



FEDERATION BANCAIRE DE L'UNION EUROPEENNE

N° 0561
BI/AB

Subject: FBE Statement on the 1st Mandate of MiFID Level 2 Consultation

Tuesday, August 31, 2004

Mr David WRIGHT
Director
DG Markt - Directorate G
European Commission
Avenue de Cortenbergh, 107
Office 03/28
B - 1040 Brussels

Dear Mr Wright,

On behalf of the European Banking Federation¹ (FBE), we are writing to make a number of points about the development of the implementing measures of the Markets in Financial Instruments Directive (MiFID).

As you know, the FBE fully supports the Commission's objectives with respect to the achievement of a single market and, specifically, an efficient and effective framework for investment services that will benefit European investors and economy.

We have been actively engaged in all phases of the consultations launched in the adoption of the MiFID and the preparation of its implementing measures to date. In our previous contributions, we have underlined the importance of allocating **adequate time** to the preparation of the Level 2 measures for this Directive. We appreciate CESR's decision to allow two more weeks' consultation for a number of issues which are linked to the subjects covered by the 2nd mandate. However, we wish to underline our belief that there must also be the willingness to re-visit the overall timetable if it proves impossible for CESR to conduct the adequate groundwork and proper consultation on its advice.

CESR has asked us to be specific with **factual evidence** for our objections to its proposals. We will endeavour to provide precise responses and counter-proposals. However, as we pointed out in the Open Hearing in July, the quality of the consultation results would be greatly enhanced if CESR provided assessments of the existing

¹ Set up in 1960, the European Banking Federation (FBE) is the voice of the European banking sector. It represents the interests of over 4,500 European banks, large and small, with total assets more than EUR 20,000 billion and over 2.3 million employees.

regulatory environment or the expected market impact of a proposal. Similarly, we encourage CESR to make more use of policy alternatives in its consultation documents to enable us to provide information on alternative routes to a policy objective.

Finally, we would like to stress the need for **transitional measures** for various aspects of the Directive which will require the industry to make organisational and technological changes. The Commission has said that such measures, where not already contemplated in the Directive, would be difficult to bring about in the absence of a political decision. We therefore urge the Commission, Council and Parliament to consider such measures in due time.

An important way of saving time and reducing the need for transitional measures is to avoid **excessive detail and prescription** in Level 2 measures, while providing the necessary degree of **legal clarity** for consistent application. The Commission's mandates and CESR's consultation paper seek to codify into EU law some matters that should be dealt with in a more flexible way if European financial markets are to continue to adapt to meet the ever-changing needs of investors and issuers and retain their global competitiveness.

We will be responding to the consultation in more detail. In the Annex, we provide our preliminary views on several important issues covered by the Consultation Paper.

We would like to conclude by thanking you for your time and by underlining our commitment to providing any assistance necessary to adopt an effective and high-quality set of implementing measures for this Directive.

Given their interest in the matter, we are also sending a similar letter to the European Parliament and the Presidency of the European Union as well as CESR and members of the European Securities Committee.

Yours sincerely,



Nikolaus Bömcke
Secretar General of the FBE



Wim Mijs
Chairman

Financial Markets Committee of the FBE

cc.: Ms Nathalie De Basaldua-Lemarchand, Head of Unit, Securities Markets

Annex:**I. GENERAL REMARKS ON THE CONSULTATION PAPER (CP)**

- We appreciate the alternatives presented by CESR in most cases and CESR's evident efforts to base its proposals on a consideration of the net benefits of its proposals. We believe CESR should make a greater use of such alternatives.
- We find that in general the CP is much too detailed and asks far too many questions. There is a danger of legislative overkill. As the FBE representative argued during the Open Hearing, we see the set of rules proposed by CESR generally as in line with existing best practice in Europe, but are concerned that codifying them as rules rather than internal procedures would in certain cases undermine flexibility and efficiency. Hence, the overall body of rules should be reviewed with a view to leaving some of these principles to Level 3 and to best practice.
- The CP envisages far too many heavy disclosure requirements. These are unnecessary, burdensome and not obviously of any benefit to customers. They do not meet the points raised by the Post-FSAP Securities Expert Group, which underlined that regulation should be justified and shown to be needed and beneficial before it is imposed. Among the disclosure requirements of concern are those relating to best execution policies and conflicts of interest policies. In addition, we see it as absolutely imperative to ensure that information provided to clients can be standardised.
- The requirements should only apply to new customers or to existing customers when revised terms and conditions are being sent to them to avoid the need to send a substantial amount of documentation to a large number of existing customers. So far as possible, there should be "grandfathering" arrangements.

II. SPECIFIC ISSUES**Best Execution:**

- The Level 1 text already contains most of the requirements that are needed with regard to best execution. CESR is proposing to include far too much additional detail with regard to best execution. The Commission mandate asks a range of detailed questions with regard to best execution. However, CESR does not have to answer all of these questions. Alternatively, CESR can make it clear that Level 2 text should not result from answering the questions in the mandate.

- It is important that banks are not required to check a very large number of trading venues to prove they have given best execution to a customer. The regulatory obligation should go no higher than to require banks to be connected to those venues which, on a consistent basis, are likely to give best execution. Otherwise banks might have to be connected to a very large number of venues, many of which most of the time would not be giving continuous execution or have significant liquidity. On the other hand, it is clear that, in the interest of serving their customers in the best way, banks will wish to continue establishing access to as many execution venues as appropriate.
- Subject to this caveat, we agree with CESR's view, expressed on page 74 of the CP, that "an investment firm shall at least include in its execution policy those possible trading venues that enable it to obtain on a consistent basis the best possible result for the execution of orders".
- The best execution principle should include the overriding recognition that, where an order is given with specific instructions on how to execute, the bank must follow those instructions. This is standard practice in most Member States.
- In measuring best execution, the regulator should consider it as a process (and in this regard we support CESR's comments on p.74 of the CP). Best execution should not be judged on a transaction-by-transaction basis. A bank should be judged on the quality of its best execution processes and the quality of execution they deliver over a period of time rather than on individual executions. This is fully consistent with the Level 1 principles concerning best execution.

