France Completes Implementation of EU Market Abuse Directive

Introduction

To harmonize existing European legal frameworks and improve investor confidence, the European Parliament, Council and Commission enacted, from January 28, 2003 to April 29, 2004, four directives (collectively, the “Market Abuse Directives”)\(^1\) and a regulation (the “Regulation”)\(^2\) on insider trading and market manipulation.

All Member States of the European Union were required to have implemented the Market Abuse Directives into their legal systems by October 12, 2004. More than a year behind schedule, France has nearly completed implementation of the Market Abuse Directives by a Parliamentary act of July 20, 2005 (the “French Implementation Act”)\(^3\) and consequent amendments by the French Financial Market Authority’s (the “AMF”) of the AMF General Regulations on September 8, 2005 and December 30, 2005 (the “RGAMF”).\(^4\)

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4. Ministerial Order of September 1, 2005, homologating various amendments to the RGAMF (J.O. No 209 of September 8, 2005, page 14589, text No 12) and Ministerial Order of December 30, 2005, homologating various amendments to the RGAMF (J.O. No. 15 of January 18, 2006, page 675, text No 54).
Background

The implementation of the Market Abuse Directive into French law started as early as August 1, 2003, with the adoption of the Financial Security Act (the “Financial Security Act”),\(^5\) pursuant to which a single regulatory authority, the AMF, was created to unify the regulatory functions previously handled separately by the Conseil des marchés financiers (the “CMF”), the Commission des opérations de bourse (the “COB”), and the Conseil de Discipline de la Gestion Financière. With the creation of the AMF, the Financial Security Act streamlined the duties of overseeing corporate finance, financial information, investment service providers, collective investment schemes, and financial markets into one authority.\(^6\)

On November 24, 2004, the AMF issued General Regulations (Règlement général de l’Autorité des marchés financiers) (the “RGAMF”), restating and codifying previous COB and CMF regulations, while simultaneously implementing several key provisions of the Market Abuse Directives, to the extent legislative delegation from the French Parliament was not required. In particular, the RGAMF modified insider trading and market manipulation rules so as to comply with the Market Abuse Directives’ new definitions. Furthermore, the safe harbor provisions for stock repurchases and stabilizing transactions set out in the implementing Regulation became directly applicable in all EU Member States as of October 12, 2004.\(^7\)

Given the high degree of convergence with existing French regulations, the AMF’s first implementation of the Market Abuse Directives into the RGAMF did not overhaul the French regulatory landscape. However, more novel aspects of the Market Abuse Directives required further legislative action from the French Parliament in order for them to be fully enforceable in France.

After the October 12, 2004 implementation deadline passed, the French Parliament used an accelerated procedure that resulted in the adoption of the French Implementation Act on July 20, 2005.\(^8\) Following a two-month market consultation, the AMF recently amended the RGAMF to implement most of the remaining regulatory aspects of the French Implementation Act.\(^9\)

Notification of Suspicious Transactions

The French Implementation Act modifies the French Monetary and Financial Code by adding new Articles L.621-17 through L.621-17-7, which consist essentially of a direct implementation of Article 6(9) of the Directive regarding notification of suspicious

\(^5\) Law n° 2003-706 of August 1, 2003 (Loi de sécurité financière).
\(^6\) As required by Article 11 of the Market Abuse Directive, which compels each Member State to designate a “single” administrative authority for enforcement of the regulatory provisions adopted pursuant to the Market Abuse Directive.
\(^7\) Article 249 of the Treaty of Amsterdam provides that, in the case of a regulation, the measure “shall be binding in its entirety and directly applicable in all Member States.”
\(^8\) According to the EU Commission’s latest Internal Market Scoreboard (see IP/05/961), France remains one of the worst performers in terms of implementing EU Financial Markets Directives on time, with a 33.3% deficit as of June 1, 2005 and a total of 117 infringement cases brought against it by the EU Commission for failure to implement or incorrect implementation as of May 1, 2005.
\(^9\) As described below, amendments to the RGAMF regarding the disclosure of management transactions are still pending.
transactions. Any trading professional who suspects that a transaction on a regulated market might involve insider trading or market manipulation, as defined by the RGAMF, must file a report with the AMF without delay.\(^{10}\)

