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REVIEW OF THE MARKET ABUSE DIRECTIVE

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General comments on the European Commission proposals

1. The European Commission presented two proposals revising the Market Abuse Directive, which came into force eight years ago, to the European Parliament and the Council on 20 October 2011. They consisted of a Regulation dealing with administrative penalties and a Directive seeking to introduce harmonised criminal sanctions in all Member States[1].

The proposals enhance the current procedures for preventing and punishing insider dealing and price manipulation, with three main thrusts:

- Apply the measures to all types of financial instrument, including financial derivatives and commodity derivatives, even if they or their underlyings are not admitted to trading on a regulated market;
- Capture new behaviours stemming from market developments since 2003;
- Harmonise the system of criminal penalties applicable to market abuse across the European Union.

AMAFI FULLY ENDORSES THE EUROPEAN COMMISSION'S AIM OF ENHANCING MARKET INTEGRITY

2. The principle of integrity is vital to orderly markets: it underpins the confidence of issuers and investors and it enables markets to properly perform their role in financing economic activity and hedging risks. Preventing and punishing market abuse is vital to securing that confidence, as AMAFI has pointed out on many occasions.

For this reason AMAFI fully endorses the objective of the European Commission.

➢ *A revision prompted by market developments*

3. Like the European Commission, AMAFI considers that anchoring the current regulatory framework solely on financial instruments admitted to trading on a regulated market (or derivatives based on those instruments) is too restrictive, in light of the growing volume of trading taking place outside these markets and the development of derivatives with underlying traded off-exchange, such as commodity derivatives.

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[1] *Proposal for a Regulation of the European Parliament and of the Council on insider dealing and market manipulation (market abuse),* Brussels, 20.10.2011*; Proposal for a directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation,* Brussels, 20.10.2011.

The scope of the market abuse rules therefore needs to be expanded in order to maintain market integrity and thus bolster investor confidence, which has been dented by the financial crisis, the sovereign debt crisis and other difficulties.

➢ ***A minimum set of common administrative and criminal sanctions will contribute to an integrated European market***

4. AMAFI wholeheartedly supports the approach that consists in precisely defining the types of infringements that are liable to administrative sanctions and identifying those that are more serious and therefore ought to incur criminal penalties.

Proper integration of Europe's markets now hinges on effective enforcement of rules, which are harmonised, not only through supervision but also through sanctions. Substantive differences between countries' penalty systems are unacceptable in an integrated market environment, especially if they result in sanctions that are inadequately dissuasive or, for some Member States, in no sanctions at all.

Further, establishing a common set of sanctions will foster cooperation among authorities when hunting for cross-border market abuse and make it possible to identify more easily the extent to which each Member State is actually enforcing the rules.

BUT TO BE EFFECTIVE, THE SYSTEM MUST BE BASED ON CONCEPTS THAT ARE CLEAR AND PRECISE

5. To achieve the overarching aim of market integrity, the new system needs to function effectively. It must therefore be based on precise concepts that leave the least possible leeway for differing interpretations.

This is necessary so that the arrangements used by financial institutions and trading platforms (and doubtless competent authorities) to detect and prevent market abuse can function effectively. But it is also necessary from the point of view of sanctions, to avoid creating legal uncertainty. This would be especially harmful because it would take many years to rectify the situation via the courts, especially in terms of criminal law, given the importance of protecting the rights of those accused of misconduct.

Far from restricting the scope of infringements and offences that competent authorities and criminal courts are able to prosecute, a precise definition of what constitutes market abuse would actually make it easier to establish such infractions (*Reg., art. 7 and 8*).

6. The scope of the Regulation and the definition of market abuse must be perfectly clear. From this perspective, three issues need to be addressed:

- Using broad-brush concepts such as "behaviour" and "transactions" in the **scope** is inconsistent with the more precise **definitions** provided for insider dealing and market manipulation;
- The definition of "inside information" has been extended to include "**relevant information**"; this will raise serious problems both for firms and issuers in terms of legal interpretation and, hence, application;
- Linking the notion of "**attempt**", applied to market manipulation and insider dealing, with the notion of "behaviour" creates a damaging legal confusion.

