Client Update

French Financial Markets Watchdog Encourages Settlements

THE AMF SETTLEMENT PROCEDURE

In France, market abuses—such as insider trading and market manipulations—are usually prosecuted by the French financial markets authority (the "**AMF**") through trial-like administrative proceedings before its Enforcement Committee. Defendants may face sanctions of up to €100 million or ten times the amount of the illegal profit made, or 15% of the annual turnover of the corporate defendant. The most egregious market abuses may be prosecuted by the French National Financial Prosecutor through the regular criminal court system, where defendants also face jail sentences.

Prior to referring a defendant to the AMF Enforcement Committee, the AMF may offer to enter into a settlement. In these instances, the defendant is not required to admit the alleged facts but must undertake to pay the Public Treasury a sum that cannot exceed the maximum pecuniary sanction applicable before the AMF Enforcement Committee. The defendant may also have to agree to implement compliance measures and to compensate identified victims. Such a settlement does not amount to a conviction.

Approval by the AMF Enforcement Committee is required for the settlement agreement to become effective. The terms of the settlement are then published on the AMF website. If the negotiation fails, if the AMF Enforcement Committee does not approve the settlement, or if the defendant does not comply with its terms, then the defendant is sent before the AMF Enforcement Committee for ordinary enforcement proceedings.

RECENT SETTLEMENTS RELATING TO MARKET ABUSES

Between September 2017 and February 2018, the AMF published the terms of the first settlements relating to alleged market abuses. One involved insider trading, while four related to market manipulations. In a nutshell:

- *Tordjman case*. This settlement was entered into by a director of a listed company who allegedly placed illegal sell and buy orders during a board meeting where he received material non-public information. According to the agreement, the defendant avoided a loss of €714 and made a profit of €1,945 on the basis of his respective sell and buy trades. Despite the modest benefits obtained, he agreed to pay a penalty of €100,000.

- *Deutsche Bank case*. The London branch of Deutsche Bank agreed to pay €300,000 to settle a case where one of its traders allegedly manipulated the price of several securities for almost 18 months. According to the agreement, the profit made by the bank for the benefit of its clients was valued, depending on the criteria used, between €6,596 and €44,979.
- *Talence Gestion and Lefort cases*. An asset management company and its managing director entered, separately, into agreements to settle charges of alleged market manipulation. Although the agreements state the defendants made no profit on the basis of their alleged wrongdoing, they agreed to pay €100,000 and €20,000, respectively. The asset management company also settled additional charges of alleged failure to comply with its obligations to report suspicious transactions by agreeing to implementation an enhanced detection and reporting program within four months from the approval of the settlement agreement.
- *Syquant Capital case*. An asset management company agreed to pay €350,000 to settle charges of alleged market manipulation through 233 market trade sequences. While the settlement agreement is not clear on this point, it suggests the company could have made illegal profits ranging from €83,756 to €283,979.

KEY FACTORS TO CONSIDER BEFORE AGREEING TO SETTLE

Although a defendant may decline the AMF's offer to settle and opt for regular enforcement proceedings, it will be important to thoroughly weigh the pros and cons of that decision. Here are four key factors to consider:

Avoiding risks associated with a finding of guilt. The main reason defendants may agree to settle with the AMF is the absence of acknowledgement of guilt or conviction. This is critical for at least two reasons: first, for certain companies, a finding of guilt may mean exclusion from regulated activities or public or private tenders; second, third parties that have suffered damages as a result of the defendants' actions may not use these settlement agreements to prove the defendants' misconduct when seeking compensation before civil courts. However, where identifiable victims exist, the AMF usually includes their compensation in the settlement agreement.

Saving time and costs. Because there is only a limited period of time to negotiate a settlement with the AMF, this option may allow defendants to limit both their legal costs and the disruption from other projects, if the negotiation is successful. Recently published settlements took about seven months from the offer to settle to the approval of the agreement by the AMF Enforcement Committee. By contrast, proceedings before the AMF Enforcement Committee usually last between one and two years, plus another year or two if the case goes on appeal.

No pecuniary incentive. A settlement with the AMF does not ensure the defendant any pecuniary advantage. The maximum settlement amount a defendant may be asked to pay is no different than the maximum financial penalty that can be imposed by the AMF Enforcement Committee in regular proceedings. The first published market abuses settlements suggest that defendants should not expect any leniency from the AMF compared to the level of financial penalty typically imposed by the AMF Enforcement Committee in similar cases.

No real confidentiality incentive. The settlement procedure also does not offer a decisive advantage in terms of confidentiality. Although the settlement procedure does not involve a public hearing, the settlement agreement is always made public. As a matter of internal policy, the AMF refuses to anonymize the identity of the settling party. By contrast, although a proceeding before the AMF Enforcement Committee generally involves a public hearing, the AMF Enforcement Committee may decide not to publish its decision or to publish it with anonymization, especially when it may cause the defendant a "serious and disproportionate damage."

In sum, the AMF settlement procedure offers clear advantages for legal entities operating in a multi-jurisdictional landscape and keen on avoiding any risk of a formal conviction. The AMF has given only limited guidance as to the types of cases in which it will use its right to offer settlement, but public comments have suggested that it would use this procedural tool only where the alleged market abuses involve relatively small profits and no new legal issues. The first few settlements noted above tend to confirm this view.

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Please do not hesitate to contact us with any questions.

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