– Consultation Response –

# Europex response to ESMA's Opinion on the trading venue perimeter

Brussels, 29 April 2022

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

We do not agree with the view that a system where on one side of any trade (buy side or sell side) there is always the same party should be considered multilateral simply because the system is operated by a third party (draft ESMA opinion no. 24).

Therefore, for example, the system for auctions in French Guarantees of Origin ("French GOs"), which EEX AG is appointed to conduct on behalf of the French state ("French GO Auctions"), is no multilateral system, because the seller is always the French state: per Article L. 314-14-1 of the French Energy Code, only the French Ministry of Energy represented by the Direction Générale de l'Energie et du Climat (French Energy and Climate Authority – "DGEC") can be the seller of French GOs in the French GO Auctions. All other participants in French GO Auctions may only assume the role of a buyer. The fact that the system is operated by a third party, i.e. EEX AG, who has been entrusted with the operation of the platform by the French state, does not change the character of the auction system from non-multilateral to multilateral.

Considering systems as "multilateral" where on one side of the trade there is always the same party would not be in line with the wording of the definition of "multilateral system". Article 4 (19) of MiFID II defines '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"*.

According to this wording, for a system to be considered multilateral it has to provide for "multiple third-party buying and selling trading interests", meaning there have to be multiple potential contractual partners on the buy side and on the sell side (see also: WM 2002, 1325 (D.IV.2.)). "Multiple" applies to both the "buying" and "selling" trading interests. This follows from the fact that both kinds of interests are linked by the word "and" (instead of "or" or "and/or"). Additionally, if "multiple" was referring to "buying and selling interests" as a whole (i.e. the sum of both), this would not provide any distinction from bilateral trading, because then also any bilateral trading would involve "multiple buying and selling interests" (one buying interest + one selling interest).

Therefore, a system wherein on one side (buy side or sell side) of any trade concluded is always the same party may not be considered multilateral. Such system would not be covered by the wording of the definition of "multilateral system".

Furthermore, the trading platform operator does not have any buying or selling interest and the fact that a third party is operating the system can therefore not turn a bilateral system into a multilateral one. The only role of the platform operator is to provide and operate the platform. Even if the platform operator may have a general business interest in that it earns money from the operation of the platform, such business interest is not sufficient to be considered as an interest under the clear wording of Art. 4 (19) MiFID II, which expressly requires "buying and selling trading interests". The operator of the platform clearly has no buying or selling interest, because he is neither buying nor selling anything on the trading platform. Furthermore, the wording of Article 4 (19) MiFID II requires "interaction" between the buying and selling interests. The business interest of the platform operator in any case does not interact with any buying or selling interest, because the platform operator as such is never counterparty to any trade concluded on the platform. Finally, Art. 4 (19) MiFID II requests interaction of buying and selling interests "in the system". The business interest of the platform operator, however, is outside the system.

But also according to the purpose of the provisions on multilateral systems the business interest of the operator of the platform should not be considered when counting the multiple buying or selling interests. For the trading process, for competition and price formation it does not make any difference whether (i) there is always the same party on one side of the trade and this person at the same time operates the trading platform, or (ii) there is always the same party on one side of the trade, but the platform is operated by a third party. The platform operator does not add further competition, because he does not add any orders and does not participate in the trading.

Therefore, ESMA in fact is right when stating in no. 23 of the consultation that the term "third party" in the definition of "multilateral system" relates to persons other than the system operator. However, this means in consequence and contrary to ESMA's statement in no. 24 that the operation of the platform by a person different from buyer and seller cannot turn a bilateral system into a multilateral one. The view that a system, where on one side of the trade there is always the same party, is not multilateral is also not contrary to the decision of the CJEU (Case C-658/15 of 16 November 2017) cited by ESMA in no. 24. First of all, this decision refers to the legal situation prior to implementation of the definition of "multilateral system" in Art. 4 (19) MiFID II and therefore cannot be used to interpret this newer definition. Additionally, in the system that was subject to the decision there were multiple persons acting on both sides (buy side and sell side). Therefore, in any event, the court has not decided a case where on one side of the system there was only one trading interest (see for example no. 34 - 36).

**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.**

Please refer to our response to Question 1.

We disagree with the view that a "single-dealer" system operated by a third party, as described in Figure 5, should be considered as a multilateral system.

