

Final Report

On ESMA's Opinion on the Trading Venue Perimeter

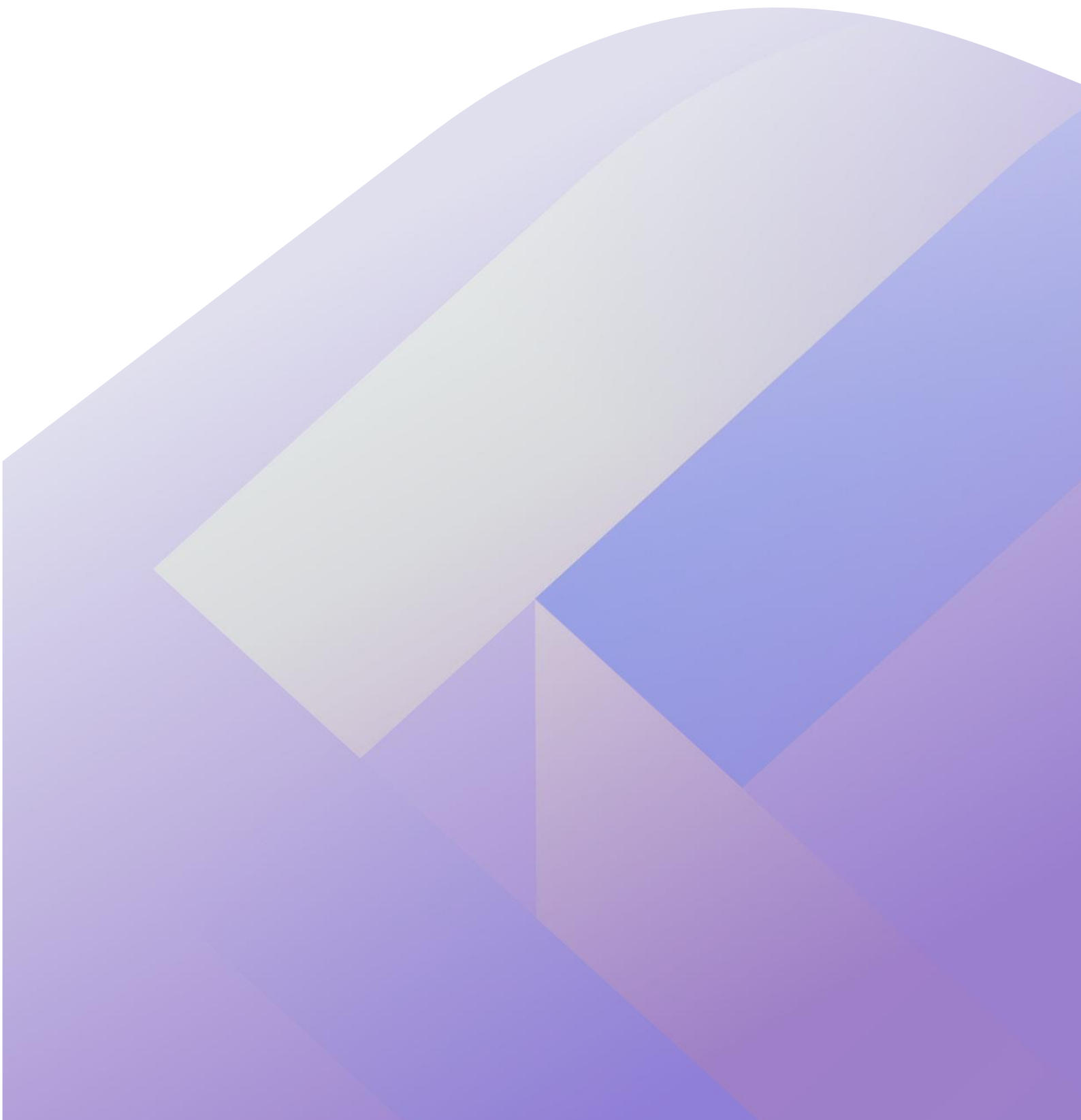


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Acronyms and definitions used

CJEU	Court of Justice of the European Union
CP	Consultation Paper
EMS	Execution Management Systems
EU	European Union
ESMA	European Securities and Markets Authority
ISVs	Independent Software Vendors
MiFID I	Markets in Financial Instruments Directive – Directive 2004/39/EC of the European Parliament and Council
MiFID II	Markets in Financial Instruments Directive (recast) – Directive 2014/65 of the European Parliament and of the Council
MiFIR	Markets in Financial Instruments Regulation – Regulation 600/2014 of the European Parliament and of the Council
MTF	Multilateral Trading Facility
NCA	National Competent Authority
OMS	Order Management Systems
OTC	Over the counter
OTF	Organised Trading Facility
Q&A	Question and answer
RFQ	Request for quote
RTO	Reception and Transmission of Orders
RTS	Regulatory Technical Standard
SFTs	Security Financing Transactions
SI	Systematic Internaliser

1 Executive Summary

Reasons for publication

Following from ESMA's commitment to publish guidance clarifying the trading venue perimeter, this final report provides ESMA's final opinion on said trading venue perimeter. The opinion provides important guidance on when systems should be considered as multilateral systems and seek authorisation as a trading venue and is based on the feedback received to the consultation paper.

Contents

This final report contains ESMA's feedback to the responses received to the consultation paper and includes the final ESMA opinion on the trading venue perimeter.

The final report is organised as follows: Sections 2 and 3 provide a brief introduction and legal background on the definition of multilateral systems and the implications of the changes introduced in MiFID II with regards to trading venue authorisation, in particular the requirement for all multilateral systems to be authorised as trading venues. Section 4 considers the main elements of the definition of multilateral system and includes the different aspects/criteria which should be considered when identifying whether a system or facility should be classified as a multilateral system. Section 5 considers specific cases in which the trading venue perimeter may be difficult to determine, in particular the cases of new technology providers, request for quote systems and the case of pre-arranged transactions.

The final ESMA opinion is provided in the Annex to this final report.

Next Steps

ESMA will work together with national competent authorities to ensure firms assess their systems against the ESMA opinion and reflect whether they are operating under the appropriate authorisation. ESMA expects national competent authorities to require firms to take appropriate action, including further discussions with the respective national competent authority if needed, in order to swiftly apply for authorisation as a trading venue where appropriate.

2 Introduction

1. The European Securities and Markets Authority (ESMA) published on 28 January 2022 a consultation paper (CP) on ESMA's opinion on the trading venue perimeter¹. The publication of the CP was the result of ESMA's commitment to publish an opinion clarifying the definition of multilateral systems and the trading venue perimeter, i.e. providing guidance on when systems should be considered as multilateral and seek authorisation as trading venues.
2. The CP examined the definition of multilateral system and the implications of the changes introduced in Directive 2014/65/EU on markets in financial instruments² (MiFID II) with regards to the authorisation of trading venues, focussing in particular on the MiFID II requirement for all multilateral systems to be authorised as trading venues. It further analysed the implication of such changes on the overall European Union (EU) microstructures.
3. The CP also considered specific cases in which it may be difficult to determine whether a trading venue authorisation is required as the trading venue perimeter is currently subject to different interpretations. In particular, the CP looked at the case of new technology providers and request for quote (RFQ) systems that may, in some instances, operate *de facto* a multilateral system without proper authorisation. Finally, it considered the case of transactions that are ultimately formalised on a trading venue but pre-arranged in a multilateral system not authorised as a trading venue.
4. This final report includes ESMA's final opinion taking into account the responses received to the CP. The final report presents the current legislative framework and provides an analysis of the feedback received to the CP. It keeps overall the same structure as the CP with an examination of the definition of multilateral system followed by a discussion on specific cases (communication tools, execution management systems (EMS), RFQs and pre-arranged transactions).
5. The opinion should enhance supervisory convergence in the Union, ensure that firms operating multilateral systems swiftly apply for authorisation as a trading venue with their respective national competent authority (NCA) and thereby contribute to a level-playing field in the EU.

¹ <https://www.esma.europa.eu/press-news/consultations/consultation-paper-opinion-trading-venue-perimeter>

² Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349).

3 Legal background

6. The MiFID II framework provides for three types of trading venues: regulated markets³, multilateral trading systems⁴ (MTF) and organised trading facilities⁵ (OTF). The aim of the MiFID II framework is to cover all multilateral systems within the definition of a trading venue⁶, in particular by including those that exercise discretion when matching orders and, for that reason, were able to operate outside the trading venue regulatory perimeter before MiFID II (e.g. certain Broker Crossing Networks that operated under Directive 2004/39/EC on markets in financial instruments⁷ (MiFID I)).
7. Thus, OTFs were introduced as an additional new type of trading venue intended to capture those multilateral systems that, by using discretion in matching orders, were previously not categorised as regulated markets or MTFs and, hence, operated outside the perimeter of MiFID I.
8. In addition to the introduction of a new type of trading venue, MiFID II includes a definition of multilateral systems, which is common to all types of trading venues, and complements it with an obligation, spelled out in Article 1(7)⁸, for all multilateral systems in financial instruments to operate either as a regulated market or as an MTF or as an OTF. These changes have the effect of recognising that any multilateral system should request authorisation as a trading venue regardless of the changes which the system needs to implement to comply with the requirements associated with the operation of a trading venue. Operating in accordance with the multilateral system definition is a sufficient condition to be required to seek authorisation as a trading venue.

³ Article 4(21) of MiFID II: “‘regulated market’ means a multilateral system operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments – in the system and in accordance with its non-discretionary rules – in a way that results in a contract, in respect of the financial instruments admitted to trading under its rules and/or systems, and which is authorised and functions regularly and in accordance with Title III of this Directive”.

⁴ Article 4(22) of MiFID II: “‘multilateral trading facility’ or ‘MTF’ means a multilateral system, operated by an investment firm or a market operator, which brings together multiple third-party buying and selling interests in financial instruments – in the system and in accordance with non-discretionary rules – in a way that results in a contract in accordance with Title II of this Directive”.

