SJ - n° 2586/Div.
Interest representative register number:
5975679180-97

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European Commission
2/4 rue de Spa
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Paris, 9 June 2009

**AFG RESPONSE TO THE EUROPEAN COMMISSION'S CALL FOR EVIDENCE ON THE REVIEW OF DIRECTIVE 2003/6/EC (MARKET ABUSE DIRECTIVE)**

AFG[1] is very grateful to the Commission for having organised such a call for evidence, as the Market Abuse Directive is one of the cornerstones of the Financial Services Action Plan (FSAP) and was particularly intended to reinforce investor protection (including for professional investors that our members are) through a better market integrity. Although professional investors have to carry out their own due diligences, they cannot have a perfect knowledge of market situations – even less nowadays, with the development of fragmented markets due to Commission actions favouring the proliferation of trading platforms and internalisation. It is therefore crucial that regulators may prohibit and prosecute market abuse, in order to ensure fair markets to the benefit of all investors, including professional ones acting on behalf of third parties such as investment companies.

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[1] The Association Française de la Gestion financière (AFG)[1] represents the France-based investment management industry, both for collective and discretionary individual portfolio managements.

Our members include 409 management companies. They are entrepreneurial or belong to French or foreign banking or insurance groups.

AFG members are managing more than 2300 billion euros in the field of investment management, making in particular the French industry *the leader in Europe in terms of financial management location* for collective investments (with nearly 1400 billion euros managed, i.e. 21% of all EU investment funds assets under management), wherever the funds are domiciled in the EU, *and second at worldwide level after the US*. In the field of collective investment, our industry includes – beside UCITS – the employee savings schemes and products such as regulated hedge funds/funds of hedge funds as well as a significant part of private equity funds. AFG is of course an active member of the European Fund and Asset Management Association (EFAMA) and of the European Federation for Retirement Provision (EFRP). AFG is also an active member of the International Investment Funds Association (IIFA).

**<u>General comments</u>:**

**1.** <u>No need for lightening the MAD at this stage</u>

Only very few market abuse sanctions followed the implementation of MAD - which is rather recent in its transposition anyway. We therefore generally do not see the need for relaxing the rules at this stage.

In particular, no explicit case or concrete proof has been brought where the current legislation would harm either commodity/energy/gas players or securities issuers.

In any case, it would be a bad political signal if the MAD were to be "lightened".

**2.** <u>Extension of MAD to other markets/platforms than Regulated Markets</u>

We would in principle (subject to more in-depth analysis if the matter arises) agree on such an extension, in order to ensure the same level of safety for investors whichever market they invest on.

**3.** <u>No need for short selling regulation</u>

- no need of regulation as there was no proof that short selling restrictions limit market prices to go down or limit market abuse

- in addition, short selling is not more abusive than any other market practice and therefore should not be submitted to a specific treatment

- but if, for political reasons, national regulators still want to provide for short selling restrictions, then a common EU definition is absolutely needed - even though unfortunately for the moment neither IOSCO nor CESR were able to deliver a single one. We are very doubtful that the Commission would be technically better placed than IOSCO or CESR to provide for one...

- so, for the moment, there is definitely no need for regulation of short selling at EU level - and it would be even worse if done:

  - through the MAD, as it would wrongly imply that short selling is particularly abusive;

  - by the Commission, as it is not a technical expert body.

**<u>Specific comments</u>:**

*<u>Scope of markets</u>*

Question p. 5: from an investor perspective, it would a priori make sense to extend the MAD scope of markets in order to cover MTFs as well, subject to more in-depth analysis of practicality of course;

*Scope of financial instruments*

1st Question p. 7: ok for aligning MAD definition of financial instruments on the MiFID one - which was established more recently, and for the sake of consistency. But we do not see a need to clarify "whose value depends on another financial instrument". May be a non-exhaustive list of examples could be provided (such as futures and options vis-à-vis underlying securities; or index-based derivatives vis-à-vis single equities being part of the underlying index, for instance);

2nd Question p. 7: no need to extend to physical markets, but it must be made clear that physical markets (as underlying markets) may contribute to market abuse on their financial derivative markets (e.g. for instance the Sumitomo market manipulation case on the copper market in the 80s). But if physical markets are excluded, a clear definition must be provided (because currently the line is ambiguous in the area of energy, such as electricity and gas markets - although the Enron case should lead to include electricity in);

