



CLARIFICATIONS REGARDING THE NOTION OF TRADING VENUE, APPLICABLE IN PARTICULAR TO FINANCIAL INSTRUMENTS REGISTERED IN A DISTRIBUTED LEDGER

This document aims to clarify the scope of the trading venue concept within the meaning of Directive (EU) No. 2014/65/EU of the European Parliament and of the Council of 15 May 2014, hereafter "MiFID II".

In particular, it specifies to what extent certain interfaces allowing to display buying and selling interests are not required to apply for an authorisation as a trading venue within the meaning of MiFID II. This clarification is important in a context where there is a growing interest in issues of financial securities registered in a distributed ledger (commonly called "security tokens") and, as a consequence, the possibility of organising the liquidity of such financial instruments on a secondary market.

Financial instruments using Distributed Ledger Technology (DLT) for their registration are subject to the entire financial regulation framework. They are different from the digital assets defined in Article L. 54-10-1 of the French Monetary and Financial Code covering virtual currencies and ICO tokens. Digital assets services are subject to specific regulations described in Chapter X of Title IV, Book V of the Monetary and Financial Code.

The following explanations appeared necessary in the context of the development of interface's projects for trading financial instruments registered in a distributed ledger. However, these developments are applicable to all trading venues and all financial instruments regardless of whether they are registered in a DLT.

1. THE TRADING VENUE NOTION

In accordance with Article L. 420-1 of the Monetary and Financial Code, every multilateral system, defined 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*", must apply for an authorisation to operate a trading venue, i.e., according to the said Article, a regulated market within the meaning of Article L. 421-1 of the French Monetary and Financial Code (hereafter "RM"),¹ a multilateral trading facility within the meaning of Article L. 424-1 of the Monetary and Financial Code (hereafter "MTF") or an organised trading facility within the meaning of Article L. 425-1 of the Monetary and Financial Code (hereafter "OTF"). Since the implementation of MiFID II, every market participant operating a system allowing the interaction of multiple third-party buying and selling interests expressed in financial instruments are therefore expected to obtain an authorisation as a market operator or investment service provider enabling it to be the operator of a trading venue (RM, MTF or OTF).

Each of the three categories of trading venues is defined by the Monetary and Financial Code as follows:

¹ This is not an authorisation to operate a trading venue, but a recognition of the status of regulated market determined by an official decision of the Minister of the Economy upon the proposal of the Autorité des Marchés Financiers (Article L. 421-4 of the Monetary and Financial Code). For the sake of simplicity, when this document refers to a trading venue authorisation, that will also include the case of recognition of a regulated market managed by a market operator.

- an RM is "a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments – in the system and in accordance with its non-discretionary rules – in a way that results in a contract, in respect of the financial instruments admitted to trading under its rules and systems";

- an MTF is "a multilateral system which brings together multiple third-party buying and selling interests in financial instruments – in the system and in accordance with its non-discretionary rules – in a way that leads to the conclusion of transactions on said instruments";

- an OTF is " a multilateral system which brings together multiple third-party buying and selling interests – in the system and at the discretion of its manager - in a way that leads to the conclusion of transactions in:²

1° the financial securities mentioned in 2 of II of Article L. 211-1;

2° structured financial products within the meaning of Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments;

3° the units mentioned in Article L. 229-7 of the Environment Code;

4° derivative instruments within the meaning of Article 2(1)(29) of Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments;

5° wholesale energy products, within the meaning of Article 2(4) of Regulation (EU) No 1227/2011 of the European Parliament and of the Council, which must be settled by physical delivery."

A reading of the definitions of these three trading venues shows that their common features are as follows:

- multilateral nature of the system;³
- bringing together of multiple buying and selling interests in the system;⁴
- in such a way as to conclude transactions in financial instruments.

2. CLARIFICATIONS REGARDING BULLETIN BOARDS

The notion of bulletin board appears in Recital 8 of MiFIR which explicitly provides that the category of organised trading facilities "should not include facilities where there is no genuine trade execution or arranging taking place in the system, such as bulletin boards used for advertising buying and selling interests [...]".

² Moreover, ESMA's Q&A (on MiFID II and MiFIR market structures topics, ESMA70-872942901-38, last updated 5 December 2019), clarified the three conditions which should lead a market participant to apply for an OTF authorisation:

- trades are executed on a multilateral basis;
- the characterised infrastructure has the characteristics of a system; and
- the execution of orders = is performed within that system or according to the system's rules.

³ Article 4(1)(19) of MiFID II: a multilateral system is "any system or facility in which multiple third-party buying and selling trading interests in financial instruments are able to interact". Recital 7 of Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 (MiFIR) specifies that "The term 'system' encompasses all those markets that are composed of a set of rules and a trading platform as well as those that only function on the basis of a set of rules." It is also specified that it is immaterial whether or not order matching is organised according to a 'technical' system.

⁴ Recital 7 of MiFIR specifies that the expression 'buying and selling interests' is to be understood in a broad sense and includes orders, quotes and indications of interest.

Position

As regards to the definition of a trading venue and given the similarity of the characteristics of the three categories of trading venues, the AMF considers that systems without execution or bringing together of buying and selling interests, such as bulletin boards used for advertising buying and selling interests, do not constitute regulated markets or multilateral trading facilities.

As a reminder, Recital 8 of MiFIR specifies that the concept of buying and selling interests should be understood in a broad sense and shall include orders, quotes and indications of interests. They do not merely refer to offers to buy or sell from a legal standpoint since mere exploratory discussions also constitute buying and selling interests.⁵

Position

The AMF considers that an interface that only displays buying and selling interests in financial instruments, including financial securities registered in a distributed ledger, with no execution or bringing together of buying and selling interests, does not need an authorisation for the operation of a trading venue within the meaning of MiFID II. The bulletin board exclusively performs advertising of buying and selling interests, possibly including prices and the quantities available, and therefore can neither organise the bringing together of these interests nor use a centralised order book. Moreover, the bulletin board should not facilitate the bringing together of buying and selling interests in any form whatsoever, in particular by proposing means of communication or contact between potential buyers and sellers which might enable them to interact via the system. However, the contact details of buyers and sellers may be displayed so that they may establish bilateral contact with one another outside of the system. Trading and the conclusion of transactions should therefore be performed bilaterally, outside of the system.

3. CLARIFICATIONS REGARDING THE PROVISION OF INVESTMENT SERVICES OTHER THAN THE OPERATION OF A TRADING VENUE⁶

When the service provider intermediates relations between buyers and sellers, this service may constitute one or more investment services, including the reception and transmission of orders, execution of orders on behalf of clients and placing of financial instruments without a firm commitment basis. The service providers offering such services relating to financial instruments, including financial securities registered in a DLT must, as for any financial instrument, apply for an authorisation as an investment service provider from the ACPR.⁷

The AMF invites project holders intending to set up bulletin boards or exchange interfaces, especially for financial securities registered in a DLT, to conduct a detailed legal analysis depending on the business they plan to develop in order to identify the regulations applicable to them. If necessary, the AMF can provide assistance. Project promoters can contact the Fintech, Innovation and Competitiveness Division at the following address: fic@amf-france.org.

⁵ Annual Report of the Comité des établissements de crédit et des entreprises d'investissement (CECEI), 2008, pages 42 et seq.

⁶ For sake of simplicity, the expression "operation of a trading venue" also includes the operation of a regulated market which is not an investment service within the meaning of Article L. 321-1 of the Monetary and Financial Code.

⁷ Or the recognition of a regulated market in accordance with Article L. 421-3 of the Monetary and Financial Code.