⁵ Article 4(23) of MiFID II: “‘organised trading facility’ or ‘OTF’ means a multilateral system which is not a regulated market or an MTF and in which multiple third-party buying and selling interests in bonds, structured finance products, emission allowances or derivatives are able to interact in the system in a way that results in a contract in accordance with Title II of this Directive”.

⁶ MiFID II also includes a definition of a trading venue. Article 4(24) of MiFID II: “‘trading venue’ means a regulated market, an MTF or an OTF”.

⁷ Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ L 145, 30.4.2004, p. 1)

⁸ Article 1(7) of MiFID II: “All multilateral systems in financial instruments shall operate either in accordance with the provisions of Title II concerning MTFs or OTFs or the provisions of Title III concerning regulated markets. (...)”

9. The combination of Article 1(7) and the definition of a multilateral system under Article 4(1)(19) of MiFID II aims at ensuring that trading in financial instruments is carried out on organised venues and, under the same conditions⁹.

4 Multilateral Systems

4.1 Background

10. The MiFID II framework introduced a definition of multilateral systems. According to Article 4(1)(19) of MiFID II a multilateral system “*means any system or facility in which multiple third-party buying and selling trading interests in financial instruments are able to interact in the system*”.
11. On the issue of the definition of multilateral system, the CP focused on two main points, (1) whether stakeholders agreed with ESMA’s interpretation of the definition of multilateral system and, (2) whether any other relevant characteristics should be added.
12. On the first point, the CP considered that the definition of multilateral systems introduced by MiFID II, sets out four different aspects/criteria which should be considered when identifying whether a system or facility can be classified as a multilateral system:
- It is a system or facility;
 - there are multiple third party buying and selling interests;
 - those trading interests need to be able to interact; and,
 - trading interests need to be in financial instruments.
13. The CP provided ESMA’s interpretation on each of the above four elements.

System or facility

14. ESMA considered in the CP that in the context of the definition of multilateral system, a system must be understood as a set of rules that governs how third-party trading interests

⁹ See Recital 6 of MiFIR: “It is important to ensure that trading in financial instruments is carried out as far as possible on organised venues and that all such venues are appropriately regulated. Under Directive 2004/39/EC, some trading systems developed which were not adequately captured by the regulatory regime. Any trading system in financial instruments, such as entities currently known as broker crossing networks, should in the future be properly regulated and be authorised under one of the types of multilateral trading venues or as a systematic internaliser under the conditions set out in this Regulation and in Directive 2014/65/EU”.

interact. Such rules or features could be contractual agreements or standard procedures that shape and facilitate the interaction between participants' trading interests.

15. ESMA reiterated that MiFID II is technology-neutral and, thus, the type of technology used or the fact that it is an automated or non-automated system, does not determine whether it is a system. The CP also clarified that the main criterion to determine whether it is a system is whether there are specific rules concerning the interaction of multiple market participants to which participants shall adhere to.
16. The CP also clarified that general-purpose communication systems are out of scope of the definition of multilateral systems. In fact, despite such systems allowing for the communication of trading interests, they are not governed by rules which facilitate such interaction of trading interests.

Multiple third-party buying and selling trading interests

17. The second aspect/criteria to identify a multilateral system, is whether the system involves multiple third-party buying and selling trading interests. The term "third-party" in this context relates to persons other than the system operator, that are not directly connected and are brought together in a transaction. The word 'multiple' refers to the system allowing various trading interests, to interact in the same system or facility.
18. The CP considered that systems where only two trading interests interact are in scope, provided such trading interests can interact according to the rules of a third-party operator. This interpretation was supported in ESMA's view by the legal reasoning established in the Court of Justice of the European Union Case **C-658/15** (*Robeco and others vs. AFM*)¹⁰.
19. The CP also considered that a single dealer system¹¹ operated by someone other than the dealer could be in scope of the multilateral system definition. This concept is further developed in the analysis of RFQ systems in section 5.2.
20. Similarly, systems that allow multiple third-party interests to interact but where, occasionally, bilateral interaction occurs too, should also be captured within the trading venue perimeter. This applies, for example, to the case of RFQ systems that can be used by members or participants at their discretion as an RFQ-to-one tool, i.e. a tool that allows (or requires) sending a request to only one counterparty. Section 5.2 will also develop this topic and provide specific considerations relating to RFQ systems.

¹⁰ JUDGMENT OF THE COURT (Fourth Chamber) 16 November 2017, *Robeco Hollands Bezit NV and Others v Stichting Autoriteit Financiële Markten (AFM)*, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62015CJ0658&from=FR>

¹¹ A single dealer system is to be understood in the context as a system where a single market maker is the counterpart to every trade in the system.

21. The CP considered that “*multiple third party buying and selling trading interests*” excludes those systems where the interaction occurs between two counterparties only, with no third-party involvement in the system. In general, those bilateral systems operate according to the rules and/or commercial policy of the dealer (normally a systematic internaliser (SI)) without any third party defining the rules for interaction. The SI trades on own account on every transaction in the system and is required to take on market risk.

Interaction between trading interests

22. On the third criteria of trading interests being “able to interact” in the system, ESMA considered in the CP that for such interaction to occur, the system must not only allow the communication of the different trading interests but also allow users to react to those trading interests, i.e. it should be possible for the user to act upon those trading interests and match, arrange and/or negotiate on essential terms of the transaction (being price, quantity) with a view to dealing in those financial instruments.

23. The CP considered that the definition of multilateral systems does not require the conclusion of a contract as a condition, but simply that trading interests can interact within the system. Hence, the conclusion of a contract is not a prerequisite for a firm to be required to request authorisation as a trading venue for the system it operates. Systems or facilities where trading interests can interact, where there is confirmation of a trade or where the essential terms have been (or can be) negotiated (for example buy/sell, price, quantity), would still be considered as meeting this criterion, even if some further contractual details are arranged outside of the system as is the case with many derivative contracts.

24. In the context of the multilateral system definition, and as clarified by Recital 8¹² of Regulation 600/2014 on markets in financial instruments¹³ (MiFIR), interaction requires that the system contains rules that concern the matching, the arranging and/or the negotiations of trading interests. Hence, the CP considered that general advertising and/or aggregation of trading interests alone do not qualify as multilateral systems.

Financial Instruments

25. The final element to consider is that the system or facility needs to allow for the interaction of third-party buying and selling trading interests in financial instruments within the meaning of Article 4(15)¹⁴ of MiFID II.

¹² Recital 8 of MiFIR “It [OTF] should not include facilities where there is no genuine trade execution or arranging taking place in the system, such as bulletin boards used for advertising buying and selling interests, other entities aggregating or pooling potential buying or selling interests, (...)”

¹³ Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (OJ L 173, 12.6.2014, p. 84).

¹⁴ ‘Financial instrument’ means those instruments specified in Section C of Annex I.

26. As such, only systems that allow third party interaction on those instruments specified in SECTION C of Annex I of MiFID II should be considered as a multilateral system within the scope of MiFID II.

4.2 Feedback to the consultation

27. Overall respondents agreed with ESMA's interpretation of the multilateral system definition, in particular with the four aspects/criteria identified in the CP that should be taken into account when assessing a multilateral system. Nevertheless, many stakeholders stressed the need for further explanation on the individual criteria considered to avoid catching too many systems. The main issues raised by stakeholders related to the concept of a system and how third-party interests interact. In addition, some feedback received from stakeholders raised concerns about the implications that the expanded scope of trading venue authorisation can have for some non-financial (corporate) companies.

System

28. Whilst some respondents considered that the definition of a system included in the proposed ESMA opinion may be too broad, a significant number of respondents agreed with ESMA's proposed guidance. Nevertheless, even those respondents that agreed with ESMA's interpretation were favourable of a clarification on the content of the rules of the system, to ensure that the opinion does not inadvertently capture non-trading systems which interoperate with trading venues.

29. As provided in the draft opinion included in the CP, by including any set of agreements or standard procedures, respondents were concerned that ESMA's interpretation risks including within the trading venue perimeter innovative mechanisms or processes that are neither intended to be considered nor *de facto* operate as multilateral systems.

30. Furthermore, respondents stressed that under ESMA's proposed guidance, the word "rule" could reference the technical standard of message construction (e.g. XML) and/or the protocol which governs the exchange of messages. Hence, the opinion could bring into scope FIX-like networks unless it is amended. Some respondents asked for a clarification that the set of rules within the system has to be provided by the system operator itself and should be mandatory.

31. Some respondents considered that these rules must contain elements that concern the matching, arranging and/or negotiation of trading interests. The rules, procedures or contractual terms should explicitly ensure that trades executed in the system are binding even if some terms are subsequently agreed outside of the system. Some respondents also noted that where trading interests interact but are not subject to legally binding rules, it should not be in scope of the multilateral trading definition.

32. In addition, some respondents were of the view that the draft opinion gives the impression that ESMA did not recognise the use of systems/software provided by third parties that are operated by the investment firm. In such cases the control of the software, including its rules, is the responsibility of the investment firm and the third-party operator does not set specific rules, minimum requirements, or the parameters for interaction, but merely provides an environment that supports financial services infrastructures through an open modular and flexible design. The feedback received urged ESMA to clarify that where the rules are set or determined by the investment firm, and not by the technology provider, this would not be considered a multilateral system. Respondents suggested that ESMA should clearly define the term “to operate” when describing a system operator.
33. A few respondents noted that, some investment firms merely use IT service providers to get a platform up and running as an outsourced function. This is because service providers have the IT expertise that the investment firm may lack. Outsourcing IT functions to third parties is common practice and does not automatically lead to this third party then becoming a trading venue.

Multiple third-party interaction

34. Most respondents considered that ESMA’s position on third-party interaction may be interpreted too broadly and potentially capture firms providing pure connectivity services between investment firms and execution venues. In that sense, respondents ask for further explanation on the meaning of “genuine trade execution” or “arranging”. The perimeter should, in their view, not cover practices that only facilitate the communication between market participants.
35. Some respondents noted in their feedback that aggregators and EMS providers are simply third-party front-end systems that allow users to connect to the systems of their pre-existing liquidity providers. These respondents note that the service of such technological providers is clearly distinguishable from those of a trading venue. For these respondents, where the trading interests aggregated within a system are still routed for, and subject to, effective execution under the relevant execution venue, it cannot be said that there is any genuine trade execution, arrangement, or interaction in the first place.
36. On the inclusion in the scope of systems where a third-party system is interposed between bilateral interactions, respondents suggested differentiating between vendor and operator. Some respondents argued that under the proposed guidance in the CP a vendor of technology used by two parties in a bilateral facility would be categorised as an operator which may lead to it being classified as multilateral.

