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- i. This opinion considers whether Guarantees of Origin [GoO] form financial instruments when admitted to a MiFIR Trading Venue and concludes that they would comply and conform with the perimeter guidance under section C10 of Annex 1 of MiFID II.
- ii. GoOs are certificates which verify that a quantity of electricity has been generated using renewable methods (i.e. solar, wind, hydro). They are defined in article 19 of the European Directive 2018/2001/EC.
- iii. GoOs are widely traded and have from September been listed on the EEX <https://www.eex.com/en/markets/guarantees-of-origin>. The contracts available on the EEX are:
- EEX European Hydro Power GO
 - EEX European Wind Power GO
 - EEX European Solar Power GO
 - EEX European Renewable Power GO (any technology GOs: Hydro/Wind/Solar/Biomass)
- 1 lot = 1,000 GOs.
- iv. Section C10 annex I to MiFID II defines the following as financial instruments: Options, futures, swaps, forward rate agreements and any other derivative contracts relating to climatic variables, freight rates or inflation rates or other official economic statistics that must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event, as well as any other derivative contracts relating to assets, rights, obligations, indices and measures not otherwise mentioned in this Section, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are traded on a regulated market, OTF, or an MTF.
- v. Article 8 of Delegated Regulation (EU) 2017/565 provides the following guidance on the interpretation of section C10:
In addition to derivative contracts expressly referred to in Section C(10) of Annex I to Directive 2014/65/EU, a derivative contract shall be subject to the provisions in that Section where it meets the criteria set out in that Section and in Article 7(3) of this Regulation and it relates to any of the following:
- (a) telecommunications bandwidth;

(b) commodity storage capacity;

(c) transmission or transportation capacity relating to commodities, whether cable, pipeline or other means with the exception of transmission rights related to electricity transmission cross zonal capacities when they are, on the primary market, entered into with or by a transmission system operator or any persons acting as service providers on their behalf and in order to allocate the transmission capacity;

(d) an allowance, credit, permit, right or similar asset which is directly linked to the supply, distribution or consumption of energy derived from renewable resources, except where the contract is already within the scope of Section C of Annex I to Directive 2014/65/EU;

(e) a geological, environmental or other physical variable, except if the contract is relating to any units recognised for compliance with the requirements of Directive 2003/87/EC of the European Parliament and of the Council (1);

(f) any other asset or right of a fungible nature, other than a right to receive a service, that is capable of being transferred;

(g) an index or measure related to the price or value of, or volume of transactions in any asset, right, service or obligation;

(h) an index or measure based on actuarial statistics.

- vi. From this list, GoOs could potentially or would likely fall under section (d) or (f).
- vii. To be caught by sub-section (d), a GoO would need to be considered either an allowance, a credit, a permit, a right or some similar asset which is linked to the supply, distribution or consumption of energy derived from renewable resources. It is our view, that a GoO does not fulfil any of these criteria because it simply constitutes evidence that a certain quantity of electricity has been generated using renewable means.
- viii. However, in our opinion the criteria under sub-section (f) are likely satisfied. Those criteria are:
- a. Is the instrument an “asset or a right”?
 - b. If so, is it fungible?

c. Is it capable of being transferred?

ix. Considerations:

- a. ***Is a GoO an asset or a right?*** A GoO is an asset which has tangible value. GoOs are widely traded and are commonly bought by suppliers who wish to demonstrate that electricity they supply is derived from renewable resources.
- b. ***Is a GoO fungible?*** Yes, GoOs from one source are interchangeable with each – that's enough to make them "fungible",¹ just as ordinary shares of a company are fungible with other ordinary shares of that company.
- c. ***Is a GO capable of being transferred?*** Yes, GoOs are already widely traded OTC and are now available to trade via the EEX.

