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FCA GUIDANCE ON THE TRADING VENUE PERIMETER: CP22/18

UK Finance - ISDA response
25 November 2022



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About Linklaters

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FCA Guidance on the Trading Venue Perimeter: CP22/18

Date: 25 November 2022

Sent to: cp22-18@fca.org.uk

Dear Gabriella,

Please find enclosed the collective responses of the member firms of UK Finance and International Swaps and Derivatives Association (ISDA) to CP22/18: Guidance on the trading venue perimeter, produced with the advisory support of Linklaters LLP.

We welcome this opportunity to share our views and recommendations for improving guidance surrounding the UK trading venue perimeter, following the Wholesale Markets Review.

If you have any questions in relation to the information within our submission, please do not hesitate to get in touch.

Kind regards,

Kevin Gaffney

Director, Secondary Markets and Post Trade,
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FCA CP 22/18 GUIDANCE ON THE TRADING VENUE PERIMETER

UK Finance and ISDA Response

Executive Summary

UK Finance and ISDA members welcome the opportunity to feed into FCA consultation 22/18: Guidance on the trading venue perimeter.

In line with the FCA's outcome-based regulatory approach, it is important that any FCA guidance only captures genuine multilateral systems, with a view to safeguarding market integrity, investor protection, and effective competition. In doing so, it is equally important that the FCA guidance does not capture technology innovations which have digitised bilateral trading interactions aimed at achieving better investor outcomes.

Market participants are increasingly using digitised methods to manage information for the purpose of increasing efficiency. These include Order Management Systems (OMS) and Execution Management Systems (EMS). These platforms facilitate bilateral communications in a more efficient way than traditional communication methods such as over the phone communications. They also improve surveillance of market abuse practices, record keeping and transparency.

To help illustrate this, below, we have set out a scenario: A buy side firm connecting bilaterally via an EMS to one or more sell side investment firms to facilitate bilateral bond trading. This is essentially a digitisation of an existing, less efficient process carried out over an unstructured bilateral channel, i.e. phone/instant messaging (IM). Under this set up:

- With respect to transparency and reporting, the investment firm is fulfilling its obligations, e.g. Pre-trade transparency, and Post-trade transparency. Similarly, the counterparties carry out any other necessary reporting obligations (e.g. transaction reporting).
- The sell side investment firm has a number of other controls and checks in place (order record keeping, market abuse controls, surveillance mechanisms, etc.).
- This process improvement lessens the risk of errors when compared to over the phone/IM mechanisms.
- Such a mechanism also offers greater flexibility for both counterparts – as their interactions are not directed or observed by an intermediary.

We see this as a technology innovation that benefits market participants, without introducing a regulatory gap.

It is the view of UK Finance and ISDA members that a typical EMS (as described above) should not constitute a multilateral system on the basis that:

- i) an EMS does not have the 'characteristics of a system or facility'. Though an EMS may impose technical specifications that are necessary for the transmission of trading information between counterparties, it would not impose legal terms governing the execution of trades (which are instead executed directly between the buy-side client and its sell side investment firm counterparty, subject to the investment firm's terms). We expand on this further below in response to Q 2; and/or
- ii) an EMS does not facilitate the interaction of *multiple* third-party buying and selling interests, but instead merely provides the technical 'pipes' to transmit trading information as between two bilateral counterparties. We set out further our views on the FCA's interpretation of this criterion of the multilateral system definition below in response to Q 2.

UK Finance and ISDA members believe that the UK regulatory framework should continue to support the development of such workflow solutions which encourage innovation, increase market efficiency and create more competition in the UK market. Requiring these platforms to seek authorisation as trading venues and subjecting them to complex, disproportionate and costly regulatory requirements would likely prevent them from operating in their current form. Such an approach would limit competition in the market and would stifle the ability of new technology providers to enter the market to provide new execution services. This restrictive approach would result in reduced innovation, and ultimately lead to increased costs for end investors (as operational and regulatory costs are ultimately directly or indirectly passed on to end investors).

To this end, market participants would find it helpful to have explicit clarity from the FCA that workflows which digitise bilateral trading interactions such as the EMS described above do not constitute a multilateral system.

