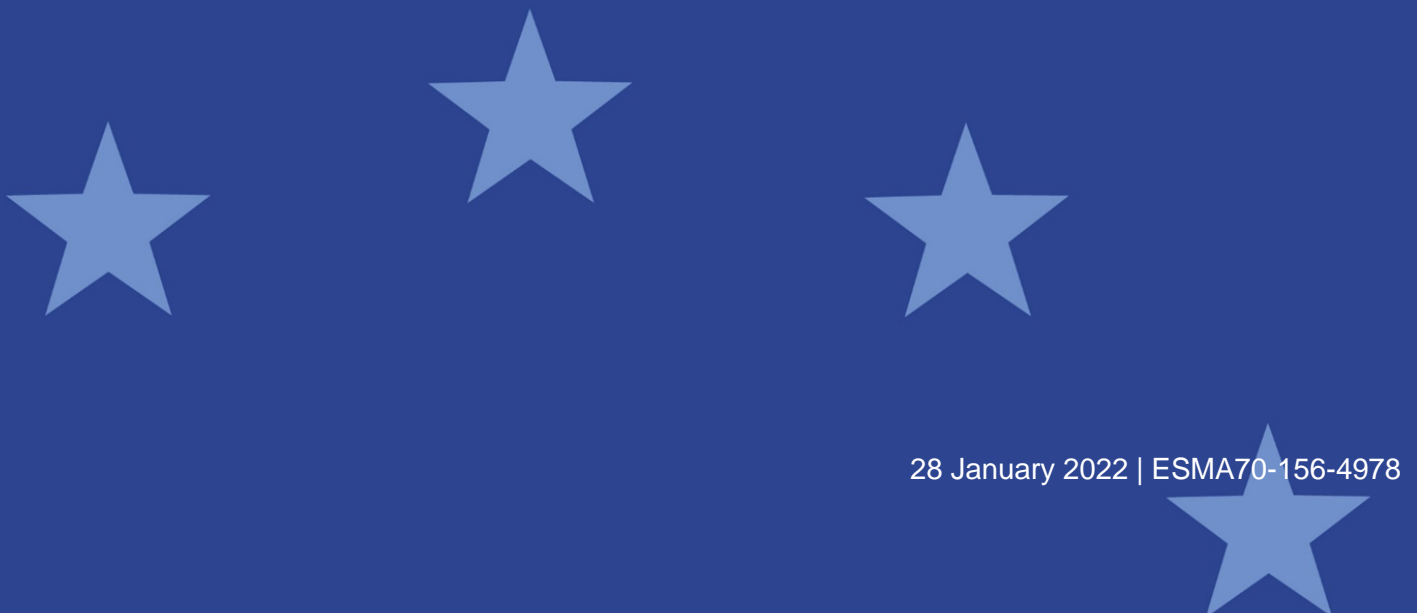


Consultation Paper

On ESMA's Opinion on the trading venue perimeter



Responding to this paper

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in Annex 1. Comments are most helpful if they:

1. respond to the question stated;
2. indicate the specific question to which the comment relates;
3. contain a clear rationale; and
4. describe any alternatives ESMA should consider.

ESMA will consider all comments received by **29 April 2022**.

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input - Consultations'.

Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the heading [Legal Notice](#).

Who should read this paper

This document will be of interest to all stakeholders involved in the securities markets. It is primarily of interest to competent authorities, investment firms and market operators that are subject to MiFID II and MiFIR. This paper is also important for trade associations and industry bodies, institutional and retail investors, their advisers, consumer groups, as well as any market participants because the MiFID II and MiFIR requirements concern the market structure of the EU and the perimeter of trading that should be considered as multilateral and regulated as such.

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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
LIS	Large in scale
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
SI	Systematic Internaliser

1 Executive Summary

Reasons for publication

Following from recent ESMA publications, in particular the final report on the functioning of Organised Trading Facilities (OTFs), ESMA committed to publish an opinion clarifying the definition of multilateral systems and the trading venue perimeter, i.e. providing guidance on when systems should be considered as multilateral systems and seek for authorisation as trading venues. This Consultation Paper (CP) aims at gathering views from stakeholders on ESMA's analysis.

Contents

This CP contains proposals aiming at clarifying the MiFID II provisions relating to multilateral systems and the trading venue authorisation perimeter.

The CP is organised as follows: Section 3 examines the definition of multilateral systems and the implications of the changes introduced in MiFID II with regards to trading venue authorisation, focussing in particular on the MiFID II requirement for all multilateral systems to be authorised as trading venues. The section further analyses the implication of such changes on the overall EU microstructures.

Section 4 considers specific cases in which it may be difficult to determine, as the trading venue perimeter is currently subject to different interpretations, whether a trading venue authorisation is required. In particular, the CP looks at request for quote systems and new technology providers that may, in some instances, operate de facto a multilateral system without proper authorisation. The CP also considers the case of pre-arranged transactions, where the execution ultimately takes place on an authorised trading venue.

Next Steps

ESMA will consider the feedback it received to this consultation and expects to publish a final report by the end of Q3 2022.

2 Introduction

1. The European Securities and Markets Authority (ESMA) published on 8 April 2021 a final review report¹ on the functioning of Organised Trading Facilities (OTFs) as required under Article 90(1)(a) of Directive 2014/65/EU² (MiFID II) (the final report).
2. The final report looked at the number of OTFs authorised in the European Union (EU) and their market share, examined how OTFs apply discretion and reviewed their use of matched principal trading. The main focus of the report was to examine the functioning of the OTF regime in the EU, and to analyse possible amendments needed to the current definition of OTF.
3. However, when examining whether any adjustments are needed to the definition of an OTF, ESMA noted that it is not possible to disentangle the definition of OTFs, the concept of multilateral system and the overall trading venue authorisation perimeter
4. Therefore, the final report contained recommendations and possible amendments to MiFID II with a view to reducing the level of complexity for market participants and making the legal framework in relation to the definition of OTFs and, more generally the trading venue perimeter, more effective. Whilst some of these recommendations were addressed to the European Commission, it was considered appropriate to clarify other issues directly through ESMA guidance.
5. In particular, ESMA committed in its final report to publish an Opinion clarifying the definition of multilateral systems and the trading venue perimeter with the aim of providing further guidance to market participants.
6. Therefore, this CP aims at gathering views from stakeholders on ESMA's analysis of what constitutes a multilateral system and, looking at specific examples, clarifying the trading venue authorisation perimeter on such cases. To this end, the CP contains not only a general clarification of the relevant MiFID II legal provisions but also aims at capturing concrete cases where the trading venue perimeter is not easily identified and might be subject to different interpretations from market participants and national competent authorities (NCA).
7. Based on the responses received to this consultation, ESMA will prepare the final report and will publish its Opinion. Respondents to the consultation are encouraged to provide relevant information, including quantitative data, to support their views or proposals.

