# CONSULTATION CESR 08-717

## Market Abuse Directive
## Level 3 – Third set of CESR guidance and information on the common operation of the Directive to the market

### Response of the AMAFI

**1.** AMAFI thanks CESR for providing it with the opportunity to discuss the third set of guidance it is putting together to help the harmonised implementation of the Market Abuse Directive with respect to stabilisation and buy-back programmes and the two-fold notion of inside information.

AMAFI is the new name adopted on 19 June 2008 by the French Association of Investment Firms (AFEI). It represents financial market professionals in France (i.e. investment firms, credit institutions and market infrastructures) and has more than 120 members representing over 10,000 professionals who operate in the cash and derivative markets for equities, fixed-income products and commodities. Nearly one-third of the members are subsidiaries or branches of non-French institutions.

**2.** AMAFI is always keen to provide its view on the application and implementation of the Market abuse directive, which it considers the cornerstone of sound and integrated European financial markets. The Association has already had the opportunity in the past to share its position with CESR on the matter of stabilisation and buy-back programmes (*AFEI/06-48* on CESR call for evidence 06-078) and has strived to provide its members with guidelines on the implementation of Regulation 2273/2003 (*AFEI/06-29*).

The Association therefore examined with great interest the paper CESR put out for consultation on 3 October 2008, which, in its opinion, offers balanced guidelines proper to contribute to a smooth functioning of the markets. On the specific questions raised, AMAFI wishes to make the following observations.

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## I. – STABILISATION AND BUY BACK PROGRAMMES

➢ ***Do you have any comments on CESR's view that stabilisation outside of the exemption in Article 8 should not be regarded as abusive solely because it occurs outside of the safe harbour?***

**3.** AMAFI welcomes CESR's clarification as it contributes to a harmonised position amongst competent authorities.

The Association believes it could also be useful for CESR to complete its position by examining its consequences in terms of burden of proof. The fact that stabilisation outside of the safe harbour is not *per se* abusive should not mean that the firm bears the burden of proof of its legitimacy. Although the firm will obviously need to document the transactions executed in the context of this stabilisation, the burden of proof still rests in the first instance on the competent authorities. As some competent authorities may take the opposite view, it would be extremely useful that CESR state this principle in its guidelines.

➢ ***What do you regard as the most serious inconsistency that you have identified?***

**4.** In our opinion, the main inconsistency relates to the ability to refresh the greenshoe, which is not considered as falling within the safe harbour by some competent authorities, whereas it is accepted as such in practice by others, even if not formally. CESR's guidelines on this matter are likely to provide the clarity needed.

➢ ***Do you have any comments on CESR's views that sell transactions are not subject to the exemption provided by Article 8?***

**5.** Although AMAFI considers that sell transactions are inherent to the stabilisation's objective of curbing price volatility, it acknowledges that a stricter and narrower interpretation of Recital 11 of Regulation 2273/2003 can be adopted, provided that such sales are not systematically considered as abusive.

As stated in a previous note to CESR (*AFEI/06-29* §15 to 18), we certainly consider that sell-side trading is 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 Regulation limits the stabiliser's position 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 make sales to replenish its over allotment capacity, restore its initial position and successfully accomplish its stabilisation objective.

**6.** In any event, sell side trading is at minimum necessary for liquidating positions taken during the course of the stabilisation. This is recognised explicitly in Recital 18 of the Regulation, which provides that *"In order to avoid confusion of market participants, stabilisation activity should be carried out by taking into account the market conditions and the offering price of the relevant security and transactions to liquidate positions established as a result of stabilisation activity should be undertaken to minimise market impact having due regard to prevailing market conditions"*.

Even though sales executed under these circumstances are not considered covered by the safe harbour, they are certainly legitimate from our point of view.

- ***Do you have any comments on CESR's clarification that selling securities that have been acquired through stabilising purchases, including selling them to facilitate subsequent stabilising activity, is not behaviour that is covered by Article 8?***

**7.** Again, AMAFI considers that there are valid arguments to consider that sell transactions executed to refresh the greenshoe are covered by article 8, as long as the refreshing is done in accordance with the stabilisation's objectives set by the Directive.

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.

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 the Directive.

**8.** If CESR were to keep the position outlined in these guidelines, AMAFI obviously supports 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.

