facility' or 'OTF' means a multilateral system which is not a regulated market or an MTF and in which multiple third-party buying and selling interests in bonds, structured finance products, emission allowances or derivatives are able to interact in the system in a way that results in a contract in accordance with Title II of this Directive".

5. In addition to establishing OTFs as a new type of trading venue, MiFID II / MiFIR also introduced a definition of multilateral system which is common to all types of trading venues. Article2(1), point (11) ~~4(19)~~ of ~~MiFID II~~ MiFIR defines a multilateral system as *"any system or facility in which multiple third-party buying and selling trading interests in financial instruments are able to interact ~~in the system~~"*.

6. Moreover, ~~MiFID II~~ MiFIR includes in Article 1(5b~~7~~) a requirement that "all multilateral systems in financial instruments shall operate either in accordance with the provisions of Title II of Directive 2014/65/EU concerning MTFs or OTFs or the provisions of Title III of that Directive concerning regulated markets".

7. The combination of the changes introduced in MiFID II / MiFIR, notably the obligation under Article 1(5b~~7~~) of ~~MiFID II~~ MiFIR and the definition of a multilateral system under Article 2(1), point (11)~~4(19)~~, has the effect of recognising that any multilateral system must request authorisation as a trading venue. That means that multilateral systems should operate in accordance with the definition of a regulated market, an MTF or an OTF, regardless of the changes necessary to comply with the requirements associated with the operation of a trading venue, in particular those in Title II (for MTFs or OTFs) or Title III (for regulated markets) of MiFID II. In practice, under MiFID II / MiFIR, the key concept for establishing the regulatory perimeter for authorisation as a trading venue is whether a system or facility is considered multilateral. Once it is identified as a multilateral system, it would then need to be authorised as a trading venue.

8. Despite the changes introduced by MiFID II / MiFIR to clarify the regulatory framework, ESMA acknowledges that there is a lack of a homogenous view of what should constitute a multilateral system, and consequently, what types of systems require authorisation as a trading venue. This may lead to regulatory inconsistencies and contribute to an unlevel playing field between entities authorised as trading venues, which are required to comply with the MiFID II / MiFIR regime and the regulatory obligations attached to it, and entities that run similar systems but operate outside the regulatory perimeter.

9. In order to ensure a consistent application of the relevant requirements by market participants across the Union, in particular in those cases where the boundary of trading

venue authorisation is blurred and subject to different interpretations, ESMA considers it necessary to provide further clarification. The aim of the opinion is to clarify when certain systems and facilities qualify as multilateral and should seek authorisation as a trading venue.

10. ESMA has considered that such clarification will contribute positively to the consistency of supervisory practices and contribute to consistent approaches throughout the Union, as a result of which, ESMA has decided to issue this opinion to NCAs.

3 Opinion

3.1 Definition of multilateral system

11. For an effective functioning of the MiFID II / MiFIR provisions, there must be clarity as to when a system or facility qualifies as a multilateral system. From the definition in Article 2(1), point (11) ~~4(19) of MiFID II~~ MiFIR, four key aspects/criteria should be met, cumulatively, to be considered a multilateral system:

    a) it is a system or facility; and

    b) there are multiple third-party buying and selling interests; and

    c) those trading interests are able to interact; and,

    d) trading interests need to be in financial instruments.

System or facility

12. A system in the context of the definition of multilateral systems must be understood as a set of rules that governs how third-party trading interests interact, i.e. the rules must contain elements that concern the matching, arranging and/or negotiation of trading interests. Such rules or features could be contractual arrangements or standard procedures that shape and facilitate the interaction of third-party trading interests. Rules in this context should not be understood to include the technical standard of message construction (e.g. XML) and/or the protocol which governs the technical exchange of messages.

13. A system is technology neutral, hence the type of technology used or whether it is automated or non-automated does not determine whether it is a system. Whilst it is easily identified when embedded in an automated system, it is more difficult to identify non-automated systems, such as voice brokerage.

