



Banking in the crosshairs: Investigations by financial regulators and competition authorities in the banking industry – Libor, Forex, what next?

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Stéphane de NAVACELLE / Thomas RICARD

Navacelle Avocats

J.P. Karsenty & Associés

60, rue Saint Lazare
75009 Paris

30, rue d'Astorg
75008 Paris

www.navacellelaw.com

www.jpksenty.com

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Certain episodes of benchmark manipulation (Libor, Forex, etc) have generated global doubt and concern with regards to the integrity of many benchmarks, undermining the integrity of the system and legal and commercial certainty, and resulting in major losses for investors.

- 1. Have the authorities from your jurisdiction proposed or adopted any measures to ensure the necessary integrity of the market and of its benchmarks, guaranteeing that they are not distorted by any conflict of interest, that they reflect economic reality and that they are used correctly? (i.e.: measures to better protect investors, reinforce confidence, address unregulated areas, and/or ensure that supervisors are granted adequate powers to fulfil their tasks)**

A number of laws and regulations have been passed and implemented in France to ensure the integrity of the market, fight against market abuse and prevent conflict of interests. The following are the key legislations:

- Ordonnance of 12 April 2007 on markets' financial instruments¹;
- Law No. 2013-672 of 26 July 2013 on the separation and regulation of banking activities;
- Ordonnance No. 2013-676 of 25 July 2013 amending the legal framework for the asset management;
- Arrêté of 5 June 2014 on the modifications of the Autorité des Marchés Financiers (AMF) rules modifications to the General Regulation of the AMF.

The c) and d) of Section II of Article L. 621-15 of the Monetary and Financial Code (CMF) set out the administrative penalties that may be ordered by the AMF.

In particular, the AMF may punish any person who has engaged or attempted to engage in insider dealing or has engaged in price manipulation, the spreading of false information or any infringement likely to undermine the protection of investors or the proper functioning of the market (together called "market abuse").

Articles L. 465-1 and L. 465-2 of the CMF provide criminal sanctions for market abuse.

¹ Ordonnance du 12 avril 2007 relative aux marchés d'instruments financiers ; Loi n° 2013-672 du 26 juillet 2013 de séparation et de régulation des activités bancaires ; Ordonnance n° 2013-676 du 25 juillet 2013 modifiant le cadre juridique de la gestion d'actifs; Arrêté du 5 juin 2014 portant homologation de modifications du règlement général de l'Autorité des marchés financiers ;

2. Which authority monitors financial bodies in your jurisdiction?

The AMF with the General Regulations of the AMF (AMF General Regulations)² both monitor financial bodies.

The AMF regulates participants and products in France's financial markets. It regulates, authorises, monitors, and, where necessary conducts investigations and issues sanctions. In addition, it ensures that investors receive material information, and provides a mediation service to assist them in disputes. It also has investigative powers and has a power of sanctions.

Concerning investigations by the AMF, the investigation procedure is governed by law and the AMF General Regulation. An Investigation Charter published in September 2012 describes the principles of good conduct for AMF investigators, as well as the expectations placed on persons summoned in connection with an investigation. An investigation comprises several stages that leads to the drafting of an investigation report. After it has reviewed the investigation report, the Board, which is the AMF's prosecutorial authority, decides what action to take, which may include one or more of the following:

- serve a statement of objections to the respondent and open sanction proceedings;
- serve a statement of objections to the respondent and propose a settlement
- forward the case to the Public Prosecutor if the evidence in the report points to a criminal offence;
- forward the case to other French or foreign administrative authorities if the report points to matters within their jurisdiction;
- send a letter of observations to persons under investigation to remind them of current regulations;
- close the case.

The AMF Enforcement Committee exercises its power to impose sanctions once the Board has decided to open sanction proceedings. The Enforcement Committee of the AMF may issue sanctions against:

- professionals under AMF supervision if they breach their professional obligations under the law, regulations and professional rules approved by the AMF;
- individuals acting under the authority or on behalf of these professionals;

² Book VI - Market abuse: Insider dealing and market manipulation Article 313-18 et seq Conflict interest, Article 314-1 and following the rules of good conduct, Article 314-3 on respect for the integrity of markets.

- any person that commits market abuse, including insider dealing, price manipulation or dissemination of false information, or any other breach that could impair investor protection or interfere with orderly markets.