Conflicts of Interest

- The proposals are excessively detailed and formalised. Many of the matters for which CESR appears to be proposing rules should only be dealt with in the context of compliance policies and a firm's internal arrangements and not legislative text, e.g. the detail relating to conflicts of interest and information barriers.

Client Order Handling

- As we have argued during the Open Hearing, we believe that CESR should be prepared to deviate from the existing CESR Standards in view of the fact that they have been put in place some time ago and on a transitional basis, and were focused on equities.

Transaction Reporting

- In MiFID, the obligations relating to transaction reporting apply to financial instruments admitted to trading on a regulated market. However, the CP envisages that the obligations will apply with regard to all MiFID financial instruments. This would be exceeding CESR's mandate. We were pleased to hear in the Open Hearing that CESR will look into this question and hope that the matter will be clarified accordingly.



FEDERATION BANCAIRE DE L'UNION EUROPEENNE

N° 0561
BI/AB

Subject: FBE Statement on the 1st Mandate of MiFID Level 2 Consultation

Tuesday, August 31, 2004

Mr Callum McCARTHY
Chairman of the CESR Expert Group on Intermediaries
CESR, 11-13 avenue de Friedland
F- 75008 PARIS

Dear Mr McCarthy,

On behalf of the European Banking Federation¹ (FBE), we are writing to you in your capacity as the Chairman of the CESR Expert Group on Intermediaries to make a number of points about the development of the implementing measures of the Markets in Financial Instruments Directive (MiFID). We hope that these remarks will form a useful basis for a more detailed discussion during the meeting you have kindly accepted to have with an FBE delegation on September 22, 2004.

As you know, the FBE fully supports the goal of creating an efficient and effective framework for investment services that will benefit European investors and economy. We believe that the implementation stage of the MiFID is critical to achieving the objectives of the Directive.

We have participated in numerous consultations conducted by CESR to date and fully support its ongoing work on the MiFID. In our previous submissions, we have underlined the importance of allocating **adequate time** to the preparation of the Level 2 measures for this Directive. We appreciate CESR's decision to allow two more weeks' consultation for a number of issues which are linked to the subjects covered by the 2nd mandate. However, we wish to underline our belief that there must also be the willingness to re-visit the overall

¹ Set up in 1960, the European Banking Federation (FBE) is the voice of the European banking sector. It represents the interests of over 4,500 European banks, large and small, with total assets of more than EUR 20,000 billion and over 2.3 million employees.

timetable if it proves impossible for CESR to conduct the adequate groundwork and proper consultation on its advice.

CESR has asked us to be specific with **factual evidence** for our objections to its proposals. We will endeavour to provide precise responses and counter-proposals. However, as we pointed out in the Open Hearing in July held by CESR, the quality of the consultation results would be greatly enhanced if CESR provided assessments of the existing regulatory environment or the expected market impact of a proposal. Similarly, we encourage CESR to make more use of policy alternatives in its consultation documents to enable us to provide information on alternative routes to a policy objective.

Finally, we would like to stress the need for **transitional measures** for various aspects of the Directive which will require the industry to make organisational and technological changes. The Commission has said that such measures, where not already contemplated in the Directive, would be difficult to bring about in the absence of a political decision. We therefore urge the Commission, Council and Parliament to consider such measures in due time.

An important way of saving time and reducing the need for transitional measures is to avoid **excessive detail and prescription** in Level 2 measures, while providing the necessary degree of **legal clarity** for consistent application. The Commission's mandates and CESR's consultation paper seek to codify into EU law some matters that should be dealt with in a more flexible way if European financial markets are to continue to adapt to meet the ever-changing needs of investors and issuers and retain their global competitiveness.

We will be responding to the consultation in more detail. In the Annex, we provide our preliminary views on several important issues covered by the Consultation Paper.

We would like to conclude by thanking you for your time and by underlining our commitment to providing any assistance necessary to adopt an effective and high-quality set of implementing measures for this Directive.

Given their interest in the matter, we are also sending a similar letter to the European Commission, the European Parliament, the Presidency of the European Union, Mr Demarigny and Mr Comporti, and Mr Prada, as well as members of the European Securities Committee.

Yours sincerely,



Nikolaus Bömcke
Secretary General of the FBE



Wim Mijs
Chairman
Financial Markets Committee of the FBE

Annex:**I. GENERAL REMARKS ON THE CONSULTATION PAPER (CP)**

- We appreciate the alternatives presented by CESR in most cases and CESR's evident efforts to base its proposals on a consideration of the net benefits of its proposals. We believe CESR should make a greater use of such alternatives.
- We find that in general the CP is much too detailed and asks far too many questions. There is a danger of legislative overkill. As the FBE representative argued during the Open Hearing, we see the set of rules proposed by CESR generally as in line with existing best practice in Europe, but are concerned that codifying them as rules rather than internal procedures would in certain cases undermine flexibility and efficiency. Hence, the overall body of rules should be reviewed with a view to leaving some of these principles to Level 3 and to best practice.
- The CP envisages far too many heavy disclosure requirements. These are unnecessary, burdensome and not obviously of any benefit to customers. They do not meet the points raised by the Post-FSAP Securities Expert Group, which underlined that regulation should be justified and shown to be needed and beneficial before it is imposed. Among the disclosure requirements of concern are those relating to best execution policies and conflicts of interest policies. In addition, we see it as absolutely imperative to ensure that information provided to clients can be standardised.
- The requirements should only apply to new customers or to existing customers when revised terms and conditions are being sent to them to avoid the need to send a substantial amount of documentation to a large number of existing customers. So far as possible, there should be "grandfathering" arrangements.

II. SPECIFIC ISSUES**Best Execution:**

- The Level 1 text already contains most of the requirements that are needed with regard to best execution. CESR is proposing to include far too much additional detail with regard to best execution. The Commission mandate asks a range of detailed questions with regard to best execution. However, CESR does not have to

answer all of these questions. Alternatively, CESR can make it clear that Level 2 text should not result from answering the questions in the mandate.

