The Brief

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The Derivatives Group

Editorial

French Shares Buy-Back Programs

French AMF Clarifies Status and Destination of Treasury Shares Acquired Before October 13, 2004

The new French shares buy-back legal framework resulting from the EU Directive 2003/6/CE on market abuse (the "**EU Directive**") provides for a "safe harbour" rule protecting issuers' transactions on own shares when certain conditions are met. Such conditions are notably set forth in EU Regulation no. 2273/2003 of December 22, 2003 (the "**EU Regulation**").

One of them requires that issuers having decided to buy-back their own shares must not, as long as their buy-back programs are operating, directly sell in the market any such treasury shares.

Failure to do so jeopardizes the benefit of the safe harbour and thus increases the risk for transactions performed under the programme to be deemed market abuses or manipulations.

This piece of legislation however left unclear the status of treasury shares acquired **prior** to the entry into force of the EU Regulation, *i.e.* October 13, 2004.

The French Financial markets authority (the "**AMF**") published on Wednesday this week two Instructions on this very issue.

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Such Instructions implement Article 241-8 of the AMF General Regulation which requires any French issuers holding treasury shares, **before its next AGM in 2005**, to either :-

- **allocate them to one of the EU Regulation objectives** (*i.e.* reducing capital, hedging certain financial instruments or employee schemes or stock option plans);

- **use them in the context of an authorised market practice** pursuant to the EU Directive (for information, the AMF is due in the next few days to authorise two first market practices for liquidity agreements and external growth operations); or

- **sold them.**

In such later case, the new Instructions confirm that the shares acquired prior to October 13, 2004 can be sold **without restrictions** by the issuer if it has not yet implemented its buy-back program.

And, when such a program is in place and operating, the Instructions, in a liberal approach given the terms of Article 241-8 of the AMF General Regulation, consider that the shares acquired before October 13, 2004 can be sold by the issuer, either:-

- by blocks sales (structural blocks or ordinary blocks, as defined by Euronext); or

- through a bank or an investment firm **acting pursuant to a formal mandate** organizing at least, according to the AMF, sales terms and conditions, remuneration modalities and reporting and declaration obligations to the issuer.

Banks and investment firms willing to act on this market will hence have to promptly develop template mandates with French issuers. An extreme attention will have to be paid to these documents which the AMF reserved the right to request a copy of. Apart from the provisions listed in the Instructions, the mandates should contain a number of protections and covenants, including a transparent organisation of each parties' liability in case of breach of stock-exchange regulations (*e.g.* combined actions of the issuer and the Bank resulting in a hit of maximum daily trading volumes).

Finally, the AMF Instructions require that any such sale is properly disclosed to the market within 7 exchange days.

For any queries you may have in relation to the new shares buy-back French regime, please do not hesitate to contact any of us.

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The present memorandum is a summary of certain legal reforms introduced or to be introduced in France. It is circulated for information purposes only and should not be used as the basis for any business or investment decision without specific legal assistance.

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