x. Spot v Forward GoOs

- a. Spot traded and settled GoOs would not be a financial instrument under C10 irrespective of whether traded on a trading venue.
- b. Whilst not legally defined at the level of the product or instrument, it is generally accepted that the spot period will depend on the rules and processes of the particular registry (for example: two trading days or such longer period..).

xi. In our view, forward contracts on GoOs traded on a trading venue ought properly to be classified as derivative financial instruments pursuant to section C10. It is clear that the intent behind the creation of the C10 category was specifically to provide scope for such transferrable assets and rights. GoOs, even where traded as a spot

¹ The concept of fungibility turns upon the sufficiency of standardisation. In the case of GoOs:

- all have a common unit size in MWh;
- they are interchangeable to the extent that a GoO relating to electricity generated using solar technology in Germany is interchangeable with a GoO relating to electricity generated using solar technology in France;
- they are standardised to such an extent that GoOs can be bought and sold on the EEX platform as lots comprising 1,000 GOs (which may be made up of GoOs produced by different energy producers.
- GoOs are standardised through the European Energy Certificate System (EECS) operated by the Association of Issuing Bodies (AIB).
- GoOs are not linked to the underlying physical electricity and can therefore be traded across international borders.
- GoOs are traded according to their production date/vintage. Therefore, any GoO produced in the same period as another GoO will be interchangeable.
- they are analogous to other financial instruments such as common shares or tranches of a CDS series where the issued classes are different to each other but fungible inter alia.

contract for prompt delivery would constitute financial instruments in themselves by dint of providing similar asset to a right.

Resources:

- i. **Definitions** of a **Guarantee of Origin [GO or GoO]**; an [energy certificate](#) defined in article 19 of the [European Directive 2018/2001/EC](#) (previously in article 15 of the [European Directive 2009/28/EC](#)).
 - a. A GOO certifies attributes of electricity, gas (including hydrogen), heating and cooling, especially coming from renewable sources and provides information to energy customers on the source of their energy.
 - b. GoOs are the only defined instruments evidencing the origin of electricity generated from [renewable energy](#) sources.
 - c. The GoO is standardized through the [European Energy Certificate System](#) (EECS) provided by the [Association of Issuing Bodies](#) (AIB). The European Energy Certificate System standardizes trade, cancellation and use of GoOs across AIB members.
 - d. 1 GoO is useable within 12 months. Within that validity time, it can be bought by electricity suppliers or any balancing responsible corporation who want to source their electricity from renewable energy sources.
 - e. GoOs have been created by the European Union and implemented in most European countries as the way to track how a Megawatt hour [MWh] of electricity was produced. 1 GoO correspond to 1 MWh. Once consumed, it is “cancelled”, in order to avoid double utilisation of the GoO.
 - f. The GoO system works as an accounting system where what is produced is accounted and what is consumed too. In between, the GOs can be exchanged between any company owning an account at the Registry in one of the Member countries.
 - g. GoOs can be exported within the European Economic Area. The Association of Issuing Bodies (AIB) connects all regional and national Registries and keeps the accounting well measured, just like SWIFT for money, which connects the banks to facilitate transfers.
 - h. In operation, a GoO is a green label or tracker that guarantees that one MWh of energy has been produced from renewable energy sources.²
 - i. GoOs are traded and when a company buys GoOs, as proof for the electricity or gas delivered or consumed, the GoOs are cancelled in an electronic certificate registry. This single standardized instrument makes it possible to track unique ownership, verify claims and ensure that GoOs are only sold once.
 - j. GoOs are issued electronically for a quantity of energy generation (1 GO per MWh), traded and redeemed (i.e. used) by suppliers as evidence for their customers of the

² [Be green - Guarantees of Origin. Your chance to choose. | Commerçg](#)

source of the delivered electricity. Generation from renewable energy sources is the most sought-after attribute.