14. Under ~~MiFID II~~ MiFIR, the definitional scope of multilateral system should include those non-automated arrangements that achieve a similar outcome as a computerised system, including those where it allows a firm to reach out to other clients to find a potential match when receiving an initial buying or selling interest.

15. Outside the scope of the definition of multilateral system should be general-purpose communication systems.

16. Despite the fact that the notion of system is broad, it should be noted that simply being a system does not mean that the system is multilateral. It is key to understand whether the other elements of the definition of multilateral system are present. In addition, it is also important to consider who operates the system and which types of rules the system operator sets.

17. ESMA considers that if an investment firm sets the rules of interaction and merely uses a software provider, for example as an outsourcing of the IT capability, the software provider itself would not be in scope of the multilateral system definition. It is then key to understand whether the rules set by the system operator (in this case the investment firm) meet the other elements of the definition of multilateral system.

Multiple third-party buying and selling interests

18. The second criterion to identify a multilateral system is whether the system involves multiple third-party buying and selling (trading) interests. The term “third-party” in this context relates to persons other than the system operator, that are brought together in a transaction. The word ‘multiple’ refers to the system allowing various trading interests to interact in the same system or facility.

19. In scope are also systems where two trading interests interact, provided such trading interests are brought together under the rules of a third-party operator. This interpretation is supported by a legal analysis[3] of the Court of Justice of the European Union. This analysis refutes the argument that a system is deemed to be bilateral even where there is always the same participant on the one side of a transaction which executes the order from an investor. Considering such system as bilateral would negate the involvement of the system operator which runs the system as an independent operator in respect of the parties entering into the transactions. Therefore, having a single liquidity provider is not sufficient for the system to be considered bilateral. This would not include, for example, the use of a

[3] JUDGMENT OF THE COURT (Fourth Chamber) 16 November 2017, Robeco Hollands Bezit NV and Others v Stichting Autoriteit Financiële Markten (AFM), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62015CJ0658&from=FR

third-party provider as an outsourcing element of a firms' IT capability (as explained in paragraph 17).

20. On the contrary, those systems where the interaction occurs between two counterparties only, with no third-party operator involvement in the interaction, should not be considered multilateral. In general, those bilateral systems operate according to the rules and/or commercial policy set by the dealer (the systematic internaliser (SI)). The SI trades on own account on every transaction in the bilateral system and is required to take on market risk.

Interaction between trading interests

21. To be considered a multilateral system in the ~~MiFID II~~ MiFIR context, not only the system has to have multiple third-party buying and selling interests, but also those trading interests must be able to interact in the system. ESMA considers that for such interaction to occur, the system must not only allow the display of the different trading interests but also allow users to react to those trading interests, i.e. it should be possible to exchange information concerning those trading interests and match, arrange and/or negotiate essential terms of a transaction (for example instrument, price, quantity) with a view to conclude a transaction in those financial instruments.

22. The definition of multilateral systems does not require the conclusion of a contract as a condition, but simply that trading interests can interact within the system. Hence, the conclusion of a legally binding contract is not a prerequisite for a firm to be required to request authorisation as a trading venue for the system it operates. Systems where trading interests can interact, where there is confirmation (or pre-arranging) of a transaction or where the essential terms have been (or can be) negotiated (for example price, quantity), would still require authorisation as a trading venue, even if some further contractual details are arranged outside of the system as is the case with many derivative contracts. In such instances it cannot be argued that there is no interaction in between trading interests only because the final terms of the contractual agreement are concluded outside of the system or facility.

23. A multilateral system, as clarified by Recital 8 of MiFIR regarding OTFs, "should not include facilities where there is no genuine trade execution or arranging taking place in the system, such as bulletin boards used for advertising buying and selling interests, other entities aggregating or pooling potential buying or selling interests, (…)".

24. Hence, interaction requires that the system contains rules concerning the matching, the arranging and/or the negotiations of trading interests. General advertising and/or aggregation of trading interests should not qualify as multilateral systems.