37. Another argument put forward by some respondents on the issue of third-party interaction relates to the requirement under Article 18(7)¹⁵ of MiFID II. Respondents argued that ESMA's interpretation of third-party interaction seems to disregard this MiFID II interaction and the requirement for MTFs to have three materially active members/users. Some respondents considered that the "one-to-many" interaction under MiFID I amounted to multilateral trading. However, under MiFID II the requirement under Article 18(7) requires "many-to-many" interaction as a minimum. Accordingly, some respondents considered that "Nx1 – to – 1" can never be considered multilateral.

Other points raised by respondents

38. Many respondents to the CP noted in their feedback that the opinion should be clearer in ensuring that the four aspects/criteria to identify a multilateral system should be met cumulatively.
39. Some respondents asked ESMA to provide more clarity on how to clearly distinguish the service of reception and transmission of orders (RTO) from a multilateral system and avoid, through the guidance provided in the ESMA opinion, blurring the distinction between the mere provision of the service of RTO and the operation of a trading venue.
40. One respondent suggested that ESMA should clarify that for any system to be defined as an MTF, it should comply with the other two limbs of the MTF definition (non-discretionary rules and result in a contract). The respondent also suggested, despite noting that this is not in scope of the CP, to decouple the concept of multilateral system with trading venue authorisation.
41. Some respondents asked ESMA to clarify the scope of this guidance, in particular with respect to primary market transactions and securities financing transactions (SFTs).
42. On the second question of the CP on whether there are any other relevant characteristics to a multilateral system that should be taken into consideration when assessing the trading venue authorisation perimeter, many respondents noted that the main point to consider is proportionality.
43. Other respondents provided a number of characteristics to be considered, for instance which trading protocols are provided by the system, the presence of trade execution timestamps, provisions governing the execution of orders and, mainly for OTFs, how the system facilitates the negotiation, or the crossing of orders.

¹⁵ Article 18(7) of MiFID II: "Member States shall require that MTFs and OTFs have at least three materially active members or users, each having the opportunity to interact with all the others in respect to price formation". It should be noted that there is no similar requirement for regulated markets.

44. Finally, a minority of respondents would like to see the guidance provided in ESMA's opinion also applying to the trading of crypto assets.

Possible implications for non-financial (corporate) companies

45. In addition to the feedback received to the consultation, ESMA received input via bilateral meetings on the consequences of the work on the trading venue perimeter from some stakeholders. In this context, some corporate companies noted that the work that ESMA is undertaking with this guidance will inevitably bring systems that are currently operating without a licence as a trading venue into the trading venue regulatory perimeter.
46. Currently some non-financial companies use these systems for their trading activity, including for hedging purposes but also for liquidity management. With the requirement for some trading systems to become authorised as trading venues, corporate companies might run into the risk of having to apply for authorisation as an investment firm under MiFID II unless an exemption applies.
47. These stakeholders noted that by trading on a system that is currently outside the trading venue perimeter, they were able, so far, to benefit from the general exemption under Article 2(1)(d)¹⁶ of MiFID II. As a consequence of these systems eventually being authorised as a trading venue, corporate entities might be considered as members or participants in a regulated market or an MTF under MiFID II. Consequently, these entities would need to comply with the hedging exemption in Article 2(1)(d)(ii) in order not to be required to be licensed as an investment firm.
48. The concern raised by corporate companies relates to the risk that, although their activity is mostly done for hedging purposes, one single transaction which may not qualify any longer as "hedging" would require them to be authorised as investment firms.
49. It should be noted that, despite the concerns from these non-financial companies, they did not question ESMA's interpretation on the trading venue perimeter as presented in the CP,

¹⁶ Article 2(1)(d) of MiFID II: "persons dealing on own account in financial instruments other than commodity derivatives or emission allowances or derivatives thereof and not providing any other investment services or performing any other investment activities in financial instruments other than commodity derivatives or emission allowances or derivatives thereof unless such persons:

(i) are market makers;

(ii) are members of or participants in a regulated market or an MTF, on the one hand, or have direct electronic access to a trading venue, on the other hand, except for non-financial entities who execute transactions on a trading venue which are objectively measurable as reducing risks directly relating to the commercial activity or treasury financing activity of those non-financial entities or their groups;

(iii) apply a high-frequency algorithmic trading technique; or

(iv) deal on own account when executing client orders;

Persons exempt under points (a), (i) or (j) are not required to meet the conditions laid down in this point in order to be exempt."

but rather intended to make regulators aware of the unintended consequences of such interpretation.

4.3 Conclusion

50. ESMA notes that overall market participants agreed with the four criteria which should be considered when identifying whether a system should be classified as multilateral. On the point made by respondents that these criteria should be cumulative ESMA notes that this was already the case in the CP and confirms this reading. Furthermore, ESMA added a clarification to the opinion.
51. ESMA stands by its interpretation that a **system** must be understood as a set of rules that governs how third-party interests interact. Rules in this context should not be understood to include the technical standard of message construction (e.g. XML) and/or the protocol which governs the technical exchange of messages. Governing how third-party interests interact, means that the rules (or arrangements) must contain elements that concern the matching, arranging and/or negotiation of trading interests. However, these rules do not need to ensure that trades executed in the system are contractually binding. In fact, the definition of a contract can take many forms depending on the legal context and therefore it cannot be a deciding factor when evaluating a system. In addition, this concept is even less clear for derivative contracts.
52. It is nevertheless important to reiterate that by simply being a system, it does not mean that the system is multilateral. The final opinion clarifies these points, whilst maintaining the notion that a system is anything that includes a set of rules that govern how trading interests interact. Whether or not it is multilateral will depend on whether the other three criteria are also met.
53. ESMA agrees with respondents that a distinction between the software provider and the software operator should be made in the guidance. Understanding who the system operator is, is key to understand whether the system is multilateral or not. ESMA agrees that if it is the investment firm that sets the rules of interaction and merely uses the software provider for example as an outsourcing of the IT capabilities, the software provider would not itself be in scope of the multilateral system definition. It is then key to understand which type of rules the system operator (in this case the investment firm) sets to evaluate whether or not it is a multilateral system.
54. Accordingly, the final opinion better clarifies this point.
55. On the issue of **third-party interaction**, it is important to note that the guidance proposed in the CP did not intend to capture systems that provide pure connectivity services between investment firms and execution venues. ESMA agrees that a system that only displays

third party trading interests which are routed to, and subject to execution under the rules of the relevant trading venue, should not be considered as a multilateral system. Despite displaying multiple third-party interests, a system which does not allow for its users to match, arrange and/or negotiate a transaction (i.e. there is no interaction of trading interests) does not qualify as a multilateral system.

56. In relation to the specific issues of EMS and RFQ systems that have been raised by many respondents, ESMA provides its views in section 5.
57. Furthermore, on the requirement under Article 18(7) of MiFID II raised by many respondents, ESMA considers it important to make a distinction between the multilateral system definition and the requirements applicable to trading venues, being regulated markets, MTFs or OTFs. For a system to be considered multilateral, it does not need to comply with the requirements under, for example, Article 18(7). The latter requirement shall be complied with once a system satisfies the four criteria of the multilateral system definition and applies for authorisation as a trading venue. The same argument is valid for other points raised by participants in relation to the other two limbs of the definition of an MTF (non-discretionary rules and result in a contract).
58. It is when a system is in scope of the multilateral system definition that it subsequently has to comply with these requirements when requesting authorisation as a trading venue (being a regulated market, MTF or OTF). ESMA notes that the aim of the present guidance is to clarify which system are in scope of the multilateral system definition. ESMA may nevertheless consider whether it is appropriate to publish guidance on the requirements for authorisation as a trading venue in the future.
59. In relation to the potential guidance on what is the service of RTO and the respondents' feedback that more guidance may be needed, ESMA will reflect whether further clarifications need to be published in the future.
60. With regards to the concerns presented by some non-financial (corporate) companies, ESMA is of the view that the wording of the exemption under Article 2(1)(d)(ii) is drafted in a very broad way and considers that some clarifications may be required to ensure a harmonised approach and proportionate application across the Union. Requiring the authorisation as an investment firm based, for example, on only a single yearly transaction not meeting anymore the hedging exemption seems disproportionate. As such, ESMA sees merit in clarifying that the hedging exemption should not be applied in such a narrow way.
61. For example, ESMA considers that it would be disproportionate if one trade that crosses from hedging to non-hedging over time would automatically trigger the obligation to request authorisation as an investment firm, or if an erroneous trade that is subsequently corrected would trigger the same obligation.

62. Nevertheless, considering the question under the exemptions on Article 2 concerns the scope of MiFID II ESMA sees merit in providing additional clarification in the coming months. Given that this is an issue of interpretation of the Level 1 text, ESMA will liaise closely with the Commission.
63. On some other points raised by respondents, ESMA notes that this guidance intends to capture secondary markets trading and not primary market activities. In relation to SFTs, ESMA already clarified¹⁷ that an entity operating a system in which multiple third-party buying and selling interests in SFT relating to financial instruments are able to interact, should seek authorisation to operate a trading venue. In addition, where a crypto asset is considered a financial instrument within the meaning of Article 4(15) of MiFID II it would be in scope of the ESMA opinion.
64. Finally, a multilateral system does not have to be one single (IT) system but can be constituted of a combination of systems, rules and/or arrangements, which together meet the four criteria of a multilateral system. It should be noted that it is not the form of the arrangement, or the technology used that determines the need for authorisation, but it is the functioning of the system that is key to assess whether the activity should require authorisation. That is to say that systems which facilitate the interaction of third-party trading interests related to financial instruments should require authorisation as a trading venue, whether it is by using in-house facilities or by employing third-party systems.

