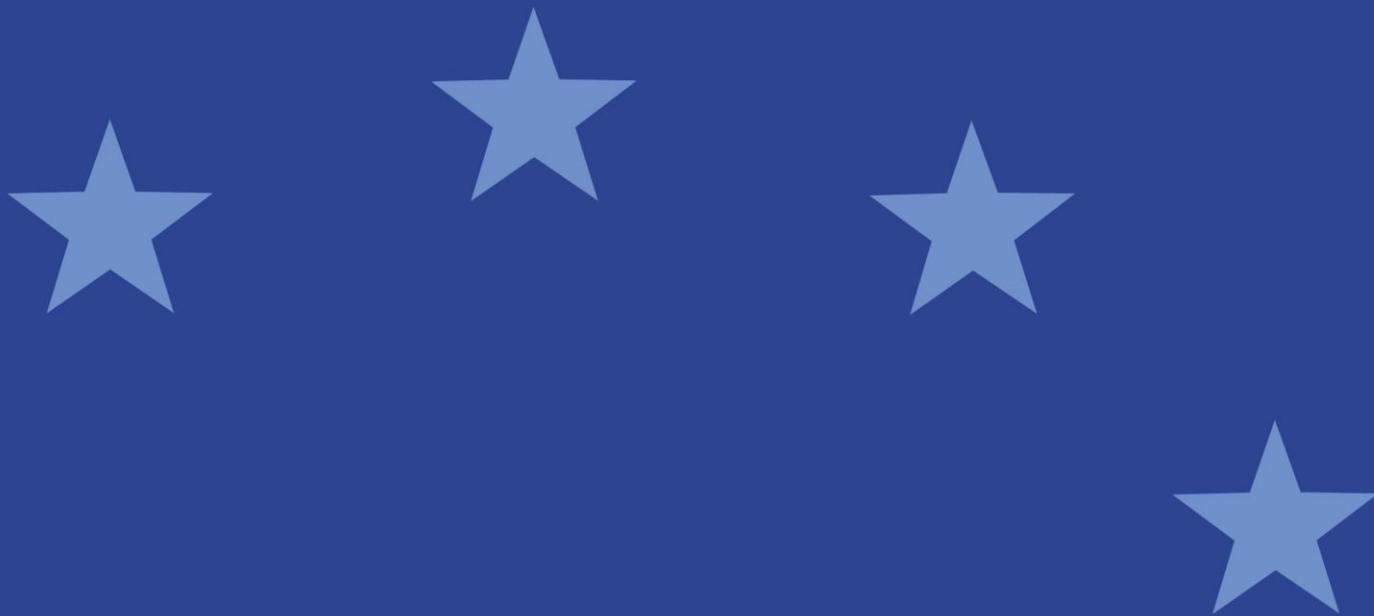




European Securities and
Markets Authority

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



30 September 2014



European Securities and
Markets Authority

Date: 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>

EACH fully agrees with the assessment by ESMA that “forwards” are indeed to be subsumed by “any other derivatives” in C6. Given that usually off-exchange traded forward contracts are very similar to usually on-exchange traded future contracts and that both are easily substitutable from a commercial point of view, it is only consequent that C6 covers forwards and futures similarly. Hence, both contract types – when traded on a RM or an MTF – should be considered financial instruments, irrespective of how they are called. In addition, this clarification helps avoid regulatory arbitrage.

The general differentiation between contracts that “can” be physically settled” and those that “must” be physically settled seems an obvious distinction; while the latter only constitutes a subset of the first (“must” < “can”). However, it is important to note in this context that almost all contracts in gas and power trading can be considered as “can be physically settled”. Yet, the overall market share of contracts that “must” indeed be physically settled is significantly smaller as it is directly linked to the ultimate production and consumption of energy.

Generally, Recital 10 of MiFID II provides a good basis for the further definition of wholesale energy products 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>

EACH considers the proposed examples to be sufficient. However, for the sake of clarification, we would like to point out that physical settlement in gas and power trading is mostly done in contracts that “can be physically settled” while the actual volume of actual physical delivery takes up only a very small share of the overall market volume.

<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>

EACH does not see any inconsistencies in the relationship between the definitions in C5, C6 and C7.

<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>

As rightly stated in the present ESMA consultation paper, there are a number of difficulties with regard to the uniform application of C6 (and C7). The sudden appearance of non-MTF platforms in relation to the entry into force of EMIR, e.g., is one of them. These non-MiFID regulated trading venues have been explicitly created to avoid being caught under C6. Since they are tolerated by some NCAs as neither full MTFs

nor as OTC trading venues, the current C6 MiFID financial instrument definition does not apply to the products traded on them. Hence, all contracts concluded on non-MTFs do neither constitute Exchange Traded Derivates (ETDs) nor OTC traded derivatives in relation to EMIR. These non-MTFs base their raison d'être on the argument that they would act discretionarily. In this context, however, it is very difficult to draw the line between discretionary and non-discretionary practices. The electronic trading technology behind the trading screens works de facto very similarly in both cases and execution happens without any real intervention for almost all trades. In reaction to the introduction of EMIR, there has been a very significant shift of liquidity away from “traditional MTFs” to non-MTFs. Today, interestingly, almost no OTC derivatives are concluded in the energy markets. Most of the contracts are either ETDs concluded at exchanges or non-financial instruments traded on non-MTFs.

Against this background, it is important to note that MiFID II is very likely to widen this shift and to diminish the share of financial instruments in energy trading even further. Given that from 2017 onwards gas and power derivatives that are traded on an OTF and “that must be physically settled” do not fall under C6, EACH is convinced that more trading will move outside the reach of financial regulation, should the related delegated act on the definition of physical settlement be too large.

<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>

No.

<ESMA_MIFID_C6_C7_QUESTION_5>