International
Capital
Market
Association Ltd

ICMA

3 December 2007

Kurt Pribil
Chair – CESR Pol
Committee of European Securities Regulators

Copy: Angie Reeh-Schild
Mike Duignan

Dear Mr Pribil

<u>Level 3 work on stabilisation regime: Topics for consideration</u>

The International Capital Market Association (**ICMA**) would like to take the opportunity to suggest topics for consideration in course of the proposed Level 3 work on the stabilisation regime.

ICMA is the self-regulatory organisation and trade association representing investment banks and securities firms issuing and trading in the international capital markets worldwide. ICMA's members are located in some 50 countries across the globe, including all the world's main financial centres, and currently number over 400 firms.

We attach our suggestions as **Annex 1** to this letter and would be pleased to discuss them with you at your convenience.

Yours faithfully,

Ondrej Petr

Ondrej Petr
Regulatory Policy – Primary Markets
+44 (0)207 510 2709
ondrej.petr@icmagroup.org

Part of the
ICMA Group of
Companies

**International Capital Market Association Ltd** 7 Limeharbour GB-London E14 9NQ

**Phone:** +44 20 7538 5656
**Fax:** +44 20 7538 4902

**Registered No.:** 1917944 England
**Registered Office:** 7 Limeharbour GB-London E14 9NQ

**ww.icma-group.org**

## ANNEX
## TOPICS FOR CONSIDERATION BY CESR

### General comments

The International Primary Market Association (one of the predecessor associations of the ICMA) actively participated in the various consultations leading up to the adoption of the Market Abuse Directive and its implementing measures. We fully support their aim of promoting integrity of the financial markets and investor confidence in those markets.

A workable regulatory framework for stabilisation has been one of our priority topics in the discussions about the market abuse regime. Recognition of stabilisation as a legitimate and beneficial activity and agreement on common, pan-European conditions under which it may be effected was one of the major achievements of the new market abuse regime.

While we in principle supported the adoption of the Regulation No. 2273/2003 (the **Stabilisation Regulation**), the four years of experience with its application suggest that:

- There is a considerable degree of divergence in the interpretation and application of the Stabilisation Regulation across the Member States. This is exacerbated by possible applicability of several Member States` regimes to a particular transaction. This results in considerable legal uncertainty and practical difficulties to market participants operating on a pan-European basis.

- The practical operation of the Stabilisation Regulation has highlighted certain difficulties resulting from its overlap with other EU securities directives and with corresponding regulation in third countries.

In the favourable market conditions prevailing since the adoption of the Stabilisation Regulation, stabilisation was often not a pressing concern. Consequently, there was generally not an urgent need to address the various difficulties created by the Stabilisation Regulation. We believe that as the banks are now adjusting to the recent market turbulences, this perspective is likely to change.

We therefore support all efforts aimed at tackling these difficulties and welcome the fact that CESR has included stabilisation in its work programme as a high-priority item. In this letter, we would like to build on the previous submissions to CESR and various discussions with CESR members on the topic and, under "*Specific comments*" below, outline the key concerns of the industry together with possible ways of addressing them.

We are aware of the limitations of CESR`s mandate as well as of the upcoming review of the market abuse legislation by the Commission. At the same time, we thought it would be helpful to summarise all our concerns in this letter, whether they are strictly speaking within CESR`s Level 3 mandate or whether they might require intervention by the Commission. We will be making a separate submission to the Commission once the review formally starts.

## Specific comments

*Acceptance of the concept of stabilisation*

The acceptance of stabilisation as a concept still differs across the Member States. This reflects different historical experience with this activity in the domestic context and, in some cases, its absence in the domestic context. These divergences cause considerable difficulties in the international context.

One competent authority, for example, recognises stabilisation only for equity but not for debt securities. In the past, it was known to require that references to stabilisation be deleted from debt offering documents.

There is no basis for such a distinction in the Stabilisation Regulation. We therefore believe that competent authorities in all Member States should accept stabilisation as a concept for all securities. CESR would seem to be the most suitable forum for such a discussion and a Level 3 instrument the most suitable tool to confirm this principle.

*Acceptance of the safe harbour principle*

The Stabilisation Regulation creates a “safe harbour” for stabilisation but, at the same time, notes in Recital 2 that conducting stabilisation outside of the safe harbour does not of itself constitute market abuse. Only some competent authorities, however, have made it clear that stabilisation outside of the safe harbour is not automatically abusive. In several Member States there are concerns that the understanding of the safe harbour principle may be much narrower.

