COMMISSION REGULATION (EC) No 2273/2003

of 22 December 2003

implementing Directive 2003/6/EC of the European Parliament and of the Council as regards exemptions for buy-back programmes and stabilisation of financial instruments

(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Directive 2003/6/EC of the European Parliament and the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) [1], and in particular Article 8 thereof,

After consulting the Committee of European Securities Regulators (CESR) [2] for technical advice,

Whereas:

(1) Article 8 of Directive 2003/6/EC provides that the prohibitions provided therein shall not apply to trading in own shares in 'buy back' programmes or to the stabilisation of a financial instrument, provided such trading is carried out in accordance with implementing measures adopted to that effect.

(2) Activities of trading in own shares in 'buy-back' programmes and of stabilisation of a financial instrument which would not benefit from the exemption of the prohibitions of Directive 2003/6/EC as provided for by Article 8 thereof, should not in themselves be deemed to constitute market abuse.

(3) On the other hand, the exemptions created by this Regulation only cover behaviour directly related to the purpose of the buy-back and stabilisation activities. Behaviour which is not directly related to the purpose of the buy-back and stabilisation activities shall therefore be considered as any other action covered by Directive 2003/6/EC and may be the object of administrative measures or sanctions, if the competent authority establishes that the action in question constitutes market abuse.

(4) As regards trading in own shares in 'buy-back' programmes, the rules provided for by this Regulation are without prejudice to the application of Council Directive 77/91/EEC on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent [3].

(5) Allowable 'buy back' activities in order to benefit from the exemption of the prohibitions of Directive 2003/6/EC include issuers needing the possibility to reduce their capital, to meet obligations arising from debt financial instruments exchangeable into equity instruments, and to meet obligations arising from allocations of shares to employees.

(6) Transparency is a prerequisite for prevention of market abuse. To this end Member States may officially appoint mechanisms to be used for public disclosure of information required to be publicly disclosed under this Regulation.

(7) Issuers having adopted 'buy-back' programmes shall inform their competent authority and, wherever required, the public.

(8) Trading in own shares in 'buy-back' programmes may be carried out through derivative financial instruments.

(9) In order to prevent market abuse, the daily volume of trading in own shares in 'buy-back' programmes shall be limited. However, some flexibility is necessary in order to respond to given market conditions such as a low level of transactions.

(10) Particular attention has to be paid to the selling of own shares during the life of a 'buy-back' programme, to the possible existence of closed periods within issuers during which transactions are prohibited and to the fact that an issuer may have legitimate reasons to delay public disclosure of inside information.

(11) Stabilisation transactions mainly have the effect of providing support for the price of an offering of relevant securities during a limited time period if they come under selling pressure, thus alleviating sales pressure generated by short term investors and maintaining an orderly market in the relevant securities. This is in the interest of those investors having subscribed or purchased those relevant securities in the context of a significant distribution, and of issuers. In this way, stabilisation can contribute to greater confidence of investors and issuers in the financial markets.

[1] OJ L 96, 12.4.2003, p. 16.

[2] CESR was established by Commission Decision 2001/527/EC (OJ L 191,13.7.2001, p. 43).

[3] OJ L 26, 31.1.1977, p. 1.

(12) Stabilisation activity may be carried out either on or off a regulated market and may be carried out by use of financial instruments other than those admitted or to be admitted to the regulated market which may influence the price of the instrument admitted or to be admitted to trading on a regulated market.

(13) Relevant securities shall include financial instruments that become fungible after an initial period because they are substantially the same, although they have different initial dividend or interest payment rights.

(14) In relation to stabilisation, block trades shall not be considered as a significant distribution of relevant securities as they are strictly private transactions.

(15) When Member States permit, in the context of an initial public offer, trading prior to the beginning of the official trading on a regulated market, the permission covers 'when issued trading'.

(16) Market integrity requires the adequate public disclosure of stabilisation activity by issuers or by entities undertaking stabilisation, acting or not on behalf of these issuers. Methods used for adequate public disclosure of such information should be efficient and can take into account market practices accepted by competent authorities.

(17) There should be adequate coordination in place between all investment firms and credit institutions undertaking stabilisation. During stabilisation, one investment firm or credit institution shall act as a central point of inquiry for any regulatory intervention by the competent authority in each Member State concerned.

(18) In order to avoid confusion of market participants, stabilisation activity should be carried out by taking into account the market conditions and the offering price of the relevant security and 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.

(19) Overallotment facilities and 'greenshoe options' are closely related to stabilisation, by providing resources and hedging for stabilisation activity.

(20) Particular attention should be paid to the exercise of an overallotment facility by an investment firm or a credit institution for the purpose of stabilisation when it results in a position uncovered by the 'greenshoe option'.

(21) The measures provided for in this Regulation are in accordance with the opinion of the European Securities Committee,

HAS ADOPTED THIS REGULATION:

CHAPTER I

DEFINITIONS

Article 1

Subject matter

This Regulation lays down the conditions to be met by buy-back programmes and the stabilisation of financial instruments in order to benefit from the exemption provided for in Article 8 of Directive 2003/6/EC.

