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| Reply form for the Consultation Paper on MiFID II/ MiFIR review on the functioning of Organised Trading Facilities (OTF) |

**Responding to this paper**

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

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

ESMA will consider all comments received by **25/11/2020.**

All contributions should be submitted online at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading ‘Your input - Consultations’.

**Instructions**

In order to facilitate analysis of responses to the Consultation Paper, respondents are requested to follow the below steps when preparing and submitting their response:

1. Insert your responses to the questions in the Consultation Paper in the present response form.
2. Please do not remove tags of the type <ESMA\_QUESTION\_FOTF\_1>. Your response to each question has to be framed by the two tags corresponding to the question.
3. If you do not wish to respond to a given question, please do not delete it but simply leave the text “TYPE YOUR TEXT HERE” between the tags.
4. When you have drafted your response, name your response form according to the following convention: ESMA\_FOTF\_nameofrespondent\_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA\_FOTF\_ABCD\_RESPONSEFORM.
5. Upload the form containing your responses, in Word format, to ESMA’s website ([www.esma.europa.eu](http://www.esma.europa.eu) under the heading “Your input – Open consultations” 🡪 “Consultation on the functioning of the Organised Trading Facility regime”).

**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 publically 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](http://www.esma.europa.eu) under the heading [Legal Notice](http://www.esma.europa.eu/legal-notice).

**Who should read this paper**

This document will be of interest to (i) alternative investment fund managers, UCITS management companies, EUSEF managers and/or EuVECA managers and their trade associations, (ii) distributors of UCITS, alternative investment funds, EuSEFs and EuVECAs, as well as (iii) institutional and retail investors investing into UCITS, alternative investment funds, EuSEFs and/or EuVECAs and their associations..

**General information about respondent**

|  |  |
| --- | --- |
| Name of the company / organisation | European Federation of Energy Traders (EFET) |
| Activity | Other Financial service providers |
| Are you representing an association? |[x]
| Country/Region | Europe |

**Introduction**

***Please make your introductory comments below, if any***

<ESMA\_COMMENT\_FOTF\_1>

TYPE YOUR TEXT HERE

<ESMA\_COMMENT\_FOTF\_1>

**Questions**

**Q1: What are your views about the current OTFs landscape in the EU? What is your initial assessment of the efficiency and usefulness of the OTF regime so far?**

<ESMA\_QUESTION\_FOTF\_1>

The OTF regime has been integral to the well-functioning of the wholesale energy market in gas and power. Given the success of the regime, most of the OTF operators currently operating in the UK in gas and power have set up new OTFs in the EU27 to operate in a post-Brexit environment to ensure the continuation of the success.

<ESMA\_QUESTION\_FOTF\_1>

**Q2: Trading in OTFs has been fairly stable and concentrated in certain type of instruments throughout the application of MiFID II. How would you explain those findings? What in your view incentivizes market participants to trade on OTFs? How do you see the OTF landscape evolving in the near future?**

<ESMA\_QUESTION\_FOTF\_2>

OTFs have been proven essential for the physical trading of wholesale energy products as defined in REMIT. The regulatory classification of wholesale energy products that must be physically settled when traded on an OTF serves as an effective risk management tool and, at the same time, bring greater transparency in the wholesale energy markets.

OTFs offer a different trading service to automated platforms such as exchanges and MTFs. The hybrid nature of OTFs – incorporating voice and electronic systems within a discretionary framework – optimises trading opportunities and brings transparency and resilience to the OTC markets. The combination of electronic systems with voice support means that OTFs are likely to continue to use technology to further enhance their offerings across the trade lifecycle including pre-trade matching of interests, execution, credit and post trade processing.

