Response
of the
Zentraler Kreditausschuss
to the CESR-Consultation Paper
"The role of CESR at level 3
under the Lamfalussy-Process"

A. General remarks

In our view, the Consultation Paper provides a precise and clearly structured presentation of CESR's tasks and is thus a very appropriate basis for a further discussion on CESR's role at level 3 of the Lamfalussy procedure.

We would like to preface our specific comments with some general observations concerning the paper:

1. Basic principles

Generally, we feel that under the fast-track legislation process, it will be indispensable that all parties involved undertake to comply with common fundamental political principles and that they shall gear their political action towards this broader vision. This broader vision should be guided by the following principles:

- Any new regulatory action should always take into account its potential impact on the EU financial industry's competitive position in the international arena.
- Any prudential supervision action needs to be accompanied by a diligent cost/benefit analysis; i.e. the benefit (protection of consumer confidence, market integrity etc.) needs to be carefully weighed against the costs for market participants. Whenever the balance of the cost/benefit ratio is disproportionate, regulatory action should be abandoned.
- State interference with the market situation shall be kept to a minimum.
- Whenever this appears appropriate, before issuing new top-down regulation, the option of self-regulation should be considered first.
- The nature of any regulatory action shall always be neutral in terms of its impact on competition and shall be implemented in a consistent manner across all Member States.
- Instead of curbing innovation, regulation should promote innovation.
- As far as pan-European products and services are concerned, an appropriate level of consumer protection is an indispensable prerequisite for consumer confidence.

- Each and any action by the regulator shall always be informed by the goal of safeguarding market integrity and financial stability.

2. System of checks and balances: separation of legislature and executive

It is our understanding that level 3 is primarily that level which allows regulators to come to a mutual interpretation of the rules and regulations adopted at level 1 and 2 and to reach convergence between their administrative practices. Notwithstanding the foregoing, creating new pieces of legislation or setting standards shall not be possible at this level. If, in order to achieve convergence, the need for any new legislation is identified, it is compulsory to address the Commission so that the initiative can be taken in the form of a legislative procedure either at level 2 or at level 1. The fact that a legally binding character should be given to joint decisions by CESR members, i.e. supervisory authorities, is equally problematic. This might also give rise to the danger of mixing up the system of checks and balances, i.e. intermingling the tasks of the legislative and the executive bodies. In this context, we would like to briefly recall the example of the Prospectus Directive's level 2 technical implementing provisions, where, in order to ensure a homogenous implementation of the Directive across all individual Member States, there was a deliberate decision in favour of the legal instrument of a Regulation. We therefore hold the view that, at level 3, there is no need for any further regulatory action by CESR. Although we do indeed perceive a need for concerted action as far as authorities' administrative practices are concerned in order to promote a largely homogenous legal framework across Member States, the proposals made by CESR may still only take on the character of recommendations. At most, a solution would be possible, where national supervisors wanting to diverge from CESR recommendations in order to take adequate account of the idiosyncrasies of their national market and of their own legal system, would have to report this divergence to CESR; this would hence put the "onus of proof" upon them. For this reason, we welcome the announcement made by CESR representatives at the open hearing on May 11 that CESR recommendations shall not have any direct binding effect.

What is also questionable in this context is, whether the same level of legislative powers can be granted to supervisors under each and any national legal system. After all, the scope of this mandate strongly depends on the precise nature of the democratic system of checks and balances incorporated in the respective constitutions. One possible alternative that should not be overlooked in this context is the possibility of mutual recognition of administrative practices that have been shaped by different market mechanisms or by a different legal situation as an alternative way for dismantling barriers to pan-European products and services.

3. Transparency

Preserving transparency for the market must remain an absolute priority; this principle also applies at level 3. Whenever supervisory authorities intend to discuss measures to create a common administrative practice at level 3, this should be made transparent to the markets within an official consultation at an early stage.

4. Early analysis of the facts of the matter and of the legal situation

With a view to both the preparation of recommendations for level 2 legislation and the agreement of administrative practices, there appears to be a compelling need to analyse the facts at hand as well as the legal situation in the various Member States. We would welcome, if such overviews were also made available to market participants. This would, at the same time, create greater transparency of the procedure. We, therefore, welcome the setting-up of a data-base which will be accessible for all market participants as announced during the open hearing on May 11.

B. Individual questions

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

Please cf. our general remarks above.

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.

We see a compelling need for an early investigation into the facts and the legal situation in various Member States and a publication of these findings and overviews.

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

As has been pointed out earlier, in our understanding, level 3 is not a further legislative level but rather a platform for sharing information and for agreeing administrative practice.

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 question whether CESR should also take action in regulatory areas which have not yet been covered by level 1 and 2 legislation has both political and practical implications. In a political respect, it is necessary to bear in mind that, whenever it proactively develops regulatory standards, CESR may not prejudice the decision on an adequate regulation of this area incumbent upon the European institutions (Commission, Council and EP). This does not mean that CESR should refrain from turning to supervision areas which to date lack level 1 and level 2 regulation and that it should refrain from making proposals for an adequate supervision thereof. In order to promote the content of the political decision-making process at level 1 and 2 and in order to back European institutions by way of regulatory proposals, this does indeed appear helpful. Yet, whenever CESR members voluntarily agree to implement at a national level those regulatory standards which they themselves developed and if this implementation is to take place before appropriate legislation has been officially adopted at level 1 and 2, then this does, however, become problematic. From our point of view, this brings CESR into a potential conflict with the European institutions. Furthermore, such an approach would also be problematic on more practical grounds: it would mean that market participants would have to constantly adjust to changing rules (initial adjustment to meet CESR standards subsequent to which – once a Directive/Regulation has been adopted at level 1 and 2 – renewed adjustment to CESR standards which may have been amended as a result to the Directive/Regulation will become necessary). CESR should therefore wait with the implementation of its recommendations until there is a specific political mandate at level 1 and 2 of the Lamfalussy procedure in place.

With a view to the treatment of new products, we would describe the tasks that have to be met by CESR as follows:

Whenever new products occur, any efficient supervisory authority has to look into the issue whether this gives rise to the need for new regulatory obligations, for instance with a view to suitable information of clients. However, subjecting the forthcoming content of new services or products to the control of supervisory authorities would be unacceptable in this context. Also in this area, CESR should always comply with the goal of fostering competition and innovation in the market.

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?

For constitutional reasons, the strict separation between legislative and executive bodies (system of checks and balances) should be adhered to. Any endorsement of administrative action through the Commission, would bypass such separation. We believe that administrative action which complies with existing laws will have to take place without such an endorsement; if the competent supervisory authorities should, however, feel the need for adoption of new rules that are universally binding for everyone, then this would absolutely have to be left to those bodies that have an official mandate for issuing legislation. Notwithstanding the foregoing, it shall be possible to invite the Commission to take the initiative in this respect.

Question 6: Do you see any other aspect of supervisory convergence where CESR could play a role? If so, how and why?
and
Question 7: What kind of mediation role do you consider would be appropriate for CESR?

From our point of view, CESR should give an outline of the procedure available to market participants and national regulators in dealing with inconsistencies in the decisions of national supervisors.

- If the specific administrative practice is not compatible with national laws, the market participant concerned shall always be entitled to an appeals procedure under national administrative law.

- If the administrative practice involving pan-European products and services is compatible with national laws, yet not with prudential supervision guidelines agreed at CESR level, then it is incumbent upon the competent supervisory authorities to bring about an agreement by way of the proposed mediation mechanism on how to best handle the situation.

- If, at the end, it should turn out that the action taken by the competent authority is compatible with the provisions at level 1 and 2, but is no longer politically acceptable, CESR shall address the Commission with the request to initiate a new legal procedure at level 1 or 2.

As far as the convergence of administrative practices is concerned, we feel it is indispensable that the decisions of national supervisors remain accessible to the market as a whole. Should CESR install a mechanism for mediation between supervisory authorities, then this mediation mechanism may only apply to the internal relations of supervisors as a peer group. Decisions affecting external relations, i.e. decisions affecting the parties subject to prudential supervision, shall be exclusively incumbent upon the national supervisor. After all, this is the only way in which legal protection can be effectively ensured via the route of 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?

In order to provide a complete view, recital 27 and article 23 paragraph 1 of the Commission Regulation (EC) No 809/2004 implementing the Prospectus Directive should be added.