

AMF Position

Questions and answers – Prohibition of marketing communications with regard to the provision of investment services on certain financial derivatives – DOC-2017-01

References: article L. 533-12-7 of the Monetary and Financial Code; article 314-31-1 of the AMF General Regulation

Under Article L. 533-12-7 of the Monetary and Financial Code¹, investment firms shall not address, directly or indirectly, by electronic means, marketing communications to any persons who may qualify as retail clients, including potential retail clients, in respect of the provision of investment services on any of the financial derivatives defined in Article 314-31-1 of the AMF General Regulation (AMFGR), that are not admitted to trading on a regulated market or multilateral trading facility and that fulfill one of the criteria referred to in the same Article of the Monetary and Financial Code.

This Position aims to clarify the scope of the prohibition.

1. What are the financial derivatives within scope?

1.1. What are the categories of financial contracts mentioned by the Monetary and Financial Code and the AMFGR?

Under Article L. 533-12-7 of the Monetary and Financial Code:

*“Investment firms shall not address, directly or indirectly, by electronic means, marketing communications to any persons who may qualify as retail client, including potential retail clients, in respect of the provision of investment services on financial derivatives that pertain to any of the three categories of derivative as defined in the AMFGR, that are not admitted to trading on a regulated market or multilateral trading facility **and that meets one of the following characteristics:***

1° *The maximum risk is unknown at the time the contract is entered into;*

2° *The risk of loss is greater than the amount initially invested;*

3° *The risk of loss compared to the potential advantages is not reasonably understood with regard to the particular nature of the derivative.*

This provision does not apply to information made public on the investment firms’ website that proposes the financial derivatives mentioned in the first paragraph.”

Article 314-31-1 of the AMFGR states that the categories of financial derivatives mentioned by the Monetary and Financial Code shall fulfill one of these criteria:

- a) **Depending on whether a condition specified in the derivative is met or not, they give rise upon the derivative’s expiry either to the payment of a predetermined gain or the partial or total loss of the amount invested;**

This category of contracts refers to so-called binary options under Article D. 211-1 A of the Monetary and Financial Code. They may be referred to differently such as digital option, sprint market, pair option, knock-in or knock-out option (KIKO), high/low option, one touch option, option builder, etc.

¹ Article 72 of the Act of Parliament n° 2016-1691 of December 9th 2016 on the fight against corruption and the modernization of the economic life.

- b) They give rise to the payment of a positive or negative difference between the opening price of an underlying asset or basket of assets and the closing price, and can oblige the client to pay an amount greater than the amount invested at the time the derivative is entered into;**

This category refers to financial derivatives entailing the payment of a difference under Article D. 211-1 A, 6° of the Monetary and Financial Code, usually known as contract for differences or “CFD”. However, CFDs that contain a built-in protection mechanism that structurally prevents the client from losing more than he initially invested are not included in this second category under Article 314-31-1 of the AMFGR. Those are CFDs:

- (i) that contain a built-in protection mechanism at the time the contract is entered into that guarantees that the investor’s maximum loss shall not be greater than the amount he initially invested and;
- (ii) where the agreed contractual provisions between the investment firm and its client do not allow this protection to be downgraded beyond the amount invested at the time the contract is entered into until the latter expires.

The prohibition remains applicable when a protection mechanism is added to the CFD position, such as a guaranteed stop loss order that the investor simultaneously sends on his own initiative or a clause (i.e. within the terms and conditions) that stipulates that the investment firm agrees to reimburse the investor for any losses beyond his initial investment.

The investment firm must be able to prove, if requested by the AMF, the existence of such a built-in protection mechanism in the CFD by sending a certificate from a French or European first-rank expertise firm that confirms unreservedly that the investment firm’s legal and operational procedures meet the requirements set out in this paragraph (b).

The “**amount invested at the time the derivative is entered into**” means the required sum of money in order to open a position. It is a **contractually-fixed** sum that does not take into account the subsequent margin calls and corresponds to the initial margin required by the investment firm to open a position, but not to maintain it.

The notion of “**amount invested at the time the derivative is entered into**” shall not be confused with the notions of deposit or exposure.

