

Norges Fondsmeglerforbund

The Association of Norwegian Stockbroking Companies
Stiftet 5. oktober 1915



CESR

Att: Secretary General Mr. Fabrice Demarigny,
17 Place de la Bourse,
75 082 Paris Cedex 02,
France

13 June 2003

Ad: CESR's Advice on additional Level 2 Implementing Measures for the Proposed
Market Abuse Directive, Second Consultation Paper

The Association of Norwegian Stockbroking Companies wishes to present the following comments in respect of the above mentioned consultation paper.

General comments

We find the proposed Level 2 advice on accepted market practices acceptable, but we have some comments to the different questions.

Regarding the insider lists we find the questions difficult to answer. This mainly because there seems to be an uncertainty regarding the scope of the directive. Does it require more than one insider list, and if so - what shall be the criteria for drawing up such a list. In our opinion the proposed approach can result in a huge amount of ad hoc lists with the risk of creating a confusing and unreliable situation. In addition to this, the proposed advice suggests that the list also shall cover the related matter or event. Giving information on the specific inside information in such lists increases the risk of unwanted disclosure and leaks.

We do not feel competent to give any specific comments on the approach to commodities derivatives.

The proposed disclosure requirements for insider's transactions are broadly acceptable.

When it comes to the suspicious transaction reporting we have on major concern, and that is related to the lack of a safe harbour for reporting suspicious transactions. In our opinion also CESR should state the problem and ask the Commission, the Parliament and the Member States to seek to resolve this by creating a safe harbour akin to that in the Money Laundering Directive.

In the directive and in the proposed Level 2 advice the reporting obligation is connected to "transactions". In our opinion this excludes orders to trade (or interest), ref. the use of these words in the directive. A consequence of this will be that the reporting obligation occurs after orders have been matched into a "transaction". If this is a correct interpretation this clearly

shows the need for a safe harbour, because when a suspicion later arises the person with reporting obligations can be considered as acting in complicity with the "abuser" and thereby again subject to penalties such as imprisonment.

Answers to the questions

1. The proposed approach is basically appropriate, but considering the many types of markets and market practices around the world, we think it would be wise to focus on markets within the EEA-area.
2. In our opinion the list of factors should be reorganised with focus on what is the most important for the market or trading venue in question. Consequences for related markets, such as derivative markets, can of course be of importance, but it is at the same time essential to bear in mind that possible consequences for other competing trading venues or markets should be of lesser – if any – importance.

The last sentence in the second bullet point of paragraph 35 seems a bit unclear because it is difficult to get a clear opinion of what is meant by "other market participants" here. Is it all market participants in a market or just the members or users of the actual trading facility. And what is meant by "respond"? This sentence can be interpreted to cover systems for "internalisation". We therefore suggest that the sentence should be deleted.

The wording of the advice is very wide with respect to which markets and market practices that can be considered when assessing a certain practice. See for example paragraph 35, fourth bullet point - "the wider market". In our opinion the focus should be on Europe, and not whether such a practice is considered acceptable or unacceptable in i.e. Japan or the U.S.

In the fifth bullet point a reference is made to "applicable codes of conduct". In our opinion this reference should be related to relevant codes of conduct (relevant in relation to market abuse).

Finally we will point out that there is a possibility that different market participants, as a mean to hinder competition, may claim that a given market practice, i.e. "hidden volume" or "internalisation", is abusive. Therefore CESR should avoid any wording in its advice that can open for such allegations, see above regarding paragraph 35 second bullet point.

3. Given the wording of the proposed advice it is not necessary to make any distinction between OTC and trading on regulated markets.
4. Yes.

To specify examples of market practices that may be classified as acceptable we need to analyse in more detail the directive and the coming level 2 regulation compared to existing market practices in i.e. Norway today. As a starting point we think that a better approach is to consider existing practises as acceptable in general, and then evaluate the different practices when concrete issues arise. The general assumption adopted by the Competent Authority should be that a practice is acceptable unless there are strong grounds for thinking that it is abusive.

5. Regarding questions 5 to 9 we do not have the detailed expertise to give adequate answers.
10. The question related to other lists than a permanent list - lists for each matter or event when it becomes inside information - is very difficult to answer.

The model for such lists seems to be what we normally see as lists of "primary insiders" - members of the board or other similar bodies, auditors and senior employees, people that normally have access to inside information. Other similar list are list drawn up in connection with transactions, i.e. lists of persons (not employed by the issuer) who receives inside information.

The approach in the proposed advice seems to be that the duty to establish the lists arises when a matter or event becomes inside information and that the lists shall cover all persons that have such information.

We are afraid that such obligations can be very difficult to handle simply because it is very difficult to know exactly when a matter or event becomes inside information, i.e. in connection with research within the issuer. On the other hand it is much easier to "see" the inside information in connection with transactions such as M&As, IPO's and so on. We fear that a duty as proposed can be very bureaucratic and not at least, that the individual list will be very unreliable.

We think that it is better to start off with a permanent list that covers, not only leading personnel and members of the board, but also people that normally can be expected to have access to inside information.

11. We think that the Level 2 advice should specify the minimum content, namely the following:

- The name of the person (the insider)
- The person's functions and responsibilities
- The date when the person's name was put on the list
- The date when the person ceased to have (regular) access to inside information.

It could also be wise to indicate what kind of persons that is likely to appear on a "permanent list".

In the proposed advice it is suggested that the list also shall cover the related matter or event. In our opinion this is not necessary. Further we will point out that a lot of lists, also giving information on the specific inside information, increases the risk of unwanted disclosure and leaks.

12. We do not think that such a list is necessary. Such a list will probably never be able to cover all relevant persons or companies.

13. See our answer to question 11.

14. Given the above answers we do not think that such an illustrative system as mentioned in paragraph 56 is needed or necessary.

15. Yes, that can be useful.

16. The insider list (permanent list) must be updated on a continuous basis.

17. In our opinion it is important to see the insiders list and the transaction disclosure duty in connection with each other. This means that the disclosure duty should only apply to the persons on the insider list (and persons closely associated). The same should also apply

for other obligations for such insiders, i.e. the Norwegian "investigating requirement"¹. This duty should cover at least the following persons:

- Members of the board (including deputy members or observers)
- Members of the control committee,
- The issuers auditor,
- Senior employees and senior employees and board members of an undertaking in the same group, who can normally be expected to have access to inside information. This normally must include persons having decision-making powers.

This approach has the advantage of administrative simplicity while delivering targeted regulatory preventative measures.

18. Yes and no other persons should be included.
19. Yes, and no threshold.
20. Yes. In Norway also the holding after the time of notification shall be disclosed, and we have no indications that this, in our small and transparent market, have caused any additional problems.
21. Yes
22. The obligation to report is proposed to occur immediately after a transaction has been carried out or completed. The directive says that notification shall take place without delay. In our opinion this opens for more flexibility so that the person or company under reporting obligation can do some investigation in circumstances where they are not sure if they have grounds to make a report or not. They can also be able to make necessary internal checks to assist in making such a decision. The notification can not take place before a suspicion has occurred and there is also a need for time to check out the suspicion.
- In our opinion "without delay" should not be defined as "immediately after".
23. We think that the listed details are more than needed and we are particularly concerned about the proposed obligation to give the "reason" for a suspicion. The information in paragraph 99 will not be required or necessary in every case and will often not all be available when the suspicion occurs. Consequently the word "shall" should be deleted.
24. Yes.

Best Regards

The Association of Norwegian Stockbroking Companies

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(sign.)

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¹ See the Norwegian Securities Trading Act § 2-3.

