EuropeanIssuers

aisbl - ivzw
Rue Belliard 4-6
B-1040 BRUSSELS

Tel : +32 (0)2 289 25 70
Fax : +32 (0)2 512 15 60

info@europeanissuers.eu
www.europeanissuers.eu

EUROPEANISSUERS REPLY TO THE PUBLIC CONSULTATION ON THE MARKET ABUSE DIRECTIVE: LEVEL 3 – THIRD SET OF CESR GUIDANCE AND INFORMATION ON THE COMMON OPERATION OF THE DIRECTIVE TO THE MARKET

Ref. CESR/08-717

Position
9 January 2008

Reference is made to the public consultation Level 3 work (Ref. CESR/08-717) regarding stabilisation and buy-back programmes and the two-fold notion of inside information.

EuropeanIssuers appreciates CESR's efforts for the clarification of some important issues of the Market Abuse Directive (hereinafter "MAD"). However we believe that CESR's guidelines would be more effective when these recommendations would be addressed to Member States and be binding for them; CESR should carefully check whether the Securities Regulators effectively follow the recommendations. As suggested by the Inter-institutional Monitoring Group[1] in order to foster the consistent and effective implementation of European regulation, level 3 Committees should "*identify any legislative (and other practical) obstacles to cooperation, whether coming from national or European legislation, and thus enable the Commission and Member States to propose improvements*". According to the Report, Level 3 Committees "*should exercise self-monitoring via in-depth peer reviews of national legislation so as to contribute to full and high quality of implementation of EU legislation*". This would help having a harmonized framework.

We would also like to remark that although the consultation document relates both to stabilisation and buy-back programmes, it mainly addresses topics of stabilisation; we think that there are more issues regarding buy-back programmes that should be tackled, as described hereinafter.

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 harbor?
We fully agree with CESR and we strongly encourage market authorities to bring forward any such practices and recognise them under the regime of accepted market practices. This will lead to greater legal certainty and to greater harmonisation across Europe.

CESR should clarify that also buy-back programmes outside the safe harbor should not be regarded as abusive solely because they occur outside of the safe harbor.

[1] See the Final report Monitoring Lamfalussy Process, Brussels. 15 October 2007.

What do you regard as the most serious inconsistency that you have identified?
In some member states market participants have devised and authorities have recognised more advanced forms of price stabilisation compared to others. Recognition of such practices as accepted market practices may lead to greater harmonisation across Europe. Techniques also accepted by markets in accordance with their regulations pursuant to MiFID may be relevant. In addition the application of the law of primary listing, as suggested in the consultation document by certain participants, is not always the most appropriate applicable law, as is the case for example for secondary offers. In contrast, the law of the issueing of the securities, to which the issuer contractually agrees each time, may be more appropriate.

Do you have any comments on CESR' s views that sell transactions are not subject to the exemption provided by article 8?
We have no comments on article 8.

However CESR should also clarify that in case of buy-back programmes, sell transactions are not subject to the restrictions of art. 6 of the MAD implementing Regulation n. (CE) 2273/2003, when they relate to employees' share option programmes built on the selling of shares (i.e. transfer with a monetary compensation) from the issuer to his employees. The restriction of selling (foreseen by art. 6) only refers to the prohibition of trading (which has a different purpose than in an employee share option plan), as Level 2 works illustrated[2]. CESR should therefore clarify in Level 3 works that in this case the selling restrictions (and the prohibitions) do not apply.

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 stabilizing activity, is not behavior that is covered by article 8?
We fully agree with CESR's clarification.

What would you regard as the difference in approach that gives rise to the most significant practical problem?
As stated above and clearly illustrated by the Esme Report, stabilisation activity may be regulated simultaneously by several Member States which could raise many problems and differences (e.g. some Member States recognize the possibility of exceeding the 5% over-allotment limit, but others do not). That is why a single regulator should be desirable.

Do you support the proposal that all competent authorities should publish the mechanism by which reports of stabilization and buy-back programmes transactions should be submitted and that ideally this should be a dedicated email address?
We agree with CESR's proposal which is also in line with the Esme Report. This would help investment firms operating on a cross-border basis because it could give the possibility to know easily how to draw up the required reports.
CESR should also be aware of the fact that some Member States require for buy-back programmes supplemental reports than those set forth by Regulation n. (CE) 2273/2003.

[2] See CESR/02-89b, p. 45 and following and CESR/02-287b Feedback statement, p. 29.

This is sometimes due to the fact that these requirements have been established before the implementation of the MAD[3].
As this situation can create unjustified disparities among issuers in different Member States and would also frustrate the simplification mechanism proposed by CESR, CESR should state clearly that supplemental reports as required by Member States have to be eliminated.

