

The Shared Executive in the European Union: Transgovernmental Regulatory Networks and the Puzzle of Delegation

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1. Introduction

Transgovernmental regulatory networks within the European Union are the latest innovation in European governance. Their emergence is considered a functional response to the need of the European Commission for an administrative apparatus that implements community law within the member states. With the rise of transgovernmental regulatory networks within the European Union, the complexity of political and administrative relationships has increased as well. Are the newly emerging networks becoming part of some sort of newly emerging EC administration (Wilks 2005; McGowan 2005), are these networks starting to form autonomous entities by themselves with capacities for self-regulation by deliberation and peer review (Sabel & Zeitlin 2010), or do the regulatory authorities that form these networks stay part of their national administration but with changing role perceptions and corporate identities (Egeberg 2006)?

On one point do most students of regulatory networks agree, and that is that the new edifices are increasingly complex from the perspective of delegation. In the classical situation, delegation concerns the transfer of formal powers and discretionary authority by a political principal, i.e. a minister, to a chosen agent, i.e. a bureaucratic agency. The chain of delegation is singular as it involves only one principal and one agent (Strøm 2000). With the rise of transgovernmental regulatory networks, delegation involves multiple principals and agents, which requires, it seems, a new language containing concepts such as “double-hattedness”, “dual delegation” or “double delegation” (Egeberg 2006; Coen & Thatcher 2008; Eberlein & Newman 2008).

This paper aims to shed light on the complicated delegation relationships that has emerged in the slipstream of European transgovernmental regulatory networks. This study will built on the works that have already been done on this issue, but also differ in two respects. First, in contrast to most studies on the nature of delegation in the EU’s transgovernmental setting, this paper will focus on a single network (i.e. Committee of European Securities Regulators – CESR) instead of undertaking a comparative analysis with the purpose of making an in-depth analysis of a single case of delegation. To this end, this paper admittedly sacrifices a degree of generalizability (cf. Visscher et al 2008). Second, this paper examines the outputs of the selected network during the period of its existence. We present the documents the network has produced, the internal structure, decision procedures and the functioning of the network with the goal of analysing the actual use of the various competences that have been delegated to the network and the individual regulators that are

members of it. To this end, then, we collected a database with over 400 documents including the policy advices the CESR network has provided to the European Commission and the guidelines and standards that the securities regulator network has produced for harmonizing the EU internal market for securities.

Outline of this paper is as follows. Section two briefly discusses the literature on transgovernmental regulatory networks in the EU and the views on the issue of delegation. Section three describes the data collection and methodology. Section four then analyses the formal structures of delegation within the CESR and, more broadly, the Lamfalussy system, with the purpose of unravelling the intricate delegation relationships at the level of a network. Section five then presents our findings from the dataset we built; the main goal of this section is examine how CESR has actually used its competencies in practices. The paper ends with a conclusion.

2. European Transgovernmental Regulatory Networks and the Problem of Delegation

The perennial question that students of delegation address is undoubtedly “Who controls?”. Delegation is a necessary act but what constitutes optimal delegation is still a question mark. Within the context of European governance the delegation problem has taken on degrees of complexity that were non-existent in traditional studies of delegation. Initially, the delegation problem within the context of the EU system was primarily concerned with the position and functioning of the European Commission (Pollack 2003). With the advent of “new modes of governance”, relationships between political and administrative actors have grown even more complex. Especially the rise of European transgovernmental regulatory networks has shaped the administrative landscape between ‘Brussels’ and Member States in such byzantine ways that the characterization of these relatively new network have become challenging from the perspective of delegation and public accountability.

The difficulty in assessing the proper delegation relationships stems from the fact, at one level, that the ERNs is a network that consists of (twenty-seven) individual national regulatory authorities and that is coordinated by some small center, i.e. a secretariat. This organization structure is one reason why it is difficult to assess the position of transgovernmental regulatory networks from a delegation perspective as the question that immediately emerges is which part of the networked body should be considered the main actor and, related to this, how well coordinated or integrated the constituent parts actually behave. On another level, difficulties arise with regard to the characterization of the

relationships and interactions that these networks maintain with a manifold of stakeholders, most notably the European Commission, comitology committees (if relevant), and the national ministries under whose jurisdiction national regulatory authorities reside. The result is a multiplex of interrelationships: complicated formal relationships between the central governments and national regulatory authorities; the European Commission and the NRAs; and between the network bodies and the EC, national governments, and NRAs. This complex of relationships has led to the following observations by students of transgovernmental regulatory networks.

According to Coen & Thatcher (2008) characterize the creation of European regulatory networks as the outcome of “double delegations”: one act of delegation runs from national regulatory authorities “upwards” while another runs “downwards” from the European Commission to the European transgovernmental regulatory networks. The autonomy of the networks is weak as in the view of these authors the networks are seriously constrained by the formal powers and resources of NRAs and the Commission. Add to this the facts that the European Commission and the national regulatory authorities are themselves products of complex delegation outcomes. What is important here is that according to Coen and Thatcher European transgovernmental regulatory networks are co-product of national regulatory authorities and the European Commission.

Eberlein & Newman (2008) employ the term “dual delegation” to describe the foundations of European transgovernmental networks. With dual delegation these authors mean the delegation of powers to agents at international and subnational levels. In this view, national states have increasingly ceded parts of their sovereignty by delegated policymaking authority to international organisations and powers of policymaking including the making of binding rules to bodies at subnational level such as regulatory and service delivery agencies. The formation of transgovernmental regulatory networks is the resultant of a “governance dilemma”: international organisations lack the administrative capacities to implement their policies at the national level. They make up for this lack by activating the autonomous national level agencies that enjoy the authority to engage in cooperative arrangement with international bodies as well as their counterparts in other national states. By joining transgovernmental networks these subnational bodies they become enabled to engage in cross-border enforcement operations. The basis of authority of these networks lies with the constituent national regulatory authorities that can bring formal authority that they have been granted by their national governments to the networks.

When qualifying a complex set of formal relationships as either “dual” or “double” delegation runs the risk of overlooking the specific procedures and structures within the networks that are crucial for understanding the politics of delegation related to the transgovernmental regulatory networks. Visscher et al’s (2008) analysis of the Committee of European Securities Regulators (CESR) within the four-level Lamfalussy model proves this. Visscher et al (2008) have examined whether the relationship between CESR and EC should be qualified as an agency relationship or as a trustee relationship? They conclude that although the European Commission delegates advisory authority to CESR and may therefore be considered to maintain a principal-agent to CESR at level two of the Lamfalussy model, the EC can not be considered its textbook principal as the EC lacks sanctioning and monitoring powers. Also, the EC may reject or replace CESR’s advice but the EC cannot cut down CESR’s budget or appoint/dismiss its personnel. With regard to the third level of Lamfalussy, Visscher et al assert that the agency model does not cover CESR’s role, because CESR should be considered the trustee that acts in the interests of the (national) market participants that are not formally represented in the EU policymaking process.

