Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 26 April 2017 [1]

Case C-658/15

Robeco Hollands Bezit N.V.,
Robeco Duurzaam Aandelen N.V.,
Robeco Safe Mix N.V.,
Robeco Solid Mix N.V.,
Robeco Balanced Mix N.V.,
Robeco Growth Mix N.V.,
Robeco Life Cycle Funds N.V.,
Robeco Afrika Fonds N.V.,
Robeco Global Stars Equities,
Robeco All Strategy Euro Bonds,
Robeco High Yield Bonds,
Robeco Property Equities
v
Stichting Autoriteit Financiële Markten (AFM)

(Request for a preliminary ruling from the College van beroep voor het bedrijfsleven (Administrative Court of Appeal for Trade and Industry, the Netherlands))

(Markets in financial instruments — Multilateral trading facilities — Concept of regulated market — Investment fund manager — Open-end investment funds — Market abuse and insider trading)

1. Multilateral trading facilities have undergone very rapid development in recent years as a result of diversification of the financial products on the market.

2. The need to offer investors adequate protection, reduce the risk and increase public supervision of the operation of financial markets, in order to ensure financial stability, has required a gradual adjustment of trading facilities. Traditional stock markets have been joined by new multilateral and bilateral platforms which allow trading in all types of financial instrument from the simplest to the most sophisticated.

3. The EU legislature has been fully engaged in the regulation of this sector. To that end, and using terminology that is sometimes difficult to understand, it has developed the following as concepts with their own definitions: ‘regulated markets’, ‘multilateral trading facilities’, ‘organised trading facilities’ and ‘systematic internalisers’ (‘SIs’).

1 Original language: Spanish.

4. This case will enable the Court to expand its still nascent case-law on the characteristics of trading facilities, and in particular of regulated markets. The referring court asks whether or not a facility called Euronext Fund Service ('EFS'), operated by Euronext Amsterdam N.V.,[2] is a regulated market, regard being had to the fact that only investors and open-end investment funds interact on that market.

I. Legal framework

A. EU law

5. The most relevant provisions for the purposes of the proceedings are laid down in Directive 2004/39/EC[3] (known as 'the MiFID I') and its main implementing provisions, which are Directive 2006/73/EC[4] and Regulation (EC) No 1287/2006[5] ('the MiFID I provisions' or 'the MiFID I body of legislation'). It will also be essential to take into account Directive 2003/6/EC.[6]

6. The body of legislation formed by the MiFID I and its implementing provisions suffered the effects of the 2008 financial crisis, which exposed a number of weaknesses in the operation and transparency of financial markets. Moreover, technological developments have made it necessary to strengthen the legislative framework, in particular trading facilities, in order to increase their transparency, better protect investors, reinforce confidence, address unregulated areas, and ensure that supervisors have the powers necessary to carry out their tasks.

7. Accordingly, the MiFID I body of legislation, which entered into force in 2007, will be replaced with effect from 3 January 2018 by the so-called MiFID II, composed essentially of Directive 2014/65/EU[7] ('the MiFID II') and Regulation (EU) No 600/2014.[8] Although the MiFID II has not yet entered into force and obviously is not applicable to the main proceedings, it includes a number of useful criteria for interpreting the MiFID I provisions.

1. Directive 2004/39

8. Article 1(1) of the MiFID I provides that the directive 'shall apply to investment firms and regulated markets'.

2 Euronext Amsterdam N.V describes itself as the successor to the historic Amsterdam stock market and operates as a regulated market.

3 Directive of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ 2004 L 145, p. 1).

4 Commission Directive of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive (OJ 2006 L 241, p. 26).

5 Commission Regulation of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards record-keeping obligations for investment firms, transaction reporting, market transparency, admission of financial instruments to trading, and defined terms for the purposes of that directive (OJ 2006 L 241, p. 1).

6 Directive of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) (OJ 2003 L 96, p. 16).

7 Directive of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ 2014 L 173, p. 349).

8 Regulation of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (OJ 2014 L 173, p. 84).

9. Recitals 2, 5, 6, 44 and 49 read as follows:

‘(2) … it is necessary to provide for the degree of harmonisation needed to offer investors a high level of protection and to allow investment firms to provide services throughout the Community, being a Single Market, on the basis of home country supervision. …

…

(5) … It is necessary to recognise the emergence of a new generation of organised trading systems alongside regulated markets which should be subjected to obligations designed to preserve the efficient and orderly functioning of financial markets …

…

(6) Definitions of regulated market and MTF [9] should be introduced and closely aligned with each other to reflect the fact that they represent the same organised trading functionality. The definitions should exclude bilateral systems where an investment firm enters into every trade on own account and not as a riskless counterparty interposed between the buyer and seller. 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. Regulated markets and MTFs are not obliged to operate a “technical” system for matching orders. A market which is only composed of a set of rules that governs aspects related to membership, admission of instruments to trading, trading between members, reporting and, where applicable, transparency obligations is a regulated market or an MTF within the meaning of this Directive and the transactions concluded under those rules are considered to be concluded under the systems of a regulated market or an MTF. The term “buying and selling interests” is to be understood in a broad sense and includes orders, quotes and indications of interest. The requirement that the interests be brought together in the system by means of non-discretionary rules set by the system operator means that they are brought together under the system’s rules or by means of the system’s protocols or internal operating procedures (including procedures embodied in computer software). The term “non-discretionary rules” means that these rules leave the investment firm operating an MTF with no discretion as to how interests may interact. The definitions require that interests be brought together in such a way as to result in a contract, meaning that execution takes place under the system’s rules or by means of the system’s protocols or internal operating procedures

…

(44) With the two-fold aim of protecting investors and ensuring the smooth operation of securities markets, it is necessary to ensure that transparency of transactions is achieved and that the rules laid down for that purpose apply to investment firms when they operate on the markets. In order to enable investors or market participants to assess at any time the terms of a transaction in shares that they are considering and to verify afterwards the conditions in which it was carried out, common rules should be established for the publication of details of completed transactions in shares and for the disclosure of details of current opportunities to trade in shares. These rules are needed to ensure the effective integration of Member State equity markets, to promote the efficiency of the overall price formation process for equity instruments, and to assist the effective operation of “best execution” obligations. These considerations require a comprehensive transparency regime applicable to all transactions in shares irrespective of their execution by an investment firm on a bilateral basis or through regulated markets or MTFs. The obligations for investment firms under this Directive to quote a bid and offer price and to execute an order at

9 The initials MTF are used in Directive 2004/39 as an abbreviation for ‘multilateral trading facility’.

the quoted price do not relieve investment firms of the obligation to route an order to another execution venue when such internalisation could prevent the firm from complying with "best execution" obligations.

