Amafi Association française des marchés financiers
FINANCIAL MARKET PROFESSIONALS

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ESMA's Discussion Paper on possible implementation measures under the Market Abuse Regulation - AMAFI's response

1. 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

2. The Association has been following closely the revision of the Market Abuse Directive and welcomes the opportunity to answer ESMA's consultation on its discussion paper regarding the possible implementation measures of the Market Abuse Regulation (DP).

Our answers concern all matters dealt with by the DP except for sections VI and VIII related respectively to the public disclosure of inside information and managers' transactions which are outside of AMAFI's core concerns.

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I. Buyback programmes and stabilisation (Article 3 of MAR)

Comments on I.1.1 – General conditions that buy-backs must meet

3. AMAFI understands that under MAR, it will no longer be possible to benefit from the safe harbour if the buy-back programme is carried out through "associated instruments" such as derivative financial instruments and that ESMA has no mandate to work on this matter. This being said, AMAFI regrets this restriction as compared to what was permitted under Regulation n° 2273/2003 (see Recital (8) and Article 5) and considers that this restriction is not well founded.

Questions

- **Q1: Do you agree that the mechanisms used in the Transparency Directive or comparable mechanism should be used for public disclosure regarding buy-backs?**

4. Yes.

- **Q2: Do you agree that aggregated figures on a daily basis would be sufficient for the public disclosure of buy-back measures? If so, should then the details of the transactions be disclosed on the issuer's web site?**

5. Aggregated figures on a daily basis are sufficient. No details of the transactions should be disclosed on the issuer's web site. The information which is currently disclosed is sufficient. More detailed information would be burdensome and of no use to the public. The competent authority will still be provided with details of all the transactions so there is no loss of information.

- **Q3: Do you agree to keep the deadline of 7 market sessions for public disclosure or to reduce it?**

6. Yes. The current system is satisfactory and should be kept even if harmonisation of the various reporting obligations could be an objective in the future.

- **Q4: Do you agree to use the same deadline as the one chosen for public disclosure for disclosure towards competent authorities?**

7. Under French law, full reporting to the competent authority is due monthly unless the issuer chooses to disclose to the public (as part of the disclosure due within 7 market sessions) all the details due to the competent authority. This system seems sufficient for the competent authority to exercise its supervision. Disclosure of all the details due to the competent authority within 7 market sessions would be unnecessarily burdensome.

- **Q5: Do you think that a single competent authority should be determined for the purpose of buy-back transactions reporting when the concerned share is traded on trading venues in different Member States? If so, what are your views on the proposed options?**

8. It is important indeed to have only one authority to whom reporting should be made. The best option is the home competent authority of the issuer. If the shares are admitted to trading on several regulated markets, the competent authority should be the authority of the Member State in which the issuer has its registered office (in order to avoid reporting to several authorities – and this is line with the provisions of the Transparency Directive). However, if the shares are not admitted to trading on the regulated market of the Member State in which it has its registered office, the reporting should be made to the competent authority of the Member State where the relevant market is the most liquid.

- **Q6: Do you agree that with multi-listed shares, the price should not be higher than the last traded price or last current bid on the most liquid market?**

9. In case of multi-listed shares, the price limit should be set taking into consideration all the regulated markets and multilateral trading facilities on which the shares are admitted to trading. Taking into account all of these markets, then the rule could be that the price should not be higher than the last traded price or last current bid on the most liquid market.

- **Q7: Do you agree that during the last third of the regular (fixed) time of an auction the issuer must not enter any orders to purchase shares?**

10. No, this proposal would be very difficult to implement throughout Europe, given the variety of systems and is impossible to implement for shares which are negotiated only as part of an auction.

- **Q8: Do you agree with the above mentioned cumulative criteria for extreme low liquidity? If not, please explain and, if possible, provide alternative criteria to consider.**

11. AMAFI does not agree with the cumulative criteria which are proposed to define “extreme low liquidity”. These criteria are too restrictive, notably regarding how often the share is traded (every 3 months would be preferable) or the free float which should rather be expressed as a percentage of the total capitalisation (for instance less than 15%). In fact, given the diversity of the liquidity profiles of the issuers, it should be up to the competent authority to define this notion for the markets it supervises.

- **Q9: Do you think that for the volume-limitation for liquid shares should be lowered and three different thresholds regarding liquid, illiquid and shares with extreme low liquidity should be introduced?**

12. The current 25% limit for liquid shares is adequate and should not be lowered. AMAFI is also strongly opposed to having three different thresholds as this would make things unnecessarily complex and difficult to manage.

- **Q10: Do you think that for the calculation of the volume limit the significant volume on all trading venues should be taken into account and that issuers are best placed to perform calculations?**

13. The volume limit, like the price limit (see Q6 above) should be set taking into consideration all the regulated markets and multilateral trading facilities on which the shares are admitted to trading. Regarding the calculation of the volume limit, indeed, the issuers are best placed to perform the necessary calculations based on significant volumes even though issuers may take into account all volumes traded (including insignificant volumes) on all trading venues.

- **Q11: Do you agree with the approach suggested to maintain the trading and selling restrictions during the buy-back and the related exemptions? If not, please explain.**

14. Yes, AMAFI agrees that the trading and selling restrictions and the exemptions provided for under the current regime should be maintained.

- **Q12: Do you agree with the above mentioned specifications of duration and calculation of the stabilization period?**

15. Yes, AMAFI agrees with what is proposed for the different types of instruments.

- **Q13: Do you believe that the disclosure provided for under the Prospectus Directive is sufficient or should there be additional communication to the market?**

16. Yes. The transparency conditions provided for under the Prospectus Directive are sufficient and no change is required in this respect.

- **Q14: Do you agree with these above mentioned details which have to be disclosed?**

17. In principle, AMAFI agrees with what is being proposed. However with respect to offers which are placed after trading hours, issuers are only required to disclose to the market the pricing of the operation, once it has been completed. Consequently, we would like the first sentence of § 38 to be modified as indicated below, the reference to "*the time of disclosure to the market of the price of the placement or offer of the relevant securities*" being the start of the time period during which stabilisation measures may be undertaken.

"For offers which do not fall under the scope of the PD it is necessary to adequately publicly disclose the fact that stabilisation measures may be undertaken ~~right before the opening of the offer period~~ ***at the latest at the time of disclosure to the market of the price of the placement or offer*** *of the relevant securities, that there is no assurance that they will be undertaken and that they may be stopped at any time".*

- **Q15: Do you agree that there should be an exclusive responsibility with regard to transparency requirements? Who should be responsible to comply with the transparency obligations: the issuer, the offeror or the entity which is actually undertaking the stabilisation?**

18. At first, it would seem logical to decide that the entity which is actually undertaking the stabilisation should be responsible for complying with the transparency obligations. The consequence of

this principle (disclosure to the market would be made by the investment firm in charge of the stabilisation operations) may not however be very clear for the market as the notices published by the investment firm would not be easily linked to the issuer concerned (and would not appear on the latter's web site). Therefore, it might preferable to decide that this information should be communicated by the investment firm to the issuer and publicly disclosed by the latter, which corresponds to the current practice. Alternatively, to deal with the situation where it is a sale and not an issue of securities, (in which case the issuer is not a party to the transaction) it could also be provided that this information which is disclosed to the competent authority (see § 44) is in turn made public by the competent authority itself.

- **Q16: Do you agree that there should be an exclusive responsibility with regard to reporting obligations? Who should be responsible for complying with the reporting requirements: the issuer, the offeror or the entity, which is actually undertaking the stabilisation?**

19. The reporting to the competent authority (if indeed this is what this question is about – as opposed to Q15 which relates to disclosure to the market) does not raise the same concern (that information reported by the stabilisation manager, therefore in its own name, may be difficult to find after a while for lack of link with the issuer concerned). Therefore the reporting to the competent authority could be done by the stabilisation manager. Alternatively, the proposal mentioned in relation to Q15 could also apply in this case.

- **Q17: Do you think that in the case of bi- or multinational stabilisation measures a centralised reporting regime should be established to exclusively one competent authority? If so, what are your views on the proposed options?**

20. The answer to this question should logically be the same as the answer to Q5 above regarding buy-back transactions reporting when the concerned share is traded on trading venues in different Member States. It is important indeed to have only one authority to whom reporting should be made. The best option is the home competent authority of the issuer. If the shares are admitted to trading on several regulated markets, the competent authority should be the authority of the Member State in which the issuer has its registered office (in order to avoid reporting to several authorities – and this is line with the provisions of the Transparency Directive). However, if the shares are not admitted to trading on the regulated market of the Member State in which it has its registered office, the reporting should be made to the competent authority of the Member State where the relevant market is the most liquid.

- **Q18: Do you agree with these price conditions for shares/other securities equivalent to shares and for securitised debt convertible or exchangeable of shares/other securities equivalent to share?**

21. Yes, AMAFI agrees that for shares/other securities equivalent to shares, stabilisation measures of the relevant securities may not be executed above the offering price.

22. With respect to securitised debt convertible or exchangeable in shares and other securities equivalent to shares, the situation is different as the market price of the convertible instrument is linked to the price of the share through which stabilisation can be carried out. ESMA's proposal, in that case, is that stabilisation through the underlying share may not be effected for a price higher than the market price of the share at the time of disclosure of the pricing of the convertible instrument to the public (which is different from the time of the pricing of the instrument). This does not take into account the variation that may occur between the time of the pricing and the time of disclosure of such pricing. This is why we would like to make two proposals for those instruments : the first one would be to state that stabilisation measures on the share may not be executed above the price which served as a reference to determine the pricing of the convertible instrument (if such price was made public); the second one (which may even be more appropriate) would be to state that stabilisation measures on the share may not be executed for

a price higher than the higher of the price of the share at two different moments: (i) the time the offer was launched or (ii) the time when the pricing of the convertible instrument was made public.

