

Position AMF 2011-08 Q&A on foreign exchange trading

References: Monetary and Financial Code, Articles L. 211-1 and D. 211-1 A

1) Are products offered as forex transactions on currency markets considered as financial instruments?

Contracts for differences (CfDs) that can be used to take forex positions, and forex contracts with no expiration date that provide for or give rise to position rollovers, are financial instruments within the meaning of Article L. 211-1 of the Monetary and Financial Code.

The Autorité de contrôle prudentiel (ACP) and the Autorité des marchés financiers (AMF) together announced in a [document on the legal classification of rolling spot forex contracts](#), drafted through the Joint Unit, that “forex contracts with no expiration date may be considered as financial contracts if they provide for or give rise to the rollover of positions (which does not cover the situation where one of the parties fails to fulfil its obligations because a rollover was not planned or agreed upon at the outset). These contracts should therefore be regulated as investment services, not banking transactions.

“This does not call into question the legal classification of transactions on the non-cash foreign exchange market, which do not provide for (or give rise to) the rollover of positions and are not therefore to be treated as financial contracts.”

Position

CfDs that can be used to take a forex position, as well as forex contracts with no expiration date that provide for or give rise to position rollovers, are financial instruments within the meaning of Article L. 211-1 of the Monetary and Financial Code. Rolling spot forex transactions, which can be rolled over tacitly to the following day, are not actually spot foreign exchange transactions but forward foreign exchange transactions with no expiration date and are therefore financial contracts.

2) Can these financial instruments be directly marketed?

Under Article L 341-10 of the Monetary and Financial Code, and subject to the provisions of Article L. 341-2 *ibid*, the following may not be marketed directly:

- products with a maximum risk that is not known when they are subscribed for or with a risk of loss that exceeds the initial financial outlay;
- financial instruments that are not admitted to trading on regulated markets or on recognised foreign markets.

Accordingly, if these products fall into one of the above categories, they are not eligible for banking and financial solicitation.

Proposing products that may not be marketed directly is liable to disciplinary sanctions¹ and criminal penalties for fraud, and is punishable by five years' imprisonment and a fine of €375,000². The fine is multiplied by five (to €1,875,000) if the offence is committed by a legal person (Code of Criminal Procedure, Article 131-38).

¹ Article L. 341-17 of the Monetary and Financial Code.

² Article L. 353-2 of the Monetary and Financial Code.

3) What are the investment services supplied by providers offering services on these financial instruments?

The investment services supplied in connection with these financial instruments are:

- order execution on behalf of third parties if the provider enters into agreements to buy or sell one or more financial instruments for a third party. It should be noted that where a provider makes proprietary trades on financial instruments in order to be helpful to a customer, the provider is supplying two services: dealing for own account and third party order execution³;
- where a provider receives and transmits an order to another “investment services provider or an entity that is governed by the law of a State outside the European Community or the European Economic Area (EEA) and that has the same status, on behalf of a third party”⁴, this provider is supplying the service of reception and transmission of orders on behalf of third parties.

Providers may also supply other services, including investment advice to clients or portfolio management services for third parties, as defined in Article D. 321-1 of the Monetary and Financial Code.

When executing these services, the provider must conform to the conduct of business rules set forth in the applicable legislation, given that these products, which are complex financial instruments,⁵ cannot under any circumstances come under the execution-only regime, which would relieve the provider of some of its obligations.

4) Who can supply these services?

Providers must be authorised as investment services providers in order to supply these services. In France, this authorisation is granted by the ACP.

Non-French providers having their registered office (or place of effective management) in the EEA and wishing to establish a business relationship with one or more clients residing in France, including by contacting a French-resident client in any way with a view to providing an investment service, must have obtained prior authorisation in their home state and must apply for a European passport to supply these services in France under the freedom to provide services.

If these providers want to set up a branch in France to offer their services, they must first be authorised in their home state and apply for a European passport to supply these investment services in France under the right of establishment.

Other providers from outside the EEA that are licensed as credit institutions in the state where their registered office is located must be authorised by the ACP if they wish to carry on their business in France through a branch.

The list of authorised institutions is available on the Banque de France website.

³ Recital 69 of Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive states: “Dealing on own account with clients by an investment firm should be considered as the execution of client orders, and therefore subject to the requirements under Directive 2004/39/EC and this Directive.”

⁴ Article D. 321-1 of the Monetary and Financial Code.

⁵ Article L. 533-13 of the Monetary and Financial Code and Article 314-57 of the AMF General Regulation on the execution-only regime. Here, the notion of complex financial instrument is not the same as that covered in AMF Position 2010-05, which concerns the marketing of structured funds and complex debt securities (especially complex EMTNs) to retail clients.



<http://www.banque-france.fr/acp/supervisory-college-website-information.htm>

The list of activities for which institutions are authorised is available on the ACP website:

https://www.regafi.fr/spip.php?page=results&type=advanced&id_secteur=1&lang=fr&denomination=&siren=&cib=&bic=&nom=&siren_agent=&num=&cat=0&retrait=0

These links specify whether the institution is:

- an ACP-authorized investment services provider,
- a branch of a company established in another EEA member state and having a right-of-establishment passport, or
- carrying on its business in France under a freedom-of-services passport.

5) Can a French or foreign provider supply these investment services in France without authorisation?

No it cannot. Subject to the waivers provided for in Article L. 531-2 of the Monetary and Financial Code, which apply to certain public financial institutions such as the Banque de France, and the provisions applicable to the European passport, Article L. 531-10 of the Monetary and Financial Code prohibits anyone other than an investment services provider from supplying a third party with investment services as their usual business. Infringement of this prohibition is liable to criminal penalties under Articles L. 573-1 (individuals) and L. 573-7 (legal entities) of the code.

Failure to comply with this prohibition is punishable *inter alia* by three years' imprisonment and a €375,000 fine. The fine is multiplied by five (to €1,875,000) if the offence is committed by a legal person (Code of Criminal Procedure, Article 131-38).