Financial Instruments

25. The final aspect of the multilateral system definition is that interaction of third-party buying and selling trading interests must be in financial instruments within the meaning of Article 4(15)[4] of MiFID II, including security financing transaction (SFT)[5].

26. As such, only systems allowing third party interaction on those instruments specified in SECTION C of Annex I of MiFID II should be considered as a multilateral system within the scope of MiFID II.

3.2 Trading venue perimeter – specific cases

27. The practical application of the EU regulatory framework in the context of the trading venue perimeter has not been entirely consistent and requires further clarification to ensure its consistent application. This opinion focuses on three key areas in which the dividing line is more difficult to draw: new technology providers, request for quote systems (RFQs) and system that pre-arrange transactions.

3.2.1 Technology Providers

28. As referred to above, Recital 8 of MiFIR clarifies that facilities where there is no genuine trade execution or arranging should not be required to seek authorisation as a trading venue. Therefore, if a platform simply provides pricing data or other information tools used to make trading decisions, this is not sufficient to conclude that such platform should require authorisation as a trading venue. It requires a genuine interaction between the users of such platform for it to be qualified as a multilateral system, for example by including a button where the intention to enter into a transaction can be confirmed.

29. ESMA identified three key characteristics, all of which should be met, for a system not to require authorisation as a trading venue but to be identified rather as a bulletin board type system. Such characteristics are that:

    a) the system should consist of an interface that only aggregates and broadcasts buying and selling interests in financial instruments;

    b) the system neither allows for the communication or negotiation between advertising parties, including any notification of any potential match between buying and selling interests in the system, nor imposes the mandatory use of tools of affiliated companies; and,

[4] 'financial instrument' means those instruments specified in Section C of Annex I.
[5] As clarified by question 9b of ESMA Q&As on market structure, multilateral and bilateral system section (ESMA70-872942901-38 Q&As on Markets Structures issues (europa.eu))

c) there is no possibility of execution or the bringing together of buying and selling interests in the system.

30. It should also be noted that it is not the form of the arrangement, nor the technology used that determines the need for authorisation. Rather it is the functioning of the arrangement that is key to assess whether the activity should require authorisation. That is to say that systems which facilitate the interaction of third-party trading interests related to financial instruments are multilateral systems and should require authorisation as a trading venue, whether it is by using in-house facilities or by employing third-party systems.

31. In addition to communication tools, ESMA noted that some so-called Execution Management Systems (EMS) have been subject to debate. In general, these systems employ software or technical tools aimed at facilitating order execution by offering an overview of liquidity and prices on various venues, subsequently sending the orders to the preferred trading venue or trading venues for execution. Therefore, EMS which purely allow its users to support their own order managing processes should not be considered multilateral systems.

32. However, irrespective of their "EMS" label, those systems which present additional features and a level of complexity that allow for the interaction of multiple third party buying and selling interests in financial instruments, thus combining all four criteria identifying a multilateral system, should be required to seek an authorisation as a trading venue.

33. For example, an EMS which would allow for firms to gather quotes from multiple players, allowing these trading interests to interact within the system with other clients' orders could be, depending on the specifics, a multilateral system and subject to the authorisation as a trading venue.

34. As such, it is key to understand what the system permits users to do. An EMS which would allow for firms to gather multiple quotes from multiple sources, and where these trading interests can interact with other trading interests (within the system) could be, depending on the specifics, considered a multilateral system. In this context, it is important to consider the role of the entity operating the system, i.e. whether it is the software vendor itself or rather the investment firm. This is particularly relevant in the case where the software vendor has embedded a number of rules that govern the interaction of trading interests in the system and does not allow investment firms to set its own rules: in this case, the software vendor would be operating a multilateral system.

35. It should also be noted that how a system classifies itself is irrelevant to the assessment, whether it is an EMS, RFQ or other. It is rather how the system functions that determines whether it falls within the scope of the definition of a multilateral system.

