

RESPONSE

Work plan of the MiFID L3 Expert Group for Q4/2007-2008

CESR Public Consultation – Ref: CESR/07-704

I. General considerations

1. The European Banking Federation (EBF)¹ welcomes the opportunity to comment on the proposed work plan of CESR's Level 3 Expert Group on the MiFID. We have contributed to the work around the MiFID through all stages of legislation, including Levels 1, 2 and 3, and are committed to continue engaging with the consultation process.
2. We are basing our response to this consultation on two important underlying principles for regulatory work in the European financial markets: first, the strive towards **greater harmonisation and convergence** in the regulation of financial markets across Member States; and secondly, the principle of **systematic consultation with stakeholders**, as foreseen by the Lamfalussy process.
3. At the same time, however, there is a need for a **pragmatic consideration of both timing and cost aspects**. Clear prioritisation is therefore important to manage the work load for both CESR itself and the industry. In addition, CESR should be aware of the cost implication of new rules on the markets.

II. Executive summary

4. CESR has put forward a quite extensive and ambitious proposal for its work over the coming year, which the EBF overall supports. Clear priorities will however be important to ensure that operational issues for firms are solved as quickly as possible.
5. As a general principle for CESR's work, it will furthermore be important to ensure that in line with the **Lamfalussy spirit, the industry is consulted at all stages of CESR's work**. In particular, where the **Q&A mechanism** goes beyond summarising the conclusions of the issues that have been duly discussed in the past, we believe that **the industry must again be centrally involved** and call on CESR to put a process to this effect in place.
6. The same caveat also applies for CESR's thematic work. We agree that it is early at this stage to decide on the areas to be addressed for further convergence work. However, this decision will be an important one as it relies on the one hand on the objective of a single market and consistent regulation, but has to involve some pragmatic cost and timing considerations as well. We therefore believe that **CESR**

¹ The European Banking Federation (EBF) 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.

should in due time have a fully-fledged consultation on the areas to be addressed for further convergence work.

7. An important part of CESR's work will be determined by its role of providing advice to the European Commission. The EBF stands ready to contribute further to these discussions, as it has done in the past.
8. CESR's technical work is much appreciated. In order to ensure the continued quality of this work, sufficient timeframes for the consultation of the industry have to be maintained.

III. Detailed remarks

9. Overall, we find CESR's proposals clear and helpful. We also welcome the clear prioritisation to deal with the large number of issues to be considered over the coming months. We recognise that an important part of CESR's work will lie in its advisory role to the European Commission and will therefore be non-discretionary.
10. We note nevertheless that CESR has defined quite a high number of areas as priorities. From our point of view, it is important to ensure that **operational issues for firms are addressed in a first instance**, so as to provide as much legal certainty as possible.

Thematic work

11. It is clear in our view that more work at Level 3 will be essential to deliver **consistency and convergence in the practical application of at least some key concepts of the MiFID**. We were therefore surprised to see these "other areas of work" marked as "medium" priority items by CESR, and hope that this is meant as an indication of timing rather than importance of the work.
12. Indeed, we would concur that more time is needed to decide on the areas for **concrete convergence** work. We also welcome CESR's acknowledgement of firms' and regulators' high workload over the past months, and that there is some need to let the many changes take effect as far as possible before further adjustments are made.
13. However, this work should then be addressed with a clear commitment to deliver. At the same time, the **benefit of convergence will have to be assessed against the additional cost** that it would impose on the industry, forcing firms to revise their implementation choices in a short timeframe after the new models and structures have been put in place.
14. In line with the Lamfalussy spirit and in order to find the appropriate balance in these potentially opposed considerations, we therefore firmly believe that **CESR should in due time have a full industry consultation on the areas to be addressed for closer alignment across supervisors.**

15. Furthermore, we note that this section was relatively vague from our point of view. We would at this stage appreciate some indication from CESR as to whether there are already some initial thoughts on the concrete measures to take, and what these would be, in particular regarding best execution and conflicts of interest.
16. Finally, as regards markets-related work, we would like to make CESR aware of practical difficulties in the field of transaction reporting. According to field no. 20 of Table 1 to Annex I of the Commission Regulation 1287/2006, the counterparty of a transaction has to be identified. If the counterparty is an investment firm, a unique code for that firm (determined by the competent authority) shall be used. Pursuant to Article 5, paragraph 3 of MiFID, Member States are requested to establish national registers of investment firms. We would like to suggest that CESR draws up a **common list of all investment firms subject to transaction reporting obligations in a standardised electronic format**. This list is necessary to ensure that the highly automated reporting process can run smoothly by avoiding duplication of work and the need to consult several, incomplete databases. This list should therefore be established swiftly on a European-wide basis and in a format that can be processed automatically. Subsequently, we would also ask CESR to consider the need to keep this list up to date.

Q&A mechanism

17. In the spirit of the Lamfalussy process, we welcome CESR seeking to take a **pragmatic approach to give advice to stakeholders on some key questions of common interest to market participants through the proposed Q&A mechanism**.
18. However, we note that this mechanism will likely also lead to some new interpretations, on which the **industry should be duly consulted** to ensure the legitimacy of CESR's answers as well as to prevent re-interpretations of issues that have already been solved in other ways and formats. In the meantime, we would suggest that in the same way as done for the Prospectus Directive, the mechanism focus in a first instance on the issues that have been successfully agreed in due legislative and/ or consultative process with the industry.
19. We would also appreciate clarification on the status of the Q&A, in particular to what extent it could be considered to provide legal certainty for firms and what the interaction of CESR's answers with the guidance provided by national regulators and with the European Commission's Q&A mechanism would be.

Work in connection with upcoming Commission reports

20. As regards the work linked to the Commission's reports, we understand that the scope for CESR to set its own priorities within this area is limited. We do however wish to reiterate **some key positions that we would ask CESR to take into account**.

21. Firstly, the potential requirement for **telephone recording** has already been discussed extensively. We have repeatedly pointed out that **little gain in terms of investor protection** could be expected from such a requirement. Indeed, the required data relating to all orders received from customers is already duly captured to date. In contrast to this, the **additional burden on the industry from a requirement for voice recording would be enormous**, in particular if such a requirement was considered for retail business. We underline once again that such a requirement is not mandated by the Level 1 text and that no infrastructure for such a requirement exists in the EU so far.
22. As regards article 4 of Level 2 which **allows Member States to impose in certain cases additional requirements on investment firms, we reiterate that this provision must only be applied in rare and well-justified cases**. The industry will closely monitor its use and looks forward to CESR's and the Commission's careful assessment of the need for such an article, as well as the danger of its misuse.
23. On the appropriateness of the definition of transaction, the tables included in annex II of the Regulation and the criteria for the determination of liquid shares contained in article 21 of the Regulation, we much **hope that greater precision in the definition of liquid shares can be achieved**. Clearly, this is a difficult issue which will have to involve complex methods, and we stand ready to further work with CESR and the Commission on this question.
24. With regard to table 4 of annex II of the Regulation, we continue to be sceptic as to the current delays, and believe in particular that the delays should be extended for the small to mid cap market to ensure well-functioning liquidity formation in Europe's equity markets. At this stage, the industry is waiting to see the practical effect of the delayed reporting regime on large trading activities since the implementation of MiFID. We trust that CESR will take a similar evidence-based approach for its own evaluation of this issue.

On-going technical work in the implementation of Level 2

25. We commend CESR for the progress in its technical work and support its ongoing efforts. Whilst we recognise the time pressure for this work, we also wish to remind CESR that in order to allow high-quality work, **sufficient time for consultations** with the market has to be foreseen.

Cooperation with other committees of regulators

26. We welcome and support the ongoing cooperation between the three Level 3 Committees.

IV. Conclusion

27. CESR's work plan provides a helpful overview of the next steps. In view of the many outstanding issues, prioritisation will be crucial, and it is important that operational issues for firms be addressed in a first place.

28. In particular in the section of thematic work, clarity on the Committee's initial thinking would be appreciated.
29. The industry must be continuously involved in the Committee's work. CESR should therefore in due time have a fully-fledged consultation on the areas to address for further convergence work and should put in place a process for the systematic involvement of the industry in the Q&A mechanism.