We believe that further clarity is needed in relation to the proposed FCA guidance to ensure that digitised workflows/communication tools that enable bilateral trading are not inadvertently captured within the trading venue perimeter. In our response to Q 2 we outline further criteria and more detailed guidance that could give the industry more clarity.

EXISTING ESMA GUIDANCE ON TRADING VENUE PERIMETER

Q 1 - Do you agree with our approach that following issuance of our final guidance, Q&As 7, 10, 11 and 12 in Section 5 of the ESMA market structures Q&As should not form part of our supervisory expectations?

Assuming that the FCA goes ahead to produce its own guidance on the 'multilateral system' definition (taking into consideration our comments below) we do not have any specific comments on the FCA's proposal to disapply Q&As 7, 10, 11 and 12 in Section 5 of the ESMA market structures Q&As. We agree that, to the extent the FCA has developed its own guidance on a topic, it will be easier for market participants subject to the UK MIFID regime to refer only to FCA guidance, rather than referring to the FCA guidance alongside existing ESMA guidance.

We note that the EU's non-legislative material such as ESMA Q&As published before 31 December 2020 remains relevant for UK market participants in their compliance with regulatory requirements. However, EU non-legislative material published after 31 December 2020, such as new ESMA Q&As and updates to previously published Q&As do not have the same application.

We consider that it would be helpful if the FCA could produce a single record of the live EU non-legislative materials that continue to be applicable to UK market participants, which will be updated on a continuing basis. Perhaps this could be achieved by the FCA committing to update the EU materials now hosted on the **FCA Handbook webpage** (i.e. amending what was carried across at the end of the Brexit transition period by, for example, indicating that Q&As 7, 10, 11 and 12 in Section 5 of the ESMA market structures Q&As no longer apply in the UK, and possibly including a cross-reference to the relevant new provisions in the Perimeter Guidance Manual (PERG)). Please note that this suggestion is made by way of a general comment in relation to all EU non-legislative material rather than a suggestion specific to the trading venue perimeter.

QUESTIONS RELATING TO THE DEFINITION OF A MULTILATERAL SYSTEM

Q 2 - Do you agree with our interpretation of the definition of a multilateral system?

We welcome the FCA's intended objective of providing further clarity to firms on the trading venue perimeter and its intention to measure the successful achievement of this objective through feedback from firms. UK Finance and ISDA members believe that further clarity is needed in relation to the proposed FCA guidance to ensure that digitised workflows/communication tools that enable bilateral trading are not inadvertently captured within the trading venue perimeter. In the absence of such further clarity, market participants would continue to find the trading venue perimeter ambiguous and/or result in the perimeter being construed more broadly, which would in turn defeat the core objective of this consultation.

Characteristics of a system or facility

As further explained below, we believe that certain functions performed by a technology provider could also be captured within the broad description of the draft guidance proposed by the FCA. Therefore, we believe that it is important to identify the differences in the functions performed and the nature of rules deployed by technology providers and trading venue operators.

'Set of rules'

We believe that further clarity is needed around what is meant by 'a set of rules'.

We note that paragraph 3.12 of the FCA CP refers to the key functions of an operator of a system, performed in accordance with the rules or protocols established by the operator itself, as indicated in recital (7) of UK MiFIR. The FCA notes that these functions (and related rules) are (a) determining the conditions for members or participants to have access to the facility, (b) setting the conditions for admission of financial instruments to trading, (c) establishing the rules for trading between members, and (d) reporting.

We consider that the above functions may capture technology providers, because these will have technical rules related to accessing the relevant workflow technology. For example, a technology provider may have technical rules relating to accessing the system and inclusion of financial instruments that could be accessed via the system. Without more nuanced guidance, functions of a technology provider merely transmitting a communication sent by a user (to the effect that a trade has been completed) could arguably constitute 'reporting' under the functions suggested above. It is therefore, important to distinguish between the mere technical rules of a technology provider and the rules of a trading venue operator. The latter rules fundamentally outline how to access the services of the venue and matching of trading interests in the system, whereas the former technical rules merely set out how to access the technology as an operational matter.

In our view, unlike technical rules of a technology operator, rules of a trading venue operator are legally enforceable by the trading venue operator. All members or participants of a trading venue must abide by such rules forming part of the contract between the members of a trading venue and the operator of the venue. These legally enforceable rules of a trading venue operator set out how trades are formed on the venue and how members should behave when using the system offered by the trading venue operator.

