

Luxembourg, 18 July 2019

To all financial market participants

**CIRCULAR CSSF 19/723**

**Re: ESMA Guidelines on the application of the definitions of commodity derivatives in Sections C6 and C7 of Annex I of MiFID II**

Ladies and Gentlemen,

The purpose of this circular is to transpose the “Guidelines on the application of C6 and C7 of Annex I of MiFID II<sup>1</sup> (Ref. ESMA-70-156-869)” (hereafter, the “Guidelines”), published on 5 June 2019 by the European Securities and Markets Authority (ESMA), into Luxembourg regulations.

The Guidelines relate to the application of the definitions of commodity derivatives and their classification under points 6 and 7 of Section C (Financial Instruments) of Annex I of MiFID II, transposed into Luxembourg legislation by the law of 30 May 2018 on markets in financial instruments and aim at ensuring a common, uniform and consistent application of MiFID II and potentially other Directives and Regulations that rely on MiFID II definitions of financial instruments.

The Guidelines represent an updated version of the guidelines that ESMA published under Directive 2004/39/EC<sup>2</sup> (Ref. ESMA/2015/675) in the same context and which were transposed into Luxembourg regulations by CSSF Circular 15/615 of 11 June 2015. This circular repeals Circular CSSF 15/615 of 11 June 2015.

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<sup>1</sup> Directive 2014/65/UE of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments amending Directive 2002/92/EC and Directive 2011/61/EU

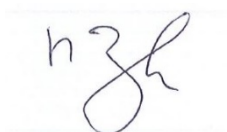
<sup>2</sup> Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC

The Guidelines are annexed to this circular and are available on ESMA's website <http://www.esma.europa.eu>.

This circular enters into force on the day of its publication.

Yours faithfully,

COMMISSION de SURVEILLANCE du SECTEUR FINANCIER



Marco ZWICK  
Directeur



Jean-Pierre FABER  
Directeur



Françoise KAUTHEN  
Directeur



Claude MARX  
Director General

Annex: Guidelines on the application of the definitions in Sections C6 and C7 of Annex I of MiFID II (Ref. ESMA70-156-869)

# Guidelines

## On the application of C6 and C7 of Annex 1 of MiFID II



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## I. Scope

### Who?

1. These guidelines apply to competent authorities and investment firms as defined in Article 4(1)(1) of MiFID II.

### What?

2. Pursuant to the application of MiFID II and Article 7 of Regulation 2017/565, these guidelines amend the ESMA C6/C7 guidelines (ESMA/2015/1341) that were issued to clarify points (6) and (7) of Section C, Annex I of MiFID as supplemented by Article 38 of Regulation 1287/2006/EC.

### When?

3. These guidelines start to apply two months after the date of their publication on the ESMA's website in all official languages of the EU.

## II. Legislative references and abbreviations

### Legislative references

<i>ESMA Regulation</i>	Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC <sup>1</sup>
<i>MiFID II</i>	Directive 2014/65/EU 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 <sup>2</sup>
<i>MiFID</i>	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

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<sup>1</sup> OJ L 331, 15.12.2010, p.84.

<sup>2</sup> OJ L 173, 12.06.2014, p.349.

Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC<sup>3</sup>

*Regulation 2017/565*

Commission Delegated Regulation (EU)2017/565 of 25 April 2016 supplementing Directive 2014/65/EU 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<sup>4</sup>

*Regulation 1287/2006*

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 recordkeeping obligations for investment firms, transaction reporting, market transparency, admission of financial instruments to trading, and defined terms for the purposes of that Directive<sup>5</sup>

### Abbreviations

<i>ESMA</i>	European Securities and Markets Authority
<i>EU</i>	European Union

## III. Purpose

1. These guidelines (hereafter referred to as the 'Guidelines') have the purpose to amend the C6/C7 guidelines (hereafter referred to as the 'Amended Guidelines'), adopted by ESMA in October 2015 in order to ensure a common, uniform and consistent application of Article 4(1)(17) read in conjunction with points (6) and (7) of Section C of Annex I of MiFID, as supplemented by Article 38 of Regulation 1287/2006/EC.
2. The issuance of the Guidelines follows the entry into force and application of MiFID II, and its supplementing Regulation 2017/565 which have repealed and replaced MiFID and its implementing Regulation 1287/2006/EC. The Guidelines are updating the Amended Guidelines to adapt them to the new MiFID II regulatory framework without changing the substance. ESMA therefore considered conducting an open public consultation and an analysis of the related costs and benefits as not proportionate in accordance with Article 16(2) of the ESMA Regulation.

