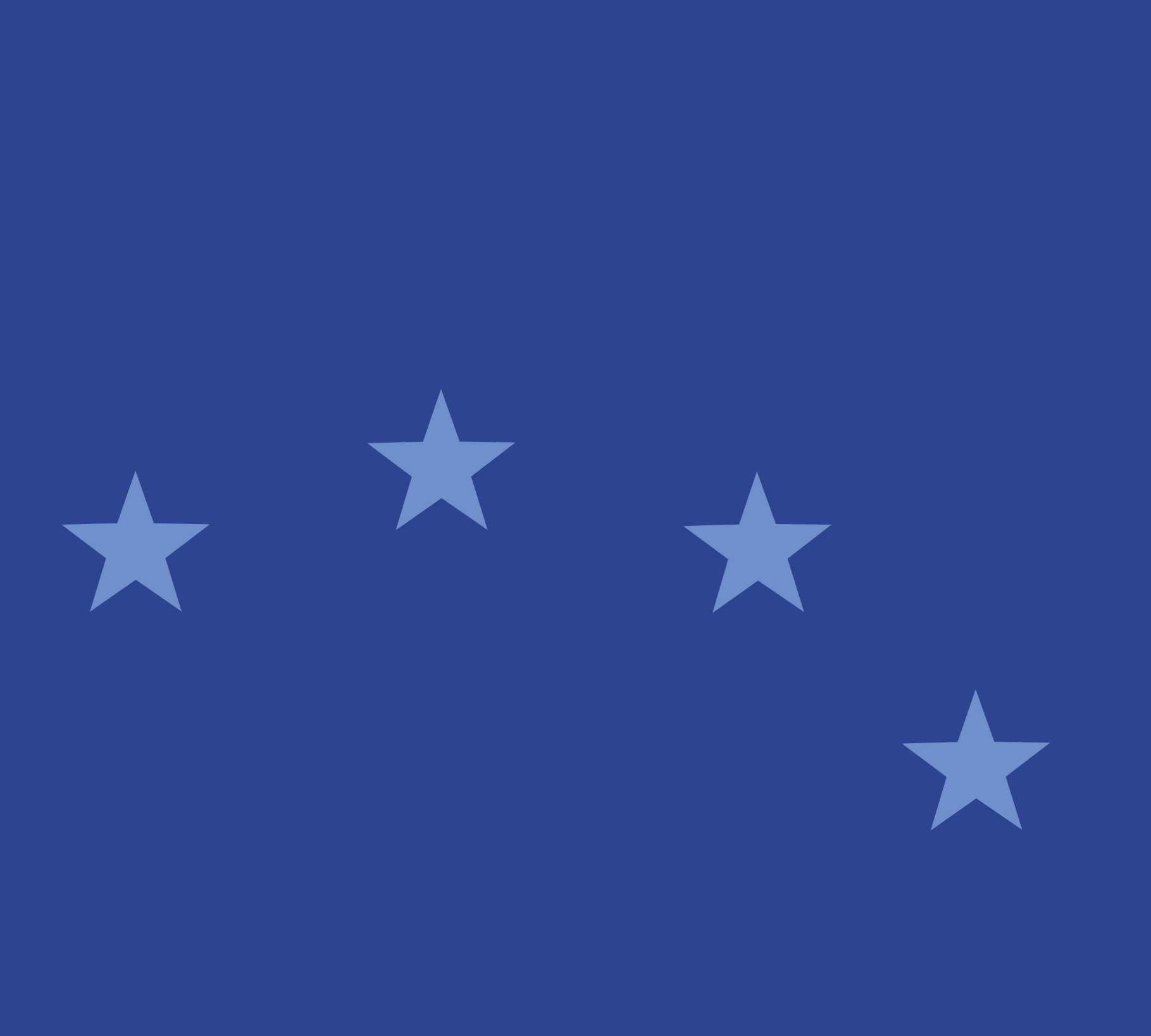
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| Reply form |
| For the Consultation Paper (CP) on ESMA’s Opinion on the trading venue perimeter |



28 January 2022 | ESMA70-156-5287

Responding to this paper

ESMA invites comments on all matters in this paper and in particular on the specific questions. 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](http://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.

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**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.

1. Do you agree with the interpretation of the definition of multilateral systems?

<ESMA\_QUESTION\_TVPM\_1>

No. DDV members do not agree with the interpretation of the definition of a multilateral system as it is based on the present consultation. We support ESMA's approach to create a uniform level playing field between regulated and previously unregulated market players. However, the principle of proportionality should be respected and excessive regulation avoided.

Banks, trading venues and other financial service providers play a crucial role in the European financial services ecosystem. Therefore, regulatory measures related to financial markets should be data-driven and based on careful data analysis.

The decision to qualify a particular actor as a multilateral system has far-reaching regulatory and economic consequences for that actor. It should be noted that financial markets are heterogeneous in nature and a wide variety of trading types have emerged, such as request-for-quote („RFQ“), request-for-stream („RFS“), RFQ to all, all-to-all. Thus, it is necessary to carefully assess each individual case, taking into account its specific design.

