ABI Associazione Bancaria Italiana

Response to the CESR on Market Abuse Level 3 – Third set of CESR guidance and information on common operation of the Directive to the market

9 January 2009

POSITION PAPER

Introduction

The Italian Banking Association welcomes the opportunity CESR has given it to participate in the consultation on the definition of Level 3 guidelines on the Market Abuse Directive with reference to stabilisation activities and buy back programmes as well as on the definition of the notion of inside information.

Observations on the consultation document

1. Stabilisation and buy back programmes

Safe harbour principle: 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? (points 6-7)

We believe that the clarification provided by CESR is useful information for the market.

One member state's regime: What do you regard as the most serious inconsistency that you have identified? (points 8-9)

Based on the experience of the intermediaries operating in Italy, to date no situations of inconsistencies have occurred between the regimes applicable to stabilisation activities carried out on a cross-border basis between EU countries.

Sell side trading during stabilisation periods: Do you have any comments on CESR's views that sell transactions are not subject to the exemption provided by Article 8? (points 10-11)

We believe that it is noteworthy to highlight firstly that the text of the CESR consultation does not contain clarifications as to which sell transactions should be excluded from the exemption provided by Article 8 of the Directive (sell transactions made during the stabilisation or sell transactions made after the stabilisation to close position opened during such activity.

With respect to the question posed in the consultation document, we note that even if article 2, para. 7 of Community Regulation 2273/2003 only contemplates the purchase (or offer to purchase) of securities in the definition of stabilisation, it is not clear why the selling of securities is not eligible for the exemption provided by article 8 of the Directive.

Stabilisation is undertaken for supporting, for a limited time, the offering price of the security due to a selling pressure in such security. Given that, it does not appear that these transactions can be deemed outside the safe

harbour. This is also clarified in cited point 11 of Community Regulation 2273/2003.

In this respect, it is useful to remember that point 18 of the same regulation provides that "the transactions to liquidate positions established as a result of stabilisation activity should be undertaken to minimise market impact having due regard to prevailing market conditions".

The fact that selling is also regulated makes one consider that selling may fall within stabilisation and buy back programmes and therefore be eligible for the exemption provided by article 8 of the Directive.

<u>Refreshing the greenshoe</u>: 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? (points 12-16)

We do not agree with the exclusion of transactions falling within the so-called "refreshing the greenshoe" from the regime provided by article 8 of the Directive.

In this regard, it is appropriate to remember once again that point 18 of Community Regulation 2273/2003 provides that "The transactions to liquidate positions established as a result of stabilisation activity should be undertaken to minimise market impact having due regard to prevailing market conditions".

The reference to the above transactions makes one consider that these transactions may fall within stabilisation activities and consequently refreshing the greenshoe could also be eligible for the exemption provided by article 8 of the Directive.

It must also be noted that refreshing the greenshoe entails clear advantages for issuers as well as investors. By freeing up financial resources, it is possible to re-build available margins to undertake further stabilisation activities, if necessary, during the relevant period.

Finally, it must be noted that – in compliance with best practice –refreshing is generally carried out according to the following methods, which are aimed at minimising market impact of the sales:

- Sales against market trends (never less than the reference price of the day proceeding the sale);
- Daily volume of the sale parameterized by the average volume traded on the security.

<u>Third country stabilisation regimes</u>: What would you regard as the difference in approach that gives rise to the most significant practical problem? (points 17-18)

As we mentioned in our answer to the question on points 8-9, issues have not arisen for intermediaries operating in Italy on problems concerning stabilisation carried out on a cross-border basis between EU countries and third world countries due to the different frameworks.

<u>Reporting mechanisms</u>: 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? (points 19-20)

Regardless of the technical modalities by which a report of stabilisation and buy back programmes transactions should be sent to competent authorities, the method chosen should guarantee the most automated procedure.

<u>Mechanism for public disclosure</u>: 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? (points 21-23)

We agree with the CESR on the possibility to use, for dissemination of information to the public on stabilisations, the mechanisms to disseminate and store information provided and implemented under the Transparency Directive. Nevertheless, as certain intermediaries carrying out stabilisation activities do not have these mechanisms (or are not required to use them), as they are not listed issuers, we must ensure that these intermediaries may use alternative instruments. This is in order to avoid undue costs for these intermediaries.

2. The two-fold notion of inside information

<u>Rumours</u>: Do you have any comments in relation to this draft guidance on the issue of rumours? (points 31-36)

We generally agree with CESR's direction on the conduct that issuers should follow when so-called rumours are published and in particular in consideration of the fact that these issuers do not always have to respond to the subject matter of the *rumors*, except in the case that the information published clearly demonstrates a leak of inside information from within the issuer itself.

We note moreover that in Italy, article 66, para. 8, of the CONSOB Issuers Regulation provides that in case the dissemination of information

concerning the financial position, economic condition and financial status of the issuer impacts on the price of the issued securities to an appreciable degree, these issuers must promptly publish a statement to inform the market on the truthfulness of the information by supplementing or correcting the content as necessary, in order to restore conditions of equal information.