FEDERATION
BANCAIRE
FRANCAISE

PUBLIC CONSULTATION
CESR WORK PROGRAMME ON MIFID LEVEL 3 WORK

FBF'S RESPONSE

GENERAL COMMENTS

1. **The French Banking Federation** (FBF) is the professional body representing over 500 commercial, cooperative and mutual banks operating in France. It includes both French and foreign-based organizations. FBF member banks have more than 25,500 permanent branches in France. They employ 500,000 people in France and around the world, and service 48 million customers.

As CESR notices, the MiFID is "*a key directive of the Financial Services Action Plan (FSAP) set up to achieve a harmonized legal framework for wholesale and retail financial markets within the European Economic Area*". As universal banks, the FBF members are very impacted by the enforcement of the MiFID on trading, brokerage and distribution.

Thus the FBF welcomes the opportunity to answer to the CESR's public consultation on the work programme envisaged on MiFID level 3.

2. The MiFID is certainly the most detailed Directive of the FSAP set up by the European Commission. It is also the Directive which involves the biggest evolutions in the financial markets' (including intermediation) architecture. The high level of details in the levels 1 and 2 show how deep are the evolutions involved by this framework and the necessity for the European legislator to be as precise as possible.

One of the aims of MiFID being to improve the functioning of the European passport (for both intermediaries and exchanges), one of the markers of success of the MiFID will be logically the quality and delivery of CESR's Level 3 work.

3. The MiFID implementation requires a great deal of systems developments and amendments in any universal bank.

The French industry is deeply involved in the transposition process in France, for the banks have already updated their procedures and systems and their process of relationship with their customers in order to comply with the MiFID provisions.

The FBF wishes to underline that such a updating of the procedures and systems concerns a wide range of products, wider than the scope of the MiFID. Indeed, the entire relationship involves more than the investment services and the commercialisation of financial instruments. In other terms, the MiFID recovers only the investment services, but the updating imposed in the retail banking networks recovers every product, including banking and insurance services, for it is practically impossible to set up several procedures and systems.

That's why the CESR has to take into account the fact that the level of detail of the levels 1 and 2 is enough for many provisions set up by the MiFID. From FBF's point of view, CESR has to concentrate only on those which generate issues in terms of interpretation or practical implementation. Indeed it would be detrimental to the industry that the CESR work programme would break the procedures set up since the MiFID and the level 2 regulations have been published.

Concerning the other provisions, the FBF estimates that CESR should wait for the complete implementation of the levels 1 and 2 before auditing, after one year or one year and a half from that time, the EU member states regulations. The result of this audit shall determine if it is necessary to set up further clarifications.

4. These statements justify the two following remarks:

- The CESR's MiFID programme seems too ambitious and extensive, while the three objectives of the CESR are the implementation of the MiFID on time, the removal of single market barriers (in order to enforce the European passport), and the convergence of the national legislation on the basis of the levels 1 and 2 provisions (in particular by the reducing of super-equivalence).

  A greater prioritisation has to be set up. Some matters deserve a greater attention, others a long term view attention. CESR should consider removing many of the topics which are included in the lower priority list. CESR is encouraged to prioritise the substantive issues where there is a pressing market need for common guidance at European level.

- The programme has to be clarified on what elements are of immediate importance; prioritisation has to be made between the points listed by the CESR.

5. The FBF also considers that CESR shall not stipulate additional regulations applying to the intermediaries. The harmonisation at level 3 is necessary to enforce a level playing field between intermediaries in Europe, but the convergence work shall not create new obligations or encourage "gold plating" practices highlighted in some member states.

6. Last but not least, the FBF supports a risk based approach the proposed "Level 3 work"; and, the FBF especially welcomes the possibility to address new issues at Level 3 as the need arises.

THE ISSUES REQUIRING FURTHER ATTENTION AT LEVEL 3

7. CESR separates MiFID Level 3 into approaches according to when it is expected to deliver and whether or not the work is mandatory or discretionary. This categorisation is useful since it enables CESR and professionals to prioritise issues which appear in implementing MiFID. However, the FBF encourages CESR to consider which specific substantive issues should be prioritised according to the market need for a convergent approach and which require the most urgent attention.

8. In this context, the FBF wishes to underline that the prioritisation set up by CESR may be updated. Indeed, whilst the issues CESR highlights as technical and of operational importance that require urgent attention are relevant, there are similarly pressing issues that require CESR to arrive at convergent implementation standards as soon as is feasible. The FBF notices that such of these issues are found in the category **"other issues"** which are discretionary. Consequently it appears that the timetable CESR proposes to work on such discretionary issues comes under pressure from its proposed work on other priority areas.

9. The most pressing issues highlighted by the French industry are the following:

- ***Functioning of the European passport (home/host)***;
- ***The outsourcing***;
- ***The inducements***;
- ***The best-execution***;
- ***The "Substitute products"***.

10. The ***Functioning of the European passport (home/host)*****:** This aspect of Level 3 is critically important to the smooth functioning of MiFID as a whole. One of the central arguments behind implementing MiFID is to improve the functioning of the passport for investment services providers.

CESR states that work will begin on this issue in Q1 2007. However, given the importance of this issue, CESR could benefit from seeking the views of the market sooner and before the end of 2006.