¹ ESMA70-156-4225 MiFID II review report on the functioning of Organised Trading Facilities (OTF) [esma70-156-4225_mifid_ii_final_report_on_functioning_of_otf.pdf \(europa.eu\)](https://www.esma.europa.eu/press-news/esma-news/esma70-156-4225-mifid-ii-final-report-on-functioning-of-otf.pdf)

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).

3 Legal background

8. The evolution of markets infrastructures throughout the years brought important changes to the regulatory framework which are applicable to secondary markets trading. To promote fair and orderly trading, market integrity and a level playing field in EU markets, co-legislators have extended the regulatory perimeter defining a trading venue over the years, from traditional exchanges to other trading facilities.
9. In the framework under Directive 2004/39/EC³ (MiFID I) trading venues were characterised by being multilateral systems that operate in accordance with non-discretionary rules bringing together buying and selling trading interests in a way that results in a contract. These were regulated markets⁴ and multilateral trading facilities⁵ (MTFs).
10. MiFID II introduced OTFs⁶ as an additional new type of trading venue. This change intended to capture those multilateral systems that, by using discretion in matching orders, were previously not categorised as regulated markets or MTFs and, hence, operated outside the perimeter of MiFID I.
11. The aim of the changes introduced by MiFID II was to cover all multilateral systems within the definition of trading venue⁷, in particular by including those that exercise discretion when matching orders and, for that reason, were able to operate outside the trading venue regulatory perimeter before MiFID II (e.g. certain Broker Crossing Networks or BCNs that operated under MiFID I).
12. In addition to the introduction of a new type of trading venue, MiFID II also includes a definition of multilateral systems (Article 4(19)), which is common to all types of trading venues, and complements it with an obligation, spelled out in Article 1(7)⁸, for all multilateral systems in financial instruments to operate either as a regulated market or as an MTF or OTF⁹. These changes have the effect of recognising that any multilateral system shall

³ Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ L 145, 30.4.2004, p. 1).

⁴ Article 4(21) of MiFID II: “‘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”.

⁵ Article 4(22) of MiFID II: “‘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 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”.

⁶ Article 4(23) of MiFID II: “‘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”.

⁷ MiFID II also includes a definition of trading venue. Article 4(24) of MiFID II: “‘trading venue’ means a regulated market, an MTF or an OTF”.

⁸ Article 1(7) of MiFID II: “All multilateral systems in financial instruments shall operate either in accordance with the provisions of Title II concerning MTFs or OTFs or the provisions of Title III concerning regulated markets. (...)”

⁹ The MFIR II / MiFIR Review published by the Commission on 25 November 2021 proposes, as recommended by ESMA in its final report, to move Article 1(7) from MiFID II to MiFIR. The proposal aims at ensuring there is an uniform application of the requirement for all multilateral systems to be licenced as either a regulated, an MTF or an OTF.

request authorisation as a trading venue regardless of the changes which the system or facility needs to implement to comply with the requirements associated with the operation of a trading venue. Operating in accordance with the multilateral system definition is sufficient to be required to seek authorisation as a trading venue.

13. MiFID II also includes the reception and transmission of orders (RTO) in relation to one or more financial instruments as an investment service / activity in Annex I, Section A of MiFID II, which represents the basis for providing other investment services. In addition, Recital 44¹⁰ of MiFID II extends the meaning of RTO including arrangements that bring together two or more investors, thereby bringing about a transaction between those investors. A person issuing new securities, including a collective investment undertaking, should not be considered an ‘investor’ for the purpose of RTO. Also, the recital should be interpreted to include brokering of transactions with one or more financial instruments for the acquisition or disposal of investments on behalf of a client with a potential buyer or seller, regardless of whether the actual offer or acceptance is communicated through the firm that brought the investors together. Conversely, investment firms interposing themselves on a matched principal trading, for example, between investors in a similar way as a trading venue are excluded from the extended meaning of Recital 44.
14. The provision of RTO entails the communication of an investment firm (or its agents) with a client, with the aim of obtaining client’s instructions in relation to transactions involving particular or specific financial instruments (orders), the reception and the subsequent transmission of such orders to another investment firm, which is authorised to execute the client order. Therefore, regarding the MiFID II investment services and activities, a clear distinction should be made between RTO and the operation of a trading venue. More specifically, multilateral systems should not be authorised as RTO but as trading venues. In particular, systems broadcasting trading interests to multiple clients with those clients being able to interact, within the system or through the software, with those trading interests, are likely to constitute a multilateral system in the MiFID II sense.
15. The combination of Article 1(7) and the definition of multilateral system under Article 4(19) aims at ensuring that trading in financial instruments is carried out on organised venues and, under the same conditions. Furthermore, the changes ensure that all such venues are appropriately regulated¹¹ by requiring any multilateral system to seek authorisation as a trading venue. Recital 6 adds that any trading system should be properly regulated and subject to authorisation as a trading venue or as a systematic internaliser (SI).

¹⁰ Recital 44: “The business of reception and transmission of orders should also include bringing together two or more investors, thereby bringing about a transaction between those investors”.

¹¹ See Recital 6 of MiFIR: “It is important to ensure that trading in financial instruments is carried out as far as possible on organised venues and that all such venues are appropriately regulated. Under Directive 2004/39/EC, some trading systems developed which were not adequately captured by the regulatory regime. Any trading system in financial instruments, such as entities currently known as broker crossing networks, should in the future be properly regulated and be authorised under one of the types of multilateral trading venues or as a systematic internaliser under the conditions set out in this Regulation and in Directive 2014/65/EU (1)”.

16. The aim of the Opinion is to clarify when certain systems and facilities qualify as multilateral. Therefore, systems or facilities with all the characteristics identified below should be required to seek authorisation as a trading venue to ensure a level-playing field in the EU.

3.1 Multilateral Systems

17. Article 4(19) of MiFID II introduced a definition of multilateral systems under which a multilateral system “means any system or facility in which multiple third-party buying and selling trading interests in financial instruments are able to interact in the system”.

