

ESMA CONSULTATION ON TRADING VENUE PERIMETER – EBF HIGH LEVEL COMMENTS

The European Banking Federation (EBF) welcomes the opportunity to comment on ESMA's draft "[Opinion on Trading Venues' Perimeter](#)".

In general terms, we understand that ESMA's intention is to provide more clarity on the concept of "multilateral system" i.e. one of the most important definitions in the MiFID 2 framework upon which the EU capital markets is currently structured, and to further harmonise the understanding of such concepts across the Union. However, having carefully read the analysis and proposals presented in the Draft Opinion, EBF members fear that ESMA will in fact achieve the opposite result. Indeed, several of the examples and figures included in the draft Opinion have left our members with a large number of new questions, worries and a significant level of legal uncertainty.

In the draft Opinion, **ESMA makes a very extensive interpretation of the definition of multilateral system that substantially differs from the wording of the level 1 text**, i.e. suggesting that it **shall no longer be a criteria that multiple trading interests should be able to interact within the system**. For example, ESMA proposes that the operation of an EMS (in which there is no execution and no interaction between multiple clients) should be considered a multilateral system thus requiring a license as a trading venue. Changes of such substantive nature to the understanding of level 1 text should in EBF's view not be made through a level 3 opinion but via a very thorough impact analysis and assessment, with the involvement of the co-legislators. Hence, our main preliminary suggestion is for ESMA to ask Local NCAs for a firmer enforcement of the legislation currently in force, prior to considering the publication of said Opinion. Secondly, if there really has to be an action from ESMA, we believe that the only step to take at this point in time, really capable of ensuring a harmonised application of the definitions and provisions discussed in the Opinion, would be an amendment of the relevant L1 legislation, consisting in moving the relevant set of definitions from the text of the MiFID2 Directive to the that of MiFIR Regulation, that is what is specifically provided for in the recent Commission's Proposal for a Review of the MiFID2 and MiFIR legislative framework aimed at the CTPs' set-up and launch (i.e. COM(2021) 726 final and COM(2021) 726 final).

Apart from the interpretation of the definition multilateral system per se, we believe that multilateral systems must be appropriately distinguished from electronic platforms that are simple communication tools.

As highlighted by the Advocate General of the CJUE in his Opinion on Robeco case (paragraph 88) in respect of the EFS System operated by Euronext, "mere information channels for the transmission of orders" must be appropriately differentiated from "systems in which financial instruments ... are traded and its activity is carried out in accordance with the rules established by the system operator (Euronext) in a trading manual."

For these purposes, we would welcome further guidance on the definition of "trading system" and "market operator". We believe that a trading system must be understood as a common set of rules to negotiate and conclude transactions on financial instruments, imposed by the market operator, to which all the participants in the system adhere without negotiation. On the other hand, if the

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rules to conclude transactions are bilaterally agreed by their users or are the result of bilateral conversations based on standardised communication protocols, not provided by the software developer (such as the FIX Protocol), the platform would not be a multilateral system but an electronic communication tool.

For instance, multiple parties may conclude transactions through the phone line in bilateral voice conversations, but the phone line wouldn't qualify as a trading system as the phone company does not provide a trading system but a communication channel. The same criteria should apply to the electronic communication channels, as MiFID is technology neutral.

In line with the foregoing criteria, a 'single-dealer' system would be an electronic trading platform in which one dealer imposes a trading system (i.e. the trading rules) on all the rest of participants that intend to trade financial instruments with it and this dealer arranges and manages this trading system. In this respect it would not be relevant whether the technology or software has been developed by this dealer/operator or by a third party.

EBF members find it unclear how ESMA's opinion interact with other parts of the binding framework such as the scope of investment services under MiFID II. For example, investment firms can be authorized to execute orders on behalf of clients (e.g. agency crossing transactions and trading on a matched principal trading basis) and to execute client orders against own account (e.g. acting as principal, which can be as SI or not depending on the SI-thresholds/opt-in). We are concerned that the extensive interpretation of multilateral trading proposed by ESMA could have the effect of **de facto limiting investment firms' ability to provide such execution services to their clients under their existing authorisations.**

According to EBF members, not only will a very extensive definition of multilateral system restrict the competition between execution venues that was introduced by MiFID I but it will also limit clients' access to different types of trading and could hamper financial innovation. Throughout the union, banks and investment firms may need to change their business models and, if our reading of the Opinion is correct, many smaller brokerage firms are likely to be put out of business. Neither of these effects will help increasing the attractiveness of EU capital markets. **On the contrary, from a CMU perspective it is very important to ensure that the MiFID II framework allows different types of trading to co-exist on EU capital markets in order to serve different clients' needs.** These needs can vary depending on type of client (retail and professional) and type of financial instrument (liquidity and transaction size). Since clients' need to have access to OTC-trading in certain situations will continue to exist, EBF sees a clear risk that ESMA's opinion will have the result of steering more trading to firms established third countries (e.g., UK and the US) where execution is more flexible.

During the next couple of years, the market structure on EU capital markets will undergo substantive changes, following the implementation of a consolidated tape and MiFIR Review as well as the potential changes as regards competition from UK firms as a result of UK Wholesale Review Against this background, we question if the timing of ESMA's opinion is appropriate. **In our view, a more cautious approach would be to let the market participants focus on the implementation of the amendments to the MiFID II and MiFIR and delay the issuance of level 3 opinion(s) until the market has adjusted to new and amended binding rules. Not until then will it be possible to fully understand the impact of the proposals.**

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About EBF

The European Banking Federation is the voice of the European banking sector, bringing together national banking associations from across Europe. The federation is committed to a thriving European economy that is underpinned by a stable, secure, and inclusive financial ecosystem, and to a flourishing society where financing is available to fund the dreams of citizens, businesses and innovators everywhere.

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