*Inside information*

1st Question p. 8: ok for not changing insider dealing prohibition definition. However, the relevant case-law and practical cases identified throughout the EU should be made more easily accessible by market participants - for instance through a 'push' information by CESR on its website - in order to give some helpful references (or even guidance) for market participants when they are trading;

2nd Question p. 8: yes, we support a priori an alignment of the inside information definition for commodity derivatives with the general definition of the directive as there is no justification for a differentiated treatment;

Question p. 10: we don't think that changes in the definition of inside information for disclosure purposes are needed, as no proof has been made for such a possible change;

1st series of Questions p. 11: we recognize that issuers may have concerns about the appropriate management of inside information. But we think that rather than changing the current requirements of the MAD, and in addition to Level 3 guidance, the Directive may reinforce the ability for issuers to contact the relevant competent authorities before deciding to delay the disclosure of inside information, or even state that then this delay is undertaken under the monitoring of the relevant competent authorities;

2nd Question p. 11: we don't agree on deleting the obligation for commodity derivative issuers, as long as clear proofs have not been given that this provision was harmful for these issuers;

Question p. 12: we support waiting for the consideration of the ECJ preliminary ruling before taking measures in order to further clarify the two approaches. In any case, it is clear that the second approach, implying demonstrating that the reason for the trade was inside information, is probably too strict as in practice the suspected persons will always be able to prove that there were other reasons for such trades. The very low number of cases following the implementation of the MAD shows that following only the first approach would be a better deterrent for market participants than the second approach;

Question p. 13: yes, the obligations to draw up lists of insiders seem to us as proportionate. To our knowledge, there were no harmful cases of this requirement until now. However, having an exhaustive set of requirements rather than minimum requirements for the content of insider lists would be obviously helpful;

1st Question p. 14: regarding transaction reporting by issuers and related persons, we don't see a need for a regulatory action;

2nd Question p. 14: we agree that rules on suspicious transactions reporting do not require modifications;

1st Question p. 15: we are not sure that an amendment of the MAD is necessary. It should depend on the occurrence or not of practical cases of restrictions for access to such records, at national level?

*Market manipulation*

2nd Question p. 15: we don't think that the definition of market manipulation should be amended. This definition came from an already internationally recognized one (through a IOSCO Report on Market Manipulation + a FESCO Report on Market Abuse), and there is a need for keeping flexibility in this definition. But once again, a better dissemination of the relevant case-law through CESR website in a "push" mode would be very helpful for market participants (as already suggested by us for insider dealing above), in order to provide practical guidance on what is allowed and what is not allowed;

Question p. 16: we consider that the rules on 'Accepted Market Practices' should be amended, not necessarily in the MAD itself but rather through CESR guidance, in order to avoid any regulatory 'dumping' among national jurisdictions - and also to avoid legal uncertainty for cross-border market participants such as our members (i.e. investment management companies);

1st Question p. 17: we don't think that the safe harbors for buy-back programs and stabilization activities should be reviewed. However, greater convergence is desirable in the application of Regulation 2273/2003, through CESR guidance;

2nd series of Question p. 17: we don't see a need for a comprehensive framework for short selling:

- as there was no proof that short selling restrictions limit market prices to go down or limit market abuse

- in addition, short selling is not more abusive than any other market practice and therefore should not be submitted to a specific treatment

- but if, for political reasons, national regulators still want to provide for short selling restrictions at national level, then a common EU definition is needed - even though for the moment neither IOSCO nor CESR was able to deliver a single one. We are very doubtful that the Commission would be technically better placed than IOSCO or CESR to provide for one...

- so, for the moment, there is definitely no need for regulation of short selling at EU level - and it would be even worse if done:

- through the MAD, as it would imply that short selling is particularly abusive;

- by the Commission, as it is not a technical expert body.

In addition, there is <u>no need to enhance risk management by financial intermediaries and banks</u>, as there is no proof of such a need as compared to the existing situation.

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We thank the European Commission very much for taking into consideration our comments and remain available for any further questions. Please feel free to contact myself at 33 1 44 94 94 14 (e-mail: p.bollon@afg.asso.fr) or our Head of International Affairs Division at 33 1 44 94 94 04 (e-mail: s.janin@afg.asso.fr).

Yours sincerely,

(signed)

Pierre Bollon