18. For an effective application of the MiFID II provisions, there must be clarity as to when a facility qualifies as a multilateral system. The definition introduced by MiFID II, sets out four different aspects which should be considered when identifying whether a system or facility can be classified as a multilateral system:

- It is a system or facility;
- there are multiple third party buying and selling interests;
- those trading interests need to be able to interact; and,
- trading interests need to be in financial instruments.

System or facility

19. In the context of Article 4(19) of MiFID II, a system must be understood as a set of rules that governs how third-party trading interests interact. Such rules or features could be contractual agreements or standard procedures that shape and facilitate interaction between participants’ trading interests.

20. A system in ESMA’s understanding is to be technology-neutral, hence the type of technology used or the fact that it is an automated or non-automated system, does not determine whether it is a system. The main criterion is whether there are specific rules concerning the interaction of multiple market participants to which participants shall adhere to.

21. Whilst a system is easily identified when embedded in an automated system, it is more difficult to identify for non-automated systems. As clarified in an ESMA Q&A, “(...) *non-automated systems or repeatable arrangements that achieve a similar outcome as a computerised system, including for instance where a firm would reach out to other clients*

to find a potential match when receiving an initial buying or selling interest, would also be characterised as a system.”¹².

22. Out of scope of the definition of multilateral systems are general-purpose communication systems. In fact, despite that such systems allow for the possibility of being used for communication of trading interests, they are not governed by rules which facilitate such interaction of trading interests.

Multiple third-party buying and selling trading interests

23. The second criterion for 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 not directly connected and are brought together in a transaction¹³. The word ‘multiple’ refers to the system allowing various trading interests, to interact in the same system or facility.
24. In scope are also systems where only two trading interests interact, provided such trading interests are brought together under the rules of a third-party operator. This interpretation is supported by the legal reasoning established in the Court of Justice of the European Union (CJEU) Case **C-658/15** (*Robeco and others vs. AFM*)¹⁴. The Court’s judgement refuted the argument that a system was bilateral in nature, even where there is always the same investment fund on the one side of a trade which executes the order from an investor within its own system. Considering this system as bilateral would ignore the involvement of the system operator which runs the system as an independent operator in respect of the transactions. The CJEU held that the latter cannot be considered a feature of bilateral trading.
25. This is also the case, for example, of a single dealer system¹⁵ operated by someone other than the market maker. It should be considered as a multilateral system as it involves a third-party operating the system. This concept is further developed in the analysis of request for quote systems (RFQ) in section 4.2.
26. Similarly, systems that allow multiple third-party interests to interact but where, occasionally, bilateral interaction occurs too, should also be captured within the trading venue perimeter. This applies, for example, to the case of RFQ systems that can be used by members or participants at their discretion as an RFQ-to-one tool, i.e. a tool that allows (or requires) sending a request to only one counterparty. Section 4 will also develop this topic and provide specific considerations relating to RFQ systems.

¹² Question 10, organised trading facilities (OTF), on multilateral and bilateral systems topics, [esma70-872942901-38_gas_markets_structures_issues.pdf](https://esma.europa.eu/media/1000000/2017/08/2017082901-38_gas_markets_structures_issues.pdf) (europa.eu)

¹³ [Third-party | Definition of Third-party by Merriam-Webster](https://www.merriam-webster.com/dictionary/third-party)

¹⁴ 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>

¹⁵ A single dealer system is to be understood in the context as a system where a single market maker is the counterpart to every trade in the system.

27. “Multiple third party buying and selling trading interests” only excludes those systems where the interaction occurs between two counterparties only, with no actual or potential third-party involvement in the system. In general, those bilateral systems operate according to the rules and/or commercial policy of the dealer (the SI) without the intervention of any third party. 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

28. On the third criterion of trading interests being “able to interact” in the system, ESMA believes that for such interaction to occur, the system must allow not only the communication of the different trading interests but also that members must be able to react to those trading interests, i.e. it should be possible to act upon those trading interests and match, arrange and/or negotiate on essential terms (being price, quantity) with a view to dealing in those financial instruments. 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 contract is not a prerequisite for a firm to be required to request authorisation as a trading venue for the system or facility it operates. Systems or facilities where trading interests can interact, where there is confirmation of a trade or where the essential terms have been (or can be) negotiated (for example buy/sell, 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.
29. The interaction can be the result of automated mechanisms, for example, where there is an automated match on an order book system; or it can be the result of a concrete action by the member or participant, as is the case on some RFQ or quote driven systems. In both circumstances there is interaction between trading interests within the system.
30. A multilateral system, as clarified by Recital 8 of Regulation 600/2014¹⁶ (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, (...)”.
31. Hence, interaction requires that the system contains rules that concern the matching, the arranging and/or the negotiations of trading interests. General advertising and/or aggregation of trading interests alone do not qualify.

Financial Instruments

¹⁶ Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (OJ L 173, 12.6.2014, p. 84).

32. The final criterion is that the facility needs to allow for the system to allow the interaction of third-party buying and selling trading interests in financial instruments within the meaning of Article 4(15)¹⁷ of MiFID II.
33. As such, only systems that allow 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.

Q1: Do you agree with the interpretation of the definition of multilateral systems?

Q2: Are there any other relevant characteristics to a multilateral system that should be taken into consideration when assessing the trading venue authorisation perimeter?

4 Trading venue perimeter – specific cases

34. Since the introduction of the regulatory framework under MiFID II which sets out the conditions under which a system or facility shall seek authorisation as a trading venue, questions regarding the practical application of the framework have emerged. This is due to certain cases where the boundaries of the trading venue authorisation perimeter are blurred and supervisory convergence has not been fully achieved within the EU as the treatment of systems with the same characteristics have not been subject to the same authorisation requirements.
35. ESMA has not identified any major shortcomings in MiFID II that would justify an immediate and significant amendment to the Level 1 text. The current regulatory framework appears suitable to ensure, where necessary, appropriate supervision of those new market players. The feedback received and the numerous exchanges with market participants, has though demonstrated that the practical application of the EU regulatory framework has not been entirely consistent, and ESMA intends to address the issue with this Opinion.
36. This section intends to further clarify how to treat specific cases. The Opinion focuses on three key areas where clarification is thought to be needed: new technology providers, request for quote systems and pre-arranged transactions.

4.1 Technology providers

37. Since the application of MiFID II one source of concern has been related to technology providers. Technology providers typically facilitate the communication with, and the access to, various sources of trading interests. Nevertheless, in some instances the type of arrangements offered might *de facto* constitute multilateral systems, which would be

¹⁷ 'financial instrument' means those instruments specified in Section C of Annex I.

operating without the proper trading venue authorisation in relation to one or more financial instruments.

