

The role of CESR at level 3 under the Lamfalussy process
Consultation (ref: CESR/04-104b)
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Contribution by BNP Paribas

□ **Presentation of BNP Paribas**

BNP Paribas (www.bnpparibas.com) is a European leader in banking and financial services, with leading positions in Asia and an active presence in the United States. It is the first bank in terms of net income and market capitalisation in the Euro zone. The group has one of the largest international banking networks with a presence in 85 countries and 90,000 employees world-wide. BNP Paribas enjoys key positions in Corporate and Investment Banking, Private Banking & Asset Management, Insurance, Securities Services and Retail Banking.

We appreciate the consultation by CESR of the financial industry as a positive initiative and welcome the opportunity to express our views as part of the ongoing process to further improve the regulatory process under the Lamfalussy procedure.

□ **Introductory remarks**

We fully concur in the views expressed by both the French Banking Federation (FBF) and AFEI (French Association of Investment Enterprises) in their responses to the present consultation.

We welcome the principle that the detailed implementation of EU law be carried out in consultation with financial services providers. However, we have to express reservations on the ways and conditions such consultations have been carried out by CESR so far and we do believe that improved consultation mechanisms have to be devised for the future.

A. 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?

The role of CESR as described in the consultation paper is ideally the role that we, as market participants, would like CESR to play. Considering CESR's important responsibilities in a coherent transposition and implementation of EU law, CESR's efforts for the future should be directed towards this goal.

Efforts by CESR to co-ordinate with the Commission remain insufficient and a real risk of overlapping and contradiction exists.

Concerning recent efforts to organise implementation issues of the Market Abuse Directive (MAD), we were not satisfied with the outcome of such efforts. In our view the issues at stake have been made more complex through definitions and concepts developed by CESR. For example, the diagnostic flags and indicators under article 6 of the MAD is an endless list, the legal impact of which is watered down by its sheer volume. Too much regulation is detrimental to good regulation.

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?

On the proposed new activities of CESR :

- 1/. We agree with the proposal to keep alive the network of CESR experts which were involved in the drafting of Level 2 advice as a permanent advisory body, only as long as this advisory committee serves a purpose, i.e. its recommendations are taken into consideration before final recommendations or rules are issued by CESR.
- 2/. We do not think it timely to give CESR increased rulemaking powers.

CESR to facilitate recognition of accepted market practices

CESR could play a useful role in facilitating recognition of accepted market practices. In so doing CESR would carry out wide ranging consultations with practitioners and aim at the largest possible consensus. Prior to recognising an accepted market practice, CESR would

- Organise discussions within professional expert groups
- Publish announcements concerning such practices, including dissenting opinions.

B. Regulatory convergence

Question 3:

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

We fully subscribe to the process of creating common rules at European level and to contribute as part of the business industry to the creation with CESR of such rules. However, we believe that whenever legislation is not yet in force at Level 1 or Level 2, CESR is not entitled to create new norms with binding effect.

Therefore, the normative function of CESR should be limited to indicative guidance, i.e. non binding rules, in the absence of existing rules in force at Level 1 and Level 2. This is warranted because of the embedded risk that Level 1 and 2 be *de facto* limited through CESR's rule making function with, possible lack of transparency.

Only in instances when legislation is in place at Level 1 and 2, could CESR be granted authority, **under a specific mandate of the Commission**, to create binding rules. In all other instances CESR guidelines, recommendations and standards should not be given more authority and are to remain non binding.

Intervention of CESR at Level 3 in a non-harmonised sector : the experience of CESR-ESCB Standards on Clearing & Settlement

In view of the outcome of this joint effort, the EU Commission has acknowledged in its Communication published 28/04/2004 the lack of a legal basis and the non- mandatory characteristics of the proposed standards ^{1/}.

The consultation procedures set and published by CESR in December 2001 have not been applied consistently, so an effective consultation process has not taken place. No prior study was made available of existing standards and the impact of the proposed standards. As a result proposed standards are a departure from European and international practices and systemic risk may be aggravated rather than alleviated. Last but not least, the scope of these standards reaches beyond the specific field of clearing and settlement and concerns global prudential regulation. The standards may be "ultra vires" in their effect on general banking regulation.

Question 4:

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

Improved coordination between the work carried out by the EU Commission and by CESR is paramount, so as to avoid that similar issues be taken up in parallel by both institutions. There should be no dichotomy nor any double parallel working between the Commission and CESR. The latter is to be competent in providing coordinated opinion once the Level 1 and 2 rules have been ascertained.

^{1/} The standards will not be mandatory; they will not therefore supersede any national legal provision that may affect their practical implementation by the competent national authorities. These inherent shortcomings of the standards demonstrate that although standard setting may provide some level of common framework for securities clearing and settlement, they may not replace a proper legislative framework.

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?

To ensure consistent application of EU directives/regulations, we respectfully submit that a procedure identical and parallel to the Level 2 procedure should be implemented at Level 3. Under this new procedure the Commission would request advice from CESR on technical implementing measures – more technical measures still than Level 2 measures – At the end of the procedure the Commission would adopt the measures proposed or it would request CESR to carry out further work until such time as satisfactory measures are put forward.

In depth consultation with market participants is a guaranty of quality legislation. Consultations of all interested parties should continue to take place at every stage of the legislative process.

C. Supervisory convergence**Question 6:**

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

We submit hereunder the following recommendations in the field of cooperation between competent authorities, based on our recent experience :

□ Requests for information

In the field of requests for information issued by supervisory authorities, we strongly advocate that supervisors apply the procedures in place and forward their requests to the supervisory authorities of other member States (MS) rather than to the financial services provider concerned by the request for information. In a number of instances we can testify that the procedures have not been applied by supervisory authorities, and requests for information have been forwarded directly by the supervisory authorities to the financial services provider.

In the case of requests for information issued by supervisory authorities outside the EU (third countries) we submit further that the Commission give a mandate to CESR to develop a new Level 3 rule. Such rule should explicitly provide that requests for information that concern the activities of a financial services provider in several MS should be forwarded to the supervisory authority of the home-country of that service provider.

□ Free movement of services

The principle is that the competent authority is the home-country authority. BNPP would welcome that the principle be reaffirmed by CESR so as to avoid cases of overlapping by more than one competent authority.

❑ **A lead supervisor urgently needed for cross-border groups**

The definition of the respective powers of the lead supervisor and of the other supervisory authorities is of crucial importance for banking groups with cross-border activities, in particular as regards the supervisory process and the validation of group - wide internal models for credit risk and operational risk.

Question 7:

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

Mediation between CESR members

Mediation by CESR is already provided for in article 16.4 §4 of the MAD in case of lack of cooperation by a national authority. We submit that there is a risk that mediation be used to systematically question automaticity of mutual recognition. Also it would not be appropriate for CESR to take side with one national authority against another, since both of them are its members. In some instances CESR could be led to act as “judge and party”, a situation which is to be avoided.

For the above reasons, we are of the opinion that the mediation role of CESR between its members should remain limited. We do state our preference for existing normal procedures, i.e. competence of the EU Commission and Court of Justice.

Mediation between a market participant and its supervisory authority

A mediation role for CESR could be developed in the context of conflict between a market participant and its national supervisory authority. In this context a right of appeal would be given to market participants in cases of severe conflict with their home-country supervisory authorities.

Such role would eventually lapse in the event of the creation of a single pan-European regulatory and supervisory authority at European level.

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*)?

In the Prospectus Directive (Article 21 § 2 – former Art. 19 of Directive 89/298/EEC) the explicit past requirement for a national authority to inform the Commission or other national authorities about the authorities designated no longer exists. We are of the opinion that it is advisable that such requirement be reinstated so as to enhance communication between national authorities and the Commission.

□ Conclusions

The working conditions under the Lamfalussy procedure have not proved to be to the satisfaction of a large majority of market participants and do not appear as a model for future work. The methods and the resulting substantive work are under criticism by market participants.

Based on our past experience of CESR's consultations we respectfully put forward the following recommendations towards more transparency and efficiency:

- CESR should consult market practitioners at the very beginning of the process - before public consultations - to avoid misunderstandings. A constructive dialogue between CESR and the Market Participants Consultative Panel should take place so that the designation of members of the Working Groups would be made on the basis of the advice of experts of the Market Participants Consultative Panel. The end result should be that the best experts be designated on every subject. Increased transparency on the procedures for the setting up of Working Groups and their internal functioning (specifically for their participants) would be highly desirable.
- CESR's final decisions, whatever they are, should be motivated in all cases, giving the reasons which lead CESR to take a course of action rather than another.
- CESR should issue advance notice of consultations it intends to make ;
- Publication of consultations should include deadlines for comments within ***no less than 90 days***.
- Announcement of dates of public hearings should be made at the outset of the consultation, notified as part of the consultation document.
- Once consultation procedures have been published by CESR, such procedures should be applied consistently until the consultation reaches its final stage, notwithstanding time pressure or other considerations.
- Before embarking on rule setting CESR should carry out preliminary studies of existing regulations and assess the impact of proposed new rules.
- An appeal mechanism of CESR's recommendations should be introduced at European level (particularly in case of *ultra vires*).
- The focus should be on improving CESR internal working methods so as to enhance productivity.

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