



**FINANCE
DENMARK**

Finance Denmark's response to ESMA's consultation on the opinion on trading venue perimeters

Finance Denmark¹ welcomes the opportunity to provide our comments to ESMA's Consultation Paper on ESMA's Opinion on the trading venue perimeter with a deadline on 29 April 2022. We understand from point 4 that the intention of the consultation is "...reducing the level of complexity for market participants and making the legal framework in relation to the definition of OTFs and, more generally the trading venue perimeter, more effective. Whilst some of these recommendations were addressed to the European Commission, it was considered appropriate to clarify other issues directly through ESMA guidance..."

General comments

However, Finance Denmark is first and foremost deeply concerned that liberalization and competition introduced with MiFID I will be compromised as the proposed Opinion represents a significant and material change in the understanding of multilateral system as defined in MiFID II, art. 4 (1) (19).

We consider the proposed Opinion to be inappropriate with the present MiFID II/MiFIR Review in mind and we consider the proposal as yet another attempt to limit competition and favor trading venues at the expense of other execution venues, which should be avoided for the following reasons:

1. As the definition of multilateral is proposed to be moved to MiFIR in the MiFID II/MiFIR Review and
2. The proposed Opinion in the consultation mainly uses ESMA's own Q&As² as sources for the interpretations of which activity should be considered multilateral. However, these Q&As are both opaque and have never been subject of consultation.

However, due to 1) and 2), we find the process extremely problematic – not least from a democratic perspective – and we urge that the understanding of multilateral is incorporated in the MiFID II/MiFIR review to ensure the political discussion both within member states and in the European Parliament as this proposal contains fundamental changes which will tip the balance and challenge the level playing field to the disadvantage of execution venues which are not trading

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² [esma70-872942901-38_qas_markets_structures_issues.pdf \(europa.eu\)](https://esma70-872942901-38_qas_markets_structures_issues.pdf)

venues, thereby challenging the competition in general. Finance Denmark strongly supports neutral EU rules which do not favor one business model at the expense of others. As the aim is to ensure an efficient Capital Market Union, competition must be encouraged and the legislative framework within MiFID II/MiFIR must allow for different types of trading and execution venues to co-exist to serve various clients' needs.

One proposal to ensure the political discussion in the member states and in the European Parliament is to include explanatory recitals in the MiFID II/MiFIR Review on the understanding of multilateral.

Secondly, the proposed Opinion will, as far as we understand, limit the ability of investment firms to offer certain types of execution services to their clients despite their licenses and the level 1 text. This will alter the level playing field and will be detrimental to many market participants, including clients as they face fewer choices and most likely worse execution. In this context, and with the present UK Wholesale review in mind, it is more important than ever to ensure that changes do not lead to less attractive markets within the EU compared to the UK. Not at least professional market participants will have to seek liquidity outside the EU to ensure Best Execution.

Thirdly, we disagree with the CJEU Robeco judgement principle where multiple third-party buying and selling interests interact is interpreted as two trading interests. Multiple is per se more than two which is also stated in MiFID II, art. 18 (7): *"Member States shall require that MTFs and OTFs have at least three active members or users, each having the opportunity to interact with all the others in respect to price formation"*.

Specific comments

Below is Finance Denmark's responses to the individual questions:

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

No. Finance Denmark disagrees with ESMA's interpretation of the definition of multilateral system:

The definition introduced by MiFID II in art. 4 (19), sets out four different aspects which should be considered when identifying whether a system or facility can be classified as a multilateral system:

1. It is a system or facility; AND
2. there are multiple third-party buying and selling interests; AND

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3. those trading interests need to be able to interact; and,
4. trading interests need to be in financial instruments.

We have added the "AND" in point 1 and 2 to underline that all four framework points must be fulfilled in order to qualify as a multilateral system as also pointed out in paragraph 16 on page 10.

Understanding of system or facility

ESMA is of the opinion that a system is technology-neutral and agrees that it is more difficult to identify a "non-automated" system and refers to its own Q&A, which have not been subject of consultation, as justification for the interpretation in paragraph 20 and 21 where *"(...) non automated systems or repeatable arrangements that achieve a similar outcome as a computerised system, including for instance where a firm would reach out to other clients to find a potential match when receiving an initial buying or selling interest, would also be characterised as a system."*

We disagree that a firm which reaches out to other clients to find a potential match constitutes a system or a facility. This is particular the case when such an activity is done ad hoc without predictability and any further specifications. According to point 19, page 10, ESMA stipulates that according to Article 4 (19) of MiFID II, a system must be understood as a set of rules that governs how third-party trading interests interact (our underlining).