AMAFI's proposals on these issues are detailed in Memorandums 1, 2, 3 and 4 in the annex.

GRADUAL IMPLEMENTATION TO AVOID THE FALSE IMPRESSION THAT THE MARKET ABUSE REGULATION APPLIES UNIFORMLY AND EXHAUSTIVELY

7. The stated aim behind this revision can mean only one thing to European investors, namely that they benefit from a uniform level of security regardless of the type of financial instrument or market they are dealing with.

But the real situation will be different, for several reasons.

8. First, **the actual level of supervision will vary significantly depending on the type of market or financial instrument**. At present the supervision of equity markets, where it is generally most efficient, is being jeopardised by the difficulties caused by market fragmentation and high speed trading[2]. Accordingly, the ambition to extend the scope of the Regulation to all financial instruments and markets is a bold one as regards supervisory capacity. It is fair to assume that not all competent authorities will be able to achieve that objective within the allotted timeframe.

Second, in the case of numerous financial instruments that are tradable on an Organised Trading Facility (OTF) and based on underlyings for which the concept of "issuer" is meaningless (e.g. currency or interest rate derivatives), defining what constitutes inside information and market abuse is no easy task.

Last, the Regulation will fail to ensure the integrity of a whole group of markets, either because the inside information to be disclosed is insufficiently standardised (e.g. commodity derivatives and CO2 emission allowances) or because some of the planned exemptions undermine the system as a whole (this applies to the right of issuers not to disclose inside information as quickly as possible if their securities are traded solely on an OTF or a Multilateral Trading Facility without their prior request or approval).

9. It is therefore necessary to adopt a pragmatic approach, relying on Level 2 measures allowing the new system to be implemented gradually and in a manner suited to the types of financial instruments that are within the scope of the Regulation for the first time.

AMAFI's proposals on these issues are detailed in Memorandum 5 in the annex.

MAINTAIN ACCEPTED MARKET PRACTICES, PARTICULARLY LIQUIDITY CONTRACTS, WHILE ADDRESSING THE ISSUE OF PRE-SOUNDINGS

10. The review of the Market Abuse Directive should also provide an opportunity to look more closely at two particularly important aspects.

Accepted market practices

11. Under the current system, each national authority is entitled to recognise as legitimate, on the markets it supervises, certain transactions that it might otherwise call into question as market abuse. In France, the AMF has recognised the market practice of using liquidity contracts, a long-standing technique that is well developed because it responds to a need implicit in a properly functioning market. Based on the French model, several other Member States (Spain, Italy, Portugal, Netherlands) have adopted this practice because it contributes to orderly market operation.

12. Under the European Commission's proposals, however, accepted market practices would be scrapped two years after the Regulation comes into effect.

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[2] See Jean-Pierre Jouyet's speech to the AMF Enforcement Committee Conference, 5 October 2011, Paris (§1.3, pp. 4 and 5).

Although the aim is to achieve closer harmonisation, it must not result in disregard for national environments, which may continue to differ significantly in certain ways. The disappearance of liquidity contracts would be detrimental to the issuers that use this market practice, particularly in the current environment, where companies are obliged to turn increasingly to the market for their funding. In consequence, each national authority should be allowed to acknowledge accepted market practices, while permitting ESMA to challenge them if it deems fit.

AMAFI's proposal on this issue is detailed in Memorandum 6 in the annex.

Pre-sounding

13. Pre-sounding consists in contacting a small number of investors to gauge their appetite for an issue on the basis of its proposed parameters, notably price and maturity, and adjust those parameters if necessary to meet market expectations. This technique is an important factor in ensuring the success of a fundraising, especially when the consequences of failure are taken into consideration.

However, pre-sounding carries the risk that inside information will be disclosed to the investors being questioned. It should therefore be appropriately regulated, as is already the case in some countries, including France. However, these regulations are meaningful only if harmonised across the European Union. Since the deals involved are highly international, firms from several countries are generally involved in pre-soundings.