On the other hand, technical rules of a technology provider can generally be modified by the users of such systems (e.g. investment firms who deploy such systems) to suit their requirements and desired parameters for execution.

Moreover, legally enforceable rules of a trading venue operator enable the operator to oversee transactions that take place on its system. For example, a trading venue operator's rules would be expected to define the point in time at which a legally enforceable trade is entered into as between trading venue members under the trading venue's rules, reserve power to the trading venue operator to cancel or amend trades in specified circumstances, and to pursue members of the trading venue for breach of the trading venue's rules governing the execution of transactions.

By contrast, a mere technology provider would not be expected to have such authority, with the execution of transactions taking place between, and subject to the terms of, the various users of the technology provider's system. In addition, a technology provider does not adopt the same onboarding process/due diligence adopted by a trading venue prior to admitting members or participants to trade on its venue.

Role of the System Operator

Our members consider that the following cumulative factors distinguish trading venue operators from workflow/technology providers.

Operational oversight of the system

As mentioned above, a trading venue operator has complete oversight of the system underpinned by a set of legally enforceable rules. For example, this enables a trading venue operator to provide an execution timestamp (see below) and cancel a trade in certain circumstances.

Remuneration of the operator

We note the FCA's reference to determinants of the remuneration of the operator and whether these determinants are linked to the interaction of trading interests in the system. In our view, trading venues typically charge a brokerage or a negotiation fee based on the economics of the transactions executed. Technology providers on the other hand, typically, charge a licence fee that is not linked to the economics of the transactions executed. In most cases, technology providers will charge a flat fee, although some may charge based on volume (but not linked to the economics) of transactions. Therefore, we believe that it is important to assess whether an operator's charging model is based on the economics of transactions which would be indicative of it being an operator of a trading venue.

There is a caveat to this in the derivatives space. Some providers of post trade risk reduction (PTRR) services, e.g. counterparty credit risk (CCR) optimisation do charge based on the economic value of the saving achieved. For the avoidance of doubt PTRR services would never constitute a trading venue.

Provision of trade execution 'timestamp'

A trading venue operator provides an execution 'timestamp' that confirms that trading interests are matched, and a trade is executed (in accordance with the operator's rules). This 'timestamp' denotes the time at which the relevant trade is formally regarded as executed and is used accordingly in subsequent reporting. In contrast, while a workflow provider may also 'record' the timing of communication flows within its system, this would not denote the official 'timestamp' of the transaction for reporting purposes. Instead, in the example of the EMS set out in the executive summary, the 'timestamp' for reporting purposes would be the one provided by the sell side firm/relevant counterparty as denoting the precise timing of the transaction.

Business model, expertise & resources

Fundamentally, the business models, expertise and resources of a trading venue operator differ from those of workflow/technology solutions. Technology providers specialise in connectivity (e.g. connecting firms to venues, clients and market data), whereas trading venue operators specialise in the actual matching of trading interests and the trading of financial instruments, with capability to employ technology to facilitate that trading. The expertise and resources of technology providers (focused on IT expertise, IT infrastructure and relevant supports) and trading operators (focused on knowledge of relevant financial instruments and markets, trading strategies etc.) reflect this.

General purpose communication systems

We welcome the additional clarity offered by the FCA in the proposed wording of PERG 13 Q24C in the section pertaining to general purpose communications systems. However, we believe that the FCA guidance should explicitly exclude any type of digitisation or electronification of already existing 'general purpose communications systems' such as telephone networks/instant messaging/emails, from the scope of a multilateral system.

On this basis we propose the following amendments to the FCA Handbook text (highlighted in bold text):

General purpose communications systems would not as such amount to trading systems or facilities. This means that the following services in and of themselves would not amount to operating a multilateral system:

- *acting as an internet service provider;*
- *providing a telephone network;*
- *operating a website; or*
- *providing chatroom facilities.*

Similarly, any digitised form and electronification of these general purpose communications systems should also be excluded from the scope as long as the intention remains the same and the digitisation is purely put in place to increase efficiency in the market.

