



Date: April 2002
Ref.: CESR/02-060

**SUMMARY OF RESPONSES TO
THE SECOND CONSULTATION OF
THE CESR/FESCO DOCUMENT:
“STABILISATION AND ALLOTMENT –
A EUROPEAN SUPERVISORY APPROACH
(FESCO/01-037B)**

April 2002

Set forth below is a list of responders and a summary of responses received in the second consultation of the FESCO Document “Stabilisation and Allotment, A European Supervisory Approach”. This document has a summary character and should not be seen as a full and exhaustive inventory of all responses received. In particular, where experts have provided a summary of the national consultation and/or of responses received in languages other than English, such summary was used for the drafting of this document.

I. List of responders¹

Infrastructure providers (stock exchanges) and associations

Vienna Stock Exchange (Austria)
 Danish Authorised Market Place (Denmark)
 International Securities Markets Association
 The Federation of European Securities Exchanges
 Helsinki Exchanges Group LTD (Finland)
 Borsa Italiana
 Euronext Amsterdam N.V. (Netherlands)
 Stockholm Stock Exchange (Sweden)

Investment services firms, other service providers and associations

Bank Austria AG
 Belgian Bankers’ Association
 The Danish Securities Dealers Association (Denmark)
 The Association of Danish Mortgage Banks (Denmark)
 European Banking Federation
 Association for Investment Management and Research
 The Finnish Bankers Association
 The Finnish Association of Securities Dealers
 Osuuspankkikeskus-OPK osuuskunta (Finland)
 The Finnish Association of Mutual Funds
 Association Française des Entreprises d’Investissement
 Fédération Bancaire Française
 BNP Paribas (France)
 Lazard (France)
 Zentraler Kreditausschuss (Germany)
 Verband der Auslandsbanken in Deutschland (Germany)
 Hellenic Bankers’ Association
 The Hellenic Association of Investment Services Companies
 Goodbody Stockbrokers (Ireland)
 Mediobanca (Italy)
 Assofiduciaria (Italy)
 Associazione Italiana Intermediari Mobiliari (ASSOSIM)
 Fortis Bank N.V.
 Dutch Banking Association (NVB), referring to the comment of Fortis Bank N.V. as representing also the other associated banks
 ING Bank N.V. (Netherlands)
 ABN AMRO Bank N.V. (Netherlands)
 Association for Stockbrokers (VVC) (Netherlands)
 Associazione Bancaria Italiana (ABI)
 The Norwegian Stockbroking Companies

¹ Includes also associations who submitted written comments to or after the open hearing held on 22 February 2002 in Paris. Such responses have not been included in the summary to avoid confusion, as they related to parts of the document that were changed from the consultative paper.



Banco Commercial Portuges Investimento
Asociación Española de Banca
Banco Santander Central Hispano
Banco Bilbao Vizcaya Argentaria (Spain)
Caja Madrid (Spain)
Bankinter (Spain)
Banco Pastor (Spain)
Caixa Catalunya (Spain)
Bancaja (Spain)
Mercapital (Spain)
Banco Atlántico (Spain)
Banco Sabadell (Spain)
Swedish Securities Dealers Association (SSDA)
Swedish Bankers Association (SBA)
Schroder Salomon Smith Barney (United Kingdom)
Fund Managers' Association (United Kingdom)
HSBC Holdings plc (United Kingdom)
London Investment Banking Association

Investor and shareholder associations

Association Belge des Consommateurs "Test-Achats"
The Danish Consumer Ombudsman (Denmark)
Euro Share Holders
The Finnish Consumer Agency
ADAM (a member of Euroshareholders) (France)
Deutsche Schutzvereinigung für Wertpapierbesitz e.V.
The Union of Institutional Investors of Greece
Association of Shareholders (VEB) (Netherlands)
Financial Services Consumer Panel (United Kingdom)

Issuers and issuers associations

Alstom (France)
L'Oréal (France)
Cap Gemini-Ernst &Young (France)
Carrefour (France)
Sodexo (France)
Altedia (France)
Brime technologie (France)
Itesoftware (France)
Oberthur card systems (France)
Assonime (Italy)
Association of Issuers (VUEO) (Netherlands)
Endesa (Spain)
Repsol-YPF (Spain)
Bodegas Riojanas (Spain)
Unipapel (Spain)
Autopistas Concesionaria Española
Koipe (Spain)

CESR members, other public bodies and authorities

The Austrian Securities Authority (Summary)
Chamber of Commerce (Austria)
Finanstilsynet Summary (Denmark)
Rahoitustarkastus Summary (Finland)
The French Financial Markets Council (*Conseil des Marchés financiers –CMF*)



