

RESPONSE TO CESR'S CONSULTATION ON**CESR'S ROLE AT LEVEL 3 OF THE LAMFALUSSY PROCESS (CESR/04-104b)****I. INTRODUCTION**

1. Set up in 1960, the European Banking Federation (FBE) is the voice of the European banks. It represents the interests of over 4,000 European banks through the 20 banking associations from the EU as well as Iceland, Norway, and Switzerland, with over 2 million employees and total assets of 20,000 billion euros. For a full list of FBE members, please see the annex.
2. The FBE fully supports the Lamfalussy process. Level 3 is an important part of the process and we are committed to doing our part to see it play an effective role. The FBE has been actively involved with CESR's work from the start and warmly welcomes the current consultation, which will allow the market participants to participate in the evolution of CESR's role at Level 3. We would also like to express our appreciation for the open hearing organised on May 11, 2004, which led to a very interesting and open exchange of views and clarification of various important issues.

II. GENERAL OBSERVATIONS

3. Generally we find the document very clear and helpful. Below we provide our observations on several subjects that relate to the whole document. In the next section (III), we will provide our answers to the questions related to the three areas of CESR's activities.

• Avoiding Over-regulation

4. Level 3 was conceived above all to align regulatory and administrative practices on the ground that might stand in the way of cross-border provision of services. We believe that Level 3 should not become a new layer of regulation. The need to achieve consistency on the ground must be balanced against the need to retain flexibility.

• Consultation Standards

5. One of the key features of CESR's activities at Level 3 should be maintenance of the high standard of consultation developed for Level 2 work. The Public Statement of Consultation Practices (December 2001) was very much welcomed and since then CESR has made further progress in its practices. We therefore expressly welcome the statements made by CESR at the open hearing on May 11th that the same principles will apply to CESR's work at Level 3.
6. We also welcome the statement by Mr Docters van Leeuwen to the effect that the regular consultation practices could be supplemented by ad hoc meetings to address the special concerns of particular market segments that might be horizontal in nature (e.g. wholesale markets, global competitiveness). We will bring such issues to the attention of CESR in the future as they relate to our membership.
7. We also welcome the statement by Mr Docters van Leeuwen that the role of the industry deserves specific recognition in the document and that CESR will broaden its references in the next version.

8. We understand that CESR wants to make greater use of a 'working calendar' that can facilitate market preparation for upcoming consultations, made difficult so far by the tight schedules of the FSAP. We strongly welcome such an initiative.
9. Finally, while we are generally very pleased with the progress made by CESR in its consultation practices overall, in our view, one of the activities listed under Level 3 of the document has at times fallen short of CESR's own principles (i.e., CESR-ESCB joint work on clearing and settlement). We reserve our final judgment on this issue until the end of the current consultation period (June 21st, 2004). It is of the utmost importance that the procedures followed by CESR to conclude its joint work with ESCB add up to a full second round of consultation. If they do not, this will seriously undermine the quality of the standards. As we have addressed CESR on numerous occasions on this subject, and specifically on what we consider to be the minimum conditions for a full second round, we will not reiterate our concerns regarding the process in this context. Below we touch upon another aspect of this work linked to the current consultation: the question of CESR's activities outside the scope of an existing EU framework.

• **CESR Initiatives outside the Scope of EU Law**

10. As a general rule, we do not object to Level 3 work being carried out by CESR in areas outside the parameters of EU law (e.g. CESR's work in 2002 on investor protection rules; CESR-ESCB work on clearing and settlement)¹. As an independent body of regulators, CESR has this right.
11. However, it is useful to recognize potential drawbacks of such an activity and to define its parameters carefully. The hierarchy of these initiatives within the overall EU regulatory framework has to be clear; these initiatives should not conflict EU law.
12. In our view, CESR's initiatives in areas not already covered by EU legislation (under Level 1 and Level 2) should be limited to well-justified cases, and should be the exception, not the rule. It should be subject to the following principles:

⇒ ***Care should be taken not to contradict existing EU law in related areas.***

13. Since we are dealing with cases where CESR's initiative occurs in an area not regulated by EU law, it may not always be obvious if CESR's work would risk contradicting EU law. However, in almost all cases there will be adjacent or related EU laws that must be taken into account by CESR. Some cases are more straightforward than others. For example, CESR's work on conduct of business rules occurred in the context of a regulatory gap created by the former Investment Services Directive (ISD), which had left the regime for investor protection fragmented. On the other hand, CESR's work on clearing and settlement will have an impact on numerous areas of EU law, such as the Financial Instruments Markets Directive (FIMD), which are not obviously connected but with which it must be well coordinated.

