



EUROPEAN SAVINGS BANKS GROUP
GROUPEMENT EUROPEEN DES CAISSES D'EPARGNE
EUROPÄISCHE SPARKASSENVEREINIGUNG

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European Savings Banks Group (ESBG)

Response to CESR's Consultation Paper on "the role of
CESR at "level 3" under the Lamfalussy process"

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Profile European Savings Banks Group

The European Savings Banks Group (ESBG) represents 25 members from 25 countries (EU countries, Norway, Iceland, Bulgaria, Czech Republic, Hungary, Latvia, Malta, Poland, Romania, Slovak Republic) representing over 1000 individual savings banks with around 66,500 branches and nearly 770,000 employees. At the start of 2002, total assets reached almost EUR 4160 billion, non-bank deposits were standing at over EUR 2012 billion and non-bank loans at just under EUR 2095 billion. Its members are retail banks that generally have a significant share in their national domestic banking markets and enjoy a common customer oriented savings banks tradition, acting in a socially responsible manner. Their market focus includes amongst others individuals, households, SMEs and local authorities.

Founded in 1963, the ESBG has established a reputation as the advocate of savings banks interests and an active promoter of business cooperation in Europe. Since 1994, the ESBG operates together with the World Savings Banks Institute (WSBI, with 109 member banks from 92 countries) under a common structure in Brussels.



Introduction

The ESBG welcomes CESR's initiative to consult with the industry on its views on level 3 of the Lamfalussy process, and more specifically, on what its role should be at that level. The ESBG believes that the paper of CESR gives an excellent overview of how it envisages level 3 of the process. As such, it should be used as a starting point for an exchange of views with the industry, but also with the European institutions involved in the process – mainly the European Commission, but also the European Parliament, the Council, or the Committee of European Banking Supervisors (CEBS).

The ESBG believes that several issues relating to the level 3 of the Lamfalussy process deserve particular attention. We will therefore comment on these topics before commenting on CESR's more precise questions.

General comments

Democratic accountability: drawing a clear borderline between the levels 2 and 3

A key issue with the Lamfalussy process relates to the definition of the scope of competence of each level of the process. Experience has already demonstrated that drawing the borderline between measures that should be dealt with at the first or second level of the process is in general terms easier in theory than in practice. With a view to ensuring that no question with a political content is left to the second "technical" level of the Lamfalussy process, the ESBG has already reiterated its belief that in case of doubt measures should be dealt with at level 1 rather than at level 2.

Similar questions arise when defining the scope of activity of CESR at level 3 of the Lamfalussy process. One of the main roles of CESR at that level is to ensure that the measures taken at the levels 1 and 2 are consistently implemented across the Member States. As such, when acting along this mandate, CESR should avoid going further than what is necessary to ensure such consistent implementation. Level 3 being related to the national implementation of European texts, decisions taken under this level should not interfere with texts drafted following the "European" level 1 and 2 processes; level 3 should not serve to set new legislation or standards. This would endanger the democratic accountability of the Lamfalussy process.

The Prospectuses Directive provides an illustration of activities that should not be part of CESR's mandate at level 3 of the process. Recently, representatives of the industry expressed their concerns that several language versions of the Commission Regulation implementing the Prospectuses Directive were ambiguous, and accordingly deserve clarification. This is for example the case of the German version. In this context, the ESBG believes that it should not be CESR's task to issue documents with the aim of clarifying these language versions, as this could interfere with decisions previously taken at the second level; rather, should such clarifications indeed prove necessary, then the necessary modifications should be made at the second level of the Lamfalussy process. This should not be a problem, since level 2 was conceived as a stage, which should facilitate the regular review of legislation.

Actually, the same applies in situations where level 1 or level 2 legislation appears to have left some gaps, or was drafted in an imperfect manner. Corrections should be made by the procedures foreseen at level 2, and not by agreements at level 3.



As a conclusion, the ESBG is of the opinion that in order to guarantee the democratic accountability of the Lamfalussy process, particular attention must be paid to ensuring that the scope of the levels 1, 2 and 3 of the process are clearly identified and respected.

Areas not covered by EU legislation

CESR has already developed several initiatives in areas not covered by EU legislation, such as its standards on investor protection and its forthcoming standards on clearing and settlement. The ESBG believes that developing level 3 initiatives in areas not covered by EU legislation entails serious risks, and accordingly should in general be avoided. Rather, should CESR Members feel that there is a need to develop new regulatory guidance in areas not covered by EU legislation, possibly on the basis of concerns raised by the industry, then CESR should submit the case to the Commission, which should in turn develop the adequate level 1 or level 2 provisions. This would be consistent with the EU framework, which grants the Commission the monopoly of initiative. Furthermore, it would ensure that the Commission entails the responsibility to guarantee the consistency of all the provisions applying on a pan-European basis in the financial services sector.

