Amafi > Association française des marchés financiers
FINANCIAL MARKET PROFESSIONALS

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ESMA's Consultation paper on draft technical standards on the Market Abuse Regulation
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AMAFI's contribution

I. Introduction

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 and welcomes the opportunity to answer ESMA's consultation on draft technical standards on the Market Abuse Regulation.

II. Buy-backs and stabilisation: the conditions for buy-back programmes and stabilisation measures

Q1: Do you agree with the approach set out for volume limitations? Do you think that the 50% volume limit in case of extreme low liquidity should be reinstated? If so, please justify.

AMAFI disagrees with the approach set out for **volume limitations** when the shares are traded on different venues. In its Discussion Paper of 14 November 2013 (ESMA/2013/1649), ESMA had considered that "*it seems all in all appropriate to oblige the issuer to base the calculation of the volume limit on significant volumes on all trading volumes*" (DP § 26). AMAFI in its response to this consultation had approved this position, considering that the issuers were indeed best placed to perform the necessary calculations taking into account all the volumes (including insignificant volumes) traded on all trading venues.

AMAFI therefore regrets the complete change of position on that subject that is mentioned in the Consultation Paper on draft technical standards (§ 28), particularly as ESMA gives no reason for such change. It mentions the fact that "*it might be too burdensome to oblige the issuer to check each and every trading venue with rather insignificant volumes in order to perform an accurate calculation*" but this exact same statement already appeared in the November 2013 Discussion Paper. At the time, ESMA had concluded that "*the omission of (insignificant) volumes during the calculation is ultimately at the disadvantage of the issuer, as this reduces the amount of shares that issuer can buy*" and therefore, as

mentioned above, it was "*appropriate to oblige the issuer to base the calculation of the volume limit on significant volumes on all trading venues*". In other words, acknowledging that it might be burdensome for issuers to also take into account the insignificant volumes, even though it was in their interest to do so, ESMA had concluded nevertheless that it was legitimate as a minimum to impose on issuers to take into account all significant volumes traded on all trading venues.

AMAFI would like therefore to understand why ESMA, with the same starting point (it might be burdensome for issuers to also take into account the insignificant volumes) has now drawn from that a completely different position since it proposes now to make the calculation per relevant venue where a purchase is planned. This is a completely different rule which does not take into account the true liquidity of the shares concerned and limits considerably the volume that may be achieved on the most liquid markets. Therefore, AMAFI would like ESMA to reconsider its position and revert to its initial view that it is legitimate to take into account all the volumes traded on all trading venues to set the maximum 25% limit of the average daily volume traded.

By the same token, AMAFI disagrees with ESMA's new proposal (§ 23) that the **price** restriction be dependent on the last price/bid of the relevant trading venue where the purchase is planned. The fact that this rule is clear, simple and easier to follow is not enough of an argument to support it, in particular since this rule, based on fragmented markets, would not result in the best execution/best price for the issuer. Therefore, AMAFI would like ESMA to reconsider this point as well and revert either to its initial view (see § 19 of its November 2013 Discussion Paper) that the price should not higher than the last traded price or last current bid on the most liquid market - taken into account all the venues on which the shares are traded - or the maximum price of all trades on all trading venues.

Regarding the **extension to 50% of the limit in case of "*extreme low liquidity*":** AMAFI feels that the small number of cases concerned may not justify the re-instatement of that rule, the implementation of which may be somewhat complex.

Q2: Do you agree with the approach set out for stabilisation measures? If not, please explain.

At this point, AMAFI would just like to make a comment regarding « block trades » to say that it greatly approves ESMA's last statement of this section (in § 58 of the Consultation Paper) which reads as follows: "*Ultimately, ESMA considers that only the operations that meet the criteria of the significant distributions as defined in Article 3 (2) (c) should be considered for the purpose of the stabilization"*.

However, this statement may in certain circumstances be incompatible with ESMA's assertion, at the beginning of the paragraph dedicated to block trades (§ 56), that those trades should be excluded from the scope of the exemption under article 5(1) of MAR. Clarification is therefore required on this point.

In its response to ESMA's consultation on is November 2013 Discussion Paper, AMAFI had stressed the fact that stabilization measures can only be considered in the context of a "significant distribution" does not mean necessarily that all types of block trades should be excluded from the scope of the exemption. When a block trade is limited in value/percentage or in the number of investors concerned, it may not indeed be considered as a "significant distribution". But the situation is very different when a significant block of securities is placed by way of accelerated book building which gives rise to prior communication to the market or at the time of the pricing. In that case, such placement should be considered as a significant distribution and should not therefore be excluded from the scope of the exemption. AMAFI would welcome clarification and support from ESMA on this particular point, which should be consistent with what appears to be ESMA's "ultimate" position that the notion of significant distribution should prevail, irrespective of how the transaction should be carried out.

III. Market soundings

Q3: Do you agree with ESMA's revised proposals for the standards that should apply prior to conducting a market sounding?

General comments

AMAFI generally welcomes the changes made to the approach originally proposed in the discussion paper on important aspects, such as cleansing, issuers' consent, block trades or confirmations. We note however that the proposed procedure is still very cumbersome and likely to dissuade buy-side from participating in both wall-crossed and non wall-crossed market soundings, making the process of raising financing more difficult.

AMAFI still disagrees with the approach consisting in including non wall-crossed market soundings in the scope of paragraphs 5 to 8 of Article 11. The purpose of these paragraphs is to set the conditions to fulfil in order to benefit from the presumption that communicating inside information in the context of a market sounding is done within the remit of one's profession. There is therefore no basis for extending these conditions to soundings not involving the communication of inside information.

ESMA indicates in § 91 of its CP that doing so will allow the DMP to avail itself of this protection in case it communicates information that it sees as not being inside information but that is in fact inside. This cannot be since all the conditions that should be met to benefit from the protection when communicating inside information will not have been met by the DMP (like for e.g. disclosures to the soundee on the inside nature of the information or the obligation to cleanse the soundee when the information is not inside anymore).