- k. Some countries issue GoOs for all fuel types of electricity or gas generation (e.g. electricity from nuclear sources, low-carbon hydrogen).
 - l. The main difference between GoOs, Tradable green certificates and Feed-in Tariffs lies in the choice that consumers have. GoOs are available to anyone and can be redeemed by anyone, whereas TGC and FiT are foremost governmental policy. Subsidies depend on government's decision. They can be scrapped at any time.
 - q. GoOs are the instrument in Europe, RECs in North America and I-REC in a number of other countries across the globe. All three systems rely on the importance to document where electricity is coming from. A consumer buying any of these certificates in the geographic area where they operate, cancels these certificates in order to verify the origin of the electricity that they have consumed. All three certificates are market-based instruments and voluntary.
- ii. **Definitions** of "*Financial Instruments*", "*Derivatives*" and "*Commodity Derivatives*"
- a. "Financial instruments" are defined as "those instruments specified in Section C of Annex I",³ i.e. any instrument listed in C(1) to C(11);
 - b. "Derivatives" are defined as "those financial instruments defined in point 44(c) of Article 4(1) of [MiFID II]; and referred to in Annex I, Section C(4) to (10) thereto"⁴; and
 - c. "Commodity" is defined in Article 2(6) of the DR which provides that "commodity" means "any goods of a fungible nature that are capable of being delivered, including metals and their ores and alloys, agricultural products, and energy such as electricity".
 - i. This definition mirrors the definition set out in Implementing Regulation of MiFID I⁵.
 - d. "Commodity derivatives" are defined as "those financial instruments defined in point (44)(c) of Article 4(1) of [MiFID II]; which relate to a commodity or an underlying referred to in Section C(10) of Annex I to [MiFID II]; or in points (5), (6), (7) and (10) of Section C of Annex I thereto"⁶.
 - e. **Tautology:** From these three definitions, for all purposes of MiFID II, it is clear that:
 - i. "commodity derivatives" are a sub-set of "derivatives", i.e. all "commodity derivatives" are also "derivatives"; and
 - ii. "derivatives" (including "commodity derivatives") are a sub-set of "financial instruments", i.e. all "derivatives" are also "financial instruments"

³ Article 4(1)(15) MiFID II.

⁴ Article 4(1)(49) MiFID II and Article 2(1)(29) MiFIR.

⁵ Article 2(1) of Commission Regulation (EC) No 1287/2006 implementing Directive 2004/39/EC

⁶ Article 4(1)(50) MiFID II and Article 2(1)(30) MiFIR.

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- iii. it cannot be said that all "derivatives" are "commodity derivatives". In particular, given the range of instruments listed in C(10), there can clearly be C(10) instruments that are "derivatives", but which are not "commodity" in nature.
1. This is supported by the Commission Delegated Regulation with regard to regulatory technical standards on transparency requirements for trading venues and investment firms in respect of bonds, structured finance products, emission allowances and derivatives of 14 July 2016, which separates "commodity derivatives" from "C(10) derivatives".⁷
- f. **Application of C6 of Annex 1 of MiFID II; ‘Options, futures, swaps, and any other derivative contract relating to commodities that can be physically settled provided that they are traded on a regulated market and/or an MTF;’**
- i. ESMA considers that definition C6 of Annex 1 of MiFID II applies in the following way:
 1. 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:
 - a. they can or must be physically settled; and
 - b. they are traded on a regulated market, an MTF and/or an OTF.
 2. ‘Physically settled’ incorporates a broad range of delivery methods and includes:
 - a. physical delivery of the relevant commodities themselves;
 - b. 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
 - c. 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.
- g. **Application of C7 of Annex 1 of MiFID II; ‘Options, futures, swaps, forwards and any other derivative contracts relating to commodities, that can be physically settled not otherwise mentioned in C.6 and not being for commercial purposes, which have the**

⁷ See Table 4 (Measure of volume) of Annex II.

characteristics of other derivative financial instruments, having regard to whether, inter alia, they are cleared and settled through recognised clearing houses or are subject to regular margin calls”;

