

31 October 2006

Mr Fabrice Demarigny
Secretary General
The Committee of European Securities Regulators
11-13 avenue de Friedland
75008 Paris
France

Dear Mr Demarigny

CESR`s Call for Evidence: Evaluation of the Supervisory Functioning of the EU Market Abuse Regime

Ref: CESR/06-78

The International Capital Market Association (**ICMA**) is pleased to respond to the CESR`s Call for Evidence: Evaluation of the Supervisory Functioning of the EU Market Abuse Regime (the **Call for Evidence**). ICMA is the self-regulatory organisation and trade association representing the investment banks and securities firms issuing and trading in the international capital markets worldwide.

We attach our response as an **Annex** to this letter and would be pleased to discuss it with you at your convenience.

Yours faithfully,



Ondrej Petr

ANNEX

General Comments

The IPMA (one of the predecessor associations of the ICMA) actively participated in the various consultations leading up to the adoption of the Market Abuse Directive (the **MAD**) and we fully support its aim of promoting integrity of the financial markets and investor confidence in those markets.

As with other FSAP measures, certain degree of divergence in the implementation of the MAD across the Member States has been inevitable. In some cases, however, this divergence causes considerable difficulties to market participants operating on a pan-European basis. In addition, the practical operation of the MAD has highlighted certain difficulties resulting from its overlap with parallel regulation of third countries, in particular the US.

We are particularly concerned about areas where divergent implementation of the MAD or its insufficient alignment with third country regimes adversely affect legitimate and established practices of the markets in international debt securities. Stabilisation of financial instruments is a prime example of such an area.

We believe that our concerns, detailed below, can be addressed without compromising the aims of the MAD and, on a practical level, without having to amend it. We commend CESR for inviting the public to comment on their experience with the market abuse regime under the MAD and for being prepared to consider adopting guidance or even suggesting changes to MAD Level 2.

We have seen the draft responses to the Call for Evidence prepared by the British Bankers` Association (BBA) and the European Banking Federation (EBF) and endorse the comments they made on the issue of stabilisation.

Stabilisation of Financial Instruments

Stabilisation of financial instruments is recognised by the MAD as a legitimate activity. Commission Regulation (EC) No 2273/03 (the **MAD Regulation**) creates a "safe harbour" for stabilisation but, at the same time, notes that conducting stabilisation outside of the safe harbour does not of itself constitute market abuse. 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 MAD.

Permissibility of stabilisation

The interpretation of "permitted stabilisation" 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. However understandable, this divergence causes difficulties in the international context.

Some Member States oppose stabilisation of debt securities in principle. By way of illustration, one of such Member States has been known to require that any reference to stabilisation be deleted from the offering documentation. Other Member States appear not to fully appreciate the concept of a "safe harbour" and do not recognise that non-

compliance with one or more of the requirements of the MAD Regulation does not automatically render the stabilising activity abusive (even though there is an express recital in the MAD Regulation to that effect).

Stabilisation notifications

The Regulation requires that certain disclosures are made prior to stabilisation to the competent authority and the public. In several Member States, it has been unclear how to properly fulfil these duties. Each competent authority should have a designated e-mail address or other mechanism enabling the electronic filing of the disclosure. Similarly, it should be clear which methods of disclosure to the market are considered sufficient. In particular, a competent authority should recognise as acceptable the electronic disclosures common in international capital markets, such as via Bloomberg, RNS, etc. We suggest that existence of a functional and efficient disclosure regime which meets these criteria is verified in course of the ongoing review of market abuse regimes in the Member States.

The following paragraph suggests a solution to situations where a stabilisation activity potentially affects several Member States. In the context of disclosure to the market, we note that in such cases there is no need to require the disclosure to be made separately in each Member State affected. This is because under the Transparency Directive, shortly to be implemented, disclosures under the MAD are expected to be made in a manner which ensures pan-European publication, but not separately for each domestic market (and potentially subject to separate domestic requirements).

Determination of the applicable national regime

In international debt issues, it is common for an issue (to be) 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 MAD does not specify which Member State is responsible for policing the market abuse regime. 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 (to be) admitted to trading on its territory. Similarly, the MAD Regulation does not specify the Member State responsible for policing the stabilisation regime. 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 by several Member States at once. If the regime was uniform, this would not matter. In practice, however, the national regimes often differ. The differences will concern in particular the understanding of "permitted stabilisation" and requirements on form and content of the disclosure. By way of an example, some of the Member States concerned in principle recognise the possibility of exceeding the 5% over-allotment limit, but others do not or one of the Member States concerned may request deletion of references to stabilisation from the offering documentation, throwing into question its legality in other Member States. The managers 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.

It would be very helpful if the Member State effectively responsible for policing stabilisation was specified. The MAD 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 solution that this Member State should be the Member State whose stabilisation regime should be followed. If the requirements of the law of this Member State were followed, other Member States should recognise the stabilisation activity as not abusive.

Such an approach would constitute a clear and unambiguous solution, which would also be consistent with the Prospectus and Transparency Directives. Moreover, an amendment to the MAD or MAD Regulation would not appear necessary to give effect to this approach as it can be interpreted from the current text. If, however, other amendments to the MAD Regulation were considered, express confirmation of this approach would be helpful.

In the long term, however, the stabilisation regimes across the EU should become consistent, if not necessarily identical.

We would like to note that similar issues arise in other areas covered by the MAD which are otherwise not discussed in this letter. In a number of such areas, internationally active firms struggle with the fact that competent authorities of different Member States seek to regulate identical conduct in a different manner on the basis that it was “carried out on their territory.” By way of an example, market abuse regimes of some Member States impose content requirements on sales materials which often vary considerably. In the absence of full harmonisation of the market abuse regime across the EU, firms should be entitled to rely on compliance with the requirements of one, clearly identifiable Member State.

Overlap with third country stabilisation regimes

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

By way of an example, a number of firms 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 (the so called Regulation M). Given the time difference, it will often not be possible to make the pre-stabilisation disclosure under the MAD Regulation in time. The US Regulation M also does not contain a 5% (or any other) over-allotment limit so the managers will lose the benefit of the safe harbour for at least two reasons. It would seem that at least where admission to trading in the EU is the only material link to the EU, Member States should not insist on unconditional compliance with the safe harbour.

On a higher level and probably in a longer run a subject to further debate, we believe it would be desirable for the EU, the US and Japan to agree on the mutual recognition of their stabilisation regimes as they appear functionally equivalent. The guiding principle should be that compliance with a functionally equivalent third country stabilisation regime cannot constitute abusive behaviour, even though it is not in compliance with the MAD Regulation. Formally, such a conclusion may be reached without having to amend the MAD or the MAD Regulation if the principle that non-compliance with the “safe harbour” does not automatically constitute market abuse is recognised.

Further issues arise as a result of the firms adjusting to both EU and US law reforms. By way of an example, the recent US securities offering reform limited the information provided to investors in connection with a new SEC-registered issue to the prospectus and a few exceptions. Anything else is a "free writing prospectus" which is subject to a strict regulation, e.g. 3-year record retention, regulatory audit, and some cases regulatory filing. Some firms are concerned that stabilisation-related announcements required by the MAD Regulation would constitute such "free writing prospectuses" which could bring them into conflict with the US laws.

We suggest that the relationship between the EU, US and Japanese laws affecting stabilisation become part of the agenda of the ongoing dialogue between the regulators, whether on a bilateral basis or within IOSCO. We would be happy to provide you with more details on the issues which arise in practice and on the third country securities laws and discuss our concerns with you further at your convenience.