

28th May 2004

CESR
11-13 avenue de Friedland
75008 Paris
France

By email to www.cesr-eu.org

Dear Sirs

Re: The Role of CESR at “Level 3” under the Lamfalussy Process

APCIMS is the trade association that represents the interests of stockbrokers and investment management firms that act on behalf of the private client. We have 230 members based in the UK, Channel Islands, the Isle of Man, Dublin and across Continental Europe. We have attached a full list of our member firms at Annex A.

APCIMS welcomes this initiative by CESR to consult on how it should organise its role at level 3 under the Lamfalussy procedure and we support many of the proposals in the paper. CESR's role at level 3 has also been the subject of lengthy consideration through the European Commission's Expert Groups and the Securities Expert Group final report contains various recommendations that are relevant. We have therefore included these in our response.

Yours faithfully

Angela Knight
Chief Executive

The Role of CESR at Level 3 under the Lamfalussy Process - General Comments

1. **Consultation process:** The responsibilities of CESR's Review Panel for monitoring the efficiency, consistency and timely nature of the implementation process is an important one and its role in helping the early identification and resolution of differences in implementation in the different EU countries is vital. Clearly CESR cannot undertake such work entirely on its own and so the practitioner input will be essential to provide information of what is actually happening in the different countries.
 - i) We therefore strongly support CESR's use of experts to contribute to the work being done on implementing the Financial Markets and Instruments Directive and we would urge CESR to undertake more work in ensuring that there is sufficient input from as wide a variety of market participants at every level as possible.
 - ii) Whilst consultation processes have improved significantly in recent years, inevitably regulators cannot fully understand some of the difficulties and practical issues that are faced by firms and practitioners on a day-to-day basis. Only market practitioners can truly assess whether rules will work and whether they add real value to the regulation of markets and protection of consumers. For this reason we consider that the widening of input from market participants is hugely important and whilst recognising there are time constraints, would urge CESR to give as much time as possible to this process.
 - iii) In addition to strengthening the dialogue with market practitioners in all countries, CESR should acknowledge the amount of comment coming from large sections of the industry. It should do this by publishing all the comments it receives on its website with the key industry issues are displayed, what changes have been proposed and accepted and where rejected, the reasons for this rejection.
2. **Principles for regulation:** We strongly support the establishment of high level principles endorsed by all CESR members. However it is noticeable that that where there are differences of political view, both legislation and regulatory requirements have tended to become overly detailed and prescriptive. We are keen to see this avoided with the current legislation and would propose that where such differences are identified, CESR (and the European Commission if required) should resolve the issues **before** Standards and detailed rules are proposed.
3. **Identification of bad legislation:** We agree with the comments and proposals on early identification of differences in implementation and are pleased to see that work is already underway to look at the Standards for Investor Protection (based on the existing Investment Services Directive).
 - i) It is vital that as part of this work only legislation or regulation which is either unworkable or unduly costly in practice is highlighted and either changed or repealed at the earliest opportunity.
 - ii) We are also concerned that some of the points that the industry and market participants have been making in response to earlier consultations may well not

have been fully understood. For example, APCIMS commented that a requirement to introduce mandatory telephone tape recording of client orders is costly and not relevant for a 'face-to-face' conversation with a financial adviser where a note of the conversation will be written. We suggested therefore that a way of covering both types of orders would be to have a policy that "required all orders to be properly evidenced". This would mean that firms could then take the decision as to whether to do this by telephone, or by written record, or some combination depending upon their business model and the costs involved. We are sorry that this practical approach appears to have been ignored.

4. **Early identification and resolution of differences in implementation:** There are a number of existing examples of differential implementation of the current Investment Services Directive (EC93/22). The result of that is the limited ability for firms to use the single passport they need to carry out business on a cross border basis. One example has been the Netherlands where a fee was required from a non-Dutch firm in advance of consideration being given to allowing them to operate within its borders. It is essential that any such issues are resolved early and again the involvement of market practitioners will be essential in achieving this both during and after the consultation phase is complete.
5. **Cost benefit analysis:** More work is also needed on cost benefit analysis. We recognise that this is a difficult area and sometimes it is hard to work out costs, particularly for new requirements and equally difficult to predict benefits. Again, market participants can help in identifying costs. A firm will need to make considerable changes as a result of implementing the FSAP and we trust that throughout the consultations the issue of cost will be at the forefront of CESR considerations and that the most cost effective way of implementing the requirements will be chosen.

APCIMS Comments in Respect of Specific Questions Raised

Question 1 Do you agree with the described role of CESR with respect to the co-ordinated transposition and application of EU law?

APCIMS comment: We support the proposal to keep alive the network of CESR experts in drafting the level 2 advice. We would also propose that it is expanded, specifically to draw in more experience from the market and to highlight and resolve early transposition issues, including technical and practical problems. This network could also be used to assist best practice and commonality of interpretation by the regulators.

Question 2 Do you see an “additional role” for CESR under level 3 where CESR could contribute to the co-ordinated implementation of EU law? If so, please explain what CESR should do to establish the role proposed?

APCIMS comment: We agree that a network of experts advising on the application of EU law should be put in place by CESR. However, these should not be confined only to the legal specialists as although there is a requirement to be as certain as possible in rule making, in some cases the desired end result can be achieved by different means. As the different legal systems of Member States mean the processes will invariably differ, we would propose that market practitioners as well as legal specialists participate in the network of experts.

