Reply form for the Consultation Paper on MAR review report

3 October 2019

Date: 3 October 2019

Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in the Consultation Paper on the MAR review report published on the ESMA website.

Instructions

Please note that, in order to facilitate the analysis of the large number of responses expected, you are requested to use this file to send your response to ESMA so as to allow us to process it properly. Therefore, ESMA will only be able to consider responses which follow the instructions described below:

- use this form and send your responses in Word format (pdf documents will not be considered except for annexes);
- do not remove the tags of type <ESMA_QUESTION_CP_MAR_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and
- if you do not have a response to a question, do not delete it and leave the text “TYPE YOUR TEXT HERE” between the tags.

Responses are most helpful:

- if they respond to the question stated;
- indicate the specific question to which the comment relates;
- contain a clear rationale; and
- describe any alternatives ESMA should consider.

Naming protocol

In order to facilitate the handling of stakeholders’ responses please save your document using the following format:

ESMA_CP_MAR_NAMEOFCOMPANY_NAMEOFDOCUMENT.

e.g. if the respondent were ESMA, the name of the reply form would be:

ESMA_CP_MAR_ESMA_REPLYFORM or

ESMA_CP_MAR_ANNEX1

Deadline

Responses must reach us by **29 November 2019.**

All contributions should be submitted online at www.esma.europa.eu under the heading ‘Your input - Consultations’.

Publication of responses

All contributions received will be published following the end of the consultation period, unless otherwise requested. **Please clearly indicate by ticking the appropriate checkbox in the website submission form if you do not wish your contribution to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure.** Note also that a confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the headings 'Legal notice' and 'Data protection'.

General information about respondent

Name of the company / organisation	Global Foreign Exchange Division (GFXD) of the Global Financial Markets Association (GFMA)
Activity	Investment Services
Are you representing an association?	☒
Country/Region	International

Introduction

Please make your introductory comments below, if any:

<ESMA_COMMENT_CP_MAR_1>

The GFXD welcomes the opportunity to comment on behalf of its members (consisting of 25[1] global foreign exchange (**FX**) market participants, collectively representing the majority of the FX inter-dealer market) on the European Securities and Markets Authority (**ESMA**) consultation on the Market Abuse Regulation (**MAR**) in the context of the MAR review, launched on 3 October 2019 (the **Consultation**).

The GFXD was formed in co-operation with the Association for Financial Markets in Europe (**AFME**), the Securities Industry and Financial Markets Association (**SIFMA**) and the Asia Securities Industry and Financial Markets Association (**ASIFMA**). We and our members are committed to ensuring a robust, open and fair marketplace and welcome the opportunity for continued dialogue with global regulators.

<ESMA_COMMENT_CP_MAR_1>

[1] Bank of America Merrill Lynch, Bank of New York Mellon, Barclays, BNP Paribas, Citigroup, Crédit Agricole, Credit Suisse, Deutsche Bank, Goldman Sachs, HSBC, JP Morgan, Lloyds Bank, Mizuho, Morgan Stanley, MUFG Bank, NatWest Markets, Nomura, Northern Trust, Royal Bank of Canada, Scotiabank, Standard Chartered Bank, State Street, UBS, Wells Fargo and Westpac.

Q1. Do you consider necessary to extend the scope of MAR to spot FX contracts? Please explain the reasons why the scope should or should not be extended, and whether the same goals could be achieved by changing any other piece of the EU regulatory framework.

<ESMA_QUESTION_CP_MAR_1>

No, the Global Foreign Exchange Division (**GFXD**) of the Global Financial Markets Association (**GFMA**) does not consider it necessary to extend the scope of MAR to Spot FX contracts. Instead, we strongly support ESMA's suggestion that it would be advisable to wait for the FX Global Code to be more deeply embedded into the market and for any developments flowing from the 2020 review to also be adopted.

Furthermore, we believe that any consideration of changes to MiFID/R (as proposed) should form part of a wider MiFID/R review and not be decided upon under a review of any other regulation, such as MAR.

The GFXD welcomes the opportunity to comment on behalf of its members (consisting of 25[2] global foreign exchange (**FX**) market participants, collectively representing the majority of the FX inter-dealer market) on the European Securities and Markets Authority (**ESMA**) consultation on the Market Abuse Regulation (**MAR**) in the context of the MAR review, launched on 3 October 2019 (the **Consultation**).

The GFXD was formed in co-operation with the Association for Financial Markets in Europe (**AFME**), the Securities Industry and Financial Markets Association (**SIFMA**) and the Asia Securities Industry and Financial Markets Association (**ASIFMA**). We and our members are committed to ensuring a robust, open and fair marketplace and welcome the opportunity for continued dialogue with global regulators.

EXECUTIVE SUMMARY

The GFXD does not believe that extending MAR and/or MiFID/R to Spot FX would be an appropriate or proportionate course of action at this time. Furthermore, we believe that any consideration of changes to MiFID/R (as proposed) should form part of a wider MiFID/R review and not be decided upon under a review of any other regulation, such as MAR.

Our view is based on a number of factors, including:

- **The breadth of the Spot FX market:** The significant impact that including Spot FX within MAR or MiFID/R would have for market participants and the structure of the EU FX market, given its size, diversity and global nature. The types of market participants and their reasons for executing Spot FX differ widely and must be taken into account;

- **Existing central bank oversight of Spot FX and the FX Global Code:** The global historical consideration of the Spot FX market as falling within the jurisdiction of central banks, and the ongoing work by those central banks, together with market participants, to fully embed the FX Global Code across the FX market;

[2] Bank of America Merrill Lynch, Bank of New York Mellon, Barclays, BNP Paribas, Citigroup, Crédit Agricole, Credit Suisse, Deutsche Bank, Goldman Sachs, HSBC, JP Morgan, Lloyds Bank, Mizuho, Morgan Stanley, MUFG Bank, NatWest Markets, Nomura, Northern Trust, Royal Bank of Canada, Scotiabank, Standard Chartered Bank, State Street, UBS, Wells Fargo and Westpac.

- **Cost-benefit analysis:** The limited benefit to regulators from bringing the Spot FX market into the scope of MAR and MiFID/R, given the complex yet incomplete market picture that reporting data is likely to provide, for the significant structural, operational and cost impact on market participants, from regulators to banks through to end users;

- **Data challenges:** The immense challenge of capturing, reporting and analysing the data that would be required, given the size and speed of operations of the Spot FX Market, particularly at a time when the revision and optimisation of existing data obligations is still underway; and

- **Fragmentation of a global market:** The impact that a break in global harmonisation of regulation would have on the global FX market.

Instead, we would like to make the following recommendations:

- **Clarification of ESMA's area of focus:** The GFXD requests additional clarity from ESMA as to which specific aspect(s) of the Spot FX market are of interest in relation to market abuse risk. As outlined above, the Spot FX market is extremely large and broad, and additional information would allow market participants to better assist ESMA in investigating a suitable response.

- **Implementation and review of the FX Global Code:** The GFXD would strongly support ESMA's suggestion to wait for the FX Global Code to be more deeply embedded into the market. Given that a review of the Code is planned in 2020, we suggest to also wait for any developments flowing from the 2020 review to also be adopted.

    - The GFXD acknowledges that, since the market has historically been overseen by central banks, the regulatory community may have less knowledge of both the Spot FX market and the Code. As part of the review, the Global FX Committee could be encouraged to seek views from respondents on whether more can be done by industry, firms and regulators to improve the understanding of the Code by market participants and their managers. ESMA could consider how this could be achieved in a European context.

STRUCTURE OF RESPONSE

The GFXD response to this question is structured as follows:

A. The Spot FX Market – Size and Structure

B. Current Coverage of Spot FX

C. Review of ESMA's Analysis of Additional Regulatory Oversight Options for Spot FX

D. GFXD Recommendations

A. THE SPOT FX MARKET – SIZE AND STRUCTURE

1. Introduction

The global FX market is the world's largest financial market, and effective exchange of currencies underpins the global financial system. Sovereign entities, central banks and other government sponsored entities rely on the global FX market to be well-functioning and liquid, and corporations and investors regularly participate in the market for important operational needs.

A "Spot FX" transaction is an agreement between two parties to buy or sell one currency against another currency at an agreed price for settlement on a "spot date" (usually two business days from the trade date). Spot FX transactions can be traded direct (executed between two parties directly), via electronic broking platforms which operate automated order matching systems or other electronic trading systems, or through a voice broker.

2. Market size

According to the Bank for International Settlements Triennial Central Bank Survey of Foreign Exchange Turnover in April 2019 (**BIS 2019**), global trading in FX markets has reached $6.6 trillion per day, its highest level to date. Of this volume, 30% is Spot FX trading, at $1.987 trillion per day[3], meaning that it constitutes a deep and generally liquid market (allowing for variations between the currency pairs traded).

The data collected by BIS and central banks on the size of the FX market is generally focused on volumes, rather than transaction numbers. However, given the size of the market and breadth of participants, discussed further below, the total number of Spot FX transactions is understood to be extremely high in comparison with other products.

The top 8 European FX centres (France, Germany, Ireland, Italy, Netherlands, Spain, Sweden and the United Kingdom) accounted for 51% of global Spot FX average daily volume, at $1.211 trillion per day[4].