Rules must not be interpreted more restrictively than the wording and must therefore be understood as one of a set of explicit or understood regulations or principles governing conduct or procedure within a particular area of activity.

Thereby, when SIs on an ad hoc basis without predictability and further specifications than ensuring the best interests of the clients, the specified activity does not constitute a system. It is our opinion that ESMA's interpretation of rules is beyond this understanding and may create an inappropriate legislative interpretation.

Understanding of multiple third-party buying and selling interests

"Multiple" is per se more than two which is also stated in MiFID II, art. 18 (7): *"Member States shall require that MTFs and OTFs have at least three active members or users, each having the opportunity to interact with all the others in respect to price formation"*, whereby we do not agree with ESMA's statement that multiple third parties may be limited to two parties.

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Understanding of third-party trading interaction

Furthermore, i.e., for SIs or investment firms which facilitate ordinary, manual brokerage there is **no third-party trading interaction**: For example, when the SI enters into a bilateral agreement on an ad hoc basis with both the buyer and the seller individually and has the ultimate risk; the clients cannot and do not interact with each other, and the SIs face the full market-, payment- and settlement risk of any bilateral trade in contrast to trading venues. In addition, unlike trading venues, SIs are always liable towards the individual client in respect of ensuring execution whether or not there may be other clients with opposite interests.

Furthermore, we direct the attention towards the requirement in MiFID II where it is specified in MiFID II, art. 4 (1) (22) and 4 (1) (23) that in order to qualify as MTF or OTF the interaction between multiple (more than two) must result in a contract, which ESMA apparently and unfortunately does not recognize according to paragraph 28, page 12.

Understanding of financial instruments

We agree with the reference to MiFID II, Annex I, Section C as the relevant instruments.

Q2: Are there any other relevant characteristics to a multilateral system that should be taken into consideration when assessing the trading venue authorization perimeter?

No. Please see our comments to Q1. In short, we consider ESMA's present understanding to be too far-reaching, opaque and not in line with level 1. We consider that all of the following rules should apply when assessing the trading venue authorization:

1. **It is a system or facility**; this means that trading must be performed systematically on non-discretionary and transparent rules for MTFs, cf. MiFID II, art. 18 and 19 and discretionary and transparent rules for OTFs, cf. MiFID II, art. 18 and 20, where the operator of the OTF can exercise discretion in relation to when to place or extract an order and when not to match other available orders, provided that this is in compliance with the instructions from the client and in accordance with MiFID II, art. 27 AND
2. **there is multiple third parties buying and selling interests**; meaning three or more parties cf. MiFID II, art. 18 (7)
3. **these trading interests need to be able to interact; and** these three or more parties must be able to interact. This requires that the parties must

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be able to identify and communicate with each other in the system and this interaction must result in a contract, cf. MiFID II, art. 4 (1) (22) and 4 (1) (23) and 18 (7).

4. **trading interests need to be in financial instruments.** As defined in Annex 1, Section C

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.

No.

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.

No. Finance Denmark is of the opinion that as long as the Order Management Systems (OMS) or the Execution Management Systems (EMS) do not fulfill the requirements of becoming multilateral as described in our responses to Q1 and Q2, they should not be subject to a trading venue authorisation.

In this context, we agree that the EMS system as illustrated in figure 1 does not qualify to apply for authorization as a trading venue.

In figure 2, it is not clear why the difference in counterparties in itself would qualify the EMS as a trading venue unless the requirements of being multilateral are fulfilled as described in our responses to Q1 and Q2? There must be additional explanations as the figure does not illustrate whether the parties can interact with each other? In this context, in paragraph 56 it is not well described whether the parties can interact with each other in a way which may result in a contract?

Is ESMA thinking of Brokers Crossing Networks, where networks of SIs can match orders on a discretionary basis? However, from ESMA's Final Report on OTFs³ it was clear that ESMA did not find evidence as "*ESMA notes that no further evidence or precise example of networks of SIs has been provided by stakeholders in their response to the CP. The claim about the transfer of BCN activity to SIs has not been further substantiated either by the stakeholders that expressed this concern in their response to the SI Report....*".

³ [esma70-156-4225 mifid ii final report on functioning of otfs.pdf \(europa.eu\)](#), point 68, page 20



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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?

The figure requires the verbal explanation to be understood. That said we agree.

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.

No. Finance Denmark does not agree as there are no more multiple third-party interactions and despite the system being operated by a third-party, the trading always takes place against a single investment firm (bank), hence it is a single dealer platform, cf. i.e. MiFIR recital 20, and not a multi-dealer platform.

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?

Finance Denmark agrees.

Q8: Are there any other conditions that should apply to these pre-arranged systems?

No.

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.

No.

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