38. ESMA acknowledges that the lack of a homogeneous view of what constitutes a multilateral system in this specific context might trigger issues of regulatory consistency. This would lead to the creation of an unlevel playing field with respect to EU trading venues which have to comply with the MiFID II regime and the large number of regulatory obligations attached to it.
39. ESMA would like to stress that the technology used is not a relevant criterion to exempt those providers from the MiFID II regulatory framework. It is the core business of a trading venue to bring together interests and the mere fact that this activity is conducted through new protocols (e.g. acting as an Application Programming Interface or API) should not lead to the conclusion that those systems are outside the boundaries of MiFID II.
40. Whilst ESMA supports and encourages new business models and innovative solutions, it is important to ensure that such models and solutions are appropriately regulated to ensure an adequate level of protection for investors and to maintain the resilience of EU markets. In order not to hamper the development of new solutions, the supervisory approach should take into account proportionality while ensuring a level playing field between all firms operating in the Union.
41. The following sections provide a non-exhaustive list of examples of some specific types of technology solutions adopted by financial players and consider some specificities which may affect the categorization of such systems as multilateral. ESMA nevertheless reiterates that an assessment of such systems should be done on a case-by-case basis, as features and complexity of such systems vary greatly.

4.1.1 Communication tools

42. During recent years, a number of technology firms have developed platforms that are self-characterised as communication tools. These platforms provide a wide variety of services to market participants, like market data services, trading inventory, amongst other things. However, the level of complexity and features of these platforms vary considerably from case to case.
43. It is therefore important to analyse and examine each case individually in order to understand whether the platform goes beyond a simple communication and/or information tool and amounts to something more complex which may include operating a de facto multilateral (trading) system. Nevertheless, some characteristics could be identified that help understanding whether a platform should require authorisation as a trading venue.
44. As referenced above, recital 8 of MiFIR is clear in identifying 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 tools used to

make trading decisions, this is not sufficient to conclude that such platform should require authorisation as a trading venue. There needs to be genuine interaction (for example by including a button, or by providing the ability to communicate) where the intention to enter into a transaction can be confirmed between the users of such platform in order for it to qualify it as a multilateral system.

45. In this respect, it is useful to recall ESMA's considerations in the final report, which provided key characteristics for the qualification 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,
- c) there is no possibility of execution or the bringing together of buying and selling interests in the system.

46. It should be noted that it is not the form of the arrangement or 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, for example, systems which facilitate the interaction of third-party trading interests related to financial instruments should require authorisation as a trading venue, whether it is by using in-house facilities or by employing third-party systems.

Q3: In your experience, is there any communication tool service that goes beyond providing information and allows trading to take place? If so, please describe the systems' characteristics.

4.1.2 Order Management Systems and Execution Management Systems

47. A significant number of market participants are making use of proprietary, or third-party, systems that support the internal management of orders or their execution. This is the case of Order Management Systems (OMS) and Execution Management Systems (EMS) which intend to allow firms to manage their orders more efficiently with benefits in terms of costs, access to markets and latency of execution.

48. In order to better understand how those systems are designed, ESMA has undertaken some research to isolate the core characteristics of OMS and EMS. ESMA notes that the level of complexity and sophistication of these systems varies considerably from firm to firm. Additionally, it appears that new types of systems, which integrate the features of OMS and EMS, are becoming more common among financial players.

49. Overall, OMS appear to be a tool used mostly by portfolio managers and buy side firms, which provides a view of the portfolio holdings as they stand and, based on any envisaged adjustment, automatically generates orders which are directed to in-house traders. The main goal of such systems seems to be the structuring of the order flow and the possibility to easily follow up the lifecycle of orders. OMS appear to be an inward-looking tool, which helps companies to keep track of holdings and provide some automation to the order submission system.
50. ESMA's view is that OMS which are aligned with the aim and functioning described above are not intended and should not be considered multilateral systems as they do not bring together, nor allow for the interaction of multiple third party buying and selling interest.
51. EMS are more tilted towards managing orders across multiple execution venues, offering traders real time information on market data and analytics. In some instances, these systems can also provide algorithmic support to traders, e.g. slicing orders which are then directed to different venues depending on available prices and liquidity indicators. EMS often generate execution reports and costs' analysis, as a follow up to trade execution.
52. ESMA notes that EMS aim 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. As such, those EMS which support the execution of orders on trading venues and do not allow for the interaction of multiple third party buying and selling interests should not be considered as multilateral systems and hence would not need to seek an authorisation as a trading venue. This instance is represented in Figure 1.
53. In Figure 1, the EMS is operated by the investment firm, either using a proprietary or third-party system. The trader inputs the transaction (including execution conditions, e.g. trade on the best price, only full execution / partial execution accepted, etc.) he/she wants to trade in the market into the EMS. The system will then collect relevant information from trading venues. The EMS would then aggregate the information from trading venues and send for execution (either automatically or manually by the trader) on the best venue considering the conditions previously inserted by the trader. Hence in this instance the EMS should not be considered as multilateral systems and hence would not need to seek an authorisation as a trading venue.
54. The outcome would be different in Figure 2, where the EMS sends orders for execution directly to specific counterparties instead of trading venues, and hence might be considered multilateral in nature and hence in scope of trading venue authorisation.