Article 2

Definitions

For the purposes of this Regulation, the following definitions shall apply in addition to those laid down in Directive 2003/6/EC:

1. 'investment firm' means any legal person as defined in point (2) of Article 1 of Council Directive 93/22/EEC ([1]);

2. 'credit institution' means a legal person as defined in Article 1(1) of Directive 2000/12/EC of the European Parliament and the Council ([2]);

3. 'buy-back programmes' means trading in own shares in accordance with Articles 19 to 24 of Council Directive 77/91/EEC;

4. 'time-scheduled "buy-back" programme' means a 'buy-back' programme where the dates and quantities of securities to be traded during the time period of the programme are set out at the time of the public disclosure of the 'buy-back' programme;

5. 'adequate public disclosure' means disclosure made in accordance with the procedure laid down in Articles 102(1) and 103 of Directive 2001/34/EC of the European Parliament and of the Council ([3]);

6. 'relevant securities' means transferable securities as defined in Directive 93/22/EEC, which are admitted to trading on a regulated market or for which a request for admission to trading on such a market has been made, and which are the subject of a significant distribution;

([1]) OJ L 141, 11.6.1993, p. 27.
([2]) OJ L 126, 26.5.2000, p. 1.
([3]) OJ L 184, 6.7.2001, p. 1.

7. 'stabilisation' means any purchase or offer to purchase relevant securities, or any transaction in associated instruments equivalent thereto, by investment firms or credit institutions, which is undertaken in the context of a significant distribution of such relevant securities exclusively for supporting the market price of these relevant securities for a predetermined period of time, due to a selling pressure in such securities;

8. 'associated instruments' means the following financial instruments (including those which are not admitted to trading on a regulated market, or for which a request for admission to trading on such a market has not been made, provided that the relevant competent authorities have agreed to standards of transparency for transactions in such financial instruments):

   (a) contracts or rights to subscribe for, acquire or dispose of relevant securities;

   (b) financial derivatives on relevant securities;

   (c) where the relevant securities are convertible or exchangeable debt instruments, the securities into which such convertible or exchangeable debt instruments may be converted or exchanged;

   (d) instruments which are issued or guaranteed by the issuer or guarantor of the relevant securities and whose market price is likely to materially influence the price of the relevant securities, or vice versa;

   (e) where the relevant securities are securities equivalent to shares, the shares represented by those securities (and any other securities equivalent to those shares).

9. 'significant distribution' means an initial or secondary offer of relevant securities, publicly announced and distinct from ordinary trading both in terms of the amount in value of the securities offered and the selling methods employed;

10. 'offeror' means the prior holders of, or the entity issuing, the relevant securities;

11. 'allotment' means the process or processes by which the number of relevant securities to be received by investors who have previously subscribed or applied for them is determined;

12. 'ancillary stabilisation' means the exercise of an overallotment facility or of a greenshoe option by investment firms or credit institutions, in the context of a significant distribution of relevant securities, exclusively for facilitating stabilisation activity;

13. 'overallotment facility' means a clause in the underwriting agreement or lead management agreement which permits acceptance of subscriptions or offers to purchase a greater number of relevant securities than originally offered;

14. 'greenshoe option' means an option granted by the offeror in favour of the investment firm(s) or credit institution(s) involved in the offer for the purpose of covering overallotments, under the terms of which such firm(s) or institution(s) may purchase up to a certain amount of relevant securities at the offer price for a certain period of time after the offer of the relevant securities.

CHAPTER II

'BUY-BACK' PROGRAMMES

Article 3

Objectives of buy-back programmes

In order to benefit from the exemption provided for in Article 8 of Directive 2003/6/EC, a buy-back programme must comply with Articles 4, 5 and 6 of this Regulation and the sole purpose of that buy-back programme must be to reduce the capital of an issuer (in value or in number of shares) or to meet obligations arising from any of the following:

(a) debt financial instruments exchangeable into equity instruments;

(b) employee share option programmes or other allocations of shares to employees of the issuer or of an associate company.

Article 4

Conditions for 'buy-back' programmes and disclosure

1. The 'buy-back' programme must comply with the conditions laid down by Article 19(1) of Directive 77/91/EEC.

2. Prior to the start of trading, full details of the programme approved in accordance with Article 19(1) of Directive 77/91/EEC must be adequately disclosed to the public in Member States in which an issuer has requested admission of its shares to trading on a regulated market.

Those details must include the objective of the programme as referred to in Article 3, the maximum consideration, the maximum number of shares to be acquired and the duration of the period for which authorisation for the programme has been given.

Subsequent changes to the programme must be subject to adequate public disclosure in Member States.

3. The issuer must have in place the mechanisms ensuring that it fulfils trade reporting obligations to the competent authority of the regulated market on which the shares have been admitted to trading. These mechanisms must record each transaction related to 'buy-back' programmes, including the information specified in Article 20(1) of Directive 93/22/EEC.

4. The issuer must publicly disclose details of all transactions as referred to in paragraph 3 no later than the end of the seventh daily market session following the date of execution of such transactions.