



Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

16 November 2017*

(Reference for a preliminary ruling — Directive 2004/39/EC — Markets in financial instruments — Article 4(1)(14) — Definition of ‘regulated market’ — Scope — System in which the participants are brokers representing investors and ‘open end’ investment fund agents required to execute orders relating to their funds)

In Case C-658/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the College van Beroep voor het Bedrijfsleven (Administrative Court of Appeal for Trade and Industry, Netherlands), made by decision of 2 December 2015, received at the Court on 7 December 2015, in the proceedings

Robeco Hollands Bezit NV and Others

v

Stichting Autoriteit Financiële Markten (AFM),

THE COURT (Fourth Chamber),

composed of T. von Danwitz, President of the Chamber, C. Vajda (Rapporteur), E. Juhász, K. Jürimäe and C. Lycourgos, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 1 February 2017,

after considering the observations submitted on behalf of:

- Robeco Hollands Bezit NV and Others, by E. Pijnacker Hordijk and A. M. ter Haar, advocaten,
- the Stichting Autoriteit Financiële Markten (AFM), by M.J. Blotwijk, advocaat, and M. van Kwawegen, acting as Agent,
- the United Kingdom Government, by D. Robertson and B. Kennelly and by S. Simmons, acting as Agents,
- the European Commission, by I.V. Rogalski and F. Wilman, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 26 April 2017,

* Language of the case: Dutch.

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation 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 (OJ 2004 L 145, p. 1).
- 2 The request has been made in proceedings between Robeco Hollands Bezit NV and 10 other companies, on the one hand, and the Stichting Autoriteit Financiële Markten (AFM) (Financial Markets Authority), on the other, concerning the imposition of charges on those companies for costs incurred by the AFM in performing its supervisory duties.

Legal context

European Union law

Directive 2004/39

- 3 Recitals 2, 5 and 6 of Directive 2004/39 state:
 - ‘(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 establish a comprehensive regulatory regime governing the execution of transactions in financial instruments irrespective of the trading methods used to conclude those transactions so as to ensure a high quality of execution of investor transactions and to uphold the integrity and overall efficiency of the financial system. A coherent and risk-sensitive framework for regulating the main types of order-execution arrangement currently active in the European financial marketplace should be provided for. ...
 - (6) Definitions of regulated market and MTF [Multilateral Trading Facility] 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). ...'

4 Article 4(1)(6), (7), (14), (15) and (17) of that directive provides:

'For the purposes of this Directive, the following definitions shall apply:

...

(6) "Dealing on own account" means trading against proprietary capital resulting in the conclusion of transactions in one or more financial instruments;

(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;

...

(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;

...

(17) "Financial instrument" means those instruments specified in Section C of Annex I;

...'

5 Point 3 of Section C of Annex I refers to 'Units in collective investment undertakings'.

Netherlands law

6 Article 1:40(1) of the Wet op het financieel toezicht (Law on financial supervision; 'the Wft') provides that the supervisory authority must charge the costs of the activities which it carries out in performing its duties to the undertakings in respect of which those activities are carried out, in so far as those costs are not charged to the State budget.

7 Pursuant to Articles 5, 6 and 8(1)(i)(4) of the Besluit bekostiging financieel toezicht (Decree on the funding of financial supervision), the AFM is authorised to impose charges on issuers within the meaning of Article 5:60(1)(a) of the Wft.

8 Article 5:60(1)(a) of the Wft provides that any person who determines or co-determines the day-to-day policy of an issuer with its seat in the Netherlands which has issued or intends to issue the financial instruments referred to in Article 5:56(1)(a) of the Wft, or the person whose proposal has led to a

purchase contract in respect of a financial instrument referred to in that provision, other than a security, or which proposes a purchase contract in respect of a financial instrument referred to in that provision, other than a security, is required, 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 in Article 5:60(1)(a) to (c) of the Wft, or to financial instruments the value of which is also determined by the value of those shares.