Besides, the primary breach from which Article 11 brings protection is the illicit divulgation of inside information as set in Article 14 paragraph c). Non-compliance with Article 14 can be sanctioned according to Article 30.1, which is not the case of non-compliance with Article 11. A breach of the procedural arrangements set in level 2 as regards Article 11 can therefore be sanctioned only in respect of the illicit divulgation of inside information, as non-compliance with these arrangements as regards non wall-crossed markets soundings is not a basis for sanction in MAR. In other words, the organisational requirements imposed by the proposed technical standards, when not related to the illicit divulgation of inside information, have no legal basis. AMAFI therefore reiterates that ESMA's proposed requirements related to non-wall crossed soundings are out of scope of its mandate.

Requests for proposal

AMAFI agrees that it is important to define what is "acting on behalf or for the account" of a market sounding beneficiary, as done in § 64. Considering an RFP by an issuer as an instruction to act on behalf of this issuer is already market practice in France and AMAFI welcomes that this position is clarified at European level.

We are however concerned with paragraph 65, which states that soundings may be "*actually performed in the days before the request for proposal*" and "*an additional situation in which the third party could be considered as acting on behalf of a market sounding beneficiary would be when the third party has obtained from the market sounding beneficiary enough information to lead it to believe that a deal launch is highly probable*".

Such situation is not market practice at all and seems to point to very specific cases where conversations between the issuer and the DMP have taken place and resulted in the DMP having actually been communicated a clear intention from the issuer to proceed with the preparation of the transaction and deciding to sound the market in anticipation of the coming RFP. Such clear intention is not different from an oral instruction and distinguishes itself from having "*sufficient information from the market sounding beneficiary to conclude that the transaction subject to the market sounding is reasonably expected to come into existence or occur* » as stated in recital (17) of the draft RTS of Annex IV. This portion of the recital could actually capture the frequent situations where an investment firm tests the market on its own initiative on potential transactions that it considers timely for an issuer, without prior instruction from the issuer that it is contemplating a transaction at this point in time.

Such questioning is common, as it enables investment firms to build knowledge of the market and to pitch ideas to issuers. It is common in particular with respect to frequent issuers who make their financing plans known to the market or when the market knows that the owner of a shareholding may sell its securities (at the end of a lock-up period for example). In these situations the DMP can reasonably expect that the transaction could come into existence but has no instruction as such from the issuer. AMAFI therefore recommends deleting this portion of the recital (17). It is enough to refer to instructions in an oral (or written) form because this does not point to any formal instruction and therefore does not leave out these situations where the DMP has had discussions with the issuer making clear its intention to proceed with the preparation of the transaction.

Private placements

Paragraph 70 states that market soundings apply to private placements and recital (19) of the draft RTS indicates that "*Communications related to and prior to a private placement or a block trade would normally fall under the scope of the market sounding regime when they are intended to provide information to potential investors in order to gauge their interest in a possible transaction and the conditions relating to it such as its potential size or pricing*".

AMAFI agrees that private placements are in scope of the rules applicable to market soundings when the information is inside information (see our comment in the second paragraph of our General comments) and is communicated to investors to gauge the investors' interest in the transaction and its terms. Recital (19) should therefore point to "inside information".

Additionally, when interpreting this statement, it should be kept in mind that the nature of private placements is such that the distinction between the placement stage and the sounding stage is not as easily drawn as for public placements. Private placements are not necessarily announced as is the case for public placements, so that any sounding phase is not necessarily separated from the placement phase by the announcement of the transaction, making it difficult to assess when/if a market sounding is taking place (Article 11 states that a market sounding consists in communicating information "*prior to the announcement of a transaction*", a condition that is absent from Recital (19)).

More importantly, private placements involving a limited number of investors entail constant dialogue with investors as the transaction is being set up, i.e. the conversations with investors are inherent to the preparation of the transaction, as they form the negotiation phase that may eventually result in the transaction, in a form acceptable to the investors concerned. These conversations should not be equated to market soundings, as their purpose is not to assess the interest of potential investors for a possible transaction but rather to negotiate with investors to agree on terms interesting to them so that the transaction could exist for these specific investors.

Recital (19) should therefore be extended to make clear that not all conversations with investors in the context of a private placement (or a block trade) are to be considered as conducted "in order to gauge the interest of investors". Building on the wording of § 69, AMAFI therefore suggests that Recital (19) reads:

"*Communications related to and prior to a private placement or a block trade would normally fall under the scope of the market sounding regime when they are intended to provide* ***inside*** *information to potential investors in order to gauge their interest in a possible transaction and the conditions relating to it such as its potential size or pricing.* ***When, in relation to conversations with potential investors, the professional is not trying to gauge the conditions relating to a possible transaction, but actually trying to conclude the transaction, the market sounding regime does not apply*** ".

Other than these comments, AMAFI agrees with the changes made to the standards that should apply prior to conducting a market sounding, when compared to the discussion paper.

Comments on the draft RTS (other than those already made above)

Recital 21

The anticipated date of the transaction could also change because of a decision by the issuer, inherent to its own situation and not to market factors. The second sentence of the recital should therefore be expanded to read:

"*When planning the market sounding process, a disclosing market participant should aim to reduce, as much as possible, the time between the moment when the market sounding is carried out and the anticipated date for the launch or announcement of the potential transaction, but it should also* ***be*** *recognise****d that*** *the anticipated launch or announcement is also dependent on external factors such as changing market conditions* ***or market sounding beneficiary's decision****.*"

Article 11

Paragraph 1 states that a DMP shall establish and maintain internal arrangements and procedures setting how to carry out the market soundings "*to ensure its compliance with Article 11(3) to (8)*" of the Regulation.

However Article 11(3) to (8) relate to the safe harbour, not to a general obligation applying systematically to any sounding. Article 11 should therefore be written in the same manner as Article 9 related to stabilisation:

"*In order to benefit from the protection set by Article 11(4), a disclosing market participant shall establish and maintain internal arrangements supported by operational procedures setting out how to carry out the market soundings prior, during and after conducting the market sounding*".