Visscher et al hence show that delegation relationships concerning European transgovernmental regulatory networks cannot easily be reduced to one type of delegation only. In contrast to Visscher et al, the first two studies have looked at various networks at the same time and came up with generic qualifications for each network. These studies have also looked at the main formal documents and have not traced the main structures and procedures by which the main decisions are taken and that position the various actors within the decision-making process. Moreover, apart from formal documents, none of these studies had command over data that precisely map the workings of the networks of their study. Their conclusions are either based on the analysis of formal rules of procedure or formal delegations. Empirical observations are limited to case-wise observations of single anecdotic remarks. In the case of Visscher et al, they present findings from interviews with key actors involved in the Lamfalussy reforms and the functioning of the Lamfalussy process.

In this paper we will examine the patterns of delegation that shape the relationships between a regulatory network and its constituent national regulators, on the one hand, and the network as such and the supranational stakeholders. Like Visscher et al we focus on the Lamfalussy system and the role of CESR. We differ in respects from this study however. First, we come to somewhat different conclusions as we focus also on the delegation relationships *within* the network of CESR, i.e. between the Committee and the member regulators. We also find little evidence for the trustee relationship of CESR at level three;

rather, CESR operates *de facto* as an autonomous agency that has the authority to instigate (non-binding) rulemaking procedures without a mandate from the Commission. This is corroborated by the data we present on the output, structure and functioning of the CESR. We find, in particular, that CESR enjoys a relatively high degree of autonomy at level three to address short-term, sudden, and/or relatively well-contained events as is demonstrated by a variety of short-lived working groups that CESR has established for such purpose.

3. Data and Methodology

The research goals of this paper are twofold:

1. A mapping of the chains of delegation that are present in the European transgovernmental regulatory network of securities regulation;
2. A mapping of the published outputs of the CESR at the various levels of EU securities regulation.
3. An assessment to what extent the *de facto* activities of the network correspond to the *de jure* organization of EU securities regulation

Data collection for the first two research goals concerned, respectively:

1. formal documents such as Community law (including Commission decisions), founding texts concerning CESR, and protocols and charters
2. published documents of CESR for level two and three work of CESR. The following criteria have been applied for data collection
 - all documents that CESR (or its working groups) have produced for level 2 and level 3 purposes. The most important types of documents in the dataset are ‘technical advices’, ‘guidelines’, ‘recommendations’, ‘standards’, ‘consultation papers’, ‘calls for evidence’, and ‘feedback statements’. Not included are responses from market participants to consultation procedures, documents with constitutive contents (e.g. on working procedures of CESR)
 - documents published between 1 January 2002 and 31 December 2009.

The data were taken from a single source: the CESR website. It was checked by us with the CESR secretariat that all documents CESR produced were published on the website. We coded all documents that conformed to our criteria under the following links (CESR to EU institutions; Standards etc; and via the standing committees and working groups links). For each document the following observations were coded:

- type of document
- lamfalussy level
- date of publication
- reference code
- title
- issue area

In addition, we also used the annual reports of CESR – that are also available from the website of CESR – to map the working groups and their main activities. Next to the mappings of the formal decision procedures and delegation relationships and the de facto activism of CESR with regards to its delegated advisory and rulemaking powers, we were also interested in the de facto structure and functioning of CESR itself. We hence coded also under the heading of ‘actors’ the expert and operational (sub)groups, both the permanent and temporary ones. For each actor we coded

- years in which actor is established and has been active
- issue for which body is established
- the Lamfalussy level at which they were active
- chairperson
- institution and country of the chairperson
- number and type of documents the body has produced on an annual basis
- the members of consultative working groups that were established to advise the CESR groups

4. Delegation in the Context of European Securities Markets Regulation: De Jure Analysis

4.1 The Lamfalussy System

Since 2001, securities regulation is embedded within the so-called Lamfalussy process. The Lamfalussy process (or system) is proposed by the Committee of Wise Men (chaired by Baron Lamfalussy) with the goal of simplifying and fastening the legislative process for Community in the area of financial markets. The tradition process of Community legislation, it was stated, was too slow for the rapid changes that occurred in the field of financial markets. Also Community laws were often too technical and specific for an area that

witnessed rapid changes and that required more flexible laws with framework principles. To improve Community legislation, the Committee of Wise Men proposed a four level system. The Lamfalussy system looks briefly as follows:

Level 1: the drafting and production of Community law that only contain framework principles drafted by the European Institutions according to established legislative procedures

Level 2: the drafting of implementing measures to finetune level 1 framework legislation to actual developments within the area of financial markets. The EC is assisted by two newly created bodies: the comitology committee European Securities Committee (ESC) and CESR, the network of national financial market regulators of the Member States.

Level 3: a framework for strengthened cooperation between the national regulators in the coordination and enforcement of Community law in Member States. CESR's main goals are the formulation of guidelines and standards to be implemented by the national regulators and the development of a monitoring system to supervise the harmonization process.

Level 4: the enforcement of Community law within the Member States with the EC acting as the guardian of Community law.

The problems of delegation we are interested here are located at levels two and three. It is to these levels that we will turn our attention now.

4.2 Chains of delegation

4.2.1 At Level 2

The process of delegation at level 2 involves the delegation of advisory competences by the European Commission (EC) after consultation of the European Securities Committee (ESC) to the Committee of European Securities Regulators (CESR). Figure x shows the chain of delegation. The European Commission sets in motion the drafting of a directive or a regulation at Level 2 with the drafting of a mandate to CESR. For the mandate, the EC first consults with the ESC and informs European Parliament's Economic and Monetary Affairs

Committee (EMAC) about the mandate.¹ Then the (provisional) mandate is opened up for comments and notices from market and other interested parties. CESR invites market and other actors to give their comments on the mandate in order to be informed about the views and expectations of interested parties about the coming consultation paper and eventually CESR's technical advice. The actual writing of the technical advice is delegated to an expert group within CESR. On the basis of Article 5.X of the CESR Charter, CESR may establish expert and other type of groups for preparing work at Level 2 and Level 3. On the basis of this delegation, CESR delivers a non-binding technical advice to the Commission for adopting implementing measures for a Level 1 directive. The expert groups are chaired by and consist of representatives of the national regulatory authorities that are members of CESR. The expert group is assisted by a consultative working group, that is established in line with Article 5 of the CESR Charter and that consists of representatives of market parties and other interested parties, i.e. industry, consultants, and academic experts. Further, the expert group is encouraged to hold public hearings, either on location or through Internet, virtually for each (interim) report that is drafted along the process, in order to ensure as much transparency and openness as possible during the level 2 process. The process from the mandate to the draft of a final technical advice consumes about twelve months (IIMG 1st, 2nd reports).