Bundesaufsichtsamt für den Wertpapierhandel Summary (Germany)
Capital Markets Commission Summary/Translation (Greece)
Department of Enterprise, Trade and Employment(Ireland)
Commissione Nazionale per le Società e la Borsa Summary (Italy)
Commission de Surveillance du Secteur Financier
Stichting Toezicht Effectenverkeer Summary (Netherlands)
Kredittilsynet Summary (Norway)
Comissão Nacional del Mercado de Valores Mobiliários Summary
Comisión Nacional del Mercado de Valores Summary (Spain)
Financial Services Authority Summary of Roundtable Meeting (United Kingdom)

Others

International Bar Association
Shearman and Sterling (France)
Bredin Prat (France)
Max-Planck-Institut für ausländisches und internationales Privatrecht, Hamburg (Germany)
Despacho Melchor, Albiñana & Suárez de Lezo Abogados
Uría & Menéndez Abogados
Slaughter and May (United Kingdom)

II Summary of comments

A. General Comments

- Frequent use of open terms (appropriate, adequate, suitable) seen as problematic. More specific wording desirable. No mention is made of possible sanctions in case of breaches of rule. Need to avoid regulatory arbitrage. (Euro Share Holders)
- Transparency is the key issue in FESCOs proposals, other restriction on the issuer seen as unwarranted. (Swedish Securities Dealers Association and Swedish Bankers Association, together the “Swedish Associations”)
- Clarity on construction of paper necessary - what is the difference between standards and more detailed proposals. (FSA Summary)
- Very positive about both ex-post and ex-ante disclosure and transparency of stabilisation and allotment from the viewpoint of investors. (Financial Services Consumer Panel)

B. Definitions

Relevant Securities

- Expand the definition of “Relevant Securities”, as modified by the definition of “Relevant Market”, to include a broader range of securities as well as markets (specifically ISMA, CORDEAL). Remove the “initial or secondary offering” and “offered to the public” conditions from the text of the proposed rule and the definition of “Relevant Securities”, and add the conditions that (1) the offering constitutes a “significant offering” of a “Relevant Security”, (2) the possibility of stabilisation is disclosed publicly prior to the first commitment to purchase in the offering and (3) all securities sold in the offering are offered initially at a single or “fixed” price. (IBA)

C. Comments to the FESCO European Standards for Stabilisation

General comments

- Stabilisation generally viewed with suspicion. Need to limit stabilisation to the short-terms correction of market irregularities. Should not be used to maintain artificially high prices. (Test-Achats)
- Is market making included in the definition of stabilisation? If yes, this could pose a severe problem for bond issues. (Danish Finanstilsynet Summary)
- Widen the definition of stabilisation to resales by the stabilisation manager of any relevant securities (if too many securities were during the first day) in order to provide the ability to intervene again. The standards should not forbid transactions to hedge a naked short (Association Française des Entreprises d'investissement).
- Bona fide stabilisation activities taking place outside the EEA and pursuant to rules similar to the Proposals should be exempt from manipulation claims by EEA authorities. The term “Investment Services Firm” should be expanded to include institutions from outside the EEA. The safe harbour should not be absolute or exclusive. (IBA)
- Real harmonisation will also require harmonised enforcement mechanisms. (AIMR)
- Need to clarify the relationship between stabilisation and the activity of market makers, sponsors and brokers. (BAWe Summary)
- Proposals are basically in accordance with existing Norwegian regulation. (Kredittilsynet Summary)
- No necessity for further restrictions on proprietary trading. (CNMV Summary)
- Worth considering whether stabilisation should also be permitted in large private placements and not be permitted in public offers with a very limited distribution only. In general, consider whether this topic is not best suited for self-regulation. (Stockholmbörsen)
- Need to match scope to proposed market abuse directive, in particular with regard to (i) Eurobonds/ISMA and (ii) when issued trading. Need to frame scope appropriately especially with regard to the distinction between block trades and public offers. Need to allow closing out of a naked short above the offering price. (FSA Summary)