Developing regulatory initiatives in areas not covered by EU legislation also raises practical problems for the industry, in particular if these initiatives are seen to “feed the regulatory process at EU level”, as mentioned in the consultation paper. CESR’s standards on investor protection illustrate our concerns on this issue: CESR developed these standards to fill in a legislative vacuum left by the Investment Services Directive of 1993; in the context of the revision of the ISD, CESR’s standards were reviewed and integrated in the new Directive, following the normal co-decision procedure. This made it necessary for the industry to adapt to two different sets of standards in a rather short period of time, with all the costs and problems that this can generate. This example also underlines the necessity for CESR to perform a global cost-benefit analysis before performing new activities.

Answers to questions

Question 1: Do you agree with the described role of CESR with respect to the coordinated transposition and application of EU law?

We agree in general with the proposed presentation of CESR’s responsibilities regarding the objective of coordinated transposition and application of EU law. In particular, we support CESR’s view that it is important that the efforts of CESR and of the Commission in ensuring coordinated implementation be coordinated. Along the same lines, the ESBG supports CESR’s initiative to establish the *Review Panel*, and especially some tasks performed by this Panel so far, such as an in-depth analysis of the implementation of the CESR’s standards in the Member States, published in March 2004. As indicated in previous consultations, notably those performed by the *Inter-Institutional Monitoring Group*, the ESBG is convinced that the use of peer pressure is an efficient way to ensure consistent implementation of EU legislation¹.

The ESBG also supports the proposal to keep alive the network of experts, as it guarantees an equal implication of the industry at the levels 2 and 3 of the process. On another note, this

¹ See in particular “Response to the Second Interim Report Monitoring the Lamfalussy Process”, European Savings Banks Group, February 2004.



proposal to extend the implication of the industry experts highlights the importance of their selection, having regard to their enhanced responsibilities. In this context, the ESBG would advocate for a more open and transparent selection process, which would guarantee the representativeness of the selected experts.

Nevertheless, as explained in the introductory remarks, CESR should primarily focus its tasks on the common and harmonised implementation of legislation agreed on level 1 and level 2: level 3 should not be used to set new standards or to create new legislation. Should there be a need to do so, then this should be done via level 1 or level 2. The rule-making powers of CESR's members derive from the democratic system of each Member State; changes to this must be discussed with the Member States.

Question 2: Do you see an “additional role” for CESR under level 3 where CESR could contribute to the co-ordinated implementation of EU law? If so, please explain what CESR should do to establish the role proposed.

Very often, questions arise because of a lack of knowledge of the precise legal context of the different Member States. In this context, the ESBG would warmly welcome a stock taking initiative by CESR on the legal situation in different Member States in topics where this proves useful, and to publish its findings.

Question 3: Do you see any other aspect of regulatory convergence where CESR could play a role?

No particular comments. As mentioned in the comments above, CESR should focus on implementation as opposed to becoming active in developing and setting legislation.

Question 4: Do you think that CESR could play a role in providing coordinated opinion on new services or products with pan-European scope?

The ESBG is of the opinion that it is always useful for the industry to know the views that supervisors take on new products or services. Nevertheless, this may not lead to a situation of bilateral or mutual recognition of new products and services by means of supervisory agreements. On the contrary, European legislation is necessary to allow the cross-border distribution of new products and services. In the case of products or services not covered by European legislation (i.e. hedge funds), level 1 legislation is required.

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?

See our section “Areas not covered by EU legislation”: it should not be CESR's responsibility to develop new guidance, which would subsequently be endorsed by the Commission. There is a need for keeping a sound balance between legislative and supervisory functions. Endorsement by the Commission of the common guidance established by CESR would undermine this separation.

Question 6: Do you see any other aspect of supervisory convergence where CESR could play a role? If so, how and why?

No particular comments.



Question 7: What kind of mediation role do you consider would be appropriate for CESR?

We believe that CESR should develop and communicate a clear procedure that the industry and the supervisory authorities could apply when conflicts between national securities regulators arise. In particular, CESR should foresee a mechanism when it appears that an administrative practice in a Member State is compatible with the national law, but not with guidelines developed by CESR.

Additionally, the ESBG is of the opinion that a mediation mechanism should only apply between supervisory authorities as a peer group. This also means that decisions affecting market participants should be the sole responsibility of the competent national supervisor. This is the only way in which legal protection can be effectively ensured, via the route of the national administrative law.

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)?

No particular comments.