We therefore believe that competent authorities in all Member States should accept the safe harbour principle as set out in Recital 2 of the Stabilisation Regulation. CESR would seem to be the most suitable forum for such a discussion and a Level 3 instrument the most suitable tool to confirm this principle.

We note that, in some circumstances, some of the requirements of the safe harbour (namely the 5% over-allotment limit) may be too restrictive. A conclusion that stabilisation outside of the safe harbour automatically constitutes market abuse would therefore be likely to result in calls for a general relaxation of such requirements. On the contrary, acceptance of the Recital 2 approach suggested above would mean that such difficulties could be addressed in a more fact-specific manner and without having to change the Stabilisation Regulation.

*One Member State’s regime applicable*

In cross-border transactions, stabilisation may be caught by several Member States` regimes.

In international debt issues, it is common for an issue of securities admitted to trading on a regulated market in a Member State A to be aimed primarily at investors in Member States B, C and D and to be actually stabilised from a Member State E. The Market Abuse Directive does not designate one Member State as responsible for market abuse aspects of a particular transaction. On the contrary (and quite rightly), each Member State is required to police any conduct carried out within its territory or which concerns financial instruments admitted to trading on its territory. Similarly, the Stabilisation Regulation does not specify the Member State responsible for policing the stabilisation regime (i.e. it does not specify which Member State’s rules apply to the permissibility of stabilisation, form and content of notifications to the competent authority and method of disclosure to the market, etc.). It does, however, provide that details of stabilisation transactions are notified only to the competent authority of the "relevant market."

Stabilisation activity in a particular case may therefore fall to be regulated and supervised by several Member States at once. If their stabilisation regimes were uniform, this would not matter. In practice, however, they are often different or even inconsistent. The banks conducting the stabilisation are consequently exposed to a considerable legal risk because it is often not possible to comply with the regimes of all the Member States potentially affected. In addition to this legal uncertainty and risk, it increases time and effort required for the banks involved in a transaction to investigate the applicable law, agree on the logistics of the stabilisation and co-ordinate it.

It would therefore be very helpful if the Member State effectively responsible for regulating stabilisation was specified. The Stabilisation Regulation provides that details of the stabilisation transactions are notified only to the competent authority of the "relevant market", i.e., the competent authority of the Member State where the securities are (to be) admitted to trading on a regulated market. It seems a logical conclusion that this Member State should be the Member State whose stabilisation regime (permissibility of stabilisation, form and content of notifications and method of disclosure) should be followed. If the requirements of the law of this Member State were followed, other Member States should recognise that the stabilisation activity is legitimate and not abusive of itself – even if it did not accord with their interpretation and application of the Stabilisation Regulation.

Although much depends on details (the policy would, for example, have to consider issues admitted to trading in several Member States), such an approach would constitute a clear and unambiguous solution, which would also be consistent with other EU securities directives. Moreover, an amendment to the Market Abuse Directive or the Stabilisation Regulation would not appear strictly speaking necessary to give effect to this approach as it can be interpreted from the current text. There is therefore a role for CESR to play in this area. At the same time, an express confirmation of this approach in the Stabilisation Regulation, if it is revised, would be helpful.

*Time- and price-related conditions of stabilisation*

With the introduction of MiFID, the definition of "*transferable securities*" (carried over into the Stabilisation Regulation through the definition of "*relevant securities*") has been broadened: While under the Investment Services Directive there was an exhaustive list of "*transferable securities*", the list under MiFID is open-ended.

This means that a wider range of instruments may now be stabilised within the Stabilisation Regulation safe harbour than previously, without this being apparent from the text of the Stabilisation Regulation. Islamic securities (for example "sukuks") or some units in collective investment vehicles are examples of instruments which benefit from this widening of scope of the Stabilisation Regulation. This is an important change which all competent authorities should be made aware of.

It also means, however, that some securities which are now within the scope of the Stabilisation Regulation may be, strictly speaking, outside of its provisions on the permitted duration of stabilisation or maximum prices of stabilisation trades. The Stabilisation Regulation limits the permitted duration of the stabilisation separately for "*shares and securities equivalent to shares*" and "*bonds and other forms of securitised debt*". Similarly, the maximum price limit is set separately for "*shares and securities equivalent to shares*" and "*securitised debt convertible or exchangeable into [shares and securities equivalent to shares]."* Some of the securities newly within the scope of the Stabilisation Regulation, however, do not clearly fit within these categories. In the short-term, it would be helpful if the competent authorities accepted that an instrument within the scope of the Stabilisation Regulation but not expressly mentioned in its provisions on time- and price-related conditions of stabilisation can still be stabilised within the safe harbour (perhaps by approximating it to one of the existing categories solely for this purpose). CESR would seem to be the most suitable forum for such a discussion and a Level 3 instrument the most suitable tool to confirm this principle. In the long-run, the provisions may need to be revised so that they accommodate, in a flexible manner, all instruments within the scope of the Stabilisation Regulation.

