

## ISDA response to ESMA's consultation paper on ESMA's Opinion on the trading venue perimeter

### General remarks:

ISDA welcomes the opportunity to respond to ESMA's consultation paper on its Opinion on the trading venue perimeter.

As a general remark, we agree with ESMA's conclusion that changes to the Level 1 definition of 'multilateral systems' are not required. Whilst ISDA members acknowledge cases (such as the Symphony/SEF example) where it is unclear whether a certain tool should be considered a venue, we believe that the market has benefited from the solutions effected through innovation by technology providers, such as aggregators, distributors of data, connectivity utilities and various other service providers in recent years. We therefore welcome ESMA's wish to both maintain a level playing field between MiFIR trading venues and very similar, but unauthorised venues, *and* to continue to support innovation by technology providers.

In this respect, we consider that the key factor that should be taken into consideration in the definition of multilateral systems is whether the system enables multiple buying and selling interests<sup>1</sup> to interact in the system. Key concepts where we would welcome further guidance include:

- **Bilateral vs multilateral systems:** If the system only allows for multiple *bilateral* interactions, or the system does not govern the interaction of buying and selling interests, it should not be deemed a multilateral system. Therefore, only operators who aggregate buying and selling orders and enable the execution of the transaction through their system should be deemed to be multilateral systems, and should therefore be required to acquire trading venue authorisation. We have discussed this further below in our response to Question 1.
- **Definition of system:** We also believe that an accurate definition of system must be provided, in order to help differentiate multilateral systems from electronic communication platforms. Any definition of system should be technology neutral.
- **Guidance on when interests interact in the system / when a system "brings together" interests:** We consider that it would also be helpful to have further guidance on when a system enables buying and selling interests to interact, or when a system would "bring together" buying and selling interests.

### **3.1 Multilateral systems**

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

ISDA does not fully agree with ESMA's interpretation of multilateral systems. It is in particular important that the technology-neutrality principle is maintained in ESMA's interpretation. However, there are some key areas where we consider that further guidance would be helpful.

#### **Bilateral vs multilateral**

We believe that the final ESMA opinion should further differentiate between systems based on multiple third-party trading interests, which should be deemed multilateral, and systems which only allow for multiple *bilateral* interactions. We think the latter should not be deemed a multilateral system as it only streamlines bilateral trading practices. If this distinction is not taken into account, we are concerned that various communication tools that market participants benefit from would require authorisation under MiFIR. These communication tools are effectively innovative solutions replacing less sophisticated ways of communicating such as phone calls or e-mails.

A bilateral system would be one where a single person (or one of a number of persons in the same group) enters into one side of every transaction effected using the system. However, this would not cover systems that qualify as central counterparties, where the participants deal among themselves and then their deals are assumed by the central counterparty as buyer and seller.

#### **Guidance on what constitutes a "system"**

In order to further distinguish multilateral systems from communication tools, we would also welcome further guidance on the definition of "system".

As highlighted by the Advocate General of the CJEU in his Opinion on *Robeco and others vs AFM* case (paragraph 88), "mere information channels for the transmission of orders" must be appropriately differentiated from "systems in which financial instruments ... are traded and its activity is carried out in accordance with the rules established by the system operator (Euronext) in a trading manual."<sup>2</sup>

We believe that a system must be understood as a common set of rules to negotiate and conclude transactions on financial instruments, provided by the market operator, to which all the participants in the system have to adhere without negotiation. On the other hand, if the terms of transactions in financial instruments are bilaterally agreed between the users of an electronic platform<sup>3</sup>, the platform would not be an electronic trading system but an electronic communication tool.<sup>4</sup> For instance, multiple parties may conclude transactions through the phone line in bilateral voice conversations, but the phone line would not qualify as a trading system as the phone company does not provide a trading system but a communication

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<sup>2</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62015CC0658&from=EN>

channel. The same criteria should apply to the electronic communication channels as MIFID is technology neutral.

### **Meaning of "interaction" or "bringing together"**

We would also welcome confirmation that a system will only qualify as a multilateral system (or as a trading venue) if buying and selling interests interact in the system, or are brought together by the system. We understand this to mean that buying and selling interests would be brought together under the system's rules or by means of the system's protocols or internal operating procedures, in a way that results in the interests interacting (e.g., by automatic matching, by way of selection of interests by users or otherwise). A system that merely brings users together and allows them to communicate, and has no facility for interaction of interests in accordance with the rules of the system, would not enable interests to interact or bring together interests.

It must be noted that the EFS System that was scrutinised in the *Robeco and others vs AFM* judgment is governed by a common set of rules imposed by Euronext (that is a licensed market operator) by means of two public documents, the 'EFS Trading Manual' and 'TCS-web user Guide to the EFS' (together the "**Trading Manual**"), to which the members have to adhere. The trading manual establishes a system that rules how the transactions on financial instruments must be concluded amongst multiple parties.

According to the judgment of the CJUE the involvement of *Euronext as "market operator, providing trading security, transparency and better protection for investors"*, shows "*that EFS is a multilateral system which is intended to promote interaction of the buying and selling interests of multiple third parties*".