5 Trading venue perimeter – specific cases

65. The feedback received to the CP, demonstrated again that the practical application of the EU regulatory framework has not been entirely consistent, and requires further clarification in order to ensure its consistent application.
66. The CP focused on three key specific areas where clarification via the ESMA opinion was considered necessary: technology providers (including communication tools and EMS), RFQ systems and pre-arranged transactions.

5.1 Technology providers

67. As technological innovation thrives in the EU, some concerns have been raised with regards to how innovative solutions are facilitating the communication with, and the access

¹⁷ Please refer to question 9b on multilateral & bilateral systems topic of ESMA's Q&A on market structure. https://www.esma.europa.eu/file/112484/download?token=Mo_twi52

to, various sources of trading interests. The line between simple communication tools and arrangements that might *de facto* constitute multilateral systems, is sometimes blurred.

68. The CP acknowledged that the lack of a homogeneous view of what constitutes a multilateral system in this specific context might trigger issues of regulatory consistency. This could lead to the creation of an unlevel playing field with respect to EU trading venues which have to comply with the MiFID II regime and the large number of regulatory obligations attached to it.
69. Whilst ESMA supports and encourages new business models and innovative solutions, it is important to ensure an adequate level of protection for investors and to maintain the resilience of EU markets.
70. The CP presented examples of some specific types of technology solutions adopted by financial players and considered some specificities which may affect the categorization of such systems as multilateral.
71. As stated in the CP, ESMA reiterates that an assessment of such systems should be done on a case-by-case basis, as its features and complexity vary greatly. Moreover, the supervisory approach should take into account proportionality while ensuring a level playing field between all firms operating in the Union.

5.1.1 Communication tools

5.1.1.1 Background

72. During recent years, a number of technology firms have developed platforms that are self-characterised as communication tools and provide a wide variety of services to market participants (for example market data services and trading inventory, among others)
73. ESMA noted in the CP that the level of complexity and features of these platforms vary considerably and considered important to analyse and examine each case individually to understand whether a platform goes beyond a simple communication and/or information tool and amounts to something more complex which may include operating a multilateral (trading) system. Having this in mind, the CP considered that some characteristics could be identified that help understanding whether a platform should require authorisation as a trading venue.
74. The aforementioned Recital 8 of MiFIR clarifies that facilities where there is no genuine trade execution or arranging should not be required to seek authorisation as a trading venue. Therefore, if a platform simply provides pricing data or other tools used to make trading decisions, this platform should not require authorisation as a trading venue. In order

for the platform to qualify as a multilateral system, there needs to be genuine interaction (for example by including a button, or by providing the ability for users to communicate between themselves) where the intention to enter into a transaction can be confirmed in the system between the users of such platform.

75. In this respect, the CP recalled ESMA's considerations in the Final Report on the functioning of OTFs¹⁸, which provided key characteristics for the qualification as a bulletin board type system. Such characteristics are that:

- a) the system should consist of an interface that only aggregates and broadcasts buying and selling interests in financial instruments;
- b) the system neither allows for the communication or negotiation between advertising parties, including any notification of any potential match between buying and selling interests in the system, nor imposes the mandatory use of tools of affiliated companies; and,
- c) there is no possibility of execution or the bringing together of buying and selling interests in the system.

5.1.1.2 Feedback to the consultation

76. In the CP, ESMA sought to understand whether platforms providing additional services to the simple communication/information tool are common and what their characteristics are.

77. The feedback to the CP highlighted that communication tools are not widely common. Some respondents reported that there are messaging tools that provide enhanced functionality around price discovery and deal negotiation, where the information shared and agreed can result in trade activity. Furthermore, some respondents considered that some messaging tools allow market participants to post or broadcast indications of interest to various dealer groups and respondents cautioned that such interactions may not be transparent to regulators. Finally, respondents also communicated in their response that several communication services also allow trading to take place.

78. Some respondents illustrated that typically, while buying and selling interests interact within these systems, the resulting transactions are executed on another trading venue. Also, these systems are, in accordance with respondents, operated by non-authorised third-party service providers (independent software vendors or ISVs) which facilitate the multilateral matching of orders in a manner very similar to RFQ systems available on authorised MTFs. These systems allow brokers to poll a number of market makers for

¹⁸ https://www.esma.europa.eu/sites/default/files/esma70-156-4225_mifid_ii_final_report_on_functioning_of_otf.pdf

quotes to determine best price. Such system operators offer a comprehensive handling of all elements of pre- and post-trade requirements while categorising themselves as purely a trading connectivity solution providing support for pre- and post-trading services.

5.1.1.3 Conclusion

79. ESMA remains of the view that pure communication tools are outside the scope of the multilateral system definition and as such not required to be authorised as a trading venue. Any communication tool that complies with the characteristics already identified in a number of ESMA's papers, including in the CP and listed in paragraph 75 of this final report, are not required to be authorised as trading venues.

80. In this context, bulletin boards are outside the scope of the multilateral system definition. In Recital 8 of MiFIR, bulletin boards are indeed referred to as "*facilities where there is no genuine trade execution or arranging taking place in the system [...] used for advertising buying and selling interests*" and as such, bulletin boards that merely aggregate and broadcast indications of interest are not multilateral systems.

81. Nevertheless, systems that alongside with advertising trading interests, facilitate the reaction to such trading interests by providing the means to match arrange and/or negotiate a transaction between participants meet the criteria of multilateral systems – in this case trading interests would be interacting in the system. Therefore, operators of such systems that facilitate the interaction, i.e. the ability for participants to react to the trading interests broadcasted with a view to make a transaction should require to be authorised as a trading venue.

82. The provision of a simple connectivity between the bulletin board and an execution venue would not bring the system into scope of the multilateral system definition as long as it does not prescribe any rules for interaction of trading interests nor give its members the means to agree on a transaction within the system.

5.1.2 Order Management Systems and Execution Management Systems

5.1.2.1 Background

83. A significant number of market participants are making use of proprietary, or third-party, systems that support the internal management of orders or their execution. This is the case of Order Management Systems (OMS) and EMS which intend to allow firms to manage their orders more efficiently with benefits in terms of costs, access to markets and latency of execution.

84. ESMA noted in the CP that the level of complexity and sophistication of these systems varies considerably from firm to firm. Additionally, it appears that new types of systems, which integrate the features of OMS and EMS, are becoming more common among financial players.
85. In the CP, ESMA considered that OMSs that are designed to automate the order submission system, to structure the order flow, and work as an inward-looking tool that helps companies to easily follow up the lifecycle of orders are not intended and should not be considered multilateral systems as long as they do not bring together, nor allow for the interaction of, multiple third party buying and selling interest.
86. EMS are more tilted towards managing orders across multiple execution venues, offering traders real time information on market data and analytics.
87. ESMA noted in the CP that EMSs aim at facilitating order execution by offering an overview of liquidity and prices on various venues, subsequently sending orders to the preferred trading venue or trading venues for execution. As such, those EMS which support the execution of orders on trading venues and do not allow for the interaction of multiple third party buying and selling interests should not be considered as multilateral systems and hence would not need to seek an authorisation as a trading venue.
88. ESMA notes however that EMSs may show specific features and different levels of complexity and may function in a similar way to trading systems operated by trading venues and, thus, require an authorisation as a trading venue.
89. ESMA is of the view that clear case-based guidance should be given to these types of EMS/OMS to ensure regulatory clarity and safeguard a level playing field between similar system.

5.1.2.2 Feedback to the consultation

90. In the CP, ESMA sought to hear from market participants whether there are EMS or OMS that, considering their functioning, should be subject to trading venue authorisation. Respondents agreed that OMSs 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 interests. In addition, a majority of respondents agreed that EMSs should not be considered as multilateral systems.
91. Regarding whether respondents were aware of any OMS or EMS that, considering their functioning, should be subject to trading venue authorisation, most respondents were not aware of examples of such systems that “organise execution”.

92. Since EMSs' expertise is solely their ability to provide technological connection and /or aggregate liquidity, respondents were of the view that they should not be considered as an organiser of markets and hence should not be in scope of the multilateral system definition.
93. A number of respondents considered that whilst EMSs often facilitate simultaneous bilateral trades, the trades are still bilateral. The determination of whether an EMS should be assessed as a trading venue should depend on whether the execution is controlled (control in this context means that it can materially change the process of selection of parties, timing) by one of the parties to the bilateral trade or by a third party. If the latter, then the EMS should be assessed as a multilateral system.
94. In addition, a significant number of respondents reiterated the point made in other sections of the consultation that it is fundamental to distinguish between a software vendor and an operator.
95. Some respondents also argued that an EMS is used by investment firms to find the execution venue (trading venue, SI, etc.) that provides best execution for the clients. If such an EMS had to license itself as a multilateral system, the system would lose its functionality.
96. Finally, some respondents did not agree that, simply because an EMS sends the orders for execution over-the-counter (OTC) instead to trading venues, these constructs should be classified as a multilateral system.
97. A few respondents agreed that those EMSs which operate close to the edge (e.g. EMSs with the ability to influence the operation of the system and the routing of orders for investment firms) may be subject to a closer scrutiny, but not necessarily meet the definition of multilateral systems.
98. A few respondents argued there are borderline cases where EMSs are multilateral systems and should be authorised as trading venues. Some of these respondents considered that an 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 be subject to an authorisation requirement. This would allow to level the playing field between EMSs and trading venues that may also operate an RFQ system, since the function and goals of those systems are similar.
99. A respondent was of the view that third-party operated EMS and OMS systems that allow users to interact with trading interests, such as single dealer quotes, should be considered as multilateral systems. This respondent considered that any entity that aggregates or consolidates trading interests from multiple third parties and meets all four key aspects of the definition of multilateral system should be required to seek authorisation as a trading venue.

