



RESPONSE

Public Consultation - CESR Work Programme on MiFID Level 3 Work

1. The European Banking Federation (FBE)¹ welcomes the opportunity to comment on the public consultation on CESR's work programme on MiFID Level 3 work.
2. Convergent implementation and application of the new MiFID regime is of critical importance to the FBE since we represent institutions that conduct business on a cross-border basis across the EU, as well as small to medium sized locally focused banks. One of the aims of MiFID is to improve the functioning of the European passport, so logically one of the markers of success of MiFID will be the quality and delivery of CESR's Level 3 work.
3. The regulated community will assess how easy, in real terms, it will be to carry out business under MiFID in more than one EU jurisdiction following the completion of CESR's MiFID Level 3 work programme. In the meantime the FBE is at the full disposal of the Committee to help bring about tangible results in fostering a common supervisory culture in general and a convergent approach to MiFID implementation in particular.

I. General remarks

4. Just as Member States discuss the transposition of MiFID in the transposition workshops set up by the European Commission and just as supervisors will exchange views on implementation at CESR's implementation *fora*, **industry too is co-ordinating its approach** to MiFID implementation. Here, pan-European trade bodies such as the FBE have a critically important role to play in facilitating the flow of practical information of an operational nature between Europe's banking sector representatives.
5. In parallel, the FBE will be vigilant in respect of the emergence of any **super-equivalent practices** from MiFID implementation in the Member States. Where practical divergence from European legislation or guidance is identified, be it in spirit, the FBE will not hesitate to inform the European Commission, since such practices have undermined the construction of the Single Market in the past (most notably through divergent implementation of the UCITS directives) and could prejudice the worthy aims of MiFID in the future. Therefore, CESR is also encouraged to monitor and react against the emergence of super-equivalent measures in the implementation of MiFID.
6. The FBE therefore, is perfectly placed to be the **industry's interlocutor with CESR**, to provide it with potential implementation difficulties and opportunities upstream, based on a wide pool of knowledge on the practical effects of implementing MiFID. We would urge CESR to recognise formally the role industry could play at MiFID Level 3 since we strongly believe that the Committee's work

¹ The European Banking Federation (FBE) is the voice of the European banking sector representing the vast majority of investment business carried out in Europe. It represents the interests of over 5,000 European banks, large and small, from 29 national banking associations, with assets of more than €20,000 billion and over 2.3 million employees.

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 Level 1 and 2 measures.

II. Detailed remarks

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 stakeholders alike to conceptualise and prioritise the tasks supervisors and industry must address in implementing MiFID. However, CESR is also encouraged 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. CESR is right to prioritise **technical issues of operational importance** needed to achieve consistent implementation of the Level 1 and Level 2 texts. We support CESR making this work a priority both in terms of substance and timing. The FBE stands ready to provide operational input into how such arrangements could operate in practice, especially for cross-border operations.
9. In particular, CESR's planned work on the **passport for investment firms and regulated markets** is of key importance since in all likelihood implementation timetables will vary slightly across jurisdictions and institutions, despite the best efforts of Member States to pass implementing legislation by the end of January 2007. Clarity on the respective roles of the home and host jurisdictions is of critical importance to banks carrying out their day-to-day operations and becoming authorised for new business lines. Moreover, this issue assumes an even greater significance in the event of crisis scenario. 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 on the practical issues, for example in a Roundtable format, sooner and before the end of 2006.
10. 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 we consider that CESR should make this one of its first priorities and endeavour to deal with it against a much faster timeframe with a view to giving guidance to firms by end of 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. If this is not done, the EU risks dismantling an existing transaction reporting system which is working, before a properly tested and working upgrade is put in place.
11. Whilst the issues CESR highlights as technical and of operational importance that require urgent attention are the right ones, we believe that there are other important issues that require attention. In each case industry is already working with its local regulatory authorities or is preparing to do so, to ensure that implementation of the priority issues is consistent and reflects as closely as possible the obligations and spirit of MiFID Levels 1 and 2. Regrettably, such issues are found in the category CESR labels as "**other issues**", which are discretionary. Consequently it appears that the timetable CESR proposes, in order to work on such discretionary issues, which are nonetheless of great importance, comes under pressure from its proposed work on other priority areas such as Level 3 "by cascade" and "3Level3" work.

12. The FBE highlights a number of “other issues” as being important, based on the practical feedback we are receiving through our membership in respect of MiFID implementation. At this stage, work is under way in the majority of Member States on these issues, and we will return to CESR with feedback as the need arises. These issues are:
- **Best execution:** The requirement on firms to offer their customers best execution is new and/or expanded for the vast majority of EU jurisdictions. 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.
 - **Inducements:** A potentially significant issue has surfaced in a number of EU jurisdictions. The problem centres on the treatment of inducements, which under MiFID are only acceptable when “improving the quality of the service.”
 - **Appropriateness:** This is an important issue where we call on the Committee to take on board the market’s views as to where clarity is most needed in due course.
13. The market recognises the importance of the advice CESR is obliged to deliver to the Commission in the preparation of reports and/or review requested by Level 1 and Level 2, the so called **Level 3 “by cascade”**. However, we are concerned that by CESR focusing on what is essentially an extension of MiFID Levels 1 and 2, resources and timetables will come under pressure, which could well be to the detriment of bringing about supervisory convergence on critically important issues under Level 3 of MiFID.
14. Moreover, we note the apparent **blurring of the respective Levels of the Lamfalussy process** by labelling the preparation of advice at Levels 1 and 2 of MiFID as a form of Level 3 work, in this case Level 3 “by cascade”. The FBE is clear that Level 3 is about developing convergent supervisory approaches to the implementing measures set out at Level 2, and where need be, the principles of the framework directive at Level 1.
15. The “**3Level3**” work CESR proposes is an important undertaking, and joint co-operation with CESR’s Level 3 counterparts, CEBS and CEIOPS is welcome. However, this work is not for the most part directly related to MiFID, therefore in line with the strong call from the market to prioritise Level 3 work by issue, as opposed to approach, we call on CESR to handle the most pressing priorities of the “3Level3” agenda, such as on outsourcing, before considering issues of relatively lesser importance, such as substitute products.
16. Finally, we support CESR organising informal **implementation fora**, since the key to success of any undertaking at Level 3 is for CESR to facilitate dialogue amongst its members and dialogue with the industry. We look forward to exploring with CESR in due course how industry could provide practical operational feedback and how this could be structured. In this spirit, we welcome CESR stating that it remains open to the possibility of future work at Level 3 where there are potential market failures, and risk to investor protection. Here too, the industry has a role to play in alerting CESR to such market failures that could be appropriately addressed at Level 3 of MiFID.

III. Conclusions

17. CESR has made an encouraging start to identifying the priorities for MiFID Level 3. We strongly support CESR's work in this area and hope that CESR finds the comments contained in this response to its public consultation useful.
18. The FBE is committed to the Lamfalussy Process. The FBE is also committed to helping to bring about convergent implementation on all "Lamfalussy Directives." Given the importance of MiFID and the place it occupies at the centre of the Financial Services Action Plan, MiFID Level 3 assumes the highest priority in our efforts to help deliver a single European capital market.
19. With this in mind, we are grateful once again for the opportunity to provide comments on the MiFID Level 3 work programme, and we remain at CESR's full disposal in the future.