



Markus Ferber
Member of the European Parliament
Economic and Monetary Affairs Committee
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Dear Mr Ferber,

Re: Clarification for non-financial end-users transacting on multilateral electronic trading platforms

I am writing to you concerning an issue that has been raised to us by several providers of electronic trading platforms to be qualified as Multilateral Trading Facilities under the new MiFID 2 regime. They have expressed concerns that the exemption for trading on own account - from which non-financial companies currently benefit under MiFID 1 when transacting on electronic trading platforms – has been interpreted by some as being threatened by the new wording introduced in MiFID 2.

Non-financial companies transact on these platforms when hedging their commercial and financial exposures because these facilities bring clear universal benefits, such as price transparency, increased efficiency and liquidity.

The concern is that the new wording of the exemption for trading on own account in Article 2 and the narrowing of its scope – legitimately intended in our understanding to capture high-frequency traders – would have the unintended consequence of excluding non-financial companies from the scope of the exemption.

The new wording under Article 2(1)(d)(ii) states that *'members of or participants in a regulated market or an MTF or [persons who] have direct electronic access to a trading venue'* do not benefit from the exemption. ESMA has already provided a useful clarification of *'direct electronic access'*¹, which in our interpretation excludes non-financial companies

¹ See ESMA's Technical Advice to the Commission on MiFID 2 and MiFIR published on 19 December 2014 where ESMA states that *ESMA considers systems that allow clients transmitting orders to an investment firm in an electronic format (on-line brokerage) to be outside of the scope of DEA as long as the client does not have the ability to determine the fraction of a second where the order should enter the order book or react to incoming market data within those timeframes. ESMA considers that website-based trading systems fall outside the scope of the definition of DEA as long as they do not provide the user that type of control over order entry and or-order execution. This view corresponds with the IOSCO Consultation Report entitled 'Policies on Direct Electronic Access' (February 2009) which does not consider "trading models of a customer calling the intermediary or sending an internet order to the intermediary" as DEA because, as long as the customer's trading is intermediated, it is not 'direct access'.*

from the definition of DEA. MiFID 2 Recital 16 defines ‘*member or participant*’ as ‘*persons having access to regulated markets or MTFs*’, but there is no further clarification on what this means precisely. We interpret this as not including non-financial companies that are merely end-users of regulated markets/MTFs, but we would nevertheless appreciate **a clarification that non-financial companies will continue to benefit from the exemption for own account trading in order to avoid any legal uncertainty.**

It seems clear to us that it cannot be the legislator’s intention to exclude our members from the scope of the exemption, as its consequences seem in plain contradiction with the very objectives of MiFID 2. Should non-financial companies no longer benefit from the exemption and be forced to be subject to the full MiFID obligations if accessing these trading venues, it is needless to say that they would discontinue using those facilities and would return to out-dated, less efficient and less transparent ways of transacting, e.g. by phone or by accessing single-bank platforms. They would lose all the benefits offered by multiparty electronic platforms, such as transparent pricing, liquidity, a full audit trail of transactions and straight through processing. This would lead to increased pricing, higher operational risk and inefficiencies for non-financial companies. This would be a clear regression and cannot be in line with MiFID’s objectives of transparency, competition and promoting electronic trading.

We of course remain at your disposal for any further clarifications and would appreciate an opportunity to meet with you in order to discuss our concerns in more detail.

Yours sincerely,



Jean-Marc Servat
Chair
European Association of Corporate Treasurers

Copied to:

European Parliament:

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