14. The Market Abuse Regulation currently being prepared is the natural vehicle for a Europe-wide set of practices for pre-sounding. AMAFI's proposal on this issue is detailed in Memorandum 7 in the annex.

ANNEX

MEMORANDUM 1

Consistency between the scope of the regulation and the definitions of market abuse

(Articles 2, 7 and 8)

1. The scope of the Regulation (*Art. 2*) combines and levels out concepts that differ significantly in nature:

- financial instruments on the one hand (*see par. 1. (a) et (b)*) and
- behaviors and transactions on the other hand (*see par. 1. (c) et (d)*).

The purpose of this combination is unclear because the definitions of insider dealing, improper disclosure of inside information and market manipulation already include these concepts, while being a lot more precise:

- Insider dealing and improper disclosure of insider information is defined as (*Art. 7*):

Using inside information to acquire or dispose of financial instruments to which the information relates;	**→ concept of transactions**
Using inside information to cancel or amend an order concerning a financial instrument to which the information relates where the order was placed before the person concerned possessed the inside information;	**→ concept of orders**
Attempt by a person in possession of inside information to acquire or dispose of or to cancel or amend an order concerning a financial instrument to which the information relates;	**→ concept of behaviour**
Recommending or inducing another person to engage in insider dealing;	**→ concept of behaviour**
Improperly disclosing inside information to another person outside of the normal course of the exercise of professional duties.	**→ concept of behaviour**

- Market manipulation is defined as (*Art. 8*):

Entering into a transaction, placing an order or any other behaviour: *- Which gives or is likely to give, false or misleading signals or,* *- Which secures or is likely to secure at an abnormal or artificial level the price of one or several financial instruments or,* *- Which affects the price of one or several financial instruments via a fictitious device or any other form of contrivance.*	**→ concepts of transactions, orders and behaviour**
Disseminating false or misleading information which has the consequences of giving or being likely to give, false or misleading signals or securing or being likely to secure at an abnormal or artificial level the price of one or several financial instruments.	**→ concept of behaviour**

2. Using the concepts of transactions, behaviour and orders in the scope is therefore not appropriate. Instead, it creates inconsistencies, like, for example:

- The definitions of insider dealing and improper disclosure of inside information (*Art. 7*) refers only to acquisitions and disposals and not to transactions generally. Consistent with these definitions, paragraph 2 of Article 2, that deals with insider dealing and improper disclosure of inside information, refers to acquisitions and disposals as well. Referring to any transaction in paragraph 1 (c) of Article 2, which sets the general scope of the Regulation, creates legal uncertainty as to the real scope of the transactions concerned by insider dealing and improper disclosure. If the purpose is to call for a wider appreciation of these abuses, then more clarity would be needed on what else is actually covered besides what is defined in Articles 7 and 8.

- The use of the term « behaviour » is also confusing. Paragraph 3 of Article 2, which concerns market manipulations, seems to infer that orders are a subset of the concept of behaviour: « *Articles 8 and 10 also apply to transactions, orders to trade or other behaviour (…)* » (AMAFI underlines). But then why are orders explicitly mentioned here and not in paragraphs 1 (general scope) and 2 (scope for insider dealing and improper disclosure) of Article 2 (this would be consistent with the definition of insider dealing in Article 7 that covers orders as well)? What purpose does it serve to refer to orders in paragraph 3 whereas the definition of market manipulations (*Art. 8*) is precise and includes orders anyway?

3. For legal certainty purpose and for the sake of clarity, AMAFI suggests to amend the scope of the Regulation in order to differentiate between:

- the financial instruments concerned, that form the scope itself;
- the types of transactions, behaviors and orders concerned, which are inherent to the definitions of insider dealing, improper disclosure of inside information and market manipulations.

In our view, this proposal makes the scope of the Regulation clearer without restricting it at all.

MEMORANDUM 2

Extension of the definition of inside information to the concept of "relevant information"

(Article 6, paragraph 1(e))

1. The definition of "inside information", which is key for this set of legislation, shall be made as precise as possible. The proposal extends this definition to include "relevant information" that is not generally available to the public but which a reasonable investor would regard as relevant for trading.

