

To  
ESMA

**Memo**

November 25, 2020  
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## **Comments to ESMA's consultation on Organised Trading Facilities**

The Associations mentioned (the Associations)<sup>1</sup> welcomes the opportunity to respond to ESMA's consultation paper on the functioning of Organized Trading Facility (OTF). For non-equity trading, the OTF serves as a complement to the trading venues established under MiFID I and it will be useful to follow-up and analyze some of its features in the context of a MiFID II review.

However, the Associations were very surprised to find that only a very limited number of questions in the consultation paper specifically relates to the OTF regime. In fact, a majority of the questions are very wide in scope and it is clear that, if implemented, ESMA's proposals could have a direct impact on a range of other business activities, such as SIs, brokers, asset managers, software providers and fintech companies, and will also cover trading in equity instruments. Considering that the mandate in article 90 MiFID II as well as the heading of the consultation paper only refer to the functioning of OTFs, the Associations fear that a large number of stakeholders have not been given a fair chance to provide their input to the consultation. The Associations therefore urge ESMA to limit its review report to the mandate in article 90 regarding the functioning of OTF and to do further analysis before making any proposals or conclusions in other areas.<sup>2</sup>

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<sup>1</sup> [Association for Financial Markets in Europe \(AFME\)](#), [Asociación de Mercados Financieros \(AMF\)](#), [Federal Association of Securities Trading Firms \(bvf\)](#), [Polish Securities Dealers Association \(IDM\)](#), [Nordic Securities Association \(NSA\)](#)

<sup>2</sup> Article 90.1 MiFID II Before 3 March 2019 the Commission shall, after consulting ESMA, present a report to the European Parliament and the Council on: (a) the functioning of OTFs, including their specific use of matched principal trading, taking into account supervisory experience acquired by competent authorities, the number of OTFs authorised in the Union and their market share and in particular examining whether any adjustments are needed to the definition of an OTF and whether the range of financial instruments covered by the OTF category remains appropriate.

The Associations would also like to underline the importance of considering each of the proposals based on the definition of multilateral system in article 4.19 MiFID II i.e. any system or facility in which multiple third-party buying and selling interests in financial instruments are able to interact in the system. We agree that it is clear from the level 1 text that all activities qualifying as "multilateral systems" shall be regulated as OTF, MTF or regulated market.<sup>3</sup> However, it is equally clear from the level 1 text, as further developed in ESMA's Q & A, that not all trading is to be considered as "multilateral" or taking place "within in a system".<sup>4</sup> In fact, in order for trading to be multilateral, it shall allow multiple clients to interact between themselves and there must be some level of structure (whether in the form of an IT-system or rulebook) that organize the communication between clients in order for it to be carried out "within a system".

Furthermore, it should be recalled that it was not the intention of the co-legislators when drafting MiFID II to force all trading in EU to take place in a multilateral system. The level 1 text clearly allow for several business models to co-exist and compete, in order to serve the distinct needs of clients in different market segments. In this regard, the Associations note that several of the proposals in the consultation paper appears to be based on concerns that MiFID II has created an unlevel playing field between different business models and that some activities which are called bilateral in reality meets the definition of multilateral system and, as a consequence, should be regulated as an OTF, MTF or RM. In our view this clearly is an enforcement issue that should be handled by National Competent Authorities applying existing rules. Level 1 read together with existing ESMA Q&A provides sufficient guidance in order to handle any such infringements.

If ESMA despite the concerns raised in this position paper decides to proceed with some of the proposals and develop new level 3 guidance, the Associations would like to emphasize the need to conduct an additional and broad consultation amongst stakeholders in order to avoid unintended consequences.

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<sup>3</sup> Article 1.7 MiFID II

<sup>4</sup> See ESMA Q & A on Market Structures Topics, ESMA70-872942901-38, section 5.2 question 10