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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 | IHS Markit |
| Activity | Other Financial service providers |
| Are you representing an association? |  |
| Country/Region | Europe |

**Introduction**

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

<ESMA\_COMMENT\_FOTF\_1>

IHS Markit, a global information company with offices in 10 EU Member States, is a leader in data, analytics and solutions for the major industries and markets that drive economies worldwide. IHS Markit has more than 50,000 business and government customers, including 80 percent of the Fortune Global 500 and the world’s leading financial institutions.

IHS Markit’s derivatives trade processing platforms, known as MarkitSERV, play an important role in EU and global derivatives markets. MarkitSERV offers processing and reporting facilities and enables risk mitigation and market connectivity and entry. Among the specific services offered by MarkitSERV are trade confirmation, trade affirmation, allocations, submission of matched (confirmed or affirmed) trades to clearing, as well as a standard connectivity solution with customer risk systems. Globally, over 2,000 firms use MarkitSERV which processes an average of 90,000 derivatives transaction events every day.

IHS Markit welcomes the opportunity to respond to the ESMA consultation report on the functioning of Organised Trading Facilities. Through its derivatives trade processing platforms, IHS Markit has a unique perspective across all types of participants in OTC derivatives markets in all the major regulatory regimes. We share with ESMA the goal of orderly and liquid OTC derivative markets.

In the context of this consultation, IHS Markit notes that many questions raised by ESMA aim to address concerns that are directly associated with the functioning of equity and bond markets rather than derivatives markets. Generally, in derivatives markets, concerns about a level playing field or comparison between Trading Venues and Investment Firms / SIs are often not relevant because there are different entities with different roles in the market structure. Questions relating, for example, to the coexistence of OTFs and networks of SIs and the need for a level playing field are not relevant in the derivatives space. In this response, IHS Markit is focussing on the issues and questions relevant for derivatives markets.

<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>

IHS Markit notes that, from a derivatives perspective, the creation of the OTF category did not disrupt the market and OTFs generally operate effectively and efficiently.

<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>

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<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>

IHS Markit is concerned that ESMA’s interpretation of ‘multilateral systems’ (para 43) is very broad, could potentially create uncertainty and cover a multitude of non-multilateral communication platforms, information aggregators, distributors of data and connectivity utilities (including EMS, OMS, middleware, instant messaging services or even email). We do not believe that this was the colegislators’ intention.

IHS Markit does not, therefore, support changing the Level 1 text as suggested. Such a measure could force technology providers to either change their models to fit the definition of trading venues as in para 41 of the consultation paper or would simply prevent them from continuing to exist in their current form and limit their ability to continue to innovate and grow. This would reduce choice and competition and increase costs to market users. This could also place the EU at a competitive disadvantage compared to other jurisdictions (such as Asia and the US) which allow software providers to play a role in the market without requiring them to become trading venues.

It is important to distinguish between systems that allow multiple third parties to interact in a system and systems that allow for multiple bilateral interactions (where each bilateral interaction cannot interact with any other). Furthermore, any facility where there is no genuine trade execution taking place (as stated in MiFIR Recital 8) and with no involvement on how and where the trade might take place should not be forced to become a trading venue.

In its own Q&A on market structure (question 7), ESMA states that the fundamental characteristic of a trading venue is to execute transactions. In this CP, however, ESMA seems to take a stricter approach to the ‘execution’ element in stating that any multilateral system needs to become authorised as a trading venue regardless of where the execution takes place. This seems inconsistent and will be confusing for the industry.

ESMA should be looking to create a system where EU markets can benefit from innovative communication software providers and utilities and allow them to coexist in the ecosystem. We are concerned that the approach expressed by ESMA in this CP will not allow for that, which will have negative consequences for market users and the efficiency and competitiveness of EU markets.

<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>

As stated above (Q3) we believe that a change to the Level 1 is not needed and would be detrimental. Similarly, an ESMA opinion along the lines proposed in the consultation would be not be helpful.

Such an approach on what constitutes ‘multilateral’ could capture communication platforms, information aggregators, distributors of data and connectivity utilities. This would be too broad, create uncertainty and could push technology providers out of the market to the detriment of market users.

We would prefer to see national regulators engaging with relevant technology providers, ensuring they have the right permissions and understand how they differentiate themselves from trading venues and avoid the definition of an OTF or an MTF. Such an approach is likely to encourage innovation and efficiency while avoiding the problems ESMA is concerned with.

<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>

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<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>

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<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>

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<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>

In derivatives markets, IHS Markit has not identified any network of SIs that would operate in a way that could qualify as a multilateral system.

<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>

IHS Markit agrees that the line differentiating bilateral and multilateral trading in the SI context is suffiently clear. We would particularly emphasise that the role of SIs in derivatives markets is different from other markets.

In equity markets, for instance, both multilateral trading venues and SIs are eligible venues under the Share Trading Obligation. This necessitates the application of aligned transparency rules (albeit with nuances to reflect the distinct role of the different execution venues).

However, the relationship between trading venues and SIs in deriviative markets are different. Most notably, market-makers and liquidity providers are the main source of liquidity for derivatives trading, both on and off venue. We would, therefore, urge ESMA to ensure it fully considers the key differences between such derivatives markets in its conclusions about the functioning of OTFs as well as SIs.

<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>

As we set out above (especially Q3), we believe that it is vital that that innovative communication software providers can operate in EU market ecosystems. This increases efficiency and competition in the market and supports innovation. As also stated above, we are concerned that ESMA’s interpretation of ‘multilateral systems’ (para 43) is extremely broad, could potentially create uncertainty and cover a multitude of non-multilateral communication platforms, information aggregators, distributors of data and connectivity utilities (including EMS, OMS, middleware, instant messaging services or even email). We do not believe that this was the colegislators’ intention.

There are a number of elements that distinguish trading venues from software providers. These include, for example, the design of the system, the execution trades, the role the software provider performs, the type of protocols, interactions between participants and fee structures.

The involvement of such providers increases the efficiency, competition and innovation in the market and this is beneficial for market users and the competitiveness of the EU.

<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>

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<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>

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<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>

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<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>

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<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>

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**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>

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<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>

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<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>

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<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>

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<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>

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<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>

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<ESMA\_QUESTION\_FOTF\_21>