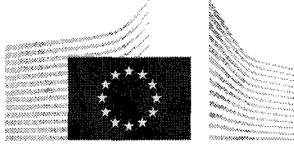


EUROPEAN COMMISSION
Directorate General Internal Market and Services

Director General

Brussels, 23. 07. 2014
Markt/G3/GW/bh ARES(2014)

Mr Steven Maijoor
Chair, ESMA
103 Rue de Grenelle
75007 Paris
France

Dear Mr Maijoor,

I write further to my letter of 14 February 2014 regarding the proposals to adopt an implementing measure pursuant to Article 4(2) Directive 2004/39/EC (MIFID1) to clarify the definition of a financial instrument relating to foreign currency (FX contract).

I would like to draw to your attention that Omnibus I (Directive 2010/78/EU) introduced a sunset clause in Article 64a of MIFID 1 which provides that "*the powers conferred on the Commission in Article 64 to adopt implementing measures that remain after the entry into force of the Lisbon Treaty on 1 December 2009 shall cease to apply on 1 December 2012.*" It will therefore not be possible to address this issue by way of a MIFID 1 implementing measure.

Clearly a consistent interpretation remains necessary, in particular to ensure the effective application of the reporting regime under Regulation (EU) No 648/2014 (EMIR). However it should also be appreciated that Directive 2014/65/EU (MIFID 2) and its associated implementing measures will come into application on 3rd January 2017. These level 2 measures can provide legal certainty on what an FX contract is. We would therefore suggest that ESMA carefully considers whether the current approach by Member States achieves a sufficiently harmonised application of the EMIR reporting obligation in the period before application of MIFID 2 or whether further measures by ESMA, e.g. guidelines, are necessary. However, a proportionate approach requires consideration that any measures, e.g. guidelines, that are adopted now, and might require changes by Member States to legislation and by stakeholders to their practices and authorisations, may need to be changed again in 2017 if these measures are not fully aligned with the future MIFID 2 implementing measures.

While we cannot pre-judge MIFID 2 implementing measures, the question of how to define a FX contract has already been extensively discussed during the public consultation and in two meetings under the European Securities Committee. A broad consensus seems to have been reached along the following lines with respect to defining FX spot contracts:

Commission européenne/Europese Commissie, 1049 Bruxelles/Brussel, BELGIQUE/BELGIË - Tel. +32 22991111

http://ec.europa.eu/internal_market/

- To use a T+2 settlement period to define FX spot contracts for European and other major currency pairs (Euro, Croatian kuna, Bulgarian lev, Czech koruna, Danish krone, Hungarian forint, Polish złoty and Romanian leu (EU Member States currencies), US dollar, Japanese yen, Australian dollar, Swiss franc, Canadian dollar, Hong Kong dollar, New Zealand dollar, Singapore dollar, Norwegian krone and Mexican peso (BIS most traded currencies)).

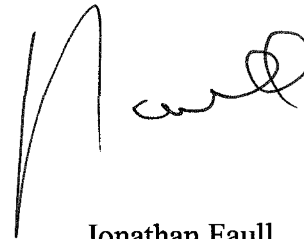
- To use the "standard delivery period" for all other currency pairs to define a FX spot contract.

- Where contracts for the exchange of currencies are used for the sale of a transferable security, to use the accepted market settlement period of that transferable security to define a FX spot contract, subject to a cap of 5 days.

- A FX contract that is used as a means of payment to facilitate payment for goods and services should also be also considered a FX spot contract.

DG MARKT officials would be happy to discuss this matter further with ESMA staff if necessary.

Yours sincerely,



Jonathan Faull

Contact: Giles WARD, email: giles.ward@ec.europa.eu
tel:+32-2-295.24.41