How should we classify this delegation? Considering the role of the EC within the Lamfalussy process, in particular at level 2, Visscher et al classify the delegation process at level 2 in the first place as "dual agency", by which they mean a situation of multiple principals-single agent, whereby the Council and European Parliament act as the principals of their agent the European Commission to whom EP and Council delegate powers to draft implementing measures, which may take the form of either a regulation or a directive, at level 2. Then, the Commission is considered the principal vis-à-vis two agents: the ESC and CESR. Both ESC and CESR are established by a Commission decision. According to Visscher et al, these acts of delegation from the Commission to ESC and CESR deems ESC and CESR as the agents of an "intermediate agent", i.e. the EC, which in effect deems ESC and CESR as "sub-agents" of Council and EP. However, by qualifying ESC as an agent of the EC Visscher et al overlook an important task of the ESC at level 2. Upon the ESC, which is established as a comitology committee, is conferred advisory powers with which the ESC can assist the EC with providing policy advice for issues at but not only level 1. At the same time, however,

¹ Given the time constraints, Level 2 procedures start parallel to the work at Level 1 on framework legislation. The mandate to CESR is in practice a provisional mandate that is formalized after the implementing measures at level 2 are

ESC is also endowed with the powers of a “regulatory committee” in concordance with Council Decision 1999/468/EC that classifies the various implementing powers the Commission may confer upon comitology committees. In its capacity of regulatory committee (cf. Article 5, Council Decision 1999/468/EC), the ESC is entitled to vote on any draft measure that the Commission submits to it. The measures of the EC are adopted when the ESC approves of them by qualified majority. If a qualified majority <ontbreekt> then the Commission must refer the measures to the Council. So, different to the assessment of Visscher et al (2008) of ESC as a mere agent of the EC, we may argue that ESC, in its capacity of regulatory committee that has to approve the mandate of CESR, is actually, at least, more of a principal to CESR next to the EC than an subservient agent to the EC. Without the formal approval of the ESC, the EC may not delegate advisory competences upon the CESR.

During the second step of delegation, CESR delegates the task of preparing the technical advice to an expert group. The Committee consists of senior representatives, one for each of the competent authorities in the securities field within the Member States of the EU (Art.1 Charter). The chair of CESR is elected from among the members of the Committee for a period of two years (Art. 2 Charter). The chair acts as the head (secretary general) of the secretariat of CESR that consists of four policy units that are headed by a director and a staff support unit for IT and administrative issues (organization chart on CESR website). In a sense, CESR can *de facto* be regarded as a network agency in the field of securities markets regulation that coordinates the work of the Member States’ national regulatory authorities (Lavrijssen & Hancher 2010). For fulfilling its main tasks – advise to the EC and the coordination of the supervision and enforcement of securities legislation in the EU – CESR may establish expert groups that are chaired by a member of the Committee or another high level representative of one of the competent regulatory authorities. The expert groups are established on the basis of a mandate and general terms of reference. The expert group is disbanded upon completion of the mandated work (Art. 5.3 Charter). Finally, the decisions of the Committee are non-binding and are decided either by consensus or a qualified majority (Art. 6 and subparagraphs of the Charter). The draft implementing measures that are submitted to the EC are subject to qualified majority – provided that consensus can not be reached. Dissenting opinions are identified and elaborated if there is need for.

This brings us to the following two observations as regards the delegation of advisory authority to CESR at level 2. First, ESC is a comitology committee that is composed of high-level bureaucratic representatives of national ministries responsible for securities markets – an

aggregate actor of national finance bureaucracies. CESR is an aggregate actor, too, but one of national independent competent authorities with regulatory powers in the field of securities markets. At the first chain of level 2 delegation, then, what happens is that the EC, whose preference we may assume to be that of further integration of the financial services markets within the EU, proposes to the ESC, that acts in its capacity as a regulatory committee and whose preferences we may assume to be a function of the individual preferences of the Member State central governmental executives for financial markets regulation, a draft mandate to be lend to CESR for drafting a technical advice on implementing measures to the EC. This implies that the mandate of the EC to the aggregate body of national competent regulatory authorities CESR is filtered by the preferences of the Member State central governmental executives. This resembles the re-creation of ‘ministry-agency’ relationship at the supranational level. Second, internally, the members of the Committee delegate by consensus mandates to the expert groups that are tasked with the preparation of the technical advices. The appointment of the chair and members of the expert groups is not explicitly regulated by the Charter. In order to assist the expert (or other) groups, the Committee also decides on the establishment of the consultative working groups. The adoption of the technical advice on the implementing measures is subject to the decision procedures of the Committee: by consensus or qualified majority. When decision-making by CESR on the final technical advice is juxtaposed to decision-making by ESC on the implementing measures proposed by the EC – provided that the EC has followed CESR’s advice as full as possible – we find that the Lamfalussy-process entails a weighing of the aggregate and negotiated preferences of central governmental executive represented by ESC against the aggregated and negotiated preferences of the Member States’ national regulatory authorities.

ESC has a substantial say on the mandate of the CESR and therewith on the substance of the final advice that CESR submits to the EC. When deciding on the draft implementing regulation or directive that the EC will submit to ESC under the regulatory procedure, the EC is dependent upon the policy position that is conveyed within CESR’s final advice. The mandate, however, is not the only monitoring device to which CESR and eventually the EC is subject. The contents of the technical advice and therewith the draft implementing measures proposed by the EC are further subject to elaborate consultation process, i.e. the EU equivalent of the US notice and comment procedure. CESR and its expert groups are subject to consultation procedures that it has adopted in CESR’s “Public Statement of Consultation Practices”, which is itself adopted after a consultation process. The consultation process starts with the mandate of CESR, that after approval by ESC is put forward for consultation by

interested parties. The EP's Economic and Monetary Affairs Committee is informed as well. The public statement on consultation practices states that CESR will target the full range of interested parties; publish the mandates and its consultation papers as widely as possible; produce intermediary reports and papers, as well as facts and figures relevant for the consultation process; and provide reasoned responses and explanation on all questions and comments that it receives from interested parties on all of its published documents.

4.2.3 At Level 3

In comparison to level 2, (the chain of) delegation and/or allocation of powers is less structured at level 3. Visscher et al (2008) find that it is much more difficult to pin down the role of the CESR at level 3. Having found the agency-hypothesis adequate for the way delegation has occurred at level 2 – but see our different assessment above – neither the agency nor the alternative trustee-hypothesis is found to be adequately covering the role and functions of CESR at level 3. In this section, we will reconstruct like we did above the chain of delegation at level 3 from an inductive perspective. In general, the tasks of CESR as they are envisioned by the Council in its Stockholm Resolution of 23 March 2001, the Commission Decision of 6 June 2001 establishing CESR (2001/527/EC), and the CESR Charter (especially, Articles 4.3 and 4.4) are to foster and review common day to day implementation of Community legislation in the fields of securities by, on the one hand, issuing guidelines, interpretation recommendations, standards, and other hand by establishing operational networks to enhance consistent supervision and enforcement of securities legislation across the member states. However, as much less had been regulated from the start – CESR's role was to take over that of its predecessor FESCO – the role and functioning of CESR at level 3 had taken shape in practice. Also, level 3 work could only take a start after the first directives that were developed under the Lamfalussy procedure had gone through the level 1 and level 2 phases. In its own terms, CESR's role at level 3 is to (1) coordinate implementation of EU law, (2) regulatory convergence, and (3) supervisory convergence (CESR 2004, p. 2). As to the first goal, CESR is invited to “produce consistent guidelines for the administrative regulations to be adopted on the national level” and to “issue joint interpretative recommendations and set common standards regarding matters not covered by EU legislation” but which could be later adopted into law at level 2. With regard to the second and third goals, CESR is invited by the Lamfalussy Report to set up a system which enables CESR to “compare and review regulatory practices to ensure effective enforcement”

throughout the EU and to define best practices, and to “periodically conduct peer reviews of administrative regulation and regulatory practices in Member States”, respectively (CESR 2004, p. 3).