Multiple third party buying and selling interests

It is important to differentiate between systems that enable multiple third parties to interact and systems that enable multiple bilateral interactions, where each bilateral interaction cannot interact with other bilateral interactions. The former are true multilateral systems whilst the latter are a collection of bilateral relationships with no multilateral aspects.

The FCA's clarification that the "third party trading interests" refers to users of the system rather than that of the system operator is helpful.

UK Finance and ISDA members believe that based on the above, a system operated by one of the counterparties to a trade, e.g. single dealer platforms operated by an SI, is not capable of meeting the criteria to be a multilateral system.

Further, we believe that market participants will benefit from further clarity around what is meant by 'the system at the point of entry, is designed to enable one person to interact with others'.

We believe that, as currently drafted, reference to 'the system at the point of entry, is designed to enable one person to interact with others' could capture communication tools such as those which consist of multiple bilateral connections where each bilateral interaction cannot interact with other bilateral interactions. Such a reading would be inconsistent with Article 18(7) of MiFID II, which states that Multilateral Trading Facilities (MTFs) and Organised Trading Facilities (OTFs) must 'have at least three materially active members or users, each having the opportunity to interact with

all the others in respect of price formation. Though compliance with Art. 18(7) MiFID II is required as a consequence of authorisation as a trading venue, ESMA's existing Market Structure Q&A on OTFs (Q&A10 of Section 5.2) clearly contemplates that trading occurs on a multilateral basis where a system user's trading interests can potentially interact with those of at least two other users (rather than capturing circumstances in which interaction can occur with a single other user only as is the case with bilateral interactions).

Moreover, if such systems were to obtain authorisation as a trading venue, we would question as to how the FCA would be able to ensure that such systems comply with Article 18(7) of MiFID II following authorisation.

We would also wish to highlight that the MiFID/MiFIR rules which apply to trading venues are aimed at genuine multi-lateral systems. Therefore, artificially subjecting bilateral interactions to MiFID/MiFIR requirements aimed at multilateral trading is counterproductive and will not help in achieving the intended objectives of the MiFID II regime.

Interaction within the system

The proposed guidance states that *'Interaction between trading interests in the system does not require a contract to be entered into for the sale/purchase of financial instruments (i.e. execution of a transaction to take place) within the system if it is with a view to the parties agreeing the terms of a trade'*.

We are of the view that this proposed guidance is inconsistent with the UK MiFID/MiFIR regime including the definition of an MTF in Art 4(1)(22) of MiFID II, which states that a *'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** (emphasis added) in accordance with Title II of this Directive'*.

In term of the above definition, the interaction needs to be purposeful with a view to trading.

Our members would note that the guidance on the concept of 'interaction' in the proposed Q24C in PERG goes beyond what is currently covered in the ESMA Q&A (that the FCA proposes to disapply), and that a mere 'exchange of information' (seemingly without that being a purposeful interaction with a view to trading) being sufficient to constitute 'interaction' is a very broad interpretation of this concept (and one which is not obviously supported in the recitals to UK MiFIR). It is the view of our members that introduction of this broad guidance could have unintended consequences (for example inappropriately catching general communication systems), and we would therefore urge the FCA to consider narrowing or amending this guidance.

Q 3 - Are there any other relevant characteristics to a multilateral system that should be taken into account?

Please see our answer to Q2.

PROPOSED GUIDANCE ON SPECIFIC ARRANGEMENTS

Q 4 - Do you agree with our proposed guidance in relation to voice broking?

Yes, UK Finance and ISDA members agree with the proposed guidance.

Q 5 - Do you agree with our proposed guidance relating to internal crossing by portfolio managers?

Yes, UK Finance and ISDA members agree with the proposed guidance.

Using the same logic provided by the FCA, our collective memberships believe that internal crossing by an investment bank for risk netting purposes should also not constitute a multilateral system.

Q 6 - Do you agree with our proposed guidance relating to blocking onto trading venues?

UK Finance and ISDA members broadly agree with the proposed guidance.

