

1 juni 2004

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Geachte heer Docters van Leeuwen,

Beste Arthur,

Betreft: **Consultatiepaper CESR level 3-problematiek**

Per brief van 29 april j.l. aan de heer Collee herinnerde u aan het consultatiepaper van CESR over de zogenoemde level 3 problematiek, waarvoor u de aandacht vroeg in het laatste Hoog Niveau Europa Overleg. U vroeg om uiterlijk 1 juni onze zienswijze te mogen ontvangen over de in dat paper ontvouwd gedachten.

In antwoord op uw verzoek treft u in de bijlage in het Engels gestelde antwoorden aan op de in het CESR-paper gestelde vragen. Wij tekenen daarbij aan dat de Fédération Bancaire Européenne (FBE) zojuist eveneens een antwoord aan CESR heeft gestuurd namens de bij haar aangesloten bankenassociaties, waaronder de NVB. Onze antwoorden moeten dan ook als aanvulling worden gezien op het commentaar van de FBE.

Ten aanzien van de onderhavige problematiek willen wij graag een drietal punten onderstrepen:

Het zou in onze visie niet zo moeten zijn dat op het niveau van de toezichthouders een formele dan wel informele extra regelgevingslaag ontstaat bovenop hetgeen reeds op level 1 en 2 wordt vastgesteld.

Met de invoering van de Wet op het financieel toezicht zal Nederland een functioneel toezichtstelsysteem krijgen, zulks in tegenstelling tot de sectorale benadering waar de Europese regelgeving van uit gaat. Wij zijn benieuwd naar de consequenties die dit zal hebben voor de afstemming tussen de AFM en haar zusterorganisaties uit de andere lidstaten, bijvoorbeeld op het gebied van de markttoegang.

Tenslotte menen wij dat een discussie als de onderhavige zou moeten worden uitgebreid naar zusterorganisaties CEBS (banken) en CEIOPS (verzekeraars en pensioenfondsen), waar immers gekozen is voor een soortgelijk model als bij CESR.

Hoogachtend,



Drs H.G.M. Blocks
Directeur

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

First of all we think the rationale of the Lamfalussy-approach is well thought-out: The method of CESR working out technical advice (Level 2 regulations) at the same time as the EC is working on the European Directive, has improved efficiency. Since Level 2 legislation is worked out by the Commission and national experts, it will be more in accordance with market practice than before because experts work relatively close to the financial markets. In this context, we are of the opinion that CESR's main role should remain the provision of technical advice to the Commission.

We agree with the fundamental idea in the statement of the European Council (the Stockholm Resolution of 23 March 2001) that the national regulators and CESR should also play an important role in the transposition process by securing more effective cooperation between supervisory authorities carrying out peer reviews and promoting best practices, so as to ensure more consistent and timely implementation of community legislation in member states. Difficulties involving the transposition and application of EU law may arise in situations where a European Directive is based on minimum harmonization. We notice a certain tendency of imposing stricter national regulations in the individual Member States by the national regulators. This leads to different levels of regulation in the Member States, which hampers the intended level playing field of the European financial markets.

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 believe that since staff members of the relevant CESR-Expert Groups have obtained a substantial knowledge of the relevant EU Directives and its corresponding technical advice, this knowledge can (or should) be used more efficiently by the Member States during the implementation of a European Directive into national legislation. In practice the staff members from the national authorities which are involved in the implementation of the relevant EU Directive, are not always the same people. This is not efficient in our view. At the same time we are of the opinion that the role of the concerned staff member(s) of the relevant CESR-Expert Group should be advisory only, similar to CESRs' role at Level 2. We are clearly in favour of limiting the powers of supervisory authorities to the drafting of rules of a purely technical or organizational nature.

3. Do you see any other aspect of regulatory convergence where CESR should play a role?

During the recent EU-enlargement we found out that during negotiations no kind of 'transition regulation' had been established regarding existing activities of financial institutions in those new member states. This resulted in the undesirable situation that some of the new Member States (e.g. Slovakia) required a whole

new notification procedure involving the European Passport regarding existing activities. CESR could assess the probable differences between the regulations and alert the Commission about them before new member states (Turkey, Romania) join the EU.

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

In case of cross-border services or - transactions, it could be convenient for financial market parties (banks) to have coordinated opinions and interpretations from the regulators in the different Member States. However, this should not interfere with mutual recognition rules. A marginal note in this context: According to a judicial sentence in the Netherlands an interpretation from a supervisor has no contractual validity.

The suggestion of CESR to intervene in areas not covered by EU law, seems rather undesirable to us. If there is no need to harmonize a certain issue within the EU, there is no need for CESR to adopt autonomous standards such as common EU-wide standards on this issue either.

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?

In case of a certain member state (or regulator) applying EU directives or regulations in such a way that the level playing field is hampered or that EU directives or regulations are violated, the normal procedure should be followed by the European Commission: this entails a warning to the member state concerned and can ultimately result in a ruling by the European Court of Justice. CESR can point out (in an advisory role) possible violations of EU law to the Commission.

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

The current role of CESR regarding supervisory convergence is very useful in our view. An aspect in which CESR could play a more prominent role is in the case of accession of new Member States into the EU. We think cooperation between some of the regulators in the new member states with the regulators in the 'old' member states can be improved (see also our comments regarding question 3 and 7).

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

CESR could mediate in case interpretations of legislation differ in case of cross border activities (e.g. cross border offerings), as long as the aim of this mediation is a consistent interpretation by local regulators to maintain the level playing field. Mediation should not involve conflicts between a regulated party and a regulator and should not interfere with the right of the regulated party to seek recourse to the judge. Another area in which CESR (and CEBS and CEIOPS) could mediate is the area of assessments by national regulators of persons who determine the day-to-day policy of the enterprise or institution in connection with the pursuit of the business of a securities firm/credit institution or insurance company. In case these enterprises or institutions are multinationals, their 'main managers' tend to be assessed individually by the national regulators in several different Member States. This causes an unnecessary administrative burden. In our view, it would be very efficient to create some sort of European passport. The same is applicable in case of requesting a declaration of no objection. In our view it should be sufficient to obtain this declaration from the regulator in the home member state.

8. Do you have any comments on the catalogue of all mutual recognition and cooperation obligations under the Directives where CESR is active?

No. We think this factual catalogue to be quite exhaustive.