- 9 Under Article 5:56(1)(a) of the Wft, a party belonging to a category of persons listed in Article 5:56(2) is forbidden to make use of insider knowledge when conducting or effecting a transaction in or from the Netherlands or a non-EU Member State in financial instruments admitted to trading on a regulated market which has been licensed in accordance with Article 5:26(1) of the Wft or a multilateral trading facility for which the investment firm holds a licence as referred to in Article 2:96 of the Wft, or for which the admission to such trading has been requested.
- 10 Article 1:1 of the Wft reads as follows:

‘regulated market: 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.’

The dispute in the main proceedings and the question referred for a preliminary ruling

- 11 The applicants in the main proceedings are ‘open end’ investment funds. For the purposes of trading shares in their funds, they use the ‘Euronext Fund Services’ system (‘the EFS system’), a segment of Euronext Amsterdam NV (‘Euronext’), the latter of which is licenced to operate or manage a regulated market under Article 5:26(1) of the Wft.
- 12 It is clear from the order for reference that the EFS system is a separate trading system in which only shares in ‘open end’ investment funds are traded. Its members include fund agents and brokers. The brokers collect the investors’ purchase and sale orders and pass them on to the fund agent of the investment fund concerned. Transactions take place on the basis of ‘forward pricing’, in the sense that when a broker places an order with a fund agent by 16.00, the fund agent executes it at 10.00 the following day on the basis of the net asset value of the investment fund, adjusted in order to take into account the transaction costs.
- 13 In a series of decisions, confirmed by decision of 13 December 2012, the AFM imposed charges on the applicants in the main proceedings in respect of the years 2009 to 2012 under Article 1:40 of the Wft. The AFM took the view that those charges were owed since the EFS system is a ‘regulated market’ within the meaning of Article 4(1)(14) of Directive 2004/39, transposed into Netherlands law by Article 1:1 of the Wft, as a result of which Article 5:60 of the Wft applies to the managers and to the agents of the applicants in the main proceedings.
- 14 Since the Rechtbank Rotterdam (District Court, Rotterdam, Netherlands) dismissed the action brought against that confirmation decision, the applicants in the main proceedings appealed to the referring court, which asks whether or not the EFS system is a ‘regulated market’ as defined in Directive 2004/39.
- 15 According to the referring court, several factors suggest that the EFS system is not a multilateral system and therefore not a regulated market within the meaning of that provision.

- 16 First, the referring court considers that the EFS system appears to be more in the nature of a bilateral system in which, as is apparent, inter alia, from recital 6 of Directive 2004/39, transactions take place exclusively between the investment fund and the investor. In that regard, it points out that, in the EFS system, the fund agent and the broker represent the investment fund and the investor respectively and that the former always executes the orders of the latter.
- 17 Second, the referring court notes that there are no reporting requirements regarding transactions concluded through the EFS system. According to the referring court, inasmuch as recital 6 of Directive 2004/39 refers to regulated market rules concerning, inter alia, reporting obligations, it may be inferred 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’.
- 18 In that context, the referring court is of the view that it follows from Commission Regulation (EC) No 1287/2006 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) that primary market transactions are not subject to a reporting obligation so that a system such as the EFS system, in which only primary market transactions are conducted, cannot be regarded as a ‘regulated market’.
- 19 Third, the referring court notes that the price of shares in the EFS system is determined by their net asset value whereas, according to the applicants in the main proceedings, the price of financial instruments traded on regulated markets is determined by supply and demand.
- 20 Fourth, that court considers that, in so far as there is a very low risk of market abuse or insider trading in the EFS system, it would not be contrary to the objectives of Directive 2004/39 to find that it is not a regulated market.
- 21 Nevertheless, the referring court does not exclude the argument to the contrary, namely that the EFS system is a regulated market within the meaning of Article 4(1)(14) of Directive 2004/39. It points out that that system is operated independently by Euronext, which has been granted an operating licence in that regard. The referring court considers that the EFS system may be regarded as a multilateral system since multiple brokers and fund agents are affiliated to it, the shares of several investment funds are traded in it and several parties place orders in it. According to the referring court, the term ‘third party’ used in that provision, interpreted in the light of common usage, must refer to any user of that system. In addition, buying and selling interests are each brought together within the EFS system, giving rise to contracts, and its operation is subject to the non-discretionary rules contained in two documents entitled ‘*EFS Trading Manual*’ and ‘*TCS-web user Guide to the EFS*’.
- 22 The referring court also takes the view that it cannot be inferred directly from recital 6 and from Article 4(1)(14) of Directive 2004/39 that the lack of a reporting requirement and of price determination according to supply and demand prevent the EFS system from being regarded as a ‘regulated market’.
- 23 In those circumstances the College van Beroep voor het Bedrijfsleven (Administrative Court of Appeal for Trade and Industry, Netherlands) decided to stay the proceedings and to refer 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 [Directive 2004/39] and, if so, what characteristics are determinant in that regard?’