However, this is not generally the case in most of the electronic communication platforms available in the market, in which software developers simply sell an electronic communication tool to the entities, but these developers do not participate or operate the trading and do not set forth the trading rules.

It should be noted that if communications platforms would require trading venue authorisation and market participants would need to establish MiFIR compliant trading venue connectivity, the costs for transactions would increase and disincentivise firms to make use of innovative communication solutions.

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

Besides the need to address the above-mentioned concerns in the final opinion, we think that the definition of multilateral systems is generally sound and does not require additional high-level criteria.

#### **4.1.1 Communication tools**

### **Q3: In your experience, is there any communication tool service that goes beyond providing information and allows trading to take place? If so, please describe the systems' characteristics.**

ISDA agrees with ESMA's statement in Paragraph 41 that assessments on a case-by-case basis are required, given the great variety and complexity of some systems. However, in line

with level playing field objectives, such an assessment should be done at the Union level to prevent regulatory arbitrage within the EU (or any assessment undertaken by national competent authorities should be reviewed at Union level, in the same way that waivers from pre-trade transparency granted by national competent authorities are reviewed by ESMA).

In general, communication tools as a facilitator of bilateral trading should not be deemed multilateral. It is also important to note that the United States and jurisdictions in Asia do not consider communication tools as venues. Adjusting the trading venue perimeter through guidance to capture communication tools as venues could stifle innovation, and place such technology providers at a competitive disadvantage by comparison with their peers from other jurisdictions.

#### **4.1.2 Order Management Systems and Execution Management Systems**

**Q4: Are you aware of any EMS and OMS that, considering their functioning, should be subject to trading venue authorisation? If yes, please provide a description**

No, ISDA is not aware of EMS or OMS that should require trading venue authorisation. ISDA agrees that 'EMS operated by the investment firm' should not be required to be authorised as trading venues as they do not fulfil the criterion of interaction of multiple third party buying and selling interest. Whilst there might be 'borderline' cases for EMS regarding the multilateral systems definition, we agree that OMS should never be considered multilateral.

We therefore strongly disagree with ESMA's suggestion that Figure 2 should be considered multilateral. As stated in question 1 above, ESMA opinion should further differentiate between systems based on multiple third-party trading interests, which should be deemed multilateral, and systems which only allow for multiple *bilateral* interactions. We think the latter should not be deemed a multilateral system as it only streamlines bilateral trading practices.

#### **4.2 Request for quote systems**

**Q5: Do you agree that Figure 4 as described illustrates the operation of a bilateral system operated by an investment firm that should not require authorisation as a trading venue?**

Yes. Whilst ISDA acknowledges the legal implications of *Robeco and others vs AFM*, we do not believe that either 'in-house' single dealer systems or 'outsourced' single dealer systems fulfil the requirement of bringing together multiple trading interests. As such there should not be any difference in their treatment with respect to the requirement (or otherwise) to acquire trading venue authorisation. In some instances, banks might have legitimate reasons to outsource such services to specialised providers which are able to operationalise bank RFQ systems more efficiently. Applying such a distinction could effectuate an uneven playing field in favour of larger, better resourced market participants.

Lastly, ISDA agrees that the system described in Figure three constitutes a multilateral system and should require authorisation under MiFIR.

**Q6: Do you agree that a ‘single-dealer’ system operator by a third party, as described in Figure 5, should be considered as a multilateral system? If not, please explain.**

As mentioned in our response to Q5, we do not consider that a "single dealer" system operated either by the dealer or by a third party should be considered as a multilateral system. We do not see a meaningful difference between ‘in-house’ and ‘outsourced’ single dealer systems and believe that neither type of system should be required to seek MiFID trading venue authorisation.

The features to distinguish a multilateral system and a single dealer system must be objective and technology neutral such as the system’s functioning and characteristics (rather than subjective factors such as whether the software is provided by third parties).

We do not support the idea that two trading systems with exactly the same functionality and characteristics may be bilateral or multilateral depending on subjective factors, such as whether the technology used is developed by a user entity or by a third party that only provides the technology for an electronic communication channel.

If the platform is based on a software developed by a third party, but the developer does not provide a common set of rules (I.E a trading system) to conclude transactions and it does not arrange the trading or intervene in any decision that affects the execution of the transactions, such developer would not be operating a market and accordingly this electronic communication tool wouldn't qualify as a multilateral system.

Operating the platform must be appropriately differentiated from the simple provision of a software or any other technology, as MIFID should be technology neutral.

#### **4.3. Pre-arranged transactions**

**Q7: Do you agree that systems pre-arranging transactions that are formalised on a trading venue, even when arranged in a multilateral way, should not be required to be authorised as trading venues? Do you agree with the justification for such approach?**

ISDA agrees with ESMA that systems which are pre-arranging transactions that are formalised on a trading venue should not require Trading Venue authorisation.

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

If such pre-arranged system were to follow the other defined criteria of a multi-lateral system, it will then need to register as a trading venue. In general, we do not see the need for any other conditions.

**Q9: Are there in your views any circumstances where it would not be possible for an executing trading venue to sign contractual arrangements with the pre-arranging platforms? If yes, please elaborate**

ISDA is not aware of any arrangement where an executing trading venue has signed a contractual arrangement with the pre-arranging platform.



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