Figure 1: EMS example 1

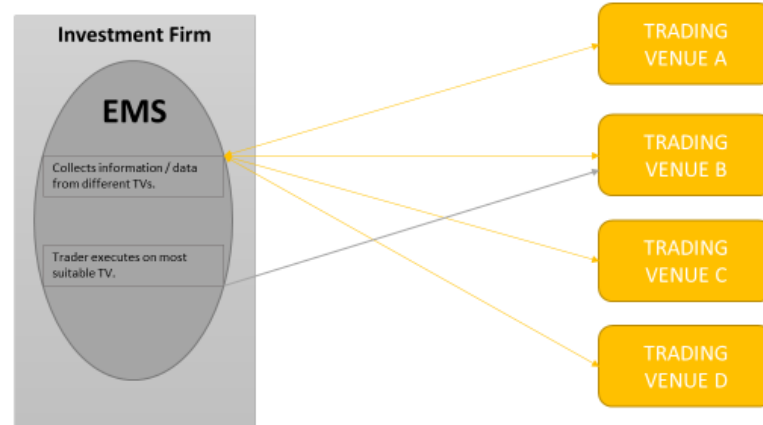
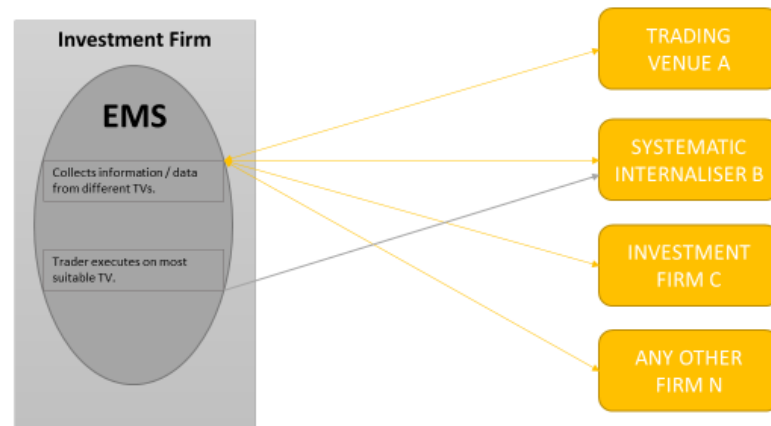


Figure 2: EMS example 2



55. In the latter case, it is crucial to ensure that the regulatory borderline between genuine execution systems and systems that constitute a trading venue is appropriately supervised. Hence, systems like the ones described above may, under certain circumstances (e.g. depending on their specific features and their level of complexity), be operated in a similar way to trading systems operated by trading venues and require, in consequence, an authorisation as a trading venue.

56. Clear guidance should be given to these types of EMS/OMS to ensure regulatory clarity and safeguard a level playing field between similar system. As an example, an EMS which would allow for firms to send RFQs to multiple players, allowing for an interaction within the system could be considered a multilateral system, depending on the specifics, and hence subject to the authorisation as a trading venue. In addition, a third-party operated

EMS that influences the operation of the system and the routing of the orders for the investment firms (or with little influence from it) should be subject to a closer scrutiny from regulators to understand whether the borderline from authorisation may be crossed.

Q4: Are you aware of any EMS or OMS that, considering their functioning, should be subject to trading venue authorisation? If yes, please provide a description.

4.2 Request for quote systems

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

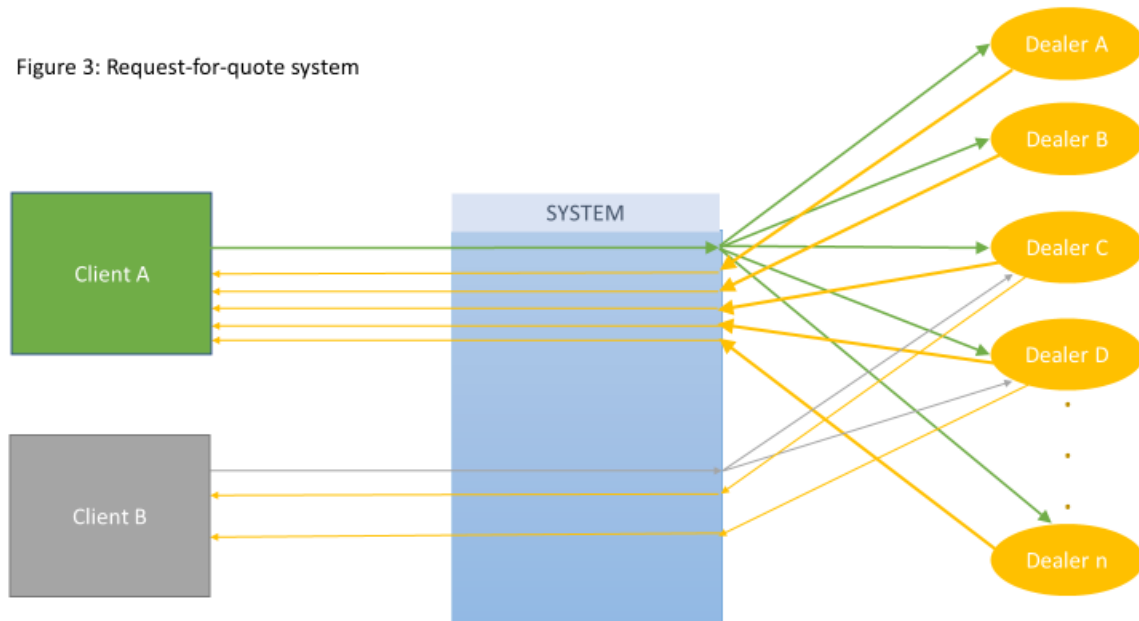
58. RTS 1 and 2 describe RFQ systems as trading systems “where a quote or quotes are provided in response to a request for quote submitted by one or more members or participants. The quote is executable exclusively by the requesting member or participant. The requesting member or participant may conclude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

59. However, 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.

60. RFQ systems as described in RTS 1 and 2, i.e. systems where quotes are provided in response to a request submitted by one firm, are generally regarded as multilateral systems and as requiring authorisation as a trading venue under MiFID II. Such conclusion stems from the fact that those systems enable the interaction of trading interests from multiple counterparties and are hence in the scope of the definition of multilateral system in Article 4(19) of MiFID II. The latter conclusion encompasses also systems that provide for RFQ to one functionalities, as further detailed below. In fact RFQ to one systems allow clients to send individual request for quotes to multiple dealers (either at the same time or separately), even if only using an RFQ to one functionality, hence enabling multilateral interaction of trading interests.

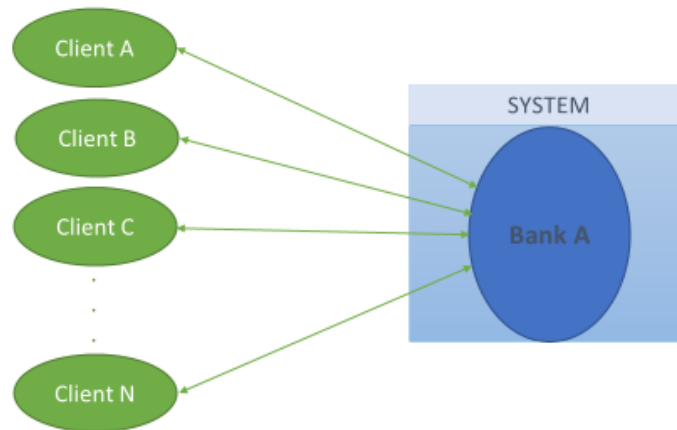
61. Figure 3 below illustrates the typical case of an RFQ system within the meaning of MiFID II.