The report can be sent by e-mail, fax or mail\(^ {11}\) and must include the following information: (a) a description of the suspicious transaction, including the type of order and type of trading market; (b) the reasons why the transaction could involve insider trading or market manipulation; (c) the means of identifying the persons for whom the transaction was enacted, as well as any other persons possibly involved; (d) an indication of whether the transaction was for the concerned person's own account or on behalf of a third party; and, (e) any other information that might be pertinent to the transaction.\(^ {12}\) The AMF is in the process of creating a model form for filing these reports.\(^ {13}\) Missing information not known at the time of filing must be communicated to the AMF as soon as it becomes available.

This report remains completely confidential and is subject to rules of professional secrecy. The French Implementation Act provides that anyone who discloses information as to the existence of such a report, who reveals what persons or companies are concerned, or who communicates any of the information contained therein faces prosecution under the French Criminal Code.\(^ {14}\) The charges differ according to the person involved in the breach of confidentiality, whether a member of the AMF or the person filing the report.\(^ {15}\)

If any other Member State is concerned by the contents of the report, the AMF is required to transmit such information to the appropriate foreign authorities as soon as possible.\(^ {16}\)

The RGAMF also requires that trading professionals set up appropriate procedures to ensure compliance with notification requirements. In particular, these procedures should facilitate the identification of relevant variables (diagnostic flags or signals of market manipulation) that could be monitored by trading professionals to detect suspicious transactions while taking into account the recommendations of the Committee of European Securities Regulators. However, this requirement will not be applicable until July 1, 2006.\(^ {17}\) Similar to the whistleblower provisions of the Sarbanes-Oxley Act of 2002,\(^ {18}\) the French Implementation Act provides that anyone having initiated, in good faith, a report to the AMF for suspicious transactions is

\(^{10}\) New Article L. 621-17-2 of the French Monetary and Financial Code.
\(^{11}\) Amended RGAMF Article 321-142 also allows a report to be made by telephone, but it must be followed by a confirmation report in writing.
\(^{12}\) New Article L.621-17-4 of the French Monetary and Financial Code.
\(^{13}\) Amended RGAMF Article 321-142.
\(^{14}\) New Articles L. 621-17-5 and L. 621-17-6 of the French Monetary and Financial Code.
\(^{15}\) The person having initiated the report faces charges under Article 226-13 of the French Criminal Code while a member of the AMF faces charges under article L. 642-1.
\(^{16}\) New Article L.621-21 of the French Monetary and Financial Code.
\(^{17}\) Amended RGAMF Article 321-144.
\(^{18}\) Section 806(a) of the Sarbanes-Oxley Act protects whistleblowers from prosecution or discrimination for having reported the possibility of corporate fraud (18 U.S.C. § 1514(A)(a)(1)).
immune from civil or criminal liability in connection with such report,\textsuperscript{19} even if the veracity of the report cannot be proven and no AMF sanctions are ultimately imposed.

**Disclosure of Certain Management Transactions**

The French Implementation Act imposes disclosure requirements for corporate insiders within an issuer concerning all transactions conducted for their own account involving securities of the issuer.\textsuperscript{20}

Under the Financial Security Act, the disclosure of certain management transactions has been required since 2003. The French Implementation Act expands insider disclosure requirement to fully implement all of the Market Abuse Directives’ requirements.

