

UK Implementation of the EU Market Abuse Directive (MAD)

IPMA comments on stabilisation issues

1. The draft of MAR 2 is helpful in so far as it attempts to ensure that the provisions of the Stabilisation and Buy-back Regulation have effect in relation to activities falling outside the scope of the Regulation but within the current scope of the price stabilising rules. However:
 - We understand that new MAR 2.4 is intended to constitute price stabilising rules. Therefore, the revised MAR 2 should contain rules similar to current MAR 2.1.1R (in relation to new section 118A(5)(a) of the Act), 2.1.6R and 2.1.9R where it provides a safe harbour extending beyond the scope of the Buy-back and Stabilisation Regulation.
 - New MAR 2.4.2R should not be limited to stabilisation action taken by "firms". Others should be able to demonstrate conformity with these requirements.
 - There should be equivalent provisions to those currently in MAR 2.8.2R(4).
2. It needs to be clear that compliance with the Stabilisation and Buy-back Regulation also protects the stabilising manager from the insider dealing regime under the Criminal Justice Act 1993 and section 397 FSMA (as the Regulation does not form part of the price stabilising rules). The proposed statutory instrument ought to include provisions adding defences corresponding to new section 118A(5)(b) in paragraph 5 Schedule 1 of the Criminal Justice Act 1993 and in section 397(5)(b) FSMA.
3. To the extent that MAR 2.4.2R applies to stabilisation action outside the scope of the Stabilisation and Buy-back Regulation, there need to be some modifications to take account of the fact that some of the Regulation's provisions are not readily applicable. In particular:
 - The term "adequate public disclosure" (article 2(5) of the Regulation) should be modified so that it refers simply to a public announcement (compare current MAR 2.1.3R(5)). For example, in the case of listings outside the EU, the requirements of Directive 2001/34/EC will not apply. We suggest that screen announcements be permitted in accordance with current market practice.
 - The restriction on the definition of "associated securities" (article 2(8) of the Regulation), requiring the competent authority's agreement to the standards of transparency, should not apply. It is unclear which authority will be the "competent authority" where the relevant securities are not admitted or to be admitted to trading on a regulated market. For example, if the relevant securities are being admitted to a non-EU exchange, the regulator of that exchange is unlikely to be willing to take action for these purposes.
 - Article 9(2) of the Regulation, relating to supplemental reporting of stabilisation transactions, should not apply. Again, it is unclear which authority would be the competent authority for these purposes where the securities are not admitted to

trading on an EU regulated market and whether that authority would accept reports of this kind.

4. In addition, to the extent that MAR 2.4.2R applies to stabilisation action outside the scope of the Stabilisation and Buy-back Regulation, the FSA should also modify the application of the requirements of the Regulation to bring it more closely into line with current requirements, in particular where the Regulation's requirements appear to be unnecessarily restrictive or burdensome:
 - The second paragraph of article 8(2) of the Regulation, requiring stabilisation when-issued trading to be subject to the rules (if any) of a regulated market, should not apply.
 - There should be greater flexibility as to the form of stabilisation disclosure required for the purposes of article 9(1) of the Regulation. For example, market participants should be allowed the (optional) use of "Stabilisation/FSA" in screen announcements or otherwise to use the form of legend currently permitted under the price stabilising rules (which, for example, allow the use of US-style legends in US listed offerings being distributed in the UK). This is appropriate since this requirement will largely cease to apply from 1 July 2005 when the measures implementing the Prospectus Directive take effect.
 - The requirements of article 9(3) of the Regulation for a post-stabilisation announcement, and of article 9(4) of the Regulation for recording of "orders", should not apply. These impose costs and administrative burden for no obvious benefit to market participants or investors.
 - The restriction on the volume of over-allotments in article 11(b) of the Regulation should not apply. This is a wholly new requirement with no clear justification or obvious benefit to market participants or investors.
 - Similarly, firms should be able, as now, to have the benefit of the safe harbour if they re-open a short position for the purposes of stabilisation (this is not addressed by article 11 of the Regulation). This facilitates stabilisation because it enables a firm to quote two way prices, even though the offer effectively gives them a short position, thus enhancing the liquidity of the issue.
5. Firms and others should be able to choose to rely on, and act in accordance with, the Stabilisation and Buy-back Regulation as from 12 October 2004 (or, at the very least, soon after the statutory instrument has been laid before Parliament) even though the existing provisions of MAR 2 have not yet been repealed because of the UK's proposed transitional period. Otherwise, a UK lead manager stabilising a Dublin listed bond issue might have to comply with the Regulation to obtain a safe harbour from the Irish implementing measures but still have to comply with the existing UK stabilisation rules because they have not yet been repealed. While the FSA might provide some comfort as to the application of the current market abuse regime in the intervening period this would not address the position under the Criminal Justice Act 1993 or section 397 FSMA.

6. For London listed issues, the London Stock Exchange should allow issuers or lead managers to make preliminary applications for admission by email to be confirmed by a subsequent formal application for admission (See point 2 in the accompanying memorandum).
 7. The FSA should confirm that it agrees that, where the Regulation applies, the relevant regime for "adequate public disclosure" is that in force in the country where the securities are to be listed. MAR 2.3.7G indicates that the FSA already accepts that the competent authority of the relevant market for the purposes of article 9(2) of the regulation is the competent authority in the country where the securities are to be listed. (See point 4 in the accompanying memorandum). However, this may need reconsideration when the Transparency Obligations Directive is implemented.
 8. The FSA should confirm that it is content with the proposed wording for disclosures set out in point 5 of the accompanying memorandum.
 9. The FSA should also confirm that it agrees that:
 - The disclosure required by articles 8(4) and (5) of the Regulation is of commercial terms, not detailed terms and conditions.
 - No disclosure is required in accordance with article 9(3) of the Regulation where the manager has not, in fact, engaged in stabilisation action requiring the protection of the safe harbour.
 - There is no need to record, for the purposes of article 9(4) of the Regulation, the typical bids and offers made in over-the-counter bond trading. If there were to be a requirement to record these, this could affect the cost-benefit analysis.
 - The standards of transparency for underlying shares are adequate, for the purposes of article 2(8) of the Regulation, where the shares are listed on a registered organisation (as defined in the London Stock Exchange rules).
- (See point 6 in the accompanying memorandum).
10. Practical questions arise if there is only one option for "adequate public disclosure" (as it applies to signal the start of the stabilisation period). For example, at present, most debt issues contemplate the possibility of stabilisation (which would typically take place in a narrow time period after launch), to allow Lead Managers to respond to market conditions. If an issue which is to be admitted to trading in London is launched in a different time zone, when an RIS is not open, or if an issue is launched for an issuer which is not already recorded on an RIS, stabilisation may not be possible at the time it is most needed. We would like to discuss alternatives with you, such as screen announcements in accordance with current practice.

10th September 2004