	FX Spot Average Daily Volume, USD millions, net-gross basis	% of Global Daily Average Volume
France	22,866	0.96%
Germany	18,916	0.80%
Ireland	702	0.03%
Italy	2,096	0.09%
Netherlands	10,705	0.45%
Spain	7,922	0.33%
Sweden	4,694	0.20%
UK	1,143,755	48.08%
Total across 8 EU Centres	1,211,656	50.94%

However, the Spot FX market is inherently global, given the nature of the product being traded, with 56% of transactions occurring on a cross-border basis.[5]

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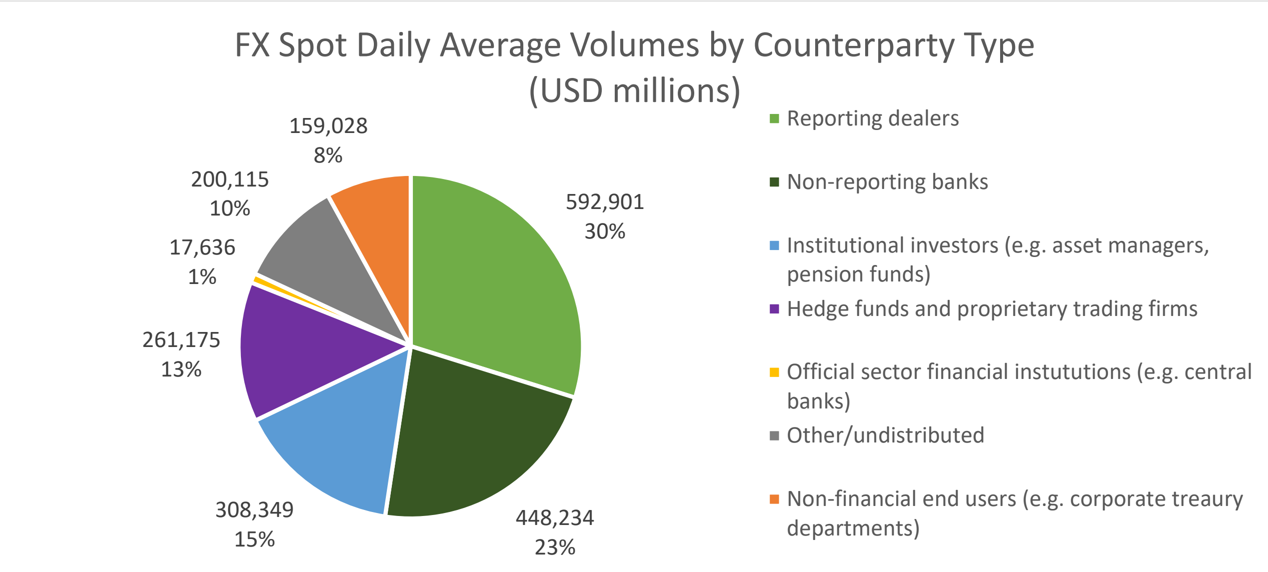
[3] Available at https://www.bis.org/statistics/rpfx19.htm. Data is on a net-net basis, adjusted for local and cross-border inter-dealer double-counting
[4] Data is on a net-gross basis, adjusted only for local inter-dealer double-counting
[5] BIS 2019

3. Market participants

In addition to the size of the Spot FX market, a key distinguishing feature is the breadth of counterparties trading Spot FX for different purposes, which challenges the view of Spot FX as a single, homogenous landscape. An extensive list of FX market participant types is provided in the FX Global Code, of which many are counterparties in Spot FX trading[6]. The list (which excludes retail market participants) includes:

- financial institutions;
- central banks;
- asset managers, sovereign wealth funds, hedge funds, pension funds, and insurance companies;
- corporate treasury departments;
- family offices running treasury operations;
- non-bank liquidity providers; firms running automated trading strategies, including high-frequency trading strategies, and/or offering algorithmic execution;
- brokers (including retail FX brokers); investment advisers; aggregators; and analogous intermediaries/agents; and
- remittance businesses, money changers, and money services businesses.

BIS 2019 also breaks down the global FX Spot market volumes:



While Spot FX can be traded purely to take advantage of changes in exchange rates, many of these counterparties will have specific reasons for executing transactions. For example:

- **By end users**: to make payments for goods and services, to reduce the risk of adverse moves in exchange rates by hedging currency exposures, to transfer balances between entities for treasury management functions, or to raise funding outside home markets;
- **By institutional investors**: to convert returns from international investments into home currency, or to facilitate the sale or purchase of foreign securities (FX security conversion transactions); or

[6] See, Foreword, Section II 'To Whom Does the FX Global Code Apply?'

- **By central banks**: to effect monetary policy.

The BIS data also records that 3% of global Spot FX volume is 'retail driven'[7], which is defined as (i) transactions with 'wholesale' financial counterparties that cater to retail investors, such as electronic retail trading platforms, and (ii) direct transactions with private individuals.

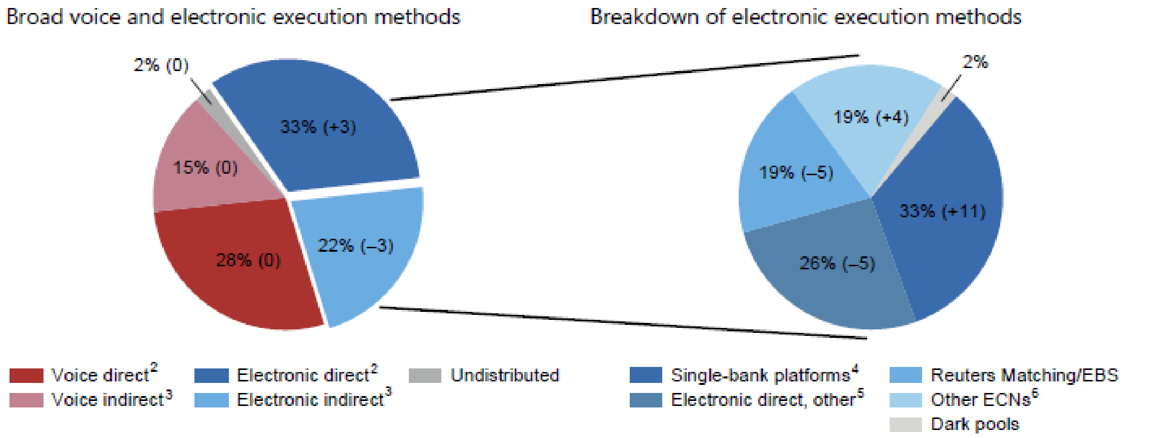
These broad-ranging reasons for executing Spot FX transactions (and in particular the volume of FX transactions effected for cross-border payments purposes) must be taken into account when assessing market data.

4. Execution methods

The differing size and sophistication of Spot FX counterparties is also reflected in the ways in which they access the market. A 2016 BIS Quarterly Review paper "Downsized FX markets: causes and implications"[8] analysed the execution methods for FX products reported in the BIS FX Triennial Central Bank Surveys of 2016 and 2013[9]:

Net-net basis,[1] daily averages in April; percentage shares in turnover, change in percentage shares since 2013 in parentheses

Graph 6



[1] Adjusted for local and cross-border inter-dealer double-counting. [2] Refers to trades not matched via a third party. [3] Refers to deals matched via a third party – either a voice broker or an electronic matching platform. [4] Single-bank trading systems operated by a single dealer. [5] Other electronic direct execution methods, eg direct electronic price streams. [6] Electronic communication networks.

Sources: BIS Triennial Central Bank Survey; authors' calculations.

These data show that, FX is a highly electronic market, even in the absence of regulatory encouragement towards electronic execution. However, the majority of trading does not take place on multilateral trading systems. This fits with ESMA's analysis of Spot FX as predominantly *"an OTC market, [where] the price determination is not necessarily made through the interaction of demand and supply in a trading venue…prices offered in the spot FX market may rely on the relationship and credit worthiness of the counterparties"*.

B. CURRENT COVERAGE OF SPOT FX

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[7] BIS 2019, daily average volume of 65,614 USD millions, net-net basis

[8] Available at https://www.bis.org/publ/qtrpdf/r_qt1612e.htm

[9] The data was not broken down to this level in the 2019 survey

1. EU and Member State Regulation

The delineation between FX Spot and derivative instruments follows a global precedent established in early securities markets regulation and confirmed in the 2009 G20 Pittsburgh commitments to focus on reforming the derivatives market after the 2008 financial crisis.

More recently, in the EU in 2017, the MiFID II[10] Org Regulation[11] provided that a FX contract will not constitute a MiFID II financial instrument if it is either a spot contract or a means of payment that fulfils specified conditions.

This history is outlined more in an annex to our response to this question.

Since MAR draws its scope from the definition of MiFID II financial instruments, the current scope of MAR (as set out in Article 2(1)) does not include Spot FX contracts, on the basis that MAR applies predominantly to 'financial instruments' admitted to trading or traded on a trading venue. For certain limited provisions, Article 2(2) of MAR extends the application to spot commodity contracts and certain financial instruments that might impact the price of a spot commodity contract. MAR does not introduce any specific reference to Spot FX contracts.

Despite not falling within the definition of MiFID 'financial instruments', it is worth noting that in certain jurisdictions, the trading of Spot FX is already subject to a number of regulatory protections.

For example, in the United Kingdom, regulated firms are subject to the Financial Conduct Authority's (**FCA**) Principles for Businesses in limited circumstances when trading Spot FX if either (a) that trading is 'ancillary' to a regulated activity; or (b) that trading is judged to have a negative effect on the integrity of the UK financial system or the ability of the firm to meet certain minimum standards for being authorised.

In some other Member States, like Belgium and Italy, local bespoke regimes have developed. These are often geared towards onshore bureau de change activity but unfortunately such regimes do not differentiate between such activity and Spot FX sales and trading in the wholesale markets. Whilst there is no consistency in how these Member States regulate Spot FX markets, it is clear that they do not have the breadth of impact (as to licensing, conduct of business and compliance) that bringing Spot FX within the scope of MiFID 'financial instruments' would do.

2. The FX Global Code

a. Background

In response to instances of misconduct within financial markets, including FX, the UK conducted its Fair and Effective Markets Review, which produced its final report in June 2015[12]. The report made a number of policy recommendations to improve conduct in Fixed Income, Currency and Commodity (**FICC**) markets, including that the UK should:

- Agree a single global FX code, providing: principles to govern trading practices and standards for venues; examples and guidance for behaviours; and tools for promoting adherence; and

[10] Markets in Financial Instruments Directive 2014/65
[11] Delegated Regulation 2017/565
[12] Available at https://www.bankofengland.co.uk/report/2015/fair-and-effective-markets-review---final-report

- Create a new statutory civil and criminal market abuse regime for spot foreign exchange, drawing on, among other things, the work of the international project to draw up a global foreign exchange code. It is worth noting that in subsequent reports[13] looking at the progress of implementation, rather than outlining milestones for implementing the new framework, the reports acknowledge the global nature of the FX market, and the need therefore to take a considered and international approach to the issues raised, and the role of the existing enhancements regarding surveillance as introduced under MiFID II and MAR.

In the same year, the Bank of England (**BoE**) joined with other central banks, including the European Central Bank (**ECB**), to announce the development of an FX global code of conduct to cover all FX products and participants. The initiative was led by the BIS and global market participants from the sell-side, buy-side and infrastructure providers. Given the focus on a single asset class and the deep involvement from market participants from many jurisdictions, the two-year drafting process involved technical granular discussions with experts in all parts of the global FX industry on market practice, in order to produce practical guidance and principles that are applicable to wide range of businesses.

