Assiom Forex reply to ESMA Consultation Paper on the MAR Review Report

Assiom Forex welcomed the opportunity to provide its feedback on the consultation paper on MAR Review published by the European Securities and Markets Authority (ESMA) on the 3rd of October.

With its 1,400 members, representing about 450 financial institutions, ASSIOM FOREX is a unique and cohesive voice which provides a crucial contribution to the debate on the main issues of the financial markets, also acting as the primary counterpart with the Supervisory Authority and Market bodies.

The Association encourages the relationship with the Monetary and Financial Supervisory Authorities, both on national and international level.

For this reason, its permanent "FX & Commodities" commission decided to answer on the behalf of its members to Questions 1 & 2 about potential extension of the scope of MAR to spot FX contract.

In order to submit a single and shared opinion, Assiom Forex requested its participants to comment and express their agreement on arguments in support and in contrast to the inclusion of FX Spot contracts under the scope of MAR listed by ESMA. Based on a very large number of submissions, ASSIOM FOREX is submitting the following answers.

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.

No, Assiom Forex does not consider necessary to extend the scope of MAR to Spot FX contracts.

Main reasons behind this answer and potential recommendations are commented below.

- A similar scope is covered by the FX GLOBAL CODE (the Code) which imposes to Market Participants to put in place appropriate processes designed to prevent and detect abusive, collusive, or manipulative practices and to mitigate material risk that could arise.

  The Code was the timely and self-made answer that the market gave to the fines imposed in November 2014 due to the misconduct related to G10 spot FX market. Moreover, it has to be noticed that, with the exception of UK, the above-mentioned fines did not involve any European jurisdiction.

  The massive subscription of the code together with the fast spreading of public register worldwide demonstrates how much market participants, especially financial institution, welcomed and supported a shared and robust mean of self-regulation.

- Similarly to MAR the FX GLOBAL CODE delimits the area from which the confidential information could arise, provides a non-exhaustive list of examples which constitute confidential information, imposes taking measures to avoid arising of misuse of confidential information scenarios through information barriers between prime brokerage and sales & trading businesses

  Furthermore, the Code protects confidential information through procedures acting to avoid unlawful disclosure of confidential information to clients and third parties, imposing communication rules and limits access to confidential information requiring a valid reason for receiving the information - the equivalent “need to know” principle of MAR.

- The nature and functioning of FX market makes it difficult for MAR’s framework and requirements to be applied. We believe that the application of MAR, given its current framework, would not be adequate for the OTC nature of the FX market and would compromise its liquidity.

  Moreover, another field of “complex application” would involve the diversity of market participants. We believe that application of MAR would exclusively consider the “financial nature” of FX spot transaction and, on the other side, would end up in ignoring its banking and transactional nature. This would generate an over-regulation of the market and would weight on market participant whose involvement is not related to pure financial aspects and in general to MAR principles.

- We do agree with ESMA’s preliminary view that before MAR could be applied, the spot FX market might need to develop features required by MiFID II to trading venues and market participants regarding systems and controls, transparency, conduct requirements, and reporting obligations.
  This would result in significant costs both in terms of updating processes of current record keeping infrastructures and in terms of monitoring systems. Activities like monitoring and market surveillance for insider dealing and market abuse checks toward the huge amount of orders and transactions would mean considerable costs for market participants and national authorities as well.
  Moreover, we do believe that a standardization process would be required regarding the quantity and quality of data to be considered.

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.

Yes, Assiom Forex is fully aware that in order for MAR scope to be extended to spot FX contracts, structural changes would be necessary.

Nevertheless, we do believe that such structural changes would need to derive from the natural development of the FX market that, as stated in the answer to Q1, already showed a sustainable and proactive approach toward a mean of self-regulation. Giving a different interpretation, we believe that regulation would need to be flexible and adaptable in order to be, only if needed, the right and adequate complement to market developments.

In this context, if regulation would generate structural changes within the market we believe that this would compromise the functioning of the market itself and at the same time would heavily weight on market participants. We believe that the extension of MAR to FX Spot transactions (and so the inclusion of FX spot in the MiFID definition of financial instruments) would ignore the principle of Proportionality that is among the main pillars of the FX Global Code.

We believe that the review of the FX Global Code during 2020 would be an important opportunity to give increasing and additional attention to the processes designed to prevent and detect abusive, collusive, or manipulative practices and to mitigate material risk that could arise.
We agree with ESMA’s indication that it would be advisable for the Code to be more endorsed among market participants – not only financial ones- before considering to change the EU regulatory status of FX Spot transaction.