

CESR

Stockholm 2008-09-30

Swedish Securities Dealers Associations response to CESR consultation on the market Abuse Directive Third set of CESR guidance and information on the common operation of the Directive to the market.

1. The Swedish Securities Dealers Association, SSDA, represents banks and firms providing investment services in Sweden. SSDA welcomes the opportunity to comment on Level 3 – Third set of guidance and information on the common operation of the Directive to the market.
2. SSDA will comment on suspicious transaction reports and will also request CESR to consider issuing guidance on the interpretation of “reasonable suspects” and “reasonable grounds for suspecting”.

Suspicious transaction reports

3. CESR suggests that where an unexecuted order for a transaction gives rise to a suspicion of market abuse, this suspicion is strongly recommended to be reported to the competent authority.
4. SSDA thinks that further consideration is necessary especially in regard to the following matters before CESR issues the guidance.
5. As the directive in some member states is implemented as a criminal law the guidance must clearly state to which article in the directive a specific guidance relate.
6. A notification in good faith to the competent authority regarding a suspicious transaction do not constitute a breach of any restrictions on disclosure of information and do not involve the person notifying in liability of any kind related to such notification (article 7.3 of the Directive 2004/72/EC). It would have been helpful if CESR in the draft guidance had discussed this rule in the light of the draft recommendation to report unexecuted orders.
7. The meaning of “order” is not all clear. It would be helpful if CESR

through more examples made the meaning of “order” and “unexecuted order” more clear. Is, for example, an order sent through an online system but filtered out to be considered an order according to the draft guidance.

8. All though the issue is not explicitly covered in this (third) set of guidance, we think it would be valuable if CESR could consider and clarify the meaning of both “transaction” and “reasonable suspects”/“reasonable grounds for suspecting”, (The latter criteria are below commonly expressed as “reasonable suspect”.)
9. Regarding the definition of “transaction”, it would be valuable if CESR confirmed that the reporting obligation only refers to transactions carried out by, or on behalf of, clients of the reporting firm itself, and thus not refer to clients of (solely) other firms (cf item 31 in the Third set of guidance, in which CESR’s recommendation on information in a STR only refers to “the client”, i e the client of the reporting firm.)
10. In Sweden the industry has felt a significant insecurity on what degree of suspicion that corresponds to “reasonable suspects”. The Swedish legislator has translated “reasonable suspects” with the same expression (in Swedish “kan antas”) that stipulates the level of evidence needed for a prosecutor to initiate a preliminary investigation in a criminal case. The degree of evidence needed there, “kan antas”, is the lowest evidence degree used in Swedish law. (A preliminary investigation can be initiated on very weak suspicions and as soon as the suspicions regards something that objectively could be a crime. The suspicion does not have to relate to a certain culprit and the details of the act do not have to be known.)
11. Representatives from The Swedish National Economic Crimes Bureau have at several occasions stated that “kan antas” (i e “reasonable suspects”) are equal to a “10 per cent suspicion” (where 100 per cent would lead to a guilty verdict).
12. We question that the Swedish legislator has made a correct implementation of “reasonable suspects”. Due to the implementation (and the subsequent interpretation by The Swedish National Economic Crimes Bureau), the Swedish security firms seem to have - to protect themselves from sanctions for omitted reporting - reported many more transactions than intended in the market abuse directives (cf the statement in 5.4 in CESR’s first set of guidance that CESR members are interested in “quality not quantity of reporting”).
13. Due to this it would thus be very useful if CESR would try to quantify or in other ways elaborate more on how strong the “reasonable suspicion” must be, eg by using a percentage in relation to full evidence or by explaining how “reasonable suspects” relates to other feasible degrees of evidence.