
FSMA_2019_17 of 5/08/2019

Application of points 6 and 7 of Section C of Annex 1 of MiFID II: implementation by the FSMA

Scope:

The Guidelines referred to in this document are addressed to the following companies (hereafter, regulated companies):

- credit institutions governed by Belgian law, where they provide investment services or perform investment activities [*];
- investment firms governed by Belgian law;
- management companies of undertakings for collective investment in transferable securities (UCITS) governed by Belgian law, where they provide services under Article 6, §3, of Directive 2009/65/EC 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 (recast) (hereafter the UCITS Directive) and
- external managers of alternative investment funds governed by Belgian law, where they provide services under Article 6, §4 of Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on alternative investment funds and their managers and amending Directives 2003/41/EC and 2009/65/EC as well as Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (hereafter the AIFM Directive).

The Guidelines are also directed at the following regulated undertakings:

- branches established in Belgium of investment firms and credit institutions, where they provide investment services, which are governed by the law of a non-EEA state;
- branches established in Belgium of credit institutions and investment firms governed by the law of another EEA state, in respect of the investment service and activities they provide within the territory of Belgium;
- branches established in Belgium of foreign management companies of undertakings for collective investment in transferable securities, where they provide services under Article 6, §3, of the AIFM Directive within the territory of Belgium;
- branches established in Belgium of external managers of foreign alternative investment funds, where they provide services under Article 6, §4, of the AIFM Directive within the territory of Belgium;
- investment firms and credit institutions governed by the law of another EEA state that provide investment services or perform investment activities in Belgium under the freedom to provide services;
- investment firms governed by the law of non-EEA states that are legally authorized to provide

[*] Investment services and activities are listed in Section A of Annex I of Directive on 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 (rewriting) and ancillary services listed in Section B.

investment services in Belgium, in respect of the transactions they perform within the territory of Belgium.

Summary/Objectives:

This document addresses the Guidelines issued by the European Securities and Markets Authority (hereafter ESMA) on the application of points 6 and 7 of Section C of Annex I of the MiFID II Directive – guidelines on the definition of commodity derivative contracts.

Dear Sir or Madam,

Pursuant to Article 16 of the ESMA Regulation¹, ESMA can issue guidelines addressed to competent authorities and financial market participants with a view to establishing consistent, efficient and effective supervisory practices within the European System of Financial Supervision and to ensuring the common, uniform and consistent application of European Union law.

In accordance with paragraph 3 of Article 16 of the aforementioned Regulation, “The competent authorities and financial market participants shall make every effort to comply with those guidelines...” and “Within 2 months of the issuance of a guideline ... each competent authority shall confirm whether it complies or intends to comply with that guideline... In the event that a competent authority does not comply or does not intend to comply, it shall inform the Authority, stating its reasons.”

It is in this context that ESMA published, on 21 December 2018, its “Guidelines on the application of C6 and C7 of Annex I of MiFID II”². These Guidelines amend and supplement the Guidelines of 20 October 2015 (ESMA/2015/1341), also titled “Guidelines on the application of C6 and C7 of Annex I of MiFID”³. They make two amendments:

- They exclude from the application of point C6 wholesale energy products traded on an organised trading facility (OTF) that must be physically settled.
- They amend the references to include the new European texts, and refer directly to the MiFID II Directive rather than to the provisions of the first MiFID Directive.

These Guidelines are based on 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 (hereafter, MiFID II) and on the Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as

¹ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority.

² Translation of the ESMA Guidelines on the application of C6 and C7 of Annex 1 of MiFID II (21 December 2018) into the various EU languages, ESMA-70-156-869, 5 June 2019. The two-month period in question in subparagraph 2 of paragraph 3 of Article 16 of the ESMA Regulation began on 5 June 2019, the date of publication of these Guidelines in the various languages of the European Union, and will end on 5 August 2019.

³ ESMA Guidelines on the application of C6 and C7 of Annex 1 of MiFID, ESMA/2015/1341, 20 October 2019.

regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive (hereafter the Delegated MiFID Regulation).

As from 5 August 2019, the Guidelines will apply to all regulated companies in question in Belgium, pursuant to MiFID II, namely, investment firms (as defined in Article 4, §1, 1), of MiFID II), credit institutions (as defined in Article 4, §1, 27), of MiFID II), where they provide investment services and activities, as well as UCITS management companies and external managers of alternative investment funds where they provide individual portfolio management or non-core services (within the meaning, respectively, of Article 6, § 3, points a) and b), of Directive 2009/65/EC 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 and of Article 6, §4, a) and b), of Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on alternative investment fund managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010). They also apply to the authorities competent for the supervision of those companies.

These Guidelines explain the scope of points C6 and C7 of Annex I of MiFID II, as provided for in Article 4, § 1, 2), which specify what constitute financial instruments, namely:

“6. Options, futures, swaps, and any other derivative contracts relating to commodities that can be physically settled provided that they are traded on a regulated market, a MTF, or an OTF, except for wholesale energy products traded on an OTF that must be physically settled.

7. Options, futures, swaps, forwards and any other derivative contracts relating to commodities, that can be physically settled not otherwise mentioned in point 6 of this Section and not being for commercial purposes, which have the characteristics of other derivative financial instruments.”

In MiFID II, “investment services and activities” means “any of the services and activities listed in Section A of Annex I relating to any of the instruments listed in Section C of Annex I”⁴. The Guidelines are therefore intended to provide more specific information about two categories of financial instruments listed in Section C of Annex I, namely, commodity derivatives contracts.

Specifically, these Guidelines cover the following points:

- The method of application of the definitions of points 6 and 7 in general terms, specifying for example that the definition of point 6 has a broad application;
- The identification of the contracts covered by point 7, with particular observations as to the commercial nature of the activity;
- The delivery methods referred to by the expression “physically settled”;
- The conditions arising from the MiFID II Delegated Regulation are set out in detail, and in particular the importance of their cumulative application.

⁴ Article 4, §1, 2), MiFID II.

By clarifying the definitions of Section C of Annex I, these Guidelines are aimed at establishing a consistent and appropriate approach for the supervision of the companies concerned and thus also contributing to strengthening the protection of investors in all Member States.

The FSMA considers that these Guidelines will be helpful in making important clarifications and in identifying the contracts covered by points 6 and 7 of Section C of Annex I, and it will incorporate these Guidelines into its supervisory plan.

* * *

Yours sincerely,

Jean-Paul SERVAIS
Chairman

Annex: [FSMA_2019_17-01 / ESMA Guidelines on the application of C6 and C7 of Annex 1 of MiFID II \(ESMA-70-156-869\)](#)