The scope of the disclosure duties is significantly expanded to encompass not only board members (membres du conseil d’administration, membres du directoire du conseil and membres du conseil de surveillance), Chief Executive Officers (directeurs généraux, directeurs généraux délégués and gérants) and “persons closely associated with them,” but “all persons having regular access to inside information and the power to make managerial decisions affecting the future development and business prospects of the issuer.”\textsuperscript{21}

Proposed amendments to the RGAMF further refine the latter category by specifically including the Chief Financial Officer (directeur financier) and the Chief Financial Information Officer (responsable de l’information financière).\textsuperscript{22} As to all other corporate insiders, the RGAMF would require that issuers draw up and regularly update a list of officers that have regular access to inside information and the power to make managerial decisions affecting its future developments and business prospects. Issuers would then have the duty to transmit the list to the AMF and to any listed corporate insider.\textsuperscript{23}

The French Implementation Act has no definition of persons closely associated with managers. In all likelihood, the group would include spouses, dependent children, and other relatives sharing the same house with them.\textsuperscript{24}

Disclosure duties no longer rest with the issuer but rather with the managers themselves.\textsuperscript{25} This is in line with U.S. practice and will ease the disclosure burden on issuers.\textsuperscript{26} The AMF has proposed that managers e-mail the information directly to the AMF, within 5 trading days, with a copy to the issuer.\textsuperscript{27} The information is then posted on the AMF’s and the issuer’s website.\textsuperscript{28}

\textsuperscript{19} New Article 621-17-7 of the French Monetary and Financial Code
\textsuperscript{20} New Article L. 621-18-2 of the French Monetary and Financial Code, implementing Article 6(4) of the Market Abuse Directive.
\textsuperscript{21} New Article L. 621-18-2(b) of the French Monetary and Financial Code.
\textsuperscript{22} Proposed RGAMF Article 222-16. Proposed RGAMF amendments on “Disclosure of Certain Management Transactions” were subject to market consultations until September 30, 2005 and have not yet been released in their final form by the AMF.
\textsuperscript{23} \textit{Id.}
\textsuperscript{24} Article 1(1) and (2) of the Third Implementing Directive.
\textsuperscript{25} \textit{Id.}
\textsuperscript{26} New Article L. 621-18-2 of the French Monetary and Financial Code.
Pursuant to the option under Article 6(2) of the Third Implementing Directive, the AMF has elected to grant a *de minimis* exemption for transactions totaling less than €5,000 at the end of any given calendar year. The RGAMF does not indicate whether such *de minimis* transactions would then be carried forward into the following calendar year’s calculations.

The RGAMF implements, without modification, the list of information required to be disclosed: (i) name of the manager, (ii) where applicable, name of a person closely associated with the manager; (iii) name of the relevant issuer; (iv) description of the financial instrument; (v) nature of the transaction (*e.g.*, acquisition or disposal); (vi) date and place of the transaction; and (vii) price and volume of the transaction.

To minimize the risk of “erroneous or fanciful disclosures,” the AMF proposes that the information be disclosed on an AMF form that must be certified by the corporate insider’s account custodian (*teneur de compte conservateur*). This procedure may create difficulties and delays for corporate insiders with foreign custodians, unaccustomed to such requests.

The RGAMF also proposes to introduce a new requirement that the issuer’s board of directors prepare a special report for its ordinary shareholders’ meeting summarizing all management transactions that occurred over the calendar year. While this rule may improve French corporate governance practices, it is not dictated by either the Market Abuse Directives or the French Implementation Act.

Unlike Rule 3a12-3 under the Exchange Act, which provides that securities registered by a foreign private issuer are exempt from Section 16, neither the Market Abuse Directives nor the French Implementation Act exempt securities registered by a non-EU issuer from reporting requirements. In practice, however, the impact on US issuers with securities trading on an EU-regulated market should be minimal, as Section 16 requirements remain more stringent than the Market Abuse Directives’ equivalent insider reporting obligations.

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26 Section 16(a) of the Exchange Act provides that “Every person who is directly or indirectly the beneficial owner of more than 10 percent of any class of any equity security (other than an exempted security) which is registered pursuant to section 12 [of the Exchange Act], or who is a director or an officer of the issuer of such security,” must file a statement stating “the amount of all equity securities of such issuer of which the filing person is the beneficial owner” and “indicate ownership by the filing person at the date of filing, any such changes in such ownership, and such purchases and sales of security-based swap agreements as have occurred since the most recent such filing.”