…

(49) The authorisation to operate a regulated market should extend to all activities which are directly related to the display, processing, execution, confirmation and reporting of orders from the point at which such orders are received by the regulated market to the point at which they are transmitted for subsequent finalisation, and to activities related to the admission of financial instruments to trading. This should also include transactions concluded through the medium of designated market makers appointed by the regulated market which are undertaken under its systems and in accordance with the rules that govern those systems. Not all transactions concluded by members or participants of the regulated market or MTF are to be considered as concluded within the systems of a regulated market or MTF. Transactions which members or participants conclude on a bilateral basis and which do not comply with all the obligations established for a regulated market or an MTF under this Directive should be considered as transactions concluded outside a regulated market or an MTF for the purposes of the definition of systematic internaliser. In such a case the obligation for investment firms to make public firm quotes should apply if the conditions established by this Directive are met.'

10. Article 4(1)(7), (13), (14) and (15) lays down the following definitions:

'(7) "Systematic internaliser" means an investment firm which, on an organised, frequent and systematic basis, deals on own account by executing client orders outside a regulated market or an MTF;

…

(13) "Market operator" means a person or persons who manages and/or operates the business of a regulated market. The market operator may be the regulated market itself;

(14) "Regulated market" means a multilateral system operated and/or managed by a market operator, 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/or systems, and which is authorised and functions regularly and in accordance with the provisions of Title III;

(15) "Multilateral trading facility (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 in accordance with the provisions of Title II'.

2. Regulation No 1287/2006

11. Article 2(8) defines 'trading venue' as 'a regulated market, MTF or systematic internaliser acting in its capacity as such, and, where appropriate, a system outside the Community with similar functions to a regulated market or MTF'.

12. Article 5 of that regulation provides:

'For the purposes of this Regulation, a reference to a transaction is a reference only to the purchase and sale of a financial instrument. For the purposes of this Regulation, other than Chapter II, the purchase and sale of a financial instrument does not include any of the following:

…

(c) primary market transactions (such as issuance, allotment or subscription) in financial instruments falling within Article 4(1)(18)(a) and (b) of Directive 2004/39/EC.'

13. Article 21(1) lists the criteria for determining whether an investment firm is an SI:

'Where an investment firm deals on own account by executing client orders outside a regulated market or an MTF, it shall be treated as a systematic internaliser if it meets the following criteria indicating that it performs that activity on an organised, frequent and systematic basis:

(a) the activity has a material commercial role for the firm, and is carried on in accordance with non-discretionary rules and procedures;

(b) the activity is carried on by personnel, or by means of an automated technical system, assigned to that purpose, irrespective of whether those personnel or that system are used exclusively for that purpose;

(c) the activity is available to clients on a regular or continuous basis.'

3. Directive 2003/6

14. Article 1(1) contains the following definition:

'"Inside information" shall mean information of a precise nature which has not been made public, relating, directly or indirectly, to one or more issuers of financial instruments or to one or more financial instruments and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments.'

15. In accordance with Article 6(4) of the directive:

'Persons discharging managerial responsibilities within an issuer of financial instruments and, where applicable, persons closely associated with them, shall, at least, notify to the competent authority the existence of transactions conducted on their own account relating to shares of the said issuer, or to derivatives or other financial instruments linked to them. Member States shall ensure that public access to information concerning such transactions, on at least an individual basis, is readily available as soon as possible.'

B. National law

16. Article 1:1 of the Wet op het financieel toezicht (Law on financial supervision; 'Wft') defines the term 'regulated market' as follows:

'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 financial instruments which have been admitted to trading in accordance with the rules and systems of that market, and which operates regularly and in accordance with the applicable rules on licensing and ongoing supervision'.

17. Under Article 5:60(1)(a), any person

– who determines or co-determines the day-to-day policy of an issuer having its registered office in the Netherlands which has issued or intends to issue financial instruments as referred to in Article 5:56(1)(a) [that is, financial instruments admitted to trading on a regulated market or a multilateral trading facility],

– or the party at whose proposal a purchase contract in respect of a financial instrument as referred to in that provision, other than a security, has been established,

– or which proposes a purchase contract in respect of a financial instrument as referred to in that provision, other than a security,

is obliged, no later than on the fifth working day following the transaction date, to report transactions conducted or effected on own account in shares pertaining to the issuer referred to under (a), (b) or (c) respectively (of Article 5:60(1)), or in financial instruments the value of which is determined in part by the value of those shares.

18. In accordance with Article 5:56(1)(a), the persons referred to in the above provision are prohibited from making use of inside information when they effect, in or from the Netherlands or from a Member State, a transaction in financial instruments admitted to trading on a regulated market which has been licensed in accordance with Article 5:26(1), or on a multilateral trading facility for which the investment firm holds a licence as referred to in Article 2:96, or for which the admission to such trading has been requested.

19. Under Article 1:40(1), the supervisory authority must charge the costs of the activities which it carries out in performing its duties to the firms in respect of which those activities are carried out, in so far as those costs are not chargeable to the State budget.

20. Pursuant to Articles 5, 6 and 8(1)(i)(4) of the Besluit bekostiging financieel toezicht (Decree on the Funding of Financial Supervision), the Stichting Autoriteit Financiële Markten (Netherlands Regulatory Authority for Financial Markets; 'the AFM') is authorised to impose charges on issuers within the meaning of Article 5:60(1)(a) of the Wft.

II. The dispute before the referring court and the question referred for a preliminary ruling

21. The proceedings before the referring court are between the AFM and Robeco Hollands Bezit N.V. and 11 other companies (undertakings for collective investment in transferable securities of the open-ended type and open-end investment funds; 'Robeco' or 'the Robeco funds'), which challenged certain calculations of charges levied by the AFM.

22. The subject matter of the dispute is, specifically, the decisions of the AFM of 30 October 2009, 31 December 2010, 30 September 2011 and 28 September 2012 ('the primary decisions'). By those decisions, the AFM imposed on the Robeco funds the charges in respect of the years 2009, 2010, 2011 and 2012, in the amounts of EUR 110, EUR 350, EUR 630 and EUR 180, respectively, in accordance with Articles 1:40 and 5:60(1)(a) of the Wft and of the Besluit bekostiging financieel toezicht (Decree on the Funding of Financial Supervision).

23. According to the AFM, those charges were payable as a result of the supervisory tasks taken on by that authority in relation to the Robeco funds in connection with the application of Directive 2003/6, which was transposed into Netherlands law by the Wft, which imposes on issuers of financial instruments traded on regulated markets the obligation to transmit information about the activities of their managers.

24. In the decision of 13 December 2012, the AFM rejected the objections raised by Robeco.

25. Robeco appealed against that decision to the Rechtbank Rotterdam (District Court, Rotterdam), which dismissed the appeal by judgment of 24 December 2013.

