

NSAs high level comments to ESMA's consultation on draft Opinion regarding Trading Venue Perimeter

The Nordic Securities Association (NSA)¹ is very concerned with ESMA's draft Opinion on Trading Venues' Perimeter and would like to provide the following comments:

- In the draft Opinion, ESMA proposes a very extensive interpretation of multilateral system which in practice will have the **effect of limiting the types of execution services accessible to clients on EU capital markets**. The NSA strongly objects to this approach which we do not believe to be in line with the goals of the Capital Markets Union (CMU). In fact, the key policy objective should be to ensure a well-functioning EU capital market where investment firms and trading venues can co-exist in order to serve their clients' needs. Since these needs differ depending on type of client (retail – professional) and type of financial instrument at hand (equity – fixed income), it is important to allow different forms of trading. The NSA sees a clear risk that ESMA's opinion could put EU investment firms at a competitive disadvantage compared to firms established in the UK and US which will not be subject to similar limitations and therefore be able to offer clients more flexible ways of execution.
- From a legal perspective, we also note that ESMA's opinion **deviates in several ways from the level 1 text**. First of all, according to the definition in article 4.1 (19) MiFID II, a multilateral system consists of the following components: (i) a system and (ii) interaction of multiple buying and selling interests and (iii) an interaction between those interests. In case of an EMS system or when an investment firm matches two clients' orders, these three criteria are not fulfilled and therefore cannot be considered to be a multilateral system. In addition, it is unclear how ESMA's extensive interpretation is aligned with the scope of investment services under MiFID II. For example, it follows from article 18.7 MiFID II that both MTF and OTF-platforms require at least three market participants. Conversely, it follows from article 4.1 (5) MiFID II that the investment service execution of orders means "acting to conclude agreements" to buy or sell one or more financial instruments on behalf of clients, i.e. an activity which ESMA seems to consider falling under the definition of multilateral system even when only two parties are involved. The NSA would like to emphasize that investment firms have organized their businesses in accordance with the wording of the level 1 text and question if it is in accordance with the rule of law to make such substantial changes through a level 3 opinion without the involvement of the co-legislators.
- Finally, the NSA would also like to **strongly question the timing** of this Opinion. There is currently an ongoing review at EU-level of several of the central provisions in MiFIR which will have a significant impact on the future market structure in EU. In our view, this is not the time to complicate the picture further by issuing a level 3 opinion that will introduce unnecessary legal uncertainty and complexity to the implementation process, in particular as the risk of unintended negative consequences is so high.

The NSA urges ESMA to take these concerns seriously and to take a very cautious approach. We stand ready to assist ESMA with additional information, should you so desire.

¹ The Nordic Securities Association (NSA) is a Nordic cooperation that works to promote a sound securities market primarily in the Nordic region. The NSA is formed by Capital Market Denmark (Kapitalmarked Danmark), Finance Finland (Finanssiala), the Norwegian Securities Dealers Association (Verdipapirforetakenes Forbund) and the Swedish Securities Markets Association (Svensk Värdepappersmarknad). www.nsa-securities.eu. Nordic Securities Association's public ID number in the Transparency Register is: 622921012417-15

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Contact Sara Mitelman

sara@svpm.se