

ESMA's Consultation paper on Guidelines on the application of C6 and C7 of Annex I of MiFID - AMAFI's contribution

I. Introduction

Association française des marchés financiers (AMAFI) is the trade organisation working at national, European and international levels to represent financial market participants in France. It acts on behalf of credit institutions, investment firms and trading and post-trade infrastructures, regardless of where they operate or where their clients or counterparties are located. AMAFI has more than 120 members operating for their own account or for clients in different segments, particularly organised and over-the-counter markets for equities, fixed-income products and derivatives. Nearly one-third of its members are subsidiaries or branches of non-French institutions.

AMAFI has been following closely the drafting and the implementation of the Markets in Financial Instruments Directive and welcomes the opportunity to answer ESMA's consultation on its consultation paper on Guidelines on the application of C6 and C7 of Annex I of MiFID.

Generally speaking, AMAFI agrees on ESMA's interpretation set out in its consultation paper. It supports a broad approach which would better ensure consistency within the EEA and among market players.

In addition, for the sake of a stable regulatory environment, AMAFI deems important that the approaches in implementing MiFID I and MiFID II be consistent with each other. It means that the approach for implementing MiFID II C6 and C7 definitions will have to be in coherence with the approach retained in the guidelines in preparation in the context of MiFID I.

II. Application of point (6) of Section C of Annex I

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?

AMAFI agrees with ESMA's proposed application of C6.

More particularly, it agrees with the specification that derivatives that "must" and "can" be physically settled are included. It also considers that the way C6 is drafted - "any other derivative contract" - supports the inclusion of "forwards" in C6.

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?*

AMAFI supports ESMA’s definition for the “physically settlement”. It should indeed incorporate a broad range of delivery methods.

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.*

AMAFI agrees with ESMA’s approach.

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

AMAFI emphasizes that ESMA’s proposed guidance is notably contributing to a consistent application of EMIR, ensuring thus a legal certainty for all market participants.

Furthermore, even if they are out of scope for the proposed ESMA’s guidelines, we believe that clarification and consistency in the definition across Europe are needed for spot contracts.

III. Application of point (7) of Section C of Annex I

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

AMAFI shares ESMA’s proposal described in page 14 of the proposed guidance. In addition, the definition of “not being for commercial purpose” should not be used extensively and should be limited to what is foreseen in article 38 (4) of 1287/2006/EC.