Article 12

Paragraph 2 states that the DMP should determine the time when the transaction is estimated to be announced. However, this requirement should only apply in the case of wall-crossed market soundings, as in other situations there is no trading black-outs motivating the determination of an inside period. In addition, the requirement to provide this date to the investor is set in Article 13. 1. iv., which is itself subject to recording requirements as per Article 15.1. e. This provision should therefore be removed from Article 12.

Paragraph 2 embeds the requirements of paragraph 5, as this paragraph already requires written records to be maintained as regards the analysis made and the information considered to reach the conclusion, including the ones provided by the issuer. If paragraph 5 was to be maintained, it should be rewritten to ensure there is no possible confusion with paragraph 2. In addition, paragraph 2 requires to record "*the source of that information*", which is unclear. Is the source not the issuer on behalf of which the DMP is acting?

Paragraph 4: "*a market sounding beneficiary*" should read "*the market sounding beneficiary*".

Q4: Do you agree with the revised proposal for standard template for scripts? Do you have any comments on the elements included in the list?

No, AMAFI disagrees.

From a legal point of view and as stated in our general comments, AMAFI disagrees with ESMA's interpretation that it can apply recording obligations to market soundings without inside information only because they may in fact include inside information. The requirement for ESMA to develop draft ITS to specify the systems and notification templates to be used only concerns paragraphs 5 to 9 of Article 11. These paragraphs concern the following:

- The safe harbour as regard the communication of inside information (paragraph 5);
- The conditions that should be complied with to benefit from the safe harbour (paragraph 6);
- Cleansing of the sounded person (paragraph 7);
- The obligation for the sounded person to determine whether it has received inside information (paragraph 8);
- The retention period of the records to be held (paragraph 9).

None of these paragraphs deal with instances where the information provided to the investor is not inside information, AMAFI therefore remains of the view that applying provisions to non wall-crossed soundings via RTS has no legal basis.

From a practical point of view, having to use a script when conducting a market sounding without inside information is very administrative. It would be very cumbersome to handle in the day-to-day life of DMPs, without clear benefit for investors. Additionally, if such requirement was maintained, it would be very important to indicate clearly the boundary between sounding without inside information and testing the market, at the risk otherwise that conversations with investors that do not result from an instruction received from the issuer could be subject to this script. Indeed, investment firms routinely put out questions to investors at their own initiative without any instruction from the issuer concerned. These questions are part of the classic role played by investment firms in matching the interests of issuers and investors. Their aim is to gauge investors' appetite for a virtual transaction, with a view of pitching it to the issuer if appropriate. The issuer may respond very quickly to a proposal from the investment firm or he can show no appetite, in which case the firm would continue to test the market and check the issuer's appetite. This may give the appearance that a market sounding is conducted, whereas the issuer's instruction, if any, will only be given later. Submitting such conversations to a script would be a complete hindrance.

As regards the content of the script of non wall-crossed soundings, in addition to considering that this requirement is out of scope of ESMA's mandate, AMAFI is of the view that the approach is very administrative and robotic and can only lead to the reduction of the possibility to sound investors because it emphasises the risk they take in a way that is disproportionate and counterproductive:

> - Points i. and ii: On professional markets, if an investor does not want to proceed with the conversation, they will tell the DMP as soon as he/she has indicated in i. that he/she calls for a market sounding. And if point iii. c. (investor's consent) was to be maintained, then point ii. is its duplicate. Point ii. therefore adds no value and should be removed.
> By the way, the terms "*market soundings*" are used to designate both wall-crossed and non-wall crossed market soundings. As the consequences of both types of soundings are very different for the investor, it should be permissible (and advisable for clarity purpose) for the DMP to indicate in i. that it calls as regards a non-wall crossed market sounding.
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> - Point iii.: a. and b. are out of proportion. Considering the consequences of communicating inside information to a third party and the introduction of rules around wall-crossed market soundings by MAR, a. and b. seem to tackle these rare situations where the information is in fact inside but has

not been identified as such. Unless there are evidence that these situations are many, these two statements are in AMAFI's view disproportionate and discomforting for market participants in terms of the level of confidence they have for each other. They are likely to discourage the buy-side firm to answer any sounding. By the time MAR enters in to force, with its specific focus on market soundings, buy-side firms should know very well their obligations (and risks) with regards to soundings, so that using such statement would only work as a deterrent to answer.

c. is totally out of scope of ESMA's mandate. The consent to be sounded is set in level 1 for wall-crossed market soundings only. There is no mandate to introduce this requirement at level 2 for non wall-crossed market soundings.

Point iii. should therefore be removed altogether.

The proposed script actually mimics all the information that should be provided to a soundee by the DMP when inside information is communicated. However, such mimicking will not be efficient in protecting the DMP in case the information communicated, which he thought to be non inside, is finally judged as inside, as not all the detailed requirements pertaining to the safe harbour will have been complied with (see our General comments above).

As regards the content of wall-crossed market soundings, the requirement for the DMP to commit to a potential date at which the information will not be inside information anymore is not consistent with the level 1 text, which requires the DMP to cleanse the buy-side when, according to their assessment, the information is not inside information anymore. With this level 2 requirement, the cleansing would happen ex ante, so that if the transaction has gone ahead as planned, the soundee is cleansed and there is no reason anymore for the DMP to comply with the level 1 requirement and inform the soundee that the information is not inside information anymore. At the very least, if this level 2 measure were maintained, it should then be made clear that the level 1 requirement is deemed fulfilled whenever the transaction is launched at the anticipated date.

AMAFI is still of the view (see our answer to the DP - AMAFI/14-04) that requiring the DMP to determine and communicate a date is not adequate because of the risk this entails both for the DMP and the soundee in case the transaction does not go ahead as planned, let alone because of the difficulty around determining such a date in all situations. The DMP may decide to commit itself on a date if it considers that the legal and regulatory risks for itself and the investor are bearable. However, because of the risks involved this should not become an obligation. Buy-side firms may (and do in practice) decline to answer a sounding if no date is agreed upfront. The right of the DMP not to commit itself, absent such commitment from the issuer, should also be recognised.