26. That court rejected the claims put forward by Robeco and accepted the arguments of the AMF. It held that the EFS system complied with the definition of regulated market in Article 1:1 of the Wft. Article 5:60 of the Wft was applicable to the management and supervisory board members and the charges levied by the AFM were lawful.

27. Robeco appealed against the judgment of the lower court to the College van beroep voor het bedrijfsleven (Administrative Court of Appeal for Trade and Industry, the Netherlands), which must establish definitively whether or not the EFS system comes within the definition of regulated market in Directive 2004/39.

28. The referring court regards as established some of the evidence and facts in the main proceedings, which I shall summarise below.

29. First, the referring court states that Euronext has a licence to operate a regulated market under Article 5:26(1) of the Wft. One segment of Euronext is EFS, established as a separate trading system in which only units in open-end investment funds are traded. The Robeco funds are open-end investment funds and must execute orders to purchase or issue shares through EFS.

30. Second, the referring court confirms that fund agents and brokers are affiliated to the EFS system as members. Every investment fund or group of investment funds has its own fund agent, who acts on account of and at the risk of the fund or group of investment funds. A broker collects the investors' purchase and sale orders and passes them on to the fund agent of the investment fund concerned.

31. Finally, the referring court explains that transactions take place on the EFS system on the basis of forward pricing. A broker can place an order with a fund agent until 16.00 (cut-off time), after which the net asset value of the investment fund (and thus the value of the share to be issued or purchased) is calculated on the basis of rates in force after the cut-off time. The fund agent executes the order placed with him at 10.00 the following morning on the basis of the calculated net asset value, with a limited increase or reduction due to the transaction costs of the investment funds. Fund agents do not conduct any transactions with each other in the EFS system, and nor do brokers. Transactions on the EFS are conducted in accordance with the rules of the EFS Trading Manual and the TCS-web User Guide to the EFS.

32. Based on those factors, the College van beroep voor het bedrijfsleven (Administrative Court of Appeal for Trade and Industry), contrary to the decision of the first-instance court, is inclined to conclude that the EFS system is not multilateral and that, therefore, it cannot be classified as a regulated market within the meaning of Article 4(1)(14) of the MiFID I.

33. In the referring court's view, recital 6 of the MiFID I distinguishes bilateral systems (the SI system) from multilateral trading facilities, which include regulated markets. The differentiating factor lies in the fact that, in bilateral systems, transactions take place exclusively between the investment firm and the investor, whereas in multilateral systems transactions between investors themselves are also possible. EFS is a bilateral system because it involves a broker (representing the investor) and a fund agent (on behalf of the funds) and the former executes transactions with the latter.

34. According to the referring court, recital 6 of the MiFID I suggests that a system in which the only transactions carried out are those which are not subject to a reporting obligation cannot be regarded as a regulated market. Under Article 5(c) of Regulation No 1287/2006, transactions in the EFS system are primary market transactions and not transactions which involve the purchase and sale of a financial instrument. Chapter III of that regulation is not applicable to those primary market transactions and, therefore, the reporting obligations it contains are not applicable to transactions in the EFS system. Since only primary market transactions, which are not therefore subject to the reporting obligation, are carried out through EFS, that system cannot be regarded as a regulated market.

35. According to the national court, that conclusion is reinforced by the fact that the value of shares which are traded through the EFS system is determined by calculation of their net asset value, as explained above. However, the price is not established in that way on regulated markets but on the basis of bids and offers by those trading there.

36. Lastly, the referring court argues that EFS is not a regulated market because price manipulation is not possible in that system and it would be difficult for insider trading to take place.

37. Nevertheless, the referring court considers the classification of EFS as a regulated market within the meaning of Article 4(1)(14) of the MIFID I to be defensible. The referring court acknowledges that it cannot be inferred directly from the text of that article or from recital 6 of the MiFID that a trading platform on which only non-reportable transactions take place, and on which the trading prices are not established on the basis of bids and offers, cannot be classified as a regulated market. It suffices that there is a market which operates on the basis of a set of rules as described in recital 6 and that there is compliance with the elements of the definition in Article 4(1)(14) of the MiFID.

38. The referring court further considers that the EFS system could come within the definition of regulated market in the MiFID I because EFS is an autonomous trading platform operated by Euronext under the appropriate licence. Euronext has been granted an operating licence in that regard; it is a multilateral system to which multiple brokers and fund agents with the ability to place orders are affiliated; users of the EFS system can be regarded as third parties in relation to Euronext; and within the EFS system the buying and selling interests of the brokers and fund agents are brought together and give rise to transactions.

39. In the light of the uncertainties concerning the interpretation of the term 'regulated market', the College van beroep voor het bedrijfsleven (Administrative Court of Appeal for Trade and Industry) has referred the following question to the Court of Justice for a preliminary ruling:

'Must a system in which multiple fund agents and brokers participate who, within that system, represent respectively "open end" investment funds and investors in commercial transactions, and which, in fact, facilitates exclusively those "open end" investment funds in their obligation to execute the purchase and selling orders for shares placed by investors, be regarded as a regulated market within the meaning of Article 4(1)14 of the MiFID [I] and, if so, what characteristics are determinant in that regard?'

III. Analysis of the question referred for a preliminary ruling

40. The referring court seeks clarification from the Court of Justice of whether or not a platform for trading in financial instruments, in the nature of the EFS system, is a regulated market within the meaning of the MiFID I. Before dealing with the answer to that question, I believe that it is necessary to outline the rules governing the systems for trading in financial instruments laid down in the MiFID I and the developments which have taken place since the implementation of those rules. Whilst they are not applicable *ratione temporis* to the proceedings, I shall refer also to the changes which, from 3 January 2018, will apply as a result of the entry into force of the MiFID II body of legislation.

A. Introductory remarks concerning systems for trading in financial instruments

41. The MiFID I and its implementing provisions amended to a large extent the legal provisions governing systems for trading in financial instruments.[10] With the aim of increasing the integration, competitiveness and efficiency of those markets within the Union, the trading monopoly held in some Member States by traditional stock markets was abolished and competition was opened up between the traditional platforms and new alternative trading facilities which had been appearing as a result of technological developments but were not regulated.

42. As I have pointed out, the EU legislature's intention was to increase transparency, better protect investors, reinforce confidence and ensure that supervisory authorities had the powers necessary to carry out their tasks.[11]

43. The MiFID I deals with three types of system for trading in financial instruments, two of which are multilateral (regulated markets and MTFs)[12] and one of which is bilateral (SI). In addition to these systems, which are consistent with an organised trading model, the MiFID I provisions provide for over-the-counter ('OTC') trading in financial instruments.

10 Those trading systems 'are multilateral systems or networks, which provide trading, clearing, settlement, and reporting services in relation to securities and derivative transactions. They support financial markets by providing essential services, connecting counterparties, reducing transaction costs through economies of scale, managing systemic and counterparty risks, and fostering transparency' (Ferrarini, G., and Saguato, P., 'Regulating Financial Market Infrastructures', *ECGI Working Paper* No 259/2014, June 2014, p. 7).

