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The Committee of European Securities Regulators
11-13 avenue de Freidland
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Dear Sirs

Market Abuse Directive, Level 3 – Public Consultation on the Third Set of CESR Guidance and Information on the Common Operation of the Directive to the Market

This is a response from the Regulatory Committee of the City of London Law Society to the public consultation by the Committee of European Securities Regulators ("CESR") on a draft Third set of Level 3 guidance on the operation of Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (the "Directive").

The City of London Law Society (CLLS) represents over 13,000 City lawyers, through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees. These comments have been prepared by the CLLS's Regulatory Committee. Members of the Regulatory Committee advise a wide range of firms in the financial markets including banks, brokers, investment advisers, investment managers, custodians, private equity and other specialist fund managers as well as market infrastructure providers such as the operators of trading, clearing and settlement systems.

Specific consultation questions on stabilisation and buy back programmes

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?

We are supportive of the proposed guidance. We would ask that the statement included in the first sentence of paragraph 7 of the consultation be amended so that it is clear that it covers the buy back by an issuer of its own shares under a buy-back programme where this is undertaken outside the scope of the safe harbour afforded under Article 8 of the Directive. The comments made in paragraph 6 of the consultation suggest that it is CESR's intention to treat trading in own shares falling outside the scope of the safe harbour in exactly the same way as equivalent stabilisation activity.

One member state's regime

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

We suspect that the most significant inconsistency encountered to date has related to the differing views taken in member states as to the meaning of the term "adequate public disclosure" as used in Articles 8 and 9 of Commission Regulation No 2273/2003 (EC) of 22 December 2003 (the "Regulation"). We note that CESR proposes to address this concern elsewhere in the consultation and have set out our comments below in response to the relevant question.

We are aware of member states taking differing views in relation to the treatment of buy-back programmes where the instrument being purchased by the issuer is a Global Depository Receipt (a "GDR"). As a GDR is a separate instrument, albeit one representing ownership of a given number of shares, there is currently a degree of uncertainty as to how a purchase transaction should be regarded where the shares underlying the GDR have been issued by the purchaser. It would be helpful if CESR could clarify whether GDRs representing ownership of shares of a particular issuer are capable of constituting the "shares" of that issuer for the purposes of Article 8 of the Directive and the Regulation.

Sell side trading during stabilisation periods

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 that secondary market sale transactions undertaken during the stabilisation period do not fall within the scope of the safe harbour afforded under Article 8 of the Directive. These sale transactions should not be confused with the overallotment of securities pursuant to the exercise of an overallotment facility, which is explicitly permitted under the terms of the Regulation, albeit subject to the conditions set out in Article 11.

We can certainly envisage circumstances where secondary market sale transactions could be undertaken for proper purposes and support CESR's statement in paragraph 11 of the consultation to the effect that any such transactions will not necessarily be abusive and should be judged on a case by case basis by reference to the criteria set out in the Directive.

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?

There is clearly a degree of overlap with the previous question. We agree that the sale of securities acquired through stabilising purchase transactions, including any sale to facilitate subsequent stabilising activity, does not fall within the scope of the safe harbour afforded under Article 8 of the Directive. That said, we are supportive of CESR's view that any such selling activity will not necessarily be abusive and should be judged by reference to the criteria set out in the Directive.

We do not agree with CESR’s view expressed in paragraph 14 of the consultation that any acquisition of securities taking place after the sale of securities acquired through stabilising purchase transactions would automatically fall outside the scope of the safe harbour afforded under Article 8 of the Regulation. In particular, where any such acquisition of securities is undertaken for the purpose of price support, we do not see why it should not be capable of falling within the scope of the safe harbour.

Third country stabilisation regimes

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

We do think that it would be desirable for market practitioners to have a greater degree of certainty in circumstances where the requirements of the Directive and those of a third country jurisdiction are

relevant to stabilisation activity (for example, where an issue of securities admitted to trading on a regulated market is stabilised from a location in a third country jurisdiction).

We support the proposal to achieve further convergence as part of the ongoing dialogue between the EU and US authorities but imagine that this is unlikely to be a feasible objective in the short term. As an interim step, we wonder whether CESR could explore the desirability of issuing further guidance to build upon the helpful statements included in the consultation. It would be particularly helpful if CESR could issue guidance recognising that stabilisation activity undertaken in significant third country jurisdictions (for example, Hong Kong, Japan and the United States of America) in conformity with applicable local requirements would not be considered to be abusive under the Directive where those third country requirements have been adhered to in practice. This would provide welcome clarity for market practitioners in relation to the treatment of global issues stabilised outside the EU for which an EU market listing has been sought.

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?

We support and welcome the recommendation set out in paragraph 20 of the consultation.

Mechanism for public disclosure

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?

We support CESR's proposal that adequate public disclosure be made through the mechanism used to implement the Transparency Directive (the "TD") in a particular member state and that the information so disclosed should be stored using the mechanism established for this purpose in the implementation of the TD in the relevant member state. We agree that the requirement to make only public disclosure of buy-back transactions means that other disclosure mechanisms can be used to effect the requisite disclosures in addition to the mechanism used to implement the TD in a particular member state.

We do think it would be helpful to market practitioners if CESR could produce further guidance in which each member state was required to recognise disclosure undertaken through a mechanism used to implement the TD in other member states as constituting adequate public disclosure under the Regulation in their own member state. Such mutual recognition would provide welcome clarity to market practitioners in situations where the requirements of more than one member state are relevant to the market abuse position (for example, where an issue of securities is to be stabilised from a location in one member state and the securities are to be admitted to trading on a regulated market in another member state). The potential duplication of disclosures under the Regulation where individual member states mandate different disclosure mechanisms under the TD provides no obvious benefit to the market at large and often involves a degree of wasted cost and practical issues for market practitioners.

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.

Specific consultation question on the two-fold notion of inside information

Rumours

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

We are concerned about CESR's proposal in paragraph 33 of the consultation to apply its proposed guidance on rumours to publications not resulting from the issuer's initiative. It is unrealistic to expect an issuer to monitor every publication to identify rumours regarding it or its business. As a result, we think it is important that CESR limits the requirement for an issuer to respond to a rumour (where it arises) to circumstances where the issuer has become aware of the rumour or ought reasonably to have become aware of it.

We are also concerned that CESR's proposed guidance on rumours may have the effect of creating more favourable conditions for the issuance of speculative rumours, meaning that rumours regarding an issuer or its business could be circulated in the knowledge that the issuer would have no choice but to respond where one or more of the rumours happened to be correct. Our view is that CESR ought to draw a clear division between precise rumours that can be shown to have originated and leaked from an issuer and precise rumours that can be shown to have originated from other sources, with the issuer being required to comment on the former and being free to ignore the latter.

Yours sincerely

Margaret Chamberlain
Chair CLLS Regulatory Committee