SWEDISH SECURITIES DEALERS ASSOCIATION

SVENSKA FONDHANDLAREFÖRENINGEN

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Committee of European Securities Regulators

***Respons to CESR's consultation on***

***MiFID complex and non complex financial instruments for the purpose of the Directive's appropriateness requirements.***

The Swedish Securities Dealers Association (SSDA) represents the common interest of banks and investment firms active on the Swedish securities market. The mission of SSDA is the maintaining of a sound, strong and efficient securities market in Sweden. SSDA promotes members' views with regard to regulatory, market and infrastructure related issues. It also provides a neutral forum for discussing and exchanging views on matters which are of common interest to its members.

SSDA has a close cooperation with other trade associations in Sweden, the Nordic area and the UK. SSDA is also active on the European arena via EFSA (European Forum of Securities Associations) and globally through ICSA (International Committee of Securities Associations). At the end of 2008, SSDA has 33 members consisting of banks and investment firms active in the Swedish securities industry.

*General remarks*

SSDA welcomes the opportunity to response to CESRs consultation on MiFID complex and non-complex financial instruments for the purpose of the Directive's appropriateness requirements.

We strongly support the general remarks made by European Banking Federation in their respons to the consulation. We would like to add the following remarks.

In order to prepare for the implementation of MiFID, SSDA and its members developed with great effort a guideline on how to interpret Act. 19(6) in MiFID Level 1 Directive (below referred to as Art 19) in combination with Art. 38 in MiFID Level 2 directive (below referred to as Art 38). Our conclusion was then and still is, that Art 19 only sets out a list for certain financial instrument that without any further assessment may be considered as non-complex. For all other instruments assessment if the instrument is non-complex should be done under Art 38. As we understand it this interpretation is also shared by the Swedish FSA and of course based on the Swedish implementation of MiFID. It is important to have a literal reading of these articles to understand the logic and for the firms to be able to make their proper assessments. Since MIFID was the result of a lot of compromises literal reading is the only method to

interpret MiFID in our view. Furthermore, even if CESR have an ambition to categorizing all financial instruments there will always be new instrument that the firms need to assess themselves. Therefore it is very important to have a clear and logic methodology for the assessments.

Please note that the MiFID rules only deals with assessing if a financial instrument is a non-complex instrument and not to assess if an instrument is a complex instruments. We believe this should be made clear.

It would be valuable, if possible, for the investment firms when setting up their routines for the assessment to receive clearer guidance on which factor is the most important in this context; is it the **risk** to invest in the relevant instrument or is the **complexity** of the instrument, i.e. the risk of not understanding the risk involved in the investment?

In short, as pointed out by EBF, new guidelines in this area, in the absence of a market failure, risk leading to confusion and unnecessary costs to implement any new methodology.

Questions:

*Question 1: Do you have any comments on CESR's view that Art. 19(6)'s reference to shares may best be read as capturing a particular range of shares and exclude other types of equity securities negotiable in the capital markets?*

*26 Equivalent third party market:* In line with our general view and the current market practice as developed since the implementation of MiFID, we believe that the alternative (i) is the only possible approach.

*28+33 Depository receipt:* We do not share your conclusion on depository receipts since the instrument in reality traded is the share, even if the share from both a holding and clearing and settlement perspective is handled via the depository receipt. I.e. the assessment is on the share and not the depository receipt. It could well be that the share is listed and traded in one EU regulated market, but the same share is from a formal perspective traded as depository receipt in another EU regulated market.

*Question 2: Do you have any comments on the approach to different interpretations of the category of "shares" ?*

*29+33 Shares in non-UCITs collective schemes* - In order to have a transparent and logic methodology for the assessment, we believe that shares in non-UCITS collective schemes should be assessed the same way as any other shares, e.g. if they are trades on an EU-regulated market they are non-complex.

*Question 4: Do you agree that other equity securities should be assessed as per the criteria in Art. 38 of the Level 2 Directive?*

No not entiry, see comment above on depository receipt.

*Question 5: Do you agree with CESR's interpretation that convertible shares will always be complex under the appropriateness requirement as drafted?*

*34 Convertible shares:* We do not agree that convertible shares automatically should be considered as not being non-complex. They are shares and should be treated as such.

*Question 6: Do you agree with an interpretation that subscription rights/nil-paid rights for shares would be complex under the appropriateness requirement?*

*35 – 36 Subscription rights:* Based on the experience especially from recent and urgent new issues of shares (to companies that suffers under the current crises), it has become obvious that it is important not to introduce obstacle and limits for share holders to actually use their right to participate in new issues of shares.

