

22 April 2003

Mr Karl-Peter Replinger
European Commission
Rue de la Loi 200/Wetstraat 200
B-1049 Brussels
BELGIUM

Dear Mr Replinger

Commission working document ESC 14/2003
Stabilisation safe harbour implementing measures

The International Primary Market Association (IPMA) is pleased to have the opportunity to submit comments on the Commission's Working Document ESC 14/2003 in relation to the implementation of the Market Abuse Directive Article 8 safe harbour for stabilisation activity. IPMA is the organisation which represents the managers and lead managers of debt and equity securities in the international capital markets.

We welcome the Commission's decision to publish draft legislation which will help to achieve effective Level 2 implementation. We have provided drafting comments by way of a mark-up of the draft Regulation which is attached. (The mark-up relates only to stabilisation and does not comment on the share buy back safe harbour). The mark-up includes detailed explanations for the changes which are not repeated in this letter, which addresses more general issues.

In preparing its advice to the Commission on stabilisation, CESR consulted widely with market participants before and after it received its official mandate from the Commission. IPMA participated actively in those consultations and, together with most other securities industry representatives, generally content with CESR's final advice. We are therefore disappointed that the Commission's draft Regulation does not follow CESR's advice more closely, and, in departing from it, the Commission has not provided explanations as to why it has done so.

In particular, we are most concerned that the effect of the Commission's proposals is to limit the safe harbour to the stabilisation of "public offers". CESR had advised that the safe harbour should apply to any "significant distribution", that is any offering which is the subject of a public announcement, regardless of whether it is a "public

offer" as such. This is of particular importance because the majority of offerings in the international markets which are listed on European regulated markets (and thus are within the scope of the Directive) are not public offers. Even following the implementation of the Prospectus Directive, we anticipate that there will continue to be a large number of institutional offerings that do not qualify as public offers, but which it will be necessary or desirable to stabilise. In addition, the Commission's proposed text would mean that it was not possible to rely on the safe harbour for stabilisation in relation to these offerings.

The Commission's text also proposes to require 'announcements' to be made in the manner specified for corporate announcements by listed issuers pursuant to the Consolidated Admissions and Reporting Directive. This was not contemplated by CESR's advice and would effectively prevent stabilisation taking place at all in relation to many offerings.

The attached mark-up addresses these issues in conformity with CESR's advice. Implementation by way of Regulation rather than Directive means that in some cases more detail is necessary to ensure the safe harbour is fully effective, and in a few places the mark-up makes some additional or alternative suggestions. These points are clearly indicated, and explained, in the supporting notes.

We support CESR's advice (paragraph 133) that mutual recognition of third country rules is important to ensure the international competitiveness of EU markets. We also agree with CESR's recommendation that the Commission should explore whether the rules of third countries or their exchanges can be recognised as equivalent to the EU rules. We recommend that the Commission follow this advice as a matter of urgency, and we have suggested text for a new Article 11 to address this. We have not been able to consult our members fully on the drafting of the text in the time available. Given the importance of this issue, there should be full consultation before a final text is agreed.

The proposed EU rules on market manipulation will apply to the stabilisation of securities offerings by EU companies with secondary listings in third countries and to non-EU companies with secondary listings in the EU. In many cases, it will not be possible or practical for stabilisation in third countries to conform to all of the particular requirements of the proposed EU rules. If mutual recognition is not granted, syndicate members who stabilise in third countries in accordance with local regulatory requirements (as they will have to), may be in breach of the EU safe harbour.

For example, the underwriters of a secondary offering in the United States by a US company which has its primary listing on the New York Stock Exchange, and a secondary listing in the EU, would have to ensure that their stabilisation activity in the US conforms to the requirements of the EU rules, because of the EU secondary listing. This will be the case even where local practice or requirements (e.g., as to the content of stabilisation legends in prospectuses or the need for post-stabilisation disclosure) differ significantly from, or conflict with, those set out in the Regulation.

The EU rules should contain a provision by which stabilisation activity carried on outside the EU can benefit from the safe harbour when conducted in accordance with

local rules so long as the relevant EU competent authorities are satisfied that those rules contain adequate safeguards in respect of the risks addressed by the EU rules. Unless this change is made, it may be more difficult for EU companies to access third country capital markets and third country issuers may be deterred from listing their securities on EU exchanges.

Finally, we note that the Commission proposes to introduce the safe harbour by way of a Regulation, rather than a Directive. We acknowledge the benefits of consistency of implementation of this safe harbour, but, if implementation is by way of a Regulation, there must be full consultation on, and explanation of, the policies behind the Regulation and clear agreement on the detailed drafting, so that Competent Authorities and market participants are in no doubt as to the requirements.

We would be pleased to discuss any of these issues or our mark up with you further.

Yours very truly

A handwritten signature in dark ink, appearing to read 'C. Dammers', followed by a horizontal line.

Clifford Dammers
Secretary General

cc. Mr Pierre Delsaux – European Commission
Mr David Wright – European Commission