2. The reference to information "not generally available to the public" is confusing, as it is not clear what it covers exactly. The market abuse regulation is based on the fundamental obligation for issuers to make public inside information and also on the transparency rules set by the Transparency Directive. If "relevant information" is defined with no clear reference to such basic foundations, major difficulties and differences in interpretations among market participants and competent authorities are to be expected. The concept could also lead to ex-post interpretation by competent authorities based on data not available at the time of trading. This would be damaging in terms of legal certainty for many years as building a clear harmonised interpretation via the national competent authorities and courts acting under the umbrella of the European Union Court of Justice would take a long time.

In addition, this new type of inside information creates uncertainty in the appreciation of inside information by issuers and intermediaries and for the application of their obligations to draw up insider lists, to set up Chinese walls and to calibrate their market abuse surveillance arrangements. For issuers particularly, it may restrict even more the periods of time during which their managers are allowed to trade the issuer's stocks. Also, because there would be no publication obligation attached to this new type of inside information, it would be very unclear when the surveillance carried out by intermediaries and issuers on the financial instruments concerned could stop.

3. One should note that the aim of this extension is already achieved since the concept of "reasonable investor" is used in the general definition of inside information as regards the effect of the information on the market (*Art. 6, par. 3*).

4. AMAFI therefore suggests deleting point (e) of Article 6.

MEMORANDUM 3

The concept of attempting to commit insider dealing

(Article 7)

1. The proposed regulation provides for an additional type of market abuse compared to MAD, the attempt to commit insider dealing, i.e.:

- attempting to acquire or dispose of financial instruments to which that information relates and
- attempting to cancel or amend an order on the basis of inside information, where the order was placed before the person concerned possessed the inside information.

2. As for the first aspect of it, "*attempting to acquire or dispose of financial instruments*", one wonders how this could be different from placing an order that, for whatever reason, is not executed eventually. Otherwise, how would the attempt be characterized (i.e. it is difficult to detect something that has not happened)?

As for the second aspect of it, attempting to cancel or amend an order, it is nothing else than having a cancellation order or an amend order not executed, or else, again, what other situations would it cover that could be legally characterised?

And one should note that orders are already in scope of the surveillance arrangements financial institutions must have in place (*Art. 11, par. 2*). Also, as a matter of example, both cases (placing an order that is not executed and amending/cancelling a previous order on the basis of inside information) can already be sanctioned under French law without using the concept of attempt.

3. If market regulators feel that these two types of attempts need to cover other situations than orders that are not executed, it should be stated clearly. A clear scope is important to be sure that surveillance arrangements of financial institutions and market operators, which are a cornerstone of the system, as well as those of competent authorities, are properly calibrated.

4. For the sake of clarity, AMAFI therefore suggests to amend Article 7 by deleting paragraph 2 and referring to orders in paragraph 1.

MEMORANDUM 4

The concept of attempting to engage in market manipulation

(Article 8)

1. The proposed regulation tries to define what an attempt to engage in market manipulation is but the definition provided is too imprecise and fails to allow the characterisation of the targeted situations. It is especially harmful for surveillance purpose (how should the surveillance systems be calibrated?) let alone for legal certainty.

AMAFI's analysis is that attempts to engage in market manipulation are already included in the definition of market manipulation:

- Paragraph 2 of Article 8 reads:

  "*2. An attempt to engage in market manipulation shall comprise the following:*

  (a) attempting to enter into a transaction, trying to place an order to trade or trying to engage in any other behaviour as defined in paragraph 1(a) or (b); or

  (b) attempting to disseminate information as defined in paragraph 1(c)."

