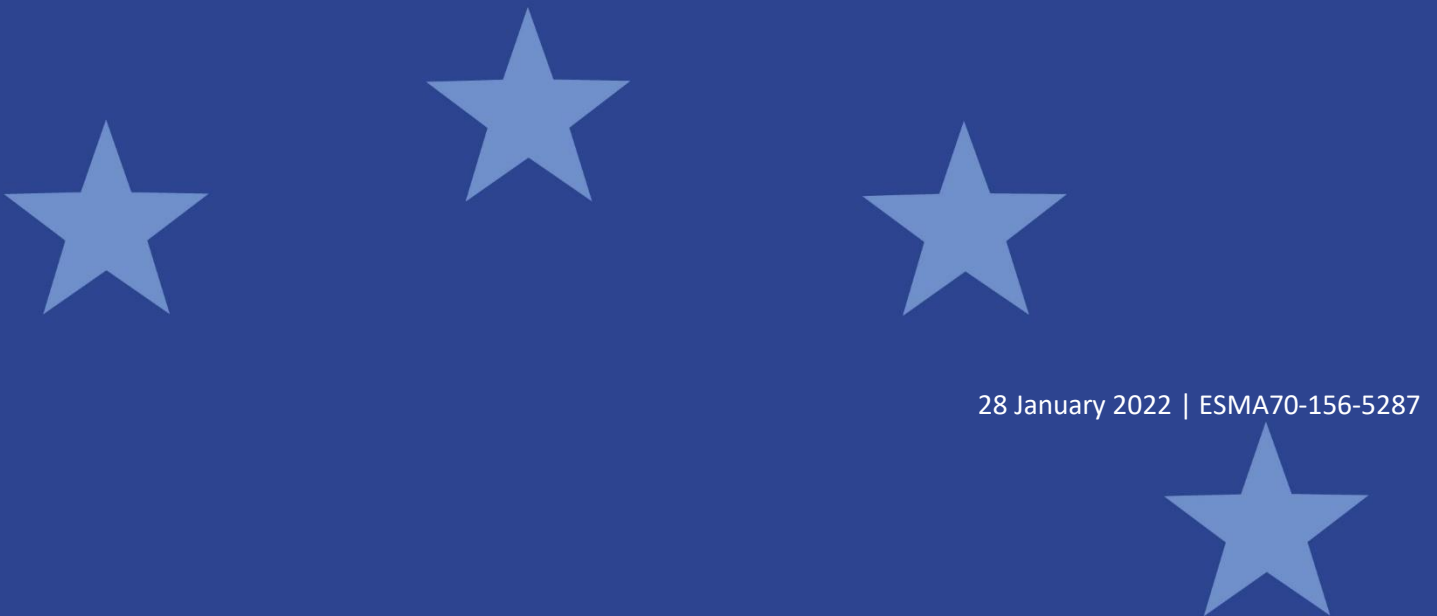


Reply form

For the Consultation Paper (CP) on ESMA's Opinion on the trading venue perimeter



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 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.

Data protection

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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.

Q1 Do you agree with the interpretation of the definition of multilateral systems?

<ESMA_QUESTION_TVPM_1>

Deutsche Börse Group generally agrees with ESMA that a system or facility in which multiple third-party buying and selling trading interests in financial instruments are able to interact in the system shall be considered as a multilateral system and should be required to seek authorization as a trading venue, in order to guarantee the level playing field between all types of trading venues in the European Union. Further, to increase transparency, we believe it is necessary to prevent potential regulatory arbitrage.

We would also like to put emphasis on the point that the term “multilateral systems” should be interpreted in a technology-neutral way and hence also comprise chat trading functionalities and voice brokerage alongside electronic systems. We consider a technology-neutral determination of multilateral systems as important to embrace and facilitate innovation, electronification and transparency in the market.

We take note that ESMA's Opinion on the trading venue perimeter aims to determine several criteria against which existing systems are measured to then conclude on the multilateral nature of their activities. Against that background, we will present in our statement DBG's views on the stringency and coherence of these different facets of ESMA's Opinion that shall help to delineate bi- and multilateral forms of trading more clearly. This being said, we also see some value in recalling that for any system to be defined as an MTF, the other two limbs of the MTF definition in MiFID II shall be given as well, namely to require trades to be concluded in the system and in accordance with non-discretionary rules – in a way that results in a contract.

While we acknowledge that this is not within the remit of this consultation, regulators may want to explore potential benefits from a decoupling of the multilaterality of any given system from the requirement to seek authorisation as a trading venue. This may allow to establishing a more nuanced approach that supports supervisors in their well-understood interest to have a clearly-defined and encompassing regulatory perimeter which leaves no system uncovered (and hence unregulated) which we expressively support. Such approach may also benefit market development, competition and innovation by establishing a more flexible and adaptive regulatory perimeter that avoids some of the negative implications of an overly strict determination and interpretation. More specifically, there may be negative repercussions for certain asset classes that are complex in nature and due to their lack of liquidity are not yet capable of being traded on MTF, and unless technology is given the space to develop to capture these asset classes in due course (as for example equities, bonds and interest rate swaps were in the past), then this will never occur. Equally, innovation in the markets generally will be severely curtailed if firms cannot develop systems and products on a reasonable cost basis. Flexibility should be a key feature of any regulatory system, and proper

regulation and oversight does not require to defining any system as MTF that does not fulfill the respective definition features.

