The voice of banking & financial services

ICMA International Capital Market Association

The Committee of European Securities Regulators
11-13 avenue de Friedland
75008 Paris
France
(Submitted via the CESR website)

9th January 2009

Dear Sirs,

Re: BBA / ICMA joint response to CESR consultation CESR/08-717

Market Abuse Directive – Level 3: Third set of CESR guidance and information on the common operation of the Directive to the market – (I) stabilisation and buy back programmes and (II) the two-fold notion of inside information

The British Bankers' Association (BBA) the International Capital Market Association (ICMA) are pleased to respond to the above consultation.

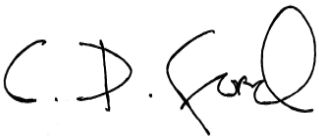
The BBA is the leading association for the UK banking and financial services sector, speaking for 223 banking members from 60 countries on the full range of UK or international banking issues and engaging with 37 associated professional firms. Collectively providing the full range of services, our member banks make up the world's largest international banking centre, operating some 150 million accounts and contributing £50 billion annually to the UK economy. The BBA welcomes the opportunity to comment on the third set of CESR Level 3 guidance on the Market Abuse Directive to the market.

ICMA is the self-regulatory organisation and trade association representing the financial institutions active 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 almost 400 firms in total.

As stated within our response to CESR's Call for Evidence on the 'Evaluation of the Supervisory Functioning of the EU Market Abuse Regime' (CESR / 06-078), we are supportive of consultation on any guidance issued by CESR with regard to the implementation and application of MAD. We acknowledge and welcome CESR's continuing efforts in facilitating the convergent implementation and application of the Market Abuse Regime throughout the EU. The current consultation in question will only serve to aid this process and ultimately encourage member states in establishing a pan-European common approach to the operation of the Directive.

We set out our responses on stabilisation and buy back programmes and on the two-fold notion of inside information in, respectively, Annexes 1 and 2 to this letter and would be pleased to discuss them with you at your convenience.

Yours faithfully,



Ruari Ewing
Advisor – Primary Markets
ruari.ewing@icmagroup.org
+44 20 7517 3225

Christopher Ford
Advisor – Capital Markets
christopher.ford@bba.org.uk
+44 20 7216 8895

Annex 1

Stabilisation and buy back programmes

We are responding to this part of the consultation from the perspective of the debt capital markets and express no views in relation to the equity capital markets as we understand that there will be separate responses from the equity capital markets perspective throughout the banking community. ICMA has raised with CESR issues concerning the Market Abuse Directive in two previous ICMA submissions[1] of 31 October 2006 and 3 December 2007. We address each of the consultation questions in turn.

Safe harbour principle

"Question to the market: Do you have any comments on CESR's view that stabilisation outside of the exemption in Article 8 should not be regarded as abusive solely because it occurs outside of the safe harbour?"

The proposed guidance was previously sought and is welcomed.

Under the existing Directive there is no specific safe harbour principle for debt buybacks and there is also so far no further guidance from CESR on this matter. In the absence of such guidance and legal background banks are forced to place reliance on safe harbour principles established for share buy-back and/or previous FSA listing rules. We would welcome support by CESR to any European Commission efforts in relation to the introduction of a clear safe harbour principle for dealing with debt buy-backs.

One member state regime / national inconsistencies

"Question to the market: What do you regard as the most serious inconsistency that you have identified?"

We welcome CESR's efforts to reduce inconsistencies between Member State's regimes. The above 'safe harbour' guidance will be helpful in this respect.

We believe that, given the Directive's objective of harmonising stabilisation practices across the 27 Member States, either its provisions should be applied uniformly across Europe or only one Member State's regime should apply. We note this latter approach (referred to in paragraph 8 of the consultation) would be within the responsibilities of the European Commission and we would look to CESR to support the Commission in this respect.

We note that inconsistencies between Member State's regimes seem to be presenting less of an obstacle than previously. However, we also note the recent reduction of market activity that may be contributing to this impression.

The concept of "adequate public disclosure" has been raised as a specific notable inconsistency. For practical purposes in Germany and Austria for example, there are specifically print media (as opposed to electronic/RIS/newswire media) publication requirements. This means that stabilisation disclosures are subject to printed press publication timelines (overnight print runs). Consequently, the stabilisation trades needed to immediately address unexpected market disturbances will be delayed to the following day. In this respect, we refer to our response below on the use of TD information dissemination and storage mechanisms.