AMAFI therefore suggests that instead of adding to level 1, ESMA should comply with the mandate to specify the technical means for appropriate communication of the information, so that it should only require the DMP to explain the market sounding recipient how it will be informed of the information not being inside anymore.

In addition, communicating to the soundee that the contemplated date is finally not the right one as required by the script (Annex I (iv) (c) of the draft ITS) may in itself carry inside information on the issuer with a life time longer than the initial information. Furthermore, the issuer may not commit itself to not launching the transaction after the contemplated date, so that it will be very difficult for the DMP to provide another date for the end of the inside period, safe at his own risks. **Annex I (iv) (c) of the draft ITS should therefore be amended to remove the requirement to provide an explanation on how the market sounding recipient will be informed in case the anticipated time is no longer valid.**

Comments on the draft RTS (other than those already made above)

Article 13

- Pursuant to our comment on the scope of the RTS and the negative impacts of a script for non wall-crossed soundings, Article 13 should only aim at market soundings involving the communication of inside information.
- There is no need to duplicate in this article the content of the scripts already detailed in Annex I of the ITS. A reference to the ITS should be inserted.
- Paragraph 2. should also refer to point ii. as in an on-going relationship, people will know each other and the consent to proceed will have been acquired already (Annex I of the draft ITS should be amended accordingly as regards the simplified template).

Q5: Do you agree with these proposals regarding sounding lists?

Telephone numbers and e-mail addresses should not be systematically included in the records of each sounding. They should be available on request because recording these for each sounding is administratively cumbersome.

AMAFI does not agree with the scope of the lists, which should not include non wall-crossed soundings as they are out of scope of paragraph 5 of Article 11, which only deals with wall-crossed market soundings.

Q6: Do you agree with the revised requirement for DMPs to maintain sounding information about the point of contact when such information is made available by the potential investor?

Yes, AMAFI agrees.

Q7: Do you agree with these proposals regarding recorded communications?

AMAFI does not agree that such heavy arrangements, especially as regards face-to-face meetings, should apply to non wall-crossed soundings. As mentioned in question 5, this is out of scope of ESMA's mandate.

Q8: Do you agree with these proposals regarding DMPs' internal processes and controls?

AMAFI agrees, except as regards Article 3.2 of the draft ITS that requires that each record (except those set forth in § 3 of the Article) are kept in an electronic form. Considering the breadth of the records to be kept, this requirement is disproportionate (it would apply for example to communications between sounding syndicate members, to proofs of employees' training, to the characterisation of the information, to the request by a potential investor not be sounded, etc....). This would require a document warehouse system that not all firms have in place. This requirement should therefore be deleted.

IV. Accepted Market Practices

Q9: Do you agree with ESMA's view on how to deal with OTC transactions?

Yes, AMAFI agrees with ESMA's view that while OTC transactions should not be "per se" excluded from the scope of AMPs, they would require a further assessment from the competent authorities to determine if they meet the criterion of substantial transparency level.

Q10: Do you agree with ESMA's view that the status of supervised person of the person performing the AMP is an essential criterion in the assessment to be conducted by the competent authority?

Yes. AMAFI considers that that status of supervised person of the person performing the AMP is an essential criterion in the assessment to be conducted by the competent authority.

V. Suspicious transaction and order reporting

Q11: Do you agree with this analysis regarding attempted market abuse and OTC derivatives?

Although AMAFI agrees with ESMA's analysis that, pursuant to Article 16(2) of MAR, persons professionally arranging or executing transactions will be required to report suspicions of attempted market abuse to the competent authorities, it is nevertheless not clear what kind of behaviour an attempted market abuse is.

Article 12(1) of MAR provides that "*placing an order to trade*", whether it is executed or not, or adopting a behaviour which "*gives, or is likely to give, false or misleading signals as to the supply of, demand for, or price of, a financial instrument* (...) *or secures, or is likely to secure, the price of one or several financial instruments* (...)" is a market manipulation. This being so wide (orders, whether executed or not, as well as any behaviour, having succeeded or not), it is difficult to understand in which situations an attempt of market manipulation will be characterised.

As a consequence, it would be appropriate that examples of attempted market abuse, preferably some already experienced by national competent authorities, be included in the Level 2 measures.

The insertion of such examples in the regulatory technical standards would be all the more helpful that investment firms are required to train their staff on the detection and reporting of attempted market abuse. If such examples are not provided, it is likely that training on attempted market abuse will be merely limited to mentioning its existence, without a real understanding of what it refers to.

Q12: Do you agree with ESMA's clarification on the timing of STOR reporting?

AMAFI does not agree with ESMA's proposals on the timing of STORs.

Despite ESMA's clarifications, it remains unclear what is the starting point of the proposed two-week period for reporting a suspicious transaction or order to a national competent authority. Does the notion of

"*suspected breach*" used in Recitals 3 and 4 of the draft technical standards refer to the date the suspicion arises or to the date the breach itself occurred, in which case the starting point would be the transaction or order date?

From AMAFI's perspective, the two-week period should not begin earlier than the date the suspicion starts existing. Requiring this period to start from the date of the transaction or the order would not be consistent with the purpose of MAR which is not that an STOR be made immediately after the transaction or order occurred but that it be sent to the competent authority as soon as the firm has a suspicion, i.e. that it has formed its opinion that a breach may have occurred.

The notion "*without delay*" used in Article 16(1) of MAR does not imply in our view that the suspicion has to be reported immediately after the transaction or order has taken place. The word "*delay*" can designate either a period of time or the fact of being late; and here, it is the latter meaning that is appropriate in our opinion. This is confirmed by the use of the expression "*sans retard*" (i.e. "*not late*") in the French version of MAR to translate the notion "*without delay*".