Clarity on the respective roles of the home and host jurisdictions is of great importance to banks carrying out their day-to-day operations and to becoming authorised for new business lines. Moreover, this issue assumes an even greater significance in the event of crisis scenario.

Linked to the wider home/host issue are the practical arrangements in respect of **transaction reporting,** which CESR is right to prioritise. Indeed, given the long lead times for IT changes and the complexity of the issue, the FBF considers that CESR should make this one of its first priorities and set up a faster timeframe in order to give a guidance to firms by end January 2007 or, alternatively, working with the industry to ensure that the time for implementing changes is adapted to take into account the need for the position to be made more clear, and adequate time to be given for systems changes and testing, before new transaction reporting requirements are put in place.

Another issue which is linked to the home/host question is the definition of the Commodity derivatives, regarding the use of the European Passport.

11. ***The outsourcing.*** The timing is sensible as a means of assisting consistent implementation of outsourcing requirements under CRD and MIFID. This issue has particular priority because of the 1st January implementation date for CRD.

Thus the FBF fully agrees with CESR's approach which involves the creation of "*consistency between standards of CEBS, the level 2 and 3 works in the MiFID area and the future work on UCITS and Solvency II*".

12. ***Inducements*****:** We call on CESR to expand the focus of its Level 3 work on inducements by considering a problem which has surfaced in many member states in the European Economic Area. The problem centres on the treatment of inducements.

The market seeks clarity on the status of inducements where clients request execution-only services. Furthermore, we believe that without Level 3 work in this area certain local regulators could require market players to change existing market structures since it is not clear, especially in respect of the relationship between investment fund managers and distributors.

13. ***The Best execution*:** Such a level of details of the requirement on firms to offer their customers best execution is new in France. Best execution under MiFID implies a significant change at the heart of banks' relationships with their clients and in the way in which institutions enter the market.

As outlined in the executive summary, the banks have already updated their procedures and systems and their process of relationship with their customers in order to comply with the level 1 and 2 MiFID provisions.

From FBF's point of view, at Level 3, there is no compelling need for a further interpretation of the best execution provisions which, already, feature a high amount of details. A start of the work in the second or third quarter 2007 would clearly be too late because of the new IT infrastructure which must be set up. It could be detrimental to engage such discussions on the best-execution in this context.

The FBF has a clear conscience that across the other member states, there is a plurality of views emerging as to how to apply best execution requirements and the role the supervisor is required to perform. The FBF has also a clear conscience of the complexity of the topic, for some regulators have written very detailed guidance on this matter.

However, it seems appropriate that CESR makes an audit on the way this principle is implemented in every member states before giving its interpretation in order to ensure the full convergence. It would also be useful that CESR could establish a comparative table of the existing best-execution provisions transposed in every country.

First, it would be very useful for the investment services providers acting cross border. Second, it would help CESR to appreciate the way the best-execution principle is understood by every regulator, regarding the architecture of the financial market in its country.

14. The ***Substitute products***. The FBF wonders what the notion recovers and what kind of provisions will be set up on this matter. It is explained in the consultation that CESR, CEIOPS and CEBS, on the basis of their agreed program, will undertake work on substitute products, and that the MiFID "level 3" expert group might be asked to contribute to such work on commercialisation ands distribution on these products.

The FBF wishes to state:

- First, that it seems that the term "substitute products" doesn't exist in any FSAP directive, and could be confusing;
- Second, that the distribution is not only a MiFID matter, but also concerns the implementation of the Prospectus Directive, the UCITS directives, and probably the future investment fund regulation which is to be set up in the next months.

THE URGENT OUTSTANDING QUESTIONS FOR MIFID IMPLEMENTATION

15. The urgent outstanding question for MiFID implementation is divided, from FBF's point of view, into two categories:

- Firstly, the questions regarding the regulatory reporting;
- Secondly, the questions concerning the consistency to improve between the MiFID and other directives such as the Prospectus Directive and the UCITS Directives

16. ***The regulatory reporting;*** The question is simply the clarification of the scope of regulatory reporting (transaction reporting), to whom this reporting is made (Home regulator, market regulator or client reporting).

17. ***The consistency between MiFID and UCITS and Prospectus Directives.*** Several elements of each of these Directives have to be matched in order to ensure clarification and consistency in the future:

- *Conflict of interests*: is compliance restricted to the Simplified Prospectus or do MIFID rules apply?
- *Suitability test*: is there a compliance responsibility to check fund shareholders and is the simplified prospectus sufficient in terms of client information?

THE MIFID CONSULTATIVE WORKING GROUP

18. In the press release of 18th July that accompanied the Consultation Paper, CESR mentioned the formation of a MIFID Consultative Working Group drawing together technical experts from the markets and types of firms affected to provide advice on the technical practicalities of the guidance developed under the work programme. The FBF welcomes this initiative.

The FBF also considers that this group should start these works early. Indeed, CESR should formally recognise the role industry could play at MiFID Level 3 since we strongly believe that the Committee's work would greatly benefit from engagement with industry to identify operational areas where work is needed to achieve a common understanding of the application of MiFID Levels 1 and 2 measures.