On 25 May 2017, the final text of the FX Global Code (the **Code**) was published, which aims to promote a "robust, fair, liquid, open and appropriately transparent market in which a diverse set of market participants, supported by resilient infrastructure, are able to confidently and effectively transact at competitive prices that reflect available market information and in a manner that conforms to acceptable standards of behaviour."

The Code was published alongside a separate report which set out a blueprint for adoption. Although it is not a regulation, the Code places responsibility on market participants to take the appropriate steps to assess and adopt the Code into their practices and cultures and has been drafted to cover both Spot FX and FX derivatives.

The Code comprises fifty five principles organised around these six leading principles:

- **Ethics**: Market participants are expected to behave in an ethical and professional manner to promote the fairness and integrity of the FX market.

- **Governance**: Market participants are expected to have a sound and effective governance framework to provide for clear responsibility for and comprehensive oversight of their FX market activity and to promote responsible engagement in the FX market.

- **Execution**: Market participants are expected to exercise care when negotiating and executing transactions in order to promote a robust, fair, open, liquid, and appropriately transparent FX market.

- **Information Sharing**: Market participants are expected to be clear and accurate in their communications and to protect confidential information to promote effective communication that supports a robust, fair, open, liquid, and appropriately transparent FX market.

- **Risk Management and Compliance**: Market participants are expected to promote and maintain a robust control and compliance environment to effectively identify, manage, and report on the risks associated with their engagement in the FX market.

[13] Progress Report (May 2018): https://www.bankofengland.co.uk/-/media/boe/files/report/2018/fair-and-effective-markets-review-progress-report.pdf?la=en&hash=E3F55D5C0600F927F1E767EAA818C4E571E72FD9 and Implementation Report (July 2016): https://www.bankofengland.co.uk/-/media/boe/files/report/2016/fair-and-effective-markets-review-implementation-report.pdf?la=en&hash=B0D871B3AC4666302A9AA0E115CA0021625D220D

- **Confirmation and Settlement Processes**: Market participants are expected to put in place robust, efficient, transparent, and risk-mitigating post-trade processes to promote the predictable, smooth, and timely settlement of transactions in the FX market.

A 'market participant' for the purpose of the FX Global Code is a person or organisation (regardless of legal form) that:

- is active in FX markets as a regular part of its business and is engaged in the activity of the purchase or sale of one currency against another, or in transactions designed to result in gains or losses based upon the change in one or more FX rates, such as derivatives, whether deliverable or non-deliverable, either directly or indirectly through other market participants; or

- operates a facility, system, platform, or organisation through which participants have the ability to execute the type of transactions described [above]; or

- provides FX benchmark execution services; and

- is not considered a retail market participant in the relevant jurisdiction(s).

The Code notes that this term includes any personnel who conduct these activities on behalf of a market participant.

There is a 'statement of commitment' form annexed to the Code which is voluntary. Market participants were encouraged to use the statement of commitment as a way of signalling their intention to adopt and adhere to the Code's principles.

All 25 members of the GFXD, who account for the majority of the interdealer FX market[14], have attested their adherence to the Code. This required each firm to perform a comprehensive review of their trading practices, systems and controls against each of the principles within the Code and to ensure ongoing compliance.

Less than a year after the launch, the Global Foreign Exchange Committee (**GFXC**), a forum made up of central banks and private sector participants which also maintains the Code[15], announced that well over 100 market participants had made statements of commitment[16]. As at July 2019, there were over 900 entries. In addition to the statement of commitment from market participants, there are now 17 national or regional FX committees[17] who are full members of the GFXC:

- Australia - The Australian Foreign Exchange Committee
- Brazil - Foreign Exchange Committee
- Canada - The Canadian Foreign Exchange Committee
- China - China Foreign Exchange Committee
- Euro Area - The Foreign Exchange Contact Group
- Hong Kong - Treasury Markets Association

[14] According to the 2019 Euromoney FX survey
[15] For more information, see https://www.globalfxc.org/overview.htm
[16] See https://www.globalfxc.org/press/p180416.htm
[17] For an example mandate for a FX Committee, the ECB states that its FX Contact Group is "a forum for interaction between the ECB and industry-wide market professionals involved in the wholesale foreign exchange (FX) market. The objective of the FXCG is to discuss developments in FX markets and share ideas and experiences on the structure and the functioning of the FX markets." See https://www.ecb.europa.eu/paym/groups/fxcg/html/index.en.html

- India - Foreign Exchange Committee
- Japan - Tokyo Foreign Exchange Committee
- Mexico - The Mexican Foreign Exchange Committee
- Russia - Moscow Foreign Exchange Joint Standing Committee
- Scandinavia - Foreign Exchange Committee
- Singapore - The Singapore Foreign Exchange Market Committee
- South Africa - South African Foreign Exchange Committee
- South Korea - Seoul Foreign Exchange Committee
- Switzerland - Swiss Foreign Exchange Committee
- United Kingdom - Foreign Exchange Joint Standing Committee
- United States - Foreign Exchange Committee

A large proportion of sell-side firms have committed to adherence the Code. For GFXD's members, this involved a significant implementation programme to assess practices and ensure that compliance with each of the Code's principles could be evidenced. The GFXC has also made extending adherence beyond sell-side entities a priority for the coming year and has established a Buy-Side Outreach Working Group for this purpose[18].

b. The Code and EU national legislation

The Code in itself does not impose legal or regulatory obligations on market participants, nor does it substitute for regulation. Rather it is intended to serve as a supplement to any and all local laws, rules and regulation by identifying global good practices and processes. As a result, compliance with the Code does not provide a legal defence to a breach of applicable national law and market participants must ensure that their internal policies and procedures comply with their national laws whilst using the Code as an "essential reference" when conducting business in the FX market and when developing and reviewing internal procedures.

At the launch of the Code, central banks in major jurisdictions such as Australia, the EU, Hong Kong, Singapore and the US endorsed the Code and expressed support for its adoption by market participants. In the UK, the BoE confirmed that the Code superseded existing guidance in its non-investment products (**NIPs**) code and the FCA stated that it expected senior managers, certified individuals and other relevant persons to take responsibility for and be able to demonstrate their own adherence with standards of market conduct[19]. The FCA confirmed that its supervision of the Senior Manager and Certification Regime (**SMCR**) rules support this.

c. Enforcing the Code – EU jurisdictional analysis

Many of the central banks' FX committees mentioned above have made adherence to the Code a pre-requisite for membership, including the ECB's FX Contact Group[20], which further encouraged major market participants to sign statements of commitment.

In terms of the tools available to local EU regulators and authorities to enforce the Code, we note the example of the UK SMCR, which has applied since 2016 to UK banks, building societies, credit unions, branches

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[18] See update in https://www.globalfxc.org/events/20190522_minutes.pdf
[19] See https://www.fca.org.uk/news/statements/fca-statement-publication-fx-global-code
[20] See https://www.ecb.europa.eu/paym/groups/pdf/fxcg/ECB_FXCG_Terms_of_Reference_1806.pdf?1089877abd4951e7be726252b3852a67

of foreign banks operating in the UK and the largest investment firms regulated by the Prudential Regulation Authority (PRA) and the FCA. The regime is being rolled out to all FCA-regulated entities from December 2019.

The FCA introduced a mechanism for formally recognising industry codes, compliance with which would indicate that the person subject to the SMCR is meeting their obligation to observe “proper standards of market conduct” with respect to unregulated markets. Before being granted the status of an “FCA-recognised industry code”, the FCA assesses whether the relevant industry code of conduct meets recognition criteria that the FCA has set out in its policy statement (PS18/18), and recognition is provided for a period of 3 years (though it can be revoked if the code no longer meets the recognition criteria). The Code was granted recognition by the FCA on 26 June 2019.[21]

However, prior to this, the FCA was still able to take action against firms or individuals which acted contrary to standards of market conduct, for example under the FCA’s Principles for Business, and in particular Principle 3 that firms must take reasonable care to organise and control their affairs responsibly and effectively, with adequate risk management systems (which also covers unregulated activities wherever they are carried out). As Principle 3 continues to apply, SMCR offers an additional tool for UK regulators to ensure that firms and individuals engaging in Spot FX activities observe proper standards of market conduct, including those encouraged by the Code.

Other jurisdictions surveyed have not implemented an equivalent of the UK’s SMCR, though we understand that the Irish regulators are expected to imminently consult on implementing a Senior Executive Accountability Regime as an Irish equivalent of the SMCR. In June, the Irish Government confirmed that the Department of Finance should begin the process of drafting heads of a Central Bank (Amendment) Bill 2019 – it is intended that procedures to address individual accountability, such as the Senior Executive Accountability Regime (SEAR) would be set out within that Bill[22]. Subsequently, the Irish approach was described in a recent speech by the Director General, Financial Conduct, Derville Rowland, Central Bank of Ireland[23] in which Mrs Rowland also mentions the international approach taken by Australia, Hong Kong and Singapore in introducing individual accountability to drive high standards of conduct.

d. Reviewing the Code

From the outset, and to ensure that the Code remains fit for purpose, the GFXC committed to undertaking a review of the Code at least once every three years. The first review of the Code will take place during 2020[24].

This is intended to be a targeted review, to ensure the Code remains current to the requirements of market participants and market factors. It will allow central banks and market participants to identify areas where additional guidance may be needed, or where the Code should be updated to reflect developments in market practice or structure. The GFXC is in the process of identifying specific areas that need to be addressed, gathering feedback widely, including from local FX committees and their members and other market participants and industry groups[25].

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[21] https://www.fca.org.uk/news/statements/fca-confirms-recognition-fx-global-uk-money-markets-codes
[22] https://www.gov.ie/en/news/355c31-t/
[23] https://centralbank.ie/news/article/speech-senior-executive-accountability-regime-derville-rowland-22-oct-2019

[24] For more detail, see the minutes of the May 2019 GFXD meeting at https://www.globalfxc.org/events/20190522_minutes.pdf
[25] See, for example, the summary of the ECB FX Contact Group meeting in September 2019 https://www.ecb.europa.eu/paym/groups/pdf/fxcg/2019/20190924/FXCG_summary.pdf

The GFXC also carried out its annual survey of market participants in October 2019 to provide respondents with an opportunity to point to areas where they think greater guidance from the Code might be necessary, as well as gauging general awareness of the Code and opinions on its effectiveness. Results of the 2019 annual survey are currently pending.