11 According to a study financed by the Commission, the outcome was increased competition between the different venues trading in financial instruments, with increased choice for investors in relation to service providers and the financial instruments available, progress which was boosted by technological developments. In general, the costs of transactions have fallen and integration has increased, according to the study by Oxera, Monitoring Prices, *Costs and Volumes of Trading and Post-trading Services*, 2011. See also the document COM(2011) 652 final, p. 2.

12 A multilateral facility may also be known as a 'trading venue' which is defined as 'a system operated by an investment firm or a market operator within the meaning of Article 4(1)(1) and 4(1)(13) of Directive 2004/39/EC other than a systematic internaliser within the meaning of Article 4(1)(7) thereof, which brings together buying or selling interests in financial instruments in the system, in a way that results in a contract in accordance with Title II or III of that Directive', according to Article 2(4) of Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ 2012 L 201, p. 1).

44. The first and best established category of system for trading in financial instruments is the regulated market, used in the MIFID I and II bodies of legislation and in other provisions of EU law. Although I shall examine the characteristic features of regulated markets in more detail below, such markets are, according to the definition in Article 4(1)(14) of the MiFID I, multilateral systems for trading in financial instruments, managed by an operator who applies non-discretionary rules, in which multiple third-party buying and selling interests in financial instruments interact, leading to the conclusion of contracts. They are similar to traditional stock markets and, according to the database of the European Securities and Markets Authority ('ESMA'),[13] there are currently 102 regulated markets in the European Union (four in the Netherlands, one of which is Euronext Amsterdam).

45. The second category — so-called multilateral trading facilities (MTFs) — was introduced by the MiFID I to encompass the alternative trading mechanisms which had emerged in practice as a result of technological developments. MTFs are also multilateral trading systems in which multiple third-party buying and selling interests interact, leading to the conclusion of contracts, under the non-discretionary management of an operator or an investment company, and they require an administrative licence. Although the rules governing MTFs are similar to those governing regulated markets, the difference is that there is no prior control of the types of financial instruments which may be traded.

46. According to the ESMA database,[14] the EU currently has 151 MTFs, of which the most important by size are platforms like BATS Trading Ltd (United Kingdom). There are two in the Netherlands: Tom MTF Derivatives Markets and Tom MTF Cash Markets.

47. The third category introduced by the MiFID I is the so-called 'systematic internaliser'. Unlike the above systems, systematic internalisers are not established as multilateral trading venues managed by a third party which are used by investors to buy and sell financial instruments, but rather as bilateral trading systems. According to Article 4(1)(7) of the MiFID I, systematic internalisers are investment firms which, on an organised, frequent and systematic basis, deal on own account through the execution of client orders. This trading system is not defined as a system as such but rather by reference to the party who executes the order.

48. Although they do not require an administrative licence from the national supervisory authority, SIs are undertakings of a sufficient size to match investors' purchase and sale orders internally, and they are therefore subject to a large number of obligations relating to transparency. The arrangements for SIs do not appear to have been very attractive since, according to the data from ESMA,[15] only 11 firms are registered as such in the whole of the European Union, none of them in the Netherlands.

49. In addition to trading in financial instruments using those organised trading systems, the MiFID I, as previously stated, provides for a fourth method of executing orders in financial instruments: OTC trading. This may be deduced from recital 53 of the directive,[16] which does not require 'the application of pre-trade transparency rules to transactions carried out on an OTC basis, the characteristics of which include that they are ad-hoc and irregular and are carried out with wholesale counterparties and are part of a business relationship which is itself characterised by dealings above standard market size, and where the deals are carried out outside the systems usually used by the firm concerned for its business as a systematic internaliser'.

13 See the data at https://registers.esma.europa.eu/publication/searchRegister?core=esma_registers_mifid_rma.

14 See the data at the following link https://registers.esma.europa.eu/publication/searchRegister?core=esma_registers_mifid_mtf.

15 See the data at the following link https://registers.esma.europa.eu/publication/searchRegister?core=esma_registers_mifid_sys.

16 See the remarks of Gomber, P., and Pierron, A., 'MiFID: Spirit and Reality of a European Financial Market Directive', *Celent Paper*, November 2010, p. 12.

50. Perhaps because of the requirements imposed on SIs (organised, frequent and systematic trading, as expressed in Article 21(3) of Regulation No 1287/2006), and because of the even more restrictive configuration of regulated markets and MTFs, the MiFID I did not include within its scope other types of OTC trading which account for a significant proportion of trading in financial instruments. These are so-called broker crossing systems, broker-dealer crossing networks and dark pools and electronic trading platforms. [17]

51. Following the 2008 financial crisis, and in the light of developments in trading platforms, [18] the MiFID II, which is not yet in force, has retained the same classification of trading systems but with the addition of a further category which it calls 'organised trading facilities' ('OTF').

52. OTFs are defined in very broad terms because this new type of multilateral trading system is intended to include OTC trading systems which *escaped* regulation under the MiFID I. [19] Its main difference in relation to regulated markets and MTFs is that the operator of an OTF can execute orders on a discretionary basis, subject, as appropriate, to the requirements of pre-trade transparency and the best execution obligations.

53. The changes described above reveal that the EU legislature seeks to make subject to regulation the various systems for trading in financial instruments which have been developing, with the sole exception of bilateral and occasional trading in those instruments. [20] The aim is that all organised trading in financial instruments should be carried out through one of the bilateral or multilateral channels provided for in the MiFID II. [21] This promotes more effective competition between the different trading systems, without the risk that operators seeking to circumvent the checks of the supervisory authorities will develop other alternative mechanisms.

B. The definition of regulated market and its application to a trading platform like EFS

54. The referring court asks the Court of Justice to clarify whether or not a trading platform with the features of the EFS system is covered by the definition of regulated market laid down in the MiFID I. Before stating my view in that regard, I should like to make three observations.

17 See the detailed analysis in Onofrei, A., *La négotiation des instruments financiers au regard de la directive MIF*, Larcier, Brussels 2012, pp. 360 to 363.

18 Recital 4 of the MiFID II explains it in these terms: 'The financial crisis has exposed weaknesses in the functioning and in the transparency of financial markets. The evolution of financial markets has exposed the need to strengthen the framework for the regulation of markets in financial instruments, including where trading in such markets takes place over-the-counter (OTC), in order to increase transparency, better protect investors, reinforce confidence, address unregulated areas, and ensure that supervisors are granted adequate powers to fulfil their tasks'.

19 Article 4(1)(23) of the MiFID II defines an organised trading facility (OTF) as 'a multilateral system which is not a regulated market or an MTF and in which multiple third-party buying and selling interests in bonds, structured finance products, emission allowances or derivatives are able to interact in the system in a way that results in a contract in accordance with Title II of this Directive'.

