# LISTING ACT

## AMAFI'S KEY MESSAGES FOR THE TRILOGUE

## INTRODUCTION

This document contains AMAFI's most important comments on all the texts that make up the "Listing Act" at the time of the trilogue between the co-legislators and the European Commission.

AMAFI has previously published observations on the European Commission's proposed "Listing Act" and on the European Parliamentarians amendments (*AMAFI 23-32 and AMAFI 23-56*).

Following the publication of the texts of the Council and the Parliament (Report A9-0303/2023, report A9-0302/2023 and report A9-0300/2023), AMAFI stresses some of these observations which are still of concern.

## PROPOSAL TO AMEND MiFID II

### 1. *Rebundling execution and research fees*

Regarding the *rebundling* threshold (*Article 24.9 of MiFID II*), AMAFI does not agree with the proposals of the Council and the Parliament to remove it. The Commission's text provides for a rebundling threshold of €10 billion. The objective is to revitalise research production for small and medium-sized enterprises (SMEs).

AMAFI considers that a return to the provisions that were in effect before MiFID II, which came into force in January 2018) would be counterproductive in operational and economic terms for research providers. Indeed, the various stakeholders (mainly research providers and asset managers) have adapted their operational processes to the current MiFID II standards and are unlikely to amend them. The risk is however to re-open negotiations on the price of research, which has already dropped down significantly since MiFID II. This would create a heightened risk on the business model of this activity, especially when exercised by smaller firms, which are often the only ones offering research on SMEs.

AMAFI proposes, if need be, to set the threshold at €5 billion, the threshold below which asset management companies consider that they invest in SMEs.

*Proposition de rédaction :*

| Texte de référence : | Proposition de l'AMAFI : |
|---|---|
| *Article 24.9a.c du texte de la Commission* :<br><br>« *the research for which the combined charges or the joint payment is made concerns issuers whose market capitalisation for the period of 36 months preceding the provision of the research did not exceed EUR 10 billion, as expressed by end-year quotes for the years when those issuers are or were listed or by the own-capital for the financial years when those issuers are or were not listed.* » | *Article 24.9a.c :*<br><br>« *the research for which the combined charges or the joint payment is made concerns issuers whose market capitalisation for the period of 36 months preceding the provision of the research did not exceed EUR 5 ~~10~~ billion, as expressed by end-year quotes for the years when those issuers are or were listed or by the own-capital for the financial years when those issuers are or were not listed.* » |

## 2. Sponsored research

### a. Code of conduct

In the context of sponsored research, and more specifically concerning the code of conduct under which it should operate (*Article 24.3b. of the draft MiFID II revision text*), AMAFI considers that it should be elaborated at national level, in compliance with ESMA guidelines to ensure it adheres to stringent rules of conflict of interest.

This approach has proven to be effective in France, where a code of conduct was elaborated in the form of a Charter on sponsored research published in May 2022 (*AMAFI 22-44 and AMAFI 22-45*) and approved by the AMF.

The Charter establishes a clear regulatory framework, provides safeguards against conflicts of interest and promotes independence and transparency as well as strict conditions for the payment and dissemination of research, so as to make sponsored research equivalent to non-sponsored investment research in terms of reliability and quality of content.

AMAFI supports Article 24.3b. as set out in the Commission's text.

### b. European Single Access Point

In the context of sponsored research, AMAFI would also like to raise two points about the *European Single Access Point* (ESAP) mentioned in recital 5 of the proposed amendment to MiFID II and Articles 24.3c. and 24.3d. of MiFID II.

First, AMAFI considers that where the research is partially paid for by the issuer, the issuer should not be obliged to submit the sponsored research to ESAP as it would then become free for asset managers. In addition, it should be clarified that the information published on the ESAP should not be the research document, but a link to the research provider's website where asset management companies or retail clients can log in, in order to have access to this document.

AMAFI also points out that recital 5 of the Parliament compromise text is contradictory with art. 24.3c of the same. Recital 5 stipulates that "*issuers should submit their issuer-sponsored research*" to ESAP while art. 24.3c provides that "*any issuer may submit its issuer-sponsored research*" to ESAP.

Second, Article 24.3c. as drafted in the European Parliament's compromise text stipulates that sponsored research is neither investment research nor commercial communication. (It is "*not to be considered regulated information within the meaning of [ the Prospectus regulation]* ***nor investment research within the meaning of Directive 2014/65/EU and is therefore not subject to the same level of regulatory scrutiny as such regulated information or investment research").***

This approach is not in line with the political and economic objective of ensuring that sponsored research offers the same level of quality as traditional research.