*Notifications to the competent authority*

The Stabilisation Regulation requires notification of stabilisation transactions to the competent authority of the "relevant market". Not all competent authorities, however, clearly indicate how the notifications should be made. This results in delays and increased costs as the banks involved in the stabilisation have to investigate the situation.

We believe that all competent authorities should clearly and publicly indicate how the notifications should be made. Ideally, they should indicate an e-mail address on their website to which the notifications should be sent. CESR would seem to be the most suitable forum for such a discussion and a Level 3 instrument the most suitable tool to confirm this principle.

*Public disclosure*

The Stabilisation Regulation requires disclosure of certain information before and after the stabilisation.

Some Member States do not accept electronic disclosures made through commercial information providers normally used in the securities markets and impose impracticable requirements. One Member State, for example, requires a press release which is not only costly (relatively much more, for example, in the context of a debt issue made under a programme than in an IPO) but often also unworkable in the timeline of the issue (in the context of a debt issue under a programme, for example, the window of time for a pre-stabilisation disclosure is only several hours long).

The seriousness of this issue would be significantly reduced if only one Member State's law was applicable to the question of public disclosure, as suggested above.

We believe, however, that all Member States should recognise electronic disclosures made through commercial information providers normally used in the securities markets and should not require paper-based and other similar disclosures. CESR would seem to be the most suitable forum for such a discussion and a Level 3 instrument the most suitable tool to confirm this principle.

More generally, the question should be considered in the context of a broader review of public disclosures under the Market Abuse Directive. The Transparency Directive has introduced principles-based requirements for pan-European dissemination of "regulated information." Inside information disclosed under the Market Abuse Directive is "regulated information" but information disclosed under other provisions of the market abuse regime is not. We believe that the Commission and CESR should consider aligning the various disparate publication requirements (including those under the Stabilisation Regulation) with the Transparency Directive. Any inconsistent requirements should be either repealed or made optional. We are aware that this may require intervention on Level 2 or even Level 1.

*Recognition of third country regimes (Possibly only Level 3 but ideally Level 2)*

Some international debt issues will be subject to both the Stabilisation Regulation and third country stabilisation regimes, in particular of the US and Japan. A number of difficult issues arise as a result of such an overlap.

By way of an example, a number of banks stabilise "global" issues (issues registered with the US SEC, made from the US primarily to US investors but for some reason also admitted to trading on an EU regulated market) from the US, complying primarily with the US stabilisation regime (Regulation M). Given the time difference between Europe and US, it will often not be possible to make the pre-stabilisation disclosure under the Stabilisation Regulation in time. There are also important substantive differences between the two sets of regulation which result in the banks being unable to comply with both at the same time, such as:

- Different scope of the regimes, with the US stabilisation regime being generally focused on conduct before the completion of the offering and the EU regime on the conduct in later stages.
- Different rules on the pre-stabilisation disclosures.
- Different treatment of "greenshoes"
- Absence of a limit on over-allotments in the US stabilisation regime.

From a policy perspective, it would seem that where an issue is more closely linked with a third country than with the EU and where the third country stabilisation regime which is followed is broadly equivalent, EU does not need to insist on unconditional compliance with the Stabilisation Regulation.

In the short-term, this could be resolved by recognising such issues as an example of situations where stabilisation outside of the Stabilisation Regulation safe harbour does not of itself constitute market abuse. CESR would seem to be the most suitable forum for such a discussion and a Level 3 instrument the most suitable tool to confirm this principle.

In the longer-term and subject to further debate, we believe it would be desirable for the EU, the US and Japan to agree on formal mutual recognition of their stabilisation regimes as they appear functionally equivalent. This might require an enabling framework in the Stabilisation Regulation followed by *ad hoc* decisions on functional equivalence of such third country regimes. While we understand that any recognition of third country stabilisation regimes would be subject to various high-level political discussions and detailed technical analysis and would therefore take some time, it would be helpful to consider including the enabling framework already in course of the review of market abuse regime next year.

We suggest that the relationship between the EU, US and other laws affecting stabilisation become part of the broader agenda of the ongoing dialogue between the regulators, whether on a bilateral basis or within IOSCO. We participate in a number of initiatives aimed at promoting such dialogue and would be happy to provide you with more details on the third country stabilisation regimes, the difficulties which arise in practice and other issues you may find relevant.