- **Q19: Do you consider that there should be price conditions for debt instruments other than securitised debt convertible or exchangeable of shares/other securities equivalent to share?**

23. AMAFI sees no reasons at this time to impose such price conditions. There should not be any conditions on debt instruments as the performance is judged on spread basis.

- **Q20: Do you agree with these conditions for ancillary stabilisation?**

24. Yes, AMAFI agrees with the proposed conditions for ancillary stabilisation.

- **Q21: Do you share ESMA's point of view that sell side trading cannot be subject to the exemption provided for by Article 3(1) of MAR and that therefore "refreshing the green shoe" does not fall under the safe harbour?**

25. No, AMAFI does not share ESMA's point of view that sell side trading cannot be subject to the exemption provided for by MAR and that therefore "*refreshing the green shoe*" does not fall under the safe harbour. First of all, it should be noted that in the version of MAR on which ESMA's Discussion Paper is based (as explained in footnote n°2 to the DP), the relevant Article of MAR is Article 3(2) which provides as follows:

"*The prohibitions in Article 9 and 10 of this Regulation do not apply to trading in securities or associated instruments for the stabilisation of securities when stabilisation is carried out etc...".*

On that basis, given that this Article refers to "trading in securities or associated instruments", there is no valid ground to assert that sell side trading has been excluded from the scope of the exemption.

No valid ground to exclude sell side trading from the scope of the exemption can be found either in the definition of "stabilisation" in Article 5(4b) of MAR which refers to "*any purchase or offer to purchase relevant securities or any transaction in associated instruments equivalent thereto".*

Therefore, rather than excluding automatically sell side transactions from the scope of the exemption, ESMA should consider whether such transactions may contribute to the stabilisation objective.

26. In this respect, AMAFI's view is that there are valid arguments to consider that sell transactions executed to refresh the greenshoe should benefit from the exemption under Article 3(2), as long as the refreshing is done in accordance with the stabilisation's objectives set by MAR.

These arguments rest on the dual advantage that this technique offers. The first advantage is to prolong the stabiliser's ability to carry out its duty towards the issuer by restoring its position so that it can make further purchases if the price were to fall again. The second is to enable it to provide liquidity in situations where there are more buyers than sellers and thereby maximise its role in reducing volatility.

As an illustration, sales are particularly useful for replenishing stabilisation capacity as regards fixed income securities, given that greenshoe options are not widely used in this market. If there is no greenshoe option, the stabiliser's position is limited to 5% of the initial offer. But this is a level that can be exhausted very quickly, especially in the event of high volatility in the security – that is, in precisely those situations where stabilisation is most necessary. For this reason, the stabiliser must be able to sell to replenish its over allotment capacity, restore its initial position and successfully accomplish its stabilisation objective.

Therefore, AMAFI disagrees strongly with ESMA's statement that "*selling in order to facilitate subsequent stabilising activity is not a behaviour that can be characterized as being for the purpose of price support*" and ESMA's view that "*such sales... nor any further acquisitions conducted after such sales"* are to be excluded from the scope of the exemption.

27. Having said that, obviously, the stabiliser's sell-side trading must be done in a way that does not compromise market integrity. AMAFI therefore considers that a compromise could be to state that sales executed within a stabilisation programme be considered covered by the safe harbour as long as they are done in accordance with the stabilisation's objectives set by MAR.

28. If any case, if ESMA were to keep the position outlined in § 51 of its DP, AMAFI would obviously and strongly support the statement that such sales should not be regarded as abusive solely because they fall outside the scope of the safe harbour. This is especially so since, for the Association, sales can be essential to the success of a stabilisation programme.

- **Q22: Do agree that "block trades" cannot be subject to the exemption provided by Article 3(-1) of MAR?**

29. The definition of ""stabilisation" in Article 5 (4b) refers to the notion of "significant distribution" which is defined (in Article 5 (5a)) as "an initial or secondary offer of securities that is distinct from ordinary trading both in terms of the amount in value of the securities to be offered and the selling method to be employed".

30. AMAFI would like to stress that 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 from ESMA on this particular issue, keeping in mind that the notion of significant distribution should prevail, irrespective of how the transaction should be carried out.

II. Market soundings (Article 7c of MAR)

Preamble

31. AMAFI has recently contributed to the regulation of market soundings in France, helping the AMF to revamp the applicable regulation. During close to two years, it went through a thorough analysis of the practice of soundings of French as well as non French firms[1].

Fully aware that the soundings' practice needs to obey a common regulatory framework in the European Union, AMAFI strongly supports the introduction of specific provisions on this matter in the Market Abuse Regulation.

[1] This work resulted in a professional Code of conduct formally approved by the AMF, with regulatory status (available in English at: http://www.amafi.fr/index.php?option=com_content&view=article&id=3122%3Alamafi-publie-son-code-de-bonne-conduite-sur-les-sondages-de-marche&catid=16%3Aactualit&Itemid=47&lang=fr)

32. The new French regulatory provisions having been in force for more than one year, experience shows that some issues exist, some of them making it necessary to amend the provisions.

As the standards envisaged by ESMA are very similar to the French set-up, AMAFI draws in its experience to answer the questions asked. We find that it may be useful as well to provide some more general comments on this topic.

In this respect, the first three comments below relate to the scope of the provisions of Article 7c and of the envisaged standards. As there are many situations where inside information may be communicated by a sell-side firm to potential investors outside of market soundings, extreme care should be taken in defining the scope of the standards. The risk otherwise is to apply the market soundings provisions to situations where they are not adapted.

General comments

- **The scope of the standards should be consistent with the mandate set by MAR**

33. Paragraph 55 of the DP states that Article 7c(9)[2] of MAR requires ESMA to develop draft RTS to determine arrangements and procedures for persons to comply with the requirements of Article 7c. However, this Article states that these RTS should concern only some aspects of Article 7c, i.e. paragraphs 5 to 9 of this Article ("*ESMA shall develop draft regulatory technical standards to determine appropriate arrangements, procedures and record keeping requirements for persons to comply with the requirements established by paragraphs 5 to 9 of this Article"*).

Similarly, the DP states that "*paragraph 10*[3] *of the same article requires ESMA to develop draft ITS to specify the systems and notification templates to be used by persons to comply*", yet such requirement, only concerns paragraphs 5 to 9 of this Article ("*ESMA shall develop draft implementing technical standards to specify the systems and notification templates to be used by persons to comply with the requirements established by paragraphs 5 to 9 of this Article, particularly the precise format of the records referred to in paragraphs 5 to 9 and the technical means for appropriate communication of the information referred to in paragraph 7 to the person receiving the market sounding"*).

Paragraphs 5 to 9 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).

Importantly, these paragraphs do not deal with instances where the information provided to the investor is not inside information. Hence, RTS including provisions relating to non wall-crossed soundings would have no legal basis.

34. Similarly, the RTS should not include requirements that are not prescribed by paragraphs 5 to 9 of Article 7c, i.e. the following measures are out of scope of the implementing measures that ESMA should draft and cannot be part of the standards:

- Agreeing among members of a syndicate (§§ 66, 69, 70, 75)
- The provision of certain types of information to the issuer and obtaining its agreement to carry out the sounding (§§ 68, 71 to 73, 76)

[2] There is a typo here, as this is Article 7c(10) that states this requirement to develop RTS, not Article 7c(9).
[3] There is also a typo here, as this Article 7c(11) that states this requirement to develop ITS, not Article 7c(10).

- Communicating a cleansing strategy (§ 84 and §§118-126)
- Reporting by the buy-side to the competent authorities (§ 110)

- **There are other situations than market soundings where inside information may be passed to third parties. These should not be subject to the rules applicable to market soundings.**

35. In § 54 of the DP, it is stated that "*MAR defines a "market sounding" as a communication of information, prior to the announcement of a transaction, to one or more potential investors*". It should be added that such communication is made "*in order to in order to gauge the interest of potential investors in a possible transaction and the conditions relating to it such as its potential size or pricing*" as mentioned in Article 7c(1) (d).

There is a formatting mistake in the text of MAR that resulted in this mention being erroneously inserted in point (1) (d) instead of being a common factor for (a) to (d).

The objective of the communication is inherent to the definition of market soundings and should not be left out, otherwise other situations where inside information may be passed to potential investors may be regarded as market soundings where they are not.

36. This is so in particular at the placement stage of securities or when a transaction cannot exist without negotiations being engaged with third parties (for example, with respect to some private placements): inside information may be passed at some stage to third parties without the objective of sounding them.

Managing this communication of inside information is necessary but does not have to be done in the same way as soundings because the arrangements taken for soundings are ill suited to these situations (use of scripts, confirmation, cleansing).Other set ups and controls exist to deal with the risk of improper communication of inside information, such as Chinese walls and the use of non disclosure agreements.

Hence, while it is true that the private side operations of sell side firms, "*such as investment banking and corporate finance are also subject to the same requirements (such as improper disclosure) as other sectors*" (*§ 63 of the DP*), some of their activities involving the communication of inside information to investors are not market sounding because they do not aim at gauging investors' interest but rather aim at setting up/negotiating the transaction that would not exist without it. The extent to which these activities are concerned by market soundings should therefore be made explicit, i.e. this is so only when communication concerns "*parties entitled to the securities*" as stated in the level 1 text.