Development of the Code was a significant undertaking, given its global nature and the breadth of market participants to which it is designed to apply. GFXD and its members are fully supportive of the review of the Code and the opportunity which this presents to assess its early impact and make any necessary improvements. We believe that this process should be allowed to take place before any other significant changes to oversight of the global FX market are considered.

C. REVIEW OF ESMA'S ANALYSIS OF ADDITIONAL REGULATORY OVERSIGHT OPTIONS FOR SPOT FX

We consider below the potential scope and impact of ESMA's options for additional regulatory oversight of Spot FX. We note that the impact of each option will also differ depending on how it is implemented, and which parts of the Spot FX market are captured, e.g. retail vs wholesale activity, speculative trading vs hedging and commercial purposes.

We also recognise the relationship between Spot FX and the FX derivatives markets, namely that the majority of FX derivatives have Spot FX as their underlier. As referenced in other sections of our response, FX derivatives are already supervised under MAR and MiFID/R as well as similar regulations in other jurisdictions designed to meet the 2009 G20 Pittsburgh Agreement.

European National Competent Authorities currently perform market abuse oversight of FX derivatives. Given the fast paced nature and short tenor of the Spot FX market we suggest that any regulatory oversight of Spot FX will likely occur post the settlement of the trade, which raises a question as to whether the same regulatory outcome can be achieved through existing EU FX derivatives regulation.

1. Extension of MAR

The ESMA consultation considers whether the scope of MAR could be extended to cover Spot FX in a similar way to the coverage of spot commodity markets.

a. The scope of MAR

From July 2016, the EU MAR (which replaced the old directive) applied the regime to all MiFID financial instruments admitted to trading or traded on trading venues (including OTFs) rather than only regulated exchanges. The scope of the regime was also extended expressly to cover transactions in the commodity spot markets (where trading in spot affects a financial instrument traded on a venue). Finally, the new regime created a new civil offence of benchmark manipulation. This offence covers any financial benchmark, regardless of whether the instruments that generate the benchmark are covered by financial regulation.

Extending the scope of MAR to cover Spot FX could be achieved in one of three ways with varying degrees of commensurate impact:

- Spot FX could be assumed into the definition of MiFID ‘financial instrument’ – the impact of this approach in the context of the resulting MiFID obligations is considered more fully in section C2;

- Spot FX could be brought within the scope of all three substantive offences under MAR – namely insider dealing, unlawful disclosure and market manipulation, on a standalone basis as a named asset class alongside MiFID financial instruments; or

- Spot FX could be expressly included within the scope of the market manipulation offence only on a standalone basis.

We consider the ramifications of each of these approaches in more detail below.

b. The impact of extending MAR to Spot FX

i. Surveillance

To the extent Spot FX is included on a standalone basis within the scope of the market manipulation offence only, the most significant area of impact would be the surveillance provisions under MAR Article 16 and Delegated Regulation 2016/957. These require in scope firms to record and perform surveillance on all quotes, orders and transactions (including modifications, updates and cancellations).

Regulated firms will already generally carry out surveillance on their Spot FX business in a manner they consider to be appropriate and proportionate to the market and the risks they perceive. Today, that surveillance would not however be tailored to MAR-style market manipulation or abusive practices, so that even firms with extensive current surveillance would need to re-evaluate the scope of their surveillance practices once the extent of the regime over Spot FX was clarified.

As noted in the September 2018 BIS paper ‘Monitoring of Fast-Paced Electronic Markets’[26], the share of Spot FX executed electronically has risen significantly since 2008, as has the share of the market executed by algorithmic trading. Furthermore, the paper cites the frequency of pricing updates on EBS, a major FX platform, as up to 200 times per second for some market participants. When the number of potential market participants, and the number of currencies (BIS 2019 covers 53 currencies) in which each may be offering prices at such a rate, on multiple platforms is taken into consideration, the volume of quote, order and transaction data is compounded accordingly.

This illustrates the scale of the technological build and data storage capacity which would be required for market participants were the MAR surveillance provisions of quotes, orders and transactions to become applicable to Spot FX. In addition, the number of Suspicious Transaction and Order Reports (**STORs)** that would be generated by firms and reported to National Competent Authorities (**NCAs**) would also be likely to significantly increase. Given that this is likely to include a significant proportion of false positives, analysis of existing STOR usage and investigation capacity should be undertaken, as part of cost-benefit analysis of any proposed changes.

It is worth noting that each year the FCA publishes data on the STORs received – the most recent numbers[27] demonstrate how biased reports continue to be towards equities as compared other asset classes already within scope of the requirements (such as fixed income). The GFXD believes that ESMA should look at how the MAR review could educate market participants to ensure that the STOR regime is functioning

[26] Available at https://www.bis.org/publ/mktc10.pdf
[27] FCA – STORs received during 2018: https://www.fca.org.uk/markets/suspicious-transaction-and-order-reports/number-stors-received-2018

effectively in relation to existing (in scope) asset classes, rather than consider the expansion of the requirements to Spot FX at this time.

ii. Inside information and the substantive offences

To the extent Spot FX is brought within scope of MiFID 'financial instruments' or brought within scope of all three market abuse offences on a standalone basis, the impact for market participants and regulators would be significant.

We consider the ramifications arising from the resulting MiFID obligations below; however, the key issues that would arise under MAR stem principally from the definition of inside information and whether that definition could work in the context of Spot FX.

For the purpose of MAR, inside information is information of a precise nature, that:

(a) has not been made public;

(b) relates, directly or indirectly, to one or more issuers or to one or more financial instruments; and

(c) if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments (that is, it is information that a reasonable investor would be likely to use as part of the basis of their investment decisions).

GFXD is of the view that this definition would not work in the context of Spot FX. MAR introduced a more restrictive definition for commodity derivatives which was not straightforward to define or implement and Spot FX is likely to be significantly more challenging.

As noted in the Consultation, other key considerations would include:

- who could be considered as the 'issuer' for spot FX contracts;
- which parameters should be taken into account when publishing inside information; and
- which entities should be exempted from the requirements of MAR.

2. Extension of MiFID II/MiFIR[28]

Given the close linkage between MAR and MiFID/R, in particular in relation to MiFIR transaction reporting, the ESMA consultation considers whether Spot FX could be brought within the scope of MAR via a change to the definition of MiFID financial instruments. As articulated above, the ramifications of this approach (which will affect a broad range of market participants, including regulators and end users), and indeed the approach of bringing Spot FX within scope of all the substantive market abuse offences from a MiFID standpoint, are considered below.

As an overall comment, the GFXD believes that any changes to MiFID/R should be considered only in the context of a wider review of MiFID/R and that a review of any other regulation, including MAR, is not an appropriate regulatory route for such considerations.

[28] Regulation 600/2014

a. The scope and purpose of MiFID

MiFID I required the authorisation of investment firms and set out rules determining how such firms must behave when dealing with clients, calibrating requirements according to the nature of the client and the activities that firms undertake. For participants in wholesale markets, clients are either categorised as professionals or, for certain business only, may be treated as eligible counterparties (**ECPs**). ECPs are considered to be the most sophisticated investors and the client categorisation regime provides fewer constraints for those firms that transact with them. MiFID I also set out rules governing the operation of exchanges and other trading venues.

When MiFID II came into force in 2018, the revised framework widened the coverage of the regulatory requirements that applied to non-equity securities and derivatives although Spot FX (as discussed above) and, depending on context and purpose, some forward contracts in foreign exchange and physical commodities, were not specifically covered. Pre and post-trade transparency requirements were extended to cover firms and venues in all bond and derivative markets, and the creation of a new regulated venue, the OTF, meant that business that was traditionally classified as over the counter became subject to the rules covering venues.

MiFID II governs all transactions in 'financial instruments', which are broadly defined in Annex I, Section C and include shares, fixed income securities and derivatives, all commodity derivatives traded on authorised venues, and most currency derivatives (excluding, depending on context and purpose, some forward contracts in foreign exchange and physical commodities). Any firm that provides an investment service relating to financial instruments must obtain authorisation (unless an exemption applies), hold capital and observe specified organisational requirements regarding systems and controls, conduct requirements and reporting obligations (i.e. transaction reporting and reporting keeping obligations). 'Investment services' are defined as transactions involving financial instruments including providing advice, all forms of agency trading and many forms of principal trading.

b. The impact of extending MiFID/R to Spot FX

i. Scope and Exemptions

As described above, the range of market participants in the Spot FX market is extremely broad, with a diverse set of drivers for their use of the market. By proposing the inclusion of Spot FX within the definition of "financial instruments", ESMA would potentially be bringing a vast array of market participants into the scope of a stringent and onerous licensing regime which was designed primarily for "true" financial services providers – banks, brokers, asset managers and advisers and would not be proportionate to the activity being undertaken by many FX market participants. Whilst MiFID/R currently contains a number of exemptions applicable to financial market participants in particular cases, these would need to be reassessed and redrafted at a potentially fundamental level, to ensure that they continued to relieve market participants of unnecessary obligations taking into account the particularities of Spot FX markets.

Historically regulators have been aligned in the approach that the regulatory perimeter for financial services should not extend to Spot FX or a variety of other FX business with a material commercial element. Whilst MiFID II took the opportunity to clarify that most FX Forward transactions were considered to be "other derivatives" (contrary to pre-existing interpretations in a number of Member States), it was recognised as critical even in the forwards market that certain transaction types be excluded from the MiFID framework – effectively leaving them outside the regulatory perimeter as has always been the case for Spot FX. For example, Delegated Regulation 2017/565 Article 10 excludes FX Forward contracts that are executed to facilitate payments for goods and services or are to facilitate the sale or purchase of a transferable security or unit in a collective investment undertaking.

Developing additional exemptions for such transactions would be critical to making an extension to the licensing regime work. However, it would also have the immediate effect of keeping many Spot FX market participants outside of the MiFID obligations including transaction reporting, meaning that NCAs would receive a limited or distorted view of the market.