As regards the issuing of guidelines, recommendations or standards, no formally specified as the one that exists for level 2 implementation measures does exist. CESR takes upon its own initiative once level 2 implementing measures have been enacted and there is a need for specifying key concepts and other open norms within the implementing measures. There are however, overeenkomsten: CESR members within the Committee issue a mandate that serves as the framework for the work of a level 3 expert group that is established (according to Article 5.3 Charter). The level 3 expert group then applies the same principles as regards transparency and openness that are laid down in the Public Statement on Consultation Processes: the expert group ensures that its (interim) papers are published as widely as possible and arranges the influx of comments and views of as large as possible a target group. Level 3 expert groups may also be accompanied by consultative working groups consisting of representatives of market parties. Depending on the (number of dimensions of the) issue, the expert may establish subgroups to address specific issues that rise during the process or that are known on beforehand. The expert (sub)groups are chaired by senior officials of the member competent authorities. At level 3, we can say that CESR acts autonomous from the Commission, ESC and the Member States. It has far-reaching discretion in decisions regarding when to establish an expert group, its precise mandate, and the final decision about the level 3 work. However, like expert groups on level 2, level 3 experts groups and hence CESR decision-making as regards common interpretations of Community law are subjected to notice and comment procedure through extensive use of consultation.

To give an example: The Expert Group on Investment Management was established in December 2003 as a Level 3 group. At a CESR meeting in June 2004 it received a mandate from the Committee (CESR 04-160) to work on the two central groups of issues relating to the harmonised implementation of the UCITS Directives: the application of the transitional provisions of the amending Directives and the clarification of some central definitions in the Directives. Following the issuing of the mandate a Call for Evidence was issued by CESR on 9 June 2004 (CESR/04-267b) with which CESR invited market parties to give their views about what CESR should consider in its future work concerning investment management (CESR 2006, p. 5). In October 2005, the Expert Group published its first consultation paper; a second consultation paper followed in May 2006. Two public hearings were conducted during the first half of 2006 and more than 50 responses were received. Having taken the responses

into account, CESR adopted the guidelines proposed by the Expert Group in June 2006. A Feedback Statement was published at almost the same moment in which CESR explains how it had dealt with the various responses it had received during the consultation process.

For regulatory and supervisory convergence, CESR has adopted two separate procedures. As for regulatory convergence, i.e. monitoring and supervision of regulatory practices in the Member States with the purposes of ensuring a common interpretation and approach to the implementation of the adopted guidelines, recommendations and standards across the Internal Market, CESR has established the Review Panel (Article 4.3, under b, CESR Charter). Its main functioning is described in the 2007 “Protocol on Review Panel of the Committee of European Securities Regulators” (CESR/07-070b). Its main task, according to the Charter is to “undertake reviews and mapping exercises of the regulatory and supervisory practices within the single market”. In the wording of the Protocol, the main task of the Review Panel is to “to monitor the consistent and timely implementation of supervisory provisions set out in Community Legislation and CESR measures with the purpose of fostering a common and uniform day to day application of all the above and of enhancing supervisory convergence within the European Economic Area” (Article 2, under 1 Protocol). Its main methods of review will be tools such as self-assessments, peer reviews, surveys and mappings. On the basis of a mandate of CESR, the Review Panel can perform selective reviews involving one or more CESR authorities. The Review Panel does not produce binding decisions, but it does report, among other things, to the Committee its findings regarding the extent to which national authorities apply provisions, signal inconsistencies and report on problems encountered and seen by CESR authorities. In a way, then, the Review Panel acts as a police patrol to the Committee. However, given the nature of the CESR membership – there is no hierarchical subordination between the CESR secretariat and the national regulatory authorities – the Review Panel cannot impose fines or sanctions upon CESR member authorities that do stray from the goal of uniform and common implementation of Community law within their country. Hence, the authority of the Review Panel must partly come from the seniority of its members and it is prescribed that the Review Panel chair must be a senior figure as well, i.e. one of the vice-chairs of CESR (Article 3 Protocol). Article 4 adds to this more stringently by prescribing CESR members to commit themselves to the procedures and goals of the Review Panel:

1. CESR authorities are required to participate in the work of the Review Panel and provide it with experts and the necessary information and input. It is the responsibility of each CESR authority to confirm the accuracy of the information provided.

...

4. If a CESR authority does not cooperate or does not meet the timeframes, the Chair of the Review panel will ask the Chair of the relevant CESR authority to explain the reasons of this non cooperation and will set a deadline for compliance. If said deadline expires, the exercise will continue without the input of this member and the outcome will be published and/ or communicated with a statement that the particular authority has been classified as “Not contributing”.

As can be seen from these provisions, the Protocol demands of CESR members to participate with full commitment to the work of the Review Panel, no cooperation being sanctioned with a reputational punishment (naming and shaming). Finally, Article 10 of the Protocol deals with decision-making concerning the reports of the Review Panel. One provision under Article 10 states that members may not block submission of Review Panel reports to the Committee; in the case where they disagree with the conclusions of the report they are only allowed to voice their dissenting views and these will be reflected in an annex to the decision. Another provision under the same article states that “[C]onclusions by the Review Panel at the different stages of the process of the exercise should be considered final and should not be questioned at a later stage”, hereby preventing the downgrading the negative conclusions a Review Panel report may convey about a member authority. In other words, despite the fact that no hierarchical relationship exists between CESR and its member authorities and that ‘hard’ sanctions are lacking, the CESR has to its avail soft sanctions that may nevertheless cause damages to the reputation of individual members. It is fair to conclude that insofar the norms within the Protocol are internalised by the member authorities and serve as effective yardsticks for controlling the behaviour of members in matters concerning regulatory convergence, the relationship between CESR and the member authorities may be represented as a principal-agency relationship. The Review Panel acts in this setting as the internal regulator of the regulators.

A final mechanism at level 3 aims the strengthening of the cooperation between member authorities regarding mutual assistance in surveillance of securities activities in the Member States. The agreements on and procedures for mutual are laid down in the “Multilateral Memorandum of Understanding on the Exchange of Information and Surveillance of Securities Activities” (CESR/05-335). The MMoU contains provisions for the exchange of information between different national regulatory authorities and regulates the

cooperation between them in cases of (cross-border) enforcements of Community law in the field of securities. CESR has established CESR-Pol as a permanent working group (Article 5.4 Charter) to oversee the implementation of the MMoU. CESR-Pol is subject to the “Terms of References on the Functioning of CESR-Pol” decided on 4 June 2002 (CESR/02-070b). In contrast to the Review Panel, CESR-Pol has no sanctioning powers and is mainly preoccupied by monitoring the MMoU and to report on potential improvements concerning practices of mutual understanding.

5. The Use of Delegated Powers of Advice and Rulemaking

5.1 Type of documents published between 2002 and 2010

Without distinguishing for Lamfalussy levels Table 1 provides the total number and types of documents that were published on the CESR website between 1 January 2002 and 31 December 2009 and that were collected on the basis of the criteria described above.