⇒ ***Similarly, CESR's work should not prejudice upcoming EU law in the same area.***

14. We note that CESR does see a benefit in its Level 3 work sometimes 'feeding back to' Level 1, as happened with investor protection rules (elements of which were used in the Commission's proposal for a revised ISD in November 2002) and as CESR states might happen with clearing and settlement (page 8, CESR/04-104b).

¹ There are more examples of this activity from the pre-Lamfalussy period, as stated by the Secretary General of CESR in the May 25th 2004 open hearing, such as FESCO's work on market integrity in 2000.

15. As a matter of principle and practicality, we do not disagree with this approach. We see it as quite natural that the Commission, in carrying out its role as the initiator of legislation, might take into account analysis or experience brought to its attention by CESR, especially on matters where the regulators' technical expertise is of relevance. The Commission is of course responsible for making policy decisions on a variety of factors that will generally be broader than such technical expertise.
16. However, CESR's initiatives taken at Level 3, adopted in the absence of an existing Level 1, should not have the effect of shaping upcoming Commission proposals. The need to avoid this is evident due to the different roles played by Level 1 and Level 3 in the Lamfalussy process. It is above all necessary because primary legislation, based on co-decision, must be subject to democratic control and involve the appropriate consultation processes to ensure its quality and endorsement by the market users.
17. In this context, we very much welcome Mr Docters van Leeuwen's statement in the open hearing to the effect that Level 3 would never get into political questions.
18. However, from the start of the Lamfalussy process, we have often seen that distinguishing between framework principles and technical matters requires vigilance. In our view, the best way to counter this problem would be to:
- i) avoid CESR initiatives in areas where EU legislation is upcoming; and
 - ii) in cases where no such EU proposals are in sight, to start the Level 3 work with a process that ensures an open debate on the scope of CESR's proposed work and its interaction with existing and/or upcoming EU legislation up front.
19. As demonstrated by the clearing and settlement standards, any decision taken by CESR in such cases – even where CESR may itself perceive its actions as technical and with a neutral impact on primary legislation – may lead to an intense debate and difference of views.
20. Another dimension to consider is the net cost impact of CESR's work. Our members have noted their concern over the implementation of existing CESR standards on investor protection, which will need to be revised and in some areas re-done when the relevant Level 2 provisions for the newly adopted FIMD are in place. In principle we believe that this was an exceptional case (where the old ISD arguably had a major flaw that needed a quick remedy) and agree with CESR's view that its intervention should have a net positive effect on the integration of the market. It is for this reason that the FBE fully participated in the consultation on this work and supported the adoption of these standards in 2002. As a broader principle, however, we must remember that initiatives by CESR in areas in which the Level 1 is undergoing change run the risk of creating additional costs, which must be weighed against their benefits.

• **Rule-making powers for CESR members**

21. With respect to CESR members being given similar rule-making powers, we find that any follow-up to CESR's recommendation must respect the national legislative process and the divisions of legislative and executive power. As long as these principles are respected, we believe that whether or how a CESR member is given the power to make rules is up to the decision of the national governments. On the other hand, as we pointed out above ('Avoiding Over-regulation'), the effect of any such conferral of powers should not be an increase in the degree of regulatory burden at the national level or a circumvention of the EU regulatory process. What is of the greatest importance at the EU level is that any rules that are adopted by CESR members as a result of their role in Level 3, whether they flow from Levels 1 and 2 or from a stand-

alone initiative of CESR, are adopted with the highest standards of transparency that ensure a fair degree of open debate and consultation.

• **Over-arching principles**

22. Last but not least, we very much welcome the suggestion of Mr Docters van Leeuwen for the industry to propose a list of over-arching principles to guide CESR's role in Level 3, and propose the following principles for consideration (which are meant to provide an overall framework, with the objectives being read in conjunction with each other):

- Impact of new measures on global competitiveness of the EU's financial sector should be positive.
- All measures should be developed with an evidence-based approach.
- State intervention should be kept to a minimum.
- Whenever possible, self-regulation should be used.
- Regulation should be commercially neutral and consistently implemented in all Member States.
- Regulation should enable, and not hamper, innovation.
- An adequate level of consumer protection should be pursued as a prerequisite of consumer confidence.
- Ensuring market integrity and financial stability should be a key consideration.