- It is important that banks are not required to check a very large number of trading venues to prove they have given best execution to a customer. The regulatory obligation should go no higher than to require banks to be connected to those venues which, on a consistent basis, are likely to give best execution. Otherwise banks might have to be connected to a very large number of venues, many of which most of the time would not be giving continuous execution or have significant liquidity. On the other hand, it is clear that, in the interest of serving their customers in the best way, banks will wish to continue establishing access to as many execution venues as appropriate.
- Subject to this caveat, we agree with CESR's view, expressed on page 74 of the CP, that "an investment firm shall at least include in its execution policy those possible trading venues that enable it to obtain on a consistent basis the best possible result for the execution of orders".
- The best execution principle should include the overriding recognition that, where an order is given with specific instructions on how to execute, the bank must follow those instructions. This is standard practice in most Member States.
- In measuring best execution, the regulator should consider it as a process (and in this regard we support CESR's comments on p.74 of the CP). Best execution should not be judged on a transaction-by-transaction basis. A bank should be judged on the quality of its best execution processes and the quality of execution they deliver over a period of time rather than on individual executions. This is fully consistent with the Level 1 principles concerning best execution.

Conflicts of Interest

- The proposals are excessively detailed and formalised. Many of the matters for which CESR appears to be proposing rules should only be dealt with in the context of compliance policies and a firm's internal arrangements and not legislative text, e.g. the detail relating to conflicts of interest and information barriers.

Client Order Handling

- As we have argued during the Open Hearing, we believe that CESR should be prepared to deviate from the existing CESR Standards in view of the fact that they

have been put in place some time ago and on a transitional basis, and were focused on equities.

Transaction Reporting

- In MiFID, the obligations relating to transaction reporting apply to financial instruments admitted to trading on a regulated market. However, the CP envisages that the obligations will apply with regard to all MiFID financial instruments. This would be exceeding CESR's mandate. We were pleased to hear in the Open Hearing that CESR will look into this question and hope that the matter will be clarified accordingly.



Subject: FBE Statement on the 1st Mandate of MiFID Level 2 Consultation

Tuesday, August 31, 2004

Mr Michel PRADA
Chairman of the CESR Expert Group on Cooperation and Enforcement
CESR, 11-13 avenue de Friedland
F- 75008 PARIS

Dear Mr Prada,

On behalf of the European Banking Federation¹ (FBE), we are writing to you in your capacity as the Chairman of the CESR Expert Group on Cooperation and Enforcement to make a number of points about the development of the implementing measures of the Markets in Financial Instruments Directive (MiFID).

As you know, the FBE fully supports the goal of creating an efficient and effective framework for investment services that will benefit European investors and economy. We believe that the implementation stage of the MiFID is critical to achieving the objectives of the Directive.

We have participated in numerous consultations conducted by CESR to date and fully support its ongoing work on the MiFID. In our previous submissions, we have repeatedly underlined the importance of allocating **adequate time** to the preparation of the Level 2 measures for this Directive. We appreciate CESR's decision to allow two more weeks' consultation for a number of issues which are linked to the subjects covered by the 2nd mandate. However, there must also be the willingness to re-visit the overall timetable if it proves impossible for CESR to conduct the adequate groundwork and proper consultation on its advice.

CESR has asked us to be specific with **factual evidence** for our objections to its proposals. We will endeavour to provide precise responses and counter-proposals. However, as we pointed out in the Open Hearing in July, the quality of the consultation

¹ Set up in 1960, the European Banking Federation (FBE) is the voice of the European banking sector. It represents the interests of over 4,500 European banks, large and small, with total assets of more than EUR 20,000 billion and over 2.3 million employees.

results would be greatly enhanced if CESR provided assessments of the existing regulatory environment or the expected market impact of a proposal. Similarly, we encourage CESR to make more use of policy alternatives in its consultation documents to enable us to provide information on alternative routes to a policy objective.

Finally, we would like to stress the need for **transitional measures** for various aspects of the Directive which will require the industry to make organisational and technological changes. The Commission has said that such measures, where not already contemplated in the Directive, would be difficult to bring about in the absence of a political decision. We therefore urge the Commission, Council and Parliament to consider such measures in due time.

An important way of saving time and reducing the need for transitional measures is to avoid **excessive detail and prescription** in Level 2 measures, while providing the necessary degree of **legal clarity** for consistent application. The Commission's mandates and CESR's consultation paper seek to codify into EU law some matters that should be dealt with in a more flexible way if European financial markets are to continue to adapt to meet the ever-changing needs of investors and issuers and retain their global competitiveness.

We will be responding to the consultation in more detail. In the Annex, we provide our preliminary views on several important issues covered by the Consultation Paper.

We would like to conclude by thanking you for your time and by underlining our commitment to providing any assistance necessary to adopt an effective and high-quality set of implementing measures for this Directive.

Given their interest in the matter, we are also sending this letter to the European Commission, the European Parliament, the Presidency of the European Union, Mr Demarigny, Mr Comporti and Mr McCarthy as well as members of the European Securities Committee.

Yours sincerely,



Nikolaus Börmcke
Secretary General of the FBE



Wim Mijs
Chairman Financial Markets Committee of
the FBE

Annex:**I. GENERAL REMARKS ON THE CONSULTATION PAPER (CP)**

- We appreciate the alternatives presented by CESR in most cases and CESR's evident efforts to base its proposals on a consideration of the net benefits of its proposals. We believe CESR should make a greater use of such alternatives.
- We find that in general the CP is much too detailed and asks far too many questions. There is a danger of legislative overkill. As the FBE representative argued during the Open Hearing, we see the set of rules proposed by CESR generally as in line with existing best practice in Europe, but are concerned that codifying them as rules rather than internal procedures would in certain cases undermine flexibility and efficiency. Hence, the overall body of rules should be reviewed with a view to leaving some of these principles to Level 3 and to best practice.
- The CP envisages far too many heavy disclosure requirements. These are unnecessary, burdensome and not obviously of any benefit to customers. They do not meet the points raised by the Post-FSAP Securities Expert Group, which underlined that regulation should be justified and shown to be needed and beneficial before it is imposed. Among the disclosure requirements of concern are those relating to best execution policies and conflicts of interest policies. In addition, we see it as absolutely imperative to ensure that information provided to clients can be standardised.
- The requirements should only apply to new customers or to existing customers when revised terms and conditions are being sent to them to avoid the need to send a substantial amount of documentation to a large number of existing customers. So far as possible, there should be "grandfathering" arrangements.