National inconsistencies in the implementation of the Directive have created considerable variations between market participants in the interpretation and application of stabilisation guidelines. Some firms do not publish pre or post stabilisation notices, others will disclose if the stabilisation was greater than 5% of the initial offer size, whilst others will disclose all stabilisations irrespective of size. There is also considerable disparity in the treatment of ancillary stabilisation/over allotment facilities. These practical differences can be

[1] http://www.icma-group.org/getdoc/cd015dd1-fc0f-41e2-9e0d-2969fb22c46a/ICMA-Response-to-CESR-Call-for-Evidence-re-MAD-pdf.aspx and http://www.icma-group.org/getdoc/e10e2da5-32a1-4945-bb92-2ec4e537bf85/ICMA-letter-to-CESR-re-stabilisation-pdf.aspx.

problematic, particularly in issuances involving multiple book-runners/joint lead managers. Greater consistency and direction from national regulators on stabilisations (what constitutes a stabilisation, when is a disclosure necessary and to whom and how should the disclosure be made?) would be most helpful.

In Spain, the CNMV as competent authority requests the removal of stabilisation legends from offering documents. The stabilisation safe harbour under the Market Abuse Directive should be recognised by retaining this legend. The CNMV is an example of a competent authority where publication of an email address or fax number for stabilisation transaction reports (as envisaged under 'Reporting mechanisms') would be welcome.

Sell trades during stabilisation period

"Question to the market: Do you have any comments on CESR's views that sell transactions are not subject to the exemption provided by Article 8?"

We agree in principle with the proposed guidance. However, the above 'safe harbour' guidance is relevant in this respect and transactions need to be reviewed individually to determine whether they is abusive or not.

'Refreshing the Greenshoe'

"Question to the market: Do you have any comments on CESR's clarification that selling securities that have been acquired through stabilising purchases, including selling them to facilitate subsequent stabilising activity, is not behaviour that is covered by Article 8?"

We see this as a question relating to the equity capital markets and so express no comments.

Third country regimes

"Question to the market: What would you regard as the difference in approach that gives rise to the most significant practical problem?"

As mentioned in relation to the *safe harbour principle* above, the proposed guidance was previously sought and is welcomed. If CESR were minded to confirm that its members would not consider as abusive stabilisation activity that would be within the Directive's safe harbour but for compliance with US or other countries' stabilisation rules, this would be (as mentioned above) also warmly welcomed.

The EU stabilisation regime was originally designed for the equity capital markets that (unlike the debt capital markets) operate on a local (rather than global) basis as issuers need to bring transactions to trading on a regulated market in the jurisdiction of their incorporation and cannot choose other jurisdictions (that might better suit investors for example). This presents practical problems as the regime takes an exclusively 'European' view that is inappropriate in the debt capital markets context.

Some specific differences in approach that we are currently aware of in the context of the US's 'Regulation M' regime are:

- different scope of the regimes, with the US 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; and
- absence of a limit on over-allotments in the US stabilisation regime.

Furthermore, given the time difference between Europe and US, it will often not be possible for pre-stabilisation disclosures made during the latter end of New York's working day to be effective, under the EU regime and within the short timetables intrinsic to the stabilisation process, as EU regulatory news services will have closed for the night.

We welcome all support that CESR gives to the European Commission's efforts to progress its dialogue with third countries' authorities and, in anticipation of such progress, to efforts to develop a legislative enabling

framework that would subsequently enable the Commission to smoothly give effect to the outcomes of such dialogue.

Reporting mechanisms

"Question to the market: Do you support the proposal that all competent authorities should publish the mechanism by which reports of stabilisation and buy-back programmes transactions should be submitted and that ideally this should be a dedicated email address?"

The proposed guidance was previously sought and is welcomed.

Public disclosure mechanism

"Question to the market: Do you support the proposal that adequate public disclosure is made through the mechanism used to implement the TD and gives rise to the obligation for this information to also be stored under the TD provisions? Do you agree that only public disclosure of buy-back transactions is required?"

The proposed guidance on the use of TD information dissemination and storage mechanisms was previously sought and is welcomed. This should help to save the markets time and confusion in effectively to comply with differing national requirements in the EU member states. The TD central data storage route is a helpful addition to media that markets routinely use such as Bloomberg and Reuters.

Other issues

"Question to the market: Are there any other substantive issues that you consider should be dealt with by CESR relating to these issues? If so, what are these issues and why do you consider them to be important?"

We have no additional comments to make.

Annex 2

The two-fold notion of inside information

"Do you have any comments in relation to this draft guidance on the issue of rumours?"

Ability to reserve comment

Paragraph 1.5 of the 2nd set of CESR Guidance, specifies that "in general, other than in exceptional circumstances or unless requested to comment by the competent regulator pursuant to Art 6.7 of MAD, issuers are under no obligation to respond to speculation or market rumours which are without substance." Implicitly, false rumours would be included in this, as they too are without substance. The latest set of guidance is consistent with this previously held view.

We continue to firmly agree that in general, issuers should be under no obligation to respond to market rumours that are without substance, or indeed false. To clarify, we consider that in such a case it is fully acceptable for the issuer to take no action whatsoever. That is, the issuer should not be obliged to disseminate an official "no comment" press release, whereby a decision to take absolutely no action is seen as perfectly acceptable. We would also emphasise that a decision by an issuer to ignore a rumour does not, and should not imply that the issuer has lent it any credibility.

