Numéro d'identification: 09245221105-30

FEDERATION
BANCAIRE
FRANCAISE

July, 23rd 2010

EUROPEAN COMMISSION – PUBLIC CONSULTATION
A REVISION OF THE MARKET ABUSE DIRECTIVE

FBF'S RESPONSE

GENERAL REMARKS

1. The French Banking Federation (FBF) represents the interests of the banking industry in France. Its membership is composed of all credit institutions authorized as banks and doing business in France, i.e. more than 500 commercial, cooperative and mutual banks. FBF member banks have more than 25,500 permanent branches in France. They employ 500,000 people in France and around the world, and service 48 million customers.

The FBF welcomes the opportunity to comment EC consultation on a revision of the Market Abuse directive.

As general remarks, we would like to underline that FBF fully supports the European Commission's fight against market abuse and market manipulation which is definitely in line with the will to broadly contribute to markets transparency. French banking industry stands ready to work with the European Commission and the supervisory authorities to find efficient and effective ways to promote market integrity.

Nevertheless, we would like to point out that **the market participants, within the future legal and harmonised framework of the market abuses, need clarity and certainty about what actions are considered reprehensible**. Indeed, the definitions of *market abuse* and *market manipulation* shall not be ambiguous as they currently are and this consultation is a real opportunity to remedy.

The following points are considered essential by the French industry to ensure the efficiency of the future regulation:

SPECIFIC REMARKS

A. EXTENSION OF THE SCOPE OF THE DIRECTIVE

The Commission services are interested in receiving stakeholders' views on the following questions:

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

The FBF favours an alignment of the "inside information" definition both for traditional financial instruments and commodity derivatives:

- the purpose of the current definition was to defend physical market actors (commodity dealers) and we think that it is in the ISPs' interest to align the two definitions ;

- moreover, in order to ensure the level playing field between all the market participants, certain current obligations should be imposed on commodity dealers. In order to improve market organisation and minimize risks of market abuse: at least the obligation to set up chinese walls, and why not the obligation to declare suspicious transactions.

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

The FBF is not against this proposal but further clarification from the Commission as to the perceived gaps and concrete examples would therefore be necessary for a more elaborated response to this question.

Moreover, we would like to highlight the difficulties the market participants will face in bringing the evidences of such attempts. As a matter of fact, the Commission proposes that the person accused of attempting to manipulate the market has to prove the legitimacy of his actions, effectively reversing the burden of proof. Instead, it should always be the authorities' obligation to prove that a certain action or transaction is manipulative or does not conform with accepted market practice.

At the very least, the European text should revise and precisely adjust the definition of the "*attempt*", so as to clearly spell out what would be considered an attempt to manipulate the market.

In that way, it must be underlined that under French criminal law, "*an attempt is committed where, being demonstrated by a beginning of execution, it was suspended or failed to achieve the desired effect solely through circumstances independent of the perpetrator's will.* » (French Penal Code, article 124-5)

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

The proposed definition has a too wide scope and needs clarification.

The French banking industry would request further information from the Commission as to what that might mean and as to what should be understood to be market-abusive in this context. Recent discussions around Credit Default Swaps, for example, have shown that some bilateral trading activities that are perfectly acceptable for the markets and are even considered to enhance market efficiency might be perceived to be abusive or harmful by some policy-makers or by the wider public.

The simple fact that an OTC could have an impact on the underlying market does not reveal *per se* a market manipulation (i.e.: a hedging transaction for a significant delta). The impact on the underlying market must also meet market manipulation criteria (artificial price, etc...).

(4) To what extent should MAD apply to financial instruments admitted to trading on MTFs?

The FBF favours an extension of MAD to financial instruments listed on MTF.

In France we already know such an extension with the concept of "organised MTF", but we support a full harmonisation of MAD in this respect, except for specific local interest markets (i.e. for example in France, the "*Marché Libre*").

(5) In particular should the obligation to disclose inside information not apply to issuers who only have instruments admitted to trading on an MTF? If so why?

The FBF does not see any particular reason to exempt issuers who only have instruments admitted to trading on an MTF from the MAD obligations.

Moreover, The FBF supports that the MAD obligations should apply to all market participants on every trading platforms in the same way, although they might vary by instrument, in order to ensure the level playing field.