5.1.2.3 Conclusion

100. In light of the feedback received, ESMA believes it is essential to clarify that the guidance proposed in the CP did not intend to capture systems which provide pure connectivity services between investment firms and execution venues. In general, EMSs employ software or technical tools aimed at facilitating order execution by offering an overview of liquidity and prices on various venues, subsequently sending the orders to the preferred trading venue or trading venues for execution. Therefore, an EMS which purely supports routing orders without a third-party prescribing the rules for this interaction, should not be considered as a multilateral system and would hence not be required to seek authorisation as a trading venue.
101. However, those systems which present additional features and level of complexity that allow for the interaction of multiple third party buying and selling interests in financial instruments, thus combining all four criteria identifying a multilateral system, should be required to seek an authorisation as a trading venue.
102. As such, it is key to understand what the system permits users to do. An EMS which would allow for firms to gather multiple quotes from multiple sources, and where these trading interests can interact with other trading interests (within the system) could be, depending on the specifics, considered a multilateral system. In this context, it is important to consider the role of the entity operating the system, i.e. whether it is the software vendor itself or rather the investment firms. This is particularly relevant in the case where the software vendor has embedded a number of rules that govern the interaction of trading interests in the system and does not allow investment firms to set its own rules: in this case, the software vendor would be operating a multilateral system.
103. It should also be noted that how a system classifies itself is irrelevant to the assessment, whether it is an EMS, RFQ or other. It is rather how the system functions that determines whether it falls within the scope of the definition of a multilateral system.

5.2 Request for quote systems

5.2.1 Background

104. MiFID II acknowledges different types of trading systems, including order book, quote-driven, hybrid, periodic auction, and voice trading systems. It also considers RFQ as a trading system that can be operated by trading venues.

105. Commission Delegated Regulation (EU) No 2017/587¹⁹ (RTS 1) and Commission Delegated Regulation (EU) No 2017/583²⁰ (RTS 2) describe RFQ systems as trading systems “*where a quote or quotes are provided in response to a request for quote submitted by one or more members or participants. The quote is executable exclusively by the requesting member or participant. The requesting member or participant may conclude a transaction by accepting the quote or quotes provided to it on request*”.
106. In the CP ESMA noted that in some cases stakeholders may have diverging interpretations of what constitutes an RFQ and whether RFQs should be considered as multilateral or bilateral. This misalignment of interpretations causes concerns in terms of supervisory convergence and level playing field as systems with similar characteristics may be subject to different authorisation regimes.
107. RFQ systems as described in RTSs 1 and 2 are multilateral systems and require authorisation as a trading venue under MiFID II. Such conclusion stems from the fact that those systems enable the interaction of trading interests from multiple counterparties and are hence in the scope of the definition of a multilateral system in Article 4(19) of MiFID II. The latter conclusion also encompasses systems that provide for an RFQ to one functionality.
108. In addition, the CP described the case of so called single-dealer platforms that allow different clients to interact with only one counterparty, usually a bank, that also operates the system. This case illustrates a system where the operator of the system not only acts as the only counterpart to every trade but also deals on own account. This is characteristic of the operation of an SI which is bilateral in nature and not multilateral.
109. On the contrary, the CP considered a similar system operated by a third-party, which only brings together trading interests but does not trade on own account, even when such system only provides a “single-dealer functionality” or “single liquidity provider”, as a multilateral system. This view is supported by Recital 7²¹ of MiFID II which highlights that

¹⁹ Commission Delegated Regulation (EU) 2017/587 of 14 July 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments with regard to regulatory technical standards on transparency requirements for trading venues and investment firms in respect of shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments and on transaction execution obligations in respect of certain shares on a trading venue or by a systematic internaliser (OJ L 87, 31.3.2017, p. 387–410).

²⁰ Commission Delegated Regulation (EU) 2017/583 of 14 July 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments with regard to regulatory technical standards on transparency requirements for trading venues and investment firms in respect of bonds, structured finance products, emission allowances and derivatives (OJ L 87, 31.3.2017, p. 229).

²¹ Recital 17 of MiFID II “Systematic internalisers should be defined as investment firms which, on an organised, frequent, systematic and substantial basis, deal on own account when executing client orders outside a regulated market, an MTF or an OTF. In order to ensure the objective and effective application of that definition to investment firms, any bilateral trading carried out with clients should be relevant and criteria should be developed for the identification of investment firms required to register as systematic internalisers. **While trading venues are facilities in which multiple third party buying and selling interests interact in the system, a systematic internaliser should not be allowed to bring together third party buying and selling interests in functionally the same way as a trading venue.**” (emphasis added)

SIs cannot bring together third-party buying and selling interests in the same way as a trading venue.

110. The CP considered that the bilateral nature of a system cannot refer only to the parties agreeing on the transaction and disregard the operator of the trading system. The function of the system operator is essential to the facilitation of the transaction and there is no such involvement in bilateral trading. In fact, the clients and the liquidity provider are third parties to the system operator, in as much as they are distinct and independent from it²².

111. If the operator of the system is independent from its members or participants and brings together third-party trading interests (Client A and Bank A, for example), then this should be understood as a multilateral system, which should seek authorisation as a trading venue. Therefore, in a so called ‘single-liquidity provider platform’, where the system operator brings together third-party interests, with only a single counterparty, and does not deal on own account, should be regarded as a multilateral system, and seek authorisation as a trading venue.

5.2.2 Feedback to the consultation

112. On the typical case of an RFQ where multiple members have the possibility to interact with multiple liquidity providers (figure 3 in the CP) all respondents agreed it should be classified as a multilateral system.

113. Respondents also agreed with the proposed guidance on the operation of a system by an investment firm that allows the investment firms’ clients to initiate a request and in which the investment firm acts as the sole counterparty to its clients. This typically illustrates the operation of an SI system (figure 4 of the CP).

114. Concerning the “single liquidity provider platforms” (figure 5 of the CP), the majority of respondents disagreed with ESMA’s stance that a system where there is always one and the same party to every trade should be considered multilateral, even if the system is operated by a third party.

115. Respondents considered that the multilateral system definition does not allow for such interpretation and that interactions in these types of systems should not be considered multilateral simply because the system is operated by a third party.

²² JUDGMENT OF THE COURT (Fourth Chamber) 16 November 2017, Robeco Hollands Bezit NV and Others v Stichting Autoriteit Financiële Markten (AFM), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62015CJ0658&from=FR>

116. Respondents considered that single dealer platforms or systems where there is always one and the same counterparty on either the buy or sell side do not constitute multilateral systems as defined in Article 4(1)(19) of MiFID II.

117. Some respondents considered though that a trading system can be multilateral despite a dedicated single market maker becoming *de facto* the counterparty to the majority of trades. Hence, in their view, the multilateral aspect refers to the possibility of “N-to-N” interaction rather than an obligation.

5.2.3 Conclusion

118. ESMA takes note of the broad support from respondents on the case of RFQ systems and single dealer platforms usually operated by SIs.

119. On the issue of single liquidity provider platforms, ESMA still considers that systems that are **operated** by a third party and allow multiple trading interests to interact, even with only one liquidity provider, may be considered multilateral systems. These types of platforms are different from SIs as it is not the liquidity provider that governs how the trading interests interact, nor it is the liquidity provider who sets the rules of the platform.

120. In this case, it is the third-party operator that sets the rules of the system and defines how the liquidity provider and other participants interact in the system. ESMA is of the opinion that systems in which the operator is independent from the (buy and sell-side) participants on the system, should be considered as multilateral. So called “single liquidity provider platforms” where there is only one dealer becoming the counterparty to all transactions, should be considered multilateral in case the system operator is independent (i.e. the liquidity provider does not have control of the rules set by the third party) from any of the participants.

121. On the contrary, as observed by many respondents, it should be noted that where an investment firm uses a software vendor to provide for IT capabilities, but it keeps control of the rules and parameters of how trading interests interact, such an arrangement would not be in scope of the multilateral system definition. Should the investment firm set the rules that govern its bilateral interaction (the investment firm would be considered the system operator in this case), then this would not be a multilateral system by virtue of the investment firm using a third-party IT provider for the system’s IT functions. The simple use of a third-party system, for example as an outsourcing function of the IT capabilities, would not automatically result in the system meeting the criteria of a multilateral system.

122. The purpose of the guidance is to clarify which systems are in scope of the multilateral system definition. ESMA nevertheless took note of concerns raised by some authorised trading venues and sell side participants that a “single dealer platform” cannot prevent

other liquidity providers from accessing the platform as it would not be in line with MiFID II requirements. In particular, these stakeholders note that Article 18(3) and 53(1) of MiFID II require transparent and non-discriminatory rules governing access based on objective criteria. ESMA considers this relates to the compliance of the requirements to operate a trading venue and not to the perimeter itself. Nevertheless, ESMA takes note of these concerns and will look into these requirements and may provide guidance on these aspects in the future if it deems appropriate.

5.3 Pre-arranged transactions

5.3.1 Background

123. The case of systems that pre-arrange transactions has been subject to different interpretations. In fact, the regulatory requirements attached to this type of activity have not always been clear and may be subject to divergent interpretations within the EU.

124. The CP considered that the activity of pre-arranging transactions in a multilateral way is only possible without authorisation as a trading venue when:

- a) All transactions arranged through the investment firm's system or facility have to be formalised on a trading venue; and,
- b) The transaction benefits from a pre-trade transparency waiver on the trading venue where it will be formalised.

125. ESMA considered that under these circumstances the main objective of MiFID II of ensuring on-venue trading, which provides for increased transparency and investor protection, has been achieved. On the contrary, should the formalisation of the transaction happen OTC, the pre-arranging activity requires authorisation as a trading venue.

126. ESMA considered in the CP that, if the conditions above are met, the system pre-arranging transactions should be considered as an extension of the trading venue where the transaction is ultimately formalised. The CP further considered that the trading venue should ensure, through contractual arrangements, that all relevant MiFID II provisions are complied with, including rules relating to non-discriminatory access and fees.

5.3.2 Feedback to the consultation

127. The majority of respondents agreed that systems pre-arranging transactions which are subsequently formalised on a trading venue, even when arranged in a multilateral way, should not be themselves required to be authorised as a trading venue. However, the

majority of these respondents disagreed there should be a requirement for an executing trading venue to sign contractual arrangements with pre-arranging systems.