3.2.2 Request-for-quote systems

36. MiFID II acknowledges different types of trading systems, including order book, quote-driven, hybrid, periodic auction, and voice trading systems. It also considers request-for-quote (RFQ) as a trading system that can be operated by trading venues.

37. RTS 1 and 2 describe RFQ systems as trading systems "where a quote or quotes are provided in response to a request for quote submitted by one or more members or participants. The quote is executable exclusively by the requesting member or participant. The requesting member or participant may conclude a transaction by accepting the quote or quotes provided to it on request".

38. ESMA noted that in some cases stakeholders may have diverging interpretations of what constitutes an RFQ and whether RFQs should be considered as multilateral or bilateral. This causes concerns in terms of supervisory convergence and level playing field as systems with similar characteristics may be subject to different authorisation regimes. It is therefore important to clarify the different types of systems arrangements, which are diverse in terms of their operation, but are all referred to as RFQs.

39. RFQ systems as described in RTS 1 and 2, are defined as systems where quotes are provided in response to a request submitted by one firm. This is the case of systems that allow for the interaction of multiple members or participants (Client A, Client B) with multiple liquidity providers (Dealer A, Dealer B, … Dealer n). Each Client has the possibility of interacting with multiple Dealers who will act as counterparties to deal in a specific financial instrument. The Client may request a quote to N Dealers and the responses are sent individually to the Client. The responses are referring to one single request on which the client requested quotes in a multilateral way. ESMA deems such systems as multilateral in nature and hence requiring authorisation as a trading venue.

40. ESMA also notes that where a system allows (or requires) the client to request a quote from only one dealer (a so called RFQ-to-one) the system would still be considered as multilateral (hence encompassed by the definition in RTS 1 and 2), regardless of whether it is by design or choice from the client. These types of systems allow for the interaction of third-party trading interests to the degree that they allow clients to send requests to multiple dealers (either at the same time or separately), even if only using an RFQ-to-one functionality. Therefore, they are considered multilateral systems.

41. A different case for consideration is the type of trading system that not only offers an exclusive RFQ-to-one functionality as described above but, in addition, only provides for a single liquidity provider. Here a clear distinction should be made considering who operates the system and in what capacity the liquidity provider trades.

42. For example, the case of a single-dealer platform that allows different clients to interact with only one counterparty, usually a bank, that also operates the system and deals on own account, illustrates the typical case of a bilateral system. In such instance, the operator of the system also acts as the only counterparty and deals on own account in its system which is typically the case of a single-dealer system operated by a systematic internaliser (SI). Hence such systems should be neither considered as multilateral in nature, nor as encompassed by the definition of RFQ systems in RTS 1 and 2. In this case, the investment firm is the operator of the system as it is the investment firm who sets the rules that govern how the trading interests may interact within the system. Where an investment firm uses a software vendor, for example as an outsourcing function of the investment firms' IT capabilities, such arrangement would not be in scope of the multilateral system definition, provided the investment firms keeps control of the rules and parameters of how trading interests interact (i.e. it is the investment firm who operates the system).

43. The key characteristic of SIs is to deal in a bilateral manner and operate on own account. Therefore, in order to be considered as bilateral, a single-dealer system must not bring together third-party interests (there is no interaction possible between the initiator of the request with anyone other than the bank) and its operator must deal on own account.

44. On the contrary, where a similar system (i.e. with a single liquidity provider) is operated by a third-party, who sets the rules of how trading interests interact and brings together trading interests without trading on own account, it cannot be considered as bilateral. This view is supported by Recital 17[6] of MiFID II which highlights that SIs cannot bring together third-party buying and selling interests in the same way as a trading venue.

45. Furthermore, the bilateral nature of a system cannot refer only to the parties that agree on the transaction and disregard the operator of the trading system. The role of the system operator in this case, which sets the rules of how the trading interests interact and is independent in respect of the transactions, cannot be ignored – there is no such involvement in bilateral trading. Such a system should be considered multilateral.