20 In that connection, Article 1(7) of the MiFID II states: 'All multilateral systems in financial instruments shall operate either in accordance with the provisions of Title II concerning MTFs or OTFs or the provisions of Title III concerning regulated markets. Any investment firms which, on an organised, frequent, systematic and substantial basis, deal on own account when executing client orders outside a regulated market, an MTF or an OTF shall operate in accordance with Title III of Regulation (EU) No 600/2014. Without prejudice to Articles 23 and 28 of Regulation (EU) No 600/2014, all transactions in financial instruments as referred to in the first and the second subparagraphs which are not concluded on multilateral systems or systematic internalisers shall comply with the relevant provisions of Title III of Regulation (EU) No 600/2014.'

21 According to Moloney, 'MiFID II/MiFIR is designed to repatriate trading on to organized trading venues and away from OTC markets' (Moloney, N., *EU Securities and Financial Markets Regulation*, 3rd ed., Oxford University Press, Oxford, 2014, p. 434). See also Clause, N.J., and Sorensen, K.E., 'Reforming the Regulation of Trading Venues in the EU under the Proposed MiFID II. Levelling the Playing Field and Overcoming Market Fragmentation?', *European Company and Financial Review*, 2012, p. 285.

55. The first is that it is for the national court, which has direct and full knowledge of how EFS operates, to establish whether or not that platform fulfils the conditions for classification as a regulated market. The Court may, of course, provide it with guidelines for interpreting the MiFID I, by drawing from the directive the conditions which must be satisfied by a trading system for inclusion in that category. Of those conditions, special attention must be paid to those at issue in this case [22] to ensure that the answer is helpful.

56. The second observation is that the information from the national court and that furnished by the parties at the hearing appears to confirm that EFS operates under the 'umbrella' of the administrative licence to act as a regulated market granted to Euronext by the AFM.

57. However, there is no evidence that the EFS segment is itself a regulated market. It is not one of the regulated markets included on the ESMA database; [23] nor does it specifically advertise itself as such, unlike other similar systems. [24]

58. However, the fact that the EFS system is not included in the list of regulated markets does not preclude it from being a market of that kind. In its judgment in *Nilaş and Others*, [25] the Court stated that the mere fact that a market is not included in that list is not a sufficient reason for assuming that that market is not a regulated market. [26]

59. Euronext could act as the operator of the Euronext Amsterdam regulated market and at the same time as the operator of the EFS trading platform. The judgment in *Nilaş and Others* held that Directive 2004/39 expressly envisages situations in which the operator of a regulated market also operates another trading system, without the latter becoming a regulated market by reason of that operation. [27] The Court stated that the classification as a regulated market of a system for trading in financial instruments requires that system to be authorised as a regulated market and its operation to satisfy the requirements set out in Title III of the MiFID I. [28]

60. It is for the referring court to establish — a matter in relation to which it has complete discretion — whether EFS is really a segment of the Euronext Amsterdam regulated market, which operates under the umbrella of that market, or whether it is itself a separate trading platform or facility, even though both have the same operator.

22 The Court used that approach in its judgments of 3 December 2015, *Banif Plus Bank* (C-312/14, EU:C:2015:794, paragraph 51), and of 30 May 2013, *Genil 48 and Comercial Hostelera de Grandes Vinos* (C-604/11, EU:C:2013:344, paragraph 43).

23 Pursuant to Article 47 of the MiFID I, entitled 'List of regulated markets': 'Each Member State shall draw up a list of the regulated markets for which it is the home Member State and shall forward that list to the other Member States and the Commission. A similar communication shall be effected in respect of each change to that list. The Commission shall publish a list of all regulated markets in the *Official Journal of the European Union* and update it at least once a year. The Commission shall also publish and update the list at its website, each time the Member States communicate changes to their lists'.

24 Such as the ETFplus market (the open-ended collective investment undertaking (CIUs) segment) of the Borsa italiana. See, in that connection, http://www.borsaitaliana.it/fondi/formazione/formazione.htm. That market is for trading in financial instruments of open-end investment funds; it is included in the ESMA list of regulated markets in Italy, and it was established and explicitly advertised as such. The ESMA database refers to it as ELECTRONIC OPEN-END FUNDS AND ETC MARKET at the link https://registers.esma.europa.eu/publication/details?core=esma_registers_mifid_rma&docId=mifid731rma.

25 Judgment of 22 March 2012 (C-248/11, EU:C:2012:166, paragraph 54).

26 Inclusion in the list drawn up by the Member States, which the definition in Article 4(1)(14) of the MiFID I does not envisage, was, in fact, an element of the definition of 'regulated market' in accordance with Article 1(13) of Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field (OJ 1993 L 141, p. 27), repealed by the MiFID I with effect from 1 November 2007.

27 Judgment of 22 March 2012, *Nilaş and Others* (C-248/11, EU:C:2012:166, paragraphs 44 to 46).

28 Ibid., paragraphs 42 to 43.

61. The third observation concerns the characteristics of the applicant undertakings. The Robeco funds are undertakings for collective investment in transferable securities (UCITS), to which Directive 2009/65/EC[29] is applicable. According to Article 1(2) of that directive, UCITS are undertakings: a) with the sole object of collective investment in transferable securities or in other liquid financial assets referred to in Article 50(1) of capital raised from the public and which operate on the principle of risk-spreading; and b) with units which are, at the request of holders, repurchased or redeemed, directly or indirectly, out of those undertakings' assets.

62. More specifically, the Robeco funds are public, open-ended UCITS, constituted in accordance with contract law (as common funds managed by a management company), in accordance with Article 1(3) of Directive 2009/65. The activity of open-end investment funds 'involves raising capital from the public, the investment and common management of that capital, the spreading of the risks and results arising from that investment and the offering of a counterparty by the UCITS to its investors or shareholders'.[30]

63. In using the EFS system operated by Euronext, the Robeco funds are involved in the organised, frequent and systematic raising of money from investors and therefore, in principle, EFS has the status of a trading venue. Article 2(8) of Regulation No 1287/2006 defines a 'trading venue' as 'a regulated market, MTF or systematic internaliser acting in its capacity as such, and, where appropriate, a system outside the Community with similar functions to a regulated market or MTF'.

64. Taking into account the characteristics of the EFS system which are set out in the order for reference, its activity and that of the Robeco funds which participate in it appears to be trading in financial instruments on an organised, frequent and systematic basis.

65. If that is the case, EFS should, in principle, come within one of the types of trading system referred to in the MiFID I, that is, a regulated market, MTF or SI (unless it is an OTC trading platform which falls outside those three categories and which, under the MiFID II, must come within the new type of trading facility, that is OTFs).