Consideration of the question referred

- 24 By its question, the referring court asks, in essence, whether Article 4(1)(14) of Directive 2004/39 must be interpreted as meaning that the concept of a ‘regulated market’ within the meaning of that provision covers a trading system in which multiple fund agents and brokers represent, respectively, ‘open end’ investment funds and investors, the sole purpose of which is to facilitate those investment funds in their obligation to execute the purchase and selling orders for shares placed by those investors.
- 25 Although it is for the national court alone to rule on the classification of the EFS system in accordance with the particular circumstances of the case at issue in the main proceedings, the Court does, however, have jurisdiction to elicit from the provisions of Directive 2004/39, in this case Article 4(1)(14), the criteria that the national court may or must apply to that end (see, to that effect, judgment of 3 December 2015, *Banif Plus Bank*, C-312/14, EU:C:2015:794, paragraph 51 and the case-law cited).
- 26 Article 4(1)(14) of Directive 2004/39 defines a regulated market as 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 of that directive.
- 27 In that regard, according to the order for reference, the EFS system does, in fact, display some of the characteristics of a regulated market described in that definition. Thus, according to the referring court, it is operated by Euronext and is subject to certain non-discretionary rules, namely those contained in two documents published by that institution, entitled ‘*EFS Trading Manual*’ and ‘*TCS-web user Guide to the EFS*’. An order placed in the EFS system by a broker with an agent of an investment fund results in a contract in respect of shares in that fund. In addition, Euronext has been authorised to operate the EFS system and there is nothing to suggest that it does not comply with the provisions of Title III of Directive 2004/39; it is for the referring court to verify whether that is the case.
- 28 The Court also notes that such shares in investment funds are ‘financial instruments’ within the meaning of Article 4(1)(17) of Directive 2004/39 read in conjunction with Section C 3 of Annex I thereof.
- 29 In order to answer the question posed by the referring court, it therefore remains to be considered whether such a trading system must be regarded as a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests within the meaning of Article 4(1)(14) of Directive 2004/39.
- 30 Although ‘multilateral system’ is not defined as such by that directive, it is stated in recital 6 thereof that the definitions of ‘regulated market’ and of ‘multilateral trading facility (MTF)’, which are the two forms of multilateral system governed by the directive, should exclude bilateral systems in which an investment firm enters into every trade on own account and not as a riskless counterparty interposed between the buyer and seller. Under Article 4(1)(6) of Directive 2004/39 dealing on own account means trading against proprietary capital resulting in transactions in financial instruments.
- 31 From that clear distinction between a multilateral system and a bilateral system, it may be inferred that a market operator or an investment firm operating a multilateral system acts without incurring risk and without trading against proprietary capital in the conclusion of transactions within that system. According to the definition in Article 4(1)(14) of Directive 2004/39, such interposition takes place

between multiple buying and selling interests of third parties, and the latter must be considered to be any natural or legal person who is distinct from and independent of the trading system and its operator.