Example: at the opening of his account, a client makes an initial deposit of €10,000. He then invests €100 in a €1,000 valued-CFD, which corresponds to the 10 % required margin by the investment firm. The level of leverage is thus 10. This deposit equals €10,000, his exposure is €1,000 and the amount invested at the time the derivative is entered into (or amount required to open a position) is €100 (i.e. 10 % x €1000).

- c) Their underlying asset is a currency or basket of currencies.**

This category includes, but is not limited to, CFDs allowing the client to open a forex position and rolling spot forex transactions under the AMF Position n° 2011-08 – Questions and answers with regard to transactions on the Forex – 31 May 2011.

1.2. How to read together the statutory criteria and the categories of derivatives referred to the AMFGR?

Marketing communications of a financial derivative are not permitted if the contract fulfills **one of the criteria under Article L. 533-12-7 of the Monetary and Financial Code** and simultaneously corresponds to **one of the categories referred to under Article 314-31-1 AMFGR**.

For example:

- A vanilla option where the underlying asset is a currency corresponds to the third category of contracts under the AMFGR but does not meet any of the statutory criteria. Such a contract does not fall within the scope of the prohibition pursuant to Article L. 533-12-7 of the Monetary and Financial Code;

- A binary option matches the first category under the AMFGR and also meets the third statutory criteria relating to the complexity of risk/benefit profile². As a result, binary options fall within the scope of prohibition of financial promotions pursuant to Article L. 533-12-7 of the Monetary and Financial Code.

1.3. Are transferable securities excluded?

Article L. 533-12-7 of the Monetary and Financial Code provides that “*investment firms shall not address, directly or indirectly, by electronic means, marketing communications to persons who may qualify as retail clients, including potential retail clients, in respect of the provision of investment services on **financial derivatives** that pertain to any of the categories of derivative as defined in Article 314-31-1 of the General Regulation of the AMF, that are not admitted to trading on a regulated market or multilateral trading facility (...)*”.

As a consequence, **financial derivatives, within the meaning of Article L. 211-1, III of the Monetary and Financial Code, are the only products subject to the prohibition regime and only when they are traded OTC. However, transferable securities within the meaning of Article L. 211-1, II of the same Code such as certificates or warrants are excluded from the scope of the prohibition.**

1.4. Are hedging transactions targeted?

Hedging transactions are **excluded** as long as they do not meet any of the three statutory criteria. These contracts aim at covering the risks that arise from fluctuations of foreign exchange rates for instance, thus impacting the value of an asset.

Position:

The investment firm must be able to prove, if requested by the AMF, that advertised derivatives addressed to potential retail clients qualify as hedging transactions that do not meet any of the three statutory criteria.

As a reminder, the third statutory criteria is as follows: “**the risk of loss compared to the potential advantages is not reasonably understood with regard to the particular nature of the derivative**”. The investment firm may show that this requirement does not apply when the information provided to the retail client adequately and clearly indicates the consequences linked to the offered contract with regard to the risks that he may wish to hedge.

2. What are the financial promotions targeted?

2.1. What is the definition of an electronic communication?

With reference to the Act of Parliament n° 2004-575³, it refers to any means of electronic communication of signs, signals, writings, pictures or sounds.

The following are electronic communications:

- information published online: either standard formats or enriched for example banners, interstitial advertising, pop-up or pop under, flash animated advertising banners, native advertising, emailing;
- communications published on social media;
- sponsored links on search engines;
- information communicated by audiovisual media or by phone;
- any other tool such as webinars, web conferences or training tools (e-learning);

² Cf. Senator Albéric de Montgolfier’s opinion presented on behalf of the Senate Financial Commission (June 22nd 2016) on the proposition for an Act adopted by the French National Assembly on the fight against corruption and the modernization of the economic life, following the application of the accelerated procedure, page 188 : “*the third statutory criteria aims at targeting products that may appear simple but they entail a risk/benefit ratio which is in fact difficult to apprehend for the non-educated investor. This third statutory criteria is essential to catch binary options within the scope of application of the law, where the maximum risk of loss is known at the time the contract is entered into and is not superior than the amount initially invested.*”

³ Article 1 of the Act of Parliament n° 2004-575 of 21 June 2004, also known as « Loi pour la confiance dans l’économie numérique ».

- communications published through remarketing techniques or any similar technique.

This provision does not target information published on advertising posters or by the written media.