Details

a) Stabilisation Period

- Clarify whether stabilisation on the grey market / OTC is prohibited and whether application only to capital increases. (Belgian Bankers Association)
- Period should be shorter. (Test-Achats)
- The proposals indicate that the safe harbour is not available until “when issued” trading begins on a regulated market (e.g., the opening of trading on the trading day following the pricing). The stabilisation period generally should begin at the time of pricing and allotment of the offering even if the regulated market is not open, as long as it is subject to trade reporting requirements. The end date of the stabilisation period should be reasonable and disclosed publicly prior to the pricing and allotment of the offering. (IBA)
- Shorten stabilisation period to 15 - 30 days. Prohibit stabilisation in the grey market entirely. (AIMR)
- Agree with proposals, especially where the grey market is concerned, as this is only OTC in Germany. (BAWe Summary)
- Trading prior listing in the grey market is regulated by the Commission proposal for a Directive on insider dealing and market abuse; every measure has to be checked whether it is an admitted market manipulation. (ZKA)

b) Stabilisation Price

- Allow price support in both directions. Fixing a price limit is counterproductive (ASA Summary)
- Clarify the concept of last independent transaction, in particular whether stabilisation can follow rising prices upwards. (Belgian Bankers Association)
- Agree that stabilisation should not be allowed over issue price. Proposal - go even lower, e.g. to 95% of issue price. (Test-Achats)
- For equity securities, there should be a cap on the stabilisation bid equal to the lower of (1) the offering price and (2) the price of the first stabilising purchase. Crafting the bid limits in this way should prevent actual or perceived abuse while preventing speculators from (1) “ratcheting down” the stabilising bid or (2) exhausting the capacity of the stabilising manager. For equity securities and debt securities, require that, if stabilising and independent bids are equal, preference be given to the independent bid. Monitor the price parameters for the debt securities safe harbour. (IBA)
- The last independent transaction should be the absolute and only price limit. (AIMR)
- The indicative nature of the last independent transaction needs to be explained more fully. (Rahoitustarkastus Summary)
- Preference to delete the reference to the last independent transaction. (BAWe Summary)
- Allow downward stabilisation to contain market volatility. Clarify the concept of the last independent transaction. (Consob Summary)
- The stabilisation manager should not be allowed to push the market price aggressively in a particular direction, however, the standards should allow for sales of securities as well. (STE Summary - Euronext, also Dutch Banking Association, “NVB”)
- Questionable whether the last independent transaction is the appropriate price limit in every case. (CMVM Summary and Banco Commercial Portuges Investimento, “BCPI”)
- Need to allow price support as well. (FSA Summary)
- The issue price should be the only upper limit. (ZKA)

c) Liquidation of Stabilisation transactions

- Rules should be designed to minimise market impact. (Test-Achats)

d) The Stabilisation Manager

- The stabilisation manager cannot be held liable for the actions of others. (Belgian Bankers Association)
 - The Proposals should clarify that (1) a consortium may appoint a different stabilisation manager for each jurisdiction and (2) the stabilisation manager for one jurisdiction will not be jointly or vicariously liable for the activities of the stabilisation manager in another jurisdiction. (IBA)
 - Unclear whether issuers are potentially included. In principle only the stabilisation manager should carry out stabilisation transactions. (Consob Summary)
 - In real life, only one entity is responsible for allotment. Unnecessary to allow for different entities in different jurisdictions. (CSSF)
 - Wording inconsistency between introduction and text of proposal. (CMVM Summary)
- e) Prospectus disclosure
- Not a useful information for the public. (Belgian Bankers Association)
 - Condition the availability of the safe harbour on public disclosure prior to receiving binding commitments to purchase that (1) stabilisation transactions are possible, (2) if applicable, that stabilisation transactions may include overallocments and covering purchases, (3) if applicable, that the seller has provided an overallocment or “greenhoe” option, including material terms such as the size of the option and the latest exercise date and (4) that stabilisation transactions may result in a market price that is higher than would otherwise prevail. The statement regarding higher prices should appear prominently in the relevant offering documents. (IBA)
 - Information should also be included in the summary prospectus required under Spanish laws. (CNMV Summary)
- f) Record keeping requirements
- There is a need for a duty to provide information to the Competent Authority daily (Consob Summary)
- g) Post Stabilisation Disclosure
- Consider bringing back limited disclosure during stabilisation to allow retail investors even access to the information accessible to professionals. (Test-Achats and Danish Finanstilsynet Summary and Euro Share Holders)
 - In favour of the timing proposed for the disclosure to the market of the information concerning the stabilisation process (ex post and not during the allotment period). However, there is no real interest in publishing ex post the average price of the stabilisation transactions weighted by the volume of trading. The ex post information should only concern the total volume of stabilisation transactions (Fédération Bancaire Française)
 - Information should be provided to the competent authority, which may decide on disclosure (ASSOSIM)
 - During and after stabilisation no stabilisation-specific public disclosure should be required. Stabilisation managers should be required to (1) report all trades, including stabilisation trades, in accordance with the rules of the Relevant Market and (2) maintain records of all trades. If an overallocment option is exercised, the market should be notified of the exercise promptly, including the amount of securities purchased and, in the case of a partial exercise, whether the remainder is available. (IBA)
 - Current requirement seen generally as fair. Helsinki Exchange would be even stricter (immediately disclosure and more details e.g prices) (Rahoitustarkastus Summary)
 - Better than in previous version, but still preferable to delete requirement for ex-post transparency entirely. (BAWe Summary)
 - Regrettable that the labelling requirement has been given up. The process will thus remain unclear for investors. (STE Summary - VEB)