Figure 3: Request-for-quote system



62. The interaction in Figure 3 shows multiple members or participants (Client A, Client B) interacting 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.
63. Even if the client would choose to request a quote from only one dealer (a so called RFQ to one) the system would still be considered as multilateral because it enables the client to send a request to multiple dealers, regardless of whether the client decides to only pick one dealer. In addition, a system that only allows Clients to send a request to one of N Dealers is still considered as a multilateral system. These types of systems still allow Clients to send requests to multiple dealers (either at the same time or separately), even if only using a RFQ to one functionality, and hence should still require authorisation as a trading venue.
64. In conclusion, a system with the characteristics illustrated in the case in Figure 3 above should always require authorisation as a trading venue.
65. There are however systems that may also be referred to in the market as 'RFQ systems' but that show different characteristics. Those systems are not covered by the definition of RFQ system in RTS 1 and 2, but market participants generally refer to them as RFQ, creating some confusion. This is the case for single-dealer platforms that allow different clients to interact with only one counterparty, usually a bank, that also operates the system. Figure 4 below illustrates such case.

Figure 4: Single dealer, bilateral system

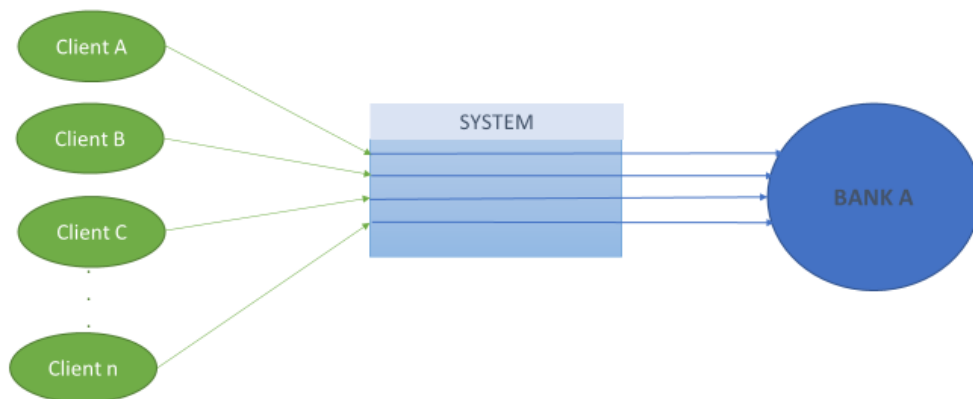


66. The key difference with the first example is that each Client N can only interact with Bank A, which is also the operator of the system, and with no other counterparty. In addition, Bank A is never in a position to initiate a request. Furthermore, Bank A not only operates the system but also deals on own account. This is typically the case of a single-dealer system operated by an SI.
67. Therefore, this example illustrates the case of a bilateral systems where the operator of the system acts as the only counterpart and deals on own account in its system.
68. 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 between the initiator and any other Client N nor other Bank than Bank A) and its operator must deal on own account.
69. On the contrary, where a similar system is operated by a third-party, who only brings together trading interests but does not trade on own account, even where such system only provides a “single-dealer functionality”, it cannot be considered as bilateral. This view is supported by Recital 7¹⁸ of MiFID II which highlights that SIs cannot bring together third-party buying and selling interests in the same way as a trading venue.

¹⁸ 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)

70. 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 is independent in respect of the transaction, cannot be ignored – there is no such involvement in bilateral trading. In fact, the clients and dealer / liquidity provider are third parties in relation to the system operator, in as much as they are independent from it¹⁹. This is the case illustrated in Figure 5.

Figure 5: Single dealer, multilateral system



71. Therefore, a single-dealer platform, where the system operator brings together third-party interests, even with a single counterparty, and does not deal on own account, should be regarded as a multilateral system and seek authorisation as a trading venue. If the operator of the system is independent from its members or participants and brings together third-party trading interests (Client A and Bank A for example), then this should be understood as a multilateral single-dealer platform, which should seek authorisation as a trading venue.

72. In conclusion, the consideration of the multilaterality of Figure 4 and 5 depends on the operator of the trading system. In those cases where the system operator is a third-party to the only counterparty then the system cannot be considered as bilateral. On the contrary, where the system is operated by the same counterparty (Bank A in the example) then the system should be considered bilateral (and may hence qualify as an SI) and does not require authorisation as a trading venue.

Q5: Do you agree that Figure 4 as described illustrates the operation of a bilateral system operated by an investment firm that should not require authorisation as a trading venue?

¹⁹ 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>

Q6: Do you agree that a “single-dealer” system operator by a third party, as described in Figure 5, should be considered as a multilateral system? If not, please explain.

4.3 Pre-arranged transactions

73. The case of systems that pre-arrange transactions that are subsequently formalised on a trading venue has been subject to different interpretations. In fact, the regulatory requirements attached to this type of activity have not always been clear and may be subject to divergent interpretations within the EU.
74. An important consideration to be made relates to where a transaction is eventually formalised. As clarified in an ESMA Q&A²⁰ a transaction cannot be concluded on more than one trading venue at the same time. Where an investment firm arranges a transaction between two clients and the clients decide to formalise the transaction on a regulated market or an MTF, or an OTF, the transaction would not be considered as taking place under the rules of the system because a transaction cannot be concluded on more than one trading venue.
75. Moreover, another reflection should be made in respect of the pre-trade transparency requirements that apply to the trading venue where the pre-arranged transaction will be formalised. This is particularly important for non-equity instruments as, contrary to equity instruments, MiFID II does not have specific provisions for negotiated or pre-arranged transactions for non-equity instruments. As a reminder, these considerations are already part of an ESMA Q&A²¹ and a supervisory briefing²² but should be reiterated in this context.
76. MiFIR already provides for the possibility to formalise negotiated transactions in equity instruments on trading venues subject to a waiver under Article 4(1)(b). ESMA also considers that pre-arranged transactions in equity instruments may be formalised under the large in scale (LIS) waiver under Article 4(1)(c) of MiFIR provided the conditions for an LIS waiver are met.
77. 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.
78. ESMA reiterates that the fact that the ultimate execution of transactions is concluded outside the system cannot be used to demonstrate that the system is not multilateral and