66. Although the national court asks only whether EFS is a regulated market, I believe that it is necessary for the Court to provide the national court with an explanation about the other types of trading system referred to in the MiFID I, so that it can assess whether EFS conforms, directly or in the alternative, to one of those systems.

67. That assessment is important because, if EFS is not a regulated market, the referring court could consider whether it is an MTF or an SI and, in addition, determine whether the reporting obligations laid down in the Netherlands legislation (in conjunction with the provisions on the control of market abuse) are also applicable to those other types of trading system, such that they justify the levying of the disputed charges by the AFM.

1. General conditions imposed on regulated markets

68. It may be inferred from the definition in Article 4(1)(14) of the MiFID I that a system for trading in financial instruments must fulfil the following conditions to be regarded as a regulated market:

– It must be a multilateral, and not a bilateral, trading system, operated by a market operator, which acts as a third party independent of buyers and sellers.

29 Directive of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ 2009 L 302, p. 32).

30 Tapia Hermida, A.J., *Manual de derecho del mercado financiero*, Iustel, Madrid, 2015, p. 352.

– It brings together or facilitates the bringing together, within the system, of multiple third-party buying and selling interests in financial instruments.

– Transactions in financial instruments admitted to trading in accordance with the relevant provisions or systems must lead to the conclusion of contracts.

– It must operate in accordance with non-discretionary rules.

– It must have an administrative licence which the national supervisory authorities grant if the platform functions regularly, in accordance with the provisions of Title III of the MiFID I.[31]

69. It is common ground before the referring court that EFS satisfies a number of those conditions, namely:

– EFS is operated by a market operator, Euronext, and it functions as a platform in accordance with non-discretionary rules (in particular, those set out in the Euronext Fund Service Trading Manual and, subsequently in the Trading Manual for the NAV Trading Facility).

– The deals carried out on EFS between investors and investment funds lead to the conclusion of contracts between those investors and those funds, while it is immaterial whether or not those contracts are formally concluded within or outside the system.

– Finally, since its establishment in 2007, EFS has 'functioned regularly' within the Euronext Amsterdam regulated market, with Euronext as the operator, in accordance with the provisions of Title III of the MiFID I. Although, as I pointed out above, that is a matter to be verified by the national court, the information provided in that court's order for reference, and that provided by most of the parties,[32] appears to confirm that EFS operates under the umbrella of the administrative licence to act as a regulated market granted to Euronext by the AFM.[33]

70. The debate is therefore confined to the remaining conditions imposed, namely, that the system must be multilateral and that it must enable the matching of multiple third-party buying and selling interests in financial instruments admitted to trading. The referring court and the Robeco funds refer, moreover, to other elements of the definition of regulated market which are not provided for in the text of the MiFID I and which I shall also examine.

2. The condition that regulated markets must be multilateral

71. Recital 6 of the MiFID I makes clear the intention of the EU legislature to differentiate between multilateral and bilateral systems for trading in financial instruments. It states that the definitions of regulated market and MTF 'should exclude bilateral systems where an investment firm enters into every trade on own account and not as a riskless counterparty interposed between the buyer and seller'.

31 Pursuant to the first subparagraph of Article 36(1) of the MiFID I, authorisation as a regulated market must be reserved to trading systems which comply with the provisions of Title III of that directive. The Court has held that since 'the inclusion on the list referred to in Article 47 of that directive must be subsequent to the authorisation, it cannot logically constitute a condition of authorisation' (judgment of 22 March 2012, *Nilaş and Others*, C-248/11, EU:C:2012:166, paragraph 53).

32 The AFM states that Euronext Amsterdam N.V. sent the referring court a letter confirming that EFS is a regulated market and stating that all the supervisory authorities of the States in which Euronext operates regulated markets (France, the United Kingdom, Belgium and Portugal, in addition to the Netherlands) were of the same opinion.

33 The Robeco funds observed at the hearing that that has only been the case since 2012, when the AFM began to classify EFS as a regulated market and to require payment of the disputed charges from it.

72. Although the MiFID I does not define multilateral systems, I believe that it may be helpful to turn to the MiFID II, which has provided a definition of such systems in Article 4(1)(19): '"multilateral system" means any system or facility in which multiple third-party buying and selling trading interests in financial instruments are able to interact in the system'.

73. Regard being had to both texts, it is my view that a system for trading in financial instruments will be multilateral if multiple investors interact in that system in order to buy and sell financial instruments and there is a riskless counterparty (system operator) interposed between those investors to ensure better functioning of the system.

74. Although there is no legislative definition of a bilateral trading system in the MiFID I either, recital 6 of the directive states that such a system is one 'where an investment firm enters into every trade on own account and not as a riskless counterparty interposed between the buyer and seller'. Article 4(1)(6) of the MiFID I explains that 'dealing on own account' means 'trading against proprietary capital resulting in the conclusion of transactions in one or more financial instruments'. Therefore, bilateral trading systems are characterised [34] by the fact that, in those systems, investors trade in financial instruments directly with the investment firm, which acts on own account and risks its capital, without the interposition of any third party.

75. The criteria for determining whether a platform for trading in financial instruments is multilateral may therefore be summarised as: a) the participation of multiple investors in buying and selling financial instruments, and b) the existence of a riskless counterparty (the operator), interposed between the different investors to ensure the proper functioning of the system.

76. Subject to the conditions set out in points 55 to 67, it is now necessary to examine whether an entity like EFS satisfies those criteria.

77. In their observations, the Robecco funds argue that the EFS system is bilateral. In their submission, it is a distribution channel for units in open investment funds. Investors may either make contact with those funds directly or do so through the EFS system. In the latter case, brokers collect purchase and sale orders from their clients and transmit them to investment fund agents who operate on EFS. The advantage for investors in using EFS is that that system enables access to a large number of investment funds and the transmission of orders is more efficient. According to Robeco's statements made at the hearing, EFS is the method used most by small investors to purchase shares in open-end investment funds, whereas large investors tend to use direct trading.

78. Therefore, the Robeco funds argue, EFS is a bilateral system for the transmission of orders for the purchase and sale of units in open investment funds, where brokers do not interact with each other and deal only with fund agents. Each agent operates on behalf of his own fund and does not match but rather clears orders for the purchase and sale of units. Only orders which lead to transactions on a primary market are placed.

79. However, I do not believe that those arguments are sufficient to counter the view that the EFS system is multilateral.

34 The Committee of European Securities Regulators stated that the expression 'multilateral systems' is intended to exclude bilateral systems and that the latter are 'those systems where a single entity enters into every trade entered through the system, on own account and not as a riskless counterparty interposed between the buyer and seller. By contrast, a system where multiple participants (e.g. market-makers) act as counterparties to the orders entered through the system would be regarded as multilateral' (point 13 of the CESR Document, Standards for Alternative Trading Systems, CESR/02-086b, July 2002, (http://www.esma.europa.eu/system/files/l-02_086b.pdf).