<ESMA\_QUESTION\_FOTF\_2>

**Q3: Do you concur with ESMA’s clarifications above regarding the application of Article 1(7) and Article 4(19) of MiFID II? If yes, do you agree with the ESMA proposed amendment of Level 1? Which other amendment of the Level 1 text would you consider to be necessary?**

<ESMA\_QUESTION\_FOTF\_3>

We think that a clarification would be helpful, as there are several multilateral systems present in the market, on which trading interests can interact apparently without appropriate authorisation. Apart from the obvious risks which unregulated and unsupervised venues bring to the market, the presence of unregulated venues calls into question the classification of contracts traded through them and is likely to lead to splits in liquidity. We question whether a Level 1 change is necessary to accomplish this intention.

<ESMA\_QUESTION\_FOTF\_3>

**Q4: Do you agree with ESMA’s two-step approach? If not, which alternative should ESMA consider?**

<ESMA\_QUESTION\_FOTF\_4>

We think that an ESMA Q&A is sufficient at the moment and any change to the Level 1 text would need to be carefully approached.

<ESMA\_QUESTION\_FOTF\_4>

**Q5: Do you agree with ESMA’s proposal not to amend the OTF authorisation regime and not to exempt smaller entities? If not, based on which criteria should those smaller entities potentially subject to an OTF exemption be identified?**

<ESMA\_QUESTION\_FOTF\_5>

We agree with ESMA’s approach, that a two-tiered approach would be in opposition to a uniform approach.

<ESMA\_QUESTION\_FOTF\_5>

**Q6: Which provisions applicable to OTFs are particularly burdensome to apply for less sophisticated firms? Which Level 1 or Level 2 amendments would alleviate this regulatory burden without jeopardising the level playing field between OTFs and the convergent application of MiFID II/MiFIR rules in the EU?**

<ESMA\_QUESTION\_FOTF\_6>

No comment.

<ESMA\_QUESTION\_FOTF\_6>

**Q7: Do you consider that ESMA should publish further guidance on the difference between the operation of an OTF, or other multilateral systems, and other investment services (primarily Reception and Transmission of Orders and Execution of orders on behalf of clients)? If yes, what elements should be considered to differentiate between the operation of multilateral systems and these other investment services?**

<ESMA\_QUESTION\_FOTF\_7>

No comment.

<ESMA\_QUESTION\_FOTF\_7>

**Q8: Do you consider that there are networks of SIs currently operating in such a way that it would in your view qualify as a multilateral system? Please give concrete examples.**

<ESMA\_QUESTION\_FOTF\_8>

No comment.

<ESMA\_QUESTION\_FOTF\_8>

**Q9: Do you agree that the line differentiating bilateral and multilateral trading in the context of SIs is sufficiently clear? Do you think there should be a Level 1 amendment?**

<ESMA\_QUESTION\_FOTF\_9>

The definition of what constitutes multilateral trading is sufficiently clear in the Level 1 text and does not require any change.

<ESMA\_QUESTION\_FOTF\_9>

**Q10: What are the main characteristics of software providers and how to categorise them? Amongst these business models of software providers, which are those that in your view constitute a multilateral system and should be authorised as such?**

<ESMA\_QUESTION\_FOTF\_10>

We think that the software in itself is neutral and should not be regulated, but the focus should be on the firms who are using the software to operate multilateral systems. We agree that where a software provider position itself in such a fashion that it seems that he is operating a multilateral trading system, regulators should look to enforce authorisation requirements on access the software provider.

<ESMA\_QUESTION\_FOTF\_10>

**Q11: Do you agree with the approach suggested by ESMA regarding software providers that pre-arranged transactions formalised on other authorised trading venues? Do you consider that this approach is sufficient to ensure a level playing field or do you think that ESMA should provide further clarifications or propose specific Level 1 amendments, and if so, which ones?**

<ESMA\_QUESTION\_FOTF\_11>

Where a software provider appears to operate a multilateral trading system NCAs should assess if the activity concerned falls within the authorisation requirements. We think that it would be short-sighted to focus on software providers, as in many cases other “market players”, such as Brokers, use the technology provided by software provider to operate a multilateral trading system.

We agree with ESMA’s view that the execution of transactions within a system is not a prerequisite to be required to seek authorisation as a trading venue. We further agree that the ultimate execution of transactions might be concluded outside the system and cannot be used to demonstrate that the system is not multilateral. It is consistent with this analysis that software providers who arrange pre-trade matching of interests for execution on a third-party venue should seek authorisation as a trading venue.