²⁰ Question 7 General Section, multilateral and bilateral systems, and Question 10, organised trading facilities (OTF), on multilateral and bilateral systems topics, [esma70-872942901-38_gas_markets_structures_issues.pdf \(europa.eu\)](https://esma.europa.eu/media/1000000/2022/08/esma70-872942901-38_gas_markets_structures_issues.pdf)

²¹ Question 11, pre-trade transparency waivers, [esma70-872942901-35_gas_transparency_issues.pdf \(europa.eu\)](https://esma.europa.eu/media/1000000/2022/08/esma70-872942901-35_gas_transparency_issues.pdf)

²² ESMA70-156-835 Supervisory Briefing Ensuring compliance with the MiFIR pre-trade transparency requirements in commodity derivatives [Microsoft Word - ESMA70-156-835 Supervisory Briefing PreTradeTransparency Non-Equity Instruments.docx \(europa.eu\)](https://esma.europa.eu/media/1000000/2022/08/ESMA70-156-835_Supervisory_Briefing_PreTradeTransparency_Non-Equity_Instruments.docx)

should not seek authorisation as trading venue. ESMA considers however that systems that pre-arrange transactions which are negotiated as multilateral 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.

79. Therefore, ESMA is of the view that the activity of pre-arranging transaction on 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; and,
- b) The transaction benefits from a pre-trade transparency waiver on the trading venue where it will be formalised.

80. If the conditions above are met, the system that pre-arranges transactions should be considered as an extension of the trading venue where the transaction is ultimately formalised. Hence, as stated in the Final Report on OTF²³, the trading venue should ensure, through contractual arrangements, that all relevant MiFID II provisions are complied with, including rules relating to non-discriminatory access and fees.

81. 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. On the contrary, should the formalisation of the transaction happen OTC, the pre-arranging activity requires authorisation as a trading venue. That is because in such a case there would be no delegation of the formalisation process to an authorised multilateral trading system and hence the pre-arranging activity itself should not be possible without the appropriate authorisation. Furthermore, where a pre-arranging system is also capable of formalising transactions, including where this occurs only for few cases, it should still require authorisation as a trading venue.

82. In addition, 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.

83. Finally, ESMA emphasizes that when trading venues execute pre-arranged transactions under the rules of their system, they must ensure that these transactions comply with the

²³ See paragraph 105 or the MiFID II review report on the functioning of Organised Trading Facilities (ref. ESMA70-156-4225, 23 March 2021)

regulations, including those concerning market abuse and disorderly trading. Trading venues have an obligation to monitor these transactions on possible violations of the rules.

Q7: Do you agree that systems pre-arranging transactions that are formalised on a trading venue, even when arranged in a multilateral way, should not be required to be authorised as trading venues? Do you agree with the justification for such approach?

Q8: Are there any other conditions that should apply to these pre-arranged systems?

Q9: Are there in your views any circumstances where it would not be possible for an executing trading venue to sign contractual arrangements with the pre-arranging platforms? If yes, please elaborate.

5 Annexes

5.1 Annex I - Summary of questions

Q1: Do you agree with the interpretation of the definition of multilateral systems?

Q2: Are there any other relevant characteristics to a multilateral system that should be taken into consideration when assessing the trading venue authorisation perimeter?

Q3: In your experience, is there any communication tool service that goes beyond providing information and allows trading to take place? If so, please describe the systems' characteristics.

Q4: Are you aware of any EMS or OMS that, considering their functioning, should be subject to trading venue authorisation? If yes, please provide a description.

Q5: Do you agree that Figure 4 as described illustrates the operation of a bilateral system operated by an investment firm that should not require authorisation as a trading venue?

Q6: Do you agree that a "single-dealer" system operator by a third party, as described in Figure 5, should be considered as a multilateral system? If not, please explain.

Q7: Do you agree that systems pre-arranging transactions that are formalised on a trading venue, even when arranged in a multilateral way, should not be required to be authorised as trading venues? Do you agree with the justification for such approach?

Q8: Are there any other conditions that should apply to these pre-arranged systems?

Q9: Are there in your views any circumstances where it would not be possible for an executing trading venue to sign contractual arrangements with the pre-arranging platforms? If yes, please elaborate.

5.2 Opinion

OPINION

On multilateral systems and the trading venue perimeter

1 Legal basis

1. ESMA's competence to deliver an opinion to competent authorities (CAs) 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)²⁴ (ESMA Regulation).
2. Pursuant to Article 29(1)(a) of the ESMA Regulation, ESMA shall provide opinions to CAs 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 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 instruments²⁵ (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”.

²⁴ 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).

²⁵ 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).

- 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 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 introduced a definition of multilateral system which is common to all types of trading venues. Article 4(19) 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. MiFID II also includes in Article 1(7) a requirement that “all multilateral systems in financial instruments shall operate either in accordance with the provisions of Title II concerning MTFs or OTFs or the provisions of Title III concerning regulated markets”.
 7. The combination of the changes introduced in MiFID II, notably the obligation under Article 1(7) of MiFID II and the definition of a multilateral system under Article 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, MTF or 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, 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, it would need to be authorised as a trading venue.
 8. Despite the changes introduced by MiFID II 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 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 within the financial markets industry, 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 CAs.

3 Opinion

3.1 Definition of multilateral system

11. For an effective functioning of the MiFID II provisions, there must be clarity as to when a system or facility qualifies as a multilateral system. From the definition in Article 4(19) of MiFID II, four key aspects should be identified in a system or facility to be considered as a multilateral system:

- a) It is a system or facility;
- b) There are multiple third-party buying and selling interests;
- 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. Such rules or features could be contractual arrangements or standard procedures that shape and facilitate the interaction between participants' trading interests.
13. A system is technology neutral, hence the type of technology used or whether it is automated or non-automated does not determine whether or not 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, the definitional scope of multilateral system should include those non-automated arrangements that achieve a similar outcome as a computerised system, including those where a firm reaches 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.

Multiple third-party buying and selling interests

16. The second criterion for 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 not directly connected and 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.
17. In scope are also systems where only 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 analysis²⁶ 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 trade 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 transactions. Therefore, having a single liquidity provider is not sufficient for the system to be considered bilateral.
18. On the contrary, those systems where the interaction occurs between two counterparties only, with no actual or potential third-party involvement operating the system, should not be considered multilateral. In general, those bilateral systems operate according to the rules and/or commercial policy of the dealer (the systematic internaliser (SI)) without the intervention of any third party. 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

19. To be considered a multilateral system in the MiFID II 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 believes that for such interaction to occur, the system must allow not only the communication of the different trading interests but also that members are able to react to those trading interests, i.e. it should be possible to act upon those trading interests and match, arrange and/or negotiate essential terms of a transaction (being price, quantity) with a view to dealing in those financial instruments.
20. 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 contract is not a prerequisite for a firm to be required to request authorisation as a trading venue for the system or facility it operates. Systems or facilities where trading interests can interact, where there is confirmation of a trade or where the essential terms have been (or can be) negotiated (for example buy/sell, 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

²⁶ 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>

because the final terms of the contractual agreement are concluded outside of the system or facility.