- **Link to issuer (Section II.1.1 of the DP)**

37. AMAFI agrees that is important to specify what it means to "*act on behalf or for the account of the issuer*" and it agrees with the proposed approach.

The case where investors are contacted by a disclosing market participant (DMP) following his receiving a request for proposal (RFP) from an issuer should also be considered. The RTS should make clear that an RFP should not be equated to an instruction by the issuer to act on its behalf, since the decision to instruct a firm to carry out the transaction will only be taken later, based on the bids received from the various firms contacted. This addition is important to ensure a common playing field among Member States.

- **Investors are professionals**

38. Several of the provisions that are contemplated in the DP seem to be based on the assumption that investors may not be fully aware of the implications of their participating in a market sounding and that they need protection other and above the transparency that are due to them by the DMP. This is so for example as regard §§ 56 and 62).

Although it is absolutely fundamental that investors be correctly informed by the sell-side firms of the nature of the conversation that is to take place and that they have appropriate elements with which to form an informed decision, investors are professionals of the financial markets who are sophisticated enough and important enough in their fields so that their opinion count for sell side firms. It should therefore not be assumed that investors are so far from being at arm's length with the sell side that the sell side should cater for a potential lack of organisation or training at the investor's. It is the sell side's responsibility to carry out market soundings professionally but it should not rest on them to implement measures to compensate for the potential weaknesses of some investors.

- **Placing is not sounding (Section II.1.2 of the DP)**

39. The development made in § 60 is not very clear as to its practical consequences. If the objective is to indicate that market soundings may be carried out to prepare for the placing of large blocks, AMAFI sees no objection to it.

However, it seems to have other implications that are not clearly stated. In particular, it is stated in § 60 that sounding out investors to prepare for the execution of block trades "*can be compared (and may amount) to placing*".

Placing yet is very different in nature to sounding investors: it is the act of selling the securities to investors, not the one of seeking their opinion to set the securities' price or assess the likelihood of the sale. The conversations that take place with investors in the placing process aim at getting the investors' agreement for buying the securities, which is different from the objective of the sounding that is to test the investors' appetite and assess whether the transaction can happen and/or under what conditions.

The sounding process is always followed by the placing itself (providing the issuer/seller gives its go ahead).

40. This distinction is important because, if placing of blocks were equated to sounding, then conversations with investors for selling securities would be subject to sounding requirements, which is not suited. As mentioned in § 61 of the DP, which AMAFI totally supports "*when, in relation to possible counterparties, the professional is not trying to gauge the conditions relating to the potential size or pricing of a transaction, i.e. it is not conducting a sounding as defined in Article 7(1) of MAR, but actually trying to conclude the transaction, then Article 7c will not apply*".

41. <u>As a conclusion, this development should be clarified and the statement that sounding may equate to placing should not be maintained in the implementing measures that ESMA will propose to the Commission</u>.

Questions

- **Q23: Do you agree with ESMA's proposals for the standards that should apply prior to conducting a market sounding?**

42. Regarding II.2.1 to II.2.4, AMAFI agrees that it is a good practice for members of a syndicate to agree on a number of elements before conducting the sounding. This should be qualified however so that the members considered are only the ones involved with the sounding (i.e. a syndicate may include some "secondary" members that are not involved in the sounding itself and are only responsible for placing a small portion of the transaction).

In addition, it should be noted that a DMP cannot ensure that the other members agree between themselves (§ 66 of the DP). In particular in the fixed income world, a DMP has no authority whatsoever on the other members. It can only make its best to try and obtain an agreement.

43. Paragraphs 68 and 71 set the requirements for the DMP to inform the issuer whether the information is inside or not and to obtain the issuer's agreement before going ahead with the sounding. As mentioned in § 33, these requirements are out of scope of the mandate provided by the Commission.

44. In addition, setting such requirements would create important issues, as is currently experienced in France where such obligations exist in the national regulation.

Regarding paragraph 68 - informing the issuer on whether the information is inside information or not -, the experience gained from the implementation of this provision in France shows that as regards information that is not inside, issuers see no value in being informed that the information is not inside information because this has no consequence for them. They consider that this is a matter that only regards the sell-side firms. This is a communication that seems odd to them and therefore that is likely to be omitted by DMPs, creating a regulatory risk with no value-added to the market.

At a minimum, if such provision were kept, it should be amended to concern only inside information, reading: "*Where the disclosing market participant is acting on behalf of an issuer, it shall inform the issuer when, according to its assessment, the information to be disclosed to the market is inside information*".

45. Similarly, as regard paragraph 71 - obtaining the issuer's agreement -, it appears that issuers are not willing to be involved in the DMP's decision to sound out investors. They consider that this is part of the DMP's job.

In addition, the persons with whom the DMP is in contact on a day-to-day basis to prepare financial transactions are generally not the ones with the power to commit the issuer. Requiring this agreement is therefore a hindrance to the timeliness of the process, preventing firms from sounding out the market as quickly as needed in an environment where a difference of a few hours may be decisive in the success of a transaction.

This requirement, which was set in France because it had an educational value for issuers, finally misses its objective and creates useless delays. This is a provision that AMAFI is contemplating removing from its Standards and that should not be included in the RTS.

46. For the same reasons, the provisions of §§ 73 (difference of views as to the nature of the information between the issuer and the DMP) and 76 (informing the issuer of the types of investors to be questioned) as they are linked to § 71, should not be inserted in the RTS.

➢ **Q24: Do you have any view on the above (timing of market soundings)?**

47. Please see § 33: restricting the hours in which market soundings can take place would be out of scope of the mandate provided by the level 1 text.

Additionally, such restriction would be hugely detrimental to the practice of market soundings, whereas in any case markets are practically open around the clock nowadays.

The focus should rather be on the fact that the market sounding should be carried out as much as possible close to the envisaged date of the launch of the transaction in order to limit the period during which the investors are insiders.

➢ **Q25: Which of the 3 options described above in paragraph 82 do you think should apply? Should any other options be considered?**

48. The paramount principle is that it is clear for the buy-side firm that the DMP is intending to carry out a wall-crossed sounding: this is the objective of the agreement required of the buy-side firm to conduct the sounding when inside information is to be communicated.

This is critical to allow the buy-side firm to refuse the sounding, hence mitigating the risk of inadvertent wall-crossing.

As long as such a process is in place, which will be the case because of the level 1 text, there is no need for introducing further obligations, i.e. Option 1 is sufficient since a buy-side firm is always in a position to refuse a sounding.

The risk of inadvertent wall-crossing exists when it is not clear to the sounded person that inside information is going to be communicated to them. When it is clear, then the responsibility of the buy-side firm is to treat the request appropriately, i.e. to make sure that it has procedures to deal with such requests and that its concerned staff are trained. Buy-side firms and their market facing staff are professional of the financial markets; they should be attuned to the risks related to possession of inside information. The risk that this may not be the case should not be transferred to the DMP.

49. This being said, it is obviously without prejudice to the freedom of buy-side firms to notify unilaterally, if they wish so, the sell-side firms they work with that they do not want to be contacted to be wall-crossed. But this should not be an obligation, all the more that buy-side firms' approach to refusing wall-crossing may differ significantly (some may refuse it for only some of their activities, some may accept to be wall-crossed in other circumstances than soundings, etc.).

When a sell-side firm is receiving such a request from a buy-side firm, it is indeed advisable for it to abide to it and hence take internal measures (such as lists) to do so but this should be dictated by the existing commercial relationships with the buy-side firm not by regulatory requirements.

50. If there were a regulatory requirement not to contact a buy-side firm that stated its wish not to be wall-crossed (Option 2), there is a risk that the scope of this forbiddance could extent to other activities than market soundings, i.e. it could be quite tricky for a buy-side firm to define precisely when it accepts to be contacted to be wall-crossed and when it does not (especially since the scope of market sounding is large in MAR). Sell-side firms, subject to the regulatory risk of infringing the obligation to respect the buy-side firm's wish may adopt a conservative approach of not approaching anymore the buy-side firm for any of its activities that involve wall-crossing, creating confusion and disrupting the normal functioning of capital markets.

51. An obligation to systematically record and update the wallcrossing wishes of all investors with which the firm has relationships (Option 3) is unrealistic and disproportionate in terms of actual reduction of inadvertent wall-crossing compared to the burden involved.

52. In AMAFI's view therefore, option 1 is the most pragmatic of all three options proposed. It does not preclude buy-side firms from stating their wish and does not create a regulatory risk that could freeze the relationships between the sell-side firms and buy-side firms.

- **Q26: Do you agree with these proposals for scripts? Are there any other elements that you think should be included?**

Regarding the use of scripts

53. When inside information is to be communicated, scripts can be very helpful in structuring the sounding process at sell-side firms and mitigating the risk of incomplete or over-communication to buy-side firms. For wall-crossed soundings, it is therefore advisable for firms to devise scripts, without however mandating them to adopt the same across the industry. Scripts vary depending on the type of transaction concerned, the type of investors contacted and the organisation of the sell-side firm. The requirement should therefore be to establish templates for scripts that will then be adapted to each transaction.

54. As regard non wall-crossed sounding scripts, please see § 33: this provision is out of scope of the mandate provided by the Commission and should therefore be removed.

