

Regulator should not jeopardise platform use by non-financial companies

OTC-platforms streamline bilateral execution and
should not be defined as multilateral trading

Introduction

Deutsches Aktieninstitut represents the entire German economy interested in the capital markets. The about 200 members of Deutsches Aktieninstitut are listed corporations, banks, stock exchanges, investors and other important market participants. Deutsches Aktieninstitut keeps offices in Frankfurt, Brussels and in Berlin. We followed the legislation process regarding MiFID II/MiFIR very closely, expressing the view of non-financial companies using derivatives in their risk management.

We consider it as very important that the regulator does not jeopardise the benefits of platforms used by non-financial companies for derivatives to hedge their operative risks. Platforms, so far classified as OTC, should not be redefined as multilateral trading venues. This would contradict the legislator's goal of increasing transparency on the derivatives markets and deprive companies of an important digitalisation tool.

Answers to selected questions

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

Non-financial companies use platforms like 360T in order to agree with banks on the details of a derivative contract bilaterally. Mainly, these derivatives are part of the risk management of risks stemming from currency, interest rate or commodity price fluctuations.

The platforms are organised as request for quote systems. Non-financial companies put a specific request in the system regarding quotes and other structural features concerning the derivative needed. The input is directed to the banks affiliated to the platform which are selected by the client for bilateral trading. Instead of phoning each bank subsequently, the client gets answers from many banks simultaneously. The information exchange on the platform takes place on a discretionary basis, e.g. the client chooses to which bank his/her request is submitted and whether he/she enters into the transaction with the bank or not.

So far, these platforms are not considered as multilateral systems under MiFID as the execution of the transactions between the non-financial company and the bank takes place outside the system. For the following reasons it is essential that these platforms remain designated as OTC under the forthcoming trading parameters:

- First of all, with trading on a multilateral platform according to the MiFID II/MiFIR definition, MTF or regulated market in particular, non-financial companies run into the risk to be defined by regulation as an investment firm. The “trading on own account” exemption according to Art. 1(d)(ii) MiFID exempts market participants from the MiFID scope unless they execute their non-hedging transactions as members or participants in a regulated market or an MTF. This means that even a single non-hedging transaction, may be executed due to an error, would endanger an end-user’s MiFID status. Becoming a MiFID-licensed investment firm would entail the status “financial counterparty” under EMIR with the clearing obligation and/or bilateral margin requirements. As these obligations would lead to liquidity needs which are no longer available for the financing of the operative business, the mere risk related to the licence requirement would force non-financial companies refrain from choosing these platforms.
- In addition, OTC platforms shield non-financial companies using hedging derivatives from significant price increases, which are the result of pre- and post-trade transparency obligations not fitting the specifics of bespoke/not standardised derivative instruments. So far, the derivatives in

question are also not in the scope of the “trading on a trading venue” definition (this may change, as the definition is currently under scrutiny).

- Lastly, the application of the so called “payment exemption” is touched by a re-definition of multilateral trading. According to Art. 10 Delegated Regulation (EU) 2017/565 a contract regarding to currencies is not regarded as derivative with all regulatory consequences, but as a mean of payment if it is – besides other requirements – not processed via a MiFID regulated trading venue. Should the platforms previously used by non-financial companies for their currency transactions be declared as multilateral trading in the future, this exemption can no longer be used.

For these reasons ESMA should clarify that platforms used by non-financial firms are still not defined as multilateral trading but as OTC, as these systems only allow for multiple **bilateral** interactions. Therefore, they are no multilateral systems as they only streamline bilateral trading practices (as replacing phones with digital tools). Otherwise, there is a risk that non-financial firms would no longer use these platforms, which would contradict the policy objective of strengthening platforms and transparent trade execution in the derivative market. It would also oppose efforts of financial departments to further digitalise/automatize treasury processes.

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?

As mentioned in our answer to Q1 non-financial companies use request for quote systems which facilitate bilateral communication, previously done by phone or e-mail, between end-clients and banks. In order to avoid unintended side-effects described in our answer to Q1 it is important that these platforms are not required authorisation under MiFID.

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