<Table 1 about here >

When coding the various documents, we have used the basic typology of the CESR (i.e. ‘technical advice’, ‘call for evidence’, etc.). However, in order to reduce the number of different labels, we present the various types of documents subdivided under five main aggregate labels that capture the general status of each type of document under the Lamfalussy process. First, we labelled ‘technical advices’, ‘guidelines’, ‘recommendations’, and ‘standards’ under the label of ‘final documents’, since these four types designate the end products of the levels two and three of the Lamfalussy process. Second, under the label of ‘process documents’ we gathered document types related to any of the (formal) phases of advisory or rulemaking processes under Lamfalussy; e.g. a ‘call for evidence’ is a document type that is issued by CESR for opening up a consultation procedure under either level two or three that leads to the publication of a technical advice or guideline, respectively. Third, a small number of documents had clear investigative functions but were not part of advisory (level two) or rulemaking (level 3) processes. ‘Response documents’ form a fourth category. These are documents that CESR has published in some direct response to questions emanating from market actors or from the EC on specific other documents published by CESR. The main function of the documents under this heading is clarification of CESR positions and

statements in the main documents. These documents, one should note, are considered as part of the soft law produced by CESR. ‘Press releases’, e.g. announcing the publication of a new CESR document, and ‘agendas’ (e.g. of scheduled hearings for consultation) are brought under the ‘Announcement documents’. Finally under the ‘other’ label we have coded such documents as cover letters, summaries of answers to questionnaires that CESR has collected from its members, guides to developers of databases on shares admitted to trading, timetables, and expert group working programmes.

Table 1 presents the total number of documents in our database with and without annexes to main documents (such as to ‘technical advices’ or ‘consultation documents’).² Given the relatively large number of annexes (thirty-six in the database) we see that their exclusion does mainly make a difference to share of consultation documents, which means that most annexes are part of a consultation document. Given this, we see that process documents (consultations, calls for evidence, feedback statements) make up for about one-third of all documents published by CESR, followed by announcements (press releases and agendas) that make up about one-quarter of all documents published by CESR between 2002 and 2010. The share of final documents is relatively modest when compared to the share of documents that serve as preparation and input to them. On the basis of the sheer number of documents that one finds under announcements and responses, the table reveals that CESR maintains a policy of openness and responsiveness in its dealings with market parties and other stakeholders. By also reporting the total number of pages per label, the table also displays the relative work effort of CESR for each area of work. The total number of pages produced shows that two-thirds (67%) of CESR’s resources is put into to fabrication of final documents; an elaborate preparatory phase where relatively lengthy process documents (including annexes) are produced is followed by the production of technical advices, standards, guidelines and recommendations. Measured in terms of page numbers and assuming that this is an adequate indicator work effort, final documents consume one-quarter of the CESR resources.

² Following our criterion to code documents with their own CESR reference code we felt obliged to enter each of the thirty-six annexes found that were given a reference code separately into the database. The nature of various annexes differed markedly from each other: next to single-page annexes containing single tables half the annexes had with more than ten pages, with the “Annex to Consultation on CESR’s draft advice on the second set of mandates from the European Commission on the Markets in Financial Instruments Directive (MiFID)” (CESR 04-717, 30 December 2004) having 108 pages. Nevertheless, although more documents are not independent as they are connected to a main document (e.g. a call for evidence to consultation documents to technical advices) annexes are still less independent. It must be the weight that CESR has given to the specific information that is contained within the annexes that these annexes are published independently from their main document. To do justice to both views, we present the share of the various types of documents therefore with and without annexes.

Next we will investigate the publication of documents over the years between 2002 and 2010. Chart 1 shows (annexes excluded) that the production of documents built up incrementally from the early years of CESR to steep in 2005. The production slowed down in the following year to build up again in 2007 and 2008. The number of publications steps again in 2009. To be sure, the chart is left censored in the sense that our data is limited to the work of CESR and therewith to the work that has been started under Financial Services Action Plan (FSAP). Work within the domain of financial markets regulation that preceded the Lamfalussy system is not covered.

<Chart 1 about here>

In Chart 2 we again look at the document production by CESR, but this time we display the number of pages produced over the years (with the annexes included). The mean number of pages for all documents is 24 pages (min = 1, max = 259). Only 17 documents have one-hundred or more pages and are produced between the second half-year of 2004 and the second half-year of 2005. The chart also shows that this is also the period where the intensity of paper production is highest. Large documents are again produced by from the beginning of 2008 until the end of 2009.

<Chart 2>

5.2 Issue areas

A further exploration of the work of CESR and CESR's use of its delegated authorities is done by investigating the work that has been done across the various issue areas concerned with securities regulation. As CESR was primarily established as an administrative means to further the implementation of the FSAP, CESR's main working areas have initially been confined to the four directives that were initiated by the Lamfalussy process: the Market Abuse Directive, the Prospectus Directive, the second Investment Services Directive (later: MiFID), and the Transparency Directive.³ However, due to the evolving views within the European

³ Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments (MiFID): creates a "single passport" that allows investment firms to operate throughout the EU; Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (Market Abuse Directive): aims to prevent insider dealing and market manipulation; Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 (Prospectus Directive): creates a "single passport" that provides issuers to operate throughout the EU and allows them to

institutions and the slowly accumulating positive experiences with the Lamfalussy process, the view has emerged to broaden the scope of the Lamfalussy process by bringing in areas of regulation that where securities play a substantial and increasing role. In the course of the Lamfalussy process' existence, The Council decided to delegate regulatory competencies in the areas of international accounting standards (the IAS Regulation), collective investment schemes (UCITS Directive), and directives in the area partly covered by company law (i.e. take-overs and corporate governance) to CESR and ESC (IIMG 2003 second report).

<Chart 3 about here>

Chart 3 shows that Markets in Financial Instruments Directive (MiFID) has been the issue area where CESR has produced the largest amount of documents with 117 documents (130 when annexes included), followed by the 80 (82 annexes included) documents published under the initially 'non-Lamfalussy' UCITS Directive (85/611/EEC, recasted by Directive 2009/65/EEC) and 67 (87 annexes included) documents under the Prospectus Directive. We find the same overall result when we look at the total number of pages produced by CESR for each issue area: MiFID documents together constitute more 2,700 pages whereas work for UCITS, Prospectus, and other issue areas do not exceed the level of 1,800 pages.

5.3 Delegated rulemaking and policy advice

After the presentation of overall descriptive data on the work efforts of CESR and the issue areas within the securities domain on which CESR has enjoyed competences, we now have come to assess CESR's allocation of resources over the two levels of the Lamfalussy process. As we saw above, work at level two consists of ultimately the production of technical advices to the EC that will use them as inputs for the drafting of implementing measures. The publication of technical advices and related process documents by CESR is upon instigation and mandate from the EC and is mandatory following the legislative work of European Institutions on level 1. At level three, a close examination of formal documents suggest that CESR's work at this level is much more left to the discretion of CESR then work at level two. Here, we will examine how CESR has allocated its resources across these two levels. We will

raise investment capital; and Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 (Transparency Directive): sets out uniform rules for the disclosure of accurate, comprehensive and timely information by issuers throughout the EU.

present two indicators: 1) the production of documents at the two levels; and 2) the number of working groups established for work at each level and the duration of their existence.