We fully support the position of EBF that the rights should be considered a component of the share itself which is speared from the share only to facilitate trading. This is also the view of the Nordic Securities Association of which SSDA is a member.

If this view, contrary to expectation, not is shared by CESR we suggest that CESR approves a simplified appropriateness test at least for selling and subscribing subscription right that would only include to certify that the investor has got the rights free of charge based on holding of the shares or that it can be assumed that the investor has bought the rights after an appropriateness test. This will protect small investors from not losing their possibility to use or sell their rights due to short timeframe.

*Question 8: Are there other specific types of such instruments that should be explicitly mentioned in a list for the purposes of CESR's exercise?*

No, since we are of the view that there should be no common list at this point in time.

*Question 10: Are there other specific types of such instruments that should be explicitly mentioned in a list for the purposes of CESR's exercise?*

No since we are of the view that there should be no common list at this point in time.

*Question 12: Do you think that this is a point on which MiFID could usefully be clarified?*

No. Structured products may often not be non-complex. Each instrumnet should however be assesed through the normal Art. 38 procedure.

*Question 14: Do you have any other comments on MiFID's treatment of "other forms of securitised debt " for the purposes of the appropriateness requirements?*

The Swedish implementation of MiFID in this context correspond with the interpreting CESR has done in this consultation.

*Question 16: Do you agree with CESR's view that it is reasonable to categorise callable and puttable bonds as complex financial instruments for the purposes of the appropriateness test?*

No. The fact that callable and puttable bonds embed an option is not the same as embedding of a derivat and could not idependently lead to that the instrument is categorised as complex. The instrument could however, depending on the terms for the instrument, be hard to understand for retail investors and could on these basis be classified as complex.

*56 – Which instruments should be assessed under article 38;* We do not agree to CESRs conclusion. At least the Swedish text it is absolutely clear that the list in Art 19 is only a list of financial instruments that are clearly non-complex. For all other instruments you have to go to Art 38 to make the assessment.

*Question 17: Do you agree with CESR's distinction between traditional covered bonds and structured covered bonds? Is there a need for further distinctions in this space? If so, please provide details in your answers*

*61* - No. Each instrument and its terms must be assessed according to Art 38 (if not comprised in Art 19(6)).

*Question 18: Do you agree that there may be case to review MiFID's treatment of debt instruments for the purposes of the appropriateness requirements?*

No

*Question 20: Are there other specific types of such instruments that should be explicitly mentioned in a list for the purposes of CESR's exercise?*

No, we are of the view that there should be no common list.

*Question 21: Do you agree with CESR's view that non-UCITS undertakings should not automatically be categorized as complex instruments simply due to the fact that they invest in complex instruments?*

Yes

*Question 22: Do you agree with CESR's analysis of the treatment of units in collective investment undertakings for the purposes of the appropriateness requirements?*

Yes

*Question 23: Do you have any further comments on CESR's consideration of the position of these instruments?*

Please note that, according to the proposal for a Directive on Alternative Investment Fund Mangaement 20097/0064 (COD), AIFs should not be considered non complex (see recital 10). We do not agree with this statement and it contravenes CESR's view as stated in the present consultation.

*Question 24: Are there other specific types of such instruments that should be explicitly mentioned in a list for the purposes of CESR's exercise?*

No, see general comments

*Question 25: Do you agree with CESR's view on the purpose of the Article 38*

As mentioned above we do not share your view that it is already in Art 19 clarified that certain instruments are not non-complex. An assessment is always needed under Art 38.

*Question 26: Do you agree with CESR's interpretation of what constitutes frequent opportunities dispose of, redeem, or otherwise realise that instrument?*

No. SSDA has in its guidance up to 30 days.This is based on a former rule in the Deposit Gurantee Scheme that stated that a deposit is liquid if you can withdraw the deposit with 30 days notice.

*Question 28: Do you agree that the lack of liquidity could undermine the compliance with article 38 (b)?*

MiFID set up clear requirements on a regulated market. If it is not sufficient that financial instruments are traded on a regulated market to satisfy the criteria under art 38 (b) we believe the MiFID requirements on regulated markets should be reviewed.

*Question 30: Do you agree with CESR view on what constitutes comprehensive and publicly available information?*

We believe it should be clarified that a prospectus that is set up in compliance with the prospectus directive must be considered as "adequately comprehensive". Otherwise the

conclusion is that the requirements in the Prospectus directive are not properly set up and should be reviewed.

*Question 31: Do you agree with CESR's analysis of the position of these instruments?*

Yes

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