In addition, requiring a DMP to state to investors that it is not speaking to them in relation to inside information is counter-intuitive, as this is the usual situation on the market. When the information is inside information it is not possible to communicate it safe under certain circumstances, which are precisely dealt with here by the rules on market soundings. These are the situations where investors should be informed, as they do not want to be wall-crossed inadvertently. On the opposite, when no mention is made of the nature of the information this is by default because the information is not considered inside information by the DMP, the normal state of play on the market.

There is therefore no value in informing investors of the fact that the information is not inside information. On the opposite, this would make the process misleading and more burdensome, especially since the scope is large and it could therefore apply to many conversations with investors.

Furthermore, requiring the DMP to state to investors that this may be inside information anyhow (item ii.) would be very disquieting and is likely to make investors nervous and unhappy with the DMP. Education of investors on inside information is important as is their awareness of the obligations linked to the possession of inside information, but this education should not become the burden of DMPs.

Regarding the scripts' content

55. As regards non-wall-crossed sounding scripts, as stated previously in § 33, they are out of scope of the ESMA's mandate and are not useful, on the opposite. Point (ii) is inappropriate as already mentioned.

Point (iii), information about subsequent disclosures relating to the market sounding, is an unwelcome copy-paste of the script used for wall-crossed soundings where such requirement is needed because further communication will take place:

- To confirm that the sounding has taken place, which aims at duly recording in writing the fact that the investor is now an insider;
- And to indicate that a specific reference or code name may be used to designate the transaction, a necessary feature as it carries inside information.

These two fundamental rationales are absent though in the case of a non wall crossed sounding and (iii) should therefore be removed.

56. As regards wall-crossed sounding scripts, the requirements cannot be "in addition to those that would be applicable to non-wall-crossed sounding scripts", at least with respect of item ii. of a. that is specific to the non inside nature of the information (warning the buy-side that there is a risk that the information may be inside information).

With respect to item i., a statement explaining the reasons why the DMP considers the information to be inside information, AMAFI has strong reservations:

- First, information used by the DMP to make its analysis may not be communicated to third parties because of its confidential nature, and if it were, could give to the buy-side even more sensitive information.

- Second, the objective of such a requirement is questionable:

  - If the objective is to provide grounds on which the investor could argue against the DMP's determination, then the ultimate aim cannot be that the DMP change its view. The DMP should not have to modify its assessment and consequently its insiders' list, on the basis of the buy-side firm's own analysis because it incurs its own liability in this respect. Its characterisation stemming from its relationships with the issuer (and the discussions it may have with it on the characterisation of the information) should be carefully weighed against a buy-side firm's isolated analysis.

  - If the objective is to educate investors, then again this is not a burden that should rest on the DMP and this would result in an over-administrative process.

→ Item i. should therefore not be part of the script's template.

With respect to item iii. that concerns the cleansing strategy, it is not consistent with the level 1 provision that requires the DMP to inform the sounded person when the information is not inside information anymore according to its assessment (*Article 7c.7*). There is no strategy to communicate or even to design since decision has been made at level 1 that the cleansing strategy should be to inform the sounded person when the information ceases to be inside information in the DMP's view.

→ Item iii. should therefore not be part of the script's template.

➢ Q27: Do you agree with these proposals regarding sounding lists?

57. AMAFI agrees that lists could be set up and maintained in order to help regulators in their enforcement actions.

However, this requirement should not be overly administrative and disproportionate in terms of cost/benefit. For example, if the names of the persons sounded need to be on the list, their contact details and a summary of the information provided need not. One can understand that this will be handy for controllers at competent authorities but the resource needed to maintain this should also be considered, whereas this information is recorded elsewhere and rapidly retrievable on request:

- contact details;
- the summary of information provided (as per level 1, the DMP should make a determination of the information to be provided before conducting the sounding -see Q23).

These two pieces of information should not therefore be part of the sounding lists.

- **Q28: Do you agree with the requirement for disclosing market participants set out in paragraph 89?**

58. Yes, when such a person exists and it is made known to the DMP.

- **Q29: Do you agree with these proposals regarding recorded lines?**

59. Yes.

- **Q30: Are you in favour of an ex post confirmation procedure? If so, do you agree with its proposed form and contents?**

60. Since the investor's agreement to answer the sounding needs to be obtained anyway, in any form, before conducting the sounding, any confirmation would serve only an audit trail purpose, it does not constitute the agreement itself, which has been obtained beforehand.

Therefore a requirement for the buy-side firm to send a confirmation to the DMP would not serve a clear purpose and would impose an administrative burden on the buy-side that is counterproductive for the ability to sound them. Also, it is not clear what consequences would entail if the buy side were to forget or refuse to confirm even though it has agreed orally to be sounded.

61. A requirement for the DMP to send a confirmation after the wall-crossed sounding has taken place corresponds to the most common practices. It serves as an audit trail and is a written proof that the wall-crossed person has been informed of its obligations and duties. AMAFI agrees with the proposed content of this confirmation.

- **Q31: Do you agree with the approach described above in paragraph 96 with regard to confirmation by investors of their agreement to be wall-crossed?**

62. AMAFI agrees that there should be no requirement for the DMP to ensure a written confirmation is issued to the buy side before inside information is communicated. This would not serve any clear purpose since the process of obtaining the investor's agreement is properly structured, via scripts, and ensures clear communication of the nature of the information and its consequences for the buy-side.

Such requirement would be a hindrance to carrying out the sounding because the investor initially contacted would have to be contacted again once the confirmation is sent, with the risk of him or her not being available anymore. This would be quite heavy operationally in terms of follow-up and it would slow the sounding process, which by nature needs to be carried out quickly and sometimes within a very short timeframe (less than an hour).

63. Paragraph 96 suggests that the DMP should receive confirmation (written or verbal) from investors that they agree to be wall-crossed prior to wall-crossing them. This is not clear if this would be a requirement different to the one at level 1 to obtain the investor's agreement to be wall-crossed.

Would that mean that someone else at the investor should confirm the agreement already given by another person? This does not seem right in terms of process because it would as well be quite administrative and would slow the sounding process (with the confirming person not necessarily available), making it more difficult to carry out soundings. If this requirement aims at ensuring that the buy-side firm is not committed inadvertently to the wall-crossing by one of its employees, then again this concern should not result in an additional burden for the DMP. The buy-side should have clear processes in place with respect to market soundings and its staff should be properly trained on them.

- **Q32: Do you agree with these proposals regarding disclosing market participants' internal processes and controls?**

64. Yes.

- **Q33: Do you have any views on the proposal in paragraphs 102 to 104 above?**

65. AMAFI agrees with paragraphs 102 and 103.

66. Regarding paragraph 103, when the DMP carries out a wall-crossed sounding and the investor has agreed to be wall-crossed, there is no value in requesting the buy-side firm to carry out its own analysis of the nature of the information since anyway it is now wall-crossed and is placed in the most conservative situation. As stated below in Q34, the buy-side can still disagree with the DMP's assessment ex post, in which case it would indeed be prudent for it to document its analysis in the case of a future regulatory enquiry, but otherwise such requirement is only administrative.

The RTS should therefore make clear that, for wall-crossed soundings, the assessment could consist in accepting the DMP's assessment.

- **Q34: Do you agree with this proposal regarding discrepancies of opinion?**

67. Paragraph 105 and 106 seem to imply that the DMP should have to change its views because it is provided with supporting information (for e.g. it is stated that, by considering that the information is not inside information, opposite to the DMP's view, the buy-side firm may avoid unnecessary restrictions not only on themselves "*but also on other buy-side firms*").

It should be made clear that such assessment by the buy-side does not have to result in the DMP changing its assessment because the DMP has its own liability in this respect and also because it may have information passed by the issuer that the buy-side has not and that cannot be communicated for confidentiality reason (like for example the fact that the transaction is still being contemplated even if the launching date initially envisaged has expired). (*See also § 56 above*)

Requiring buy-side firms to argue with the DMPs is dangerous because it will place DMPs in a position that is commercially difficult between two business relationships (the issuer and the buy-side), while issuers, who are firstly responsible for determining the nature of the information pertaining to their activities and operations and for wall-crossing third parties (when they are able to delay the communication of inside information) are left out of the equation.

68. Also, it should be clearly stated that such consideration by the buy-side, independent of any issuer's public statement or DMP's statement, carries risks. For example, the RTS should clearly indicate that there are risks stemming from a transaction that does not go ahead but that may be relaunched some days later under similar terms. The information initially disclosed may still be inside information in which case, the investor, if it has traded on related securities meanwhile, may find itself in violation of the trading blackout obligation.

To resolve such issue, an option could be for ESMA to indicate that it is acceptable to consider that after a couple of weeks it is reasonable to assume that the information attached to a transaction that has not gone ahead as initially envisaged is not inside information anymore. (*see also Q39 below*)

- **Q35: Do you think that the buy-side should or should not also inform the disclosing market participant when it thinks it has been given inside information by the disclosing market participant but the disclosing market participant has not indicated that it is inside information?**

69. The investor can decide to inform the DMP but it should not be required to do so. Such communication can be useful as the DMP may reconsider its view and take a more conservative and protective position. But the DMP may as well not change its opinion (for e.g. the investor may be risk-adverse and consider the information as inside information from its perspective) hence this should not be a requirement for the investor.

As stated before, each stakeholder bears its own risks in respect to market abuse and should thus be free to adopt its own approach to managing these risks.

- **Q36: Do you agree with the proposal for the buy side to report the competent authorities when they suspect improper disclosure of inside information particularly to capture situations where such an obligation does not already otherwise arise under Market Abuse Regulation?**

70. This is out of scope of the guidelines as mandated by the level 1 text. Guidelines cannot impose new requirements that are not based on the level 1 text. A reporting obligation to competent authorities should not be set in guidelines, especially since its consequences in terms of liability can be material and it involves communicating personal data.