We do not see any requirement for any level 1 amendments, but can see that further clarification from ESMA, as set out in the consultation document, would be beneficial.

<ESMA\_QUESTION\_FOTF\_11>

**Q12: Do you agree with the principles suggested by ESMA to identify a bulletin board? If not, please elaborate. Do you agree to amend Level 1 to include a definition of bulletin board?**

<ESMA\_QUESTION\_FOTF\_12>

We think that this is not necessary, as the assessment against the requirements of trading venues and SIs would allow market participants to understand if their activity falls within the scope of the regulatory requirements. We see no need to create a new category.

<ESMA\_QUESTION\_FOTF\_12>

**Q13: Are you aware of any facility operating as a bulletin board that would not comply with the principles identified above?**

<ESMA\_QUESTION\_FOTF\_13>

No comment.

<ESMA\_QUESTION\_FOTF\_13>

**Q14: Market participants that currently operate such systems are invited to share more detailed information on their crossing systems (scale of the activity, geographical coverage, instruments concerned, etc…), providing examples of such platforms and describing how much costs & fees are saved this way as opposed to executing the relevant transactions via brokers or trading venues.**

<ESMA\_QUESTION\_FOTF\_14>

No comment.

<ESMA\_QUESTION\_FOTF\_14>

**Q15: Do you consider that internal crossing systems allowing different fund managers within the same group to transact between themselves should be in scope of MiFID II or regarded as an investment management function covered under the AIFMD and UCITS? Please explain. In your view, should the regulatory treatment of these internal crossing system be clarified via a Level 1 change?**

<ESMA\_QUESTION\_FOTF\_15>

No comment.

**Q16: Do you agree with the interpretation provided by ESMA regarding how discretion should be applied and do you think the concept of discretion should be further clarified?**

<ESMA\_QUESTION\_FOTF\_16>

No comment.

<ESMA\_QUESTION\_FOTF\_16>

**Q17: For OTF operators: Do you apply discretion predominantly in placement of orders or in execution of orders? Does this depend on the type of trading system you operate? Please explain.**

<ESMA\_QUESTION\_FOTF\_17>

No comment.

<ESMA\_QUESTION\_FOTF\_17>

**Q18: For OTF clients: Do you face any issue in the way OTF operators exercise discretion for order placement and order execution? If so, please explain. Does it appear to be used regularly in practice by OTF operators?**

<ESMA\_QUESTION\_FOTF\_18>

The current discretions used by OTFs and the brokers that operate them work well for fair and orderly markets on the screens. We, as clients, also utilise discretion and the broker in most cases will follow our instructions, i.e. potential counterparties with credit issues not being shown our prices. The OTFs in the gas and power markets all have clear rulebooks governing the operation of their platforms including discretion.

<ESMA\_QUESTION\_FOTF\_18>

**Q19: Do you think ESMA should clarify any aspect in relation to MPT or that any specific measure in relation to MPT shall be recommended?**

<ESMA\_QUESTION\_FOTF\_19>

We do not think that MPT needs further clarification.

<ESMA\_QUESTION\_FOTF\_19>

**Q20: In your view what is the difference between MPT and riskless principal trading and should this difference be clarified in Level 1?. In addition, what, in your view, incentivizes a firm to engage in MPT rather than in agency cross trades (i.e. trades where a broker arranges transactions between two of its clients but without interposing itself)?**

<ESMA\_QUESTION\_FOTF\_20>

No comment.

<ESMA\_QUESTION\_FOTF\_20>

**Q21: Do you agree with ESMA’s proposal to clarify that the prohibition of investment firms or market operators operating an MTF to execute client orders against proprietary capital or to engage in matched principal trading only applies to the MTF they operate, in line with the same wording as applicable to regulated markets?**

<ESMA\_QUESTION\_FOTF\_21>

No comment.

<ESMA\_QUESTION\_FOTF\_21>