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<sup>3</sup> OJ L145, 30.04.2004 p.1-44.

<sup>4</sup> OJ L173, 12.06.2014, p.349.

<sup>5</sup> OJ L145, 30.04.2004, p.1.

3. The Amended Guidelines and the Guidelines are issued at the initiative of ESMA under Article 16 of the ESMA Regulation. The Guidelines clarify Article 4(1)(2) of MiFID II which is to be read in conjunction with points (6) and (7) of Section C of Annex I to MiFID II and Article 7 of Regulation 2017/565.

## **IV. Compliance and reporting obligations**

### **Status of the guidelines**

1. In accordance with Article 16(3) of the ESMA Regulation, competent authorities and financial market participants must make every effort to comply with these Guidelines.
2. Competent authorities to which these Guidelines apply should comply by incorporating them into their national legal and/or supervisory frameworks as appropriate, including where particular Guidelines are directed primarily at financial market participants. In this case, competent authorities should ensure through their supervision that financial market participants comply with the Guidelines.

### **Reporting requirements**

3. Within two months of the date of publication of the Guidelines on ESMA's website in all EU official languages, competent authorities to which these Guidelines apply must notify ESMA whether they (i) comply, (ii) do not comply, but intend to comply, or (iii) do not comply and do not intend to comply with the Guidelines.
4. In case of non-compliance, competent authorities must also notify ESMA within two months of the date of publication of the Guidelines on ESMA's website in all EU official languages of their reasons for not complying with the Guidelines.
5. A template for notifications is available on ESMA's website. Once the template has been filled in, it shall be transmitted to ESMA.
6. Financial market participants are not required to report whether they comply with these Guidelines.

## V. Guidelines on the application of C6 and C7 of Annex 1 of MiFID II

### V.I. Amending Guidelines

#### Application of C6 of Annex 1 of MiFID II

1. ESMA considers that definition C6 of Annex 1 of MiFID II applies in the following way:
  - a. C6 has a broad application, encompassing all commodity derivative contracts, including forwards but excluding wholesale energy products traded on an OTF that must be physically settled, providing that:
    - i. they can or must be physically settled; and
    - ii. they are traded on a regulated market, an MTF and/or an OTF.
  - b. “*Physically settled*” incorporates a broad range of delivery methods and includes:
    - i. physical delivery of the relevant commodities themselves;
    - ii. delivery of a document giving rights of an ownership nature to the relevant commodities or the relevant quantity of the commodities concerned (such as a bill of lading or a warehouse warrant); or
    - iii. another method of bringing about the transfer of rights of an ownership nature in relation to the relevant quantity of commodities without physically delivering them (including notification, scheduling or nomination to the operator of an energy supply network) that entitles the recipient to the relevant quantity of the commodities.

#### Application of C7 of Annex 1 of MiFID II

2. ESMA considers that definition C7 of Annex 1 of MiFID II applies in the following way:
  - a. C7 forms a category that is distinct from C6 and encompasses commodity derivative contracts that can be physically settled which are not traded on a regulated market, an MTF or an OTF providing that the commodity derivative contract:
    - i. is not a spot contract as defined under Article 7(2) of Regulation (EU) 2017/565;
    - ii. is not for the commercial purposes described under Article 7(4) of Regulation (EU) 2017/565; and
    - iii. meets one of the three criteria under Article 7(1)(a) and also the separate criteria under Article 7(1)(b) of Regulation (EU) 2017/565.
  - b. “*Physically settled*” incorporates a broad range of delivery methods and includes:



- i. physical delivery of the relevant commodities themselves;
  - ii. delivery of a document giving rights of an ownership nature to the relevant commodities or the relevant quantity of the commodities concerned (such as a bill of lading or a warehouse warrant); or,
  - iii. another method of bringing about the transfer of rights of an ownership nature in relation to the relevant quantity of commodities without physically delivering them (including notification, scheduling or nomination to the operator of an energy supply network) that entitles the recipient to the relevant quantity of the commodities.
3. Physically settled commodity derivatives which do not fall within the definition of C6, i.e. are not traded on a Regulated Market, an MTF or an OTF, may fall within the definition of C7 and the definitions of C6 and C7 form two distinct categories as C7 applies to commodity derivatives *“that can be physically settled not otherwise mentioned in C6”*.
4. The other characteristics of commodity derivatives under C7 - *“not being for commercial purposes, which have the characteristics of other derivative financial instruments”* - are further defined under Article 7 of Regulation (EU) 2017/565.
5. ESMA notes that the conditions defined in Article 7 of Regulation 2017/565, are to be applied cumulatively.