71. In addition, ESMA indicates in § 110 that the suspicion by the buy-side of improper disclosure of inside information should be based on the fact that "*the disclosing market participant has not complied with Article 7c(5)*". However, not complying with Article 7c(5) does not amount to an "*improper disclosure of inside information*". Article 7c(5) is a safe harbour provision, i.e. it states that a disclosure should be deemed made in the normal course of a person's employment, profession or duty if some specific conditions are met. It does not state that not abiding by these conditions constitute improper disclosure. Recital (16o) makes this clear: "*Market participants who do not comply with the detailed provisions of this Regulation when conducting a market sounding should not be presumed to have improperly disclosed inside information but they cannot take advantage of the exemption given to those who have complied with such provisions*".

Therefore, if ESMA was to decide to include this reporting requirement in the RTS, it should not be based on whether the provisions of Article 7c have been abided by the DMP or not. It should be based solely on the definition of improper disclosure information. Also, it would then need to be properly articulated with the STR requirement, as this requirement is applicable to a number of sounded persons and aims at any violation to the market abuse regulation, including improper communication of inside information.

- **Q37: Do you have any views on the proposals in paragraphs 113 to 115 above?**

72. It should be made clear that the buy-side's own determination can be that it accepts the DMP's assessment when the DMP has considered the information to be inside information. If the buy-side has approved the wall-crossed sounding, it is because it is comfortable with becoming an insider. Hence, requiring them to do again the analysis done by another one that he agrees upon would be an intellectual exercise with no practical value-added.

➢ **Q38: Do you think there are any other issues that should be included in ESMA guidelines for the buy-side?**

73. Another issue that is not considered is the organisational arrangements that the buy-side could set up to properly manage the inside information it may be communicated through market soundings. This is a critical aspect for the success of market soundings and to mitigate their risks.

For example, it may be difficult for not so large buy-side firms to devise proper internal procedures to manage the risks of propagation. The regulation on market soundings and the technical arrangements that are required from firms may prevent access by smaller firms, creating another barrier to entry. ESMA may therefore bring value in giving examples of arrangements that are both acceptable to competent authorities and feasible for these firms.

➢ **Q39: What are your views on these options (regarding cleansing strategy)?**

74. AMAFI agrees neither with Option 1, nor with Option 2. Such requirement is totally out of scope of the RTS. When the level 1 text was adopted following discussions on cleansing, the choice was made to require DMP to cleanse the buy-side when, according to their assessment, the information is not inside information anymore, which is not the same as agreeing or communicating on a cleansing strategy. Re-introducing such an obligation in the standards is not consistent with the choice made at level 1.

75. Cleansing is a very difficult issue when the transaction does not go ahead as initially envisaged because the information may remain inside for a while (if the transaction can still go ahead) and communicating abandonment to the soundee may in itself be a communication of inside information.

The challenge is then to reconcile two legitimate but conflicting needs:

- Issuers are sensitive about publicly communicating on the postponement or abandonment of a transaction because it could reflect badly on them (even if only caused by market conditions) and could hurt their securities' prices and endanger their financing prospects. In addition, cleansing soundees assumes that the issuer commits not to launch a similar transaction before a certain period of time has passed, with the risk of missing a market window.

- For many investors, the decision on whether to respond to a wall-crossed sounding is conditioned on being wall-crossed for a short period of time since it can have material consequences for them in terms of trading blackouts. When a transaction does not go ahead, simply waiting that time lapses so that the information may no longer be likely to have a significant effect on the prices of financial instruments is often not an option.

The DP however tend to consider the difficulties experienced by the buy-side firms without considering the ones of the DMPs, making the issue a mere technical one whereas it has some strategic implications as well for issuers.

In an ideal world, the issue of cleansing investors should not be the one of the sell-side firms, as issuers should issue cleansing statements. But for the reasons stated above such statements are in fact very rare.

76. As the AMAFI Code concludes, the sell-side firm may decide to commit itself on a cleansing strategy 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. The right of buy-side firms to decline answering a sounding if no insider period is agreed upfront must be recognised, as must be recognised the right of an issuer not to commit itself, a decision that it may revisit if the sounding is critical to the success of the transaction.

77. As a conclusion, the RTS could consider two types of situations:

- When the transaction goes ahead as planned, hence making the information public, it could be stated that the DMP does not have to contact the soundees for cleansing;

- To provide for the situations where the transaction does not go ahead on the date envisaged, the RTS could specify that it is acceptable for a DMP to advise upfront the soundee that if the transaction does not go ahead on the date envisaged, it will not be an insider anymore after a given period of time (such as 2 weeks), providing the DMP does not get contrary information from the issuer. If such contrary information is received, so that the information remain in fact inside information, then the DMP has to contact the soundees to inform them.

III. Specification of the indicators of market manipulation laid down in Annex I of MAR (Article 8(5) of MAR)

- **Q40: Which practices do you think are more related to manipulation of benchmarks?**

78. AMAFI comments on proprietary benchmarks only, i.e. benchmarks created by investment firms and banks for their clients, which are based on market data not on external contributions and that are calculated based on a closed formula. For these benchmarks, the manipulation would consist in manipulating the prices of the financial instruments composing it. It is therefore tricky to distinguish between market manipulation as we know it already (manipulation of the price of a financial instrument) and manipulation of the benchmark, the second one being a consequence of the first.

AMAFI considers that when detecting the manipulation of the price of a financial instrument, firms should not have to consider the impact of this manipulation of the benchmarks potentially linked to this financial instrument, i.e. only one suspicious transaction report (STR) should be sent to the relevant competent authority.

On the opposite, the detection of the manipulation of benchmarks could rest on the variation of the benchmark's value, i.e. abnormal variations could trigger an analysis with a view to determining if the underlying financial instruments are manipulated.

- **Q41: Are there other examples of practices of market manipulation that should be added to the list presented in Annex III, that are more focused, for instance, on OTC derivatives, spot commodity contracts or auctioned products based on emission allowances or that are more related with persons who act in collaboration with others to commit market manipulation?**

79. AMAFI does not see other examples that could be added.

It is of the opinion that the list is quite exhaustive but also that the examples provided should be made more explicit so financial institutions can better work out how they should adapt their surveillance system. For example, since manipulations on commodities trading are quite specific, it would be interesting to have examples pertaining only to these markets. Another example concerns emission allowances, for which not all signals are applicable (see p. 15 of the AMAFI Guide on Market Abuse http://www.amafi.fr/images/stories/pdf/docs/code_professionnel/guide%20abus%20de%20marche.pdf).

80. Furthermore, because of the number of examples listed, an approach could be to sort them out by category/type in order to facilitate understanding, as AMAFI has done in its Guide.

81. Finally, formulation of example j needs to be revised (a typo error makes it illegible).

- **Q42: In your view, what other ways exist to measure order cancellations?**

82. Order to trade ratio and cancellation rate alone are not really informative of a manipulation because of the customary nature of a high cancellation rate on markets nowadays. It is more interesting to consider the order to trade ratio combined with order size as suggested in § 140 of the DP.

As regards quote stuffing, the order to trade ratio may be of interest in itself (without combining it with the order size) but this is a type of manipulation that, in our view, can be identified by trading venues, not by firms (see Q46).

- **Q43: What indicators are the most pertinent to detect cross-venue or cross-product manipulation and which would cover the greatest number of situations?**

83. To be able to detect such manipulation, a central repository of trading venues' order books would be necessary. Also, a common time standard between venues would be necessary so that meaningful comparisons could be done (i.e. a difference of one microsecond in the timestamps used by two trading venues can change significantly the results of the analysis).

Also, cross-venue manipulation is more likely to be picked up by regulators than firms (at least as regards client orders) because firms only have partial view of their clients' trading.

- **Q44: Are there other indicators/signals of market manipulation that should usefully be added to this list appearing in Annex IV?**

84. Please see Q41.

- **Q45: Which of the indicators of manipulative behaviour in an automated environment listed in Annex IV would you consider to be the most difficult to detect? Are there other indicators/signals of market that should be added to the list? Please explain.**

85. Generally speaking, it would be of great help that examples of each indicator be provided so firms can better understand them.

86. One of the most difficult indicators to detect is the one related to smoking (point v.). It is not quite clear what "alluring" limit orders refer to. It seems that this is more an example rather than a signal in itself because it looks like an illustration of the existing signal of entering orders without any intention to execute them to create a false impression (point d. of Annex III) except that this example is more precise (limit orders are used) and takes place in an automated trading environment.

87. The signal related to ping orders should be more precise because ping orders are not illegitimate in themselves and the signal does not help in defining which small orders are an issue from a market abuse perspective. It is indeed quite ordinary to send small orders, particularly to a dark platform, to assess the depth of the market for the financial instrument concerned in order to ensure an efficient execution and comply with the best execution obligation (sending a large order to a trading venue where the liquidity is insufficient is not a proper way to ensure best execution of a client order).

The concern with small orders arises when they are entered with no intention to be executed but rather to modify the reference price of the financial instrument concerned. Hence the signal should not pinpoint at small orders that are entered "*to ascertain the level of hidden orders and particularly used to assess what*

is resting on a trading platform" it should aim at small orders that are entered to create false or misleading signals.