Expanding the scope of financial instruments under MiFID and considering the remit of any additional exemptions is not straight forward. As a result, the GFXD would strongly suggest that the MAR review is not the appropriate forum for these questions to be raised and rather that, if this approach is considered to have any merit in principle, they should form part of the MiFID review where the implications for global currency markets and related cost benefit analysis could be considered more fully.

ii. Transparency, Reporting and Recordkeeping

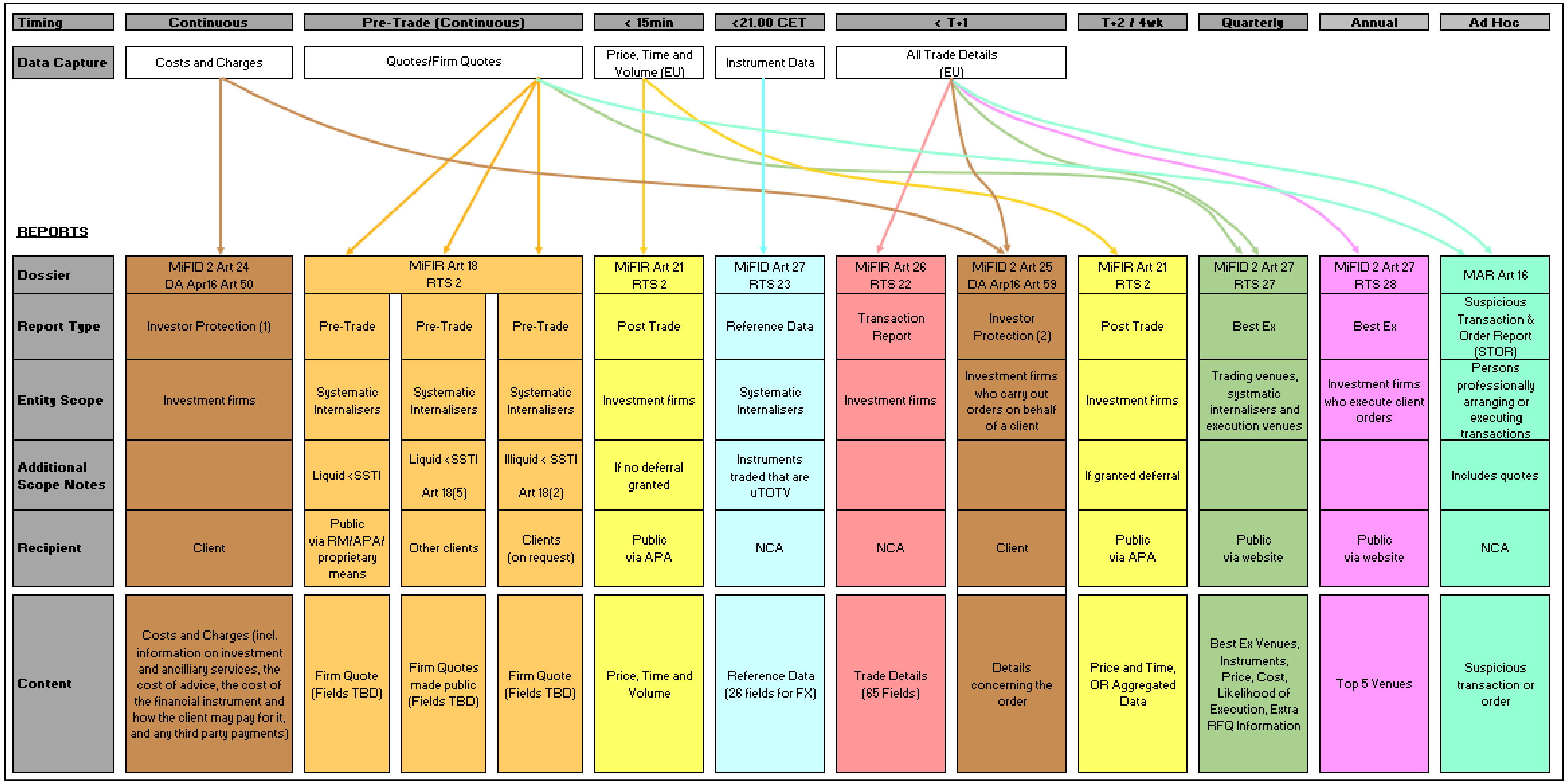
MiFID/R contains a number of provisions in this regard, for example transaction reporting and pre-/post-trade transparency. Were MiFID/R to be extended to Spot FX, amendments to each of these obligations would need to be considered, at significant resourcing and cost to both regulators and market participants. The points made in relation to transaction reporting and record keeping would also be relevant to the extent MAR were extended by simply including Spot FX within the scope of all substantive offences rather than assuming it into the definition of financial instrument.

For instance, it is likely that the current set of 65 MiFIR transaction reporting fields[29] would need amendment or clarification in order to ensure they were applicable and captured the relevant terms of a Spot FX transaction. The data fields also require personal data to be collected by reporting parties about the persons arranging the transaction at both the buyer and the seller (which includes banks collecting personal data from their clients, including end users both inside and outside of the EU). Given the breadth of market participants as outlined above the scale of this personal data collection should be taken into consideration.

To illustrate the scale of this challenge, the below figure outlines the various stages of data capture and reporting that would be required under MAR and MiFID/R.

Figure 1: Data capture and reporting obligations under MAR, MiFID II and MiFIR:

[29] See Delegated Regulation 2017/590 Annex I


Timing
Continuous
Pre-Trade (Continuous)
< 15min
<21.00 CET
< T+1
T+2 / 4wk
Quarterly
Annual
Ad Hoc
Data Capture
Costs and Charges
Quotes/Firm Quotes
Price, Time and Volume (EU)
Instrument Data
All Trade Details (EU)
REPORTS
Dossier
Report Type
Entity Scope
Additional Scope Notes
Recipient
Content
MiFID 2 Art 24 DA Apr16 Art 50
Investor Protection (1)
Investment firms
Client
Costs and Charges (incl. information on investment and ancilliary services, the cost of advice, the cost of the financial instrument and how the client may pay for it, and any third party payments)
MiFIR Art 18 RTS 2
Pre-Trade
Systematic Internalisers
Liquid <SSTI
Public via RM/APA/ proprietary means
Firm Quote (Fields TBD)
Pre-Trade
Systematic Internalisers
Liquid <SSTI Art 18(5)
Other clients
Firm Quotes made public (Fields TBD)
Pre-Trade
Systematic Internalisers
Illiquid < SSTI Art 18(2)
Clients (on request)
Firm Quote (Fields TBD)
MiFIR Art 21 RTS 2
Post Trade
Investment firms
If no deferral granted
Public via APA
Price, Time and Volume
MiFIR Art 27 RTS 23
Reference Data
Systematic Internalisers
Instruments traded that are uTOTV
NCA
Reference Data (26 fields for FX)
MiFIR Art 26 RTS 22
Transaction Report
Investment firms
NCA
Trade Details (65 Fields)
MiFID 2 Art 25 DA Arp16 Art 59
Investor Protection (2)
Investment firms who carry out orders on behalf of a client
Client
Details concerning the order
MiFIR Art 21 RTS 2
Post Trade
Investment firms
If granted deferral
Public via APA
Price and Time, OR Aggregated Data
MiFID 2 Art 27 RTS 27
Best Ex
Trading venues, systmatic internalisers and execution venues
Public via website
Best Ex Venues, Instruments, Price, Cost, Likelihood of Execution, Extra RFQ Information
MiFID 2 Art 27 RTS 28
Best Ex
Investment firms who execute client orders
Public via website
Top 5 Venues
MAR Art 16
Suspicious Transaction & Order Report (STOR)
Persons professionally arranging or executing transactions
Includes quotes
NCA
Suspicious transaction or order

A range of market infrastructure providers would be significantly affected. The Derivatives Service Bureau International Securities Identification Number (ISIN) service would need to be extended to cover Spot FX, which would require a significant increase in capacity. Providers of Approved Publication Arrangements and Approved Reporting Mechanisms would need to develop offerings with sufficient capacity for Spot FX.

The impact would also be felt by market participants who currently trade only Spot FX in the EU and are therefore not subject to existing MiFID/R obligations. This would include both EU counterparties who do not engage in the FX derivatives market, and non-EU counterparties who trade Spot FX in Europe given the size and depth of the market as outlined above. If they wished to maintain their access to the EU market, they would be required to obtain a Legal Entity Identifier, if they do not already possess one, and would be subject to the relevant reporting obligations.

Furthermore, there exist significant counterparties in the Spot FX market (including many Non-Bank Liquidity Providers) who are currently outside the regulatory perimeter and would therefore not be subject to these obligations. These counterparties have been increasing their market share over recent years[30]. This would mean that the transparency gained by such an extension would still be incomplete and therefore may present a misleading view of the market.

Even assuming that the exemptions noted in section (a) above were put in place, the number of transaction reports made to NCAs would also be expected to increase significantly, given the size of the market as described above. This would require considerable investment from NCAs as well as market participants, both in terms of their capacity to receive reports and also their ability to perform effective analysis on the data. Given the breadth of market participants and their reasons for executing Spot FX transactions (for example, to effect cross-border payments), the data would also be difficult to perform surveillance on and would be likely to generate a significant volume of 'false positives', preventing a clear view of market activity. This may not prove appropriate under cost-benefit analysis.

Expanding the number of reports required to NCAs would also seem inconsistent with the current reporting landscape, which is widely understood to be fragmented and in need of significant revision. In its 2014 publication "Feasibility study on approaches to aggregate OTC derivatives data"[31], the Financial Stability Board detailed the challenges created by the differing data fields and data standards implemented across major jurisdictions in response to the G20 commitments on trade reporting of OTC derivatives. Since that time, a significant global data harmonisation effort has been underway, led by the Committee on Payments and Market Infrastructures (CPMI) and the International Organisation of Securities Commission (IOSCO), to create a standardised set of reporting fields and identifiers. ESMA has been instrumental in this workstream, providing expertise on a number of key elements. The technical guidance for these standards (with over 100 different data fields) has now been published, with major jurisdictions expected to implement them as changes to their existing reporting rules over the coming years.

Simultaneously, the EU has conducted a view of its own trade reporting rules under EMIR[32] and has been working to reduce the amount of data received by authorities and the number of small and non-financial counterparties affected by reporting obligations[33]. It would therefore be more appropriate to focus on streamlining and optimising existing reporting obligations rather than mandating additional data reporting, particularly on the scale of the Spot FX market.