23. On a more technical point, we find that the distinction among the three roles - coordinated implementation of EU law by CESR members; regulatory convergence; and supervisory convergence – could be made clearer.

24. Below we provide our response to the questions posed in the three sections.

III. ANSWER TO THE QUESTIONS

• **Coordinated implementation of EU law by CESR members**

Question 1:

Do you agree with the described role of CESR with respect to the coordinated transposition and application of EU law?

25. We welcome the principle that CESR will cooperate with the Commission, which will remain the primary force in ensuring enforcement (Level 4). We would welcome further details as to how CESR plans to ensure on its side that these two roles do not overlap.

26. In the open hearing on May 11th, CESR explained that it has held an ad hoc meeting on the implementation of the Market Abuse Directive, and does intend to make information about this work public shortly. We welcome this work and believe that it would be useful for the industry to be involved in the process.

27. In principle we found the first report of the Review Panel very useful indeed. Although we did not have any comments on this first report, we also expressly welcome the fact that it was published for comments. We support CESR's plan to follow up on this first report, which was on a self-assessment basis, with a more analytical / synthetic study of compliance of CESR members with CESR's standards. This could give an opportunity for identifying areas where compliance needs to be strengthened further. We believe it might also be useful for CESR to consider how the industry might be involved in such an assessment.

Question 2:

Do you see an "additional role" for CESR under level 3 where CESR could contribute to the coordinated implementation of EU law? If so, please explain what CESR should do to establish the role proposed?

28. We welcome the proposal to retain the network of CESR experts advising on application of EU law. The transparency of any role played by these experts will of course be of the essence. We would welcome information on their meetings and their advice.
29. Finally, with respect to CESR members being given similar rule-making powers, we find that any follow-up to CESR's recommendation must respect the national legislative process and the divisions of legislative and executive power. As long as these principles are respected, we believe that whether or how a CESR member is given the power to make rules is up to the decision of the national governments. The effect of any such conferral of powers should not be an increase in the degree of regulatory burden at the national level or a circumvention of the EU regulatory process. What is of the greatest importance at the EU level is that any rules that are adopted by CESR members as a result of their role in Level 3, whether they flows from Levels 1 and 2 or from a stand-alone initiative of CESR, are adopted with a high standard of transparency that ensures a fair degree of open debate and consultation.

• Regulatory convergence

30. First of all, we believe that CESR's work in bringing about a consistent application of the Prospectus and Market Abuse Directives is very important. We believe that the scope of work must be flexible up-front. Given the fact that time is often limited and not all of the subjects may have the same degree of urgency, a process of prioritization, in consultation with the industry, would be useful. We strongly support the practice of issuing a call for evidence before starting Level 3 work (as happened with the Prospectus Directive guidelines). We recommend that CESR use the opportunity of the call for evidence to receive feedback on the priority issues that must be dealt with at Level 3 before starting its Level 3 work.
31. CESR explained that it has started work on a common approach to "accepted market practices" (Market Abuse Directive). As with the Prospectus Directive, we would welcome a call for evidence before this work progresses.
32. Also, we see great benefit in CESR carrying out assessment studies of the legal situation in a given area before it takes any initiative. This was already done for advertisement rules in the context of the Prospectus Directive and for transaction reporting in the context of the 1st mandate for the FIMD (although the latter has not yet been released.) We understand that the decision as to when to release such a report would be made by the chair of the Expert Group and generally occur at the time when CESR is ready to publish its consultation paper. In principle, we would urge CESR to make greater use of such studies and to publish them as early as possible, so that the industry is able to benefit from these studies in its own preparation before the consultations. This would speak in favour of publishing such studies before a consultation paper is ready. The Expert Group would be free to ensure that this should not be taken as the start of a consultation.

Question 3:

Do you see any other aspect of regulatory convergence where CESR could play a role?

33. No.

Question 4:

Do you think that CESR could play a role in providing coordinated opinion on new services or products with pan-European scope?