128. The concern stems from the fact that trading venues should only be responsible for ensuring legal and regulatory compliance of the process of order entry, execution, and trade formalization on the trading venue under its rules.
129. Respondents considered that it is the pre-arranging firm's responsibility to comply with its regulatory and legal obligations applicable to the pre-arranging of transactions and catering to the exchange/ trading system. Such allocation of responsibilities should not be disrupted by a special mandatory agreement between the trading venue and the pre-arranging firm.
130. One respondent warned that some of these systems that arrange transactions may not be regulated in any form.

5.3.3 Conclusion

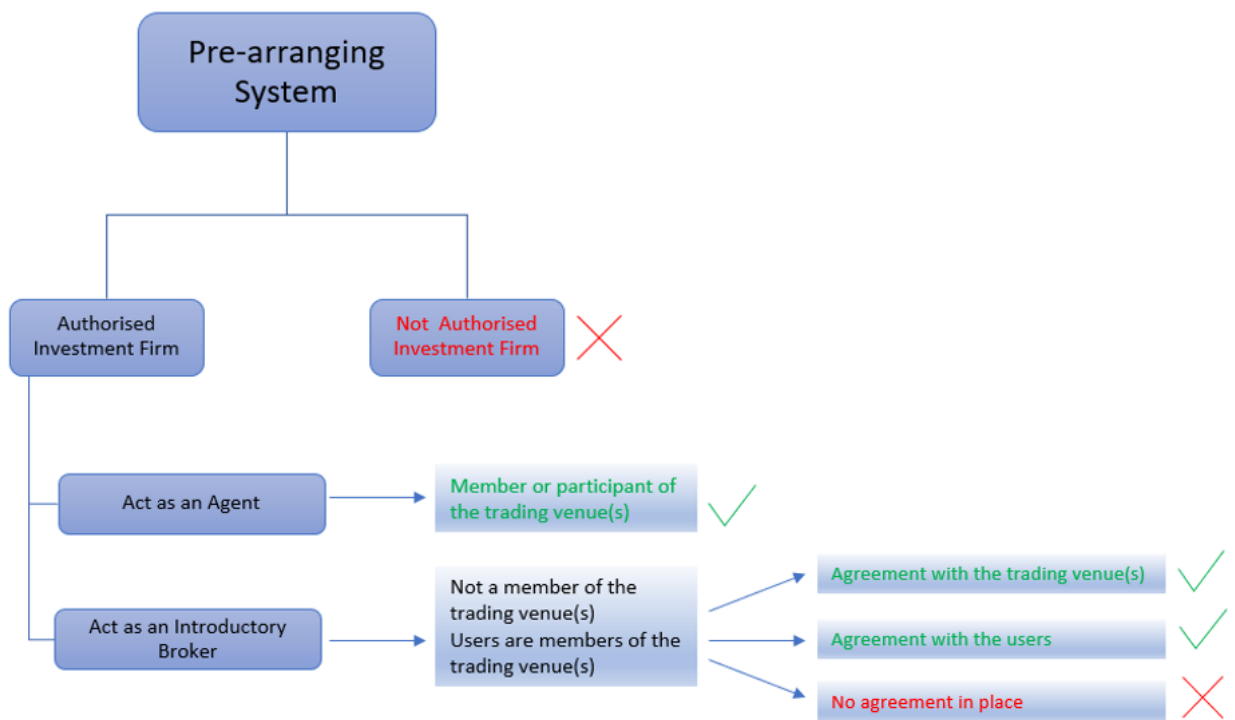
131. MiFID II requires all multilateral systems to be authorised as trading venues. The objective of the co-legislators was to bring more trading activity into the regulated sphere, in particular by increasing the number of transactions on regulated venues to ensure better protection for investors. Article 1(7) of MiFID II in particular states that "*all multilateral systems in financial instruments shall operate either in accordance with the provisions of Title II concerning MTFs or OTFs or the provisions of Title III concerning regulated markets*".
132. Therefore, if a system arranges a transaction in a multilateral way, i.e. by meeting the four criteria of the multilateral system definition, it should require authorisation as a trading venue. Nevertheless, the specific case of transactions that are pre-arranged but subsequently formalised on a trading venue, for example to benefit from the trading venues' post-trade services (e.g. for clearing purposes), or to reduce firms' cost of direct membership should be looked at with particular attention.
133. It is important to recognise that in those circumstances, the ultimate objective of increasing on-venue trading is achieved as the transaction ends up being ultimately executed on a trading venue. Moreover, ESMA already provided guidance²³ under which it recognised that a transaction cannot be concluded on more than one trading venue at the same time.

²³ See for example Question 7 and 10 on ESMA's Q&As on MiFID II and MiFIR market structures topics (multilateral & bilateral systems section) [ESMA70-872942901-38 Q&As on MiFID II and MiFIR market structures topics \(europa.eu\)](https://www.esma.europa.eu/press-material/press-conferences-and-news/esma-q&as-on-mifid-ii-and-mifir-market-structures-topics)

134. ESMA therefore keeps its view that where a transaction is pre-arranged on a multilateral system not authorised as a trading venue, but ultimately formalised on a trading venue, the pre-arranging system does not need to be authorised as a trading venue. Such consideration is contingent of the pre-arranging system meeting the criteria already indicated in the CP, to which respondents agreed, that is that all transactions are formalised on a trading venue and benefit from a pre-trade transparency waiver.
135. ESMA takes note of the concerns raised by some respondents concerning the obligation for pre-arranging systems and trading venues to sign a written agreement. Nevertheless, ESMA remains of the view that an appropriate oversight of these pre-arranging systems must be in place, while recognising the need to provide further clarity on how such oversight could be ensured.
136. Firstly, ESMA considers that any pre-arranging system should be authorised as a MiFID II investment firm as it provides an investment service to clients. In addition, these pre-arranging firms should have an arrangement with the trading venue to ensure an appropriate oversight. The examples below are intended to provide some guidance for stakeholders on how such written agreements may be implemented but should not be seen as an exhaustive reflection of all business models currently being operated by pre-arranged systems.
137. For example, where the pre-arranging firm acts in an agency capacity vis-à-vis the trading venue used for formalising the pre-arranged transactions, the firm will be a member of the trading venue. ESMA considers that the membership agreement itself is an appropriate agreement between the pre-arranging system and the trading venue.
138. Another case could be where the pre-arranging firm is not a member of the trading venue and acts like an introductory broker to two firms, which then formalise the transaction on the trading venue. ESMA is of the view that the pre-arranging firm needs to ensure that this transaction is formalised on the trading venue. Therefore, it should have a written agreement either with the firms themselves that ensures that the pre-arranged trades are formalised on a trading venue, or it could have an agreement directly with the trading venue(s) where the trades are formalised that allows the pre-arranging firm to have the ability to check whether the transactions it arranged are always formalised on a trading venue.
139. ESMA maintains that the onus of ensuring that all transactions are eventually formalised on a trading venue rests with the system that pre-arranges the transaction, including demonstrating compliance to the respective NCA for regulatory and supervisory purposes. Nevertheless, ESMA considers that trading venues need to ensure that all transactions that are formalised on their venue are carried out in accordance with the rules

of the trading venue. The trading venue should hence ensure they establish systems to detect any attempt to circumvent the requirements under MiFID II.

Figure 1: Illustration of examples of permissible and non-permissible pre-arranging structures



6 Annex – Final Opinion

OPINION

On multilateral systems and the trading venue perimeter

1 Legal basis

1. ESMA's competence to deliver an opinion to national competent authorities (NCAs) is based on Article 29(1)(a) of Regulation (EC) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority)²⁴ (ESMA Regulation).
2. Pursuant to Article 29(1)(a) of the ESMA Regulation, ESMA shall provide opinions to NCAs for the purpose of building a common Union supervisory culture and consistent supervisory practices, as well as ensuring uniform procedures and consistent approaches throughout the Union.
3. In accordance with Article 44(1) of the ESMA Regulation the Board of Supervisors has adopted this opinion.

2 Background

4. There are three types of trading venues under Directive 2014/65/EU on markets in financial instruments²⁵ (MiFID II):
 - a) Regulated Markets (RM): “‘regulated market’ means a multilateral system operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments – in the system and in accordance with its non-discretionary rules – in a way that results in a contract, in respect of the financial instruments admitted to trading under its rules and/or systems, and which is authorised and functions regularly and in accordance with Title III of this Directive”.

²⁴ Regulation (EU) 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15. 12.2010, p. 84).

²⁵ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349).

- b) Multilateral Trading Facilities (MTF): “‘multilateral trading facility’ or ‘MTF’ means a multilateral system, operated by an investment firm or a market operator, which brings together multiple third-party buying and selling interests in financial instruments – in the system and in accordance with non-discretionary rules – in a way that results in a contract in accordance with Title II of this Directive”.
 - c) Organised Trading Facilities (OTF): “‘organised trading facility’ or ‘OTF’ means a multilateral system which is not a regulated market or an MTF and in which multiple third-party buying and selling interests in bonds, structured finance products, emission allowances or derivatives are able to interact in the system in a way that results in a contract in accordance with Title II of this Directive”.
5. In addition to establishing OTFs as a new type of trading venue, MiFID II also introduced a definition of multilateral system which is common to all types of trading venues. Article 4(19) of MiFID II defines a 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”*.
 6. Moreover, MiFID II includes in Article 1(7) a requirement that *“all multilateral systems in financial instruments shall operate either in accordance with the provisions of Title II concerning MTFs or OTFs or the provisions of Title III concerning regulated markets”*.
 7. The combination of the changes introduced in MiFID II, notably the obligation under Article 1(7) of MiFID II and the definition of a multilateral system under Article 4(19), has the effect of recognising that any multilateral system must request authorisation as a trading venue. That means that multilateral systems should operate in accordance with the definition of a regulated market, an MTF or an OTF, regardless of the changes necessary to comply with the requirements associated with the operation of a trading venue, in particular those in Title II (for MTFs or OTFs) or Title III (for regulated markets) of MiFID II. In practice, under MiFID II, the key concept for establishing the regulatory perimeter for authorisation as a trading venue is whether a system or facility is considered multilateral. Once it is identified as a multilateral, it would then need to be authorised as a trading venue.
 8. Despite the changes introduced by MiFID II to clarify the regulatory framework, ESMA acknowledges that there is a lack of a homogenous view of what should constitute a multilateral system, and consequently, what types of systems require authorisation as a trading venue. This may lead to regulatory inconsistencies and contribute to an unlevel playing field between entities authorised as trading venues, which are required to comply with the MiFID II regime and the regulatory obligations attached to it, and entities that run similar systems but operate outside the regulatory perimeter.