II. SPECIFIC ISSUES**Best Execution:**

- The Level 1 text already contains most of the requirements that are needed with regard to best execution. CESR is proposing to include far too much additional detail with regard to best execution. The Commission mandate asks a range of detailed questions with regard to best execution. However, CESR does not have to

answer all of these questions. Alternatively, CESR can make it clear that Level 2 text should not result from answering the questions in the mandate.

- It is important that banks are not required to check a very large number of trading venues to prove they have given best execution to a customer. The regulatory obligation should go no higher than to require banks to be connected to those venues which, on a consistent basis, are likely to give best execution. Otherwise banks might have to be connected to a very large number of venues, many of which most of the time would not be giving continuous execution or have significant liquidity. On the other hand, it is clear that, in the interest of serving their customers in the best way, banks will wish to continue establishing access to as many execution venues as appropriate.
- Subject to this caveat, we agree with CESR's view, expressed on page 74 of the CP, that "an investment firm shall at least include in its execution policy those possible trading venues that enable it to obtain on a consistent basis the best possible result for the execution of orders".
- The best execution principle should include the overriding recognition that, where an order is given with specific instructions on how to execute, the bank must follow those instructions. This is standard practice in most Member States.
- In measuring best execution, the regulator should consider it as a process (and in this regard we support CESR's comments on p.74 of the CP). Best execution should not be judged on a transaction-by-transaction basis. A bank should be judged on the quality of its best execution processes and the quality of execution they deliver over a period of time rather than on individual executions. This is fully consistent with the Level 1 principles concerning best execution.

Conflicts of Interest

- The proposals are excessively detailed and formalised. Many of the matters for which CESR appears to be proposing rules should only be dealt with in the context of compliance policies and a firm's internal arrangements and not legislative text, e.g. the detail relating to conflicts of interest and information barriers.

Client Order Handling

- As we have argued during the Open Hearing, we believe that CESR should be prepared to deviate from the existing CESR Standards in view of the fact that they

have been put in place some time ago and on a transitional basis, and were focused on equities.

Transaction Reporting

- In MiFID, the obligations relating to transaction reporting apply to financial instruments admitted to trading on a regulated market. However, the CP envisages that the obligations will apply with regard to all MiFID financial instruments. This would be exceeding CESR's mandate. We were pleased to hear in the Open Hearing that CESR will look into this question and hope that the matter will be clarified accordingly.



FEDERATION BANCAIRE DE L'UNION EUROPEENNE

N° 0561
BI/AB

Subject: FBE Statement on the 1st Mandate of MiFID Level 2 Consultation

Tuesday, August 31, 2004

Mr Fabrice DEMARIGNY
Secretary General of CESR
CESR, 11-13 avenue de Friedland
F- 75008 PARIS

Dear Mr Demarigny,

On behalf of the European Banking Federation¹ (FBE), we are writing to make a number of points about the development of the implementing measures of the Markets in Financial Instruments Directive (MiFID).

As you know, the FBE fully supports the goal of creating an efficient and effective framework for investment services that will benefit European investors and economy. We believe that the implementation stage of the MiFID is critical to achieving the objectives of the Directive.

We have participated in numerous consultations conducted by CESR to date and fully support its ongoing work on the MIFID. In our previous submissions, we have underlined the importance of allocating **adequate time** to the preparation of the Level 2 measures for this Directive. We appreciate CESR's decision to allow two more weeks' consultation for a number of issues which are linked to the subjects covered by the 2nd mandate. However, we wish to underline our belief that there must also be the willingness to re-visit the overall timetable if it proves impossible for CESR to conduct the adequate groundwork and proper consultation on its advice.

CESR has asked us to be specific with **factual evidence** for our objections to its proposals. We will endeavour to provide precise responses and counter-proposals. However, as we pointed out in the Open Hearing in July, the quality of the consultation results would be greatly enhanced if CESR provided assessments of the existing regulatory environment or the expected market impact of a proposal. Similarly, we

¹ Set up in 1960, the European Banking Federation (FBE) is the voice of the European banking sector. It represents the interests of over 4,500 European banks, large and small, with total assets of more than EUR 20,000 billion and over 2.3 million employees.

encourage CESR to make more use of policy alternatives in its consultation documents to enable us to provide information on alternative routes to a policy objective.

Finally, we would like to stress the need for **transitional measures** for various aspects of the Directive which will require the industry to make organisational and technological changes. The Commission has said that such measures, where not already contemplated in the Directive, would be difficult to bring about in the absence of a political decision. We therefore urge the Commission, Council and Parliament to consider such measures in due time.

An important way of saving time and reducing the need for transitional measures is to avoid **excessive detail and prescription** in Level 2 measures, while providing the necessary degree of **legal clarity** for consistent application. The Commission's mandates and CESR's consultation paper seek to codify into EU law some matters that should be dealt with in a more flexible way if European financial markets are to continue to adapt to meet the ever-changing needs of investors and issuers and retain their global competitiveness.

We will be responding to the consultation in more detail. In the Annex, we provide our preliminary views on several important issues covered by the Consultation Paper.

We would like to conclude by thanking you for your time and by underlining our commitment to providing any assistance necessary to adopt an effective and high-quality set of implementing measures for this Directive.

Given their interest in the matter, we are also sending a similar letter to the European Commission, the European Parliament, the Presidency of the European Union, Messrs McCarthy and Prada, as well as members of the European Securities Committee.

Yours sincerely,



Nikolaus Bömcke
Secretary General of the FBE



Wim Mijs
Chairman
Financial Markets Committee of the FBE

cc.: Mr Carlo Comporti, Deputy to the Secretary General

Annex:**I. GENERAL REMARKS ON THE CONSULTATION PAPER (CP)**

- We appreciate the alternatives presented by CESR in most cases and CESR's evident efforts to base its proposals on a consideration of the net benefits of its proposals. We believe CESR should make a greater use of such alternatives.
- We find that in general the CP is much too detailed and asks far too many questions. There is a danger of legislative overkill. As the FBE representative argued during the Open Hearing, we see the set of rules proposed by CESR generally as in line with existing best practice in Europe, but are concerned that codifying them as rules rather than internal procedures would in certain cases undermine flexibility and efficiency. Hence, the overall body of rules should be reviewed with a view to leaving some of these principles to Level 3 and to best practice.
- The CP envisages far too many heavy disclosure requirements. These are unnecessary, burdensome and not obviously of any benefit to customers. They do not meet the points raised by the Post-FSAP Securities Expert Group, which underlined that regulation should be justified and shown to be needed and beneficial before it is imposed. Among the disclosure requirements of concern are those relating to best execution policies and conflicts of interest policies. In addition, we see it as absolutely imperative to ensure that information provided to clients can be standardised.
- The requirements should only apply to new customers or to existing customers when revised terms and conditions are being sent to them to avoid the need to send a substantial amount of documentation to a large number of existing customers. So far as possible, there should be "grandfathering" arrangements.

II. SPECIFIC ISSUES**Best Execution:**

- The Level 1 text already contains most of the requirements that are needed with regard to best execution. CESR is proposing to include far too much additional detail with regard to best execution. The Commission mandate asks a range of detailed questions with regard to best execution. However, CESR does not have to answer all of these questions. Alternatively, CESR can make it clear that Level 2 text should not result from answering the questions in the mandate.

- It is important that banks are not required to check a very large number of trading venues to prove they have given best execution to a customer. The regulatory obligation should go no higher than to require banks to be connected to those venues which, on a consistent basis, are likely to give best execution. Otherwise banks might have to be connected to a very large number of venues, many of which most of the time would not be giving continuous execution or have significant liquidity. On the other hand, it is clear that, in the interest of serving their customers in the best way, banks will wish to continue establishing access to as many execution venues as appropriate.
- Subject to this caveat, we agree with CESR's view, expressed on page 74 of the CP, that "an investment firm shall at least include in its execution policy those possible trading venues that enable it to obtain on a consistent basis the best possible result for the execution of orders".
- The best execution principle should include the overriding recognition that, where an order is given with specific instructions on how to execute, the bank must follow those instructions. This is standard practice in most Member States.
- In measuring best execution, the regulator should consider it as a process (and in this regard we support CESR's comments on p.74 of the CP). Best execution should not be judged on a transaction-by-transaction basis. A bank should be judged on the quality of its best execution processes and the quality of execution they deliver over a period of time rather than on individual executions. This is fully consistent with the Level 1 principles concerning best execution.

Conflicts of Interest

- The proposals are excessively detailed and formalised. Many of the matters for which CESR appears to be proposing rules should only be dealt with in the context of compliance policies and a firm's internal arrangements and not legislative text, e.g. the detail relating to conflicts of interest and information barriers.

Client Order Handling

- As we have argued during the Open Hearing, we believe that CESR should be prepared to deviate from the existing CESR Standards in view of the fact that they have been put in place some time ago and on a transitional basis, and were focused on equities.

Transaction Reporting

- In MiFID, the obligations relating to transaction reporting apply to financial instruments admitted to trading on a regulated market. However, the CP envisages that the obligations will apply with regard to all MiFID financial instruments. This would be exceeding CESR's mandate. We were pleased to hear in the Open Hearing that CESR will look into this question and hope that the matter will be clarified accordingly.



FEDERATION BANCAIRE DE L'UNION EUROPEENNE

N° 0561
BI/AB

Subject: FBE Statement on the 1st Mandate of MiFID Level 2 Consultation

Tuesday, August 31, 2004

Ms Pervenche Beres, MEP,
Chair of the ECON Committee
European Parliament
Rue Wiertz, 60
ASP 14G202
B - 1047 Brussels

Dear Ms Beres,

On behalf of the European Banking Federation¹ (FBE), we are writing to you in your capacity as the Chairwoman of the Economic and Monetary Affairs Committee of the European Parliament to make a number of points about the development of the implementing measures of the Markets in Financial Instruments Directive (MiFID). May we also take this opportunity to congratulate you on your new appointment and wish you and all members of your Committee a most successful and productive term.

The successful implementation of the MiFID should bring about an efficient common regulatory framework for investment services in Europe with tangible benefits for the investors and economy. The implementing measures will to a large extent determine whether the objectives of the Directive are fully achieved. The European Parliament played a key role during the adoption of the MiFID and will continue having an important role through its oversight of the preparation of the implementing measures.

We have been actively engaged in all phases of the consultations launched in the adoption of the MiFID and the preparation of its implementing measures to date. In our previous contributions, we have underlined the importance of allocating **adequate time** to the preparation of the Level 2 measures for this Directive. We appreciate CESR's decision to allow two more weeks' consultation for a number of issues which are linked to the subjects

¹ Set up in 1960, the European Banking Federation (FBE) is the voice of the European banking sector. It represents the interests of over 4,500 European banks, large and small, with total assets of more than EUR 20,000 billion and over 2.3 million employees.

covered by the 2nd mandate. However, there must also be the willingness to re-visit the overall timetable if it proves impossible for CESR to conduct the adequate groundwork and proper consultation on its advice.

CESR has asked us to be specific with **factual evidence** for our objections to its proposals. We will endeavour to provide precise responses and counter-proposals. However, as we pointed out in the Open Hearing in July, the quality of the consultation results would be greatly enhanced if CESR provided assessments of the existing regulatory environment or the expected market impact of a proposal. Similarly, we encourage CESR to make more use of policy alternatives in its consultation documents to enable us to provide information on alternative routes to a policy objective.

Finally, we would like to stress the need for **transitional measures** for various aspects of the Directive which will require the industry to make organisational and technological changes. The Commission has said that such measures, where not already contemplated in the Directive, would be difficult to bring about in the absence of a political decision. We therefore urge the Commission, Council and Parliament to consider such measures in due time.

An important way of saving time and reducing the need for transitional measures is to avoid **excessive detail and prescription** in Level 2 measures, while providing the necessary degree of **legal clarity** for consistent application. The Commission's mandates and CESR's consultation paper seek to codify into EU law some matters that should be dealt with in a more flexible way if European financial markets are to continue to adapt to meet the ever-changing needs of investors and issuers and retain their global competitiveness.

We will be responding to the consultation in more detail. In the Annex, we provide our preliminary views on several important issues covered by the Consultation Paper.

We would like to conclude by thanking you for your time and by underlining our commitment to providing any assistance necessary to adopt an effective and high-quality set of implementing measures for this Directive.

Given their interest in the matter, we are also sending this letter to the European Commission, the Presidency of the European Union, CESR, as well as members of the European Securities Committee.

Yours sincerely,



Nikolaus Bömcke
Secretary General of the FBE



Wim Mijs
Chairman

Financial Markets Committee of the FBE

cc.:

Mr José Manuel García-Margallo y Marfil, MEP, 1st Vice Chairperson

Mr Guntars Krasts, MEP, 2nd Vice Chairperson

Mr John Purvis, MEP, 3rd Vice Chairperson

Mr Christopher Huhne, MEP

Mr Alexander Radwan, MEP

Ms Theresa Villiers, MEP

Ms Sarah Wagenknecht, MEP

Annex:**I. GENERAL REMARKS ON THE CONSULTATION PAPER (CP)**

- We appreciate the alternatives presented by CESR in most cases and CESR's evident efforts to base its proposals on a consideration of the net benefits of its proposals. We believe CESR should make a greater use of such alternatives.
- We find that in general the CP is much too detailed and asks far too many questions. There is a danger of legislative overkill. As the FBE representative argued during the Open Hearing, we see the set of rules proposed by CESR generally as in line with existing best practice in Europe, but are concerned that codifying them as rules rather than internal procedures would in certain cases undermine flexibility and efficiency. Hence, the overall body of rules should be reviewed with a view to leaving some of these principles to Level 3 and to best practice.
- The CP envisages far too many heavy disclosure requirements. These are unnecessary, burdensome and not obviously of any benefit to customers. They do not meet the points raised by the Post-FSAP Securities Expert Group, which underlined that regulation should be justified and shown to be needed and beneficial before it is imposed. Among the disclosure requirements of concern are those relating to best execution policies and conflicts of interest policies. In addition, we see it as absolutely imperative to ensure that information provided to clients can be standardised.
- The requirements should only apply to new customers or to existing customers when revised terms and conditions are being sent to them to avoid the need to send a substantial amount of documentation to a large number of existing customers. So far as possible, there should be "grandfathering" arrangements.

II. SPECIFIC ISSUES**Best Execution:**

- The Level 1 text already contains most of the requirements that are needed with regard to best execution. CESR is proposing to include far too much additional detail with regard to best execution. The Commission mandate asks a range of detailed questions with regard to best execution. However, CESR does not have to answer all of these questions. Alternatively, CESR can make it clear that Level 2 text should not result from answering the questions in the mandate.

- It is important that banks are not required to check a very large number of trading venues to prove they have given best execution to a customer. The regulatory obligation should go no higher than to require banks to be connected to those venues which, on a consistent basis, are likely to give best execution. Otherwise banks might have to be connected to a very large number of venues, many of which most of the time would not be giving continuous execution or have significant liquidity. On the other hand, it is clear that, in the interest of serving their customers in the best way, banks will wish to continue establishing access to as many execution venues as appropriate.
- Subject to this caveat, we agree with CESR's view, expressed on page 74 of the CP, that "an investment firm shall at least include in its execution policy those possible trading venues that enable it to obtain on a consistent basis the best possible result for the execution of orders".
- The best execution principle should include the overriding recognition that, where an order is given with specific instructions on how to execute, the bank must follow those instructions. This is standard practice in most Member States.
- In measuring best execution, the regulator should consider it as a process (and in this regard we support CESR's comments on p.74 of the CP). Best execution should not be judged on a transaction-by-transaction basis. A bank should be judged on the quality of its best execution processes and the quality of execution they deliver over a period of time rather than on individual executions. This is fully consistent with the Level 1 principles concerning best execution.

Conflicts of Interest

- The proposals are excessively detailed and formalised. Many of the matters for which CESR appears to be proposing rules should only be dealt with in the context of compliance policies and a firm's internal arrangements and not legislative text, e.g. the detail relating to conflicts of interest and information barriers.

Client Order Handling

- As we have argued during the Open Hearing, we believe that CESR should be prepared to deviate from the existing CESR Standards in view of the fact that they have been put in place some time ago and on a transitional basis, and were focused on equities.

Transaction Reporting

- In MiFID, the obligations relating to transaction reporting apply to financial instruments admitted to trading on a regulated market. However, the CP envisages that the obligations will apply with regard to all MiFID financial instruments. This would be exceeding CESR's mandate. We were pleased to hear in the Open Hearing that CESR will look into this question and hope that the matter will be clarified accordingly.



FEDERATION BANCAIRE DE L'UNION EUROPEENNE

N° 0561
BI/AB

Subject: FBE Statement on the 1st Mandate of MiFID Level 2 Consultation

Tuesday, August 31, 2004

Mr Gerrit ZALM
Minister of Finance
Ministerie van Financiën
Korte Voorhout 7
Postbus 20201
NL-2500 EE Den Haag

Dear Mr Zalm,

On behalf of the European Banking Federation¹ (FBE), we are writing to you in your capacity as the Chairman of the EcoFin Council to make a number of points about the development of the implementing measures of the Markets in Financial Instruments Directive (MiFID).

The successful implementation of the MiFID should bring about an efficient common regulatory framework for investment services in Europe with tangible benefits for the investors and economy. We therefore firmly believe that progress on the implementation of the MiFID will contribute to the Presidency's goal of speeding up the achievement of the Lisbon Agenda objectives.

We have been actively engaged in all phases of the consultations launched in the adoption of the MiFID and the preparation of its implementing measures to date. In our previous contributions, we have underlined the importance of allocating **adequate time** to the preparation of the Level 2 measures for this Directive. We appreciate CESR's decision to allow two more weeks' consultation for a number of issues which are linked to the subjects covered by the 2nd mandate. However, we wish to underline our belief that there must also be the willingness to re-visit the overall timetable if it proves impossible for CESR to conduct the adequate groundwork and proper consultation on its advice.

¹ Set up in 1960, the European Banking Federation (FBE) is the voice of the European banking sector. It represents the interests of over 4,500 European banks, large and small, with total assets of more than EUR 20,000 billion and over 2.3 million employees.

CESR has asked us to be specific with **factual evidence** for our objections to its proposals. We will endeavour to provide precise responses and counter-proposals. However, as we pointed out in the Open Hearing in July held by CESR, the quality of the consultation results would be greatly enhanced if CESR provided assessments of the existing regulatory environment or the expected market impact of a proposal. Similarly, we encourage CESR to make more use of policy alternatives in its consultation documents to enable us to provide information on alternative routes to a policy objective.

Finally, we would like to stress the need for **transitional measures** for various aspects of the Directive which will require the industry to make organisational and technological changes. The Commission has said that such measures, where not already contemplated in the Directive, would be difficult to bring about in the absence of a political decision. We therefore urge the Commission, Council and Parliament to consider such measures in due time.

An important way of saving time and reducing the need for transitional measures is to avoid **excessive detail and prescription** in Level 2 measures, while providing the necessary degree of **legal clarity** for consistent application. The Commission's mandates and CESR's consultation paper seek to codify into EU law some matters that should be dealt with in a more flexible way if European financial markets are to continue to adapt to meet the ever-changing needs of investors and issuers and retain their global competitiveness.

We will be responding to the consultation in more detail. In the Annex, we provide our preliminary views on several important issues covered by the Consultation Paper.

We would like to conclude by thanking you for your time and by underlining our commitment to providing any assistance necessary to adopt an effective and high-quality set of implementing measures for this Directive.

Given their interest in the matter, we are also sending a similar letter to the European Commission, the European Parliament, CESR, as well as members of the European Securities Committee.

Yours sincerely,



Nikolaus Bömcke
Secretary General of the FBE



Wim Mijs
Chairman
Financial Markets Committee of the FBE

cc.:

Mr Bernard ter Haar, Director, Financial Markets Policy, Ministry of Finance

Mr Wicief Poesiat, Financial Attaché, Permanent Representation of the Netherlands to the
EU

Annex:**I. GENERAL REMARKS ON THE CONSULTATION PAPER (CP)**

- We appreciate the alternatives presented by CESR in most cases and CESR's evident efforts to base its proposals on a consideration of the net benefits of its proposals. We believe CESR should make a greater use of such alternatives.
- We find that in general the CP is much too detailed and asks far too many questions. There is a danger of legislative overkill. As the FBE representative argued during the Open Hearing, we see the set of rules proposed by CESR generally as in line with existing best practice in Europe, but are concerned that codifying them as rules rather than internal procedures would in certain cases undermine flexibility and efficiency. Hence, the overall body of rules should be reviewed with a view to leaving some of these principles to Level 3 and to best practice.
- The CP envisages far too many heavy disclosure requirements. These are unnecessary, burdensome and not obviously of any benefit to customers. They do not meet the points raised by the Post-FSAP Securities Expert Group, which underlined that regulation should be justified and shown to be needed and beneficial before it is imposed. Among the disclosure requirements of concern are those relating to best execution policies and conflicts of interest policies. In addition, we see it as absolutely imperative to ensure that information provided to clients can be standardised.
- The requirements should only apply to new customers or to existing customers when revised terms and conditions are being sent to them to avoid the need to send a substantial amount of documentation to a large number of existing customers. So far as possible, there should be "grandfathering" arrangements.

II. SPECIFIC ISSUES**Best Execution:**

- The Level 1 text already contains most of the requirements that are needed with regard to best execution. CESR is proposing to include far too much additional detail with regard to best execution. The Commission mandate asks a range of detailed questions with regard to best execution. However, CESR does not have to answer all of these questions. Alternatively, CESR can make it clear that Level 2 text should not result from answering the questions in the mandate.

- It is important that banks are not required to check a very large number of trading venues to prove they have given best execution to a customer. The regulatory obligation should go no higher than to require banks to be connected to those venues which, on a consistent basis, are likely to give best execution. Otherwise banks might have to be connected to a very large number of venues, many of which most of the time would not be giving continuous execution or have significant liquidity. On the other hand, it is clear that, in the interest of serving their customers in the best way, banks will wish to continue establishing access to as many execution venues as appropriate.
- Subject to this caveat, we agree with CESR's view, expressed on page 74 of the CP, that "an investment firm shall at least include in its execution policy those possible trading venues that enable it to obtain on a consistent basis the best possible result for the execution of orders".
- The best execution principle should include the overriding recognition that, where an order is given with specific instructions on how to execute, the bank must follow those instructions. This is standard practice in most Member States.
- In measuring best execution, the regulator should consider it as a process (and in this regard we support CESR's comments on p.74 of the CP). Best execution should not be judged on a transaction-by-transaction basis. A bank should be judged on the quality of its best execution processes and the quality of execution they deliver over a period of time rather than on individual executions. This is fully consistent with the Level 1 principles concerning best execution.

Conflicts of Interest

- The proposals are excessively detailed and formalised. Many of the matters for which CESR appears to be proposing rules should only be dealt with in the context of compliance policies and a firm's internal arrangements and not legislative text, e.g. the detail relating to conflicts of interest and information barriers.

Client Order Handling

- As we have argued during the Open Hearing, we believe that CESR should be prepared to deviate from the existing CESR Standards in view of the fact that they have been put in place some time ago and on a transitional basis, and were focused on equities.

Transaction Reporting

- In MiFID, the obligations relating to transaction reporting apply to financial instruments admitted to trading on a regulated market. However, the CP envisages that the obligations will apply with regard to all MiFID financial instruments. This would be exceeding CESR's mandate. We were pleased to hear in the Open Hearing that CESR will look into this question and hope that the matter will be clarified accordingly.



FEDERATION BANCAIRE DE L'UNION EUROPEENNE

N° 0561
BI/AB

Subject: FBE Statement on the 1st Mandate of MiFID Level 2 Consultation

Tuesday, August 31, 2004

Members of the European Securities Committee (ESC)
c/o European Commission
Directorate General Internal Market and Services
Rue de la Loi 200
B-1049 Brussels

Dear Sir, Madam,

On behalf of the European Banking Federation¹ (FBE), we are writing to you in your capacity as members of the European Securities Committee (ESC) to make a number of points about the development of the implementing measures of the Markets in Financial Instruments Directive (MiFID).

We believe that the implementation stage of the MiFID is critical to achieving the objectives of the Directive, and therefore believe that the ESC will play a very key role in establishing an efficient common regulatory framework for investment services in Europe with tangible benefits for the investors and economy.

We have been actively engaged in all phases of the consultations launched in the adoption of the MiFID and the preparation of its implementing measures to date. In our previous submissions, we have underlined the importance of allocating **adequate time** to the preparation of the Level 2 measures for this Directive. We appreciate CESR's decision to allow two more weeks' consultation for a number of issues which are linked to the subjects covered by the 2nd mandate. However, we wish to underline our belief that there must also be the willingness to re-visit the overall timetable if it proves impossible for CESR to conduct the adequate groundwork and proper consultation on its advice.

CESR has asked us to be specific with **factual evidence** for our objections to its proposals. We will endeavour to provide precise responses and counter-proposals. However, as we pointed out in the Open Hearing in July, the quality of the consultation

¹ Set up in 1960, the European Banking Federation (FBE) is the voice of the European banking sector. It represents the interests of over 4,500 European banks, large and small, with total assets

results would be greatly enhanced if CESR provided assessments of the existing regulatory environment or the expected market impact of a proposal. Similarly, we encourage CESR to make more use of policy alternatives in its consultation documents to enable us to provide information on alternative routes to a policy objective.

Finally, we would like to stress the need for **transitional measures** for various aspects of the Directive which will require the industry to make organisational and technological changes. The Commission has said that such measures, where not already contemplated in the Directive, would be difficult to bring about in the absence of a political decision. We therefore urge the Commission, Council and Parliament to consider such measures in due time.

An important way of saving time and reducing the need for transitional measures is to avoid **excessive detail and prescription** in Level 2 measures, while providing the necessary degree of **legal clarity** for consistent application. The Commission's mandates and CESR's consultation paper seek to codify into EU law some matters that should be dealt with in a more flexible way if European financial markets are to continue to adapt to meet the ever-changing needs of investors and issuers and retain their global competitiveness.

We will be responding to the consultation in more detail. In the Annex, we provide our preliminary views on several important issues covered by the Consultation Paper.

We would like to conclude by thanking you for your time and by underlining our commitment to providing any assistance necessary to adopt an effective and high-quality set of implementing measures for this Directive.

Given their interest in the matter, we are also sending this letter to the European Commission, the European Parliament, and CESR.

Yours sincerely,



Nikolaus Bömcke
Secretary General of the FBE



Wim Mijs
Chairman

Financial Markets Committee of the FBE

Annex:**I. GENERAL REMARKS ON THE CONSULTATION PAPER (CP)**

- We appreciate the alternatives presented by CESR in most cases and CESR's evident efforts to base its proposals on a consideration of the net benefits of its proposals. We believe CESR should make a greater use of such alternatives.
- We find that in general the CP is much too detailed and asks far too many questions. There is a danger of legislative overkill. As the FBE representative argued during the Open Hearing, we see the set of rules proposed by CESR generally as in line with existing best practice in Europe, but are concerned that codifying them as rules rather than internal procedures would in certain cases undermine flexibility and efficiency. Hence, the overall body of rules should be reviewed with a view to leaving some of these principles to Level 3 and to best practice.
- The CP envisages far too many heavy disclosure requirements. These are unnecessary, burdensome and not obviously of any benefit to customers. They do not meet the points raised by the Post-FSAP Securities Expert Group, which underlined that regulation should be justified and shown to be needed and beneficial before it is imposed. Among the disclosure requirements of concern are those relating to best execution policies and conflicts of interest policies. In addition, we see it as absolutely imperative to ensure that information provided to clients can be standardised.
- The requirements should only apply to new customers or to existing customers when revised terms and conditions are being sent to them to avoid the need to send a substantial amount of documentation to a large number of existing customers. So far as possible, there should be "grandfathering" arrangements.

II. SPECIFIC ISSUES**Best Execution:**

- The Level 1 text already contains most of the requirements that are needed with regard to best execution. CESR is proposing to include far too much additional detail with regard to best execution. The Commission mandate asks a range of detailed questions with regard to best execution. However, CESR does not have to answer all of these questions. Alternatively, CESR can make it clear that Level 2 text should not result from answering the questions in the mandate.

- It is important that banks are not required to check a very large number of trading venues to prove they have given best execution to a customer. The regulatory obligation should go no higher than to require banks to be connected to those venues which, on a consistent basis, are likely to give best execution. Otherwise banks might have to be connected to a very large number of venues, many of which most of the time would not be giving continuous execution or have significant liquidity. On the other hand, it is clear that, in the interest of serving their customers in the best way, banks will wish to continue establishing access to as many execution venues as appropriate.
- Subject to this caveat, we agree with CESR's view, expressed on page 74 of the CP, that "an investment firm shall at least include in its execution policy those possible trading venues that enable it to obtain on a consistent basis the best possible result for the execution of orders".
- The best execution principle should include the overriding recognition that, where an order is given with specific instructions on how to execute, the bank must follow those instructions. This is standard practice in most Member States.
- In measuring best execution, the regulator should consider it as a process (and in this regard we support CESR's comments on p.74 of the CP). Best execution should not be judged on a transaction-by-transaction basis. A bank should be judged on the quality of its best execution processes and the quality of execution they deliver over a period of time rather than on individual executions. This is fully consistent with the Level 1 principles concerning best execution.

Conflicts of Interest

- The proposals are excessively detailed and formalised. Many of the matters for which CESR appears to be proposing rules should only be dealt with in the context of compliance policies and a firm's internal arrangements and not legislative text, e.g. the detail relating to conflicts of interest and information barriers.

Client Order Handling

- As we have argued during the Open Hearing, we believe that CESR should be prepared to deviate from the existing CESR Standards in view of the fact that they have been put in place some time ago and on a transitional basis, and were focused on equities.

Transaction Reporting

- In MiFID, the obligations relating to transaction reporting apply to financial instruments admitted to trading on a regulated market. However, the CP envisages that the obligations will apply with regard to all MiFID financial instruments. This would be exceeding CESR's mandate. We were pleased to hear in the Open Hearing that CESR will look into this question and hope that the matter will be clarified accordingly.