80. As the AFM and the Commission point out, in the EFS system there is an operator (Euronext Amsterdam N.V.) which transmits to fund agents the investor's purchase and sale orders submitted by brokers. In the transactions between brokers and agents, Euronext, as the operator of EFS, acts as a third party. Euronext's operation of this trading platform is carried out on a non-discretionary basis, in accordance with the Euronext Fund Service Trading Manual.

81. Brokers and fund agents can definitely effect transactions bilaterally, which does not preclude the classification of EFS as a multilateral system, since a third party (Euronext) intervenes as the market operator, providing trading security, transparency and better protection for investors. That factor explains why small investors in open-end investment funds are the main users of the EFS system. Large investors have the necessary knowledge to protect themselves.

82. The intervention of Euronext enables funds to attract investors more easily than if they only used bilateral trading. Specifically, the establishment of EFS in 2007 [35] was carried out by Euronext Amsterdam in close collaboration with the AFM and the representative association of Netherlands investment funds. Euronext stated that the main advantage of the new EFS model for investors was that of operating in 'a clearly regulated market'. [36]

83. If investors, or their brokers, bought and sold shares directly from or to open-end investment fund agents, outside EFS, it would be a bilateral trading system which would have the form of an SI (if trading was carried out on a continuous, frequent and systematic basis) or an OTC trading system not subject to the MiFID I (if trading were only occasional). That does not appear to be the case here.

84. The fact that Euronext intervenes in the system as an operator which does not act on own account or expose proprietary capital to risks also shows that EFS is a multilateral system. Moreover, Euronext is prohibited from buying, selling or matching units in funds in order to retain the attributes of independence and impartiality which enable it to transmit to the AFM pre- and post-trade information on transactions effected in the EFS system, in accordance with the provisions of the MiFID I.

3. Requirement that there must be intersection of the buying and selling interests of multiple third parties on regulated markets

85. The other element of the definition of regulated market which causes difficulties for the referring court is the requirement that the buying and selling interests of multiple third parties must intersect.

86. The Robeco funds submit that within the EFS system there are only bilateral relationships between brokers and fund agents, as a result of which units are bought or sold. Therefore, there is no interaction between the fund agents themselves or between the brokers themselves.

87. I do not find that argument persuasive either. As the United Kingdom Government observes, the agents of the different funds deal on the EFS system with multiple brokers who represent investors. Brokers can choose which transactions they carry out with the agents of the various funds and those agents, for their part, may trade with the brokers of multiple investors. Accordingly, there is an intersection or interaction between the buying and selling interests of multiple third parties, which is the nature of a regulated market or any multilateral trading platform in financial instruments.

35 Euronext intends to extend its EFS system to France, by developing a multilateral platform for open-end investment funds which operated on the Paris stock market; the platform is also called Euronext Fund Services and will be operated by Euronext Paris. See the information in Euronext, *Expansion of Euronext Fund Services to include open-end funds on Euronext Paris*, Info-Flash, 24 July 2015.

36 CESR, Call for Evidence on UCITS Distribution, Reply form Euronext, CESR/07-205, June 2007, p. 2.

88. EFS is not a mere *information channel* for the transmission of orders. It is a system in which financial instruments (units in open-end investment funds) are traded and its activity is carried out in accordance with the rules established by the system operator (Euronext) in a trading manual. [37]

89. That interaction is not permitted in bilateral trading systems (like SIs). Therefore, recital 17 of the MiFID II, which can be used as a criterion for interpretation even though it is not in force, states that 'while trading venues are facilities in which multiple third party buying and selling interests interact in the system, a systematic internaliser should not be allowed to bring together third party buying and selling interests in functionally the same way as a trading venue.'

90. It must be borne in mind that an open-end investment fund is an UCITS whose task, as I have indicated, consists of the raising of capital from the public with a view to the common investment and management of that capital, thereby spreading the risks and results of that investment among its investors who are thus able to obtain a return on their investments with lower exposure to risk.

91. It is essential that an investment fund raise capital from investors and that is what the Netherlands funds sought through the establishment of an organised trading facility like EFS. That facility promotes the intersection of the buying and selling interests of funds, represented by their agents, and of investors wishing to buy or sell units in those funds, who participate in EFS through their brokers. Unlike OTC trading systems and SIs, EFS provides a definite advantage in promoting the intersection of buying and selling interests relating to units in open investment funds.

92. Moreover, since, as their representative acknowledged at the hearing, the Robeco funds continue to sell their units through bilateral trading, I fail to understand how a trading system in which Euronext participates can also be classified as bilateral. The involvement of a third party as an independent operator, in contrast to bilateral trading, shows, in my view, that EFS is a multilateral system which is intended to promote interaction of the buying and selling interests of multiple third parties, to trade units in open-end investment funds.

4. Other possible elements of the definition of regulated market

93. The referring court and the Robeco funds have referred to other elements which, in their view, characterise regulated markets. These are specifically: a) the price formation mechanism used in the trading system; b) the primary nature of the system; and c) whether or not a risk of market abuse exists. The referring court and the Robeco funds argue that the application of those elements to EFS confirms that it is a bilateral system and not a multilateral trading platform in financial instruments.

94. I shall state now that none of those elements are provided for in the definition of regulated market in Article 4(1)(14) of the MiFID I and nor do I believe that they are implicit in that definition, from which it follows that they should not be taken into account when establishing whether or not a platform like EFS is a regulated market.

95. As regards the first factor, the referring court explains that transactions take place on EFS on the basis of forward pricing, in other words, on the basis of the net asset value, calculated using the rates in force after the cut-off time. [38] The Robeco funds submit that that method of fixing the price of transactions on EFS is not governed by the law of bids and offers for financial instruments traded within the platform, which must always govern a regulated market.

37 The abovementioned *Euronext Investment Fund Services Trading Manual*, subsequently replaced by the *Trading Manual for the NAV Trading Facility.*

38 See the more detailed explanation of the mechanism at point 31 of this Opinion.

96. However, the MiFID I does not stipulate any of the different methods of price formation as a differentiating factor of regulated markets. That factor is therefore irrelevant for the purposes of determining whether or not, under that directive, EFS is a regulated market.

97. That is confirmed by Articles 29(2) and 44(2) of the MiFID I, implemented by Article 18 of Regulation No 1287/2006, which provides for the possibility of waiving the pre-trade transparency obligations in the case of MTFs and regulated markets whose prices are determined by mechanisms other than bids and offers for the financial instruments traded on the platform. The reason for allowing the waiver is, logically, because there may be regulated markets with different types of price formation mechanisms.

98. Furthermore, according to the information supplied by the AFM at the hearing, bids and offers for units do play quite an important role in price formation on EFS. Where bids and offers for units in a fund are the same they are cleared by the fund agent but, where the bid exceeds the offer, investors pay an additional percentage for units; in the opposite case, investors are given a reduction. A higher bid or offer for units in an investment fund depends on the results of their investments in markets in financial instruments.