Considering CESR's examples of sell transactions that are difficult to legitimate (§15 and 16 of the guidelines), these could paradoxically give the impression that such sales are actually abusive. The example of a behaviour for which it may be "*harder to demonstrate a legitimate purpose*" is the one where sales are performed whereas the price has been largely stable in the days before the sales. One should note that this is precisely when the price has been stable, but the stabilisation period is not over yet, that the stabiliser is likely to be able to reconstitute its position. We therefore suggest refraining from using examples that may result, in practice, in considering any sale as abusive and stating instead that sales not performed in accordance with the stabilisation's objectives set by the Directive are likely to be considered abusive.

- ***What would you regard as the difference in approach that gives rise to the most significant practical problem?***

**9.** No comment

- ***Do you support the proposal that all competent authorities should publish the mechanism by which reports of stabilisation and buy-back programmes transactions should be submitted and that ideally this should be a dedicated email address?***

**10.** AMAFI welcomes CESR's proposal but considers that it should go further in ensuring as well that all dedicated email addresses be easily accessible in a central repository. In AMAFI's view, CESR's website is the most adequate and accessible repository for this information.

In addition and to further facilitate the reporting, the various reporting forms used by Member States' competent authorities should also be centralised on CESR's website.

- ***Do you support the proposal that adequate public disclosure is made through the mechanism used to implement the TD and gives rise to the obligation for this information to also be stored under the TD provisions? Do you agree that only public disclosure of buy-back transactions is required?***

**11.** The issue being addressed here is not clear to us, as there seems to be several elements intermingled in this draft guideline:

- details of the programme: obligations and mechanisms of disclosure to the public and storing
- transactions executed within the programme: obligations and mechanisms of disclosure to the public and the competent authority and storing.

The reason why the guideline makes reference to the Transparence Directive is not clear to us either, as it is applicable to issuers in the first place. Some clarification on this matter would be useful.

With regards to storing and reporting transactions executed within the programmes, MIFiD already prescribes that all transactions should be stored for five years and should also be reported to the competent authority. There is therefore, in our opinion, no possibility to only make public disclosure of these transactions without storing them.

With regards to disclosing the details of buy-back and stabilisation programmes, AMAFI considers that the public disclosure can be achieved by way of a communication by the issuer or the investment firm. It is not clear to us what "*other ways*" refer to in CESR's proposal.

- ***Are there any other substantive issues that you consider should be dealt with by CESR relating to these issues? If so, what are these issues and why do you consider them to be important?***

**12.** No comment

## II. – THE TWO-FOLD NOTION OF INSIDE INFORMATION

**13.** As a preamble and without commenting on whether a two-fold definition would be useful, AMAFI believes that there is a need to clarify circumstances under which an issuer should disclose inside information to the public. This is of special concern to investment firms in situations where conflicts of interest could arise. As an example, an investment firm may gain access to inside information on an issuer who is a client of it. This issuer could consider, against the firm's advice, that all conditions are not met to warrant the disclosure of this information, whereas another part of the firm is involved with other clients in matters likely to be affected by the inside information.

In current market circumstances where the number of distressed companies is growing, this matter is likely to become more acute and CESR's guidelines on what constitutes inside information disclosable to the public and on how to interpret the conditions under which an issuer can delay the dissemination of such information would be extremely useful. This exercise could build upon the second set of CESR guidance (*CESR/06-562b*) with a view to refining the list of events constituting inside information (change in creditworthiness could be added for example) and detailing circumstances under which dissemination to the public can (and cannot) be delayed.

- ***Do you have any comments in relation to this draft guidance on the issue of rumours?***

**14.** CESR's proposal aims at elaborating on the circumstances under which a rumour should prompt an issuer to answer, but does not provide a definition of the rumour. Being able to qualify a piece of information as a rumour is yet critical for the application of CESR's guidelines. AMAFI therefore sees as fundamental that the current proposal be completed with a definition of what a rumour is.

**15.** In addition, the draft proposal seems to create a risk that phishing strategies via rumours are used to oblige issuers to react. It is therefore essential that §36 be explicit enough about the meaning of "*information sufficiently precise*" and the origin of the "*leak of information*", which should not be restricted to the issuer itself.

When elaborating on the notion of "*information sufficiently precise*", it is important, in our view, to consider current market circumstances and provide topical examples such as changes in creditworthiness. This will contribute to reducing the probability of conflicts of interest and market abuse in the current market turmoil.