In our perception, the ESMA Opinions do not provide guidance for the NCA in every case. For example, it currently seems unclear whether the criteria listed in paragraph 11 of the Opinion must be present alternatively or cumulatively in order to arrive at a classification of the individual market player as a multilateral system. In our opinion, it needs to be clarified that a multilateral system only exists if

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

ESMA's view with regard to the Multi Third Party Concept is particularly questionable. According to Article 18 (7) MiFID II, MTFs or OTFs must have "at least three materially active members or users, each having the opportunity to interact with all the others in respect to price information". Several elements of the proposed opinion appear to disregard this MiFID II provision. This applies in particular to constellations in which a system or facility merely provides a technical communication platform through which bilateral interaction can take place.

This constellation often presents itself as follows: A software provider in the market allows clients to connect to sell side brokers and the terms on which they do so. The software replaces what would otherwise be done by phone so is merely a more efficient way of a buy side client seeking quotes. This service can be provided either by only selling the software which clients can install on their own servers or by supply on the provider's servers as an additional service. For the former the clients install, maintain and manages software and connectivity to brokers / liquidity providers themselves. For the latter the software provider supports staff installation, maintains and manages the software and connectivity to brokers / liquidity providers as a service for clients not wanting to take on the IT burden of hosting servers themselves. In both cases the service provider does not have any insight into what the client is doing, except for support purposes. The provider does not see what the client is trading or the prices they are seeing.

In some cases ESMA´s upcoming opinion rather creates confusion than clarity. For instance when it comes to unique distinguishing features between the financial service of reception and transmission of orders („RTO“) and a multilateral system the opinion lacks sufficient guidance. The mere statement that an RTO that carries characteristics of a multilateral system should be licensed as such does not provide for clarity.

<ESMA\_QUESTION\_TVPM\_1>

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

<ESMA\_QUESTION\_TVPM\_2>

We belive it is important to distinguish between (i) systems that allow multiple third parties to interact in a system, and (ii) systems that allow for multiple bilateral interactions with existing relationships where each bilateral interaction cannot interact with each other. The former are to be considered true multilateral systems whereas the latter present themselves as a collection of bilateral relationships with no multilateral aspect.

According to an ESMA statement (Q&A on market structure topics, answer to question 7), „the fundamental characteristic of a trading venue is to execute transactions.“ Thus a facility without any genuine trading execution taking place in the system and without any involvement how and where the trade might take place should not qualify as a trading venue.

Additionally we would like to note that in bilateral trading via a systematic internaliser („SI“) the relevant financial service (i.e. selling and buying of financial instruments) is provided by the bank. This is the service to be regulated, not the setting up and maintenance of an IT-platform. A qualification of such IT-service providers as an MTF would trigger higher costs for the customers without a clear benefit for the market participants and the investors. Eventually service providers may be forced to shut down their servive entirely which would require banks, investment funds or others to insource the relevant IT-infrastructure. We do not believe that such change in business models is intended by the MiFIR provisions on trading venues.

<ESMA\_QUESTION\_TVPM\_2>

1. 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.

<ESMA\_QUESTION\_TVPM\_3>

No, DDV members are not aware of any communication tool service that goes beyond providing information and allows trading to take place. Independently of this we would like to ask ESMA, when looking at individual cases, to take into consideration all the criteria of the definition of a multilateral system carefully and not to regard only selected elements of it.

<ESMA\_QUESTION\_TVPM\_3>

1. 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.

<ESMA\_QUESTION\_TVPM\_4>

No, DDV members are not aware of any EMS or OMS, that, considering their functioning, should be subject to trading venue authorisation.

<ESMA\_QUESTION\_TVPM\_4>

1. 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?

<ESMA\_QUESTION\_TVPM\_5>

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<ESMA\_QUESTION\_TVPM\_5>

1. 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.

<ESMA\_QUESTION\_TVPM\_6>

The answer to this question depends on the role the system has in the three-party arrangement. According to German Bundesanstalt für Finanzdienstleistungsaufsicht („BaFin“), a system is defined as „an objective set of rules governing membership, the admission of financial instruments to trading, trading between members, notification of completed transactions and transparency obligations.“ Following this approach, the mere existence of an external third party that just provides a communications tool for counterparties engaged in bilateral arrangements does not constitute a multilateral system. In this respect we plead for maintaining the differentiation between a software and a marketplace.

<ESMA\_QUESTION\_TVPM\_6>

1. 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?

<ESMA\_QUESTION\_TVPM\_7>

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<ESMA\_QUESTION\_TVPM\_7>

1. Are there any other conditions that should apply to these pre-arranged systems?

<ESMA\_QUESTION\_TVPM\_8>

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<ESMA\_QUESTION\_TVPM\_8>

1. 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

<ESMA\_QUESTION\_TVPM\_9>

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<ESMA\_QUESTION\_TVPM\_9>