esma European Securities and Markets Authority

Reply form for the Consultation paper Guidelines on the application of C6 and C7 of Annex I of MiFID

30 September 2014

Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in the Consultation paper - Guidelines on the application of C6 and C7 of Annex I of MiFID, published on the ESMA website (here).

Instructions

Please note that, in order to facilitate the analysis of the number of responses expected, you are requested to use this file to send your response to ESMA so as to allow us to process it properly. Therefore, please follow the instructions described below:

i. use this form and send your responses in Word format;

ii. do not remove the tags of type < ESMA_ MIFID_C6_C7_QUESTION_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and

iii. if you do not have a response to a question, do not delete it and leave the text "TYPE YOUR TEXT HERE" between the tags.

Responses are most helpful:

i. if they respond to the question stated;

ii. contain a clear rationale, including on any related costs and benefits; and

iii. describe any alternatives that ESMA should consider

To help you navigate this document more easily, bookmarks are available in "Navigation Pane" for Word 2010 and in "Document Map" for Word 2007.

Responses must reach us by **05 January 2015**.

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input/Consultations'.

Publication of responses

All contributions received will be published following the end of the consultation period, unless otherwise requested. **Please clearly indicate by ticking the appropriate checkbox in the website submission form if you do not wish your contribution to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure.** Note also that a confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the heading 'Disclaimer'.

Q1: Do you agree with ESMA's approach on specifying that C6 includes commodity derivative contracts that "must" be physically settled and contracts that "can" be physically settled?

<ESMA_MIFID_C6_C7_QUESTION_1>
AFG welcomes the ESMA's interpretation and considers that it will contribute to a greater clarity on the definition of commodity derivatives contracts mentioned to the points C5, C6 and C7 of MiFID Annex I.
We understand that C6 definition concerns the commodity derivatives contracts traded on the regulated markets or MTFs.
We would like to remind that on the regulated markets, no choice is possible. The contracts are either settled in cash or physically settled. So for AFG, C6 includes only commodity derivative contracts that **"must"** be physically settled
<ESMA_MIFID_C6_C7_QUESTION_1>

Q2: Do you consider there are any alternatives for or additions to the proposed examples of "physically settled" that ESMA should consider within the definition of C6? If you do, what are these?

<ESMA_MIFID_C6_C7_QUESTION_2>
French asset management regulation authorizes certain AIFs to conclude commodity derivative contracts.
For settlement of these contracts, the FIAs shall receive cash and they are not authorised to receive goods (except for professional specialized funds that can receive goods).
So the French asset management companies for the AIFs managed can conclude commodity derivative contracts entering into the definitions of C5, C6 and C7 of MiFID Annex I.
AFG supports ESMA's definition of physically settlement that should incorporate a broad range of delivery methods.
<ESMA_MIFID_C6_C7_QUESTION_2>

Q3: Do you agree with ESMA's discussion of the relationship between definitions C5, C6 and C7 and that there is no conflict between these definitions? If you do not, please provide reasons to support your response. In particular, ESMA is interested in views regarding whether the proposed boundaries would result in "gaps", into which some instruments would fall and not be covered by any of the definitions of financial instrument. ESMA also seeks views on whether there are any adverse consequences from the fact that some instruments could fall into different definitions depending upon the inherent characteristics of the contract e.g. those with "take or pay" clauses that may be either cash or physically settled.

<ESMA_MIFID_C6_C7_QUESTION_3>
AFG agrees that the regulation as expressed in the MiFID Annex I is very confusing and opens way to different interpretations.
AFG supports ESMA's interpretation but proposes this amendment:
- "Forwards" are, by nature, OTC contracts. They should therefore not be subject to the point C6 of MiFID Annex I.
<ESMA_MIFID_C6_C7_QUESTION_3>

Q4: What further comments do you have on ESMA's proposed guidance on the application of C6?

<ESMA_MIFID_C6_C7_QUESTION_4>
See AFG's answer in the question 3.
<ESMA_MIFID_C6_C7_QUESTION_4>

Q5: Do you have any comments on ESMA's proposed guidance on the specification of C7?

<ESMA_MIFID_C6_C7_QUESTION_5>

AFG considers that the C7 definition is a too wide and includes in particular OTC contracts and contracts that are traded on a 3d country venue similar to a RM or a MTF. Accordingly, AFG considers that C7 includes commodity derivative contracts that **"can"** be physically settled for OTC contracts (the parties have the choice between a physical settlement or a cash settlement and they can modify their contracts at any time by mutual agreement) and that **"must"** be physically settled for the standardised contracts.
Moreover, the notion of "commercial purpose" described under article 38(4) of Regulation 1287/2006/EC is not really clear. It would be helpful to clarify this notion especially when the contract is concluded between a trading company and a financial actor, to avoid a distortion of treatment between commercial and non-commercial actors that could affect market depth and liquidity.
See also AFG's answer in the question 2.
<ESMA_MIFID_C6_C7_QUESTION_5>