- As for (a) :

  - It is difficult to see what situations "*trying to place an order to trade*" cover other than situations where the order has not reached its destination for whatever reason – but then characterising such a situation and detecting it is difficult,

  - "*Trying to engage in any other behavior*", because it is very large, actually covers the first two elements ("*attempting to enter into a transaction"* and *"trying to place an order to trade"* …)[3]

- Paragraph 1 (a) provides that the effect does not have to happen for the manipulation to be characterised: it is sufficient that the effect is likely to happen[4]. So, any behavior that is likely to have the stated effects is in the scope of market manipulation. "Any behavior" is a very large concept, large enough to include attempts…

[3] Also, because paragraph 1(a) and (b) does not provide a definition but instead indicates the consequences of the transaction, the order or the behavior, the wording should be modified to read "which has the following consequences defined in paragraph 1(a) or (b)".

[4] "*1. For the purposes of this Regulation, market manipulation shall comprise the following activities:*
(a) entering into a transaction, placing an order to trade or any other behavior which has the following consequences:
– it gives, or is likely to give, false or misleading signals as to the supply of, demand for, or price of, a financial instrument or a related spot commodity contract; or
– it secures, or is likely to secure, the price of one or several financial instruments or a related spot commodity contracts at an abnormal or artificial level; " (AMAFI underlines)

2. If an attempt to engage in market manipulation is considered as covering a wider scope than market manipulation, it is important to make that clear by explaining what else is targeted so it can be monitored.

If, on the contrary, there is agreement that attempts are already included in the definition of market manipulation, then a specific definition of attempts to engage in market manipulation is not needed. In such a case, AMAFI would suggest deleting paragraph 2 that defines attempts and modifying paragraph 1 to ensure it includes likely effects in (b) and (c) as well. This will enable competent authorities and financial institutions to have more clarity of the surveillance systems they should implement. One should recognise however that the objectives of surveillance arrangements and sanctioning powers may differ somehow. There may be a need for an explicit ability for sanctioning authorities to sanction an attempt to commit market manipulation, in which case this should be provided for by maintaining as is Article 25 (e).

MEMORANDUM 5

Planning for a staged implementation of the extension to all MTFs and OTFs and to commodity derivatives

(Articles 2 and 6)

Extension to all MTFs and OTFs

1. It is proposed that the scope of the financial instruments concerned be extended to all financial instruments traded on a MTF or OTF of the Union. AMAFI is a firm believer that the current scope is indeed too narrow and that an extension of the market abuse rules would provide real benefit in terms of market integrity and confidence.

2. However, the all encompassing extension that is proposed raises some concerns on two main aspects:

- Some MTFs or OTFs trade or will trade some financial instruments for which the concept of "issuer" is meaningless (e.g. currency or interest rate derivatives), hence not subject to transparency requirements. Some thought will therefore be needed to define, for these instruments, what constitutes inside information and insider dealing.

- Some MTFs or OTFs trade or will trade financial instruments that are not admitted to trading on a regulated market and whose trading on these venues has not been requested or approved by their issuers. In this case, the proposed regulation provides that these issuers, who are not subject to the transparency requirements of the Prospectus and Transparency Directives, should not have to make public inside information as soon as possible (*Art.12, par. 8*). But, paradoxically, the other market participants would still have the obligation to prevent and detect insider dealing related to theses issuers. This two-pronged approach will not secure the integrity of these financial instruments' markets: if issuers do not have to identify inside information, they will not ring-fence it. Requesting other market participants to do so is therefore useless from a market integrity point of view. The proposed arrangements for MTFs and OTFs will not meet the EU's ambitious objective of prevention and detection of market abuse. More, it will create an erroneous feeling among investors that all markets are equally and uniformly covered (i.e. to the same standard as regulated markets), which will not be the case.

3. For these reasons, AMAFI suggests to adopt a staged approach in extending the market abuse regulation to all MTFs and OTFs. Some level 2 measures should be provided for to allow the Commission to set criteria for the application of the rules to MTFs and OTFs. These criteria could include the types of financial instruments traded, the types of investors authorized to access the MTF/OTFs, etc.