[30] According to Euromoney FX Surveys, available at https://www.euromoney.com/
[31] Available at https://www.fsb.org/wp-content/uploads/r_140919.pdf
[32] European Market Infrastructure Regulation – Regulation 648/2012
[33] See, for example, the European Commission's press release at https://europa.eu/rapid/press-release_IP-17-1150_en.htm?locale=en

Finally, we note that a number of initiatives are already underway to improve the availability of consolidated market data in FX. While these are still at an early stage, as more market participants begin to engage the data volume and quality will improve, providing more transparency to the market.

iii. Market Structure

MiFID/R sets out rules for the organisation and operation of exchanges and other trading venues. Venues must be authorised to allow trading in MiFID/R financial instruments and they must observe organisational and operational requirements. Venues are subject to transaction transparency rules, which require venues to advertise all offers and quotes publicly prior to trading (pre-trade transparency) and publish details of all completed transactions (post-trade transparency).

Spot FX markets are predominantly quote-driven OTC markets which means that most of the existing trading platforms may not meet the requirements to be considered as MiFID II trading venues. The cross-border nature of the market also means that counterparties are not necessarily trading on venues based in their own jurisdiction. The need for flexibility on settlement and tenor across the majority of FX products is often cited as representing a barrier to the further development of organised exchanges and associated clearing. In addition (and as cited in the Consultation), given the OTC nature of the market, the price determination is not necessarily made through the interaction of demand and supply in a trading venue. Extending the definition of MiFID financial instruments to include Spot FX could therefore give rise to significant challenges as regards the operation of the market and potentially drive changes to liquidity, which would harm the ability of end users to meet their business needs through the Spot FX market.

iv. Other MiFID/R Obligations

There may be changes to the scope of existing MiFID/R obligations in relation to derivatives, given that Spot FX is often considered the underlying for FX derivatives, which would therefore become uTOTV (i.e. the underlying is traded on a trading venue).

The implementation of other MiFID/R obligations to Spot FX would also need to be considered, for example best execution reporting, costs and charges reporting and algorithmic trading. A full cost-benefit analysis should be performed to ensure that the investment required would deliver appropriate advantages to clients and regulators.

v. Impact on other EU Regulations

We note that a number of EU regulations currently draw upon the MiFID II definition of financial instruments for their scope. Depending on how any amendment to MiFID II Annex 1 Section C to include Spot FX was drafted, this could have unforeseen impacts on these other regulations.

vi. Impact on Global Harmonisation

As discussed above, the FX market is inherently global (given the nature of the product), with 56% of transactions carried out on a cross-border basis. Market participants rely on a broadly harmonised approach to regulation across major jurisdictions to ensure the smooth functioning of the market.

The need for global harmonisation is generally recognised by regulators when considering changes to the FX market. For example, in its February 2015 Feedback Statement on its Consultation on the Clearing

Obligation for Non-Deliverable FX Forwards[34], ESMA stated that it took note of "the importance of international consistency in the implementation schedule of the clearing obligation. In this respect, ESMA considers that the criteria for the determination of the clearing obligation should be further assessed considering the global nature of the FX market". We believe that the possible impact of a lack of harmonisation in the global FX Spot market would be even greater, given the size of the Spot FX market as outlined above.

It is also worth considering at this point the impact of other examples of major jurisdictions putting in place rules which cut across the globally harmonised nature of the FX market. For example, in 2013 the CFTC 'Footnote 88' requirement extended Swap Execution Facility (SEF) rules to non-SEF venues which only offered products that were not subject to a trading mandate. Industry research conducted on the cross-asset impact of this obligation concluded that liquidity was fragmented as a result, with trading activity on US platforms and with US participants decreasing significantly as a result.[35]

With the exception of a small number of local requirements, Spot FX is not subject to securities regulation in any major jurisdiction and is generally overseen by central banks. In order to maintain this globally harmonised approach, the FX Global Code was drafted with the input of central banks and market participants from around the world and has been endorsed by central banks in all major jurisdictions.

D. GFXD RECOMMENDATIONS

The GFXD does not believe that extending MAR and/or MiFID/R to Spot FX would be an appropriate or proportionate course of action at this time. This is based on a number of factors detailed above, including:

- The breadth of the Spot FX market: The significant impact that including Spot FX within MAR or MiFID/R would have for market participants and the structure of the EU FX market, given its size, diversity and global nature. The types of market participants and their reasons for executing Spot FX differ widely and must be taken into account;

- Existing central bank oversight and the FX Global Code: The global historical consideration of the Spot FX market as falling within the jurisdiction of central banks, and the ongoing work by those central banks, together with market participants, to fully embed the FX Global Code across the FX market;

- Cost-benefit analysis: The limited benefit to regulators from bringing the Spot FX market into the scope of MAR and MiFID/R, given the complex yet incomplete market picture that reporting data is likely to provide, for the significant structural, operational and cost impact on market participants, from banks through to end users;

- Data challenges: The immense challenge of capturing, reporting and analysing the data that would be required, given the size and speed of operations of the Spot FX Market, particularly at a time when the revision and optimisation of existing data obligations is still underway; and

- Fragmentation of a global market: The impact that a break in global harmonisation of regulation would have on the global FX market.

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[34] Available at https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-esma-234_-_feedback_statement_on_the_clearing_obligation_of_non_deliverable_forward.pdf
[35] See https://www.isda.org/a/4PDDE/footnote-88-research-note-20131218.pdf

Furthermore, we believe that any consideration of changes to MiFID/R should form part of a wider MiFID/R review and not be decided upon under a review of any other regulation, such as MAR.

Instead, we would like to make the following recommendations:

Clarification of ESMA's area of focus

- **The GFXD requests additional clarity from ESMA as to which specific aspect(s) of the Spot FX market are of interest in relation to market abuse risk. As outlined above, the Spot FX market is extremely large and broad, and additional information would allow market participants to better assist ESMA in investigating a suitable response.**

The FX Global Code

- **The GFXD would strongly support ESMA's suggestion to wait for the Code to be more deeply embedded into the market. Given that a review of the Code is planned in 2020, we suggest to also wait for any developments flowing from the 2020 review to also be adopted.**
- The GFXD acknowledges that, since the market has historically been overseen by central banks, the regulatory community may have less knowledge of both the Spot FX market and the Code. As part of the review, the GFXC could be encouraged to seek views from respondents on whether more can be done by industry, firms and regulators to improve the understanding of the Code by market participants and their managers. ESMA could consider how this could be achieved in a European context.

ANNEX – HISTORY OF SPOT FX SUPERVISION

1. Global Distinction Between Spot FX and FX Derivatives

The distinction between Spot FX and FX derivatives originated in 1974, when the US Congress voted to exclude "transactions in foreign currency...unless such transactions involve the sale...for future delivery conducted on a board of trade," from the jurisdiction of the Commodity Exchange Act (**CEA**) of Commodity Futures Trading Commission (**CFTC**) regulation[36]. In Europe, harmonised financial services regulation focused primarily on centrally traded markets, initially through the Investment Service Directive[37]. Incremental growth in financial markets has resulted in the revised framework under MiFID expanding to a broader range of asset classes considered to have the character of financial instruments; however, Spot FX continues to be considered separately from FX forwards / derivatives on a global basis, and has generally fallen within the jurisdiction of central banks rather than regulators of securities and derivatives. This coherence of approach has been particularly key given the global nature of the market as outlined above, and has facilitated the growth of FX as a liquid and efficient cross-border market.

[36] See T. Tormey, 1997 "A Derivatives Dilemma: The Treasury Amendment Controversy and the Regulatory Status of Foreign Currency Options", Fordham Law Review Vol. 65 Issue 5
[37] Investment Services Directive 93/22/EEC

The distinction was again reinforced by the decision of the G20 at its Pittsburgh Summit in 2009 to focus attention on reform of the over-the-counter (OTC) derivatives market as a response to the 2008 financial crisis[38]. This was considered the market in which key risks needed to be addressed, and for which regulators in major jurisdictions have since designed and implemented comprehensive new rules on risk mitigation measures and trade reporting.

2. EU Regulation

In 2004 the European Commission Q&A on MiFID I[39] (ID.191 and ID. 885), the Commission confirmed that "*spot market foreign exchange arrangements are not considered to be financial instruments for the purposes of MiFID*" and "*spot foreign exchange contracts are not considered financial instruments under MiFID irrespective of the purpose of the operation, i.e. commercial or otherwise*"[40].

There is no general definition of "spot" in MiFID I. By way of analogy, in the context of commodity and other contracts, a spot transaction was defined (in Article 38(2) of the MiFID I Level 2 Regulation[41]) as a transaction under the terms of which delivery is scheduled for the later of: (a) two trading days; and (b) the period generally accepted in the market as the standard delivery period, unless parties understand otherwise. However, Member States took different approaches to the classification of FX contracts the settlement date of which is between 3 and 7 trading days. Moreover, some Member States transposed MiFID I so as to exclude certain categories of FX forward contracts from the definition of financial instrument and those excluded categories themselves vary across the Member States.

In the EU in 2017, the MiFID II[42] Org Regulation[43] provided that a FX contract will not constitute a MiFID II financial instrument if it is either a spot contract or a means of payment that fulfils specified conditions. Article 10(2) states that a FX Spot contract is a contract for the exchange of one currency against another currency, where delivery is scheduled to be made within the longer of the following periods:

- two trading days in respect of any pair of major currencies (as prescribed in Article 10(3);
- for currencies where at least one is not a major currency, the longer of two trading days and the period generally accepted in the market for that currency as the standard delivery period;
- where the contract is used for the main purpose of the sale or purchase of a transferable security or a unit in a collective investment undertaking (**CIU**), within the shorter of: (a) the period generally accepted in the market for the settlement of that transferable security or unit in a CIU as the standard delivery period; and (b) 5 trading days,

provided that, irrespective of the time for which delivery is scheduled, a contract will not be a spot contract if there is an understanding between the parties to the contract that delivery of the currency will not be performed within the period specified in the contract and will be postponed.