In addition, as some CESR members (such as the Financial Services Authority in the UK) have extensive rule making powers, yet other CESR members’ powers are much more limited, we understand CESR’s desire that all members be given similar rule making responsibilities. As this may not be achievable within the near future, CESR needs to concentrate on ensuring that the desired outcome is achieved and that countries use their different routes and options available to them.

Lastly, CESR has a role in highlighting the importance of mutual recognition between supervisors. While this may be more important for certain types of business, as financial markets are innovative, there are likely to be frequent occasions where the only way that cross border service can be effected for a new product or a new service is by mutual recognition between regulators. Such a route can be both effective and put in place much more quickly than the legislative process.

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

APCIMS comment: We note the example given of CESR’s work in adopting standards on clearing and settlement and we supported much of this work. However, the process whereby CESR adopted the IOSCO standards were not subject to any consultation with industry. It is essential that any aspects of regulatory convergence or when considering adopting standards or any other types of codes, that CESR consults extensively with the industry first to assess whether additional standards will be useful. Such consultation must also include a full cost benefit analysis.

We would also suggest that CESR could usefully play a role in establishing standards for training and competence throughout the industry. While financial advisers in some countries are required to obtain professional qualifications first, in other countries there are no such qualifications. We would support consideration being given to some common principles in this area with mutual recognition of country specific professional qualifications.

Another aspect of importance is CESR's role in ensuring that national regulators also consult extensively with their industry in an open and transparent way. CESR could make this a requirement of CESR members and also promote both consultation and transparency by publishing responses, as proposed earlier.

As part of the consultative process, CESR should establish sub-groups of market practitioners for particular issues, topics and sectors. Not only is specific sector expertise required but as many of the issues will be cross sectoral then it is essential that these are identified and properly managed through the group/sub-group structure.

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

APCIMS comment: There is already a pan-European market in the basic financial services of equities, bonds and collective investment products. The different tax and legal systems that operate across the EU will however continue to provide some barriers after the FSAP has been implemented. It is vital that the FSAP measures are allowed to become established before any additional measures or requirements are introduced. However, as new developments in one market may be relevant for other markets in other EU countries, the role that CESR can play is in ensuring that there is mutual recognition between the relevant regulators. We believe that this is not only a hugely valuable role, but also provides the necessary recognition of the fact that different countries will continue to have different requirements.

Question 5 Would you consider endorsement by the Commission of the common guidance established by CESR as a helpful tool to ensure consistent application of EU directives/regulations?

APCIMS comment: We are not sure whether this would be helpful. CESR has a strong role in ensuring that there is practical common application of guidance and standards. The involvement of the Commission in endorsing these standards may well not be as helpful as a proper feedback loop (as discussed in the Securities Expert Group) so that as it undertakes its work, CESR will be able to advise the Commission of any evidence based problems which will need to be addressed by legislation in the future.

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

APCIMS comment: We suggest that CESR has already set out an ambitious role for its work for the foreseeable future and we would consider that its proposed new activities are both wide-ranging and complimentary to its current activities.

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

APCIMS comment: Such a mediation role would inevitably have to be advisory. Nevertheless, we consider that the situation is likely to arise where regulators have interpreted a requirement differently (and often this will be in the detail) with the result that either a firm is subject to inconsistent requirements or firms in different countries continue to be regulated differently. Under such circumstances a specialist mediator could take evidence from the firm or firms involved, and the relevant regulators in order to come to a conclusion. As part of this it would be essential that market experts are also involved and that both the issue and the outcome are published.

Question 8 Do you have any comments on the catalogue of all mutual recognition and co-operation obligations under the Directives where CESR is active?

APCIMS has not comment on this matter.

Summary of Commission Securities Expert Group in Relation to Comments on Level 3 of the Lamfalussy Process

Para 56: In order to enhance consistent implementation, the Group sees the role of CESR at Level 3 mainly as producing guidelines and recommendations for administrative regulation and in assessing regulatory practices, as well as conducting peer reviews. It agrees with suggestions that the European Commission should provide guidance and assistance to Member States on the transposition of directives.

Para 58: Furthermore, the Group sees a role for CESR at Level 3 in coordinating impact analyses to ensure even implementation; in conducting consultations with market participants, in enhancing flexibility in the implementation process and recognising national legal differences while, at the same time, giving effect to EC legislation and taking account of market innovation; and in building on the internal market principles of home state, mutual recognition, core standards and operational convergence. The Group noted in this context that coordination at Level 3 also had a role in enhancing investor protection.

Para 59: The Group emphasises that Level 3 should be used as a tool to achieve operational convergence in day to day supervisory practice, rather than a further push for standardisation national legislation. The ECOFIN Council should be asked to underline the importance of this approach.

Para 60: A particularly important role for level 3 will be to provide information about bad or unworkable legislation, as the start of a feedback process to enable Level 1 and Level 2 legislation to be upgraded.

Para 61: The group suggested that an implementation group should be established under CESR auspices for each Level 3 activity, to provide a collective sense of responsibility for common implementation practices and peer group assessment. This body should publish a regular commentary. The Group also considers that CESR should continue to be mainly staffed by the various national regulators and supports the Inter Institutional Monitoring Group's recommendation that there should be exchanges of staff between national regulators.

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