

THE CNMV APPROVES THE TECHNICAL GUIDE ON CURRENCY DERIVATIVES USED AS A MEANS OF PAYMENT THAT ARE NOT CONSIDERED TO BE A FINANCIAL INSTRUMENT

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- The Technical Guide contains a series of criteria on how to apply the rules related to when certain currency derivative financial instruments (“forwards”) should be considered as a means of payment not subject to MiFID rules.

The Spanish National Securities Market Commission (CNMV) has approved a [Technical Guide on currency derivatives used as means of payments not considered to be a financial instrument for the purposes of MiFID](#). During the consultation phase (which took place between 24 July and 18 September 2020), numerous comments and observations were received from stakeholders. These, together with the report issued by the CNMV Advisory Committee, have been taken into account to define the final wording of the Technical Guide.

In accordance with the provisions of Article 10(1)(b) of Delegated Regulation (EU) 2017/565 of 25 April, supplementing Directive 2014/65/EU of the European Parliament and of the Council, derivative instruments related to foreign currencies that are means of payment and meet certain requirements are not considered to be financial instruments. This means that these derivative instruments (forward foreign exchange contracts) are not subject to MiFID and the CNMV’s supervision, without prejudice to these instruments, where appropriate, being subject to the transparency and client protection rules of banking regulations and to the rules and regulations governing payment services.

For the CNMV, it is important that financial institutions satisfactorily ensure that the requirements set out in the regulation are complied with, providing appropriate procedures for this purpose, applying them effectively and recording the verification steps taken.

The Technical Guide contains criteria that the CNMV intends to apply, on the basis of its experience, when carrying out its supervisory functions in this sphere:

- In order to be considered as a means of payment, they must be forward contracts aimed at effecting or receiving payments in foreign currency for specific goods, services or direct investments by the client. Therefore, the amount and the

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maturity date contracted must correspond to real trade operations or to direct investments made by the client. It is acceptable that the contract is not finally applied to those specific operations for commercial or other justifiable reasons, as are acceptable slight changes in the amount or the date of execution.

- it is considered generally acceptable that verifying the fulfilment of the aforementioned requirement is carried out either by obtaining from the client descriptive information for each operation, before the contract, or, in the case of clients whose activity is sufficiently known, by means of a explicit statement by the client indicating the purpose of the contract.
- Entities must also carry out *ex post* reviews on sufficiently representative samples of the activities conducted aimed at verifying that the purpose of the trades was to facilitate the payment of identifiable goods, services or direct investments.

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