The applicable sanctions vary depending on the type of respondent and offence. Where issued, fines are paid either to the Treasury or to the guarantee fund to which the professional belongs³.

The Autorité de contrôle prudentiel et de résolution (ACPR) is responsible for supervising the banking and insurance sectors in France. The ACPR, which is an independent administrative authority, is charged with preserving the stability of the financial system and protecting the customers, insurance policyholders, members and beneficiaries of the persons that it supervises.

The ACPR's statutory objectives are set out in Article L. 612-1 of the CMF.

To discharge its duties, the ACPR has, with respect to entities under its jurisdiction:

- supervisory powers;
- the power to impose administrative enforcement measures;
- disciplinary powers.

It may also make public any information that it deems necessary to discharge its duties.

In view of the increasing overlap between different types of savings media (particularly life insurance and investment funds) and the emergence of market participants capable of distributing a comprehensive range of insurance and banking products, the AMF and the ACP set up a Joint Unit in 2010. This close collaboration allows the two authorities to enhance oversight of financial product marketing in France to improve investor protection.

3. [For EU and EFTA member states] has your country completed the transposition of Directive 2014/65/EU of the European Parliament and of the Council on markets in financial instruments (also known as «MiFID II»)? If not, when will transposition be completed?

The transposition has not yet been made. It should be made for the end of 2016.

³ See the following link for an overview of the applicable sanctions: http://www.amf-france.org/en_US/L-AMF/Missions-et-competences/Sanctions.html?

4. Have the authorities in your jurisdiction conducted any inquiry on leading banks or institutions in relation anti-trust practices with regards to essential financial information and/or the clearing system?

The European Commission had opened an investigation on anticompetitive practice from April 2011, following up on notifications by Deutsche Börse and the Chicago Mercantile Exchange, which wanted to enter the CDS market between 2006 and 2009 and trade on dedicated stock exchanges. They could not obtain the required data from Markit and ISDA, who apparently withdrew the information at the request of several banks.

The Commission launched investigations as to possible manipulation of the EURIBOR and LIBOR benchmarks for interbank lending rates by a number of banks. The suspicion was that banks had provided estimates of the interest rate at which they would accept offers of funding which were different from the rate they would have accepted in practice. As a result, the integrity of the rates has been called into question – rates which are used as benchmarks for borrowing and as references for the pricing of many financial instruments such as interest rate swaps and consumer contracts such as mortgages, loans and credit cards.

At the French level, preliminary investigations may have been initiated by the Public prosecutor, but that did not lead to official investigations.

The LIBOR case has raised concerns at the interplay between an antitrust investigation at the European level and the possibility of a criminal one at the French level, underlining the lack of efficiency of the French system in that respect.

The French Competition authority gave a decision in 2010⁴ on prices and associated conditions applied by banks and financial institutions for processing cheques submitted for encashment purposes. It fined 11 French banks 384.9 million Euros for having charged unjustified interbank fees during the transition towards a new digital system for processing checks. New interbank fees were raised during the transition towards the new digital system for processing checks⁵.

The decision was quashed by the Court of appeal on 23 February 2012, which considered the practices identified were not sufficiently harmful to constitute anti-competitive practices susceptible to be sanctioned.

⁴ http://www.autoritedelaconurrence.fr/doc/10d28_en.pdf

⁵ http://www.autoritedelaconurrence.fr/user/standard.php?id_rub=368&id_article=1472

5. Which new requirements have been established in order to reinforce governance and oversight and introducing measures sanctioning those responsible for LIBOR and other index manipulation?

The Commission proposal for a Regulation on indices used as benchmarks in financial instruments and financial contracts was backed up by the French Senate in June 2013 and passed in July 2013⁶.

Anticipating the EU requirement, this legislation improves indices used as benchmarks in financial instruments and financial contracts⁷.

This legislation also contains a legal definition of the benchmark as *«any data calculated from the nominal value, confirmed or estimated, of one or more underlying reference data, of one or more interest rate confirmed or estimated, or any value or measure, and by reference to which is determined the amount payable under a financial instrument or the value of a financial instrument»*⁸.

This legislation also created an article L 465-2-1 for the CMF regarding criminal sanctions. Any person transmitting *«any false or misleading information used to calculate an index [...] that should distort the price of a financial instrument or an asset which should attached this index, when the person who transmitted data or information knew or have known, that data or information was false or»*⁹ risks a 2-year jail sentence and a 1.5 million Euros fine.

