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Committee of European Securities Regulators
11-13 avenue de Friedland
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1 June, 2004

Dear Sirs,

Consultation Paper: The Role of CESR at "Level 3" under the Lamfalussy Process

The International Swaps and Derivatives Association (ISDA) welcomes the opportunity to comment on the consultation paper published by the Committee of European Securities Regulators (CESR) on the role of CESR at "Level 3" under the Lamfalussy process.

ISDA is an international organisation whose members include more than 600 of the world's largest commercial, universal and investment banks as well as other companies and institutions with extensive activities in the area of swaps and other individually negotiated derivatives transactions. Additional information on ISDA can be found at our website (<http://www.isda.org/>).

We would make the following general points before responding to the specific questions raised by the consultation paper:

- The consultation paper focuses on the need for co-ordinated implementation of EU law and convergence of regulatory and supervisory approaches. However, focusing exclusively on harmonisation may not be the best way of achieving the overall objective of a successful, integrated European securities market. CESR should also explicitly recognise the importance of promoting financial integration through encouraging mutual recognition of differing approaches, particularly in the context of wholesale markets.
- CESR should articulate its processes to ensure transparency and consultation on its Level 3 work. CESR should publish timely information about its Level 3 work, including information about the results of meetings and the development of new initiatives. In addition, CESR should ensure that there is adequate consultation on the

development of guidelines and other less formal initiatives, as well as on the development of formal standards.

- CESR should analyse existing national rules and practices, and publish the results of that analysis for consultation and comment, as an essential first step when it is developing new initiatives. CESR's work should be based on a thorough understanding of the existing situation. This will also help the Review Panel to undertake its assessments.
- CESR should also encourage adequate transparency and consultation at the national level, both in relation to proposed transposition of directives and in relation to independent initiatives not driven by EU directives. Member states and national regulators or other agencies should seek to obtain comment on regulatory proposals from a broad range of interested parties, not just limited to national bodies or national market participants. It is particularly important to develop effective pre-consultation for measures that require implementation through primary legislation, to ensure that a range of views is at least obtained before draft legislation enters what can be a complex national legislative process.
- The desire for greater co-operation between regulators must not prejudice the confidentiality of information obtained by an individual competent authority in the course of its supervisory activities. The applicable EU directives and national law impose strict requirements on national regulators regarding the disclosure of individualised information. There would need to be careful review before confidential information is disclosed to other competent authorities not directly involved in the supervisory matter in question or to other bodies or agencies (such as CESR itself or the European Commission).

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

We consider that the assessment process carried out by the Review Panel has an important role to play in achieving the objective of more consistent implementation. We support the Panel's stated intention to move on to a targeted list of prioritised areas of review. As already indicated, we consider that CESR's work in developing policy should be preceded by the publication of an analysis of at least key elements of the regulatory framework and approach currently existing in the various member states. This would assist CESR to develop appropriate and proportionate proposals. It would also facilitate the subsequent work of the Review Panel in reviewing the eventual implementation of any recommendations or standards.

We agree that it would be helpful if member states gave broadly similar rule-making competences to national regulators. Nevertheless, the distinction between level 1 and level 2 is not necessarily indicative of what measures should be transposed in national laws and what could be transposed by delegation to national regulators. It may be entirely

appropriate for a member state to delegate to national regulators the transposition of some level 1 provisions which are not the subject of additional level 2 measures (for example, the provisions of article 26 of the Directive on markets in financial instruments regarding certain rules applicable to MTFs). Equally, in some cases, it may be inappropriate for member states to delegate the transposition of certain provisions which are the subject of level 2 measures (for example, the provisions of that same Directive which set the scope of investment services and activities, where this defines the scope of a national regulator's regulatory competence).

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?

See our response to question 1.

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

The consultation paper mentions the development of common approaches through the use of minuted meetings, indicative guidance and other processes, as well as through the use of formal CESR standards. CESR should ensure that there is also adequate transparency and consultation in these less formal processes. There is a risk that decisions will be taken which could have significant impact on markets, but without appropriate opportunity for comment from market participants and consumers.

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

In general, we do not consider that the European regulatory framework should be one where there is a need for regulatory approval for individual new products or services, especially in wholesale markets such as the over-the-counter derivatives markets. Also, a firm planning the launch of a new product would rarely launch that product or service immediately in all member states. It may be concerned about the competitive and confidentiality issues if its approach to one regulator were disclosed more broadly. However, there may be some occasions where the firm in question wishes its national regulator to seek a broader range of regulatory opinion through CESR. Nevertheless, CESR should not seek to assume such a role in cases where this is not requested by the firm in question.

CESR may of course have a role in developing or coordinating policy on new and emerging activities, outside the context of individual cases. However, CESR should be mindful of the need to encourage rather than limit innovation and competition. It should adopt an evidence-based approach to regulation, rather than basing new regulation on a

precautionary principle. The approach taken to the regulation of alternative trading systems should not be a precedent for the regulation of other new activities.

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?

There will be some occasions where it is useful for the Commission to issue interpretative guidance or transposition guidelines. In some cases, the need for this may arise because CESR may identify particular issues in the course of its level 3 work and may seek input from the Commission. However, we would envisage that these cases will be relatively limited and, in any event, the interpretation of Community law is ultimately a matter for the courts. Nevertheless, we would expect that the Commission would monitor CESR's work and would comment if it had concerns that the approaches being developed were likely to conflict with Community law.

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

The main tasks outlined in the paper are already likely to require substantially greater resources than will be available to CESR in the short to medium term. CESR will need to make choices of which of its existing tasks to prioritise, rather than seeking new areas of activity. Thus, we consider that CESR should focus on policy issues of general application rather than seeking to be directly involved in the supervision of individual firms. For example, we consider that arrangements for joint supervisory visits are best left to bilateral agreement between the competent authorities concerned.

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

There may be cases where CESR might be able to play a role in seeking to resolve differences between individual regulators. However, if CESR undertakes any mediation role, it will be necessary to give careful consideration to the extent to which the national regulators involved are able to disclose confidential supervisory information about individual firms to CESR or other competent authorities not directly involved in the matter in question. Nevertheless, differences of view between regulators may well raise policy issues which are appropriate for discussion in CESR.

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)?

We have no comments on this catalogue.

We hope that this is of assistance. Please contact Daniela Marilungo at ISDA in Brussels (+322 401 87 60) if you have any comments on this.

Yours faithfully,

Mark Harding,
Chairman, ISDA European Regulatory Committee