As regards the sheer number of documents that CESR has produced for each level, Chart four shows that overall CESR's workload has been dominated by the mandates it received for level two work than the initiatives CESR has undertaken at level three. This discrepancy between the levels has been largest until 2006. The reason for this is clear, as the first years under the Lamfalussy process have been devoted to the drafting of framework directives and implementing measures at levels one and two, respectively. CESR's level three activities under the Lamfalussy process could only start after level one work had been finished. Some work has been done, still, at level three during the first four years of the Lamfalussy process but this has been devoted to pre-Lamfalussy legislation in areas regulated by the first Investment Services Directive, UCITS and other pre-FSAP financial market laws. It can easily be seen too that the actual substantive work on level three took start almost immediately after the first peak of level two work had been finished. A second peak of level two work, which mainly concerns credit rating agencies and work on the Transparency directive, will expectedly lead to an increase in level three work in the coming year.

<Chart four about here>

We also compare the amount of work done by CESR at the two Lamfalussy levels per issue area. Chart five shows that with regard to the issue areas under its jurisdiction, CESR has been involved at both level two and level three work. However, there are striking differences with regard to the levels at which CESR has been active per issue area in terms of documents published. Whereas, for example, CESR has published almost an equal amount of documents both at level two and three in the area of the Prospectus Directive, CESR has been much more active in publishing documents at level two than at level three in the case of MiFID. Furthermore, we see that in other areas, UCITS, accounting and market abuse, CESR has been more active at level two than at level three. Finally, in another set of areas, i.e. that of transparency and credit rating agencies, CESR has only produced documents for the drafting of technical advices. In other words, there is seemingly no pattern, i.e. a balance, between the manner in which CESR is active as an agent that delivers policy advice and a principal that (sub)delegates authority to its members for drafting guidelines, recommendations and standards at level three.

<Chart five about here>

Second, CESR's work at both levels has been carried out by a variety of working groups. These working groups are created by CESR: level two groups are created by CESR after the CESR Committee has received a (provisional) mandate from the EC and level three groups are created by upon a mandate issued by the CESR Committee itself. Table two lists all working groups that have been created at both levels between 2002 and 2010 (as reported within the 2002-2009 annual reports of CESR). Firstly, we see that CESR has established 33 working groups. Most of these working groups are 'expert group' type of actors (n=21) followed by 'operational groups', 'task forces', and 'networks' (n = 6, 4, 2 respectively). Secondly, there substantially less working groups established for level two than for level three work, as 24 of all groups are established for level three. Included at this level are the several 'enforcement and supervision' bodies, i.e. working groups of CESR that are established for the review and monitoring of the implementation of level three standards, guidelines, and recommendations by the national regulatory authorities that are member of CESR. Another observation is that at level three CESR establishes quite a number of subgroups and groups with temporary mandates (e.g. the Madoff task force) to address issues pertaining to level three work. This observation subscribes to the inference we made above with regard to the autonomy CESR enjoys at level three. At this level the CESR Committee enjoys more flexibility and discretion to address long-term as well as short(er)-term issues that the regulators come across. The output of the short-term level three work of CESR does not have to be reflected in the amount of documents that is actually produced.

<Table two about here>

6. Conclusion

With the rise of transgovernmental networks the study of delegation has come to resemble Byzantinology. At the transgovernmental level within the EU, the national and the supranational levels of politics and administration have become intricately intertwined. What this paper makes clear in the first place is that straightforward labels as "dual" or "double delegation" do not adequately reflect the reality of delegation in the transgovernmental space. What is needed are systematic and detailed studies of the de jure allocation of formal competencies as well as their de facto use by the network. As regards to the central question

that has driven so many students of transgovernmental networks as regards who controls: the paper makes the tentative case for partial autonomy of the network. Whereas the competences of CESR for advising the Commission were relatively well prescribed, the findings in this paper suggest that CESR autonomous as regards the what constitutes the ‘core business’ of its members, the regulatory authorities, namely the issuing of guidelines, recommendations and standards, on the one hand, and addressing and responding to sudden or short-term events upon own initiative.

References

These can be obtained by the author.

List of CESR working groups

Table 1. Types of document published by CESR between 2002 and 2010 (with and without annexes counted)

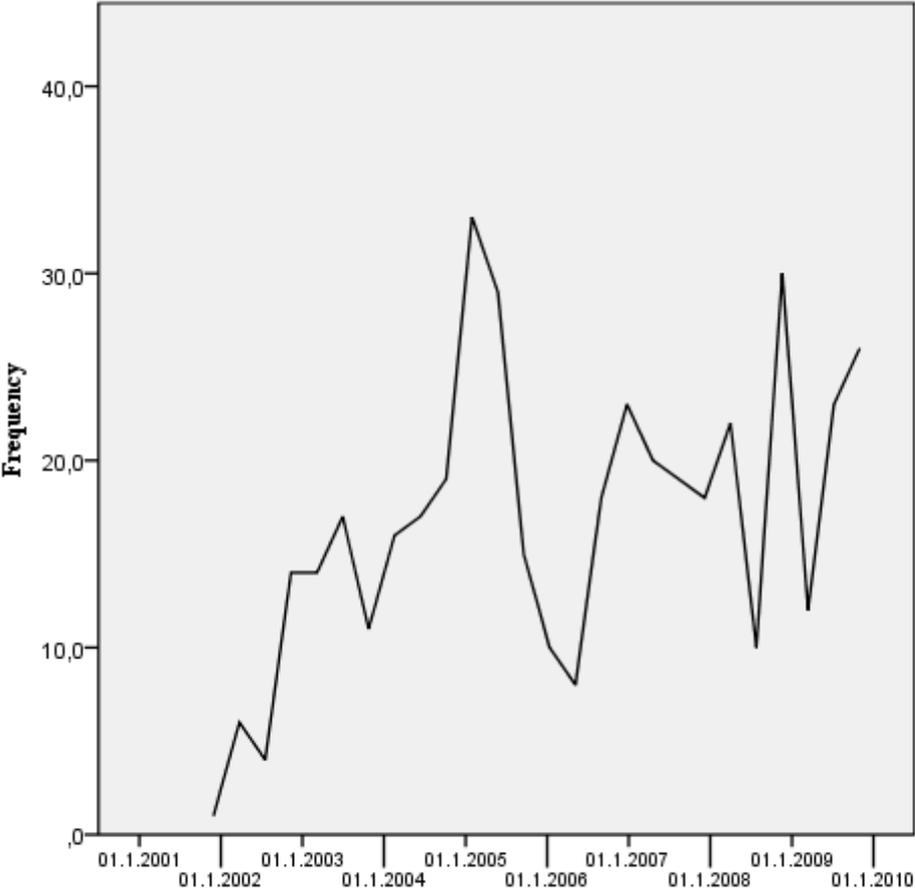
	Percent (annexes included)	Percent (annexes excluded)
Final documents		
Technical advice	6,7	5,8
Standards	1,8	2,0
Guidelines	3,4	3,8
Recommendation	1,8	2,0
<i>Subtotal (%)</i>	<i>13,7</i>	<i>13,6</i>
<i>Total number of pages (share of total)</i>	<i>2505 (24.0%)</i>	
Process documents		
Consultation	20,9	15,3
Feedback statement	9,9	10,8
Call for evidence	6,9	7,5
<i>Subtotal (%)</i>	<i>37,7</i>	<i>33,6</i>
<i>Total number of pages (share of total)</i>	<i>4468 (42.8%)</i>	
Investigative documents		
Advice	1,6	1,8
Paper	0,9	1,0
Report	5,5	6,0
<i>Subtotal (%)</i>	<i>8,0</i>	<i>8,8</i>
<i>Total number of pages (share of total)</i>	<i>1891 (18.1%)</i>	
Response documents		
Questions & Answers	4,8	5,3
Public statement	3,0	3,3
Response	2,8	3,0
<i>Subtotal (%)</i>	<i>10,6</i>	<i>11,6</i>
<i>Total number of pages (share of total)</i>	<i>1103 (10.6%)</i>	
Announcements		
Press release	17,5	19,0
Agenda	5,7	6,3
<i>Subtotal (%)</i>	<i>23,2</i>	<i>25,3</i>
<i>Total number of pages (share of total)</i>	<i>290 (2.9%)</i>	
Other	6,7	7,3
<i>Total number of pages (share of total)</i>	<i>171 (1.6%)</i>	
Total (%)	100,0	100,0
Total (N)	435	399

