

Response to CESR's call for evidence
"Evaluation of the supervisory functioning of the EU market abuse regime"

AFEP appreciates CESR's invitation to all interested parties to report on experiences with the new market abuse regime in Europe.

AFEP currently represents the top eighty five private sector companies in France, with a combined market capitalization in 2005 of approximately Eur 1000 billion, combined sales of over Eur 1100 billion and more than 4,8 million employees. The Association seeks to improve the French and European legislative framework in which companies operate by promoting initiatives that contribute to the growth of companies in the world market economy.

Our comments will focus on problems our member companies have identified with the functioning of the market abuse regime in France.

GENERAL COMMENTS:

As a matter of principle, it is preferable that **level 2** technical implementing measures take the form of **directly applicable regulations**, rather than directives, which require implementing measures themselves, and therefore bear the risk of leading to differences among EU countries.

It should also be avoided that implementing measures give rise to diverging translations. For example, the English and French versions of Article 5 § 1 of Regulation 2003/2273/EC concerning the trading conditions of buy-back programs are not in keeping with each other. In such cases, where the Regulation is directly applicable in all Member States from the moment of its publication in the Official Journal of the European Union, **there should be a rapid procedure at European Commission level, allowing to remove possible uncertainties resulting from diverging translations.**

I. DIRECTORS' DEALINGS

Threshold below which no notification is required

According to Art. 6 § 2 of Directive 2004/72/CE, Member States may decide that no notification is required or that it may be delayed until the total amount of transactions has reached 5,000 euros. **This threshold is too low.**

In order to provide the market only with information on significant transactions operated by managers, it would be **advisable to introduce a threshold under which single transactions would not have to be notified.** Indeed, notifications of absurdly low transactions (tens of euros) could be avoided by fixing a **threshold of 500 euros per transaction.**

If these single transactions exceed **the global threshold, which AFEP proposes to raise to 10,000 euros / year**, then the sum of all transactions conducted by the director, even below the threshold of 500 euros, would have to be disclosed.

II. INSIDERS' LISTS

A. Insiders' identity

There should be harmonisation of what is understood by the “**identity**” of any person having access to inside information (Art. 5 § 2a of Directive 2004/72/EC) in order to allow companies operating in different Member States to be able to refer to harmonised procedures when they establish and up-date permanent or occasional insiders' lists.

Indeed, some Member States require even the personal address of the person to be included in the list.

AFEP suggests the following to be clarified:

- **identity of natural persons** means: name, first name, professional address, name of the relevant issuer, professional telephone and e-mail address;
- **identity of legal persons** means: corporate name, type of company, activity, professional and e-mail address, contact person, telephone number.

B. Third parties

Art. 6 § 3 of Directive 2003/6/EC obliges issuers, or persons acting on their behalf or for their account, to draw up a list of those persons working for them, under a contract of employment or otherwise, who have access to inside information, and to regularly update this list.

It should be clarified at European level that the **issuer is obliged to include only the corporate name** of this third party (in most cases indeed the latter is a legal person) **and not the names of all the natural persons** possibly having access to the insider information within this third party. This is the solution adopted by the French regulator.

C. Security measures

It is also advisable to provide for European harmonisation on the **necessity (or not) to protect insiders' lists against falsification**. Indeed, the French agency entrusted with enforcement of rules on privacy and personal data protection (CNIL), ruled that insiders' lists must be protected against any falsification of the data they contain by appropriate security measures.

D. Conservation

According to Art. 5 § 4 of Directive 2004/72/EC, Member States shall ensure that insider lists be kept for at least **five years** after being drawn up or updated. The length of the conservation period is particularly burdensome in most cases. Indeed, any updating of the list triggers the beginning of another five year conservation period, leading to multiple and often voluminous lists being conserved at the same time.

AFEP suggests **making conservation periods coincide with prescription periods** in the different Member States. It seems illogical to be obliged to conserve an insider list for a five year period when the prescription for insider trading is only **three years**.

C. BUY BACK OF SHARES

Requirements imposed by the different market authorities across the EU on buy back programs should be harmonised.

For example, the French regulator AMF obliges issuers to include in the 10 % limit financial derivatives (put, call...). This requirement is based on no text and does not seem pertinent as derivatives cannot be exercised. In addition, other European regulators do not seem to have introduced similar obligations.

Incidentally, the AMF requires historical information on the buy backs to be included in the detailed buy back program, which is not provided for by the Commission Regulation 2273/2003 of 22 December 2003.

At last, a **clarification is needed concerning the scope of the safe harbour**. Article 3 (b) states that it concerns employee share option programmes or other allocations of shares to employees of the issuer or of an associate company. However, most companies propose to their shareholders a resolution authorising the Board to grant share options not only to employees, but **also to directors** of the company or of an associate company.

AFEP calls on CESR to make clear, in the framework of level 3, that the safe harbour provided for in Article 8 of Directive 2003/6 also applies to options granted to directors.