

Comments from Van der Moolen Holding NV
on
The Role of CESR at “Level 3” under the Lamfalussy Process (CESR/04-104b)

General Comments

Van der Moolen broadly supports the goal of harmonizing financial services regulation across the European Union, and using the role envisioned for CESR by the Lamfalussy proposals as the means to accomplishing this. However, Van der Moolen does not believe that regulatory harmonization should be included among the primary objectives of CESR. Rather, harmonization should be regarded as a secondary good, to be achieved indirectly in the course of pursuing CESR’s primary goal of creating and enforcing quality regulation. As such, the goal of harmonization should be subordinate to cost/benefit considerations, and where mutual recognition of unharmonized national practices provides quality regulation, CESR should bear the burden of proof to demonstrate that harmonization would provide a better quality and/or more cost-effective regulatory regime. Harmonization should not be regarded as an end in itself, but as something that in many cases, but perhaps not all, is pragmatically desirable.

Making a fetish of harmonization is likely to be especially problematic for wholesale markets, which are also the most likely source of many innovations and therefore the most likely markets to “run ahead” both of existing regulation and of the competence of national authorities to analyze their implications. Here in particular, the role of advisor to the Commission and instigator of regulatory proposals that the Lamfalussy report envisions for CESR is crucially important. As a committee of experts in the financial services area, CESR is well-suited to protecting the wholesale markets from the threat that harmonization based on retail market practices could hold. In connection with wholesale markets, the proper role of CESR could almost be seen as championing mutual recognition at the expense of harmonization, except where harmonization can be shown unequivocally to provide a better solution.

The following comments address questions on pp. 7, 8 and 10 of the CESR document.

Questions 1 and 2:

The role of CESR as described is insufficient. The text mentions only matters such as the Market Abuse Directive that are of fairly recent vintage, but does not mention any role for CESR in ensuring that the original Investment Services Directive (ISD/ 93/22/EEC) is properly and consistently implemented, which it is not. In particular, certain jurisdictions deliberately violate the spirit, if not the letter, of the “European passport” provisions of ISD I, effectively granting firms within their jurisdiction “passport” rights while denying them, or at least the full exercise of them, to firms outside those jurisdictions. While the means used to effect these violations vary, and in some cases involve bureaucratic obstruction or clearing requirements that do not fall directly within the scope of CESR’s remit, their effect is to allow certain jurisdictions to “opt out” of EU financial services legislation. There is limited benefit to the securities sector in pursuing harmonized implementation at the level of ISD II if it is not already in place for ISD I.

If CESR is to perform the role envisioned for it under Lamfalussy, the scope of its activities must extend to all EU financial services legislation, not only that finalized subsequent to the Lamfalussy committee's findings. Where means that are outside the direct regulatory control of CESR members are used to subvert that legislation, CESR members have a clear duty to exercise moral suasion over their national governments. CESR members from compliant jurisdictions have a corresponding duty to exert pressure on CESR members from jurisdictions that employ institutional or other means to subvert EU financial services legislation, to fulfill their duty of fostering EU-wide applicability of the spirit as well as the letter of EU legislation.

Questions 3 to 5:

It is our understanding of the Lamfalussy recommendations that CESR is intended to be an originator of regulatory innovation, subject to Commission oversight and approval, and that it should serve as "additional eyes and ears" for the Commission on financial services matters. Van der Moolen strongly endorses such a role for CESR, and the proposals under 2.3 seem to embody this vision. However, it is not at all clear to us that Lamfalussy envisioned CESR as the Commission's mouthpiece on matters of financial services regulation, and we think it inappropriate that it should become such. Hence, while Commission endorsement of CESR positions on common guidance may be helpful in lending to CESR the Commission's authority, we do not think that such endorsement should be necessary, and regular recourse to such endorsement is likely to undermine CESR's autonomous authority. An indication that the Commission will not make recommendations that are contrary to CESR common guidance should be quite sufficient. Such an indication is also necessary, as a means of assuring securities industry participants that common guidance from CESR will not subsequently be altered by the higher authority. CESR should not require Commission endorsement, but market participants do require Commission assurances.

Question 6:

Cf. comments given in connection with Questions 1 and 2.

Question 7:

We do not regard mediation as an appropriate role within the college of CESR members. As we understand it, the purpose intended for CESR under the Lamfalussy proposals is that it constitute a committee of experts. There is a danger that this expertise would be compromised if CESR saw its role as attempting to reach a lowest common denominator among its membership in each instance. While experts are clearly capable of disagreement, disagreement should lead to debate that improves the quality of the proposal in question, rather than mediation that seeks to reach a compromise on the matter in hand. Where disagreement arises from causes that are not matters of principal but rather parochial concerns, then the membership of CESR should exercise their moral suasion on that member whose arguments in a particular case are not principle-based to drop his or her objections.

Question 8:

No comments at this time.