The same sentences apply to any person whose behaviour led to the manipulation of a benchmark calculation.

This new legislation also modified article L.621-15 of the CMF to increase the competence of the AMF in terms of sanctions so that the persons (and not only the entities) are within its scope.

⁶ The EU Council backed up European Commission proposal to fight against the manipulation of financial benchmarks in February 2015.

⁷ LOI n° 2013-672 du 26 juillet 2013 de séparation et de régulation des activités bancaires.

⁸ *« toute donnée diffusée calculée à partir de la valeur ou du prix, constaté ou estimé, d'un ou plusieurs sous-jacents, d'un ou plusieurs taux d'intérêt constatés ou estimés, ou de toute autre valeur ou mesure, et par référence à laquelle est déterminé le montant payable au titre d'un instrument financier ou la valeur d'un instrument financier »* (our translation).

⁹ *« des informations fausses ou trompeuses utilisées pour calculer un indice[...] ou de nature à fausser le cours d'un instrument financier ou d'un actif auquel serait lié cet indice, lorsque la personne ayant transmis les données ou les informations savait ou aurait dû savoir qu'elles étaient fausses ou trompeuses »* (our translation).

6. **Has any similar scandal-malpractice affected your jurisdiction? Have penalties been imposed? and/or administrative or criminal sanctions? If not, which sanctions are foreseen in your jurisdiction for this type of misconducts?**

Price manipulation is sanctioned under French law (see above)¹⁰.

Criminal sanctions also exist in case of price fixing – their application remains very scarce. The French competition authority retains the power to transfer the case to the Prosecutor’s office if it deems necessary. In practice there is no risk of such transmission in case of leniency application.

7. **How are the potential conflicts of interest affecting banks or other financial institutions addressed in your jurisdiction? Which requirements are adopted to ensure that benchmarks reflect economic reality and that they are used correctly?**

The changes follow what is set at the EU level.

The AMF intervenes upwards as it constantly monitors all the professionals authorised to provide investment services. It verifies the information filed routinely or at its request and ensures that the services offered by financial intermediaries comply with the regulations. As explained earlier it also authorised products, including investment funds, throughout their life. It ensures they are regulation-compliant and checks the quality of the information disseminated to investors through such documents as annual reports, newsletters and advertising literature.

8. **Are any measures foreseen in your jurisdiction for the protection of “whistleblowers”?**

The French Labour Code has been modified to protect employees that are acting as whistle-blowers.

According to article L. 1161-1 of the French Labour Code *«No person can be kept out from a recruitment procedure or access to internship or formation, no employee may be punished, dismissed or be the subject of discriminatory measures, direct or indirect, in particular concerning remuneration, training, reclassification, assignment, qualification, classification, promotion, transfert or contract renewal for having reported in good faith to his/her employer or to the judicial or administrative authorities, of facts of corruption that comes to his/her knowledge in the call of duty »*¹¹.

¹⁰ Article L465-2 alinéa 1^{er} du code monétaire et financier.

¹¹ *« Aucune personne ne peut être écartée d'une procédure de recrutement ou de l'accès à un stage ou à une période de formation en entreprise, aucun salarié ne peut être sanctionné, licencié ou faire l'objet d'une mesure discriminatoire, directe ou indirecte, notamment en matière de rémunération, de formation, de reclassement, d'affectation, de qualification, de classification, de promotion professionnelle, de mutation ou de renouvellement de contrat pour avoir relaté ou témoigné, de bonne foi, soit à son employeur, soit aux autorités*

In the banking sector, while not qualifying as whistle-blower per se, a reporting exists in some instances, notably to fight against money laundering¹².

9. Is there any measure in place in your jurisdiction to guarantee suitable and appropriate evaluation of benchmarks?

See above on this question.

10. Which requirements and/or transparency rules –if any- are undertaken in your jurisdiction in order to prevent distortions of competition resulting from divergences between other national laws and/or to provide more legal certainty for market participants? (i.e. to prevent or limit regulatory complexity and potential regulatory arbitrage)

Most changes have been made at the EU level, and followed up at the national level.

It promotes legal certainty and favours investments.

judiciaires ou administratives, de faits de corruption dont il aurait eu connaissance dans l'exercice de ses fonctions » (our translation).

¹² Articles L.561-1, L.562-1 à L.562-10 et L.564-1 à L.564-6 du code monétaire et financier.