2.2. What are the features of the targeted marketing communications?

Position:

Marketing communications addressed, directly or indirectly, by electronic means relating to the provision of investment services linked to financial derivatives mentioned in Article L. 533-12-7 of the Monetary and Financial Code and Article 314-31-1 of the AMFGR include, in particular, the following:

(i) Marketing communications where their content – texts, graphics, audiovisual – mentions at least one of the following words or expressions: FOREX, FX, CFD, binary options, binary, or any other word or expression with a similar meaning or suggestion.

Marketing communications relating to CFDs containing a built-in protection mechanism as defined in § 1.1, b, above-mentioned are however permitted provided that:

- they explicitly mention such protection mechanism;
- according to Article L. 533-12 of the Monetary and Financial Code, such marketing communications must include the mention of the risks inherent in such derivatives in a visible, explicit and balanced manner; and
- do not refer to financial derivatives for which marketing communications are prohibited (see ii) below).

(ii) Marketing communications where their content does not mention any of the above-mentioned words or expressions if they:

- refer to a website page that offers any of the financial derivatives mentioned by Article 314-31-1 of the AMFGR; or,
- refer to a contact form, a proposition to download a mobile trading application, or any tool that aims at putting the client in contact with the investment firm which offers the above-mentioned derivatives.

Those communications may involve the following:

- a training offer or political, economic or financial-related information;
- communications published by any person bound by an affiliate agreement or a business provider/introducer agreement with the investment firm;
- communications published by a comparison website.

Nevertheless, the prohibition is not applicable when it is proven that these marketing communications do not aim to offer financial derivatives mentioned in Article 314-31-1 of the AMFGR, in particular when it is proven that such offerings are only a very small part of the offerings on the investment firm's website compared to the firm's overall business activities.

Corporate communications defined as an advert exclusively designed to promote the corporate image are not targeted by Article L. 533-12-7 of the Monetary and Financial Code provided that they do not refer to any of the elements mentioned in paragraph (ii).

2.3. Is the information made public by an investment firm on its website targeted?

According to the last paragraph of Article L. 533-12-7 of the Monetary and Financial Code, the information made public by an investment firm on its website is not in the scope of the prohibition.

This provision only applies to the investment firm website from which investment services are provided. Marketing

communications published on the investment firms' official social media page or any of its other websites may be prohibited.

According to Article L. 533-12 of the Monetary and Financial Code, investment services providers shall ensure that all information they publish on their website shall have a "content which is accurate, clear and not misleading" as defined by Articles 314-10 and following of the AMFGR.

2.4. What are the categories of people targeted by the prohibited communications?

According to Article L. 533-12-7 of the Monetary and Financial Code, any forms of marketing communications addressed by electronic means to persons **who may qualify as retail clients, including potential retail clients are prohibited**. Conversely, a communication exclusively addressed to professional clients by electronic means, in particular to potential retail clients who are certain to qualify as professional is authorised. In all cases, the investment firm is responsible for being able to demonstrate the professional nature of these clients.

For example, the electronic means that may reach retail clients – including potential retail clients – may be websites either generalist or specialised, in particular the websites which disseminate financial information, or any audiovisual communications.

2.5. Is the delivering of information in response to client enquiry in the scope of the prohibition?

Position:

The information about one of the financial derivatives mentioned by Article 314-31-1 of the AMFGR delivered in response to client enquiry (reverse solicitation) is outside the scope of the prohibition.

As a consequence, the investment firm must save the elements of the initial enquiry and be able to prove the initial enquiry was made by the client (letters, emails, phone records, etc.).

However, when the client is a legal entity, there is no need for the enquiry to be made on transaction by transaction basis, and may deal with one or several transactions. In this situation as well, the investment firm must save the elements of the initial enquiry and be able to prove the initial enquiry was made by the client.

2.6. Are sponsorship arrangements in the scope of the prohibition?

Sponsorship arrangements linked to the financial derivatives mentioned by Article L. 533-12-7 of the Monetary and Financial Code and at Article 314-31-1 of the AMFGR are prohibited.

Indeed, according to Article L. 222-16-2 of the Consumer Code:

"All sponsorship arrangements are forbidden when their purpose or effect is, direct or indirect, advertising in favor of investment services about financial derivatives referred to Article L. 533-12-7 of the Monetary and Financial Code.

Any violation of the above provision shall be punished by an administrative fine which cannot exceed 100,000 euros (...)."