



- The Chairman -

Mr David Wright
Deputy Director General
European Commission
DG Markt Internal Market and Services
2, rue de Spa
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Contact person: Stéphane Kerjean
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Dear Sir,

Re: The MiFID and forward foreign exchange agreements

The implementation of the directive on markets in financial instruments (MiFID)¹ in the various EU Member States has revealed an issue of legal uncertainty regarding the rules which should be applied by credit institutions and investment firms when dealing with forward foreign exchange agreements. The preliminary investigation undertaken by the EFMLG² confirms that Member States have adopted diverging solutions regarding this issue and the EFMLG would like to encourage the European Commission to clarify the matter with a view to ensuring a level playing field across the EU.

The MiFID (and its preparatory documents) provides contrasted signals as to whether forward foreign exchange agreements should be considered as falling or not under the scope of the MiFID. One essential ambiguity relating to the legal

¹ Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, OJ L 145, 30.4.2004, p. 1-44.

² The EFMLG is a group of legal experts from the EU banking sector dedicated to analysing and undertaking initiatives intended to foster the harmonisation of laws and market practices and facilitate the integration of financial markets in Europe following the introduction of the euro. The members of the Group are selected, on the basis of their personal experience, amongst lawyers of those credit institutions based in the EU which are most active in the European financial markets, namely the banks of the Euribor and Eonia panels.

qualification of forward foreign exchange agreements under Community legislation is that, while trading in foreign exchange constitutes a core banking activity, the question has arisen as to whether (i) forward foreign exchange transactions could be considered as financial instruments as listed in the MiFID, and, more particularly, whether they could fall under the categories defined in Section C(4) of Annex I to the MiFID or (ii) whether they could be considered as ancillary services within the meaning of the MiFID. The legal qualification of these transactions entails some consequences with regard to the nature and scope of the obligations which should apply to credit institutions and investment firms under the MiFID when performing this type of activities. This needs to be clarified in order to provide legal certainty for market operators and to remedy the current heterogeneity of the solutions provided by legislators and supervisory authorities in the various EU Member States.

On these aspects, the EFMLG is of the view that the subjection of credit institutions and investment firms to the MiFID requirements in relation to the above agreements would not correspond to the intentions of the European legislator when drafting the MiFID. Furthermore, such an approach would contradict the practices currently prevailing over the major forward foreign exchange markets all over the world and would increase the risk that other markets worldwide gain a competitive regulatory advantage over the EU.

According to the Bank for International Settlements (BIS), the activity in the foreign exchange segment of the OTC derivatives market is dominated by traditional instruments such as outright forwards and FX swaps³. These relatively simple instruments account for 90% of turnover in FX derivatives⁴. In terms of geographical distribution, a major part of the turnover for these activities takes place in the UK and the US⁵. It is of interest to note in this respect that the two most important markets for FX forwards in the world are to a large extent unregulated. In the UK, wholesale foreign exchange trading has remained outside the remit of Financial Services Authorities regulation. As such, participants in the FX market have been guided in their activities by the provisions of the Non-Investment Products Code ('the NIPs Code')⁶. In the US, OTC FX forwards, including non-deliverable forwards, are not

³ BIS Triennial Central Bank Survey, December 2007, Foreign exchange and derivatives market activity in 2007, p.15.

⁴ With an average daily turnover of \$2.1 trillion.

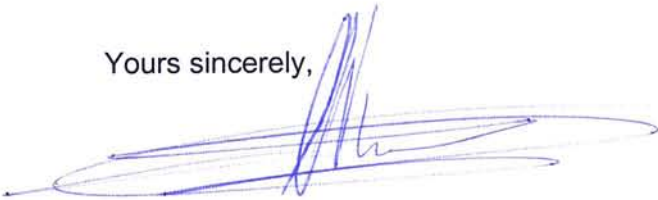
⁵ Pp.18-20 of the BIS Survey. Outside the United Kingdom and the United States, most trades took place in Europe (18%).

⁶ The NIPs Code establishes standards of good practice in the wholesale markets in non-investment products consisting of the sterling, foreign exchange and bullion wholesale deposit markets as well as the spot and forward foreign exchange and bullion markets.

generally regulated unless they are offered to or entered into with retail counterparties by unregulated entities.

Against this backdrop, the Commission might wish to consider inviting the Committee of European Securities Regulators and the Committee of European Banking Supervisors to examine how to guarantee an uniform application of the MiFID with respect to forward foreign exchange agreements and to ensure sufficient legal certainty on this issue. The EFMLG is of the view that a public consultation would certainly be beneficial in order to gather the views of the markets on these matters. The EFMLG stands at the Commission's disposal in order to exchange views on these aspects and provide any legal assistance, as required.

Yours sincerely,



Antonio Sáinz de Vicuña

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