As it is difficult to differentiate between legitimate and illegitimate small orders, it would help that objective criteria to identify potential manipulative intention be added to the description of the signal:

- As regards the notion of small order itself that could be assessed with respect to the usual or average notional of an order on that instrument;

- As regards the frequency of the small orders, i.e. the practice should be identified over a certain period of time (for e.g. over a day or two) as it may be an indication that the intention may not be the execution of a larger trade – i.e. a few small orders, discontinued in time, do not constitute a signal of manipulation in themselves.

88. The signal related to spoofing and layering is difficult to detect because of the huge amount of data that need to be analysed and the speed with which orders are entered: the challenge is to generate meaningful and manageable alerts to allow pertinent analysis in an appropriate time frame.

89. The signal related to layering is not specific to automated trading environments; it is a pattern that can be used by non algorithm related trading.

90. Finally as regard this section of the Annex IV dedicated to automated trading, it should be specified what the notion of automated trading is referring to. This notion is not defined as such in MiFID II (only algorithmic trading and high frequency algorithmic trading technique are defined, respectively in Articles 4.30 and 4.30a). It is not defined per se either in ESMA's guidelines on this subject.

- **Q46: From what moment does an inflow of orders become difficult to analyse and thus potentially constitute an indicator of quote stuffing?**

91. A large inflow of orders is not necessarily synonymous with quote stuffing. In actual facts, quote stuffing is a manipulation that is more likely to be detected by trading venues because investment firms consider the inflow of orders from the point of view of their capacity to deal with it. The inflow of orders is assessed based on the percentage of the firm's bandwidth used. It is more related to the capacity limits of the investment firm rather than the one of the underlying market.

- **Q47: What tools should be used or developed in order to allow for a better detection of the indicators of manipulative behaviour in an automated trading environment?**

92. Same answer as Q43 (a common repository of order books is necessary).

IV. Accepted Market Practices (Article 8a (5) of MAR)

- **Q48: Do you agree with the approach suggested in relation to OTC trading?**

93. Yes, AMAFI agrees with the approach suggested in relation to OTC trading. It would be too restrictive to dismiss practices that may be performed outside a trading venue and it would not be coherent with the purpose of Article 8(a) to exclude transactions that take place outside a trading venue (OTC trading). AMAFI also agrees that when conducting its assessment of a particular market practice, the competent authority will have to consider whether the necessary criteria (and notably that of transparency) are met for OTC trading.

- **Q49: Do you agree with ESMA's approach in relation to entities which can perform or execute an AMP?**

94. Yes, AMAFI agrees with ESMA's approach in this respect. Only the firms who are subject to supervisory duties from the regulators (MiFID firms, credit institutions) should be entitled to perform AMPs.

- **Q50: Does ESMA need to account for situations where some disclosure obligations might be exempted?**

95. No. The competent authorities should be able to use the list of "non exhaustive" factors set out by ESMA with some flexibility taking into account the particulars of their own national market when assessing whether the required level of transparency is met *ex ante* and during the execution of an AMP.

- **Q51: Do you consider there is specific additional information that should be disclosed when executing an AMP?**

96. No.

- **Q52: Do you agree that the factors listed seek to ensure a high degree of safeguards and proper interplay of forces of supply and demand?**

97. Yes, AMAFI agrees with the purpose of these factors. Again, within the framework set by MAR and ESMA, the appreciation of whether the specific market practice meets the above principle should be left to the competent authority.

- **Q53: Do you agree with the fact that AMPs may in some instances protect specific market participants (retail clients)?**

98. It may be the case but AMAFI is not aware of any AMP which is specifically intended to protect retail or other class of investors.

- **Q54: Do you agree with the principle of persons performing an AMP to act independently? In which situations should the principle be adapted?**

99. AMAFI fully agrees that for certain AMPs, the principle of independency of action of the firm executing the AMP is essential. This is the case for instance for equity liquidity contracts. This principle of independence is at the heart of the AMP of liquidity contracts which has been implemented in France for many years under the close supervision of the AMF (competent authority). No adaptation is needed in this connection.

- **Q55: Do you think persons performing AMPs should be members of the trading venue in which they execute the AMP?**

100. Not necessarily for as long as they are the persons performing AMPs are firms who are subject to supervisory duties from the regulators (MiFID firms, credit institutions) (see above answer to Q49).

- **Q56: Should an *ex ante* list of situations when the AMP should be temporarily suspended or restricted be established (e.g. takeover bids)?**

101. Even during takeover bids, an AMP could remain implemented under certain conditions. Also, during a buy-back programme, an AMP could be implemented. Suspension should not therefore be decided *ex ante* but on a case by case basis, by the competent authority. In any case, this question depends on the optional arrangements made by the Member States pursuant to Article 12 of the Directive 2004/25/EC of 21 April 2004 on takeover bids, when they transposed such Directive into their national legislation. It is recalled that such optional arrangements relate to the obligations set out in Article 9 and 11 of such Directive which concern certain measures which may result in the frustration of the bid.

- **Q57: Do you agree with the above mentioned principles that seek to ensure that AMPs do not create risks for the integrity of related markets and would you consider adding others?**

102. Yes, AMAFI agrees with those principles which are already implemented in France with respect to the AMP of liquidity contract. As regards the compensation of the firm which provides the service, the overriding principle should be that the terms of the remuneration should not be set in a way that could affect the independence of the firm. For that reason, indeed, variable compensation related to volume carried out or number of trades executed should not be permitted. This does not mean that a part (a least a small part) of the remuneration could not be determined by reference to variable factors provided, in that case, that the variable part of the remuneration is conditioned by objective and measurable elements which do not affect the independence of the service and which are not contrary to the objectives of the PMA.

- **Q58: What kind of records of orders, transactions etc. should a person that performs an AMP have?**

103. Firms allowed to perform AMPs should only be MiFID firms subject to supervisory duties from regulators (see Q49 above). As such they are already subject to a number of obligations regarding record keeping. There is no reason to provide for additional or different obligations.

- **Q59: Do you agree with the above mentioned principles that take into account the retail investors' participation in the relevant market? Would you consider adding others?**

104. The extent of the retail investors' participation in the relevant market may in some cases be one of the many structural characteristics of the relevant market to be taken into account by the competent authority.

V. Suspicious Transaction and Order Reports (Article 11 of MAR)

- **Q60: Do you agree with this analysis? Do you have any additional views on reporting suspicious orders which have not been executed?**

105. Yes, AMAFI agrees.

It should be noted though that regarding attempted market abuse, it is quite unclear what kind of behaviour would constitute such a breach. As orders are clearly within scope of MAR, whether they are executed or not, it is difficult to identify what tangible elements will allow for the characterisation of an attempt

➢ **Q61: Do you agree that the above approach to timing of STR reporting strikes the right balance in practice?**

106. AMAFI agrees that batching STRs is not appropriate at all.

107. As regard the two-week delay, it is not clear :

1. What its starting point is: the date at which the suspicion arose as stated in § 196 of the DP "*within two weeks of the suspected breach*" or the transaction/order date? If such requirement was kept, it should be calculated from the date the suspicion exists.

2. What benefit it would bring: the terms "without delay" do not mean in our view that the STR should be made immediately. In English "delay" is used to designate a period of a time but also the fact of being late. It seems reasonable here to consider that the second meaning is the appropriate one.

Conversely, there are several reasons why this requirement would be detrimental. A suspicion may frequently not arise quickly after the transaction:

- Some alerts may be based on the review of data over a certain period of time (for e.g.to detect abnormal client behaviour over time), thus generating suspicion on transactions/orders that may have taken place/been placed a few weeks ago;
- Sometimes it is the recurrence of a trading pattern that rises suspicion, which can be only detected over time;
- Suspicion may arise at the time of an internal control carried out periodically (including when the purpose of this control is not to detect market abuse);
- Suspicion may arise on a past transaction in the light of information obtained later and which sheds new light on the motive of the transaction.

Hence, breaches of this standard delay will inevitably happen for reasons other than carelessness.

In addition, such requirement could lead both to a decrease of STRs for suspicions arising later than 2 weeks after the transaction/order date for fear of regulatory backlash and to an increase of poorly motivated STRs expeditiously prepared to comply with the delay.

108. The guiding principle on that matter should be that when a case of potential market abuse is identified, an STR, if required, is sent to the competent authority as soon as the firm has formed its opinion. Any carelessness in the treatment of alerts can be tackled anyway by competent authorities based on the level 1 text. Indeed, a firm is required to have efficient arrangements in place and if it sends STRs late then it could be that its arrangements are not efficient, which can be sanctioned.

➢ **Q62: Do you agree that institutions should generally base their decision on what they see and not make unreasonable presumption unless there is good reason to do so?**

109. Obviously institutions should base their decisions on facts that are available to them. The potential consequences of the reporting on the person concerned are too important to second-guess or base one's decision on assumptions or hearsay. AMAFI does not agree that they should be able "*to make unreasonable presumption*" if "*there is good reason to do so*"[4]. The suspicion itself inherently involves an amount of hypotheses but they should be based on facts. The STRs process should not be weakened by assuming that it could be based on presumptions only.

[4] The sentence should be changed anyway from an « unreasonable presumption » to a "presumption".

110. Paragraph 202 of the DP states that "*the responsibility for determining whether to make STRs rests solely with the entity under the reporting obligation*", which seems so obvious a statement that it raises question as to why it is inserted here. It would be helpful to make it clear what issue this statement is addressing: is this related to situations where a chain of market participants, including within a group, are involved in a transaction that raises suspicion? In that case, would it not be clearer to indicate that each party has its own obligation and that reporting by one does not absolve the other and that each should make its own analysis (which does not preclude, within a group, the exchange of information when authorised by national legislation)?