In addition, the wording of Article 24.3d. of the European Parliament's compromise text indicates that sponsored research that does not comply with the code of conduct would qualify as commercial communication. ("*Research that is labelled as issuer-sponsored research shall indicate on its front page in a clear and prominent way that it has been prepared in accordance with the Union code of conduct referred to in paragraph 3b. Any other research material paid fully or in part by the issuer* ***but no prepared in compliance with the Union code of conduct as referred to in paragraph 3b shall be labelled as marketing communication*****").** Therefore, the European Parliament introduces a third possible category that would in fact be marketing communication, blurring the lines between commercial communication, investment research within the meaning of MiFID II and sponsored research governed by the code of conduct. This is in contradiction with the objective pursued by France over the past 3 years to ensure that sponsored research produced in accordance with MiFID's independence rules and distributed within the meaning of MAR can be considered as investment research.

AMAFI suggests retaining Articles 24.3c. and 24.3d. as drafted in the Commission's version of the text.

## PROPOSAL TO AMEND THE PROSPECTUS REGULATION

### 1. Exemption to the 300-page limit of the Prospectus

There's an issue concerning the exclusions from the 300-page limit of the Prospectus, referred to in Article 6.5 of the proposed amendment to the Prospectus Regulation.

The Commission proposes to exclude the summary of the prospectus and the information incorporated by reference from the 300-page limit. The Commission adds a paragraph specifying that the page limit doesn't apply to the the Universal Registration Document (URD). Parliament's report does not foresee such exclusions.

AMAFI calls for reverting to the version of the text proposed by the Council, and to exclude also the Registration document (RD) from the 300-page limit, in addition to the URD (*see proposed drafting hereafter*).

The Association emphasises the importance of excluding documents incorporated by reference from the 300-page limit and to exclude the URD and the DR therefrom too. Indeed, the URD and RD alone sometimes exceed 300 pages, and are very difficult to shorten, given the increasing number of elements

that need to be included in the prospectus (including ESG elements added in the European Parliament's compromise text).

As stated in AMAFI's previous positions on the *Listing Act*, this 300-page limit would prevent market players from using the separate document prospectus, which is a very common practice in France and works very well.

*Proposed Drafting:*

| Reference text: | AMAFI's proposal: |
|---|---|
| *Art. 6.5§2 of the Council's draft text:*<br><br>*« [...] By way of derogation from the first subparagraph and from paragraph 4, information included in a universal registration document may be included without regard to the standardised format, the standardised sequence and the maximum length' »* | *Art. 6.5§2:*<br><br>*"... By way of derogation from the first subparagraph and from paragraph 4, information included in a registration document or a universal registration document may be included without regard to the standardised format, the standardised sequence and the maximum length' »* |

## 2 Exemption from the publication of a prospectus for fungible securities already admitted to trading

Regarding the exemption from the publication of a prospectus in the event of the issuance of fungible securities with securities already admitted to trading, as proposed in Article 1.4da. of the Commission's text, AMAFI supports the European Parliament's proposal for a text.

The Council's draft text adds, point IV of Annex IX, an obligation on the issuer to comply with the texts in force since admission to trading. This is precisely what makes it very difficult to apply the text in practice.

## 3 Incorporation by reference

AMAFI emphasizes that the incorporation by reference provided for in Article 19 of the Prospectus Regulation must remain optional, and not mandatory. For this reason, it fully supports Parliament's proposed text.

## 4 Offering Period

In the context of an initial public offering, the reduction of the time between the publication of the prospectus and the end of the offering from 6 to 3 days (*Article 21.1 of the Prospectus Regulation*) is strongly supported by AMAFI as it increases flexibility, which is essential in particular in volatile markets. The Association therefore disagrees with the Commission's proposal to reduce the delay from 6 to 4 days only.

### 5 Supplement to the Prospectus

With regard to the prospectus supplement (*Article 17 of the Prospectus Regulation*), AMAFI insists on the importance of retaining the Parliament's version of the text.