Rumours based on substance

The latest set of CESR level 3 Guidance proposes that when a relevant publication or rumour relates explicitly to a piece of inside information from within an issuer, the latter is expected to respond with a press comment offering affirmation of the rumour. This is because CESR regards the piece of information as sufficiently precise to indicate that a leakage has taken place, in turn compromising the confidentiality of the inside information. CESR does not consider that a policy of "no comment" by the issuer would be acceptable in this circumstance. Furthermore, CESR propose that this guidance should also apply to publications, which includes articles published in the press or internet postings, which are not resulting from the issuer's initiative in relation to its disclosure obligations.

With the exception of certain circumstances (which we set out further within this response), we support CESR's proposed guidance. It is appropriate that where an issuer is certain that there has been a breach of sufficient and appropriate systems and controls, and a leak of inside information has occurred resulting in a rumour based on substance, the issuer in question should, without delay, respond to the rumour. Furthermore, we agree the issuer's response should be made publicly available under the same conditions and mechanisms that are used for the communication of inside information.

Extension to 'publications'

We are, however, concerned by CESR's proposal to extend the guidance on rumours to include all publications. Whilst in theory this is attractive, it is quite unrealistic to expect issuers to monitor, at all times, all publications that could potentially disseminate a piece of leaked inside information. This is especially true of internet postings, and blog-type publications. CESR should consider carefully the resource intensive systems firms would need to employ in order to monitor daily, the huge magnitude of internet postings that circulate. We consider that this would be hugely inefficient, and somewhat unrealistic.

Whilst it can be expected of issuers to have a grip of any potential leaks that are disseminated in the accepted media / financial press, we consider that a degree of regulatory forbearance should be displayed in cases where an issuer may be slow in responding to a leak of inside information, where the leak is disseminated in a blog-type internet posting. CESR's guidance should perhaps be amended, so that the obligation to respond only applies when a rumour based on substance has received a certain amount of attention, and to the extent that it can reasonably be assumed it has also come to the attention of the issuer.

Speculative rumours ('fishing')

Our members share a common concern that CESR's proposed draft guidance will leave issuers vulnerable to 'fishing'. CESR's second set of draft guidance on the operation of the Market Abuse Directive [*ref: CESR/06-562* - February 2007] notes that the precise nature of information is to be assessed on a case-by-case basis and depends on what the information is and the surrounding context. Paragraph 1.6 reports that if a piece of information in question concerns a process that occurs in stages, each stage of the process - as well as the overall process - could be information of a precise nature. An example might be a takeover bid. The fact that the proposed takeover might not in the end take place does not mean that the approach to the target company is not precise information in its own right. Furthermore, paragraph 1.7 states that it is not necessary for a piece of information to be comprehensive for it to be considered precise. For example, an approach to a target company about a takeover bid can be considered as precise information, even if the bidder had not yet decided the price. Similarly, a piece of information could be considered as precise even if it refers to matters or events that could be alternatives. For example, the fact that a company was proposing to launch a takeover bid for one or other of two companies could be considered as precise even though the bidding company had not finally decided which would be its target.

It is therefore apparent from *CESR/06-562* that a piece of information need not be particularly comprehensive for it to be classed as 'precise'. Considering the 'precise' nature of inside information, the latest set of CESR guidance could result in a situation where speculators create a rumour – with absolutely no basis – in the hope that it transpires to be correct, through no more than a coincidence. Under the current proposals, such a case would mean the issuer in question would be obliged to publish a confirmation. For CESR to take such a measure would be damaging to the industry. We do not consider that issuers should be forced to disclose information that they may wish to disclose at a later date – or indeed not at all – because of a non-substantiated, speculative rumour. It has been argued by CESR that the act of fishing by speculators is not likely, by reason of inside information being precise by definition. However, the aforementioned examples show that fishing is a realistic prospect, as 'precise' inside information need not always be particularly comprehensive. For example, consider a firm who is in very early take over talks with another, when – by pure coincidence – a speculator created a rumour that the same two firms were in merger talks. Although no leak has occurred, CESR's proposed guidance would require the companies in question to confirm that they are indeed in talks.

We consider that a distinction should be drawn between cases where it can be proved – beyond reasonable doubt – that a piece of inside information has been leaked, and those where a simple speculative rumour is correct through no more than a coincidence. Although a speculative rumour may be precise (according to previous CESR guidance) it does not necessarily mean the rumour was based on a leakage of inside information. As such, all rumours – and the decision with regard to whether an issuer is forced to disclose inside information - should be examined on a case by case basis. Furthermore, the information should be sufficiently detailed to indicate that a leak has truly occurred. This will then negate the possibility of speculators creating rumours with the aim of flushing out inside information from issuers.

We would appreciate CESR providing further colour around what types of rumours issuers would be expected to confirm, and how detailed an interpretation of precise CESR will be taking in circumstances relating to rumours. We contend the current interpretation to be too wide.