



**Maria Teresa Fabregas Fernandez**  
**Head of Unit C3 Securities Markets**  
**DG FISMA**  
Rue de Spa 2  
1000 Brussels

11 May 2015

**Subject: Definition of foreign exchange instruments under MiFID 2**

Dear Ms Fabregas Fernandez,

Non-financial companies use Foreign Exchange (FX) instruments to reduce currency exposures generated by their underlying commercial transactions and related to their operations in the real economy. This activity does not pose a systemic risk to derivative markets. We understand that DG FISMA has drafted a pan-EU definition of a FX financial instrument (under the MIFID 2 delegated acts) by which a contract relating to a currency is not a financial instrument if it is a spot contract or a means of payment that must be settled physically, and is effected to facilitate payment for goods, services or direct investment.

EACT welcomes this initiative of the Commission, since we agree that a clarification of the definition of an FX spot contract is necessary to establish legal certainty and avoid asymmetric reporting and regulatory interpretation across EU member states. EACT submitted a response in May 2014 to the Commission's consultation on this topic and we are pleased to note that the Commission has recognised the broad consensus that FX used by non-financial end users for hedging their commercial activities should not fall within the scope of a derivative.

**However, we believe that the draft definition presently being considered by the Commission is not fully aligned with the level 1 text of EMIR and would result in a definition that continues to have an inconsistent interpretation.**

In summary, Article 10(3) of EMIR excludes from the clearing threshold **OTC derivative contracts entered into by a non-financial counterparty (NFC), or by other NFC entities within the group to which the NFC belongs, [for the purpose of] reducing risks directly relating to commercial activity or treasury financing activity of the NFC or of**

**that group.** We would recommend that the definition and exclusion already codified in Article 10(3) should form the basis of the definition for the purposes of MiFID2. This could be achieved relatively simply by appending the words “*and treasury financing activities*” as follows:

*“A contract relating to a currency is not a financial instrument if it is a spot contract or a means of payment that must be settled physically otherwise than by reason of a default or other termination event, and is effected to facilitate payment or receipt of payment for goods, services, direct investment or treasury financing activities by a non-financial counterparty (NFC), or by other NFC entities within the group to which the NFC belongs.”*

We believe that this approach would help to harmonise EU requirements with other jurisdictions outside the EU which generally have exempted FX forwards and/or non-financial end users from the scope of their OTC derivative regulations.

We understand that this point was raised this Wednesday 6 May in a discussion on Capital Markets Union with Mr Lee Foulger (Cabinet Member, Commissioner Hill), who advised that you are the appropriate person to contact on this point; we would welcome the opportunity to discuss these concerns with you in more detail, on behalf of the wider non-financial community of corporate end-users, before this important definition is finalised.

Yours sincerely,

A handwritten signature in black ink, reading "Richard Raeburn". The signature is fluid and cursive, with the first name "Richard" and last name "Raeburn" clearly distinguishable.

Richard Raeburn  
Chair – European Association of Corporate Treasurers