- Disclosure requirement is likely to deter stabilisation, thus damaging investors interests. (NVB)
- Supportive of the deletion of labelling requirement as well as of the currently prescribed disclosure. (CMVM Summary)
- Generally supportive of current requirement, as disclosure during stabilisation could be counterproductive. Some calls for more stringent requirements. (CNMV Summary)
- Allowing one week is too generous. Immediate disclosure necessary. (Stockholmbörsen)
- This disclosure is potentially misleading. (FSA Summary)

D. Comments to the Overallotment facility and Greenshoe

I. *General comments*

- Flexibility would be wise, i.e. allow use of the greenshoe even without overallotment. (Belgian Bankers Association)
- An overallotment should require the prior allotment of the shares originally offered. (AIMR)
- Current definition is appropriate for German market. (BAWe Summary)
- Clarify definitions and include definition of the lending option (Consob Summary):

“There is the possibility for the global co-ordinator to borrow, normally from the offeror or the shareholders, the necessary amount of securities in order to provide the investors with the shares of the over-allotment. The global co-ordinator may exercise the option for the entire amount or only for part of it, but not for a greater amount than that over-allotted.

The shares borrowed may be returned to the lender through the exercise of the green-shoe option and/or by returning the shares eventually bought on the market during the stabilisation activity.

The Global Co-ordinator should exercise the lending option not later than when the settlement of the offer is completed.

- Overallotment only if shares originally offered have been subscribed fully. Otherwise, a risk of misleading the public exists. (CSSF)
- Supportive of broad definition of overallotment to include underallotment as well. (CMVM and CNMV Summaries)
- Investors do not understand how the overallotment and greenshoe works and prospectuses do not contain sufficiently clear information. A need for a proper explanation/definition exists. (Stockholmbörsen)
- Need to cover refreshing of the short. (FSA Summary)

II. *Details*

a) *Disclosure*

b) *Market Transparency*

- Elaborate proposal more. (AIMR)

c) *Market Integrity*

- Consider allowing exercise of the Greenshoe option even where no over allotment has taken place. (Consob Summary)

E. Comments to the FESCO European Standards on Allotment

I. General Comments

- Strict rules may disadvantage retail investors who will obtain larger allotments than they would wish for in weak offerings. (ASA Summary)
- Fully supportive of fair treatment, however, only for investors belonging to the same category. (Belgian Bankers Association)
- Equal treatment of investors is an important principle in an IPO which is not properly respected in the paper. (Euro Share Holders)
- Preferential and consortium allotments as well as friend and family programmes are inherently unfair and conflict with principles of professional conduct. Consider undertaking investor education along the lines of the UK FSA fact-sheets. (AIMR)
- The allotment standards should not apply to professional investors or “affinity group” offerings or tranches. Affinity groups should be included in the definition of professional investors. Require that the allotment standards be followed if the offered securities are (1) admitted or are to be admitted to trading on a Regulated Market and (2) purchase commitments are received from more than a small number of investors who are not “professional investors”. The term “professional investor” should be consistent with other pan-European regulations that distinguish among classes of investors, but should also include investors that have financial resources above certain defined thresholds. (IBA)
- Supportive of general thrust, concerns over inflexibility of proposals. According to the Finnish Association of Mutual Funds and Helsinki Exchange there is a need to set standards also for the treatment of professional investors. Need for harmonisation concerning the acquisition of own shares. The Finnish Consumer Agency supported FESCO’s initiative, but didn’t have any special comment. (Rahoitustarkastus Summary)
- A centralised allotment system may be necessary to achieve a sufficient degree of fair treatment. (Consob Summary)
- Supportive of proposals, definition of “public offers” should be given. (STE Summary - Euronext)
- Supportive of proposal, however, the very important principle of equal treatment is not addressed. (STE Summary - VEB)
- Necessity to reconsider standards to reflect the fact that allotment is a business decision. (STE Summary - VEUE)
- Proposal is less strict than current practice and interpretation of conduct of business rules in Norway. (Kredittilsynet Summary)
- Friends and Family Programmes are unknown in Portuguese law, which reflects the fact that there is no different treatment of investors in the same material position in the retail tranche. (CMVM Summary)
- Broadly supportive of the inclusion of (i) issuers and (ii) intra-professional allotments in the proposals. Clearly against differentiation of subscriptions based on which entity they are made through. No clear picture in free retention and friends and family programmes. All preferential treatment should be disclosed in the prospectus. Claw-back issues adequately dealt with. (CNMV Summary)
- The offeror or stabilisation manager should be entitled to allot with discretion, which necessarily implies preferential treatment for certain investors. (Swedish Associations)
- Proposals unsuitable for cross-border sophisticated debt markets. Necessity to clearly define scope, both in terms of what a public offer and what allotment is. Generally, the onward sale of securities by brokers who had themselves been allotted shares should not be seen as an allotment. Leads to further questions such as definition of retail/public offer, centralised vs. de-centralised allotment systems, applicability of disclosure requirements to the professional tranche in a mixed tranche offer, danger of boilerplate disclosure. (FSA Summary)
- Issuers should have the right to influence the identity of their institutional shareholders; so there is no need for regulation. (VAB)

