Association française des marchés financiers
LES PROFESSIONNELS DE LA BOURSE ET DE LA FINANCE

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ESMA'S CONSULTATION PAPER
DRAFT GUIDELINES ON THE MARKET ABUSE REGULATION
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AMAFI's response

Association française des marchés financiers (AMAFI) is the trade organisation working at national, European and international levels to represent financial market participants in France. It acts on behalf of credit institutions, investment firms and trading and post-trade infrastructures, regardless of where they operate or where their clients or counterparties are located. AMAFI has more than 120 members operating for their own account or for clients in different segments, particularly organised and over-the-counter markets for equities, fixed-income products and derivatives. Nearly one-third of its members are subsidiaries or branches of non-French institutions.

AMAFI has been following closely the revision of the Market Abuse Directive, notably the market sounding issue for which it strongly supported the introduction of specific provisions in the Market Abuse Regulation[1], and welcomes the opportunity to answer ESMA's consultation paper regarding the Guidelines for persons receiving market soundings (CP).

AMAFI wishes to remind that markets soundings play a significant role in the proper business financing across Europe.

The European Parliament and the Council also stressed the importance of the market soundings under Recital 32 of MAR which provides: *"[Market soundings] are a highly valuable tool to gauge the opinion of potential investors, enhance shareholder dialogue, ensure that deals run smoothly, and that the views of issuers, existing shareholders and potential new investors are aligned. They may be particularly beneficial when markets lack confidence or a relevant benchmark, or are volatile. Thus <u>the ability to conduct market soundings is important for the proper functioning of financial markets</u> and market soundings should not in themselves be regarded as market abuse"*.

AMAFI generally welcomes the proposed guidelines for persons receiving market soundings. However at a time where less and less investors want to respond to market soundings, it is necessary to ensure that constraints on them are proportionate and not unnecessarily too cumbersome. That appears not to be the case in all situations subject to the draft guidelines.

The main consequence of the regime proposed is the extinction risk of market soundings due to administrative burdens imposed to MSR. If the market soundings disappear, the cost of issues could increase and this could have very serious economic consequences for issuers. Such a consequence would be contrary to the goal of the Capital Market Union which aims at strengthening the market's ability to ensure the financing of the European economy.

[1] Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC.

1. Designated persons or contact point within the MSR entitled to receive market soundings

AMAFI has no remark about this draft guideline.

2. Communicating the wish not to receive market soundings

AMAFI has no remark about this draft guideline: it is an useful possibility for MSRs if they wish to do so.

3. MSR's assessment as to whether they are in possession of inside information as a result of the market sounding and as to when they cease to be in possession of inside information

Q1: Do you agree with this proposal regarding MSR's assessment as to whether they are in possession of inside information as a result of the market sounding and as to when they cease to be in possession of inside information?

In practice, there is no situation where MSR would take the risk to assess the information as not an inside information while DMP is assessing it like an inside one. And in doing so, it is difficult to see what would be at stake: there is no risk created since, as inside information is concerned, MSR is restricted in using such information. There are therefore no reasons to impose such a constraint in this case.

The obligation for MSR to do a personal assessment of the information should occur only in two cases:

- On one hand, when DMP assesses the information as an inside one, and (exceptionally) MSR would like to treat it otherwise, the later has to conduct its own assessment;
- On the other hand, when DMP assesses the information as not an inside one, MSR has to check, whether in combination with other information it may have in its possession, the information needs, at its level, to be classified as inside information.

4. Discrepancies of opinion between DMP and MSR

Q2: Do you agree with this proposal regarding discrepancies of opinion between DMP and MSR?

No, we consider that the MSR should never inform the DMP on any discrepancies of opinion. When DMP does not assess the information to be inside information, MSR should make its own assessment but in this case it should take its own responsibilities and should not communicate the differences of opinion to the DMP.

In practice, two cases could occur:

- Either MSR has another information which may lead it to classify the information differently than the DMP: under no circumstances this information should be shared with DMP;

- Or, MSR has no other information but its assessment leads to a discrepancy with DMP's position: the knowledge of the discrepancies of opinion would not bring anything to the DMP as there is no consequence attached to this situation (and AMAFI does not see how another solution could be set up).

5. Internal procedures and staff training

Q3: Do you agree with this proposal regarding internal procedures and staff training? Should the Guidelines be more detailed and specific about the internal procedures to prevent the circulation of inside information?

As pointed out before, it is necessary to have proportionate constraints, not too cumbersome. The opinion of investors, notably the management industry, is key in such an issue.

6. List of MSR's staff that are in possession of the information communicated in the course of the market soundings

Q4: Do you agree with this proposal regarding a list of MSR's staff that are in possession of the information communicated in the course of the market sounding?

We consider that it is not necessary to impose such an obligation on MSRs. However if ESMA issues guidelines on this topic, it should state explicitly that drawing up a list of persons in possession of information communicated in the course of market soundings is not necessary when such persons are already included on an insiders list pursuant to article 18 of MAR.

7. Assessment of related financial instruments

AMAFI questions how managements companies which not have a buy side financial analysis could have an exhaustive knowledge of issuers in order to assess the risk of contagion of inside information between such issuers. Articles 8, 10 and 11 of EU Regulation 596/2014 do not refer to the notion of "issuer".

8. Written minutes or notes

Q5: Do you agree with the revised approach regarding the recording of the telephone calls?
Q6: Do you agree with the proposal regarding MSR's obligation to draw up their own version of the written minutes or notes in case of disagreement with the content of those drafted by the DMP?

As pointed out before, it is necessary to have proportionate constraints, not too cumbersome. MSR should have the possibility to have durable medium to comply with their record keeping obligation.

9. Record keeping

We understand that these guidelines aim at avoiding the use and the transmission of inside information through market soundings, however it should not lead to impose so much administrative cumbersome for MSR likely to compromise market soundings.

Q7: Can you provide possible elements of compliance cost with reference to the regime proposed in the guidelines for MSRs?

The main consequence of the regime proposed is the extinction risk of market soundings due to administrative burdens and legal risks imposed to MSR. If the market soundings disappear, the cost of issues could increase and this could have very serious economic consequences for issuers.