

ESMA CONSULTATION PAPER OPINION ON THE TRADING VENUE PERIMETER

AMAFI comments

INTRODUCTION

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Association Française des Marchés Financiers (AMAFI) is the legal trade organisation representing financial market participants in France. AMAFI members are investment firms and credit institutions (French, European and global firms), operating in and/or from France (corporate and investment banks (CIBs), brokers-dealers, market-infrastructures, exchanges and private banks). AMAFI has been extremely active on MiFID II issues. We are involved in all regulatory matters that concern commercialization of financial instruments. As far as financial products are concerned, we mostly represent all issuers/manufacturers of products (CIBs) but, through our private bank members, distributors as well. AMAFI has more than 150 members operating in equities and fixed-income and interest rate products, as well as commodities, derivatives and structured products for both professional and retail clients.

AMAFI welcomes the opportunity to respond to this consultation paper (hereafter the CP) on the Opinion on the trading venue perimeter.

Before answering the specific questions raised in the CP, AMAFI would like to highlight the following general comments.

GENERAL COMMENTS

In paragraph 35 of the CP, it is stated that *“ESMA has not identified any major shortcomings in MiFID II that would justify an immediate and significant amendment to the Level 1 text. The current regulatory framework appears suitable to ensure, where necessary, appropriate supervision of those new market players”*.

AMAFI shares this analysis and therefore wonders why the proposed Opinion includes elements that appear to change the current concept of multilateral systems.

If the opinion were adopted as it stands, there is a risk that some investment firms would be obliged to seek authorisation as a multilateral system with all the attendant cost implications, such as compliance costs, reporting costs and operating costs

Many firms will not be able to bear these additional costs, in a very tight economic context, and will have to cease their activities. This will be to the detriment of the diversity of players within the EU and ultimately to the detriment of investors, especially the smaller ones.

Moreover, the proposed Opinion deals with issues that are related to the European Commission MiFID review package. It would therefore be more appropriate to release this Opinion after the EU negotiations are completed.

RESPONSES TO ESMA QUESTIONS

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

No.

We consider that ESMA's interpretation of 'multilateral' is too wide.

The conditions in paragraph 11 of the draft Opinion should be cumulative requirements (with 'and' in between each requirement) as follows:

"Four key aspects should be identified in a system or facility to be considered as a multilateral system:

- a) It is a system or facility; **and**
- b) there are multiple third-party buying and selling interests; **and**
- c) those trading interests are able to interact; **and,**
- d) trading interests need to be in financial instruments.

ESMA's draft Opinion is in contradiction with the current body of regulation, be it the Level 1 texts or the Q&A published by ESMA.

The draft Opinion dramatically changes the concepts "multilateral system" and "multi-dealer platform" which are defined and referred to in the Level 1 texts in Article 4(19) MiFID2 and in Recital 20 MiFIR respectively (and validated by ESMA's own Market Structure Q&A).

The draft proposal creates less certainty by departing from the purpose of a trading venue, which is to facilitate interaction between multiple parties leading to price formation, as referred to in (i) Article 18(7) MiFID2 which requires an MTF or OTF operator to have "*at least three materially active members or users, each having the opportunity to interact with all the others in respect to price formation*"; and (ii) the definitions of MTF and OTF in Article 4(1)(22) MiFID2 both of which include as an essential element "*interaction in a system in a way that results in a contract*".

Moreover, the draft Opinion is not coherent with ESMA's Market Structure Q&A (questions 7 and 10) and paragraph 76 of its previous consultation paper.

Indeed question 7 of ESMA's Q&A states:

"...the fundamental characteristic of a trading venue is to execute transactions. As defined under Article 4(1)(21), (22) and (23) of MiFID2, trading venues under all its possible forms as regulated market, multilateral trading facility and organised trading facility are multilateral systems "which bring together multiple third-party buying and selling interests in financial instruments [...] in a way that results in a contract". Therefore, a trading venue should not be allowed to arrange transactions without formalising the execution of those transactions under its rules and systems. ESMA has also already clarified that a transaction cannot be concluded on more than one trading venue at the same time".

In this context, AMAFI would like ESMA to clarify how the figure 2 in the CP (paragraph 54 to 56) should be deemed to be a multilateral system. The situation described in this example is put in place by investment firms in order to comply with their best execution obligation. In the equity field notably, there is no reason that an EMS at the hand of a broker should not be allowed to connect to a systematic internaliser to provide best execution to its clients.

The reliance on the CJEU Robeco judgment is very questionable. Indeed, it is based on the concepts and text of MiFID1, which would have been decided differently under MiFID2. It also considers a market for the issuance and redemption of shares in UCITS overseen by Euronext's trading venue rules so it was very fact specific.

Question 2: Are there any other relevant characteristics to a multilateral system that should be taken into consideration when assessing the trading venue authorisation perimeter?

According to AMAFI, ESMA should define the criteria to assess whether a system is multilateral and has to seek an authorisation as a trading venue. Those criteria could be:

- A rule book governing the transactions
- The issuing of an executions timestamp
- The possibility to cancel transactions in some circumstances
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Moreover, Single Dealer Platforms operated by third party software/ IT providers should not be captured (on the basis that the CJEU Robeco judgment was based on MiFID1 and not the MiFID2 text or concepts).

Question 3: 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.

AMAFI is 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 consider only selected elements of it.

Question 4: 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.

AMAFI is not aware of any EMS or OMS, that, considering their functioning, should be subject to trading venue authorisation.

Question 5: 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?

Yes.

AMAFI agrees with ESMA analysis.

Question 6: 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.

We do not agree with the ESMA interpretation that “single-dealer” systems operated by a third party should be considered as a multilateral system. Indeed, we are concerned that some 1-to-1 Request for Quote (RFQ) systems which aggregate quotes may also be captured by the definition. Those systems do not match trading interests and do not facilitate the conclusion of a contract; therefore, we would welcome clarity on their exclusion from the scope of the definition of multilateral systems. This interpretation appears to disregard MiFIR Recital 20 and MiFID 2 Article 18(7).

Question 7: 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?

Yes.

Yes, AMAFI agrees that systems pre-arranging transactions that are formalised on a trading venue should not require trading venue authorisation.

Question 8: Are there any other conditions that should apply to these pre-arranged systems?

No.

AMAFI considers that there is no need to add any other conditions to pre-arranged systems.

Question 9: 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.

AMAFI is not aware of any such circumstance.