21. The interaction can be the result of automated mechanisms, for example, where there is an automated match on an order book system; or it can be the result of a concrete action by the member or participant, as it is the case on some RFQ or quote driven systems. In both circumstances there is interaction between trading interests within the system.
22. 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, (...)”.
23. 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

24. The final criterion is the interaction of third-party buying and selling trading interests must be in financial instruments within the meaning of Article 4(15)²⁷ of MiFID II.
25. As such, only systems that allow 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

26. The 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

27. 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 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, for example by including a button where the intention to enter into a transaction can be confirmed, between the users of such platform to qualify it as a multilateral system.

²⁷ ‘financial instrument’ means those instruments specified in Section C of Annex I.

28. ESMA therefore 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,
- c) there is no possibility of execution or the bringing together of buying and selling interests in the system.

29. 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, for example, systems which facilitate the interaction of third-party trading interests related to financial instruments should require authorisation as a trading venue, whether it is by using in-house facilities or by employing third-party systems.

30. In addition to communication tools, ESMA noted that some Execution Management Systems (EMS) have been subject to debate. In general, EMS aim 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. Those EMS which do not allow for the interaction of multiple third party buying and selling interests but rather support managing orders, should not be required to seek an authorisation as a trading venue.

31. Despite the previous considerations, it remains crucial to ensure that the regulatory borderline between complex systems and what constitutes a trading venue is appropriately supervised. EMS with additional features and levels of complexity including allowing interaction of trading interests may, under certain circumstances, be subject to authorisation as a trading venue.

32. 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, be subject to the authorisation as a trading venue.

3.2.2 Request-for-quote systems

33. 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.

34. 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”.
35. 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 cause 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.
36. 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. In light of the above consideration, ESMA deems such systems as multilateral in nature and hence requiring authorisation as a trading venue.
37. 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 a RFQ to one functionality. Therefore, they are considered multilateral systems.
38. A different case for consideration is the one of trading systems that not only offer an exclusive RFQ-to-one functionality as described above but, in addition, also only provide 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.
39. 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 counterpart 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.

40. 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.
41. On the contrary, where a similar system is operated by a third-party, who only brings together trading interests but does not trade on own account, even where such system only provides a “single-dealer functionality”, it cannot be considered as bilateral. This view is supported by Recital 7²⁸ of MiFID II which highlights that SIs cannot bring together third-party buying and selling interests in the same way as a trading venue.
42. 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 is independent in respect of the transaction, cannot be ignored – there is no such involvement in bilateral trading. In fact, the clients and dealer / liquidity provider are third parties in relation to the system operator, in as much as they are independent from it²⁹.
43. Therefore, a single-dealer platform, where the system operator brings together third-party interests, even with a single counterparty, and does not deal on own account, should be regarded as a multilateral system and seek authorisation as a trading venue. If the operator of the system is independent from its members or participants and brings together third-party trading interests (Client A and Bank A for example), then this should be understood as a multilateral single-dealer platform, which should seek authorisation as a trading venue.
44. . Where the system is operated by the counterparty and the counterparty (deals on own account then the system should be considered bilateral (and may hence qualify as an SI) and does not require authorisation as a trading venue.

3.2.3 Systems that pre-arrange transactions

45. The case of systems that pre-arrange transactions and subsequently formalise them on a trading venue, should be analysed in line with already published guidance from ESMA.
46. In particular, where an investment firm arranges a transaction between two clients and the clients decide to formalise the transaction on a trading venue, the transaction would not be

²⁸ 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)

²⁹ 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>

considered as taking place under the rules of the system because a transaction cannot be concluded on more than one venue³⁰.

47. 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 MiFIR³¹.
48. ESMA reiterates that the fact that the ultimate execution of transactions is concluded outside the system cannot be used to demonstrate that the system is not multilateral. However, ESMA considers however that systems that pre-arrange transactions which are negotiated as multilateral 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.
49. Therefore, ESMA is of the view that the activity of pre-arranging transaction on 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; and,
 - b) The transaction benefits from a pre-trade transparency waiver in the trading venue where it will be formalised.
50. 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. On the contrary, should the formalisation of the transaction happen OTC, the pre-arranging activity requires authorisation as a trading venue. That is because in such a case there would be no delegation of the formalisation process to an authorised multilateral trading system and hence the pre-arranging activity itself should not be possible without the appropriate authorisation. Furthermore, where a pre-arranging system is also capable of formalising transactions, including where this is occurs only for few cases, it should still require authorisation as a trading venue.
51. In addition, 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

³⁰ Question 7 General Section, multilateral and bilateral systems, and Question 10, organised trading facilities (OTF), on multilateral and bilateral systems topics, [esma70-872942901-38_gas_markets_structures_issues.pdf](https://esma.europa.eu/media/1000000/2022/08/esma70-872942901-38_gas_markets_structures_issues.pdf) (europa.eu)

³¹ Question 11, pre-trade transparency waivers, [esma70-872942901-35_gas_transparency_issues.pdf](https://esma.europa.eu/media/1000000/2022/08/esma70-872942901-35_gas_transparency_issues.pdf) (europa.eu)

transaction, including demonstrating compliance to the respective CA for regulatory and supervisory purposes

4 Conclusion

52. This opinion provides guidance on general principles as well as specific cases to be considered by CAs when assessing whether a firm/entity is operating a multilateral system and should in consequence be authorised as a trading venue by CAs. Nevertheless, such judgement will always require a case-by case assessment. ESMA expects that, considering the guidance provided in this Opinion, CAs should assess whether any firm operating within their jurisdiction is operating outside of their regulatory authorisation.
53. ESMA expects that CAs require firms to assess their systems against this opinion and reflect whether they are operating under the appropriate authorisation capacity. ESMA expects CAs to require firms to take appropriate action, including further discussions with the respective CAs, in order to swiftly apply for authorisation as a trading venue where appropriate.