- 32 The explanations provided by the referring court tend to suggest that the EFS system displays those characteristics and must therefore be regarded as a ‘regulated market’ within the meaning of Article 4(1)(14) of Directive 2004/39.
- 33 In the first place, it is clear that purchase and sales transactions involving shares in ‘open end’ investment funds between brokers, who act on behalf of investors, and the agents of those investment funds are executed within the EFS system, which does not incur any risk or trade against proprietary capital in respect of those transactions.
- 34 In that context, the Court cannot accept the argument that the EFS system appears to be more in the nature of a bilateral system, given that there is, in fact, always an investment fund which executes the order from an investor within its own system. As the Advocate General stated in point 92 of his Opinion, such an argument ignores the involvement of Euronext, which operates the EFS system as an independent operator in respect of such transactions. There is no such involvement in bilateral trading.
- 35 In that regard, as the United Kingdom Government observes, the fact that, in a system such as the EFS system, there is no trading between the various brokers or between the various investment fund agents is irrelevant in so far as, within that system, the agents can conclude transactions with multiple brokers and vice versa.
- 36 In the second place, it must be considered that multiple third-party buying and selling interests are brought together by the presence, within the EFS system, of brokers acting on behalf of investors and investment fund agents.
- 37 Such brokers and agents are third parties in relation to that system inasmuch as they are distinct from and independent of it.
- 38 Moreover, the fact, as emphasised by the referring court and the applicants in the main proceedings, that the agents and their investment funds are only required to execute orders to issue or purchase shares in investment funds that they receive via the EFS system does not prevent multiple buying and selling interests from being brought together due to the presence of those agents and brokers within that system. In the light, *inter alia*, of the broad understanding of the term ‘buying and selling interests’ set out in recital 6 of Directive 2004/39, that term cannot be interpreted as excluding positions of a participant in a trading system on the sole ground that they arise from an obligation to purchase or issue such shares.
- 39 In the third place, the referring court and the applicants in the main proceedings point to certain characteristics of the EFS system, namely the lack of an obligation to report transactions executed through that system, the primary nature of those transactions, the fact that prices are established not directly as a result of supply and demand but on the basis of the net value of the shares bought or sold, as fixed on the day following an order being placed, and the low risk of market abuse and insider trading. They consider that those characteristics militate against the characterisation of the system as a regulated market.
- 40 However, none of those characteristics, were they to be present, can be regarded as incompatible with the concept of a ‘regulated market’ within the meaning of Article 4(1)(14) of Directive 2004/39.

- 41 As the AFM, the United Kingdom Government and the European Commission state in their written observations, that provision does not set out any further information or limitation on the functioning of a regulated market as regards whether or not transactions must be reported, their primary or secondary nature or price formation.
- 42 As regards, more particularly, reporting transactions, it should be noted that the statement in recital 6 of Directive 2004/39 that a market only composed of a set of rules that governs aspects related inter alia to reporting obligations is a regulated market or an MTF merely means that it is sufficient, for the purpose of its characterisation as a regulated market or an MTF, for a market to display those characteristics. It does not follow that reporting obligations are a necessary condition for such a characterisation.
- 43 As to the argument, in essence, that it is unnecessary to characterise the EFS system as a regulated market in view of the low risk of abuse in the execution of transactions, that argument cannot succeed. As the Commission states in its written observations, the provisions of Directive 2004/39 concerning regulated markets are not intended merely to prevent abuse. As follows, inter alia, from recitals 2 and 5 of that directive, those provisions aim, more broadly, at the harmonisation needed to offer investors a high level of protection, by establishing a comprehensive regulatory regime governing the execution of transactions in respect of financial instruments so as to ensure a high quality of execution of transactions and to uphold the integrity and overall efficiency of the financial system.
- 44 Having regard to all of the foregoing considerations, the answer to the question referred is that Article 4(1)(14) of Directive 2004/39 must be interpreted as meaning that the concept of a 'regulated market' within the meaning of that provision covers a trading system in which multiple fund agents and brokers represent, respectively, 'open end' investment funds and investors, the sole purpose of which is to facilitate those investment funds in their obligation to execute the purchase and selling orders for shares placed by those investors.

Costs

- 45 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

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 must be interpreted as meaning that the concept of a 'regulated market' within the meaning of that provision covers a trading system in which multiple fund agents and brokers represent, respectively, 'open end' investment funds and investors, the sole purpose of which is to facilitate those investment funds in their obligation to execute the purchase and selling orders for shares placed by those investors.

[Signatures]