9. In order to ensure a consistent application of the relevant requirements by market participants across the Union, in particular in those cases where the boundary of trading venue authorisation is blurred and subject to different interpretations, ESMA considers it necessary to provide further clarification. The aim of the opinion is to clarify when certain systems and facilities qualify as multilateral and should seek authorisation as a trading venue.
10. ESMA has considered that such clarification will contribute positively to the consistency of supervisory practices and contribute to consistent approaches throughout the Union, as a result of which, ESMA has decided to issue this opinion to NCAs.

3 Opinion

3.1 Definition of multilateral system

11. For an effective functioning of the MiFID II provisions, there must be clarity as to when a system or facility qualifies as a multilateral system. From the definition in Article 4(19) of MiFID II, four key aspects/criteria should be met, cumulatively, to be considered 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.

System or facility

12. A system in the context of the definition of multilateral systems must be understood as a set of rules that governs how third-party trading interests interact, i.e. the rules must contain elements that concern the matching, arranging and/or negotiation of trading interests. Such rules or features could be contractual arrangements or standard procedures that shape and facilitate the interaction of third-party trading interests. Rules in this context should not be understood to include the technical standard of message construction (e.g. XML) and/or the protocol which governs the technical exchange of messages.
13. A system is technology neutral, hence the type of technology used or whether it is automated or non-automated does not determine whether it is a system. Whilst it is easily identified when embedded in an automated system, it is more difficult to identify non-automated systems, such as voice brokerage.

14. Under MiFID II, the definitional scope of multilateral system should include those non-automated arrangements that achieve a similar outcome as a computerised system, including those where it allows a firm to reach out to other clients to find a potential match when receiving an initial buying or selling interest.
15. Outside the scope of the definition of multilateral system should be general-purpose communication systems.
16. Despite the fact that the notion of system is broad, it should be noted that simply being a system does not mean that the system is multilateral. It is key to understand whether the other elements of the definition of multilateral system are present. In addition, it is also important to consider who operates the system and which types of rules the system operator sets.
17. ESMA considers that if an investment firm sets the rules of interaction and merely uses a software provider, for example as an outsourcing of the IT capability, the software provider itself would not be in scope of the multilateral system definition. It is then key to understand whether the rules set by the system operator (in this case the investment firm) meet the other elements of the definition of multilateral system.

Multiple third-party buying and selling interests

18. The second criteria to identify a multilateral system is whether the system involves multiple third-party buying and selling (trading) interests. The term “third-party” in this context relates to persons other than the system operator, that are brought together in a transaction. The word ‘multiple’ refers to the system allowing various trading interests to interact in the same system or facility.
19. In scope are also systems where two trading interests interact, provided such trading interests are brought together under the rules of a third-party operator. This interpretation is supported by a legal analysis²⁶ of the Court of Justice of the European Union. This analysis refutes the argument that a system is deemed to be bilateral even where there is always the same participant on the one side of a transaction which executes the order from an investor. Considering such system as bilateral would negate the involvement of the system operator which runs the system as an independent operator in respect of the parties entering into the transactions. Therefore, having a single liquidity provider is not sufficient for the system to be considered bilateral. This would not include, for example, the use of a

²⁶ JUDGMENT OF THE COURT (Fourth Chamber) 16 November 2017, Robeco Hollands Bezit NV and Others v Stichting Autoriteit Financiële Markten (AFM), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62015CJ0658&from=FR>

third-party provider as an outsourcing element of a firms' IT capability (as explained in paragraph 17).

20. On the contrary, those systems where the interaction occurs between two counterparties only, with no third-party operator involvement in the interaction, should not be considered multilateral. In general, those bilateral systems operate according to the rules and/or commercial policy set by the dealer (the systematic internaliser (SI)). The SI trades on own account on every transaction in the bilateral system and is required to take on market risk.

Interaction between trading interests

21. To be considered a multilateral system in the MiFID II context, not only the system has to have multiple third-party buying and selling interests, but also those trading interests must be able to interact in the system. ESMA considers that for such interaction to occur, the system must not only allow the display of the different trading interests but also allow users to react to those trading interests, i.e. it should be possible to exchange information concerning those trading interests and match, arrange and/or negotiate essential terms of a transaction (for example instrument, price, quantity) with a view to conclude a transaction in those financial instruments.
22. The definition of multilateral systems does not require the conclusion of a contract as a condition, but simply that trading interests can interact within the system. Hence, the conclusion of a legally binding contract is not a prerequisite for a firm to be required to request authorisation as a trading venue for the system it operates. Systems where trading interests can interact, where there is confirmation (or pre-arranging) of a transaction or where the essential terms have been (or can be) negotiated (for example price, quantity), would still require authorisation as a trading venue, even if some further contractual details are arranged outside of the system as is the case with many derivative contracts. In such instances it cannot be argued that there is no interaction in between trading interests only because the final terms of the contractual agreement are concluded outside of the system or facility.
23. A multilateral system, as clarified by Recital 8 of MiFIR regarding OTFs, "*should not include facilities where there is no genuine trade execution or arranging taking place in the system, such as bulletin boards used for advertising buying and selling interests, other entities aggregating or pooling potential buying or selling interests, (...)*".
24. Hence, interaction requires that the system contains rules concerning the matching, the arranging and/or the negotiations of trading interests. General advertising and/or aggregation of trading interests should not qualify as multilateral systems.

Financial Instruments

25. The final aspect of the multilateral system definition is that interaction of third-party buying and selling trading interests must be in financial instruments within the meaning of Article 4(15)²⁷ of MiFID II, including security financing transaction (SFT)²⁸.
26. As such, only systems allowing third party interaction on those instruments specified in SECTION C of Annex I of MiFID II should be considered as a multilateral system within the scope of MiFID II.

3.2 Trading venue perimeter – specific cases

27. The practical application of the EU regulatory framework in the context of the trading venue perimeter has not been entirely consistent and requires further clarification to ensure its consistent application. This opinion focuses on three key areas in which the dividing line is more difficult to draw: new technology providers, request for quote systems (RFQs) and system that pre-arrange transactions.

3.2.1 Technology Providers

28. As referred to above, Recital 8 of MiFIR clarifies that facilities where there is no genuine trade execution or arranging should not be required to seek authorisation as a trading venue. Therefore, if a platform simply provides pricing data or other information tools used to make trading decisions, this is not sufficient to conclude that such platform should require authorisation as a trading venue. It requires a genuine interaction between the users of such platform for it to be qualified as a multilateral system, for example by including a button where the intention to enter into a transaction can be confirmed.
29. ESMA identified three key characteristics, all of which should be met, for a system not to require authorisation as a trading venue but to be identified rather as a bulletin board type system. Such characteristics are that:
- a) the system should consist of an interface that only aggregates and broadcasts buying and selling interests in financial instruments;
 - b) the system neither allows for the communication or negotiation between advertising parties, including any notification of any potential match between buying and selling interests in the system, nor imposes the mandatory use of tools of affiliated companies; and,

²⁷ 'financial instrument' means those instruments specified in Section C of Annex I.

²⁸ As clarified by question 9b of ESMA Q&As on market structure, multilateral and bilateral system section ([ESMA70-872942901-38 Q&As on Markets Structures issues \(europa.eu\)](https://www.esma.europa.eu/press-material/press-conferences-and-events/question-and-answer-sessions))

- c) there is no possibility of execution or the bringing together of buying and selling interests in the system.

30. It should also be noted that it is not the form of the arrangement, nor the technology used that determines the need for authorisation. Rather it is the functioning of the arrangement that is key to assess whether the activity should require authorisation. That is to say that systems which facilitate the interaction of third-party trading interests related to financial instruments are multilateral systems and should require authorisation as a trading venue, whether it is by using in-house facilities or by employing third-party systems.
31. In addition to communication tools, ESMA noted that some so-called Execution Management Systems (EMS) have been subject to debate. In general, these systems employ software or technical tools aimed at facilitating order execution by offering an overview of liquidity and prices on various venues, subsequently sending the orders to the preferred trading venue or trading venues for execution. Therefore, EMS which purely allow its users to support their own order managing processes should not be considered multilateral systems.
32. However, irrespective of their “EMS” label, those systems which present additional features and a level of complexity that allow for the interaction of multiple third party buying and selling interests in financial instruments, thus combining all four criteria identifying a multilateral system, should be required to seek an authorisation as a trading venue.
33. For example, an EMS which would allow for firms to gather quotes from multiple players, allowing these trading interests to interact within the system with other clients’ orders could be, depending on the specifics, a multilateral system and subject to the authorisation as a trading venue.
34. As such, it is key to understand what the system permits users to do. An EMS which would allow for firms to gather multiple quotes from multiple sources, and where these trading interests can interact with other trading interests (within the system) could be, depending on the specifics, considered a multilateral system. In this context, it is important to consider the role of the entity operating the system, i.e. whether it is the software vendor itself or rather the investment firm. This is particularly relevant in the case where the software vendor has embedded a number of rules that govern the interaction of trading interests in the system and does not allow investment firms to set its own rules: in this case, the software vendor would be operating a multilateral system.
35. It should also be noted that how a system classifies itself is irrelevant to the assessment, whether it is an EMS, RFQ or other. It is rather how the system functions that determines whether it falls within the scope of the definition of a multilateral system.

