

Brussels, 24th August 2007

Response

Impact Assessment Guidelines for EU Level 3 Committees (Ref: CESR/07-089)

I. Introduction:

1. The Federation of European Securities Exchanges (FESE) represents operators of the European regulated markets and other market segments, comprising the markets for not only securities, but also financial, energy and commodity derivatives. Established in 1974 as a small forum of stock exchanges in Europe, FESE today has 23 full members representing close to 40 securities exchanges from all the countries of the European Union (EU) and Iceland, Norway, and Switzerland, as well as several corresponding members from other non-EU countries.
2. We welcome the opportunity to comment on the proposed Impact Assessment Guidelines for EU Level 3 Committees since we consider the use of Impact Assessments (IA) a key tool of financial regulation and supervision. In particular, we support the consultation process used by CESR in adopting Level 3 guidance in all the FSAP directives so far (e.g. Prospectus Directive, Market Abuse Directive) and, in particular, the practice of publishing a Call for Evidence on the possible Level 3 work (e.g. MiFID, Transparency Obligations Directive). We believe that more formal guidelines adopted across Level 3 Committees concerning ex ante and ex post IA will be very helpful and will further improve Level 3.
3. FESE supports the comments made by the European Forum of Securities Associations (EFSA). In addition, we would like to offer a number of points pertaining more directly to our experience with Level 3.

II. Summary:

4. Based on our recent experiences with CESR's Level 3 work – which we detail in the following paragraph – we would like to offer the following thoughts:
 - CESR and the industry need to synchronise during the deliberation process on any major decision that could involve IT investments, necessitate to change internal processes or is likely to trigger the deployment of additional human resources;
 - CESR should require industry input especially when deciding whether an issue requires a cost-benefit analysis;
 - CESR should clarify its intentions with a feedback statement after every consultation and before the final decision is made to help identify potential problems and give the industry a last chance to point out potentially serious problems;
 - Generally, consultations should always allow enough time to respond considering the subject at hand;
 - CESR needs to be particularly sensitive about the inclusiveness and explicitness of its consultations when commercial interests of market players diverge. A public consultation that frames all the questions clearly and in detail will ensure that potential conflicts are identified and discussed openly.

III. Recent experiences with Level 3

5. Our most recent experiences concerning Level 3 pertain to the Market Abuse Directive (MAD), MiFID, Prospectus Directive (PD), and Transparency Obligations Directive (TOD).

- a) On **MAD**, we have responded to the June 2006 Call for Evidence Evaluation of the Supervisory Functioning of the EU Market Abuse Regime, the November 2006 Public Consultation on the Draft Second Set of Guidance on the Operation of the Market Abuse Directive and finally welcomed the Second Set of CESR Guidance and Information on the Common Operation of the Directive to the Market published in July. Although some of the problems we highlighted could not be addressed (because they were in fact related to Level 1 and Level 2), we are convinced that CESR's guidance on what constitutes inside information, when it is legitimate to delay the disclosure of inside information, when client orders constitute inside information and on insider lists in multiple jurisdictions will be of great help if applied by CESR members in their day-to-day regulatory practices.
- b) In January 2007, in the context of its work on transaction reporting - an element of Level 3 **MiFID** - CESR unveiled its plans to extend mandatory ISIN codes to derivative markets (where ISINs are currently not used). This had not been expected by the industry. FESE, in coordination with a number of European banks and associations, set about to provide feedback on the difficulties and costs of imposing ISO standards across all derivatives markets and products.

In retrospect, the problems arose from the fact that the only consultation on this subject had not been exhaustive in content and the deadline had been very short. Moreover, in this case, CESR did not publish a feedback statement which would have clearly spelled out how CESR was going to address the industry's concerns. This did not allow stakeholders to assess the relative costs and benefits of the various options that were being discussed by CESR. Lacking this crucial information, CESR's decision underestimated the disruptive impact that it would have had on the industry.

Fortunately, CESR was able to address the issue constructively and in coordination with the industry. In a relatively short period of time, CESR, the European Commission and the European banking and exchange industry found an alternative solution which meets both CESR's needs and the legal requirements of MiFID whilst being less costly and disruptive for the industry. FESE very much welcomes this outcome.

- c) FESE also participated in the process assessing the supervisory functioning of the **PD** regime (the January 2007 Call for Evidence on the supervisory functioning of the Prospectus Directive and Regulation). We support the general approach outlined by CESR. In particular, we consider that the Frequently Asked Questions (FAQ) is a useful tool and support CESR's intention to update it on an ongoing basis and to extend it to more complex subjects over time.
- d) Finally, we are currently drafting our response to the Call for Evidence on the possible CESR L3 work on **TOD**. As stated above, we consider these consultations of paramount importance in order to build up a transparent and effective decision making framework.

IV. Governance structure

6. As mentioned above, we fully share EFSA's call for a clear governance structure building on the "working methods" for IA set out in the draft Guidelines. In our view, a reliable IA should be conducted by a 3rd party; the independence of the experts conducting the exercise is of the utmost importance. In this regard, we find the reference made by the IIMG in its Second Interim Report to the creation of "an independent Impact Assessment Board (IAB)" in the Commission a useful concept that may also be relevant in the context of the L3 Committees. Any such body to be created should itself operate transparently and incorporate the views of the market participants.
7. The same principles apply to ex post assessments, which should be conducted ideally by a 3rd party and, if not, at least by a unit that is separate from that which conceived the IA or the one that implemented its outcome. The question of *when* to launch the ex post assessment is also crucial. An appropriate amount of time should elapse from the moment the new legislation enters into force and the time in which its effects can be observed. If the ex post assessment was launched too soon, there would be the risk of having a partial view of the effects – no matter whether positive or negative – produced by the legislation and consequently failing to acknowledge some of the legislation's merits and/or adverse scenarios.

V. Conclusion

8. Finally and more generally, although we strongly support consultations and impact assessments and see them as a highly beneficial tool for improving regulation, consultation feedback and impact assessments should not delay a decision to amend regulatory measures when the practical consequences of a measure becomes clear and that such measure appears to be inadequate (for instance the measure unduly increases costs, negatively affects market functioning or reduces the competitiveness of EU markets). This may happen, in particular, in cases where there was no proper consultation or impact assessment or the expected impact of a regulatory measure has been inaccurately assessed. In those cases, there should be a practical and rapid mechanism, involving the industry, to assess problems and find solutions in a timely manner and the inaccurate impact assessment or consultation feedback should not delay the process of correcting an inaccurate regulatory measure.