3.2.3 Systems that pre-arrange transactions

46. ~~MiFID II~~ MiFIR requires all multilateral systems to be authorised as trading venues. The objective of co-legislators was to bring more trading activity into the regulated sphere, in

[6] Recital 17 of MiFID II "Systematic internalisers should be defined as investment firms which, on an organised, frequent, systematic and substantial basis, deal on own account when executing client orders outside a regulated market, an MTF or an OTF. In order to ensure the objective and effective application of that definition to investment firms, any bilateral trading carried out with clients should be relevant and criteria should be developed for the identification of investment firms required to register as systematic internalisers. **While trading venues are facilities in which multiple third party buying and selling interests interact in the system, a systematic internaliser should not be allowed to bring together third party buying and selling interests in functionally the same way as a trading venue."** (emphasis added)

particular by increasing the number of transactions on regulated venues to ensure better protection for investors.

47. Therefore, if a system arranges a transaction in a multilateral way, i.e. by meeting the four criteria of the multilateral system definition, it should require authorisation as a trading venue. Nevertheless, the specific case of transactions that are pre-arranged but subsequently formalised on a trading venue, for example for clearing purposes, should be looked at with particular attention and should be analysed in line with already published guidance from ESMA.

48. In particular, where an investment firm arranges a transaction between two parties and the parties formalise the transaction on a trading venue, the transaction would be considered to take place under the rules of the trading venue which formalises the transaction because a transaction cannot be concluded under the rules of more than one venue[7].

49. Moreover, MiFIR provides for the possibility to formalise negotiated transactions in equity instruments on trading venues subject to a waiver under Article 4(1)(b). Despite MiFIR not having specific provisions for negotiated or pre-arranged transactions for non-equity instruments, ESMA considers it nevertheless possible to formalise negotiated or pre-arranged transactions on a trading venue subject to meeting the conditions for the respective waivers from pre-trade transparency set out in Article 9(1) of MiFIR[8].

50. ESMA reiterates that the execution of transactions being concluded outside of the system cannot be used to demonstrate that the system is not multilateral. However, ESMA considers that systems that pre-arrange transactions which are negotiated on a multilateral basis should be considered as an extension of the trading venue where the transaction is ultimately formalised. That is to say that the pre-arranging system itself does not require authorisation as a trading venue as it delegates the process of formalisation of the transaction to an authorised trading venue. As the pre-arranging system cannot comply with pre-trade transparency, the transaction also needs to be formalised on the trading venue under a pre-trade transparency waiver.

51. It should be noted that pre-trade transparency requirements applicable to non-equity instruments now apply only to trading venues operating an order book or periodic auction system. Importantly, RFQ systems and voice trading systems offering trading in non-equity instruments are no longer within the scope of mandatory pre-trade transparency meaning they are not required to publish firm quotes or trading interests. While multilateral systems operating an order book or auction model must continue to comply with the revised

[7] Question 7 General Section, multilateral and bilateral systems, and Question 10, organised trading facilities (OTF), on multilateral and bilateral systems topics, esma70-872942901-38_qas_markets_structures_issues.pdf (europa.eu)
[8] Question 11, pre-trade transparency waivers, esma70-872942901-35_qas_transparency_issues.pdf (europa.eu)

transparency regime, RFQ and voice systems (for non-equity instruments), are no longer subject to pre-trade transparency obligations under MiFIR, and therefore a pre-trade transparency waiver should not be required.

52. Further, the activity of pre-arranging transactions in a multilateral way is only possible without authorisation as a trading venue when the transaction is formalised on an EU trading venue. Nevertheless, to provide for a similar treatment of third-country trading venues across MiFIR, ESMA considers that for the purposes of the pre-arranging activity, it should also be possible to formalise transactions on third-country venues assessed as equivalent for the purpose of the shares and derivatives trading obligation under MiFIR, or, those third-country markets considered as equivalent to a regulated market in the Union for the purposes of Article 2(7) of EMIR. This ensures that third-country venues that have been assessed as equivalent under any of the above areas of MiFIR and EMIR have the same treatment in relation to the trading venue perimeter.