27 Proposed RGAMF Article 2222-14. This proposed amendment implements without modifications the Market Abuse Directive’s five-business days filing deadline, which is significantly longer than the two-business days imposed by Section 16(a) after its amendment by the Sarbanes-Oxley Act of 2002.

28 RGAMF Article 222-15.

29 RGAMF Article 222-14 (proposed RGAMF Article 222-15).

30 RGAMF Article 222-15 (proposed RGAMF Article 222-17).

31 AMF Consultation Table dated August 2, 2005.

32 Proposed RGAMF Article 222-17, last paragraph.

33 Proposed RGAMF Article 222-18.

34 17 CFR 240.3a12-3

35 As defined in Rule 3b-4 (17 CFR 240.3b-4).
Insider Lists

One of the most controversial requirements of the Market Abuse Directive is that issuers must now prepare and regularly update lists of persons working for them who have access to inside information relating, directly or indirectly, to the issuer. The French Implementation Act, as interpreted by the AMF, takes an exhaustive approach in identifying insiders that will need to be included on insider lists.

First, the issuer must list anyone working for the issuer who has access to inside information relating, directly or indirectly, to the issuer, whether on an ongoing or temporary basis. Depending on the size, structure or type of business conducted by the issuer, insiders under this category could include members of management or supervisory boards and officers or employees of the issuer who have access to inside information relating, directly or indirectly, to the issuer.

Next, the issuer must compile a list of any third parties that have access to inside information as a result of their professional dealings with the issuer on an ongoing basis. Third party insiders under this category could include statutory auditors, regular advisers of the issuer and companies providing outsourcing services to the issuer. The issuer must also compile a separate or cumulative list of any third parties who have access to inside information on a temporary basis. Third party insiders under this category would include potential acquirors of the issuer, law firms, public relations agencies or banks advising the issuer or potential acquirors regarding an actual or potential transaction. Rating agencies that have access to inside information would also need to be listed. However, the AMF views financial analysts and journalists as falling outside the scope of the insider list unless they gain access to inside information as a result of their professional dealings with the issuer.

Finally, the listed third parties must themselves list all employees or agents who have access to inside information. In this way, the burden of compiling the list of insiders is shared with the concerned third parties. By way of example, the AMF states that a law firm advising the issuer on a financial transaction would have to list all its employees working on the transaction having access to the files, such as associates, translators or librarians.

The insider lists must contain, at a minimum: (a) the identity of each person having access to inside information; (b) the reason why such person is on the list; and (c) the date on which the list of insiders was created and updated. Additionally, lists of insiders must be promptly updated (a) whenever there is a change in the reason why any person is already on the list; (b) whenever any new person needs to be added to the list; or (c) to state when any person on the list ceases to have access to inside information.

38 Id.
39 Amended RGAMF Article 222-17, implementing Article 5(2) and (3) of the Third Implementing Directive.
inside information. The list must be retained for at least five years after the date it was prepared or last updated. All of the lists must be transmitted to the AMF upon request.

Issuers and third parties required to maintain lists of insiders must take measures to inform each person on the list of the legal and regulatory duties entailed and of the sanctions attached to the misuse or improper circulation of inside information. Curiously, the French Implementation Act fails to implement the Market Abuse Directive’s requirement that the insiders acknowledge having received such information.

Conclusion

The creation of the AMF, the enactment of the RGAMF, and the passing of the Financial Security Act effected major substantive reform of the regulatory framework governing market abuse in France. The final implementation of the Market Abuse Directives through the French Implementation Act adds significant new disclosure and reporting requirements for suspicious and insider trading transactions that should facilitate the enforcement of market abuse rules.

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40 Amended RGAMF Article 222-18.
41 Amended RGAMF Article 222-20.
42 Amended RGAMF Article 222-16.
43 Amended RGAMF Article 222-19.
44 Article 5(5) of the Third Implementing Directive.