However, we believe that reference to *'consistent with the intentions of the parties'* could introduce unintended complexity, confusion, and potential disputes between counterparties to trades regarding their intention. When parties approach an investment firm to execute a trade, we do not believe that such parties will express how they intend to use blocking arrangements or a trading venue every time such an approach is made. Therefore, we suggest that the FCA removes explicit reference to this. An alternative articulation would be to state that these arrangements would not involve the firm operating a multilateral system, unless this approach was inconsistent with an agreement in place between the firm and the parties of the underlying transactions.

It is our members' view that the draft FCA guidance on blocking would allow blocking to be done for any trade size, rather than just being available for blocking of Large in Scale trades. Our members also believe that blocking would be available for any asset class (including fixed income products), even under a potential future regime and irrespective of whether pre-trade transparency requirements are applicable to relevant fixed income instruments.

We request the FCA to confirm the above position in the guidance for avoidance of doubt.

Q 7 - Do you agree with our interpretation to regard a crowdfunding platform operating only in primary markets as not involving the operation of a multilateral system?

UK Finance and ISDA members agree with the FCA guidance on crowdfunding platforms operating in primary markets.

Q 8 - Do you agree with our interpretation of the characteristics of a bulletin board?

Our members believe that it would be more helpful if the FCA provides its guidance relating to bulletin boards by making an assessment against the four elements of the definition of a 'multilateral system' and associated guidance proposed by the FCA.

There is a concern that, by providing various examples, the guidance on the trading venue perimeter may become more dispersed, such that firms would need to check various sections of the FCA Handbook to see whether any of the commentary on a particular example could impact the interpretation of the four elements of the 'multilateral systems' definition even beyond the specific example discussed.

In relation to the specific guidance provided, we do not agree with the second bullet point in Q 24I, which states that a system would not be a bulletin board if *'it allows users to respond within the system to other trading users' interests, including by communicating in relation to, negotiating or accepting essential terms of transactions'*. This appears to capture pure communication tools which allow users to respond/communicate with respect to the trading interests of other users.

Q 9 - Do you agree with our approach to updating the Glossary definition of a service company in relation to client limitation types?

UK Finance and ISDA members have no comments on the updated definition.

POTENTIAL AREAS FOR FUTURE CHANGE

Q 10 - Which regulatory requirements applicable to MTFs and OTFs are most likely to create barriers to entry to the trading venue market for smaller firms?

Our members consider that, whilst some market participants may consider regulatory requirements applicable to MTFs and OTFs to be onerous and create barriers to entry, these requirements should apply to all trading venues, irrespective of their size due to their intended objectives. These requirements are aimed at protecting market integrity (i.e. orderly and resilient markets which are appropriately transparent and help price formation, and are clean (free of market abuse and financial crime)) and investor protection.

It is our view that these requirements, and the protections they offer to markets and to market participants interacting with venues, are of equal relevance in the context of small venues and should not be diminished.

However, we acknowledge that the FCA should adopt a proportionate approach in its supervisory expectations regarding as to how MTFs and OTFs implement these requirements.

Q 11 - Does the existing service company regime already address concerns regarding these barriers to entry?

The regulatory regimes applicable to trading venues and firms that come under the Service Company Regime differ due to difference in services provided by trading venue operators and service companies. Therefore, we do not believe that the Service Company Regime should be considered as a substitute for the regulatory regime applicable to trading venues. Consequently, we do not believe that the existing Service Company Regime addresses any concerns (nor should it be considered as such) regarding barriers to entry into the trading venue market for smaller firms (noting also our comments in response to Q 10 above regarding the importance of robust regulation of trading venues).

We think that there may be certain firms who use the existing Service Company Regime because they have met the requirements to be authorised to make arrangements with a view to transactions in investments. These firms fall outside of the regulatory perimeter of investment firms and authorisation under the Service Company Regime gives the FCA oversight of their activities. This should continue to exist.

Q 12 - Based on which criteria should firms be potentially subject to a more scalable set of requirements?

Please refer to our response to Q10 above.

Handbook text: Please provide any comments on our draft Handbook text

Please see our answers to Q2, Q5, Q6 and Q8.

CBA: Please provide any comments on our cost benefit analysis

As mentioned in our responses above, we do not consider the proposed guidance to be primarily clarificatory in line with firms' interpretation of the definition of a multilateral system. Therefore, we are of the view that costs to firms including costs relating to familiarisation and enacting changes to platform functionalities could be far greater than the FCA's assessment.

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