53. Therefore, ESMA is of the view that the activity of pre-arranging transaction in a multilateral way is only possible without authorisation as a trading venue when:

    a) All transactions arranged through the investment firm's system or facility have to be formalised on a trading venue as defined in Article 2(24) of MiFID II, or, for shares, a third-country trading venue assessed as equivalent in accordance with Article 25(4), point (a), or for derivatives, third-country trading venues assessed as equivalent in accordance with Article 28(1)(d) of MiFIR, or those third-country markets considered as equivalent to a regulated market in the Union for the purposes of Article 2(7) of EMIR ; and,

    b) where applicable, the transaction benefits from a pre-trade transparency waiver in the trading venue where it will be formalised.

54. ESMA considers that under these circumstances the main objective of MiFID II of ensuring on-venue trading, which provides for increased transparency and investor protection, has been achieved. Nevertheless, there must be an appropriate oversight of this pre-arranging system and therefore, an agreement of some sort between the pre-arranging system and the trading venue should be in place. On the contrary, should the formalisation of the transaction happen OTC, the pre-arranging activity requires authorisation as a trading venue. Furthermore, where a pre-arranging system is capable of formalising transactions, including where this occurs only for few cases, it should still require authorisation as a trading venue.

55. ESMA considers that any pre-arranging system should be authorised as a MiFID II investment firm as it provides an investment service to clients. In addition, these pre-arranging firms should have an arrangement with the trading venue to ensure appropriate

oversight and compliance with the rules for trading venues. The examples below are intended to provide guidance for stakeholders on how such written agreements may be implemented but should not be seen as an exhaustive reflection of all business models currently being operated by pre-arranged systems.

56. For example, where the pre-arranging firm acts in an agency capacity vis a vis the trading venue used for formalising the pre-arranged transactions, the firm will be member of the trading venue. ESMA considers that the membership agreement itself is an appropriate agreement between the pre-arranging system and the trading venue.

57. Another case could be where the pre-arranging firm is not a member of the trading venue and acts like an introductory broker to two firms, which then formalise the transaction on the trading venue. ESMA is of the view that the pre-arranging firm needs to ensure that this transaction is formalised on the trading venue. Therefore, it should have a written agreement either with the firms themselves that ensures that the pre-arranged trades are formalised on a trading venue, or it could have an agreement directly with the trading venue(s) where the trades are formalised that allows the pre-arranging firm to have the ability to check whether the transactions it arranged are always formalised on a trading venue.

58. Finally, it should be stressed that the onus of ensuring that all transactions are eventually formalised on a trading venue sits with the system that pre-arranges the transaction, including demonstrating compliance to the respective NCA for regulatory and supervisory purposes. Nevertheless, ESMA considers that trading venues need to ensure that all transactions that are formalised on their venue are carried out in accordance with the rules of the trading venue. The trading venue should hence ensure they establish systems to detect any attempt to circumvent the requirements under MiFID II / MiFIR.

4 Conclusion

59. This opinion provides guidance on general principles as well as specific cases to be considered by NCAs when assessing whether a firm/entity is operating a multilateral system and should in consequence be authorised as a trading venue by NCAs. Nevertheless, such judgement will always require a case-by-case assessment. ESMA expects that, considering the guidance provided in this opinion, NCAs should assess whether any firm operating within their jurisdiction is operating outside of their regulatory perimeter.

60. ESMA expects that NCAs require firms to assess their systems against this opinion and reflect whether they are operating under the appropriate authorisation capacity. ESMA expects NCAs to require firms to take appropriate action, including further discussions with

the respective NCAs, in order to swiftly apply for authorisation as a trading venue where appropriate.