34. The full scope of this proposed activity is not sufficiently clear to us at this point. We assume that the activity does not refer to any mechanism that would interfere with the existing mutual recognition rules established in directives already adopted. As far as the secondary market is concerned, the FIMD will ensure this. In the primary market, the Prospectus Directive, which fully harmonizes the primary market and establishes a very clear passport, will enable the issuer of any product to be offered / admitted to trading without further vetting by the authorities of the host Member States. In such cases, we do not see any need for a further review by CESR or any member of it to determine the fitness of the product for circulation within the EU. Clearly this principle applies to both existing and new products, which do not have to fit into a given disclosure schedule in order to be approved; the authorizing body will simply work with the issuer to determine the necessary adjustment to existing schedules. It would be an infringement of the Directive to install any mechanism that requires a vetting of a new product.
35. On the other hand, some of our members could foresee a limited number of cases where there may be a potential for CESR to play a useful role as a coordinator among regulators to achieve a common approach to new pan-European products and services that do not already benefit from a passport and which require an explicit approval in all Member States.

Question 5:

Would you consider endorsement by the Commission of the common guidance established by CESR as a helpful tool to ensure consistent application of EU directives/regulations?

36. We would like to refer to our previous comments on “CESR Initiatives Outside the Scope of EU Law” above.
37. Additionally, we would like to strongly support CESR’s proposal to alert the Commission to practical difficulties with EU legislation. Regulators have the relevant expertise and contact with the industry in the context of their consultation that can generate useful feedback for the Commission (as was seen in the case of the Market Abuse Directive implementing measures, where various practical aspects of the proposals were brought to the attention of CESR).

• **Supervisory convergence**

Question 6:

Do you see any other aspect of supervisory convergence where CESR could play a role? If so, how and why?

38. In principle, we would welcome CESR’s objective of using databases to facilitate regulators’ access to each other’s decisions. However, for clarification, we would like to learn more about CESR’s plans regarding such databases, in particular as to whether they would be made public. Furthermore, with respect to both this question and Question 8, we would urge CESR to reflect on legal liability issues that might emerge from making information public which may be considered confidential by national law. Banking secrecy rules in current national laws should be fully respected.

Question 7:

What kind of mediation role do you consider would be appropriate for CESR?

39. In principle, many of our members welcome this initiative, as long as it does not interfere with the right of the entities involved to seek recourse to legal remedies. Naturally, if this role were to be developed, it should be done in a way that does not create a conflict of jurisdictions.
40. In addition, we note with interest that the Post-FSAP Securities Expert Group Report has underlined the need for an effective mechanism to deal with conflicts between regulated entities and regulators, which could arise from insufficient implementation of EU regulation or supervisory decisions that are not considered in line with EU legislation. We are aware that there are various proposals currently discussed regarding such a mechanism (e.g. a 3rd party, CESR or other public entity assuming the role of mediator). We are currently analyzing these options and will form an opinion in the context of our response to the Securities Expert Group Report. We will inform CESR accordingly.
41. We were also interested in CESR's statement in the open hearing that it recognizes a potential problem if its mediation becomes a way of 'shortcutting' the other mechanisms and that CESR will try to avoid this. We would be interested in CESR's subsequent plans concerning this area.

Question 8:

Do you have any comments on the catalogue of all mutual recognition and cooperation obligations under the Directives where CESR is active (see Annex 4)?

42. For the sake of completeness, Recital 27 and Article 23(1) of the Prospectus Directive must be added to this section.

Annex: List of FBE Members²:

1. Austrian Bankers' Association / *Verband Österreichischer Banken & Bankiers*
2. Bankers' & Securities Dealers' Association of Iceland
3. Belgian Bankers' Association / *Belgische Vereniging van Banken - Association Belge des Banques*
4. British Bankers' Association
5. Danish Bankers' Association / *Finansrådet - Dansk Pengeinstitutters Forening*
6. Finnish Bankers' Association
7. French Bankers Association / *Association Française des Banques*
8. German Bankers' Association / *Bundesverband Deutscher Banken*
9. Hellenic Bank Association
10. Hungarian Banking Association
11. Irish Bankers' Federation
12. Italian Banking Association / *Associazione Bancaria Italiana*
13. Luxembourg Bankers' Association / *Association des Banques et Banquiers du Luxembourg*
14. Norwegian Financial Services Association / *Finansnæringens Hovedorganisasjon*
15. Portuguese Bankers Association / *Associação Portuguesa de Bancos*
16. Slovak Banking Association
17. Spanish Bankers' Association / *Asociación Española de Banca*
18. Swedish Bankers' Association / *Svenska Bankföreningen*
19. Swiss Bankers Association
20. The Netherlands Bankers' Association / *Nederlandse Vereniging van Banken*

² As of July 2004, six more of the banking associations from the new Member States will join the FBE as full members.