This may also help to address the serious concerns that with a too narrow perimeter, many non-financial corporates would find themselves in a situation where they would have to demonstrate that their treasury trading activities on any newly determined MTF would still qualify as exempted activity according to Art. 2.1(d)(ii) MiFID II which may come with very burdensome operational efforts and compliance risks and ultimately may result in a loss of competitiveness of EU based venues.

Further, we would additionally urge ESMA to be mindful of current developments in the United Kingdom's approach to determine the regulatory perimeter as part of its "Wholesale Markets Review" and to allow firms to elect to be MTFs or alternatively operate under the UK version of the MiFID II RTO, i.e. as arranging "...with a view to others participating" or as "...bringing about".

Against this background we ask ESMA to make explicit that the set of rules should be mandatory (i.e. imposed by the market operator) in order to qualify as a "multilateral system". In Paragraphs 13 and 14, ESMA refers to the MiFID II service of reception and transmission of orders (RTO) and the link to multilateral systems, stating that "a clear distinction should be made between RTO and the operation of a trading venue". We agree with that statement, however, some added clarity would be helpful on how to clearly distinguish RTO from a multilateral system.

Following these introductory remarks, we will comment in more detail on ESMA's views in our response to Question 1 and the following ones.

We do not agree with the view that a system where on one side of any trade there is always one and the same party should be considered multilateral simply because the system is operated by a third party (draft ESMA opinion no. 24). Such view would not be in line with the wording of the definition of "multilateral system". Article 4 (19) of MiFID II defines 'multilateral system' as "any system or facility in which multiple third-party buying and selling trading interests in financial instruments are able to interact in the system". According to this wording, for a system to be considered multilateral it has to provide for "multiple third-party buying and selling trading interests". This means that for a system to be multilateral in the system – though not necessarily in every trading activity (e.g. in every auction) – there have to be multiple trading interests on both buy side and sell side. Hence we consider that on single dealer platforms or systems where there is always one and the same counterparty do not constitute multilateral systems.

Furthermore, the trading platform operator does not have any buying or selling interest and the fact that a third party is operating the system can therefore not turn a bilateral system into a multilateral one. The only role of the platform operator is to provide and operate the platform. The platform operator does have a general business interest to create revenues from the operation of the platform; however, such business interest is not sufficient to be considered as an interest under the clear wording of Art. 4 (19) MiFID II, which expressly requires “buying and selling trading interests”. The operator of the platform clearly has no buying or selling interest, because he is neither buying nor selling anything on the trading platform. Furthermore, Article 4 (19) MiFID II requires “interaction” between the buying and selling interests. The business interest of the platform operator in any case does not interact with any buying or selling interest, because the platform operator as such is never counterparty to any trade concluded on the platform. Finally, Art. 4 (19) MiFID II requests interaction of buying and selling interests “in the system”. The business interest of the platform operator, however, is outside the system.

But also according to the purpose of the provisions on multilateral systems the business interest of the operator of the platform should not be considered when counting the multiple buying or selling interests. For the trading process, for competition and price formation it does not make any difference whether (i) there is always the same party on one side of any trade and this person at the same time operates the trading platform, or (ii) there is always the same party on one side of any trade, but the platform is operated by a third party. The platform operator does not add further competition, because it does not add any orders nor does it participate in the trading.

ESMA in fact is right when stating in no. 23 of the consultation that the term “third party” in the definition of “multilateral system” relates to persons other than the system operator. However, this means in consequence and contrary to ESMA’s statement in no. 24 that the operation of the platform by a person different from buyer and seller cannot turn a bilateral system into a multilateral one.

The view that a system, where on one side of any trade there is always the same party, is not multilateral is also in line with the decision of the CJEU (Case C-658/15 of 16 November 2017) cited by ESMA in no. 24. First of all, this decision refers to the legal situation prior to implementation of the definition of “multilateral system” in Art. 4 (19) MiFID II and therefore cannot be used to interpret this newer definition. Additionally, in the system that was subject to the decision there were multiple persons acting on both sides (buy side and sell side). Therefore, the court has anyway not ruled a case where on one side of the system there was only one trading interest (see for example no. 34 - 36).

<ESMA_QUESTION_TVPM_1>

Q2 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>

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<ESMA_QUESTION_TVPM_2>

Q3 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>

Q4 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 agree with ESMA that OMS should not be considered as multilateral systems as they do not bring together, nor allow for the interaction of multiple third party buying and selling interest.

In contrast an EMS, while facilitating order execution by offering an overview of liquidity and prices on various venues, may sometimes be considered a multilateral system. As rightly mentioned in ESMA's examples EMS, which would allow for firms to send RFQs to multiple players, allowing for an interaction within the system should fall under the definition of a multilateral system and therefore, be subject to an authorization requirement. This would allow to level the playing field between such EMS systems and trading venues such as regulated markets that may also operate a similar RFQ system, since the function and goals of those systems are similar.