Table 2. Working groups established by CESR Committee between 2002 and 2008

Name working group	Type	Years	Subgroup?	Issue area
<i>Level two</i>				
Credit Rating Agencies Task Force	Task force	2004-2007	No	Credit rating
Expert group Cooperation and Enforcement issues – MIFID	Expert group	2003-2005	Yes	MiFID
Expert group Market abuse	Expert group	2002-2003	No	Market abuse
Expert group Prospectuses	Expert group	2002-2005	No	Prospectuses
Expert group Transparency and Efficiency	Expert group	2002	No	Transparency
Expert group on Markets – MIFID	Expert group	2003-2008	Yes	MiFID
Expert group on intermediaries issues – MIFID	Expert group	2003-2008	Yes	MiFID
Transparency Expert Group	Expert group	2004-2007	No	Transparency
UCITS Expert Group	Expert group	2005	No	UCITS
<i>Total: 9</i>				
<i>Level three</i>				
CESR-Fin: Assessment of Equivalence of third country GAAP	Operational group	2004-2005	Yes	Accounting
CESR-Fin: Permanent group Accounting	Operational group	2002-2008	No	Accounting
CESR-Pol: Permanent group Enforcement	Operational group	2002-2008	No	Enforcement & supervision
CESR-Pol: Surveillance and Intelligence Group	Operational group	2006-2008	Yes	Enforcement & supervision
CESR-Pol: Task force on Madoff fraud	Task force	2008	Yes	Enforcement & supervision
CESR-Pol: ad hoc MAD Level 3 drafting group	Operational group	2006-2007	Yes	Enforcement & supervision
CESR-Tech	Expert group	2006-2008	No	Enforcement & supervision
Corporate Governance Network	Network	2007	No	Corporate governance
Credit Rating Agencies expert group	Expert group	2008-	No	Credit rating
ECONET	Expert group	2006-2008	No	Economic analysis
ECONET: subgroup Impact Assessment	Expert group	2006	Yes	Economic analysis
Expert group Alternative trading systems	Expert group	2002	No	Alternative trading systems
Expert group Standards for Investor Protection	Expert group	2002	No	Investor protection
Investment Management Expert Group	Expert group	2004-2008	No	UCITS
Investment Management Expert Group: Key investor information sub-group	Expert group	2007	Yes	UCITS
Investment Management Expert Group: Operational Task Force	Task force	2007	Yes	UCITS
Joint working group Clearing and Settlement	Expert group	2002-2006	No	Clearing & settlement
Level 3 Expert group - MIFID	Expert group	2006-2008	No	MiFID

Mediation Task Force	Task force	2005-2006	No	Enforcement & supervision
Post Trading Expert Group	Expert group	2007-2008	No	Post trading
Prospectus Contact Group	Expert group	2006-2008	No	Prospectuses
Provisional Expert group on Investment management	Expert group	2003	No	UCITS
Review Panel	Operational group	2003-2008	No	Enforcement & supervision
Takeover bids network	Network	2007-2008	No	Take-overs
<i>Total level 3: 24</i>				
<i>Total all working groups: 33</i>				

Chart 1



**Chart 1. Publication of documents by CESR, 2002-2010
(annexes included)**

Chart 2

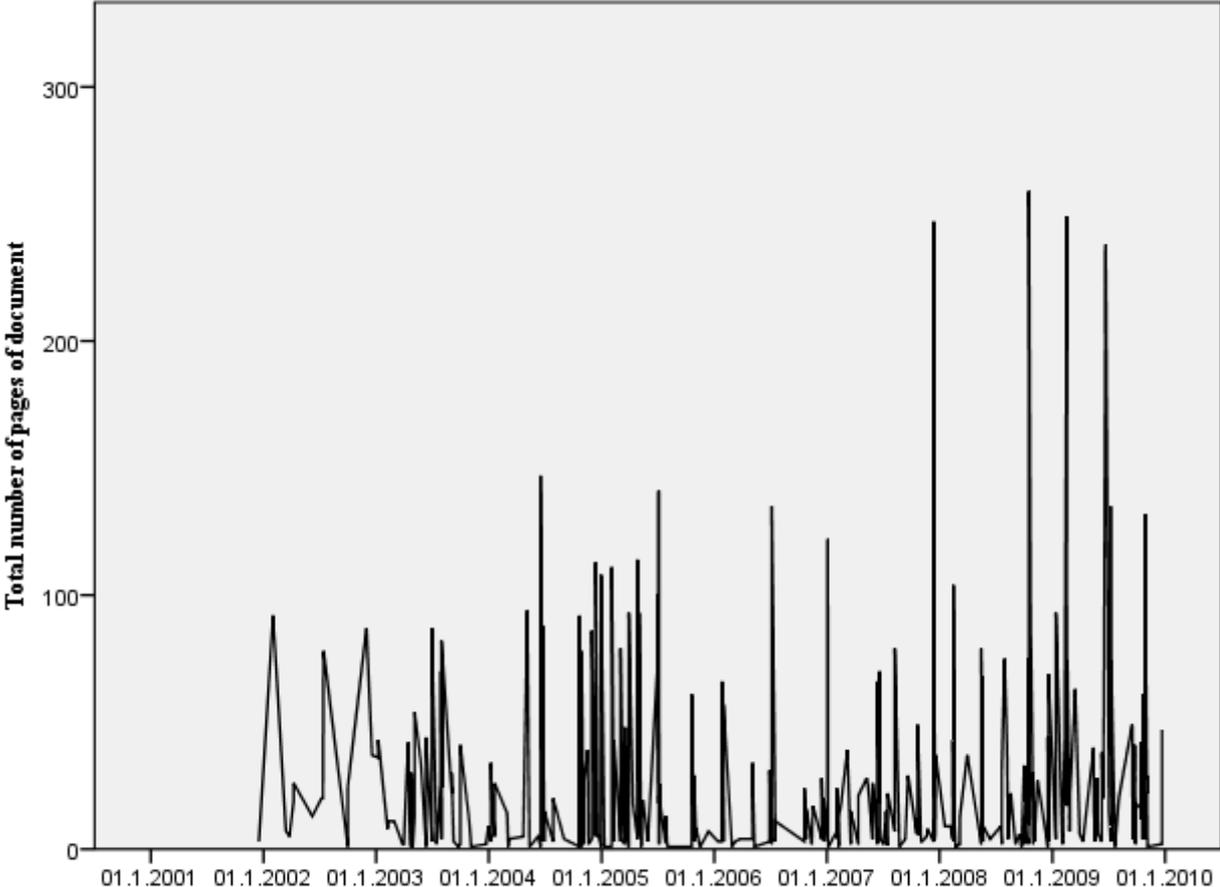


Chart 2. Publication of documents by CESR measured as number of pages, 2002-2010 (annexes included)

