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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>

We do not agree with the proposed definition of multilateral systems and are concerned by this broad approach, which tends to bring all investment/asset managers in scope of the trading venue regulation. In general, all four criteria are likely to be fulfilled by investment/asset managers, e.g.:

* Multiple third-party buying and selling trading interests: an investment/asset manager trades on behalf of its clients and funds with counterparties and never on its own account. The systems and/or infrastructure used are usually operated by a third-party. In conclusion, the criterion would be fulfilled.
* It is a system or facility: as the definition is broad an includes non-automated procedures, the daily trading desk interaction with the market is caught and the criterion fulfilled.
* Interaction between trading interests: arranging, negotiating and/or “matching” of essential trading terms are key elements in any order-routing system of an investment/asset manager. Hence, this criterion is fulfilled.
* Financial instruments: trading interests typically occurs in financial instruments within the meaning of Article 4(15) of MiFID II, the criterion is therefore fulfilled.

We strongly encourage a review of this definition to ensure that trading activities by investment/asset managers on behalf of clients and funds do not qualify for trading venue authorisation. Investment/asset managers are not and do not operate trading venues in the understanding of the market.<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>

For a system to be deemed multilateral, there should be a system operator (or organiser) that:

* Is a provider of the trading protocol; and
* Has provisions governing the execution protocol
* Has full control of rules (business and software); and
* Has visibility over the data; and
* Provides the trade execution timestamp (which indicates where the trade is matched and executed); and
* Oversees the facilitation of negotiation or the crossing of orders which is the concept used for OTFs in MiFID2 Article 20(6).

An additional point we believe worth highlighting is that, under Article 18(7) MiFID2, multilateral trading facilities (MTFs) and organised trading facilities (OTF)s must “*have at least three materially active members or users, each having the opportunity to interact with all the others in respect to price formation.*” In our view, it appears that many of the elements of the proposed ESMA Opinion do not sufficiently consider the MiFID II “interaction” and “three materially active members/users” requirement as set out in the legislation.<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>

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<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>

We disagree with the conclusion in Figure 2. Independent of the functionality of the EMS, complying with regulatory obligations in relation to Best Execution and Market Conformity whereby trading interests are routed to different parties and venues to find best prices would bring the EMS in scope of the trading venue authorisation. We are struggling to understand, why an EMS should be considered as trading venue, as in simple terms the EMS will only look for the best prices of trading interests of investment/asset management clients and funds. The resulting trading activity would then be concluded on a MTF or with a SI, hence we fail to understand the added value to qualify the EMS as trading venue, as market critical activities and necessary reporting are fulfilled by the MTF or SI. In contrast to a trading venue, the EMS does not match trading interests of any party but is limited to clients/funds of the investment/asset manager on the one side and the authorised trading counterparts of the investment/asset manager on the other side.

Considering MiFIR requirements, associated obligations for trading venues such as e.g., transaction reporting and contribution to the consolidated tape cannot be met by investment/asset managers as infrastructure is not set-up for nano-second communication. Further, as the transactions are concluded on MTFs or SIs, respective obligations would be conducted by these trading venues and would lead to a duplication of information. If an EMS would be considered a trading venue, then practically the trade would be concluded twice, once on the trading venue (e.g. MTF, SI) and once in the EMS, which from our perspective would be an incorrect result and also trigger double regulatory reporting of the same transaction and cause false inflation of volume.

Example to illustrate why an EMS in the ESMA Figure 2 scenario does not qualify as a trading venue:

* One 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;
* It is sold as software only, which clients can (1) install on their own servers, or (2) can be provided on servers as an additional service;
* For (1), the client installs, maintains and manages the software, and connectivity to brokers / liquidity provider themselves;
* For (2), the software provider supports staff installations, 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 software provider has no visibility into what the client is doing, except for support purposes.  The provider doesn’t see what they’re trading or the prices they’re seeing.
* In some cases for (1), the software provider has no access to servers, even for support purposes.  The client maintains and manages the software;
* It is noteworthy that the software provider should not have visibility of the system data for many reasons (day to day) including market abuse control (need to know access only) and for data confidentiality and trading sensitivity reasons;
* The software provider has no self-initiated powers, other than to ensure the software works.  It does not have power to intervene in trades by suspending trading for reasons other than software issues, or to request specific information from users, such as information on positions, clients, etc.

We strongly recommend a review of the definition to ensure that trading activities by investment/asset managers on behalf of clients and funds do not qualify for trading venue authorisation. Investment/asset managers are not and do not operate trading venues in the understanding of the market. Further, proprietary systems (e.g. OMS, EMS) of investment/asset managers not sold or made available to third parties should be out-of-scope.<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>

Yes, we agree that Figure 4 represents a bilateral interaction and should not require TV authorisation.

<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>

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<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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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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