

## **Comments on CESR's Work on Level 2 Measures for the Directive on Markets in Financial Instruments (FIMD)**

### **Introduction**

The European Banking Federation<sup>1</sup> (FBE) supports the revision of the Directive on Markets in Financial Instruments (formerly Investment Services Directive) from the start, fully endorsing the twin goals of establishing a truly functioning cross-border passport for investment services and modernizing the regime for execution of orders in line with new market developments since the original directive.

The FBE has been actively engaged in numerous CESR consultations in the past and looks forward to providing input throughout the Level 2 process.

### **Remarks on the Call for Evidence**

Our key observations are as follows:

- ❖ We observe with great concern that the Commission wishes to use to the instrument of a "Regulation" for those forthcoming provisions that will directly regulate relations between an investment firm and its clients or employees. We are well aware of the fact that this decision on the part of the Commission is beyond CESR's mandate. Yet, this decision has an important impact on CESR's work in that it increases the need for CESR to carefully assess whether its advice is compatible with the national provisions in existence, e.g. under civil law or labour law, which have not been harmonised.
- ❖ It is also necessary to take into account a firm's entitlement to a certain degree of organisational discretion. In general, it is more feasible for the legal instrument of a "Directive" to take account of national jurisdictions and the highly heterogeneous structures, sizes and operations of the various undertakings sufficiently. The Level 2 work on the FIMD risks introducing contradictions with the national legal frameworks and different corporate organisational structures. The fact that the Commission plans largely to revert to the use of "Regulations" should encourage CESR to issue less detailed provisions.
- ❖ In a more general sense, the right level of detail will be crucial to the quality and effectiveness of the implementing measures. The Commission explicitly asks CESR to pay particular attention to the level of detail in its advice. However, the annexes attached to the mandate at times seem to suggest a high level of detail or prescription. We believe that CESR should feel free to provide a more appropriate level of detail in its advice than the level in these annexes.

---

<sup>1</sup> Set up in 1960, the European Banking Federation (FBE) is the voice of the European banking sector. It represents the interests of over 4,000 banks from the 15 EU Member States as well as Hungary, Iceland, Norway and Switzerland, with over 2 million employees and total assets of 20,000 billion euros.

- ❖ As we have commented elsewhere, “parallel working” on Level 2 measures while the Level 1 legislation is incomplete poses certain problems that have to be managed. In full accordance with the IIMG principle that the provisional mandate only relate to those questions that have been agreed to by all the institutions at the end of the 1<sup>st</sup> reading, we would recommend that CESR postpone its work on the measures for the “best execution” (Article 21 of the proposed Directive) part of the provisional mandate until after the Directive is adopted. In this subject and all others where the Parliament and Council do not share the same view, utmost effort must go into maintaining neutrality towards the different positions of these institutions.
- ❖ The experience with the Market Abuse and Prospectus Directives shows that CESR plays an important role by providing views on practical aspects of the implementation of the proposed mandate. While observing its mandate, CESR can inform the Commission of potential problems which are brought to its attention by market participants. For example, the problem of liability linked to the duty to notify suspicious transactions in the Market Abuse Directive was highlighted in the CESR consultation and mentioned in the final CESR advice. We believe that the ISD work would also benefit from this kind of analysis.
- ❖ Also important is CESR’s role in assisting the Commission in making policy decisions when drawing up Level 2 measures. Where alternative policies are available to reach the envisaged objectives, CESR’s advice should include an analysis of options to enable the Commission to make the optimal decisions. This would also help align the Commission’s work with CESR’s advice better and maximise the usefulness and relevance of CESR’s advice to the Commission’s work.
- ❖ Finally, we would like to reiterate our support for the Lamfalussy process. As highlighted in our response to the IIMG consultation, there is continuous need for improvements to the process for it to achieve its full potential. Overall, the key principle for CESR’s work should be prioritising its work in a way so that two objectives are met: Key subjects should receive the full amount of time and attention needed for the market participants to submit a considered response to each stage of the consultation, and CESR should be able to base its work on a thorough analysis of the information provided.