The exception to this exclusion of Spot FX contracts from MiFID II is that such transactions could be understood to be included under MiFID II where they are considered ancillary services to the provision of

[38] Leaders' statement, available at http://g20.org.tr/wp-content/uploads/2014/12/Pittsburgh_Declaration_0.pdf
[39] Markets in Financial Instruments Directive 2004/39 (MiFID I)
[40] 'Financial instruments' for the purposes of MiFID are defined in Section C of Annex 1, which include currency derivative contracts. Point (4) of Section C of Annex I to MiFID defines financial instruments as "*Options, futures, swaps , forward rate agreements and any other derivative contracts relating to securities, currencies, interest rates or yields, emission allowances or other derivatives instruments, financial indices or financial measures which may be settled physically or in cash*"
[41] Commission Regulation 1287/2006
[42] Markets in Financial Instruments Directive 2014/65
[43] Delegated Regulation 2017/565

investment services as set out in MiFID II Annex 1 Section B (4). It should be noted, however, that MiFID does not require the regulation of ancillary services at a Member State level, and that the primary purpose of their inclusion in MiFID is to ensure that, if a Member State were to choose locally to regulate any of those services, firms which already had a MiFID passport would not need an additional local licence for such ancillary services – the effect is not to apply MiFID licensing and compliance requirements generally to such ancillary services.

<ESMA_QUESTION_CP_MAR_1>

Q2. Do you agree with ESMA's preliminary view about the structural changes that would be necessary to apply MAR to spot FX contracts? Please elaborate and indicate if you would consider necessary introducing additional regulatory changes.

<ESMA_QUESTION_CP_MAR_2>

No, the Global Foreign Exchange Division (**GFXD**) of the Global Financial Markets Association (**GFMA**), does not believe that ESMA's analysis of the structural changes is sufficient.

As outlined in our response to Q1, GFXD believes that significant structural changes would be needed to apply MAR to Spot FX Contracts, which would vary depending on the way in which this was performed. We outline these in further detail in our response to Q1 and below.

For this reason, we do not believe that extending MAR and/or MiFID/R to Spot FX would be an appropriate or proportionate course of action. Instead, we support ESMA's suggestion that it would be advisable to wait for the Code to be more deeply embedded into the market and for any developments flowing from the 2020 review to also be adopted.

a. Scope of regulated entities

Particularly if Spot FX were to be included in the MiFID definition of "financial instruments", ESMA would potentially be bringing a vast array of market participants into the scope of a stringent and onerous licensing regime which was designed primarily for "true" financial services providers – banks, brokers, asset managers and advisers and would not be proportionate to the activity being undertaken by many FX market participants.

b. Execution venues

Spot FX markets are predominantly quote-driven OTC markets which means that most of the existing trading platforms may not meet the requirements to be considered as MiFID II trading venues. The cross-border nature of the market also means that counterparties are not necessarily trading on venues based in their own jurisdiction. The need for flexibility on settlement and tenor across the majority of FX products is often cited as representing a barrier to the further development of organised exchanges and associated clearing. In addition (and as cited in the Consultation), given the OTC nature of the market, the price determination is not necessarily made through the interaction of demand and supply in a trading venue. Extending the definition of MiFID financial instruments to include Spot FX could therefore give rise to significant challenges as regards the operation of the market and potentially drive changes to liquidity, which would harm the ability of end users to meet their business needs through the Spot FX market.

c. Data capture, storage and reporting

The FX market is the world's largest financial market. Of this, top 8 European FX centres (France, Germany, Ireland, Italy, Netherlands, Spain, Sweden and the United Kingdom) accounted for 51% of global Spot FX average daily volume, at $1.211 trillion per day[44]. Pricing quotes on FX platforms can be updated up to 200 times per second for some market participants and the share of the market executed by algorithmic trading has risen significantly over the last ten years[45].

This illustrates the scale of the technological build and data storage capacity which would be required for market participants were the MAR surveillance provisions of quotes, orders and transactions, and the MiFID/R transparency and transaction reporting provisions, to become applicable to FX Spot.

The number of STORs and transaction reports that would be generated by firms and reported to NCAs would also be likely to significantly increase. This would require technological build for NCAs to ensure that they had the capacity to receive higher volumes of reports from a broader range of counterparties. It would also require the development of Spot FX offerings from the Derivatives Service Bureau (DSB) International Securities Identification Number (ISIN) service, Approved Publication Arrangements (APAs) and Approved Reporting Mechanisms (ARMs).

d. Global harmonisation

The FX market is inherently global (given the nature of the product), with 56% of transactions carried out on a cross-border basis[46]. Market participants rely on a broadly harmonised approach to regulation across major jurisdictions to ensure the smooth functioning of the market.

The need for global harmonisation is generally recognised by regulators when considering changes to the FX market. For example, in its February 2015 Feedback Statement on its Consultation on the Clearing Obligation for Non-Deliverable FX Forwards[47], ESMA stated that it took note of "the importance of international consistency in the implementation schedule of the clearing obligation. In this respect, ESMA considers that the criteria for the determination of the clearing obligation should be further assessed considering the global nature of the FX market". We believe that the possible impact of a lack of harmonisation in the global FX Spot market would be even greater, given the size of the Spot FX market as outlined above.

It is also worth considering at this point the impact of other examples of major jurisdictions putting in place rules which cut across the globally harmonised nature of the FX market. For example, in 2013 the CFTC 'Footnote 88' requirement extended Swap Execution Facility (SEF) rules to non-SEF venues which only offered products that were not subject to a trading mandate. Industry research conducted on the cross-asset impact of this obligation concluded that liquidity was fragmented as a result, with trading activity on US platforms and with US participants decreasing significantly as a result.[48]

With the exception of a small number of local requirements, Spot FX is not subject to securities regulation in any major jurisdiction and is generally overseen by central banks. In order to maintain this globally harmonised approach, the FX Global Code was drafted with the input of central banks and market participants from around the world and has been endorsed by central banks in all major jurisdictions.

<ESMA_QUESTION_CP_MAR_2>

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[44] BIS 2019. Data is on a net-gross basis, adjusted only for local inter-dealer double-counting
[45] See https://www.bis.org/publ/mktc10.pdf
[46] BIS 2019
[47] Available at https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-esma-234_-_feedback_statement_on_the_clearing_obligation_of_non_deliverable_forward.pdf
[48] See https://www.isda.org/a/4PDDE/footnote-88-research-note-20131218.pdf

Q3. Do you agree with this analysis? Do you think that the difference between the MAR and BMR definitions raises any market abuse risks and if so what changes might be necessary?

<ESMA_QUESTION_CP_MAR_3>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_3>

Q4. Do you agree that the Article 30 of MAR "Administrative sanctions and other administrative measures" should also make reference to administrators of benchmarks and supervised contributors?

<ESMA_QUESTION_CP_MAR_4>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_4>

Q5. Do you agree that the Article 23 of MAR "Powers of competent authorities" point (g) should also make reference to administrators of benchmarks and supervised contributors? Do you think that is there any other provision in Article 23 that should be amended to tackle (attempted) manipulation of benchmarks?

<ESMA_QUESTION_CP_MAR_5>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_5>

Q6. Do you agree that Article 30 of MAR points (e), (f) and (g) should also make reference to submitters within supervised contributors and assessors within administrators of commodity benchmarks?

<ESMA_QUESTION_CP_MAR_6>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_6>

Q7. Do you agree that there is a need to modify the reporting mechanism under Article 5(3) of MAR? Please justify your position.

<ESMA_QUESTION_CP_MAR_7>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_7>

Q8. If you agree that the reporting mechanism should be modified, do you agree that Option 3 as described is the best way forward? Please justify your position and if you disagree please suggest alternative.

<ESMA_QUESTION_CP_MAR_8>
TYPE YOUR TEXT HERE

<ESMA_QUESTION_CP_MAR_8>

Q9. Do you agree to remove the obligation for issuers to report under Article 5(3) of MAR information specified in Article 25(1) and (2) of MiFIR? If not, please explain.

<ESMA_QUESTION_CP_MAR_9>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_9>

Q10. Do you agree with the list of fields to be reported by the issuers to the NCA? If not, please elaborate.

<ESMA_QUESTION_CP_MAR_10>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_10>

Q11. Do you agree with ESMA's preliminary view?

<ESMA_QUESTION_CP_MAR_11>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_11>

Q12. Would you find more useful other aggregated data related to the BBP and if so what aggregated data? Please elaborate.

<ESMA_QUESTION_CP_MAR_12>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_12>

Q13. Have market participants experienced any difficulties with identifying what information is inside information and the moment in which information becomes inside information under the current MAR definition?

<ESMA_QUESTION_CP_MAR_13>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_13>

Q14. Do market participants consider that the definition of inside information is sufficient for combatting market abuse?

<ESMA_QUESTION_CP_MAR_14>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_14>

Q15. In particular, have market participants identified information that they would consider as inside information, but which is not covered by the current definition of inside information?

<ESMA_QUESTION_CP_MAR_15>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_15>

Q16. Have market participants identified inside information on commodity derivatives which is not included in the current definition of Article 7(1)(b) of MAR?

<ESMA_QUESTION_CP_MAR_16>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_16>

Q17. What is an appropriate balance between the scope of inside information relating to commodity derivatives and allowing commodity producers to undertake hedging transactions on the basis of that information, to enable them to carry out their commercial activities and to support the effective functioning of the market?

<ESMA_QUESTION_CP_MAR_17>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_17>

Q18. As of today, does the current definition of Article 7(1)(b) of MAR allow commodity producers to hedge their commercial activities? In this respect, please provide information on hedging difficulties encountered.

<ESMA_QUESTION_CP_MAR_18>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_18>

Q19. Please provide your views on whether the general definition of inside information of Article 7(1)(a) of MAR could be used for commodity derivatives. In such case, would safeguards enabling commodity producers to undertake hedging transactions based on proprietary inside information related to their commercial activities be needed? Which types of safeguards would you envisage?

<ESMA_QUESTION_CP_MAR_19>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_19>

Q20. What changes could be made to include other cases of front running?

<ESMA_QUESTION_CP_MAR_20>
TYPE YOUR TEXT HERE

<ESMA_QUESTION_CP_MAR_20>

Q21. Do you consider that specific conditions should be added in MAR to cover front-running on financial instruments which have an illiquid market?

<ESMA_QUESTION_CP_MAR_21>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_21>

Q22. What market abuse and/or conduct risks could arise from pre-hedging behaviours and what systems and controls do firms have in place to address those risks? What measures could be used in MAR or other legislation to address those risks?

<ESMA_QUESTION_CP_MAR_22>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_22>

Q23. What benefits do pre-hedging behaviours provide to firms, clients and to the functioning of the market?

<ESMA_QUESTION_CP_MAR_23>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_23>

Q24. What financial instruments are subject to pre-hedging behaviours and why?

<ESMA_QUESTION_CP_MAR_24>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_24>

Q25. Please provide your views on the functioning of the conditions to delay disclosure of inside information and on whether they enable issuers to delay disclosure of inside information where necessary.