(6) Is there a need for an adapted regime for SMEs admitted to trading on regulated markets and/or MTFs? To what extent should the adapted regime apply to SMEs or to "companies with reduced market capitalisation" as defined in Prospectus Directive? To what extent can the criteria to be fulfilled by SMEs as proposed for such an adapted regime be further specified through delegated acts?

The FBF considers that market abuse or market manipulation is more likely to occur with regard to smaller issuers, as it is easier to move less liquid markets. Relaxation of these rules would therefore deteriorate investor protection, which is as such not acceptable and would rather discourage investors from trading in shares of smaller issuers.

Following the small business act initiatives, and even if it is of utmost importance not to discourage SMEs to have an easier access to financial markets, the FBF is of the opinion that as soon as a company is listed, it shall respect the MAD regime broadly and this latter shall not be adapted according to the size of the company. In order to be efficient, this regime shall be then applied uniformly.

B. ENFORCEMENT POWERS AND SANCTIONS

As a general matter, the FBF notes that market operators are better placed to detect suspicious orders or transactions than are intermediaries, due to their wider view on market developments

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

The FBF favours most of the enhancements proposed by the Commission (such as telephone and data traffic records) since they have already been implemented in the French regulatory framework.

Besides, the FBF also supports the global extension of suspicious transaction reporting to OTC transactions.

Regarding the powers of the competent authorities, the French banking industry underlines a lack of precision and clarity, particularly with respect to:

- the identification of the competent authority,

- the specific powers to investigate market abuse.

Therefore, the FBF stands for a general clarification on this issue since in their role as intermediaries, banks need to know exactly what types of orders and transactions they would be required to report, with a good degree of comfort that such orders or transactions should indeed be flagged to the competent authorities.

All of this is then subject to full legal clarity and certainty.

In addition, the FBF would suggest that market abuse directive provides a safe harbour for transactions concluded *via* a portfolio management service, under specific conditions which could be defined through an implementation directive or directly by ESMA.

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

The FBF is of the view that on the one hand, it is necessary to harmonise the amount of the fines and, on the other hand, to determine the competent authority granted to do so.

However, knowing that market abuse offence is often a criminal offence and, as a consequence, that its prosecution is regulated by national laws, the FBF recognises that a full harmonisation across Member States will surely be difficult.

Nevertheless, the FBF encourages a high degree of consistency of the sanction regime across Member States.

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

The FBF favours the cooperation between ESMA and the regulators provided that the cooperation is really efficient, which implies a maximum harmonisation in terms of transmission of information and implementation of standardized systems of reporting.

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

The FBF strongly encourages such cooperation with third countries authorities on a mutual recognition basis. In that respect, the ESMA should play a central role.

Regarding the way to reach such cooperation, it is the FBF opinion that supervisory authorities will be best-placed to consider in more details the appropriate supervisory arrangements, under the ESMA supervision from a European point of view.

C. SINGLE RULE BOOK

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

The FBF does not favour the proposed rule consisting in declaring to market authorities the decision to differ the publication of privileged information (when justified by the protection of legitim interests of the issuer).

Firstly, we consider that the less people are aware of such information, the more the information is protected and the more likely this information will be protected.

Secondly, the proposed rule is confused, particularly when the delay of disclosure is caused by the systemic risk; indeed, the scope of the information qualified as « privileged » is not defined. Moreover, as soon as a systemic risk entity is concerned, the market regulator shall necessarily cooperate with the prudential authority.

In that respect, issuers should continuously have the sole responsibility to decide whether to delay the disclosure of insider information, in compliance with the MAD's general requirements.

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

The FBF welcomes a European definition and the harmonisation of recognised market practices, provided that ESMA is granted to elaborate it and this harmonisation does not challenge current recognised rules (stabilisation programs, etc). Indeed, at this time, however, significant differences between markets remain, which fully justify the divergence of accepted market practices across Member States.

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

The FBF is in favour of the proposed new threshold of 20. 000 Euros but we insist on the fact that the *rationae personae* scope shall not be changed.

The FBF would moreover request full harmonisation of this threshold across the EU, in nominal terms.

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

None. As a general remark however, the FBF would encourage the Commission to aim at the highest possible degree of convergence of national laws and regulations, as an essential element to enhance the efficiency of the European capital market.

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

As a general matter, the FBF notes that market operators are better placed to detect suspicious orders or transactions than are intermediaries, due to their wider view on market developments