

Ares(2014)

16 May 2014

Jonathan Faull  
Director General  
DG Internal Market & Services  
European Commission  
1049 Brussels  
Belgium  
Cc: Maria Teresa Fabregas Fernandez



Dear Mr Faull

**Issue 124 (FX and MiFID)**

The role of the Financial Markets Law Committee (the "FMLC" or the "Committee") is to identify issues of legal uncertainty, or misunderstanding, present and future, in the framework of the wholesale financial markets which might give rise to material risks, and to consider how such issues should be addressed.

The FMLC has previously considered issues of legal uncertainty relating to the scope of the definition of "financial instruments" under Directive 2004/39/EC ("MiFID") in the context of foreign exchange contracts. In particular, the FMLC considered in 2006 and 2007 whether foreign exchange forwards fall within such definition and are, therefore, regulated under MiFID. The FMLC wrote to the European Commission at the time to express its concern that, were foreign exchange forwards to constitute financial instruments under MiFID, financial contracts developed and used almost exclusively for commercial purposes may inadvertently fall within the scope of a directive intended to provide for the regulation of investment products. The European Commission subsequently provided guidance<sup>1</sup> to the effect that:

"Even if FX forwards are qualified as a financial instrument in section C of Annex I to MiFID, their intermediation will be subject to MiFID requirements only in the case there is an investment service or activity performed in the sense of MiFID. [...] Thus, FX forward transactions not connected to the provision of an investment service, i.e. commercial FX forward transactions, are not covered by MiFID".

On 14 February 2014, the European Securities and Markets Authority wrote to the European Commission stating that:

1. Available at: <http://ec.europa.eu/yqol/index.cfm?fuseaction=question.show&questionId=292>

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“the different transpositions of the MiFID across Member States mean that there is no single, commonly adopted definition of derivative or derivative contract in the European Union, thus preventing the convergent application of Regulation (EU) No 648/2014 on OTC derivatives, central counterparties and trade repositories (“EMIR”). This is particularly true in the case of foreign exchange (FX) forwards and physically settled commodity forwards.”

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On 10 April 2014, the European Commission issued a Consultation Document on FX Financial Instruments (the “Consultation Document”).<sup>2</sup> The FMLC notes that the Consultation Document poses principally questions of policy and/or of fact relating to foreign exchange markets. It does not fall within the remit of the FMLC to comment on such issues.

The Consultation Document states, however, that:

“The majority of Member States do not have a definition of a forward or delineate a boundary for FX spots in their legislation [...] and in the minority of cases where they have, the approach adopted has differed. As a result [Point (4) of Section C of Annex I of the MiFID] is not currently being applied on a harmonised basis across the Union.”

The adoption of a measure which harmonises across the European Union the application of the definition of financial instrument under MiFID would constitute a step towards legal certainty. As such, the FMLC welcomes the possibility that such a measure be adopted.

The FMLC nevertheless reserves its position with regard to future issues of legal uncertainty that may arise as a result of the adoption of any such harmonising measure.

A copy of this letter has been sent to Maria Teresa Fabregas Fernandez (Head of Unit, Unit G3: Securities and Markets).

I and Members of the Committee would be delighted to meet you to discuss the issues raised in this letter. Please do not hesitate to contact me to arrange such a meeting or should you require further information or assistance.

Yours sincerely

Joanna Perkins

FMLC Chief Executive

2. Available at: [http://ec.europa.eu/internal\\_market/consultations/2014/foreign-exchange/docs/consultation-document\\_en.pdf](http://ec.europa.eu/internal_market/consultations/2014/foreign-exchange/docs/consultation-document_en.pdf)