<ESMA_QUESTION_CP_MAR_25>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_25>

Q26. Please provide relevant examples of difficulties encountered in the assessment of the conditions for the delay or in the application of the procedure under Article 17(4) of MAR.

<ESMA_QUESTION_CP_MAR_26>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_26>

Q27. Please provide your view on the inclusion of a requirement in MAR for issuers to have systems and controls for identifying, handling, and disclosing inside information. What would the impact be of introducing a systems and controls requirement for issuers?

<ESMA_QUESTION_CP_MAR_27>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_27>

Q28. Please provide examples of cases in which the identification of when an information became "inside information" was problematic.

<ESMA_QUESTION_CP_MAR_28>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_28>

Q29. Please provide your views on the notification to NCAs of the delay of disclosure of inside information, in those cases in which the relevant information loses its inside nature following the decision to delay the disclosure.

<ESMA_QUESTION_CP_MAR_29>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_29>

Q30. Please provide your views on whether Article 17(5) of MAR has to be made more explicit to include the case of a listed issuer, which is not a credit or financial institution, but which is controlling, directly or indirectly, a listed or non-listed credit or financial institution.

<ESMA_QUESTION_CP_MAR_30>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_30>

Q31. Please provide relevant examples of difficulties encountered in the assessment of the conditions for the delay or in the application of Article 17(5) of MAR.

<ESMA_QUESTION_CP_MAR_31>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_31>

Q32. Please indicate whether you have found difficulties in the assessment of the obligation to disclose a piece of inside information under Article 17 MAR when analysed together with other obligations arising from CRD, CRR or BRRD. Please provide specific examples.

<ESMA_QUESTION_CP_MAR_32>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_32>

Q33. Do you agree with the proposed amendments to Article 11 of MAR?

<ESMA_QUESTION_CP_MAR_33>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_33>

Q34. Do you think that some limitation to the definition of market sounding should be introduced (e.g. excluding certain categories of transactions) or that additional clarification on the scope of the definition of market sounding should be provided?

<ESMA_QUESTION_CP_MAR_34>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_34>

Q35. What are in your view the stages of the interaction between DMPs and potential investors, from the initial contact to the execution of the transaction, that should be covered by the definition of market soundings?

<ESMA_QUESTION_CP_MAR_35>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_35>

Q36. Do you think that the reference to "prior to the announcement of a transaction" in the definition of market sounding is appropriate or whether it should be amended to cover also those communications of information not followed by any specific announcement?

<ESMA_QUESTION_CP_MAR_36>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_36>

Q37. Can you provide information on situations where the market soundings regime has proven to be of difficult application by DMPs or persons receiving the market sounding? Could you please elaborate?

<ESMA_QUESTION_CP_MAR_37>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_37>

Q38. Can you provide your views on how to simplify or improve the market sounding procedure and requirements while ensuring an adequate level of audit trail of the

conveyed information (in relation to both the DMPs and the persons receiving the market sounding)?

<ESMA_QUESTION_CP_MAR_38>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_38>

Q39. Do you agree with ESMA's preliminary view on the usefulness of insider list? If not, please elaborate.

<ESMA_QUESTION_CP_MAR_39>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_39>

Q40. Do you consider that the insider list regime should be amended to make it more effective? Please elaborate.

<ESMA_QUESTION_CP_MAR_40>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_40>

Q41. What changes and what systems and controls would issuers need to put in place in order to be able to provide NCAs, at their request, the insider list with the individuals who had actually accessed the inside information within a short time period?

<ESMA_QUESTION_CP_MAR_41>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_41>

Q42. What are your views about expanding the scope of Article 18(1) of MAR (i.e. drawing up and maintain the insider list) to include any person performing tasks through which they have access to inside information, irrespective of the fact that they act on behalf or on account of the issuer? Please identify any other cases that you consider appropriate.

<ESMA_QUESTION_CP_MAR_42>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_42>

Q43. Do you consider useful maintaining the permanent insider section? If yes, please elaborate on your reasons for using the permanent insider section and who should be included in that section in your opinion.

<ESMA_QUESTION_CP_MAR_43>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_43>

Q44. Do you agree with ESMA's preliminary view?

<ESMA_QUESTION_CP_MAR_44>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_44>

Q45. Do you have any other suggestion on the insider lists that would support more efficiently their objectives while reducing the administrative work they entail? If yes, please elaborate how those changes could contribute to that purpose.

<ESMA_QUESTION_CP_MAR_45>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_45>

Q46. Does the minimum reporting threshold have to be increased from Euro 5,000? If so, what threshold would ensure an appropriate balance between transparency to the market, preventing market abuse and the reporting burden on issuers, PDMRs, and closely associated persons?

<ESMA_QUESTION_CP_MAR_46>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_46>

Q47. Should NCAs still have the option to keep a higher threshold? In that case, should the optional threshold be higher than Euro 20,000? If so, please describe the criteria to be used to set the higher optional threshold (by way of example, the liquidity of the financial instrument, or the average compensation received by the managers).

<ESMA_QUESTION_CP_MAR_47>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_47>

Q48. Did you identify alternative criteria on which the reporting threshold could be based? Please explain why.

<ESMA_QUESTION_CP_MAR_48>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_48>

Q49. On the application of this provision for EAMPs: have issues or difficulties been experienced?

<ESMA_QUESTION_CP_MAR_49>
TYPE YOUR TEXT HERE

<ESMA_QUESTION_CP_MAR_49>

Q50. Did you identify alternative criteria on which the subsequent notifications could be based? Please explain why.

<ESMA_QUESTION_CP_MAR_50>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_50>

Q51. Do you consider that the 20% threshold included in Article 19(1a)(a) and (b) is appropriate? If not, please explain the reason why and provide examples in which the 20% threshold is not effective.

<ESMA_QUESTION_CP_MAR_51>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_51>

Q52. Have you identified any possible alternative system to set the threshold in relation to managers' transactions where the issuer's shares or debt instruments form part of a collective investment undertaking or provide exposure to a portfolio of assets?

<ESMA_QUESTION_CP_MAR_52>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_52>

Q53. Did you identify elements of Article 19(11) of MAR which in your view could be amended? If yes, why? Have you identified alternatives to the closed period?

<ESMA_QUESTION_CP_MAR_53>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_53>

Q54. Market participants are requested to indicate if the current framework to identify the closed period is working well or if clarifications are sought.

<ESMA_QUESTION_CP_MAR_54>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_54>

Q55. Please provide your views on extending the requirement of Article 19(11) to (i) issuers, and to (ii) persons closely associated with PDMRs. Please indicate which would be the impact on issuers and persona closely associated with PDMRs, including any benefits and downsides.

<ESMA_QUESTION_CP_MAR_55>

TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_55>

Q56. Please provide your views on the extension of the immediate sale provided by Article 19(12)(a) to financial instruments other than shares. Please explain which financial instruments should be included and why.

<ESMA_QUESTION_CP_MAR_56>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_56>

Q57. Please provide your views on whether, in addition to the criteria in Article 19(12) (a) and (b), other criteria resulting in further cases of exemption from the closed period obligation could be considered.

<ESMA_QUESTION_CP_MAR_57>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_57>

Q58. Do you consider that CIUs admitted to trading or trading on a trading venue should be differentiated with respect to other issuers? Please elaborate your response specifically with respect to PDMR obligations, disclosure of inside information and insider lists. In this regard, please consider whether you could identify any articulation or consistency issues between MAR and the EU or national regulations for the different types of CIUs, with regards for example to transparency requirements under MAR vis-à-vis market timing or front running issues.

<ESMA_QUESTION_CP_MAR_58>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_58>

Q59. Do you agree with ESMA's preliminary view? Please indicate which transactions should be captured by PDMR obligations in the case of management companies of CIUs.

<ESMA_QUESTION_CP_MAR_59>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_59>

Q60. Do you agree with ESMA's preliminary view? If not, please elaborate.

<ESMA_QUESTION_CP_MAR_60>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_60>

Q61. **What persons should PDMR obligations apply to depending on the different structures of CIUs and why? In particular, please indicate whether the definition of "relevant persons" would be adequate for CIUs other than UCITs and AIFs.**

<ESMA_QUESTION_CP_MAR_61>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_61>

Q62. **ESMA would like to gather views from stakeholders on whether other entities than the asset management company (e.g. depository) and other entities on which the CIUs has delegated the execution of certain tasks should be captured by the PDMR regime.**

<ESMA_QUESTION_CP_MAR_62>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_62>

Q63. **Do you agree with ESMA's conclusion? If not, please elaborate.**

<ESMA_QUESTION_CP_MAR_63>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_63>

Q64. **Do you agree with ESMA preliminary view? Please elaborate.**

<ESMA_QUESTION_CP_MAR_64>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_64>

Q65. **Do you agree with ESMA's preliminary views? Do you consider that specific obligations are needed for elaborating insider lists related to CIUs admitted to traded or traded on a trading venue?**

<ESMA_QUESTION_CP_MAR_65>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_65>

Q66. **Please provide your views on the abovementioned harmonisation of reporting formats of order book data. In addition, please provide your views on the impact and cost linked to the implementation of new common standards to transmit order book data to NCAs upon request. Please provide your views on the consequences of using XML templates or other types of templates.**

<ESMA_QUESTION_CP_MAR_66>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_66>

Q67. **Please provide your views on the impact and cost linked to the establishment of a regular reporting mechanism of order book data.**

<ESMA_QUESTION_CP_MAR_67>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_67>

Q68. **In particular, please: a) elaborate on the cost differences between a daily reporting system and a daily record keeping and ad-hoc transmission mechanism; b) explain if and how the impact would change by limiting the scope of a regular reporting mechanism of order book data to a subset of financial instruments. In that context, please provide detailed description of the criteria that you would use to define the appropriate scope of financial instruments for the order book reporting.**

<ESMA_QUESTION_CP_MAR_68>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_68>

Q69. **What are your views regarding those proposed amendments to MAR?**

<ESMA_QUESTION_CP_MAR_69>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_69>

Q70. **Are you in favour of amending Article 30(1) second paragraph of MAR so that all NCAs in the EU have the capacity of imposing administrative sanctions? If yes, please elaborate.**

<ESMA_QUESTION_CP_MAR_70>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_70>

Q71. **Please share your views on the elements described above.**

<ESMA_QUESTION_CP_MAR_71>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MAR_71>