Chart 3

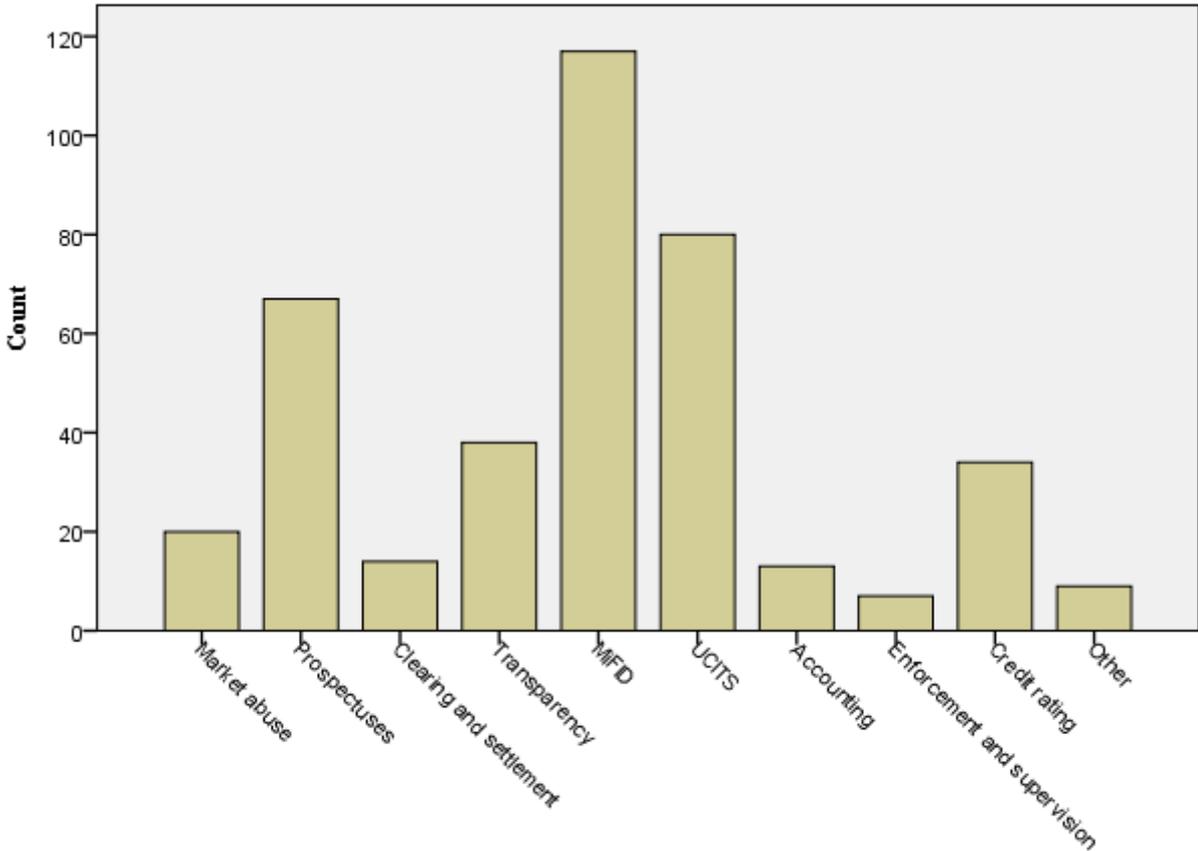


Chart 3. Documents published by CESR according to issue area, 2002-2010 (annexes included)

Chart 4

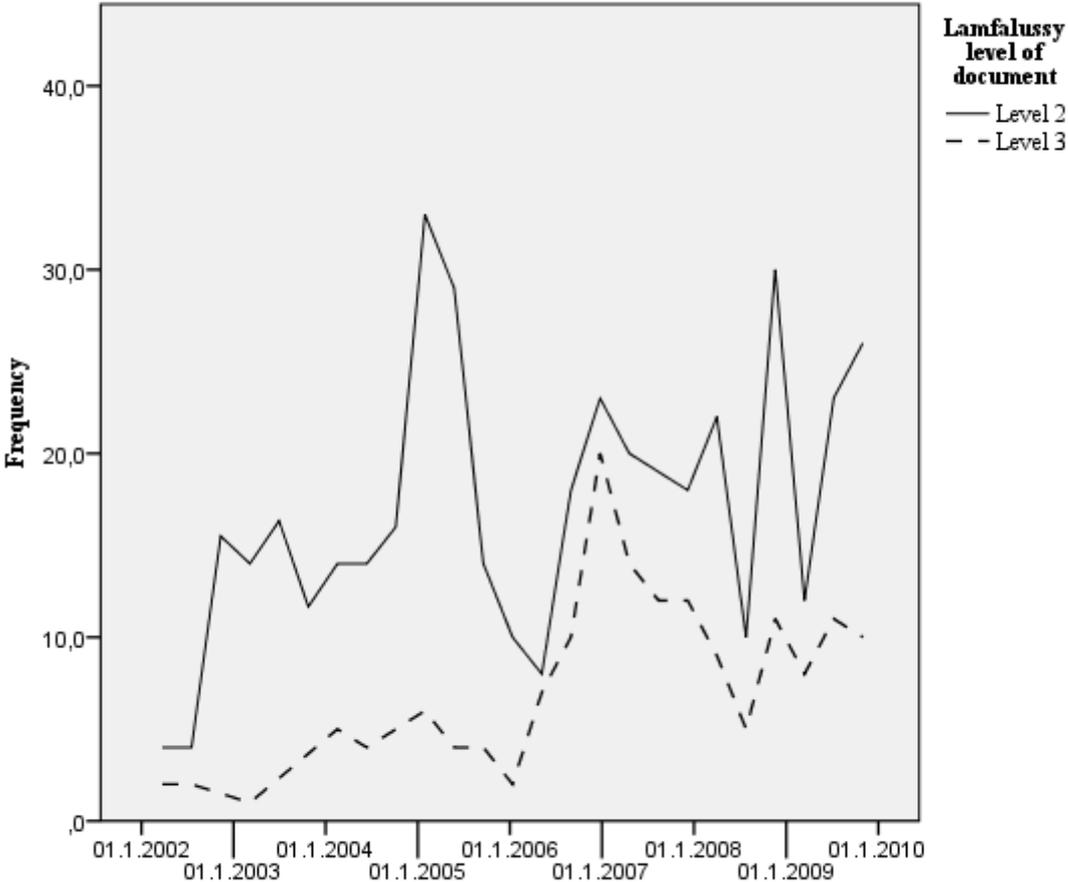


Chart 4. Level 2 and level 3 documents published by CESR, 2002-2010 (annexes included)

Chart 5