3.2.2 Request-for-quote systems

36. MiFID II acknowledges different types of trading systems, including order book, quote-driven, hybrid, periodic auction, and voice trading systems. It also considers request-for-quote (RFQ) as a trading system that can be operated by trading venues.
37. RTS 1 and 2 describe RFQ systems as trading systems “*where a quote or quotes are provided in response to a request for quote submitted by one or more members or participants. The quote is executable exclusively by the requesting member or participant. The requesting member or participant may conclude a transaction by accepting the quote or quotes provided to it on request*”.
38. ESMA noted that in some cases stakeholders may have diverging interpretations of what constitutes an RFQ and whether RFQs should be considered as multilateral or bilateral. This causes concerns in terms of supervisory convergence and level playing field as systems with similar characteristics may be subject to different authorisation regimes. It is therefore important to clarify the different types of systems arrangements, which are diverse in terms of their operation, but are all referred to as RFQs.
39. RFQ systems as described in RTS 1 and 2, are defined as systems where quotes are provided in response to a request submitted by one firm. This is the case of systems that allow for the interaction of multiple members or participants (Client A, Client B) with multiple liquidity providers (Dealer A, Dealer B, ... Dealer n). Each Client has the possibility of interacting with multiple Dealers who will act as counterparties to deal in a specific financial instrument. The Client may request a quote to N Dealers and the responses are sent individually to the Client. The responses are referring to one single request on which the client requested quotes in a multilateral way. ESMA deems such systems as multilateral in nature and hence requiring authorisation as a trading venue.
40. ESMA also notes that where a system allows (or requires) the client to request a quote from only one dealer (a so called RFQ-to-one) the system would still be considered as multilateral (hence encompassed by the definition in RTS 1 and 2), regardless of whether it is by design or choice from the client. These types of systems allow for the interaction of third-party trading interests to the degree that they allow clients to send requests to multiple dealers (either at the same time or separately), even if only using an RFQ-to-one functionality. Therefore, they are considered multilateral systems.
41. A different case for consideration is the type of trading system that not only offers an exclusive RFQ-to-one functionality as described above but, in addition, only provides for a single liquidity provider. Here a clear distinction should be made considering who operates the system and in what capacity the liquidity provider trades.

42. For example, the case of a single-dealer platform that allows different clients to interact with only one counterparty, usually a bank, that also operates the system and deals on own account, illustrates the typical case of a bilateral system. In such instance, the operator of the system also acts as the only counterparty and deals on own account in its system which is typically the case of a single-dealer system operated by a systematic internaliser (SI). Hence such systems should be neither considered as multilateral in nature, nor as encompassed by the definition of RFQ systems in RTS 1 and 2. In this case, the investment firm is the operator of the system as it is the investment firm who sets the rules that govern how the trading interests may interact within the system. Where an investment firm uses a software vendor, for example as an outsourcing functions of the investment firms' IT capabilities, such arrangement would not be in scope of the multilateral system definition, provided the investment firms keeps control of the rules and parameters of how trading interests interact (i.e. it is the investment firm who operates the system).
43. The key characteristic of SIs is to deal in a bilateral manner and operate on own account. Therefore, in order to be considered as bilateral, a single-dealer system must not bring together third-party interests (there is no interaction possible between the initiator of the request with anyone other than the bank) and its operator must deal on own account.
44. On the contrary, where a similar system (i.e. with a single liquidity provider) is operated by a third-party, who sets the rules of how trading interests interact and brings together trading interests without trading on own account, it cannot be considered as bilateral. This view is supported by Recital 17²⁹ of MiFID II which highlights that SIs cannot bring together third-party buying and selling interests in the same way as a trading venue.
45. Furthermore, the bilateral nature of a system cannot refer only to the parties that agree on the transaction and disregard the operator of the trading system. The role of the system operator in this case, which sets the rules of how the trading interests interact and is independent in respect of the transactions, cannot be ignored – there is no such involvement in bilateral trading. Such a system should be considered multilateral.

3.2.3 Systems that pre-arrange transactions

46. MiFID II requires all multilateral systems to be authorised as trading venues. The objective of co-legislators was to bring more trading activity into the regulated sphere, in particular

²⁹ Recital 17 of MiFID II “Systematic internalisers should be defined as investment firms which, on an organised, frequent, systematic and substantial basis, deal on own account when executing client orders outside a regulated market, an MTF or an OTF. In order to ensure the objective and effective application of that definition to investment firms, any bilateral trading carried out with clients should be relevant and criteria should be developed for the identification of investment firms required to register as systematic internalisers. **While trading venues are facilities in which multiple third party buying and selling interests interact in the system, a systematic internaliser should not be allowed to bring together third party buying and selling interests in functionally the same way as a trading venue.**” (emphasis added)

by increasing the number of transactions on regulated venues to ensure better protection for investors.

47. Therefore, if a system arranges a transaction in a multilateral way, i.e. by meeting the four criteria of the multilateral system definition, it should require authorisation as a trading venue. Nevertheless, the specific case of transactions that are pre-arranged but subsequently formalised on a trading venue, for example for clearing purposes, should be looked at with particular attention and should be analysed in line with already published guidance from ESMA.
48. In particular, where an investment firm arranges a transaction between two parties and the parties formalise the transaction on a trading venue, the transaction would be considered to take place under the rules of the trading venue which formalises the transaction because a transaction cannot be concluded under the rules of more than one venue³⁰.
49. Moreover, MiFIR provides for the possibility to formalise negotiated transactions in equity instruments on trading venues subject to a waiver under Article 4(1)(b). Despite MiFIR not having specific provisions for negotiated or pre-arranged transactions for non-equity instruments, ESMA considers it nevertheless possible to formalise negotiated or pre-arranged transactions on a trading venue subject to meeting the conditions for the respective waivers from pre-trade transparency set out in Article 9(1) of MiFIR³¹.
50. ESMA reiterates that the execution of transactions being concluded outside of the system cannot be used to demonstrate that the system is not multilateral. However, ESMA considers that systems that pre-arrange transactions which are negotiated on a multilateral basis should be considered as an extension of the trading venue where the transaction is ultimately formalised. That is to say that the pre-arranging system itself does not require authorisation as a trading venue as it delegates the process of formalisation of the transaction to an authorised trading venue. As the pre-arranging system cannot comply with pre-trade transparency, the transaction also needs to be formalised on the trading venue under a pre-trade transparency waiver.
51. Therefore, ESMA is of the view that the activity of pre-arranging transaction on a multilateral way is only possible without authorisation as a trading venue when:
- a) All transactions arranged through the investment firm's system or facility have to be formalised on a trading venue; and,

³⁰ Question 7 General Section, multilateral and bilateral systems, and Question 10, organised trading facilities (OTF), on multilateral and bilateral systems topics, [esma70-872942901-38 qas markets structures issues.pdf \(europa.eu\)](https://esma.europa.eu/press-material/press-conferences-and-news/esma-70-872942901-38-qas-markets-structures-issues)

³¹ Question 11, pre-trade transparency waivers, [esma70-872942901-35 qas transparency issues.pdf \(europa.eu\)](https://esma.europa.eu/press-material/press-conferences-and-news/esma-70-872942901-35-qas-transparency-issues)

b) The transaction benefits from a pre-trade transparency waiver in the trading venue where it will be formalised.

52. ESMA considers that under these circumstances the main objective of MiFID II of ensuring on-venue trading, which provides for increased transparency and investor protection, has been achieved. Nevertheless, there must be an appropriate oversight of this pre-arranging system and therefore, an agreement of some sort between the pre-arranging system and the trading venue should be in place. On the contrary, should the formalisation of the transaction happen OTC, the pre-arranging activity requires authorisation as a trading venue. Furthermore, where a pre-arranging system is capable of formalising transactions, including where this occurs only for few cases, it should still require authorisation as a trading venue.
53. ESMA considers that any pre-arranging system should be authorised as a MiFID II investment firm as it provides an investment service to clients. In addition, these pre-arranging firms should have an arrangement with the trading venue to ensure appropriate oversight and compliance with the rules for trading venues. The examples below are intended to provide guidance for stakeholders on how such written agreements may be implemented but should not be seen as an exhaustive reflection of all business models currently being operated by pre-arranged systems.
54. For example, where the pre-arranging firm acts in an agency capacity vis a vis the trading venue used for formalising the pre-arranged transactions, the firm will be member of the trading venue. ESMA considers that the membership agreement itself is an appropriate agreement. between the pre-arranging system and the trading venue.
55. Another case could be where the pre-arranging firm is not a member of the trading venue and acts like an introductory broker to two firms, which then formalise the transaction on the trading venue. ESMA is of the view that the pre-arranging firm needs to ensure that this transaction is formalised on the trading venue. Therefore, it should have a written agreement either with the firms themselves that ensures that the pre-arranged trades are formalised on a trading venue, or it could have an agreement directly with the trading venue(s) where the trades are formalised that allows the pre-arranging firm to have the ability to check whether the transactions it arranged are always formalised on a trading venue.
56. Finally, it should be stressed that the onus of ensuring that all transactions are eventually formalised on a trading venue sits with the system that pre-arranges the transaction, including demonstrating compliance to the respective NCA for regulatory and supervisory purposes. Nevertheless, ESMA considers that trading venues need to ensure that all transactions that are formalised on their venue are carried out in accordance with the rules

of the trading venue. The trading venue should hence ensure they establish systems to detect any attempt to circumvent the requirements under MiFID II.

4 Conclusion

57. This opinion provides guidance on general principles as well as specific cases to be considered by NCAs when assessing whether a firm/entity is operating a multilateral system and should in consequence be authorised as a trading venue by NCAs. Nevertheless, such judgement will always require a case-by-case assessment. ESMA expects that, considering the guidance provided in this opinion, NCAs should assess whether any firm operating within their jurisdiction is operating outside of their regulatory perimeter.
58. ESMA expects that NCAs require firms to assess their systems against this opinion and reflect whether they are operating under the appropriate authorisation capacity. ESMA expects NCAs to require firms to take appropriate action, including further discussions with the respective NCAs, in order to swiftly apply for authorisation as a trading venue where appropriate.