Indeed, the Commission proposes to add a paragraph to Article 17 of the Prospectus Regulation, stating that where the final offering price referred to in the first subparagraph deviates by more than 20% from the maximum price indicated in the prospectus, the issuer will have to publish a supplement to the prospectus. The addition of that requirement would imply a restriction of the terms of the offer, which is not in line with the objective of simplification. The conditions for the publication of a prospectus supplement as defined in Article 23 of the Prospectus Regulation, i.e. when there is a material change in the information provided in the prospectus are sufficient and make the addition of this paragraph unnecessary.

## PROPOSAL TO AMEND THE MARKET ABUSE REGULATION

### 1. Market Sondings

In Article 11.4 of the proposal to amend the Market Abuse Regulation (MAR) as amended in Parliament's compromise text, the provisions on market soundings are no longer set out as a safe harbour but as mandatory conditions. The Commission's and Council's texts use the words "*may choose to comply"*, while the Parliament's text uses the words "*shall comply"*.

AMAFI insists on the importance of maintaining the safe harbour as the obligation to apply very onerous administrative measures, including in cases where there is no provision for the disclosure of inside information, is excessively burdensome. In the event that a polling institution has classified information as inside information, it is highly unlikely, given the risk of sanction it runs, that it will choose to be outside the safe harbour.

AMAFI wishes to revert to the version of Article 11.4 as drafted in the Commission's text.

In addition, the provisions relating to market soundings should be amended to:

- Extend to all financial instruments, not just bonds, the clarification that discussions taking place for the sole purpose of concluding a transaction are not market soundings; and
- Exclude contacts with investors aimed at adapting the conditions for issuing an EMTN to their needs.

### 2. Disclosure of Inside Information

AMAFI does not agree with the Parliament's compromise text to include in a delegated act, an indicative list of information that may constitute inside information and when it can reasonably be expected to be disclosed to the market. Such a list is likely to bring rigidity to a process which, by its very nature, requires a case-by-case assessment.

AMAFI also does not welcome the proposed change to the deferred publication regime to replace the general condition that the postponement of publication "should not mislead the public" (*Article 17.4.b of*

*MAR*) with an exhaustive list consisting of the three cases from the 2016 Guidelines on legitimate interests, which were intended to be illustrative. Such a list would bring rigidity to a process which, by its very nature, requires a case-by-case assessment and is also unlikely to cover all possible cases. In addition, the proposed list of criteria introduces legally ill-defined concepts (such as "*in contrast with market expectations*") that are likely to generate difficulties of interpretation and thus legal uncertainty for issuers. For this reason, AMAFI believes that the proposed criteria should only be indicative.

## 3. Insider Lists

With regard to insider lists, issuers of vanilla-only bonds should be exempted from the requirement to publicly disclose inside information other than that those compromising their ability to repay their debts.

AMAFI is also of the opinion that the obligation to draw up insider lists still entails too onerous requirements and recommends the following amendments to these provisions:

- The nature of the information to be included in the list should be reduced (in particular the personal data of the listed persons) and additional information should only be provided at the request of a national competent authority;

- Issuers and persons acting on their behalf (including financial intermediaries) should have the right to include in their own insider list only one natural person per external provider, through whom they have access to other insiders of that third party.

## 4. Extension of the share buybacks reporting procedure to stabilisation operations

AMAFI reiterates its desire that the proposed simplifications in terms of reporting and information on share buybacks be extended to stabilisation operations in Article 5 of the proposal to amend the Market Abuse Regulation.

In addition, AMAFI notes that the delegated regulations relating to share buybacks and stabilisation activity should be amended to simplify and align with the changes proposed by the Market Abuse Regulation.

*Proposition de rédaction :*

| Reference texts : | AMAFI's Proposal: |
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| *Article 5 of the proposed amendment to MAR :*<br><br>1. The prohibitions in Articles 14 and 15 of this Regulation do not apply to trading in own shares in buy-back programmes where:<br><br>(a) the full details of the programme are disclosed prior to the start of trading ; | *Article 5:*<br><br>1.The prohibitions in Articles 14 and 15 of this Regulation do not apply to trading in own shares in buy-back programmes where:<br><br>(a) the full details of the programme are disclosed prior to the start of trading ; |