Furthermore, in practice, when the surveillance system of a firm detects a potentially suspicious transaction or order, it triggers an alert and it is only from that moment that the staff responsible for determining whether or not a suspicion has to be reported will start analysing the transaction or order. While such analysis is often carried out quickly, more time is required sometimes when a more thorough analysis of the transaction or order is needed. Such analysis can result in a suspicion of market abuse. It would therefore be inadequate for practical reasons to require that the starting point of the reporting period be the breach itself or the alert triggered by the surveillance system of the firm.

As a consequence, AMAFI recommends that the starting point of the reporting period be the formation of the suspicion and, for the sake of clarity, that the notion of "suspected breach" be replaced to remove any ambiguity. This would be more consistent with MAR Level 1 measures which aim to prevent firms from acting carelessly in the monitoring and reporting of market abuse or attempted market abuse to competent authorities. Recitals 3 and 4 of the draft regulatory technical standards should thus be amended as follows:

> *"(3) Suspicious transaction and order reports should be submitted to the relevant competent authority as soon as possible once a reasonable suspicion is formed in relation to a trading behaviour. "Batching", the practice consisting in waiting for a particular number of suspicious orders and/or transactions to justify a submission although suspicion by this time has already risen, is not consistent with the requirement to notify without delay. Generally and indicatively, suspicious transaction and order reports should be submitted within two weeks of the* ***suspicion of market abuse becoming reasonable*** ~~*actual suspected breach*~~*."*

> *"(4) Exceptionally, there may be circumstance when a reasonable suspicion of market abuse or attempted market abuse is formed some time after the* ***transaction or order*** ~~*suspected breach*~~ *effectively occurred, due to subsequent events or information coming to light. This should not be considered a reason for not reporting to the competent authority. In these specific circumstances, the person making the notification should be in a position to justify the time discrepancy between the occurrence of the suspected breach and the formation of the reasonable suspicion of market abuse or attempted market abuse, in order to demonstrate compliance with the reporting requirement."*

If ESMA decided that the starting point of the reporting period was nevertheless to be the breach itself, the reporting period should at least be longer than two weeks. This is because there are other reasons for not submitting an STOR within two weeks of the breach than situations where transactions and orders become suspicious retrospectively in the light of subsequent events.

This is so for example when the suspicion arises in the course of an internal control carried out periodically, the original purpose of which may not be to detect market abuse. It could also happen for types of monitoring of orders and transactions covering a certain period of time (based on historical trends for example).

A balance should be sought between timeliness of reporting and, on the one hand, the deterrent effect such a delay can have on firms, who may prefer not to report rather than reporting late, and on the other hand, the risk that poorly motivated STORs be sent by firms anxious to comply with the delay.

If the starting point of the delay is to remain the suspected breach itself then it would be more suitable to extend the delay from two weeks to at least one month.

Q13: Do you agree with ESMA's position on automated surveillance?

No. ESMA's proposal to require that all investment firms, irrespective of their size and the nature of their activities, establish **automated surveillance systems** to conduct effective monitoring of transactions and orders is inappropriate.

Although this will not represent the majority of cases, there are situations where human analysis is more efficient or as efficient as systems to detect market abuse. For instance, it can be more appropriate for highly specialised firms that deal with clients in a specific field of business, offering a limited number of investment services (such as reception and transmission of orders or execution of orders on behalf of clients) on a narrow range of financial instruments to rely entirely on their staff for raising and identifying suspicions of market abuse rather than on automated systems. This can also be the case for businesses with a low volume of orders and transactions (for example proprietary investments), so that monitoring can be carried out by people.

Firms in these situations should not have to develop an automated surveillance system or buy one from an external provider, even if it is an "*off-the shelf*" system in the latter case. Such requirement would create another barrier to entry, as the development or purchase of such systems represents additional costs.

AMAFI therefore recommends removing the word "automated" from Article 5.1 of the draft RTS so that investment firms do not have to establish and maintain automated surveillance systems where not justified by the nature of their activities and the volume of transactions.

Besides, although AMAFI agrees that "*where a chain of market participants are involved in a transaction, each entity has its own obligation to report suspicions*" (*V.2.2 Partial view, § 192, p. 46*), such statement, when applied to entities belonging to a financial group, can actually lead to inefficient monitoring and detection, as it could prevent the group from centralising its monitoring and reporting. It is often more efficient in a group to create expertise in market abuse monitoring and develop systems centrally, each entity providing a delegation to the parent company. This has the advantage of enhancing the monitoring capacity of these entities and it also allows competent authorities to get an easier access to the information instead of chasing the different links of the chain.

As a consequence, we recommend amending the second paragraph of Article 6 of the draft regulatory technical standards as follows:

> "*2. Where multiple persons are involved in the processing of an order or a transaction, each person subject to the reporting obligation under Article 16(1) and (2) of Regulation (EU) 596/2014 shall be individually responsible for considering whether to submit a STOR.* ***Entities belonging to a group can delegate this responsibility to an entity of their group.*** "

Q14: Do you have any additional views on the proposed information to be included in, and the overall layout of the STORs?

AMAFI considers that the following fields of the STOR template should be amended:

- ***Section 2 – Identity of entity / person making disclosure***:

Pursuant to Article 16 of MAR, "*market operators and investment firms that operate a trading venue*" and "*persons professionally arranging or executing transactions*" are responsible for reporting suspicious orders and transactions to competent authorities. It is therefore the legal entity, and not its employees, which is subject to the requirement to submit STORs, so that it is not justified to include in the template the names and positions of individuals within the firm.

If the objective of these fields is to identify the individual, if any, who detected the suspected breach, we consider that this is not helpful as the compliance contact details are provided and compliance will organise discussions with the individual as the NCA's request.

In addition, personal data related to employees of the firm should only be provided as part of an investigation launched by a competent authority. This would ensure a greater protection for individuals, and incidentally for the reporting entity, as for example where an STOR is communicated by a competent authority to a foreign authority, it is not always known how the latter will use it, potentially putting at risk the individual whose name is mentioned.

Finally, if such personal data were included in STORs, the person concerned would have, according to existing rules on data privacy protection, the right to request access to this record, hence creating an issue as regards the confidential nature of STORs.

Fields related to the "*name of individual*" and its "*position within entity*" should thus be removed from the STOR template. If they were nevertheless maintained in the final template, it would at least be appropriate to add the mention "*if applicable*" as there will be instances where the reporting entity is not able to provide such information (such as when the suspicion arose from an automated surveillance system).

- ***Section 3 – Identity of entity / person suspected of breach***

This section seems to have been drawn up only for physical persons as it is expected that information be provided on the position and the place of employment of the entity/person suspected of breach. However, a suspicion can also be reported about a legal person, so that in some instances such information may not be relevant.

The mention "*if applicable*" should thus be added after "*date of birth*", "*place of employment*" and "*position*".

- ***Section 6 – Documentation attached***

Recordings of conversations between the firm and its client, which are listed amongst the documentation that can be attached to an STOR, must not be provided outside of a formal investigation conducted by a competent authority. This kind of information is too sensitive to be transmitted at the stage of voluntary reporting to the authority because it is confidential and firms have an obligation to ensure the confidentiality of their clients and employees' information outside of any request made by a recognised authority or a judicial authority.

In addition, from a practical point of view, conversation tapes could contain information that may relate to other matters than the ones relating to the STOR, so that attaching a conversation tape related to a specific order or transaction may not be done "*without delay*".

"*Recordings of conversations*" should therefore not be included in the list of documents that can be attached to an STOR.

Q15: Do you have any additional views on templates?

AMAFI supports the adoption of a common format of STOR by all competent authorities.

However, such attempt at harmonising the format of STORs may prove unsuccessful, as did all previous similar CESR attempts, if ESMA does not effectively monitor that this template is complied with by all competent authorities. In the past, competent authorities have actually amended the STOR template to fit their own needs.

It would therefore be useful that peer reviews be regularly carried out under the supervision of ESMA. Such peer reviews and their frequency could be mentioned in the technical standards.

Besides, the use of a common format of STORs across the European Union is unlikely to be achieved as long as STORs will not be sent to a single place in the EU. The reporting of suspicions often gives rise to difficulties in identifying the competent authority to which they must be sent, as each competent authority can have its own interpretation of the notion of "*execution and arrangement of transaction*".

AMAFI is therefore of the opinion that all STORs should be sent to a central repository, for the competent authorities to pick up the STORs they consider pertaining to their competency.

Q16: Do you have any views on ESMA's clarification regarding "near misses"?

AMAFI considers that investment firms should keep records of near misses as such records could prove useful for firms to demonstrate that they have complied with their obligations and explain the reasons why they have decided not to submit an STOR.

However, it would be useful that the Level 2 measures provide a clarification of what a "near miss" is. The regulatory technical standards should make it clear, via a recital for example, that near misses are alerts that have been investigated and for which the question arose as to whether to report a suspicion or not, the final decision made being not to report. It should be clear that a near miss does not cover each potential suspicion and actual alert triggered by the surveillance system of the firm. The wording of Article 10.2 b. is not precise enough in this respect.

VI. Technical means for public disclosure of inside information and delays

Q17: Do you agree with the proposal regarding the channel for disclosure of inside information?

AMAFI has not examined this question.

Q18: Do you believe that potential investors in emission allowances or, more importantly, related derivative products, have effective access to inside information related to emission allowances that have been publicly disclosed meeting REMIT standards as described in the CP, i.e. using platforms dedicated to the publication of REMIT inside information or websites of the energy market participants as currently recommended in the ACER guidance?

AMAFI has not examined this question.

Q19: What would be the practical implications for the energy market participants under REMIT who would also be EAMPs under MAR to use disclosure channels meeting the MAR requirements for actively disseminating information that would be inside information under both REMIT and MAR?

AMAFI has not examined this question.

Q20: Do you agree with ESMA's proposals regarding the format and content of the notification?

AMAFI has not examined this question.

Q21: Do you agree with the proposed records to be kept?

AMAFI has not examined this question.

VII. Insider list

Q22: Do you agree with ESMA's proposals regarding the elements to be included in the insider lists?

No, AMAFI strongly disagrees with ESMA's proposals on the elements to be included in insider lists because they are excessively burdensome for firms and risky from a personal data protection point of view.

First of all, as regards the amount of information required, it must be noted that investment firms, by nature of their businesses with issuers, are heavily involved in setting up and maintaining insider lists on behalf of issuers. As a result, investment firms often maintain many insider lists, some firms having a total of more than 15,000 insiders a year.

In this regard, gathering and compiling as many data as proposed by ESMA would create a huge administrative burden for investment firms disproportionate with the expected benefits, stated in recital 27 of MAR, which are to facilitate the competent authorities' work in case of an investigation. Competent authorities request only a small portion of all insider lists maintained by investment firms (not even 10%).

Significant resources would have to be used to comply with this requirement for a benefit that is not quantified by ESMA, is limited to cases where a competent authority decides to start an investigation and can be achieved through further request from the competent authority.

An alternative could be that firms upon the request of a competent authority promptly provide these data. The delay within which the information would have to be provided could be defined in the technical standards.

Furthermore, as regards the nature of the required data, many of them are personal data the recording and use of which is regulated by several sets of rules, and in particular by the European Directive 95/46/EC (commonly referred to as Data Protection Directive) which provides that the collection of personal data must be "*adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed*" (*Directive 95/46/EC, Article 6(1)c*).

Some of the personal data required do not appear to be necessary to enable competent authorities to fulfil their task of protecting the integrity of financial markets, so that requiring their collection would appear excessive. Collecting such personal data could thus put investment firms at risk of non-compliance with existing regulations on data protection and privacy.

As a consequence, AMAFI considers that the home and personal mobile telephone numbers, personal e-mail address and home address of an insider should not be included in the list. A requirement to include these personal data in insider lists would anyhow prove ineffective because as employees have no legal obligation to provide their employers with this kind of information, it is likely that firms will not have such information at their disposal.

In addition, the following data should not be included in insider lists as regards employees of the firm, as the employee is easily identifiable and these data can be easily retrieved from internal systems:

- Birth name, data and place of birth;
- Work address;
- National ID; and
- Work telephone numbers and e-mail address.

Q23: Do you agree with the two approaches regarding the format of insider lists?

Although some leeway is granted as regards the format of insider lists, with the possibility to establish either a consolidated list or a list for each particular inside information, both templates assume that each insider is associated with a specific inside information.

However, some insiders within firms are permanent insiders because of their position in the firm and their managerial responsibilities, such as members of the board of directors or of the compliance function. Hence, firms usually draw up two different kinds of lists: a list of permanent insiders and lists associated with specific transactions.

Such option that exists today in some Member States should still be available with MAR, so long as an exhaustive list containing both types of insiders can be made readily available to competent authorities upon request.

If such approach were not allowed, firms would have to add their permanent insiders in both their general list or deal-specific lists, each time a new project or event triggers the duty to draw up an insider list, which would be unduly burdensome.

The draft ITS should therefore make clear that the permanent insiders of a firm can be identified in a specific list, distinct from the other insider lists.

Furthermore, it is essential that issuers, investment firms and other entities that hold inside information be allowed to maintain their own insider lists and that each of them be responsible for the provision of its insider lists to the competent authorities. Establishing a single centralised list of all individuals with access to inside information and maintaining it up-to-date at the level of the issuer or the investment firm is not feasible. As each legal entity has its own procedures and policies, it would necessitate building specific circuits of information between all the entities involved in the transaction, it would imply the communication of personal data to third parties and finally, it would increase the risk of a leak of very sensitive information (inside information).

Indeed, the current practice is that each entity participating in a deal maintains its own insider list. Such practice is not detrimental to competent authorities nor does it impair their understanding of the natural persons who have access to the inside information, as they are able to request insider lists from any party involved in the deal and, where necessary, combine these lists.

In this regard, it is important that both templates provide for the possibility to list legal entities in addition to physical persons since it is customary that legal entities involved in a deal, such as lawyers or accountants, be included in the insider list as they draw up their own list of insiders. As stated in Recital 8 of the draft implementing technical standards "*auditors, attorneys, accountants and tax advisors (...)*" are among the "*categories of professional with access to inside information [that] should be included in the insider list*".

The technical standards should therefore explicitly allow each entity involved in a transaction to maintain and update its own insider lists. As a consequence, both templates of insider lists should be amended accordingly to allow for the inclusion of legal entities.

VIII. Managers' transactions format and template for notification and disclosure

Q24: Do you have any views on the proposed method of aggregation?

AMAFI has not examined this question.

Q25: Do you agree with the content to be required in the notification?

AMAFI has not examined this question.

IX. Investment recommendations

Q26: Do you agree with the twofold approach suggested by ESMA of applying a general set of requirements to all persons in the scope and additional requirements to so-called "qualified persons" and "experts"?

AMAFI understands that employees of investment firms who produce recommendations would be considered as qualified persons as per Art. 3(1)(34) (i) of MAR and not as experts. With this understanding, AMAFI has no comment on the proposed approach.

Q27: Should the issuance of recommendations "on a regular basis" (e.g. every day, week or month) be included in the list of characteristics that a person must have in order to qualify as an "expert"? Can you suggest other objective characteristics that could be included in the "expert" definition?

AMAFI has no comment on the notion of expert.

Q28: Are the suggested standards for objective presentation of investment recommendation suitable to all asset classes? If not, please explain why.

As regards morning notes

In § 359, ESMA points out that "*tailored personal recommendation emanating from sales departments should not fall within the notion of investment recommendation*". In § 360, it indicates that so-called "morning notes", i.e. "*short research sent to clients in the morning that concerns several financial instruments and where producers comment and update their previous investment recommendations in the light of news reported by media*" are investment recommendations. AMAFI agrees with both statements. It notes however, that the draft RTS is not as clear in its Recital (6) dealing with this matter since it provides a larger definition of the type of notes considered, i.e. short notes sent "*to clients commenting and updating previous investment recommendations in the light of external events often labelled as morning notes or sales notes"*, which could include emails sent by salespeople to their clients not related to research produced by the firm. Such emails should not be viewed as investment recommendation even they are not tailored personal recommendation.

AMAFI therefore recommends amending Recital (6) as follows:

*« Investment recommendations can take various forms, such as a short **research sent** to clients commenting and updating previous investment recommendations in the light of external events **or news** often labelled as morning notes or sales notes, and the qualification will depend at least on the substance of the information as well as how that information is disseminated."*

As regards the category of investment research labelled as marketing communication

MiFID creates two categories of research, the first one is presented as objective and independent whereas the second one does not meet these standards and is considered as marketing communication. The second one is therefore not subject to the disclosures applicable to the first one.

However, ESMA indicates that this second category of research still pertains to investment recommendations as per MAR. MAR however, and the proposed draft RTS in particular, sets a number of disclosure requirements (Articles 4.2 and 5), which would then apply to marketing communications. As these disclosures aim at ensuring objectivity and independence of the investment recommendation, applying them to marketing communications would in effect treat these communications as objective and independent research, hence removing the two categories of research defined in MiFID.

Even though this inconsistency already existed between MIFID I and MAD, AMAFI suggests that it is resolved in the updated regulations by distinguishing in the draft RTS the provisions that should apply to these two categories, i.e. making clear that articles 4.2 and 5 do not apply to research presented as marketing communication.

As regards the suggested standards for objective presentation of investment recommendation

The requirement to compare the recommendations issued related to an issuer over a 12-month period is adapted to equity research but is not always relevant for credit research or quantitative research. It is very much at this level. For credit research and quantitative research, the concept of the issuer is not as relevant as the specific issue or the type of macroeconomic indicator considered. Article 4.2., points h and i, could therefore be amended in this respect to introduce some proportionality. Similarly, Article 5.5.a. should be adapted to non equity research.

Q29: Do you agree with the proposed standards for the objective presentation of investment recommendations and how they apply to the different categories of persons in the scope? If not, please specify.

AMAFI has no comment as to the standards applicable to experts.

Q30: Do you agree with the proposed standards for the disclosure of interest or indication of conflicts of interests and how they apply to the different categories of persons in the scope? If not, please specify.

AMAFI has no comment on the notion of expert.

Q31: Do you consider the proposed level of thresholds for conflict of interest appropriate for increasing the transparency of investment recommendation?

No, in AMAFI's view the proposed requirements are disproportionate and inconsistent with current regulations related to some of the matters concerned (such as the Transparency Directive):

- Specific calculation tools would have to be developed, as the proposed rules do not match existing requirements related to the matters concerned. For example, as regard participation thresholds, the proposed rules differ not only in relation to thresholds but also in relation to the way they are calculated, the inclusion of the trading book or not, the time delay to report, the approach at group level or not.; the same inconsistencies exist as regards reporting of the trading position during a public takeover.
- The feasibility and meaningfulness of some of the disclosures are questionable absent some important information on how to compute them (the long and short positions will vary intra-day and day after day).
- The value of this detailed information to clients is questionable, as it can even be misleading, whereas it will be very costly and complex to compute.

Additionally, this approach is not consistent with the principle that conflicts of interest should be disclosed as a last resort, when they cannot be managed and can hurt the objectivity of the recommendation (Article 5 of implementing Directive 2003/125/CE). The firm should have proper arrangements to prevent such situations from happening. The proposed approach is not consistent with these requirements. It also denies the organisational arrangements set up by firms to deal with the conflicts of interest related to investment research, such as barriers of information, maintenance of confidentiality, controls of the trading...

AMAFI copies below its answers to the discussion paper (AMAFI/14-04), which have not changed:

- With regard to participation thresholds

"*Such information on participation thresholds is currently not harmonised by the Transparency Directive so that, if this suggestion was retained, harmonisation would exist as regards specifically investment recommendation, meaning that information not currently available to the wider market would be available for some clients only and as regards some issuers only. This is not consistent – AMAFI is of the view that harmonisation of participation thresholds should happen first.*

Also, from a practical point of view, it would mean that firms would have to develop different systems to calculate participation thresholds whether in the context of the Transparency Directive or in the one of MAR for investment recommendations; which is not practical at all."

It should be added that if the proposed requirement were maintained, it would be necessary to set exemptions for the trading book, similar to the ones set forth in the Transparency Directive and for the same reason, i.e. to ensure that firms are not harmed by adverse trading when making public their trading positions. This would also allow firms to leverage the IT systems already developed for compliance with the Transparency Directive.

- With regard to trading positions

"*Information on net short positions are already made available by competent authorities on their websites, as soon as their reach -0.5% and are therefore available for clients to consult. Also the calculation methodology set by the Short selling regulation forbids the inclusion of convertibles and preference shareholder rights in the calculation, which means that the information provided to clients would be misleading as to the real position of the firm on the instrument concerned.*"

As regards positions in debt instruments: "*There is a risk in AMAFI's view that clients will be lost by the amount of information provided and the difficulty inherent to interpreting such technical information. For e.g. would the position be calculated at an instrument level or at an issuer one and according to which methodology (i.e. if at the level of the issuer, then each firm will have its own criteria to make the calculation, making the absolute numbers meaningless from firm to firm).*"

It should be added that as regards trading positions on other instruments than shares, the value of the disclosure is doubtful. Such obligation is disproportionate to the materiality of the alleged conflict of interest and its meaning to clients is questionable. For example, a firm may have an overall long position on a country's debt but this does not mean that it will recommend a buy on it (its interest could be a buy for the short term debt and a sell for the long term for e.g.).

In addition, disclosing a position on a particular debt issue would be detrimental market wise for the firm as it carries confidential information on the trading position of the firm.

Q32: Do you think that the positions of the producer of the investment recommendation should be aggregated with the ones of the related person(s) in order to assess whether the threshold has been reached?

It is not clear to AMAFI what “related persons” refers to.

If it is related to a consolidated approach in the context of a group, AMAFI is of the view that, in the sake of consistency and simplicity, the same rules should apply as set forth in the current legislations requiring calculation of positions(Short selling Regulation) and major shareholdings (Transparency directive).

Q33: Do you agree that a disclosure is required when the remuneration of the person producing the investment recommendation is tied to trading fees received by his employer or a person related to the employer?

No. AMAFI agrees that the remuneration of the analyst should not be tied to the fees generated by specific transactions related to the investment recommendations produced. In its view such situation should be tackled upfront via organisational arrangements so that no such conflict can occur, instead of being tackled by disclosure (which would be in sharp contrast with MIFID II’s approach to conflicts of interests).

However, it is too extreme to state, as done in § 392, that the remuneration cannot be linked to the trading fees generated by the firm, as the remuneration will anyhow be linked to the overall performance of the firm, which can be based on its trading revenues if the firm has no other business.

AMAFI suggests therefore mentioning that the remuneration of the « *persons involved in preparing the recommendation* » should not be tied to specific transactions but can be linked to the overall performance of the firm in consideration of qualitative criteria (such as assessment by clients of the quality of the research produced by the person, compliance of the person with applicable regulations and internal policies, etc.).

In Article 5.4. b. and c., the wording should be slightly amended to recognise that the remuneration of analysts cannot be totally independent from the transactions/trading carried out by the firm and the overall revenue they generate. At a minimum the word “directly” should be inserted before “tied” in both paragraphs.

Q34: Do you agree with the proposed standards relating to the dissemination of recommendation produced by third parties? If not, please specify.

Yes, AMAFI agrees.

Q35: Do you consider that publication of extracts rather than the whole recommendation by news disseminators is a substantial alteration of the investment recommendation produced by a third party?

No, as long as the producer of the recommendation is identified clearly and it is clearly indicated that these are extracts.

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