- **Q63: Do you have any views on what those reasons could be?**

111. As stated in the previous question, assumptions should not be made. Institutions should explain the facts that gave rise to suspicion, and if necessary the doubts that they have, they should not elaborate scenarios of potential motives, situations, etc. If they are aware of information from third-party sources that seem relevant to the case, they should include them.

- **Q64: Do you have a view on whether entities subject to the reporting obligation of Article 11 shouldn't be subject to a requirement to establish automated surveillance systems and, if so, which firms? What features as a minimum should such systems cover?**

112. An automated surveillance system may be seen as necessary as it provides a systematic approach that may be reassuring in terms of analysing comprehensively orders and transactions. However, automated systems may also contribute to altering the awareness and pro-activity of employees towards unusual situations that should trigger investigations. They foster a box-ticking culture where specialised employees deal with alerts all day long with the risk of losing substance.

It is without doubt that market surveillance cannot be carried out without automated systems for certain types and volumes of businesses. There are however some situations where the role of people in identifying potential market abuse is more important than systems. For example, highly specialised firms that deal with clients in a specific field of business, offering a limited number of investment services (such as the reception and transmission of orders) on a narrow range of financial instruments may rely entirely on their front office staff for raising suspicions of market abuse. Such is the case also in businesses where the client relationships is strong and involves close communication, as for e.g. in the ultra high net worth business.

113. More generally, proportionality should apply so that small investment firms, with only a handful of employees, should not be subject to developing an automated system or buying one to an external provider. This would otherwise create a barrier to entry that is not proportionate to the potential benefit, all the more that the running costs associated with these systems are high, especially in terms of human resources that must be dedicated to managing the alerts they generate.

114. The level 1 requirement for firms to have effective arrangements in place (Article 11) should be sufficient to manage the issue of the type of system/the sophistication needed.

- **Q65: Do you consider that trading venues should be required to have an IT system allowing ex post reading and analysis of the order book? If not, please explain.**

115. AMAFI agrees that trading venues should be required to have an IT system allowing ex post reading and analysis of the order book.

- **Q66: Do you have views on the level of training that should be provided to staff to effectively detect and report suspicious orders and transactions?**

116. AMAFI agrees that staff awareness is absolutely vital as staff is a very important source of detection and reporting and is an integral part of the surveillance arrangements of the firm. Each firm should train its staff on detecting and reporting internally suspicious orders and transactions. The AMAFI guide makes staff training an essential element.

This training should be provided to each new member of staff and to existing staff at a frequency that is adapted to the size and business of the firm.

The content of such training should be tailored to the businesses carried out by the firm and to the functions occupied by the different members of staff (i.e. the level of detail may change depending on the risk that a function may be exposed to market abuse). For e.g. staff should be cognisant of the signals of market abuse that correspond to the type of abuse that can take place in the business they are in. Staff should also be provided with real-life examples of suspicions that the firm has experienced in the past. They should be made aware of the sanctions attached to market abuse and the internal processes to raise a suspicion should be clear to everyone.

The content of the training should be updated whenever necessary and at least each time the regulation changes.

117. As regards more specifically attempts of market abuse, as indicated above in § 105, it is unclear which situations are targeted by this concept. In this respect, it would be useful that examples be inserted in the standards so that firms are able to train staff on this matter.

118. On another point, in § 209 of the DP it is stated that the "*responsibility for reporting lies at the level of the individual who has a suspicion*". AMAFI strongly objects to this statement. The responsibility for reporting a suspicion to a competent authority is exclusively the one of the firm as set in Article 11:

- Paragraph 1 aims at "*any person referred to in the first subparagraph*", i.e. "*Market operators and investment firms*"
- Paragraph 2 aims at "*Any person professionally arranging or executing transactions in financial instruments*"

AMAFI does not agree that the definition of persons professionally arranging or executing transactions should be interpreted to aim at employees of a firm[5]. This does not fit with the obligation stated in Article 11.2 for a person professionally arranging or executing transactions to "*establish and maintain effective arrangements, systems and procedures to detect and report suspicious orders and transactions*", i.e. such responsibility is the one of the entity/person authorised for providing the services of reception and transmission of orders and orders execution, it is not legally the one of its employees.

This is why training of employees is so important so that detection but also escalation of suspicions can take place.

119. In addition, although the authority has the right to communicate with any employee of an investment firm, the contact person for the authority should primary be the person in charge of reporting suspicions for the firm and who has access to the facts of the case. If there is a need to communicate with the employee who has carried out the transaction (on own account or on account of a third party),

[5] " *"persons professionally arranging or executing transactions in financial instruments" means a person, professionally engaged in the reception and transmission of orders or in the execution of transactions in financial instruments*" (Article 5)

this should only happen once the person in charge of STRs is informed because the firm's personnel is often not aware of the notification. Such direct contact would create a risk of a leakage of information of a sensitive nature and it is unlikely to provide further explanation on the rationale for raising the STR.

It should therefore be made clear in the standards that the reporting that is referred to here is an internal reporting to a function that is charged with analysing the case in order for the firm to decide on whether to report a suspicion or not.

Direct reporting by employees to competent authorities relates to whisleblowing, as provided for by Article 29, not to STRs.

- **Q67: Do you agree with the proposed information to be included in, and the overall layout of the STRs?**

120. Comments on specific fields of the STR template:

- Section 2 - Name of individual and position within entity: See above § 118. This field should be removed.
  In addition, if such personal data was to be included then it would be subject to the data privacy regulation and in particular, the person concerned would have the right to request access to this record, hence creating an issue as regards the confidential nature of STRs.
  Such personal data may be provided in the context of an investigation launched by the competent authority following the STR, because it is then properly protected, but not before.

- Section 2 - Address: it should be specified that this is the reporting entity's address.

- Section 3 is worded in such a way that it seems to aim at physical persons only –"where applicable" should be added after "*date of birth*", "*place of employment*" and "*position*".

- Section 4 – For MTF/OTF, the firm should describe the "*nature of suspicious order book interaction*": it should be added "*if applicable*".

- In section 5 "*Documentation attached*", recording of conversation is listed. AMAFI opposes providing the tapes of conversations between the firm and its client outside of a formal investigation by the competent authority. Such 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 maintain the confidentiality of their clients and employees' information outside of any official request by a recognised authority. From a practical point of view as well, conversation tapes could contain information that may touch on other matters than the ones relating to the STR and providing the conversation tapes may not be done "*without delay*".
  AMAFI therefore calls on ESMA not to list recording of conservations as documentation that can be attached to the STR. Alternatively, a transcription of the sentence/sentences relevant to the case can be inserted.

121. As an additional comment, AMAFI would welcome that ESMA consider in these standards arrangements to ensure the anonymity of the firm that notified the STR when it is used in a prosecution. In France, when an STR is attached to a case, the identity of the reporting entity is not made available. This set-up does not exist at European level nor as regards third party jurisdictions, i.e. when an STR is transmitted to the competent authority of another State, the judiciary authorities of that State may attach it to the case without protecting the identity of the firm and its compliance officer. This is an issue in the case of a leak of the STR information in the media and for the personal protection of the staff involved who may be subject to retaliation.

- **Q68: Do you agree that ESMA should substantially revise existing STR templates and develop a common electronic template? Do you have any views on what ESMA should consider when developing these templates?**

122. AMAFI supports the adoption of a common format of STR by all competent authorities. Experience from previous CESR attempts at harmonising such templates have unfortunately failed, each competent authority having its own requirements. One can therefore doubt that the proposed format by ESMA will be complied with by all competent authorities and this is certainly an area where ESMA should conduct peer reviews.

123. AMAFI does not believe that using an electronic form will help ensure the same template is used by all. It is also of the opinion that as long as the STRs are not sent to a single place in the EU, imposing an electronic format is unhelpful. It should be noted indeed that the reporting of suspicions gives rise to difficulties in identifying the competent authority(ies) concerned, as the interpretation of execution and arrangement of a transaction varies across competent authorities. This leads to dual reporting – AMAFI is therefore in favour of a solution whereby the STR would be sent to a central repository, for the competent authorities to pick up the STRs they consider pertaining to their competency.

- **Q69: Do you agree with ESMA's view for a five year record-keeping requirement, and that this should also apply to decisions regarding "near misses"?**

124. Yes, AMAFI agrees for harmonisation sake with other record keeping requirements (such as MiFID's).

VII. Insider list (Article 13 of MAR)

- **Q84: Do you agree with the information about the relevant person in the insider list?**
- **Q85: Do you agree on the proposed harmonised format in Annex V?**

125. As a preamble, the proposed template assumes that each insider list will be associated with one deal only. However, some insiders within firms are permanent insiders because of their position in the firm, which leads to the drawing up of two different lists by some firms: a list associated with a specific deal and a list of permanent insiders. This option that exists today should still be available with MAR, i.e. the permanent insiders should not have to be added to each deal specific's insider list.

In this case however, the RTS could make clear that the request by an authority to obtain the list of insiders involved transmitting the list specific to the deal concerned but also the list of permanent insiders.

126. As regard the content of the proposed template, AMAFI supports the creation of a standardised format for insider list. Yet, it does not agree with the amount of information required. The topic of insider list should be looked at from an issuer's perspective but also from an investment firm's one. It is customary for issuers not to draw themselves an insider list when they work with investment firms, leaving them to draw their own lists. As a result investment firms maintain many insider lists, containing many insiders (some have more than 15,000 insiders a year).