In addition, while preparing these level 2 measures, attention should be given to the rules that should apply to MTFs and OTFs: if there is no transparency requirements weighting on the issuers concerned, or if there is no issuers involved, the level 2 measures should be able to determine which rule is applicable to the venue in question, i.e. it may be useless to try and apply the rules preventing insider dealing (see above) but still appropriate to apply the rules against market manipulation. Such a proportionate and pragmatic approach would significantly increase the efficiency of the surveillance, would constitute a fair and balanced communication to investors and finally, would be friendly to companies needing to access financial markets (a need that should increase in the near future since access to credit will become more difficult).

Extension to commodity derivatives

4. It is proposed that the definition of inside information for commodity derivatives be extended to information pertaining to the underlying commodity market (*Art. 6, par. 1(b)*), which is absolutely appropriate since inside information on the commodity can be used by executing transactions on related derivatives (and vice-versa).

5. However, as most of the commodity spot markets are not regulated yet at the Union level, and many trade OTC with a global scope that would require global regulation, information pertaining to these markets are not regulated. The type of information concerned is therefore quite unclear for a number of commodities markets and the proposed wording does illustrate this issue: "*notably information which is required to be disclosed in accordance with legal or regulatory provisions at the Union or national level, market rules, contracts or customs, on the relevant commodity derivatives or spot markets*". Monitoring against insider dealing on this basis is likely to be patchy, divergent among financial institutions and competent authorities and finally inefficient.

6. For the purposes of applying Article 6, paragraph 1 b), some level 2 measures should therefore be provided for to determine for each type of spot commodity market and commodity derivative the type of information required to be disclosed in accordance with legal or regulatory provisions at the Union or national level, market rules or customs. This work should also take into consideration regulations that are being elaborated or are in existence on these issues (for example REMIT[5]).

[5] Proposal for a regulation of the European Parliament and the Council on energy market integrity and transparency

MEMORANDUM 6

Accepted market practices – liquidity contract

(Article 32)

The Legal framework for market practices under the current MAD

- In its Article 1.2 (a), MAD provided that certain "*transactions or orders to trade*" which would normally be considered to be "*market manipulation*", by way of exception, would not fall under that definition if "*the person who entered into the transactions or issued the orders to trade establishes that his reasons for so doing are legitimate and that these transactions or orders to trade conform to accepted market practices on the regulated market concerned*".

- The concept of "*accepted market practices*" was defined in Article 1.5 as practices which are "*reasonably expected in one or more financial markets and are accepted by the competent authority in accordance with guidelines adopted by the Commission in accordance with the procedure laid down in Article 17-2*)".

- Commission Directive 2004/72/CE of 29 April 2004 implementing MAD on several specific points, including "accepted market practices", set out *inter alia*, the factors to be taken into account when considering market practices, the consultation procedures to be observed by competent authorities when considering whether to accept or continue to accept a particular market practice and the publicity to be given to the decisions taken by the national authorities regarding the acceptability of the market practice concerned, including the appropriate description of such practices.

Accepted market practice relating to liquidity contracts in France

- **A Brief description of the practice in France**

  ✓ For well over ten years, France has experienced liquidity contracts on its regulated market. After MAD came into effect, the French competent authority (AMF) decided, for the first time in 2005, to recognize as an "*accepted market practice*", the liquidity contracts entered into pursuant to certain principles - which it had approved - set out in a Code of conduct, issued by a professional organization. Since 2005, the "*accepted market practice*" relating to liquidity contracts has been updated twice.

  ✓ The practice currently in effect results from a decision of 21 March 2011 which was taken after a large public consultation of all interested parties on a revised proposal of the practice, taking into account the fact that this accepted market practice has now been extended to a number of other Member States.

  ✓ While there is no doubt that liquidity contracts are implemented as part of a buy-back programme (and as such must be authorized by the general meeting of the issuer), it departs in several respects from the conditions applicable to buy-back programmes under Commission Regulation (EC) n° 2273/2003 of 22 December 2003. In particular, the restrictions relating to price and volume and to trading periods are not applicable to liquidity contracts.