Other EMS types where their functionality does not allow for trading interests of different parties to interact with each other without involving a trading venue should be excluded from the definition of a multilateral system.

Referring to our response in Q1, we would like to highlight that EMS should be understood in a technology neutral way, meaning the term EMS should capture not only electronic systems, but also chat and telephone business. Only understanding EMS as electronic systems, may favour opaque and intransparent voice and chat systems over innovative and electrified systems.

<ESMA_QUESTION_TVPM_4>

Q5 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>

We agree with ESMA that such system should be considered bilateral. It may hence qualify as an SI and does not require authorisation as a trading venue.

<ESMA_QUESTION_TVPM_5>

Q6 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>

We disagree with the view that a “single-dealer” system operated by a third party, as described in Figure 5, should be considered as a multilateral system.

Please refer to our response to Question 1

The trading platform operator does not have any buying or selling interest and the fact that a third party is operating the system can therefore not turn a bilateral system into a multilateral one. The only role of the platform operator is to provide and operate the platform. Even if the platform operator may have a general business interest in that it earns money from the operation of the platform, such business interest is not sufficient to be considered as an interest under the clear wording of Art. 4 (19) MiFID II, which expressly requires “buying and selling trading interests”. The operator of the platform clearly has no buying or selling interest, because he is neither buying nor selling anything on the trading platform. Furthermore, the wording of Article 4 (19) MiFID II requires “interaction” between the buying and selling interests. The business interest of the platform operator in any case does not interact with any buying or selling interest, because the platform operator as such is never counterparty to any trade concluded on the platform. Finally, Art. 4 (19) MiFID II requests interaction of buying and selling interests “in the system”. The business interest of the platform operator, however, is outside the system.

But also according to the purpose of the provisions on multilateral systems the business interest of the operator of the platform should not be considered when counting the multiple buying or selling interests. For the trading process, for competition and price formation it does

not make any difference whether (i) there is always the same party on one side of any trade and this person at the same time operates the trading platform, or (ii) there is always the same party on one side of any trade, but the platform is operated by a third party. The platform operator does not add further competition, because it does not add any orders or participate in trading.

ESMA in fact is right when stating in no. 23 of the consultation that the term “third party” in the definition of “multilateral system” relates to persons other than the system operator. However, this means in consequence and contrary to ESMA’s statement in no. 24 that the operation of the platform by a person different from buyer and seller cannot turn a bilateral system into a multilateral one.

The view that a system, where on one side of the trade there is always the same party, is not multilateral is also in line to the decision of the CJEU (Case C-658/15 of 16 November 2017) cited by ESMA in no. 24. First of all, this decision refers to the legal situation prior to implementation of the definition of “multilateral system” in Art. 4 (19) MiFID II and therefore cannot be used to interpret this newer definition. Additionally, in the system that was subject to the decision there were multiple persons acting on both sides (buy side and sell side). Therefore, the court has anyway not decided a case where on one side of the system there was only one trading interest (see for example no. 34 - 36).

<ESMA_QUESTION_TVPM_6>

Q7 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>

DBG believes that pre-arranging platforms shall not be considered as extension of a trading venue (or vice versa). Indeed, trading venues mostly do not have any contractual relationship with the systems used to pre-negotiate the buying and selling interests/orders before normalization and execution into their system. In most cases a member admitted to the trading venue enters the information in the exchange’s system but the system which has been used for the negotiation remains unknown. Only the order resulting from the negotiation is formalized on the trading venue and executed.

It should be clear that the pre-arranging system does not outsource the trade conclusion to the trading venue. The pre-arranging firm is at no point in time mandated to execute trades and therefore cannot outsource this task (which it never had). Trade conclusion is exclusively and originally the task of the trading venue.

Neither does the trading venue on which a trade is concluded outsource the arranging of the transaction to the pre-arranging firm. Pre-arranging a trade prior to its conclusion on the trading venue is no necessary part of the trade conclusion. These off-book trades (and order book trades more generally) are only concluded on the trading venue in accordance with its rules, which do not require any pre-arranging. As the trading venue therefore does not have to pre-arrange any trade, it may not outsource such task (which it never had).

Therefore, contrary to ESMA's proposal in paragraph 80, we deem it to be the sole responsibility of the pre-arranging firm to comply with its regulatory and legal obligations applicable to the pre-arranging of transactions and catering to the exchange/trading system, while it is the sole responsibility of the trading venue to ensure legal and regulatory compliance of the process of order entry, execution and trade formalization on the trading venue under its rules. Such allocation of responsibilities should not be disrupted by a special mandatory agreement between the trading venue and the pre-arranging firm.

In addition, for MiFID II/MiFiR provisions that do not relate to a particular trade, but to trading as a whole (like provisions on non-discriminatory access) it would remain unclear which trading venue (and to what extent) would have to ensure compliance, if a firm formalized all trades on a trading venue, however not always on the same one.

<ESMA_QUESTION_TVPM_7>

Q8 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>

Q9 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>