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| (b) trades are reported as being part of the buy-back programme to the competent authority of the trading venue in accordance with paragraph 3 and subsequently disclosed to the public in an aggregated form ; | (b) trades are reported as being part of the buy-back programme to the competent authority of the trading venue in accordance with paragraph 3 and subsequently disclosed to the public in an aggregated form ; |
| (c) adequate limits with regard to price and volume are complied with; and | (c) adequate limits with regard to price and volume are complied with; and |
| (d) it is carried out in accordance with the objectives referred to in paragraph 2 and the conditions set out in this Article and in the regulatory technical standards referred to in paragraph 6. | (d) it is carried out in accordance with the objectives referred to in paragraph 2 and the conditions set out in this Article and in the regulatory technical standards referred to in paragraph 6. |
| 2. In order to benefit from the exemption provided for in paragraph 1, a buy-back programme shall have as its sole purpose: | 2.In order to benefit from the exemption provided for in paragraph 1, a buy-back programme shall have as its sole purpose: |
| (a) .to reduce the capital of an issuer; | (a) to reduce the capital of an issuer; |
| (b) to meet obligations arising from debt financial instruments that are exchangeable into equity instruments; or | (b) to meet obligations arising from debt financial instruments that are exchangeable into equity instruments; or |
| (c) to meet obligations arising from share option programmes, or other allocations of shares, to employees or to members of the administrative, management or supervisory bodies of the issuer or of an associate company. | (c) to meet obligations arising from share option programmes, or other allocations of shares, to employees or to members of the administrative, management or supervisory bodies of the issuer or of an associate company. |
| 3. In order to benefit from the exemption laid down in paragraph 1, the issuer shall report all transactions relating to the buy-back programme to the competent authority of the most relevant market in terms of liquidity as referred to in Article 26(1) of Regulation (EU) No 600/2014. The receiving competent authority shall, upon request, forward the information to the competent authorities of the trading venue on which the shares have been admitted to trading and are traded. | 3.In order to benefit from the exemption laid down in paragraph 1, the issuer shall report all transactions relating to the buy-back programme to the competent authority of the most relevant market in terms of liquidity as referred to in Article 26(1) of Regulation (EU) No 600/2014. The receiving competent authority shall, upon request, forward the information to the competent authorities of the trading venue on which the shares have been admitted to trading and are traded. |
| 4.The prohibitions in Articles 14 and 15 of this Regulation do not apply to trading in securities or associated instruments for the stabilisation of securities where: | 4.The prohibitions in Articles 14 and 15 of this Regulation do not apply to trading in securities or associated instruments for the stabilisation of securities where: |
| (a) stabilisation is carried out for a limited period; | (a) stabilisation is carried out for a limited period; |

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| (b) relevant information about the stabilisation is disclosed and notified to the competent authority of the trading venue in accordance with paragraph 5; | (b) relevant information about the stabilisation is disclosed and notified ~~is reported to the~~ competent authority of the trading venue in accordance with paragraph 5 and subsequently disclosed to the public in an aggregated form; |
| (c) adequate limits with regard to price are complied with; and | (c) adequate limits with regard to price are complied with; and |
| (d) such trading complies with the conditions for stabilisation laid down in the regulatory technical standards referred to in paragraph 6 | (d) such trading complies with the conditions for stabilisation laid down in the regulatory technical standards referred to in paragraph 6 |
| 5. Without prejudice to Article 23(1), the details of all stabilisation transactions shall be notified by issuers, offerors, or entities undertaking the stabilisation, whether or not they act on behalf of such persons, to the competent authority of the trading venue no later than the end of the seventh daily market session following the date of execution of such transactions. | 5. Without prejudice to Article 23(1), the details of all stabilisation transactions shall be notified by issuers, offerors, or entities undertaking the stabilisation, whether or not they act on behalf of such persons, to the competent authority ~~of the trading venue~~ of the most relevant market in terms of liquidity as referred to in Article 26(1) of Regulation (EU) No 600/2014 no later than the end of the seventh daily market session following the date of execution of such transactions. The receiving competent authority shall, upon request, forward the information to the competent authorities of the trading venue on which the shares have been admitted to trading are traded. |
| 6. In order to ensure consistent harmonisation of this Article, ESMA shall develop draft regulatory technical standards to specify the conditions that buy-back programmes and stabilisation measures referred to in paragraphs 1 and 4 must meet, including conditions for trading, restrictions regarding time and volume, disclosure and reporting obligations, and price conditions.<br><br>ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.<br><br>Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010. | 6. In order to ensure consistent harmonisation of this Article, ESMA shall develop draft regulatory technical standards to specify the conditions that buy-back programmes and stabilisation measures referred to in paragraphs 1 and 4 must meet, including conditions for trading, restrictions regarding time and volume, disclosure and reporting obligations, and price conditions.<br><br>ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.<br><br>Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010. |