- ✓ **The core principle** on which the practice of liquidity contracts is based is the independence of the financial intermediary whose mission is to ensure the liquidity of the shares concerned. Endowed by the issuer with a certain amount of shares and cash, the financial intermediary (whose own funds are not involved in the process) may sell or buy shares on the market when appropriate, according to its own experience and judgment. It may not receive instructions from the issuer. The only purpose of the transactions entered into by the financial intermediary pursuant to the liquidity contract is to ensure the liquidity of the shares in question and reduce or even eliminate the price swings which may result from an imbalance between sell orders and buy orders which does not reflect any underlying trend but is merely the result of a temporary mismatch between supply and demand. The framework currently in place in France ensures that the financial intermediary is effectively independent from the issuer when it decides to buy or sell shares under the liquidity contract. This independence is guaranteed, inter alia, by the strict rules which apply to its remuneration (for instance to ensure that it is not remunerated in a way which could affect its independence, most of its remuneration must be fixed in advance and/or based on non discretionary factors).

▪ Benefits of liquidity contracts

- ✓ Within the legal framework described above, liquidity contracts are a very useful tool to ensure the proper functioning of the secondary market for the benefit of the issuers and of the investors. In fact, MAD mentions the enhancement of liquidity as a favorable factor which could lead to the acceptance of the practice in question.

- ✓ They ensure the regularity of the trading of certain shares which may not be liquid enough and avoid the possibility of a sudden swing in the share price which is not justified by the market trend.

- ✓ It is particularly important for small and medium size companies which do not have a steady and regular volume of trading. At a time where the national and European authorities want to encourage the investment in SMEs and therefore their liquidity, it appears essential to maintain the practice of liquidity contracts, as strictly regulated, in France, by the national competent authority.

- ✓ But it is also beneficial for liquid shares (notably big caps) to limit their volatility. A significant volatility has a negative impact on investors who have a long term view of the market. This in turn has an impact on the development of the issuers concerned who need to have a strong and reliable group of shareholders ready to support them in their mid and long term development. In that case, the purpose and effect of liquidity contracts is clearly not to bring a structural liquidity to the shares concerned but only to solve the temporary lack of liquidity which may happen from time to time as a result of a temporary mismatch between supply and demand.

MEMORANDUM 7
Market pre-sounding
(Article 7 par. 4)

1. Market practice has led to a technique whereby investment firms handling primary and secondary market placements contact a small number of investors to gauge their appetite for the securities concerned on the basis of the planned issuance parameters, notably price, issue volume and maturity. This technique is generally known as pre-sounding. The key aim is to be able to adjust the parameters in order to ensure that the placement is successful if it goes ahead, thereby avoiding the risk for the issuer of not placing the entire issue or placing it at a price that is badly calibrated and would discourage investments in its future issues.

The ability for investment firms to carry out pre-soundings is important for the financing of issuers via the markets, a type of financing that is likely to develop significantly in the coming years due to the changes made to the prudential rules applying to the financing by banks.

However, pre-sounding needs to be carried out with care since it may lead to the disclosure of inside information to the investors who are sounded out, and ultimately of course to insider dealing. Managing this risk is considered essential by regulators and financial institutions.

2. Today, because most of the financing transactions carried out by issuers are international in nature, are very competitive and involve syndicates, the regulation of pre-sounding cannot rest on national provisions only (when they exist). It is important for market integrity purpose and for the sake of a level playing field that all firms involved in a pre-sounding be submitted to the same set of rules.

For several months now, AMAFI, who considers this issue important, has worked with the Autorité des Marchés Financiers in France, to set clear and precise conditions to carrying out pre-soundings, i.e. organisational rules applicable to investment firms, coordination obligations among syndicate members, standards of communication with issuers and investors… AMAFI's discussions with investment firms located outside of France make it believe that such willingness to better regulate the practice are shared and that the work carried out could constitute a basis for discussion at European level.

3. AMAFI therefore calls for the development of specific level 2 measures in the Market Abuse Regulation to submit firms carrying out pre-sounding to harmonised regulation in order to foster market integrity. This could be anchored on paragraph 4 of Article 7 of the proposed Regulation that creates an exception to the prohibition of disclosing inside information when it is made in the normal course of the exercise of duties resulting from an employment or profession.