The trading platform operator does not have any buying or selling interest and the fact that a third party is operating the system can therefore not turn a bilateral system into a multilateral one. The only role of the platform operator is to provide and operate the platform. Even if the platform operator may have a general business interest in that it earns money from the operation of the platform, such business interest is not sufficient to be considered as an interest under the clear wording of Art. 4 (19) MiFID II, which expressly requires "buying and selling trading interests". The operator of the platform clearly has no buying or selling interest, because he is neither buying nor selling anything on the trading platform. Furthermore, the wording of Article 4 (19) MiFID II requires "interaction" between the buying and selling interests. The business interest of the platform operator in any case does not interact with any buying or selling interest, because the platform operator as such is never counterparty to any trade concluded on the platform. Finally, Art. 4 (19) MiFID II requests interaction of buying and selling interests "in the system". The business interest of the platform operator, however, is outside the system.

But also, according to the purpose of the provisions on multilateral systems the business interest of the operator of the platform should not be considered when counting the multiple buying or selling interests. For the trading process, for competition and price formation it does not make any difference whether (i) there is always the same party on one side of the trade and this person at the same time operates the trading platform, or (ii) there is always the same party on one side of the trade, but the platform is operated by a third party. The platform operator does not add further competition, because he does not add any orders and does not participate in the trading.

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The view that a system, where on one side of the trade there is always the same party, is not multilateral is also not contrary to the decision of the CJEU (Case C-658/15 of 16 November 2017) cited by ESMA in no. 24. First of all, this decision refers to the legal situation prior to implementation of the definition of "multilateral system" in Art. 4 (19) MiFID II and therefore cannot be used to interpret this newer definition. Additionally, in the system that was subject to the decision there were multiple persons acting on both sides (buy side and sell side). Therefore, in any event, the court has not decided a case where on one side of the system there was only one trading interest (see for example no. 34 - 36).

**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?**

We do not agree with the opinion expressed in **no. 80** of the consultation that the mere arranging of buy and sell interests or negotiation of essential terms without trade conclusion

is sufficient 'interaction' within the meaning of the definition of 'multilateral system' in Art. 4 (1) (19) MiFID II. 'Interaction' should require trade conclusion. Otherwise, a (pre-) arranging firm may require a trading venue license (because it (pre-) arranges trades in a multilateral way and is therefore deemed to operate a 'multilateral system') but may not get such license because for all kinds of markets (regulated market, MTF and OTF) MiFID II requests trade conclusion in the system (see Art. 4 (1) (21-23) MiFID II).

Subsequent trade conclusion on a trading venue cannot be considered a trade conclusion in the 'system' of the pre- arranging firm.

The opinion expressed in no. 80 of the consultation also seems to be based on the assumption that the pre-arranging firm outsources the trade conclusion to the trading venue. This is not the case because the pre-arranging firm is at no point in time mandated to execute the respective trades and therefore cannot outsource this task (which it never had). Trade execution is exclusively and originally the task of the trading venue.

Neither does the trading venue on which a trade is concluded outsource the arranging of the transaction to the pre-arranging firm. Pre-arranging outside of the trading venue is not necessary for or part of the trade conclusion. Trades are concluded in accordance with the rules of the trading venue which do not require any pre-arranging. As the trading venue therefore does not have to pre-arrange any trade, it does not need to outsource this task (which it does not have) to the pre-arranging firm. The spheres of the pre-arranging system and the trading venue are completely separate.

The trading venue is therefore not responsible for the process of pre-arranging and for the pre-arranging firm fulfilling all regulatory and legal requirements. We deem it rather to be the sole responsibility of the pre-arranging firm to comply with its regulatory and legal obligations applicable to the pre-arranging of transactions while it is the sole responsibility of the trading venue to ensure legal and regulatory compliance once the process of registration on the trading venue under its rules has started. Such allocation of responsibilities should not be disrupted by a special mandatory agreement between the trading venue and the pre-arranging firm. In addition, for MiFID II provisions that do not relate to a particular trade, but to trading as a whole (like provisions on non-discriminatory access), it would remain unclear which trading venue (and to what extent) would have to ensure compliance, if the pre-arranging firm formalises all trades on a trading venue, but not always on the same one. Imposition of such contractual arrangements may also further impair transparency requirements, while unnecessarily complicating the legal relations between trading venues, entities prearranging transactions and trading members.

## About

Europex is a not-for-profit association of European energy exchanges with 30 members. It represents the interests of exchange-based wholesale electricity, gas and environmental markets, focuses on developments of the European regulatory framework for wholesale energy trading and provides a discussion platform at European level.

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