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?
We share the view according to which 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. The same means to publicly disclose should be used both for stabilisation and buy-back programmes because according to the TD, the notion of "regulated information" includes all the information which the issuer is required to disclose under the TD and the MAD.

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?

- Firstly a wider set of purposes for buy-back programmes should be considered, as stated by CESR and the Esme Group. In addition a specific safe harbour should be recognised in cases where the bidder builds a position to the target either alone or through persons acting in concert with the purpose to launch a takeover bid.
- With regard to buy-back programmes, it would be important to clarify in (future) Level 3 works whether the exemption of the Level 2 Regulation applies to trading in own shares in buy-back programmes by directors of the issuer, as suggested by the Esme Group[4].
- Price stabilization in cases of hostile takeovers should also be considered as an option in order to address some of the price pressures of short-termism in takeovers and the reaction that share exchange offers receive from the market. Empirical evidence suggests that once an offer is announced the bidder is most likely to experience downward price pressures due to the operation of arbitrageurs or the dilution caused by a share offer exchange. Excessive short selling attacks to issuers may be also another case where price stabilising techniques may be relevant. This is after all a legitimate defence used by states in foreign exchange markets. Accordingly, the operation of some of the price stabilising rules could be extended, in the case of takeovers, or share exchange offers, or short selling attacks
- With reference to accepted market practices (AMP), according to art. 1 of the MAD, the market participant is exempted from punishment provided that his reasons for doing the transactions are legitimate. This means that the burden of proof is on the market participant and that transactions are in principle deemed to be prohibited. It needs to be reviewed whether this burden of proof should be amended in a sense that the reasons for trading are deemed to be legitimate and accepted unless the

[3] This is the case in Italy. See Consob Regulation n. 11971/1999 (articles 73, 93, 87, 87-*bis*,101, 144-*bis*).
[4] See Esme Report, par. 6, p. 15.

competent authority declares these as being illegitimate. As an alternative, Level 3 works could come forward with presumptions of legitimate reasons.

Moreover, as clearly stated by CESR which made an overview of the sanctions under the MAD, it is necessary to accommodate concerns about the diversity of measures and sanctions applied in the Member States. According to the applicable regime in some Member States, the AMPs and the existence of a legitimate reason lead to an exemption from the application of administrative sanctions but not from the application of criminal ones (e.g. Italy). It would be important to ascertain if the same happens in other Member States because differences in this field could create unjustified disparities and stand in the way of a level playing field: a survey by CESR would be welcome.

- Finally, according to MiFID, the possibility to access the regulated market is now granted also to entities other than investment firms and credit institutions[5]. This should imply for issuers who have in place appropriate "chinese walls" the possibility to buy themselves the shares without the services of an intermediary. CESR should therefore clarify whether it is possible for the issuer, during a buy-back programme, to buy the shares directly without the services of an intermediary.

Do you have any comments in relation to this draft guidance on the issue of rumours?
We appreciate CESR's draft guidance on this issue. We share the views expressed by CESR according to which issuers are under no obligation to respond to speculation or market rumours which are without substance. The legal basis for commenting on rumours (art. 6, par. 7, of the level 1 Directive) puts forward two necessary conditions. The first one is that the rumour must be related to an inside information as defined in the level 1 Directive: false news, or even true rumours related to information that is confidential information, but not yet inside, do not have to be commented on. The second is that the rumours must be related to an inside information "within the issuer". In fact, inside information which is not "within" the issuer, like a takeover on the issuer itself, does not fall under the disclosure obligation of article 6 and, thus, there is no legal basis to impose a comment on that.

However we think that the guidance should go further and should clarify that rumours (even if not without substance) have to be commented on only when, in addition to these rumours being related to inside information, "within the issuer", there are also price or abnormal quantity movements. When these three conditions are not met cumulatively, a "no comment" should always be allowed.

The approach to rumours must be coordinated with the one in terms of disclosure of intentions applied in many countries in the context of takeovers in order to give certainty to issuers.

As regards the content of the communication made in reaction to rumours, competent authorities should take a uniform approach regarding the use of a "no comment" statement by a listed company.

[5] See art. 42, par. 3.

CESR should also clarify what should be done in cases of deliberate publication of rumours with the purpose to extract from a company a piece of information that would otherwise be kept confidential: "fishing of confidential information". Such practices should be closely monitored by competent authorities.

Finally and as already stated above, we think that CESR should gather the rules concerning rumours in each Member State and give an overview to the market, as already done with reference to sanctions in the field of MAD.

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