- i. ESMA considers that definition C7 of Annex 1 of MiFID II applies in the following way:
 1. 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:
 - a. is not a spot contract as defined under Article 7(2) of Regulation (EU) 2017/565;
 - b. is not for the commercial purposes described under Article 7(4) of Regulation (EU) 2017/565; and
 - c. meets one of the three criteria under Article 7(1)(a) and the separate criteria under Article 7(1)(b) of Regulation (EU) 2017/565.
 2. “Physically settled” incorporates a broad range of delivery methods and includes:
 - a. physical delivery of the relevant commodities themselves;
 - b. 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,
 - c. 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.
- ii. 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”.
- iii. 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.
- iv. ESMA notes that the conditions defined in Article 7 of Regulation 2017/565, are to be applied cumulatively.

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- h. **Section C(10) of Annex I to MiFID II covers:** "Options, futures, swaps, forward rate agreements and any other derivative contracts relating to climatic variables, freight rates or inflation rates or other official economic statistics that must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event, as well as any other derivative contracts relating to assets, rights, obligations, indices and measures not otherwise mentioned in [Section C(10)], which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are traded on a regulated market, OTF, or an MTF".
- i. in order for a C(10) derivative contract to be classified as a "commodity derivative", it must:
 1. directly relate to a "commodity" (as defined in Article 2(6) of the Commission Delegated Regulation of 25 April 2016 ("DR")); or
 2. directly and solely relate to an underlying commodity or commodities; or
 3. directly impact the price of an underlying commodity or commodities.
 - ii. In the case of point (iii), the impact on price should not be transitory or minor, otherwise the scope of the position limits regime will be unknowable and consequently impossible to implement and enforce.
 - iii. To note the UK FCA's Perimeter Guidance Manual⁸ provides that "the concept of commodity does not include services or other items that are not goods, such as currencies or rights in real estate, or that are entirely intangible"
- i. **Trading Venues;** the definition of "trading venue" (as that term is used in Articles 57 and 58 MiFID II) does not include any third country venue (irrespective of whether the third country venue is recognised in accordance with the third country recognition regime).
- i. Article 4(1)(24) MiFID II provides that, "trading venue means a regulated market, an MTF or an OTF"
 - ii. Article 4(1)(21) MiFID II provides that, "regulated market means a multilateral system operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments – in the system and in accordance with its non-discretionary rules – in a way that results in a contract, in respect of the financial instruments admitted to trading under its rules and/or systems, and which is authorised and functions regularly and in accordance with Title III of [MiFID II]".

⁸ 3 Question 33 of Section 13.4.

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- iii. Article 4(1)(22) MiFID II provides that "multilateral trading facility or MTF means a multilateral system, operated by an investment firm or a market operator, which brings together multiple third-party buying and selling interests in financial instruments – in the system and in accordance with non-discretionary rules – in a way that results in a contract in accordance with Title II of [MiFID II]".
 - iv. Article 4(1)(23) MiFID II provides that "organised trading facility or OTF means a multilateral system which is not a regulated market or an MTF and in which multiple third-party buying and selling interests in bonds, structured finance products, emission allowances or derivatives are able to interact in the system in a way that results in a contract in accordance with Title II of [MiFID II]".
 - v. MiFID II distinguishes between "commodity derivative" contracts traded on a venue and OTC contracts. It is clear in MiFID II that if a contract is traded on a "trading venue", it cannot be an OTC contract. Neither MiFID II nor MiFIR defines "over the counter" or "OTC contract" explicitly or by reference to any other Regulation or Directive. The meaning in that phrase reflects the distinction between an OTC contract and one which is traded on a venue.
 - vi. Articles 57 and 58 of MiFID II and RTS 21 do not specifically refer to or incorporate provisions of EMIR⁹ and do not incorporate the EMIR definition of "OTC derivative". This is in contrast to other sections of MiFID II and MiFIR where express reference is made to provisions of that Regulation.

⁹ Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories.