

**London Investment Banking Association
Asociación de Mercados Financieros
Association of Private Client Investment Managers and Stockbrokers /
European Association of Securities Dealers
Associazione Italiana Intermediari Mobiliari
Bundesverband der Wertpapierfirmen an den deutschen Börsen
Danish Securities Dealers Association
Euribor ACI European Commission Working Group
Finnish Association of Securities Dealers
Futures and Options Association
Icelandic Financial Services Association
International Capital Market Association
International Swaps and Derivatives Association
Norwegian Securities Dealers Association
Securities Industry and Financial Markets Association
Swedish Securities Dealers Association**

**Response to EC DG Internal Market consultation on amendments to EC
Decisions establishing CESR, CEBS, and CEIOPS**

18th July 2008

Summary

This is a joint response by the 15 Associations listed above, which collectively represent a significant proportion of securities business in Europe, to DG Markt's consultation. In analysing the responses to the consultation, we ask DG Markt to weight it accordingly.

We welcome the fact that DG Markt is consulting on the review of the European Commission Decisions establishing CESR, CEBS, and CEIOPS. We think the review of the EC Decisions establishing the Level 3 Committees needs to deliver something clear and functional and simple that aligns the Decisions and the stated roles of the Committees to the extent necessary, but does not go into prescriptive detail about what they should do or how they should do it.

It is also important to distinguish the Level 3 Committees' role in Level 2 development of implementing legislation, which is to provide advice in response to Commission mandates, from their role at Level 3 of the Lamfalussy process, which is to provide a network through which national regulators can foster and achieve supervisory convergence and consistency of implementation. Their performance of the Level 2 role may be directed and constrained by the Commission mandates. But in the Level 3 role it is important to give the Committees operational independence in the means that they use to pursue the overall goal of supervisory convergence and consistency of implementation.

We agree with DG Markt that all of the roles which it addresses in sections 3.1 to 3.8 of the consultation paper are functions and tasks which the Level 3 Committees

need to be able to perform and to consider using when appropriate. In many cases the Committees are already carrying them out, or have the ability to do so. But it is important to allow the Committees to grow and evolve their Level 3 role, without either giving them too many tasks of too specific a nature, or constraining their ability to perform other tasks if the development of supervisory cooperation makes them appropriate. Flexibility and operational independence in the Level 3 role is also important to enable the Committees and their members to build in effective cooperation arrangements with third country regulators. The 14th May ECOFIN Conclusions listed a number of tasks that could be included in the Decisions establishing the Committees. In order to avoid constraining or overburdening the Committees, we consider that these tasks should be referred to in the Decisions in a neutral way as illustrations of the tasks that the Committees might perform when they judge it appropriate, not as tasks that they are 'mandated' to do, or to give priority to.

For the same reasons, we oppose DG Markt's proposals in sections 3.9 and 3.10, which would impose too many procedural or political constraints on the Committees' operational freedom of action.

Any reference in the Decisions to the Level 3 Committees' role in financial stability arrangements should be similarly neutral, and not prejudge or constrain the outcome of the current international work, involving a wide range of actors, to put in place effective arrangements.

General comments

A common theme of the consultation is DG Markt's assertion that reference to a task in the Decisions establishing the Level 3 Committees is necessary to give effect to the decisions of ECOFIN, or to reinforce roles that are proposed in EU legislation. In its 14th May 2008 Conclusions ECOFIN invited the Commission to revise the Decisions on the establishment of CESR, CEBS, and CEIOPS so as to ensure consistency in their mandates and tasks, and to strengthen their contribution to supervisory cooperation and convergence. The ECOFIN Conclusions further state that "specific tasks should be explicitly given to the EU Committees of Supervisors to foster supervisory cooperation and convergence, and their role in assessing risks to financial stability", listing six tasks that "this could include". Whilst it may be appropriate to refer in the Decisions in a neutral way to these possible tasks, it is important that the Decisions do not seek to mandate that they should be done, or how they should be done. The Decisions should also not duplicate, or go beyond, the actions that are specified for the Level 3 Committees themselves, in either the ECOFIN Conclusions or specific provisions in legislation. In some cases, DG Markt's proposed formalisation of the roles of Level 3 Committees would either cut across roles that the ECOFIN Conclusions allocate to the Level 3 Committees themselves, or could actually inhibit supervisory convergence by removing freedom of action from the Committees. It is worth recalling also that in its 2007 Own Initiative Report on Financial Services Policy, the European Parliament notes that for strong supervision, a high level of independence and neutrality is required.

Section 2

DG Markt says that it “does not consider that a radical overhaul of the existing Decision is needed”. We agree, but this intention does not seem to be borne out by the detailed content of the proposals. DG Markt says that “This should not be seen as an exhaustive list” [of tasks], which “would not be consistent with the independent status of the Committees”. Again, we agree. But the list of tasks that DG Markt envisages is already too prescriptive and in danger of severely limiting the independent status of the Committees, as explained in detail below. DG Markt says that “If necessary, this mandate, or parts thereof, could be further specified by the co-legislators in relevant directives”. Where a role for Level 3 Committees is specified in legislation, there is no reason also to spell it out in the Decision; where it is not so specified, it would not be appropriate to use the Decisions as a substitute for legislation.

We agree with DG Markt’s objective “to broadly align the Decisions, but not to achieve complete harmonisation between the three Decisions as sector-specific issues may require some differences between them”. It is important not to align the detail of the Decisions for the sake of it, but to ensure that relevant sectoral differences are validly reflected.

Section 3.1 Mediation

Q(i) Do you agree that voluntary and/or obligatory mediation can be a useful tool to enhance the effectiveness of supervision?

Mediation has great value (whether a difference of interpretation is raised by the supervisors themselves, or by market participants), but only as a voluntary mechanism. Where both parties consent to its use, the likelihood of their coming to an agreement brokered by a neutral third party is increased. On the other hand any obligatory mediation scheme is less likely to succeed if one or more of the parties feels under duress to participate. DG Markt’s analysis (“The Commission Services consider... that it would be useful if the Committees of Supervisors would act as mediators each time this is actually needed”; “The use of mediation mechanisms has been so far too limited”; “Supervisors should be encouraged to make greater use of them”) suggests that it may be thinking of replacing the Level 3 Committees’ existing mediation arrangements (in which, it is important to note, it is mediators selected by the Level 3 Committees, not the Committees themselves, who act as mediators) with a more mandatory arbitration mechanism. Coercive mechanisms would inhibit, not encourage, supervisors from seeking mutually acceptable resolution of differences. It is important to be clear that the outcome of a mediation is an agreement by the parties, not a decision of the mediator.

Q(ii) Do you agree that this task should be conferred to the Committees of Supervisors in the Decisions establishing them?

No. As essentially voluntary mechanisms which Level 3 Committees have already established, there is no pressing need to refer to mediation in the Commission Decisions. Moreover, as there is no impediment to mediation mechanisms being set up or consulted, their existence and use does not require quasi-legislative status or

support. Any reference that is included, as suggested in the May 2008 ECOFIN Conclusions, needs to be entirely neutral, merely referring to mediation as a task that Level 3 Committees are able to perform at their discretion (although it would be entirely appropriate, if the parties decided to do so, to work through an alternative mediator, for example, if they considered that in order to find a workable outcome independent mediation was necessary).

It is also important to bear in mind that the CRD and Solvency 2 proposals may not be finalised in the manner that EC currently envisages. For example, the industry does not see that a college of regulators structure that includes third country supervisors (which will need to exist in order to deliver a meaningful supervisory arrangement) can or should be bound by any need to refer its decisions for mediation to an EU regional body.

Section 3.2 Consultative role

Q(iii) Do you agree that the Committees of Supervisors should have an explicit consultative role with respect to certain decisions to be taken by supervisory authorities?

A reference in the Commission Decisions is not needed where the consultative role is enshrined in EU legislation, nor is such a task foreseen by the May 2008 ECOFIN Conclusions. Commission Decisions should not confer consultative roles over and above what is in legislation: all other aspects of Level 3 Committee's consultative role should be left to the discretion of the Committees themselves. It makes no more sense to have a presumption that there should be a consultative role than that there should not. Any reference that is included in the Decisions should therefore be entirely neutral, merely referring to the fact that the Committee is able to perform the consultative function set out in legislation.

Section 3.3. Information exchange

Q(iv) Do you agree with the proposed role of the three Committees of Supervisors with regard to information exchange?

DG Markt says that "the Committees of Supervisors should be mandated in Commission Decisions to establish mechanisms to ensure effective information exchange between supervisory authorities". Such a mandate is not consistent with the May 2008 ECOFIN Conclusions, which refer to "facilitating adequate information exchange" as a possible task for the Committees. Also, given that this task is likely to be reinforced in CRD amendments, Level 3 Committees do not need to be mandated in the Decisions as DG Markt suggests. As in 3.1. and 3.2. above, the Decisions should at most merely refer to facilitation of exchange of information as one of the tasks that the Committees are able to perform. Furthermore, only information which is necessary should be subject to exchange and in all cases data protection rights must be respected.

DG Markt says that more standardised reporting requirements (cf section 3.5) could make it easier for supervisors to share information. We agree, and strongly support the need to work towards coordinating reporting requirements. When the Level 3 Committees tackle this task, though, it is important to apply cost-benefit disciplines

and to consider, for example, that firms could incur significant system costs to update their reporting systems to bring them into line with standardised formats.

Section 3.4 Delegation of tasks and responsibilities

Q(v) Do you agree that the Committees of Supervisors should as a priority have a role to foster delegation of tasks between national supervisors?

No, such a priority should not be specified in the Commission Decision. Delegation of tasks is an important tool to streamline the supervision of groups and avoid duplication, and for building trust among supervisors who retain responsibility for the tasks delegated. However, it is only one way among several in which supervisory convergence, supervisory efficiency, and consistency of implementation can be achieved. Delegation of tasks should be considered as a possible means to an efficient outcome, not as an end in itself. Whether delegation of tasks is appropriate will depend on the task and the circumstances of the case. Further analysis is needed, which the Committees themselves should perform, before it could be appropriate to specify that, in any case, delegation of tasks should be 'fostered' 'as a priority'. The Committees should be allowed to perform this analysis without the constraint of a 'mandate' from the Commission, and delegation of tasks should certainly not be given a general 'priority' as DG Markt proposes. Delegation of tasks is not mentioned in the May 2008 ECOFIN Conclusions as a possible task for the Level 3 Committees, and the very most that would be appropriate would be simply a reference to fostering delegation, where appropriate, as one of the tasks that the Committees may perform.

Q (vi) Do you consider that delegation of responsibilities should also be regarded as a priority? If so, what could be the role of the Committee of Supervisors in this respect?

No. DG Markt acknowledges that delegation of responsibilities raises delicate legal issues, in particular because it may interfere with the allocation of responsibilities in directives. The inclusion of delegation of responsibilities 'as a priority' in the Decisions would not help to resolve those issues, and might well make them more intractable by inhibiting the delegation of tasks and sharing of responsibilities where Level 3 Committees and their members are able to agree to do so. Furthermore, there is a limit to how far a 'responsibility' can truly be delegated. Carrying out a function or task that derives from any given responsibility can be delegated, but if something goes wrong because a responsibility has been 'delegated', the problem will still be more the responsibility of the delegating supervisor than of the 'delegatee'. The Commission should not seek to use the Committee Decisions to try to step around issues that should properly be dealt with in the context of national accountability and EU legislation.

Section 3.5 Streamlining reporting requirements

Q(vii) Do you agree with the proposed role of the three Committees of Supervisors with regard to streamlining of reporting requirements?

DG Markt says that it thinks that the Committees' "responsibility to introduce more homogeneity in reporting requirements should be reflected in the amended

Commission Decisions". Given that ECOFIN Conclusions have specifically mandated the Committees to do this, it is questionable whether trying to use the Decisions to mandate 'intensified work' on it is necessary. While more consistent data gathering is an important objective which requires more political will, it is important to ensure that streamlining does actually facilitate the reporting task for international groups, and does not simply take the form of an aggregation of national reporting requirements, and also to take into account the costs that firms would incur as a result of the changes to formats and data sets. It is also necessary to recognise that different Member States are likely to guard their own views of what extra information is essential. Given these factors, the Decisions should merely refer to the Committees' task to facilitate the streamlining of reporting requirements, as in the May 2008 ECOFIN Conclusions.

Section 3.6 Colleges of supervisors

Q(viii) Do you agree with the proposed role of the three Committees of Supervisors with regard to colleges or similar arrangements?

As some of the Associations explained in our response to DG Markt's consultation on the CRD revision, it is essential to keep distinct three different concepts:

- (a) Colleges of supervisors: the forum, including third country supervisors as well as EU supervisors of a global group, in which day to day supervision of the group is coordinated, and information exchanged;
- (b) Consolidating supervisor: The Supervisor who, as set out in EU legislation, performs certain tasks in relation to the EU sub-group;
- (c) Financial stability groups: the forum, including finance ministries and central banks as well as supervisors, in which financial stability and crisis management issues are coordinated.

The May 2008 ECOFIN have already mandated the Committees to undertake a number of tasks which DG Markt identifies as crucial: set operational guidelines for colleges, monitor the coherence of colleges, and share best practice. We agree with the proposed role of the Level 3 Committees in relation to colleges, though we question DG Markt's view that "it is essential to explicitly mandate the Committees of Supervisors in order to ensure effective and efficient functioning of the colleges in practice". It appears likely that colleges will be referred to in legislation. They will certainly form a core part of the continuing prudential supervision of cross-border groups.

At the same time, they will need to accommodate their structure and mode of operation to third country supervisors of group members (an element which needs to be reflected in any CRD revisions). Where there is third country participation, there is no question that an EU mandate can force on them the kinds of decision-making protocols that DG Markt suggests. Given the greater formality of the contexts in which colleges are being established, it is essential that the Committees themselves, and the members of the colleges (including third country members) retain operational flexibility within the colleges themselves.

Given the range of interlocking contexts, there is no need for an 'explicit mandate' from the Commission through the Decisions, and such an 'explicit mandate' must not constrain college members' operational independence. Colleges are only obliquely referred to in the May 2008 ECOFIN Conclusions' list of possible tasks for Level 3 Committees, but other parts of the ECOFIN Conclusions, as well as DG Markt's draft CRD amendments, refer to a range of college-related tasks specifically. It is therefore not necessary, and not appropriate, for the Decisions to be used to 'mandate' the effective and efficient functioning of the colleges in practice. The most that is appropriate would be a neutral reference in the Decisions to the promotion of the efficient and effective functioning of colleges, in cooperation with third country regulators, as being one of the roles that the Committees perform.

Section 3.7 Development of a common supervisory culture

Q(ix) Do you agree with the proposed role of the three Committees of Supervisors to develop a common European culture. If yes, what are the most important tools to meet this objective?

We agree that the development of a common supervisory culture through the building of understanding and trust between national authorities, both within and outside the EU, is an important and central role of the Level 3 Committees, which they have been developing effectively for several years at all levels of seniority. It is however a role that is best left to the national authorities themselves to determine how to fulfil, working through the Committees, as they have been doing up to now. It is not necessary for the Commission to mandate this function in the Decisions, and any reference to it should be neutral and not mandatory, as suggested in the list of possible tasks for Level 3 Committees in the May 2008 ECOFIN Conclusions.

Section 3.8 Cross-sectoral cooperation

DG Markt's approach (on this point and on others covered by the consultation) should follow the principles that it enunciates in this section: "The wording should remain fairly general as to allow the Committees of Supervisors to organise efficient cooperation in an independent way"; "The proliferation of committees should be avoided and the existing structures should be used to the full".

Q(x) Do you agree with the need to provide a general framework for joint 3L3 work in the Commission Decisions establishing the Committees of Supervisors?

No. This is a matter that is being worked out effectively by the Committees themselves, no doubt partly because many EU countries already have cross-sectoral regulatory authorities. Spelling it out in the Decisions might disrupt the current effective arrangements, and amount to quasi-legislation in a virgin territory. The sectoral supervisors know that they have to cooperate, and they have the means to do so. But not enough is known about the necessary interactions between the supervisors of the different sectors to warrant or justify dealing with this through the Decisions establishing the Committees. The Level 3 Committees should develop their thinking on how to do so without being constrained by the Decisions. The most that should be included is a neutral reference along the lines of the possible

task "to ensure efficient cooperation across financial sectors" mentioned in the May 2008 ECOFIN Conclusions.

Q(xi) Should the obligation and responsibility for 3L3 cooperation and coordination be spelled out in a more detailed way? If so, what are the specific obligations and responsibilities the Committees of Supervisors should be assigned in this respect?

No, for the reasons given in response to Q(x). As DG Markt acknowledges, the Committees should be enabled to organise efficient cooperation in an independent way. It should therefore not be spelled out in the Decisions in a more detailed way, and any references should be kept general and neutral.

Q(xii) Do you agree with the approach suggested for the supervision of financial conglomerates

DG Markt suggests the establishment, impliedly by the modification of the Level 3 Committee Decisions, "with an obligation for them strictly to cooperate", of a Joint Working Committee on Financial Conglomerates. It is not clear from DG Markt's consultation paper how it envisages the proposed JWCF as differing from the existing Interim Working Committee on Financial Conglomerates operated by CEBS and CEIOPS, nor what role, if any, is envisaged in it for CESR. Level 3 work on conglomerates becomes more important in the context of convergence of rules relating to group supervision and the definition of capital. We therefore suggest that DG Markt should consult further on the basis of more detailed information about what it envisages, but also bearing in mind that the May 2008 ECOFIN Conclusions refer only to a possible task of "ensuring efficient cooperation across financial sectors": no more detail than this is necessary or appropriate in the Decisions establishing the Committees.

Section 3.9 Qualified Majority Voting

Q(xiii) Do you consider that the Committees of Supervisors should be requested in the Decisions to take decisions by qualified majority, with a "comply or explain" procedure?

No. The possibility for Level 3 Committees to apply QMV where necessary, with public explanation by those supervisors which do not follow the majority approach, is an important means by which Level 3 Committees may be able to improve decision-making and supervisory transparency where there is no consensus, recognising that different supervisory approaches may be equally valid. But we do not consider that the use of QMV with "comply or explain" should be specified in the Commission Decisions. As DG Markt states, the Committees are currently, in accordance with the ECOFIN Conclusions and road map, introducing into their charters the possibility to take decisions by QMV, with a comply or explain mechanism. This process does not amount, as DG Markt implies, to a 'requirement' to take decisions by QMV, which DG Markt suggests should be 'enshrined' in the Decisions 'to give more weight to the new procedure and avoid any roll-back'. The quasi-legislative function that would be implied by any requirement to use QMV at Level 3 would not meet better regulation standards, would be contrary to the May 2008 Conclusions, could be highly damaging to the promotion of committed supervisory cooperation and convergence, and should be avoided. There is no

failure which would justify such a prescriptive intervention, and other approaches to decision making could be equally effective, depending on the circumstances. It should be left to the Committees themselves to decide in what circumstances to use QMV, and how to deploy the comply or explain mechanism. The Committees should therefore not “be requested in the Decisions to take decisions by qualified majority, with a comply or explain mechanism”.

Section 3.10 Annual Work-programmes of the Committees of Supervisors

Q(xiv) Do you consider that the request of the Committees of Supervisors to submit their annual work-programmes to the ECOFIN Council, the European Parliament and the Commission should be included in the Decisions?

No. DG Markt's analysis (“this would allow the Institutions to give political guidance as to how supervisory cooperation and convergence should be achieved”; “This will also enhance the accountability of the Committees at the EU level”) implies a level of political accountability of Level 3 Committees to EU institutions which was not mandated by the May 2008 ECOFIN Conclusions, and which would interfere with their operational independence. It is of course entirely appropriate for Level 3 Committees to be transparent and open about their plans, as they are, and for the EU institutions to be able to comment on those plans. But the Commission should not attempt to make them more politically accountable to EU institutions. The ECOFIN request to the Committees to provide their annual work programmes to the institutions should therefore not be included in the Decisions.

Section 4 Financial Stability

We agree with the Commission's statement that: “close cooperation at the international level (e.g. with the IMF, the FSF, and US authorities) will be essential to ensure an effective and coherent global approach”. But close specification of roles and responsibilities at EU level through the Decisions establishing the Level 3 Committees would inhibit and constrain close cooperation at international level. These issues touch on much broader questions about the response to the financial turmoil which should not be dealt with through a DG Markt consultation on changes to the Decisions establishing the Committees.

Q(xv) Do you agree with the proposed role of the three Committees of Supervisors?

Any Level 3 Committee role in this field should merely be referred to in the Decisions (in a separate section from those relating to normal supervision), and not mandated. If, in the light of current reviews, the role needs to be mandated, that mandation should be effected through a different and more appropriate instrument from the Decisions to establish the Committees.

Q(xvi) Are additional efforts needed to strengthen risk analysis and responsiveness at the EU level? If so, please specify these efforts.

No. The Decisions establishing the Committees should not be used to “strengthen risk analysis and responsiveness at EU level”. If the finance ministers need regular updates from the Level 3 Committees, they are capable of asking for them

themselves. The Decisions should not be used to try to establish a methodology to map and classify risks and policy action. This is a matter which is continually developing at global level, and is not something that can possibly be picked up in the revision of a Commission Decision establishing EU Level 3 supervisory committees.