Gathering and compiling all the proposed data would create a huge administrative burden incommensurate with the expected benefits that are to facilitate the competent authorities' work in case of an investigation (as stated by recital 27 of the Regulation). Out of all insider lists maintained by an investment firm, only a small number is used by competent authorities. It is therefore not proportionate to require systematically some information that will become useful only in the case of an investigation but

that require a high level of administration. In addition, many of these data are easily retrievable upon request by the firms themselves (through HR records or direct request to the individuals concerned).

Furthermore, many of the data required are personal: such requirement should be weighed against the data privacy regulation (in particular Directive 95/46/EC) and in particular the onus that the personal data recorded be proportionate to the finality of the record, as mentioned in § 17 and 18 of the Opinion of the European Data Protection Supervisor on the Regulation (2012/C 177/01). Employees have no legal obligation to provide their employers with their home telephone number, personal mobile number and personal email addresses, and this issue may be even more acute for employees outside of the EU.

AMAFI does not agree, for any insider, that the following personal data be required, as they receive inside information in the context of their profession or business: home and personal mobile telephone numbers, personal email address and home address.

In addition, AMAFI does not agree that the following data should be included for insiders that are employees of the firm:

- Birth surname, date and place of birth
- Work address
- National ID
  Work telephone numbers
- Work email addresses
- Function

Such information can obviously be provided by the firm but this should be done upon request of the competent authority. These data are retrievable from the firm's HR records and should not have to be duplicated.

A concern with this kind of data is its obsolescence as time goes by – it is not clear from the DP if the objective is to retrieve data valid at the time the person was an insider (to dig out for conversations, emails, etc…) or at the time of the investigation (to search the person's home for e.g.). If these data have to be kept up to date by firms, this is an even bigger issue from a workload perspective.

127. Finally, but importantly, it should be noted that the template should provide for the possibility to list legal entities in addition to physical persons since it is customary that legal entities such as lawyers, accountants, etc. involved in a deal, be included in the list, while they take care of drawing up their own insider list.

- **Q86: Do you agree on the proposal on the language of the insider list?**

128. Yes, AMAFI agrees.

- **Q87: Do you agree on the standards for submission? What kind of acceptable electronic formats should be incorporated?**

129. Yes, AMAFI agrees.

- **Q88: Should ESMA provide a technical format for the insider list including the necessary technical details about the information to be provided (e.g. standards to use, length of the information fields…)?**

130. The technical format itself should not be set by ESMA because some flexibility should be left for smaller firms so they are able to comply with the requirement to send their lists electronically, without creating the need to go through specific developments.

- **Q89: Do you agree on the procedure for updating insider lists?**

131. Yes, AMAFI agrees although it should be noted that it is not always possible to determine with exact accuracy the time at which an individual received inside information, for practical reasons (for e.g. when the information was received during a meeting, the time could be the beginning of the meeting, the end or whatever time in the middle) but also because there is interpretation on the generating factor of the inside information. Hence the mathematical approach that is taken to the provision of insider lists at a specific date and time seems a bit idealistic.

- **Q90: Do you agree on the proposal to put in place an internal system/process whereby the relevant information is recorded and available to facilitate the effective fulfilment of the requirement, or do you see other possibilities to fulfil the obligation?**

132. AMAFI believes that the requirement of Article 13(2) is incoherent, as already raised during the negotiation process. In his view, if the list should be made available at the competent authority's request, then the most secure option to do so from a regulatory perspective is to draw up the list in the first place...

It should be also noted that, contrary to paragraphs 1 and 1a of this Article, there is no mention in paragraph 2 of the person acting on the behalf of the issuer or on its account. Hence it seems that although the issuer would be exempted from drawing an insider list, the person acting on its behalf or on its account will not be, which is not logical. The RTS should specify whether these persons should establish insider lists.

IX. Investment recommendations (Article 15 of MAR)

- **Q97: Do you have suggestions on how to determine when an investment recommendation is "intended for distribution channels or for the public"?**

133. AMAFI agrees with ESMA's reasoning. The difference with investment advice, which is based on the existence of a personalised recommendation, is key in its view.

Financial analysis is not a service that should be considered as a public good – it is paid for and can be offered to a sub-set of clients, or for some very specialised research paper, to only a handful of clients, still it remains an investment recommendation that is very different in nature to investment advice.

134. However, AMAFI is worried that the proposed definition could then include other communications to clients that are not investment recommendation. For example, market commentaries communicated to clients by investment firms generally in the morning are obviously not personalised recommendations (i.e. investment advice) and not either general investment recommendations since they are based on general investment recommendations already published, and therefore should not be caught by the definition.

- **Q98: Do you think that there should be a threshold for what constitute "large number of persons" for the purpose of determining that an investment recommendation is intended for the public?**

135. No, setting a threshold would be artificial – the elements characterising financial analysis are not so much the number of persons having access to it but rather the nature of the recommendation and the process of its elaboration.

- **Q99: Do you agree that the existing requirements on the identity of producers of recommendations should be maintained?**

136. Yes, AMAFI agrees.

- **Q100: Do you agree that, as a starting point, ESMA should keep the approach adopted in the existing level 2 rules, with respect to objective presentation of investment recommendations?**

137. Yes AMAFI agrees. It should be noted though that some of the obligations of financial analysts are not necessarily adapted to non equity research (e.g. a change in recommendation concerning the same issuer has little meaning as regards bonds).

- **Q101: Do you agree with the suggested approach aiming at increasing transparency on the methodologies used to evaluate a financial instrument or issuer compared to the current situation?**

138. As the DP does not make clear what additional information on methodologies would be required, AMAFI cannot agree or disagree. Each target price is the result of a reasoning whose methodology is already described today (including the names of the models used) and whose assumptions are communicated as well (including the underlying data used), as per the requirements set in level 2 of MAR. This already seems detailed and transparent enough, all the more that clients are generally more interested in the reasoning than the target price.

- **Q102: Do you agree that, as a starting point, ESMA should keep the approach adopted in the existing level 2 rules with respect to disclosure of particular interests or indications of conflicts of interest?**

139. Yes, AMAFI agrees.

- **General comment on questions 103 to 108**

140. AMAFI is not comfortable with the amount of additional information that is suggested. An important principle attached to conflicts of interest is that they should be disclosed as soon as they can hurt the objectivity of the recommendation (Article 5 of implementing Directive 2003/125/CE).

The suggestions made here go against this principle considering that there are conflicts of interest that are not managed properly since the idea would be to disclose information ex ante.

Specific regulations exist that deal with the various matters considered in the DP (MiFID, Transparency Directive and Short selling regulation): these do not provide for such disclosure and there is no such requirement in the level 1 text of MAR. There is therefore a lack of legal basis to require such disclosures.

In addition, AMAFI is of the opinion that this information will be heavy to collect and will not bring value to clients who are likely to overlook it or even misinterpret it in some cases.

- **Q103: Should the thresholds for disclosure of major shareholdings be reduced to 2-3% of the total issued share capital, or is the current threshold of 5% sufficient where the firm can choose to disclose significant shareholdings above a lower threshold (for example 1%) than is required? Or, do you have suggestions for alternative approaches to the disclosure of conflict of interests (e.g. any holdings should be disclosed)?**

141. 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.

- **Q104: Do you agree on the introduction of a disclosure duty for net short positions? If yes, what threshold do you consider would be appropriate and why?**

142. No, AMAFI does not agree. 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.

- **Q105: Do you agree on the introduction of a disclosure duty for positions in debt instruments? If yes, what threshold do you consider would be appropriate and why?**

143. It is not clear what value such information would have. 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).

- **Q106: Do you think that additional specific thresholds should be specified with respect to other 'non-equities' financial instruments?**

144. No, AMAFI does not think so because the value of such information is not obvious at all. 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.

- **Q107: Do you think that further disclosure on previous recommendations should be given?**

145. Such disclosure already exists today: it is made available not on the investment recommendation itself but on the website of the firm. If the use of such media is still allowed (i.e. if there is no requirement

to produce the information on each single investment recommendation) then AMAFI has not issue with this obligation.

- **Q108: If so, do you think that an analysis of the gap between market price and price target should also be required in this additional disclosure on previous recommendations?**

146. No, AMAFI thinks that such information would be superfluous: a firm whose investment recommendations are consistently wrong will be sanctioned anyway by disgruntled clients who will not buy its recommendations anymore.

- **Q109: Do you agree with the suggested approach to the content of the disclaimer in relation to the disclosure of conflicts of interest?**

147. Yes, AMAFI agrees.

- **Q110: Do you think a case-by-case assessment for non-written recommendations is appropriate or that specific rules should be developed?**

148. AMAFI agrees that a case-by-case assessment is appropriate because it is not aware of issues related to disclosures for non-written recommendations.

- **Q111: Do you think that the rules on recommendations produced by third parties set forth in implementing Directive 2003/125/EC should be updated?**

149. If the entity is part of a group, it does not select the investment recommendations it disseminates, it just serves as a channel to clients, hence such requirement would be useless in this case and would only create a piling up of disclosure.

If such requirement was retained, intermediaries that disseminate investment recommendations produced by their group should be exempted from it.

X. Reporting of violations (Article 29 of MAR)

- **Q112: Do you agree on the proposed approach and the suggested procedures for the receipt of reports of breaches and their follow-up? Do you see other topics to be addressed?**

150. The DP sets some good minimum high level principles.

- **Q113: Do you agree on the proposed approach to the protection of the reporting and reported persons? Do you see other topics to be considered?**

151. Yes AMAFI agrees. It does not see other topics to be considered.