II. *Details*

Introduction / Subscription through non-syndicate investment firms

- Seen as extremely problematic, as investors will be forced into client relationships with syndicate members if they wish to participate in an issue. (Test-Achats)

Introduction / Free Retention

- Seen as a particularly unhealthy market practice with increased risk of rule contravention for investment firms. (Test-Achats)
- Clarify concept of free retention (Association Française des Entreprises d'investissement).
- Prohibit "free retention" vis-à-vis the retail tranche. (IBA)
- Free retention and preferential treatment conflicts with the principle of fair treatment. (Consob Summary)

1) Allotment Principles

a) Allotment Manager

- The provision dealing with the allotment manager would necessarily prevent allocations to non-syndicate members. (ASA Summary)
- On-line brokers and other order consolidators that are acting for retail investors and do not submit separate orders for each retail investor should be required to (1) segregate their orders into a retail tranche and a professional investor tranche, (2) identify the number of retail investors and other information and (3) agree to apply the same allotment methods to their retail tranches as the allotment manager applies to retail orders generally. (IBA)
- Allotment manager should be in a position to undertake individual allotments (Danish Finanstilsynet Summary)
- Requirement does not take account of situations where there are joint bookrunners. (FSA Summary)

b) Allotment Methods

- Claw-back sensible, however, minimum retail tranche problematic. (Belgian Bankers Association)
- Claw-back with minimum retail tranche very positive for retail investors. (Test-Achats)
- The claw-back as redrafted is acceptable. (BAWe Summary)
- The minimum retail tranche requirement interferes with the necessary flexibility for the allotment process. If it is desired, the interests of the retail and institutional tranche should be balanced more fairly. (CNMV Summary)

2) Pre – Allotment Disclosure

- Proposal: If allotment process is not set up in advance, the disclosure of this fact should be sufficient. (ASA Summary)
- Prospectus should mention guidelines only and allow for flexibility. (Belgian Bankers Association)
- The prospectus should always be made available to retail investors, at least the summary must be provided to them. (Test-Achats)
- Disclosure should be as comprehensive as possible. (Euro Share Holders)
- Disclosure problematic because (i) investors do not read the prospectus anyway and (ii) the risk of prospectus liability is significantly increased. (BAWe Summary)
- Excessive disclosure will open up opportunities for abuse by other market participants. Unclear what use retail investors will make of this information. (FSA Summary)

- The issuer should only be obliged to publish details insofar as they have been agreed between the issuer and lead management with binding effect for the consortium as a whole. (ZKA)

3) Disclosure of Allotment

- Doubtful whether this will serve the protection of retail investors. (ASA Summary)

a) Public Disclosure

This requirement will give other players opportunities for abuse. (FSA Summary)

b) Investor Information

- Requirement to stringent, publication in newspapers should suffice. (Belgian Bankers Association)
- Having access to the information about the allotment is not sufficient. Retail investors must be able to offer shares for sale as well. (Test-Achats)
- Requirement may interfere with commencement of trading. (CMVM Summary)
- Requirement to stringent, if prospectus contains a clear indication that investors who have not been allotted shares will not be notified. (Swedish Associations)
- It is not possible to inform every investor before trading by post, because often the first trading day is a Monday and the allotment is settled on weekend. (ZKA)

c) Record keeping and Disclosure to the Regulator

d) Consortium Allotment

- Specify the prohibition in more detail, especially as concerns applications for the asset management entities, investment management portfolio and the so called issue end. (Belgian Bankers Association)
- Very problematic, especially as the proposals ban employees from receiving preferential treatment that is independent of their professional position (BAWe Summary)