99. The second factor put forward by the referring court and the Robeco funds relates to the primary nature of the market, on which units in open-end investment funds are issued and subscribed but there is no secondary trading of those financial instruments.

100. However, the definition of regulated market in the MiFID I does not include any reference to that element (nor does the definition of MTF). Moreover, as the Commission observes, on a regulated market the initial (primary) placing of financial instruments and the subsequent secondary trading of those instruments are both possible.[39] Therefore, the fact that the issuance and subscription of units in investment funds are not the subject of secondary trading does not preclude EFS from being a regulated market.

101. Furthermore, as the United Kingdom Government points out, Regulation (EU) No 1031/2010[40] deals with the auctioning of greenhouse gas emission allowances, which constitutes primary trading in a financial instrument. According to Article 35(1) of that regulation, 'auctions shall only be conducted on an auction platform authorised as a regulated market under paragraph 5 by the competent national authorities referred to in the second subparagraph of paragraph 4'. That provision therefore expressly allows primary market transactions to take place on a regulated market, in accordance with the conditions laid down in the MiFID I.

102. Finally, the Robeco funds submit — a submission echoed by the referring court — that in the EFS system there is virtually no risk of market abuse and that, therefore, its classification as a regulated market (with the concomitant obligation to transmit information about the activities of the investment fund managers) does not contribute anything to the protection of investors.

103. However, I do not believe that that argument can be accepted either. First, the elements of the definition of regulated market in the MiFID I do not include the degree to which there is a possibility of market manipulation. Second, the AFM has refuted (to my mind, with foundation) Robeco's argument confirming that there is a possibility of market abuse or insider dealing in systems like the EFS.

39 In Moloney's view, the concept of regulated market 'is therefore "opting in" in design and captures the distinct primary market capital-rising and secondary market trading functionalities' (Moloney, N., *EU Securities and Financial Markets Regulation*, 3rd ed., Oxford University Press, Oxford, 2014, p. 463).

40 Commission Regulation of 12 November 2010 on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances pursuant to Directive 2003/87/EC of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowances trading within the Community (OJ 2010 L 302, p. 1).

104. Specifically, the AFM has furnished examples in which such unlawful conduct has occurred in the trading of units in investment funds. In situations such as the departure of an important investment fund manager, inside information may exist and may give rise to market abuse affecting the value of units,[41] a situation which may also occur in relation to decisions such as the transformation of an open-end investment fund into a closed UCITS.

105. Article 9 of Directive 2003/6, which is applicable *ratione temporis* to the main proceedings, provided only for the obligation to transmit information in relation to managers of undertakings with instruments admitted to trading in regulated markets, because that was the only type of organised trading in existence at the time when that directive was adopted. Subsequently, as I explained above, the MiFID I created MTFs and the MiFID II has provided for the establishment of OTFs as new organised multilateral trading facilities. A systematic interpretation of those provisions suggests that the obligations to transmit information to the supervisory authorities in order to prevent unlawful conduct in the form of insider trading (Article 6 of Directive 2003/6) should apply also to the operators of the new organised trading facilities for financial instruments contained in the post-2003 EU legal provisions. That interpretation has been fully confirmed by the new Regulation (EU) No 596/2014.[42]

106. The interpretation which I suggest, to the effect that a trading system with the characteristics of EFS must be regarded as a regulated market, pursuant to the MiFID I, is consistent with the aim pursued by that directive.

107. The aim of the MiFID I body of legislation, which was later consolidated by the MiFID II, is to make subject to regulation and control the different trading systems which have emerged, leaving outside those systems only bilateral and occasional trading in financial instruments.[43] Therefore, any organised trading must come within one of the multilateral or bilateral systems provided for in the MiFID I provisions, and, after 3 January 2018, in the MiFID II provisions.[44] This encourages more effective competition between the different trading systems, without the risk that operators seeking to circumvent the checks carried out by the supervisory authorities will develop OTC trading systems. If the concept of regulated market in the MiFID I were interpreted as excluding trading platforms like EFS, on which investors interact with open-end investment funds, the aims pursued by the EU legislature in this sector would be undermined.

41 The departure of the Pimco fund manager in September 2014 led to the withdrawal of EUR 3 700 million (https://www.ft.com/content/56aa4284-4fc1-11e4-a0a4-00144feab7de). The move, in late 2014, by the manager of Ignis Asset Management to Old Mutual Global Investors and the departure of the fund manager of Bestinver Asset Management also had a significant impact (http://www.expansion.com/2014/09/23/mercados/fondos/1411459605.html).

42 Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (OJ 2014 L 173, p. 1). Recital 8 of that directive reads as follows: 'The scope of Directive 2003/6/EC focused on financial instruments admitted to trading on a regulated market or for which a request for admission to trading on such a market has been made. However, in recent years financial instruments have been increasingly traded on multilateral trading facilities (MTFs). There are also financial instruments which are traded only on other types of organised trading facilities (OTFs) or only over the counter (OTC). The scope of this Regulation should therefore include any financial instrument traded on a regulated market, an MTF or an OTF, and any other conduct or action which can have an effect on such a financial instrument irrespective of whether it takes place on a trading venue. … This should improve investor protection, preserve the integrity of markets and ensure that market abuse of such instruments is clearly prohibited'.

43 In that connection, Article 1(7) of the MiFID II provides: 'All multilateral systems in financial instruments shall operate either in accordance with the provisions of Title II concerning MTFs or OTFs or the provisions of Title III concerning regulated markets. Any investment firms which, on an organised, frequent, systematic and substantial basis, deal on own account when executing client orders outside a regulated market, an MTF or an OTF shall operate in accordance with Title III of Regulation (EU) No 600/2014. Without prejudice to Articles 23 and 28 of Regulation (EU) No 600/2014, all transactions in financial instruments as referred to in the first and the second subparagraphs which are not concluded on multilateral systems or systematic internalisers shall comply with the relevant provisions of Title III of Regulation (EU) No 600/2014.'

44 Clause, N.J., and Sorensen, K.E., 'Reforming the Regulation of Trading Venues in the EU under the Proposed MiFID II. Levelling the Playing Field and Overcoming Market Fragmentation?', *European Company and Financial Review*, 2012, p. 285.

IV. Conclusion

108. In the light of the foregoing considerations, I propose that the Court reply as follows to the question referred for a preliminary ruling by the College van beroep voor het bedrijfsleven (Administrative Court of Appeal for Trade and Industry, Netherlands):

An organised multilateral facility for trading in financial instruments, in which investors' buying and selling interests interact, through brokers, with open-end investment funds, represented by their agents, under the control of an independent operator, must be classified as a regulated market within the meaning of Article 4(1)(14) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC.