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EUROPEAN COMMISSION'S PUBLIC CONSULTATION

A revision of the Market Abuse Directive

Response of the AMAFI

1. AMAFI thanks the European Commission for providing it with the opportunity to discuss the review of the Market Abuse Directive.

AMAFI is always keen to provide its view on the application and implementation of the Market abuse directive, which it considers the cornerstone of sound and integrated European financial markets. It shares the view that the revision should be ambitious in enlarging its scope and is also of the opinion that it is a great opportunity to improve the current surveillance system in the EU.

2. The Association therefore examined with great interest the paper the European Commission put out for consultation on 25 June 2010 and sets forth below a few general observations that it considers important to take into account in the context of this revision, before answering the specific questions asked by the Commission services in their paper.

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EXECUTIVE SUMMARY

I. General observations

- *The real challenge at heart of the revision of the Market abuse framework is its extension to markets and financial instruments that are not currently regulated. This is indeed an important matter and AMAFI agrees that a number of markets and instruments should not be left out of a proper market abuse framework.*

- *However, this legitimate concern should not lead to unlimited requirements on regulators in terms of surveillance. Hence the revision of the MAD should be conducted considering matters of efficiency and priorities as well.*

- *To succeed, this revised framework should be supported by an efficient surveillance system, endowed with proper technical and human capabilities and that is able to pass the hurdle of market fragmentation. The revision of the MAD, coupled with the one of MiFID, should therefore include a complete overhaul of the market surveillance systems in the EU.*

II. Answers to the Commission's questions

- *AMAFI disagrees with the extension of the definition of inside information to commodity derivatives, as this would de facto rules the underlying physical markets and would have a major impact on them and the economy as a whole. A specific market abuse framework is needed for commodity derivatives and must be designed in relation with the underlying physical markets.*

- *There is no such thing as an attempt at market manipulation but only actual manipulations. The challenge is to move away from the criterion of impact on the price to other criteria that regulators could use to qualify the abuse. These need to be defined precisely to allow firms to operate in a secured regulatory environment.*

- *MTFs that compete with regulated markets should be applied similar requirements as regulated markets in terms of surveillance. There is room in the EU economy for MTFs that play a role as "incubators" for the financing of SMEs and aware investors and issuers should be free to decide whether they wish to deal on these markets or not.*

- *Derivatives whose underlying is within the scope of the MAD should be brought in as well. Other derivatives whose underlying are not financial instruments that present the same characteristics as securities should be assessed on a case-by-case basis by ESMA to decide whether or not they should be placed within the scope. This will set whether MTFs that deal with these instruments should be within the scope of the MAD or not.*

- *There are practical issues of cooperation among Member States that firms face in their day-to-day business that should be dealt with as part of the revision.*

- *The protection of the party notifying a suspicion needs harmonizing and should be reinforced by the Directive.*

GENERAL OBSERVATIONS

The extension of the scope of the MAD should not be conducted without considering matters of efficiency and priorities

3. Stock markets have experienced a process of fragmentation in Europe since the implementation of MiFID, which considerably impairs the regulators' view of the activity on the stocks that fall within the remit of their surveillance and creates opportunity for criminals to commit market abuse.

In AMAFI's view, these shortcomings should be considered when revising the MAD on two counts:

- First, to ensure the revision deals with this issue and improvements are suggested to resolve it, which should constitute the utmost priority;

- Second, to ensure the extension of the MAD focuses on the areas that create the biggest concerns in terms of market abuse and that will bring results in terms of enforcement actions. This notion of efficiency should not be overlooked, as setting up and running surveillance systems require major investments in systems and human resources that not all competent authorities are able to commit. Requesting them to monitor all financial instruments is possible but it is not realistic to think that it would result in all financial instruments being monitored properly. The EU should aim at efficiency in its surveillance by focusing its resources on these areas where the risks of market abuse are the highest.

4. For this reason, AMAFI suggests that a two-tiered approach be followed for possibly extending the MAD to other financial instruments (derivatives and instruments other than bonds and stocks that are traded on MTF) (see below §§ 22 and following).

The revision of the MAD, coupled with the one of MiFID, should include a complete overhaul of the transaction reporting system and the market surveillance in the EU

5. The revision of the MAD should be taken as an opportunity by the Commission to set up a proper monitoring structure, as the current reporting system creates duplications, inconsistencies among member States and inefficiencies and the TREM system is not sufficient to provide an exhaustive view to regulators in this fragmented environment.

During the public hearing held on the 2nd of July in Brussels on the subject, the Commission services mentioned that the objective of the revision should be ambitious. This ambition should be embodied in the implementation of a centralised reporting system in the EU with at distance connections by authorities that would offer to each competent authority a view of all trades executed on a given financial instrument.

The 27 competent authorities could also pool their surveillance resources together, i.e. not only data but also IT and human resources. This would in our view help authorities develop a common expertise and reduce costs of development and maintenance of sophisticated IT systems.

6. In addition, extending the scope of the MAD will create new reporting obligations for firms and will undoubtedly increase the dimension of the current issues experienced by the reporting system (duplication of reporting, inconsistent requirements, fragmented reporting among several Member States) unless they are resolved via a revision of the current reporting rules (i.e. mainly, clarification of the notion of where a transaction is executed, including in the case of distant access to a market - and reporting of branches' transactions).

7. Hence the extension of the scope of the MAD should be coupled with a complete overhaul of the reporting mechanism set by MiFID to ensure Member States give themselves the necessary tool to achieve the objective of improving the fight against market abuse.

Market abuse deterrence is also linked to procedural matters for which greater harmonisation would be beneficial

8. Harmonisation of minimal (and maximal) sanctions within the EU is an important step towards effective deterrence in the EU. Yet, enforcement is also linked to procedural rules that Member States adopt with regards for e.g. to the investigation of suspected cases of market abuse and the rights of defence (including procedures to allow the hearing of the opposite party).

Although this is not an area that can be easily harmonised, competent authorities could work at drawing up common guidelines in these respects so as to bring about greater consistency in their enforcement procedures. This would help promote the development of a common expertise and be protective of the rights of the defence in a contradictory process. It would also help reduce opportunities for regulatory arbitrage. In AMAFI's view, this is an initiative that ESMA could lead, as part of the effort to increase deterrence of market abuse.

Technical comments on the Commission services' suggestions for amending the wording of the Directive

Proposed definition of inside information for commodities

9. The Commission services propose to define "inside information" with respect to commodity derivatives as "*information of a precise nature which has not been made public, relating, directly or indirectly, to one or more such derivatives and which if it were made public, would be likely to have a significant effect on the prices of such derivatives or affect the price of the underlying asset*".

Apart from AMAFI's disapproval of this alignment on the definition of inside information for financial instruments (see §§ 12 and following), there are in our view two technical issues with this proposal:

- The term "significantly" should be added at the front of the last part of the sentence: "*or affect* ***significantly*** *the price of the underlying asset*";

- The effect could be either on the price of the derivative or on the price of the underlying asset. The obligation to abstain from trading (*Directive 2003/6/EC, art. 2*) refers to the acquisition or disposal (or attempt to acquire or dispose) of a financial instrument to which the inside information relates. The proposed definition creates uncertainty as to the financial instrument the information "relates" to: it could be to the derivative only (restrictive interpretation based on the syntax of the definition) or also to the physical commodity (extensive interpretation based on the fact that the inside information can also have an impact on the underlying asset). This uncertainty should be removed.

Proposed definition of market manipulation via CDS

10. The Commission services propose to prohibit manipulation of "*any financial instrument not admitted to trading on a regulated market or an MTF in a Member State, but which can have an impact on the value of a financial instrument admitted to trading on a regulated market or on an MTF*".

"Price" should be substituted to "value" if this prohibition is kept as such.

Articulation of the building blocks of the Directive

11. More generally speaking, the Directive sets a definition of inside information (art. 1.1), then the obligation of abstaining from trading and communicating the inside information (art. 2), then the obligation to report suspicious transactions (art. 6. 9.), then the scope of the directive (art. 9).

The logic of the articulation between these building blocks should be reviewed to ensure the Directive reads more easily and the definition of "insider dealing" should be provided (terms used in art. 6.9 but not defined).

ANSWERS TO THE CONSULTATION'S QUESTIONS

A. – Extension of the scope of the directive

(1) Should the definition of inside information for commodity derivatives be expanded in order to be aligned with the general definition of inside information and thus better protect investors?

Commodity derivatives differ significantly from derivatives of financial instruments

12. Prevention of market abuse on commodity and commodity derivatives markets is indisputably an important objective but the means to achieve it need to be thoroughly thought out.

Aligning the definition of inside information for commodity derivatives on the existing one for financial instruments, as proposed by the Commission services, is assuming that participants in commodity derivative markets can be assimilated to the ones in "classical" markets (in terms of their objectives and activities) and that information asymmetries can be dealt with in the same manner. This is not the case though: commodity derivatives differ from other financial instruments on these two aspects because their underlying is a commodity and not a financial instrument.

As far as financial instruments are concerned, a company who issues securities makes the deliberate choice to have them listed on a market and to impose on itself the constraints of the resulting transparency requirements, whereas for commodities, there is often no such issuer, but rather producers and industrial companies, and no decision on their part to put their goods on the market.

Applying to commodity derivatives a broader definition of inside information that would be based on the impact of the information on the price (of the derivative or of the commodity) and not on the information usually available on these markets, would result in the obligation for any person holding this information to abstain from trading[1], which would include such market participants as producers and users of the commodity concerned (and in some cases even Member States) who structurally hold information that may have an impact on the price of the derivative or the commodity.

Aligning the definition would de facto set the transparency rules applicable to all physical markets, which is unlikely to be appropriate

13. Participants in physical commodity markets would therefore be constrained in their trading and hedging or lead to publish information as a result of the creation by others of derivatives on the commodity they deal with, without having been part in the decision process to set up such financial instruments. This situation would be at odds with the one that exist in derivatives of financial instruments where issuers knowingly accept the constraints resulting from admission to a regulated market[2].

As an example, if a cooperative of wheat producers wins an important international tender offer, which would be considered as inside information according to the proposal, it will not be able to hedge the price of its offer as long as the result of the tender offer is not published in newspapers, which could take a week. Hence, this will result in the cooperative being at risk of market fluctuations during that time. The

[1] See comment § 9 second bullet.

[2] The Directive acknowledges that there should be an element of willingness from the issuer for its securities to fall within the scope of the MAD since the transparency requirements do not apply to "*issuers who have not requested or approved admission of their financial instruments to trading on a regulated market in a Member State*" (*Directive 2003/6/EC, art. 9*)

consideration of this risk could lead the cooperative to propose less competitive prices in the future, hence putting it at a competitive disadvantage compared to non EU players (and a market that is global).

This proposal would therefore have a major impact on some of the commodity markets concerned, as it would reshuffle the flow of information on these and the competitive powers of the participants and restrain their trading activity.

14. It is therefore not possible to enlarge the definition of inside information for commodity derivatives without considering the impact this would have on their underlying physical markets: to do such a thing would necessarily set transparency rules applicable to these markets, which may not be adapted and may have adverse economic effects that would not be limited to the financial world but would also hit the physical markets and more generally, the economic world.

A specific market abuse framework is needed for commodity derivatives, that is intimately linked to the corresponding physical markets

15. It is a given fact that for a number of physical markets, transparency rules still have to be set up and this is not an easy task since there are structural asymmetries of information in those markets. The issue highlighted by the Commission services that transparency in these markets needs to be improved and that practices and rules around information disclosure are not precise enough is real. But it should be dealt with directly rather than circumventing it by modifying the definition of inside information : the concept of inside information will become clear on these markets once information that ought to be public will have been defined, not the opposite.

Besides, the diversity of the type of commodities concerned (emission allowances, agricultural products, oil, gas, etc.) calls for a solution that is adapted to each of them, since the roles of market participants and the information flow pertaining to each market may differ significantly. Ultimately, deterring market abuse on commodity derivatives can not happen without conducting an analysis on the underling commodities markets, in close cooperation with the regulators of these markets when they exist.

AMAFI therefore calls for a more thorough examination of these issues by the Commission services. The MAD, which was built with financial instruments in mind (used directly or as underlying) must not be copied and pasted on markets dealing with commodities.

The revision of the MAD should not be delayed to deal with commodities and the solution to this matter should not be rushed to keep with the revision's timetable

16. This review must be conducted with regulators of the underlying physical markets when they exist, considering as well the global nature of many of these markets. This could lead to a distinct directive specific to the commodities markets (and their derivatives) or to a separate section in the current MAD. If the latter option is chosen, then the thinking that is needed on this matter should not be postponed to a later date in favour of a quick solution that would not be adapted but would fit in the timetable that is set for the revision of the MAD. The revision of the MAD should follow its course according to this timetable and later additions could be made to it to deal with the specific matter of commodities (via for example an implementing directive).

17. Hence, AMAFI does not agree that the definition of inside information for commodity derivatives should be aligned on the one for financial instruments and considers that a reference to the information that participants would expect to receive should be maintained, as it is presently the most appropriate concept to catch insider dealing on these markets considering the current degree of transparency on most of them.

(2) Should MAD be extended to cover attempts to manipulate the market? If so why? Is the definition proposed in this consultation document based on efficient criteria to cover all cases of possible abuses that today are not covered by MAD?

One could wonder whether it is worth diverting resources of competent authorities on cases that do not harm market integrity

18. AMAFI understands the objective of the Commission services here, which is to catch manipulative behaviours that may not have an identifiable impact on the market. But considering the priorities that should guide the revision of the Directive (see § 3 above), and the more important issues that are at stake, one could wonder whether it is worth using competent authorities' resources on matters that do not impact the market.

Catching behaviours rather than actual harms to the market is understandable in an ideal world with unlimited monitoring resources. However, to the extent that the behaviours in question, though morally reprehensible, have no impact on the market, one could wonder whether they actually constitute market abuse? It is given that the cornerstone of the market abuse directive is the integrity of the market and that this notion has a moral aspect to it, but as long as market integrity is not harmed, one should wonder whether it is worth for market regulators to focus on such behaviours?

The objective here is not so much to catch attempts but rather actual manipulations that had no impact on the price

19. AMAFI understands that the objective of the Commission services here is to catch manipulative behaviours that did occur (i.e. these are not "attempts") but have had no identifiable impact on the price, because this impact is so small that regulators have difficulty proving it is the result of the manipulation.

The concept of "attempts" is therefore not adequate and this proposal should not be maintained, especially since it introduces confusion as to the objective of the regulator and creates an unsecured regulatory environment for firms.

If impact on the price is not a sufficient criterion to assess manipulation, then the profit made (or the loss avoided) could be used as a substitute

20. Manipulative behaviours that do not have an identifiable impact on the price may still generate a sizable profit (or avoided loss) for the person committing them, to the detriment of other market participants. An alternative approach to the issue could be to give competent authorities the ability not to consider the impact on the price but the profit made (or the loss avoided) by the perpetrator because of this behaviour. This approach would however require that the elements that are constitutive of a market manipulation be present, and that they could be assessed based on sufficiently precise criteria and signals. This is a pre-requisite to ensure that this change does not end in considering as a manipulation a profitable trade that is perfectly legitimate.

If other criteria than the impact on the price are needed to qualify manipulation, the Directive needs to be amended to ensure constituents of market manipulation are clearly laid out so that the burden of proof does not fall on firms

21. If the Commission services were to maintain their proposal that "*regulators would not have to prove that behaviour intended to manipulate the market actually had that effect*", or were to consider other types of impact like the profit or loss made as mentioned above, safeguards should be added to the Directive to ensure that there is indeed a case of attempted market manipulation: if market manipulation cannot be assessed through its impact on the market (which is paradoxically the objective of any manipulation), then clear constituents of the manipulation must be defined and the examples contained in the directive are not sufficient for this purpose. For example, the signals that are listed in article 4 of the implementing Directive 2003/124/CE are all but one (see c. of the article) referencing the impact on the price of the instruments. Similarly, the examples provided in article 1 of Directive 2003/6/CE for the type of manipulation targeted here, are all based on the price of the instrument.

Defining these constituents would provide firms with a secure regulatory framework so that they are not placed in the paradoxical situation where they would have to prove that they have not manipulated the market (yet with no effect) – regulators should still have to prove the presence of elements constitutive of market manipulation.

As an example, as far as soft commodities are concerned, if the impact on the price of the manipulative behaviour is not a key criterion anymore, then there is a risk that a producer or user that is a leader on the market of the commodity could be considered as having a manipulative behaviour, whereas it plays a legitimate role, that is key, in contributing to the physical exchanges of the commodity and aligning the price of the derivatives market on the price of the commodity.

Hence, if the Commission services maintain their proposal (or add a consideration of the profit made or the loss avoided, as suggested above), constituents of market manipulation when there is no impact on the price should be clearly identified in the Directive.

(3) Should the prohibition of market manipulation be expanded to cover manipulative actions committed through derivatives?

22. One should note that derivatives of an underlying admitted to trading on a regulated market falls within the scope of the directive as far as insider dealing is concerned but not for market manipulation.

There are indeed reasons to extend the scope of the MAD to derivatives of financial instruments that themselves fall within the scope of the MAD (i.e. instruments admitted on regulated markets) and AMAFI supports this initiative. To the extent that the issuer of a financial instrument has made the choice to have its financial instruments listed on a venue falling within the scope of the MAD, then the derivatives of these financial instruments, whatever the venue (including OTC) they are executed on, should also fall within its scope, including with respect of its requirements on market manipulation.

23. However, and putting aside the case of commodities, the possibility that exists for bonds and stocks to be admitted on a venue that falls within the scope of the MAD, does not always exist for other financial instruments. Other underlying (FX, interest rates, volatility, etc.) are not subject to similar transparency rules, do not have a concept of "issuer" and may have no effect on financial instruments that are within the scope of the MAD, hence do not pose the same threat in terms of market manipulation and insider dealing.

A case-by-case approach should thus be adopted to consider each type of derivatives (apart from the ones whose underlying is a stock or a bond) and decide whether it should be covered by the MAD. In addition, for each type of derivatives covered, signals and examples should be provided to set a line between what is a manipulation and what is not and help firms set up appropriate surveillance systems. ESMA should be entrusted with carrying out these tasks, with the help of an expert group for example.

This would have the advantage of focusing the competent authorities' attention on the areas where their surveillance is the most needed, while taking into account the specifics of the various derivatives concerned and allowing for an appropriate monitoring.

24. As far as commodities are concerned (please see above § 12 to 1617 for AMAFI's view on these), again, a specific market abuse framework is needed because 1. these markets are different in the way they operate and 2. the type of manipulation that can happen on the commodity derivatives markets are different to the ones that can be committed on derivatives of financial instruments.

As an example of 1., it may happen that the size of the regulated market for a soft commodity is too small to allow leading participants to hedge their risks without impacting the price of the derivative. As a result these participants execute only a portion of their hedge on the regulated market and execute the rest over-the-counter. This OTC execution, although it can be sizeable, is not done with the intention to manipulate the market and should not be considered as such.

As an example of 2. for soft commodities like wheat, the possibility to deliver the goods physically is critical to keep the derivatives market prices in synch with the physical markets' one, allowing for efficient hedging. When the spread between the two prices becomes too large, it is critical that delivery can take place and that there is enough capacity in the grain elevators to allow it. Hence, an example of manipulation would be for a market participant to corner the market by reducing storage capacities, a type of manipulation that is not dealt with by the directive at the moment.

If AMAFI agrees that market abuse rules should be set up for commodity markets and their derivatives, it therefore strongly suggests that it should be specific and separate form the current MAD.

Questions 4, 5 and 6:
(4) To what extent should MAD apply to financial instruments admitted to trading on MTFs?
(5) In particular should the obligation to disclose inside information not apply to issuers who only have instruments admitted to trading on an MTF? If so why?
(6) Is there a need for an adapted regime for SMEs admitted to trading on regulated markets and/or MTFs? To what extent should the adapted regime apply to SMEs or to "companies with reduced market capitalisation" as defined in Prospectus Directive? To what extent can the criteria to be fulfilled by SMEs as proposed for such an adapted regime be further specified through delegated acts? Do you consider that the scope of the MAD should go beyond regulated markets? In particular, should it be extended to cover MTFs?

25. AMAFI agrees that the interests of SMEs should be considered as part of the revision of the MAD but does not think that the proposed approach is the right one and suggests another one set out below (that it has already developed in its answer to the EC's call for evidence launched on 20 April 2009 - see *AMAFI/09-34* – and that is copied in Appendix 1 of this paper for reference).

This position rests on two main observations:

- **There is indeed a need for a level playing field between organised markets and MTFs but not all MTFs compete with organised markets.**

  For MTFs that deal with the same financial instruments as the ones admitted to trading by organised markets, there is no doubt that MAD should apply… but this is already the case given that article 9 of Directive 2003/6/CE provides that wherever a transaction is executed, it falls within the scope of the MAD as soon as the financial instrument concerned is admitted to trading on a regulated market. To create a level playing field between these venues, the additional step to be taken is the one proposed by the Commission services in its consultation paper (§ 5 of section C. Single rule book) that would require from these markets a proper surveillance infrastructure, a proposal which AMAFI supports.

- **There should still be market places in the EU where both issuers and investors, at their own risks, of which they are fully aware, could decide to deal on and that are not within the scope of the MAD**.

  The investor protection principle should not apply at the expense of the freedom of choice of issuers and investors. Maintaining the opportunity for small and mid-size companies to access capital markets via the admission to trading on smaller MTFs, with lesser constraints (and, obviously, with a much more limited set of potential investors) is important in terms of providing "incubation" places where companies can develop (see for example Alternativa or Marché Libre in France).

  In accordance with MiFID, access to these financial instruments must indeed be limited to knowledgeable investors for which they are suited and firms, must warn their clients wishing to invest on such venues of the risks that they are taking but as a principle, people should not be prevented from taking a risk they understand and are willing to take.

26. This is why AMAFI does not support the proposal that some requirements of the MAD could be lessened for some MTFs dealing with the securities of SMEs[3]. This would be a source of confusion for non professional clients, as it would in practice create two different MAD frameworks, which it is doubtful non professional investors would clearly understand. A risk would be created that investors invest in MTFs that are not fully covered by the MAD without understanding the risks that they are taking, which in our view is far worse than the clear-cut situation were an MTF is fully covered or not.

Member States should be the best placed to decide whether a MTF (that does not deal with securities admitted on a regulated market) should fall within the scope of the MAD. These MTF could be called "organised MTFs" in the Directive and a definition should be provided that states that these are MTF that apply the Market Abuse rules. Also, MTFs that grow to a certain size or volume of exchange (or even financial instruments whose trading volume has reached a certain threshold) could be reviewed by ESMA to decide whether they should move to an "organised MTF" status. Having said that, one could wonder if such a safeguard would prove useful in practice because such appetite for non organised MTFs is rather unlikely (or, at least, would be paradoxical) coming from investors who do not benefit from the protection that MAD offers.

27. Furthermore, ESMA could play a role in deciding whether the market abuse framework should apply to these varied MTFs that do not deal with "classical" financial instruments such as stocks and bonds (interest rate swaps, credit derivatives, commodity derivatives, currency options …). Again, a one-size fit all approach to MTFs that can be very different is inappropriate considering the nature of the financial instruments involved. It would result in repatriating within the scope of the Directive financial instruments that should not be covered (see § 23 above) and would impose an unnecessary burden on competent authorities in terms of surveillance effort.

For example, it would be inappropriate to extend to an MTF the obligation on issuers to disclose inside information (Question (5) of the consultation paper) when this MTF deals with derivatives for which there is no issuer.

28. The proposal to extend the scope of the MAD to financial instruments not admitted to trading on a regulated market or an MTF but which can have an impact on the value of a financial instrument admitted to trading on a regulated market or an MTF is surely aiming more specifically at CDS.

AMAFI agrees that CDS should be covered to the extent that their reference obligation falls within the scope of the MAD. Hence, AMAFI would favour a wording that would clearly target impacted instruments that are covered by the MAD, which would read as: "*other financial instruments which can have an impact on the value of a financial instrument covered by the directive*".

B. – Enforcement powers and sanctions

(7) How can the powers of competent authorities to investigate market abuse be enhanced? Do you consider that the scope of suspicious transactions reports should be extended to suspicious orders and suspicious OTC transactions? Why?

29. The enhancements proposed by the Commission are already in force in France and AMAFI supports the harmonisation of powers and sanctions in the EEA.

[3] In addition, it does not believe that the proposed simplification is sufficient for SMEs, as in addition to disclosing inside information, another burden consists in maintaining insider lists, a matter that is not addressed here.

30. Suspicious transactions reports already include orders. Article 6 of Directive 2003/6/EC refers to "transactions" but does not limit them to executed transactions. Furthermore, the definition of market manipulation (*Directive 2003/6/EC, article 1*) explicitly refers to orders (as well as examples of signals listed in articles 4 and 5 of Directive 2003/124/EC).

Similarly, as far as insider dealing is concerned, article 2 of Directive 2003/6/EC, which sets the requirement to abstain from using the information, refers to "*trying to acquire or dispose*" of financial instruments, which clearly covers orders.

If there is a confusion introduced by the term "transaction" used in article 6, then AMAFI agrees that it should be clarified.

(8) How can sanctions be made more deterrent? To what extent need the sanction regimes be harmonised at the EU level in order to prevent market abuse? Do you agree with the suggestions made on the scope of appropriate administrative measures and sanctions, on the amounts of fines and on the disclosure of measures and sanctions? Why?

31. AMAFI agrees that a minimum should be set across the EU for the amount of an administrative fine, as it would be a step towards ensuring competent authorities impose sanctions of a similar force across the EU. In the same vein, a maximum should be set as well (France is setting this maximum at EUR 100 million[4]), as it also serves as a deterrent if it is high enough.

An exception should however be permitted so that this minimum could be reduced to the amount of the profit made or the loss avoided in cases where the person has cooperated in the investigation or acknowledged the facts, or when the financial or personal situation of the person is such that the payment of the fine can not be met.

A possible option to foster harmonisation of practices would be to charge ESMA to carry out a regular review (like for e.g. every 18 months) of the sanctions imposed by competent authorities in the EU, with the aim of ensuring that the minimum is abided by and that similar cases lead to similar sanctions.

(9) Do you agree with the narrowing of the reasons why a competent authority may refuse to cooperate with another one as described above? Why? What coordination role should ESMA play in the relations among EU competent authorities for enforcement purposes? Should ESMA be informed of every case of cooperation between competent authorities? Should ESMA act as a binding mediator when competent authorities disagree on the scope of information that the requested authority must communicate to the requesting authority?

32. ESMA's involvement in matters of cooperation between competent authorities is welcome. AMAFI sees its actions in this respect as a way of fostering greater harmonisation of practices and as such welcomes the proposal that ESMA be involved in resolving disputes between competent authorities.

It is not clear though for what purpose ESMA would be informed of every case of cooperation between competent authorities. In this context, AMAFI does not see for which reason competent authorities should be burdened with such an administrative task.

[4] Via a draft bill under discussion in the Senate, the "Projet de loi de regulation bancaire et financière, art. 5D.

(10) How can the system of cooperation among national and third country competent authorities be enhanced? What should the role of ESMA be?

33. ESMA could indeed play a role in improving cooperation between its members and third country competent authorities, especially in cross-border investigations involving several of its members. ESMA could for example coordinate and channel requests from third country competent authorities. It could also play a role in setting up agreements of mutual recognition between its members (or a subset of its members) and a third country.

34. As for the cooperation among competent authorities, it could be further enhanced with regard to transactions executed on a venue as a distant access member. There is still confusion and disagreement among authorities as to which one is competent to receive STRs related to such transactions. ESMA could help resolve this issue. For the sake of simplicity, in such situations, investment firms would rather send their STRs to a single authority, their Home regulator.

35. Cooperation among competent authorities could also be enhanced as regards cross-border investigations conducted to identify market abuses. Article 57 of MiFID sets cooperation rules among competent authorities in respect of surveillance and investigations and is therefore applicable in the context of market abuse. Apart from the case of distant market access, the rules set out that a competent authority that intends to carry out an investigation in another Member State should send a request for cooperation to the Member State's competent authority.

In practice, firms often receive direct requests from other Member States' authorities as part of an investigation, their Home authority having not been informed and current rules are not clear enough to help competent authorities resolve their differences on these.

There is thus a need for a clearer delineation of the situations where a competent authority can send direct requests to firms and from the ones where it must go through the local competent authority. One way to achieve this would be for ESMA to adopt guidelines with clear criteria as to when a competent authority should seek cooperation from a local competent authority before addressing a request to a firm.

C. – Single Rule book

(11) Do you consider that a competent authority should be granted the power to decide the delay of disclosure of inside information in the case where an issuer needs an emergency lending assistance under the conditions described above? Why?

36. The narrowing of the question to emergency lending assistance is surprising considering that the consultation paper sets out a larger context in which competent authorities could be granted such power. AMAFI's answer therefore should be read within this larger context.

AMAFI agrees that competent authority could be granted this power. The relationships between the issuer and the competent authority should be considered though, as it is unlikely that a competent authority will be aware of the emergency situation without first receiving a warning from the issuer. The nature of the obligations resting on the issuer in this respect should therefore be clarified.

37. This should also be looked at from the perspective of the articulation between the prudential regulator and the market regulator which are distinct bodies in some Member States. There should be a mechanism to set how the information should flow between the issuer, the prudential regulator and the market regulator. Also the respective responsibilities of both regulators as to the assessment of the situation should be clear.

(12) Should there be greater coordination between regulators on accepted market practices?

38. It should be possible to apply a market practice accepted on the reference market of a stock on all markets where that stock is traded in the EU, especially since that stock's surveillance is under the responsibility of the competent authority of the reference market who should ensure the rules governing the practice are abided by wherever the stock is traded.

This could be an issue in terms of investigation and sanctioning power when the firm suspected of trespassing the AMP is located outside of the competent authority' s Member State. Greater coordination between competent authorities is therefore needed in this context.

39. If ESMA was to issue binding technical standards with respect to AMPs, these should not deprive a competent authority of its power to accept a market practice (i.e. no subordination to the agreement of ESMA should be introduced). The standards that ESMA would set should relate to criteria that should be considered when deciding on the acceptability of a practice, they should not have the effect of calling into question market practices that have already been accepted by competent authorities.

(13) Do you consider that it is necessary to modify the threshold for the notification to regulators of transactions by managers of issuers? Do you consider that the threshold of Euro 20,000 is appropriate? If so why?

40. AMAFI agrees that the current threshold is ineffective in practice and should be set at a higher level. A more flexible approach could also be to give ESMA the power to set that threshold (and update it from time to time).

(14) Do you consider that there are other areas where it is necessary to progress towards a single rulebook? Which ones?

41. AMAFI considers that there are other areas where a common rule book is necessary. These are set out below.

Firms should be given the means to check whether a prospective employee was previously convicted of market abuse

42. Firms aim at ensuring that the staff they are hiring meets high standards of integrity. One of the basic checks to carry out for this purpose is to verify whether the applicant has been convicted of market abuse. But this check is not made easy, as no procedure is in place to allow it. When such a procedure exists in a Member State, its effectiveness is often limited since only local convictions that were made public are considered.

Although an EU register of convicted individuals accessible to all firms is certainly not a feasible solution for reasons of personal data privacy and criminal laws, the revision of the MAD should include a mechanism whereby firms could put forward specific requests to a central body to obtain information, if available, on recent sanctions imposed on the individual concerned. Such a process would ensure that firms are aware of the risks they are taking when hiring new staff and are in a position to manage these risks accordingly.

Another solution would be to harmonize the regime of "approved persons" by involving regulators who would be responsible for maintaining a list of approved persons.

The content of suspicion transaction reports should be harmonised

43. Although the content of the suspicious transaction report is harmonised as to the type of information that it should include (*Directive 2004/72/EC, art. 9*), there are numerous differences in the actual detail that is required by the various competent authorities, creating unnecessary complexity in the organisation of firms with cross-border activities.

CESR has published a standard format in its "First set of guidance and information on the common operation of the Directive" (*CESR/04-5056, 11 May 2005*), that is still not used consistently across all jurisdictions. This template should therefore become part of the implementing directive (via an appendix for example).

The transfer of suspicion transaction reports between competent authorities should not lessen the protection due to the reporting party

44. Article 11 of Directive 2004/72/EC provides some protection to the person having notified a suspicious transaction to a competent authority, as the authority should not disclose to any person the identity of this person. But this protection is offered only in the case where such disclosure "*would, or would be likely to harm the person having notified the transactions*".

This caveat is an issue because, in practice, this harm is experienced whenever the disclosure happens. When a defendant happens to know who the reporting party is, it creates potential risks both for the firm and its compliance officer (whose identity can be found easily once the name of the firm is known). The physical integrity of a firm's staff in charge of the notifications may be at stake. As for the firm, it takes a commercial risk when reporting suspicions to the authorities, especially when the suspicion on the concerned client or counterpart turns out to be without basis. This risk is not theoretical, as there's been a recent case where the press has made public an STR sent by a firm to an competent authority[5].

45. The revision of the Directive should therefore provide the opportunity to reinforce this protection in the situations where:

- the STR is transmitted to another competent authority in the EU
- the STR is transmitted to a judicial authority.

[5] Even when the defendant becomes aware of the transactions that are in the scope of the investigation, there are often several transactions concerned and several firms involved in different capacities, hence the identity of the reporting entity is not self evident.

In the first situation, the identity of the notifying person should be transmitted only when it is useful to the investigation, i.e. when the receiving authority cannot rely on the investigation already carried out by the transmitting authority and needs direct access to the notifying person in case further information is required. A change should be made to the Directive, so that the transmission of this information is not systematic but limited to responses to a specific request.

In the second situation, the STR is likely to become part of the elements that the defendant has access to in the course of the judicial proceedings. This is the reason why, in France, the STR is not physically transmitted to the judicial authorities, who receive instead the information contained on the STR (with the exclusion of the name of the reporting party)[6].

AMAFI would therefore like that the Directive be amended to offer this same level of protection across the EU.

(15) Do you consider that it is necessary to clarify the obligations of market operators to better prevent and detect market abuse? Why? Is the suggested approach sufficient?

46. AMAFI agrees that MTF who are within the scope of the MAD should exercise proper surveillance of their market with respect to insider dealing and market manipulation and should have a duty to report suspicious activity to their competent authority.

47. The rest of the Commission service's proposal (set out in § 5 of the consultation document) is unclear. Publication of information and reporting of suspicions are both provisions that are already in force.

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[6] « *Lorsque l'Autorité de marchés financiers transmet (…) certains faits ou informations au procureur de la République près le tribunal de grande instance de Paris, la déclaration prévue à l'article L. 621-17-2, dont le procureur de la République est avisé, ne figure pas au dossier de la procédure* », *Code monétaire et financier, art. L. 621-17-3*

APPENDIX 1
Extract of AMAFI's answer (AMAFI/09-34)
to the EC's call for evidence launched on 20 April 2010

- ***Do you consider that the scope of the MAD should go beyond regulated markets? In particular, should it be extended to cover MTFs?***

48. The primary objective of a market abuse framework is to protect investors by safeguarding market integrity. The need for such a framework is obvious: it creates confidence without which a large number of investors would not invest in financial instruments and, consequently, without which issuers would not be in a position to finance their development. But, in the same time, nobody can ensure that the market abuse framework, which imposes real constraints on issuers, investors and intermediaries, is the right response to every situation. Providing that some investors find advantages to it, some issuers may choose a less rigid framework offering less protection or even no protection at all.

Unilaterally extending the application of MAD to all MTFs may not therefore be appropriate, as it would reduce issuers' ability to find the right financing at the right price with the right constraints.

49. The European Commission seems to consider that ensuring a level playing field between MTFs is essential. In this respect, one should stress that all MTFs do not compete with each other and/or regulated markets. One should distinguish between MTFs providing an alternative trading venue for shares admitted to trading on a Regulated Market that do compete with it and between each other and other MTFs that offer small and mid-size companies the opportunity to access capital markets without constraints that could prove too costly. The securities traded on the former are already within the scope of the MAD and the latter do not usually compete with the former, as they attract different industrial segments and target different types of investors. Hence, although the principle of a level playing field between markets that are competing against each other must be supported, it does not apply as such to all MTFs.

50. If MTFs are brought closer to regulated markets, there is a risk that the distinction between the two becomes blurred or even nil, whereas market forces should be able to choose the best option. Furthermore, in a post-MIFID era, no investor can be advised to trade on a market that does not offer the protection appropriate to its situation: suitability and appropriateness obligations apply and are enforceable by competent authorities. In this regulatory context, the existence of different market types, offering different levels of protection, is not a source of increased risk for investors.

51. The extension of MAD to an MTF should therefore be optional, the result of the will of both the MTF and the issuers of its admitted securities. Such MTFs should be granted a specific status by the competent authority in charge of enforcing the applicable regulatory provisions.

52. In addition, depending on the MTF, this extension may not be fully fledged, as some of the MAD provisions may not be applicable due to the business model and liquidity of the MTF concerned. For example, prescriptions related to buy-back programmes and stabilisation activities may not be adapted to some markets: for those, the market abuse framework could be circumscribed to insider dealing and a more limited set of market manipulations.

Consequently, the extension of MAD to MTFs should allow for two types of statuses: one which would correspond to the full set of the MAD provisions; another one, which would correspond to a more limited set. On the opposite "unregulated" MTFs should be able to operate outside of a market abuse framework.

53. Finally, needless to say that the current rule laying down that MAD applies to a transaction not executed on a regulated market but related to an instrument that is admitted to a regulated market would work symmetrically for an MTF to which a market abuse framework applies: transactions executed on other venues and related to instruments admitted to trading on these MTFs would be within the scope of the MAD. Combined with the fact that MAD already applies to financial instruments admitted to trading on regulated markets (and therefore to transactions executed on MTFs where these instruments are traded) this proposal would significantly extend the scope of the MAD.