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FIRST INTERIM REPORT BY THE REVIEW PANEL TO CESR

With this first interim report of the Review Panel, CESR has started giving substance to its mission at Level 3 as defined in the Lamfalussy report which is to ensure more consistent and timely implementation of Community legislation in Member States.

The Review Panel has started its work with the scrutiny of the status of implementation of the harmonised Standards on ATs and the rules of conduct.

These Standards were approved before the formal establishment of CESR and most of them are now included in the proposed new ISD, which is still under discussion. Despite some uncertainty created by this, the Members of CESR were willing to start the process of checking the proper transposition and implementation of the Standards in order to show their commitment to do so and even anticipate, as far as possible, the transposition of the ISD2.

As a first step this report provides a global overview of the state of implementation in the EEA and in Accession Countries, which is on the whole quite satisfactory. The final objective, which is to have a common set of rules to protect investors across Europe and offer an appropriate regulatory regime for ATs, is not any more theoretical but is becoming reality. It is certain that the final adoption of the new ISD will considerably accelerate the process.

After a rigorous description of the state of implementation of the Standards by each Member, the process of a collective peer review of these tables will start. In the meantime, this first interim report is open to comments by the public until the end of April 2004.



1. Background

At the CESR Meeting of 16/17 December 2002, it was decided to establish a Review Panel, to be composed of the Internal Coordinators of CESR Members. (The Internal Coordinators of the CESR Observers and the European Commission have observer status.)

The Review Panel is chaired by Kaarlo Jännäri, Vice Chairman of CESR, who is supported by the CESR Secretariat, which facilitates the work of the Review Panel.

Pursuant to the terms of reference of the Review Panel (Ref. CESR/03-061), its **role** is “*to assist CESR in its task of ensuring more consistent and timely implementation of Community legislation in Member States*”, as decided by the European Council in its Resolution of March 2001.

The **mandate** given to the Review Panel provides the following:

“The Panel is the middle-step in the implementation process; it intervenes after the self-assessment conducted by members and before the final approval by the CESR. It gives its opinion on the overall process of implementation, discusses common approaches for the implementation, provides common understanding and expresses views on specific problems encountered by individual members. In case of particular circumstances, the Panel may propose to establish a special group to address issues of technical nature. Clarifications of CESR Standards will be collected by the Secretariat and shared with the Panel.”

Thus, the Review Panel has an important role at Level 3 of the Lamfalussy Process, at which co-operation and networking among EU securities regulators should ensure consistent and equivalent implementation of both Level 1 and Level 2 legislation, and define best practice at Level 3, in particular by comparing and reviewing regulatory practices to ensure effective enforcement throughout the Union.

2. First Exercise of the Review Panel

CESR decided to conduct its first monitoring exercise with respect to the CESR Standards on Investor Protection (“A European Regime of Investor Protection - The Harmonization of Conduct of Business Rules” [CESR/01-014d], “A European Regime of Investor Protection – The Professional and the Counterparty Regimes” [CESR/02-098b]) and the CESR Standards for Alternative Trading Systems (CESR/02-086b). The CESR Standards are based on the current text of the Investment Services Directive (ISD), which provides a rather high level of generality in the areas covered by the Standards.

CESR is aware of the fact that this first exercise is affected by the process of revision of the Investment Services Directive (ISD2), which is currently being discussed by the EU Institutions and is likely to be adopted in spring 2004. It is probable that the revision of the ISD is also going to have an impact on a number of areas dealt with in the CESR Standards. Nevertheless, CESR took the view that Members should not wait with the implementation of the CESR Standards until the final adoption of the revision of the ISD2. This decision was guided by the fact that the coming into force of the ISD2 and its transposition in the Member States might take considerable time and that it is very likely that the CESR Standards would be reflected to a large extent in the final outcome of the legislative process as to the ISD2.¹ In light of this, the results of this exercise of the Review Panel should be considered as giving an interim picture of the status of implementation in each Member State.

The first exercise of the Review Panel was initiated in May 2003 with the distribution of so-called “correspondence tables” as to these two sets of standards: the first column contains the respective CESR Standard/Rule; regarding the other columns as to implementing authority(ies), implementing measures and any comments on the status of implementation, respondents were asked to complete them accordingly. The correspondence tables were sent to all CESR Members and Observers to assess

¹ It should be noted that CESR took the view that decisions already taken by CESR should not be re-opened, unless they are affected by changes to the regulatory framework at Level 1.



the status of implementation in their respective jurisdiction.² The Members³ sent their responses to CESR in the course of July and August 2003. The CESR Secretariat conducted a first preliminary analysis, in order to achieve a consistent approach in the responses by the Members. The first meeting of the Review Panel took place on 8 September 2003 to discuss preliminary results.

In the first meeting of the Review Panel, Members agreed on a number of methodological principles, which would be followed by the Members in their self-assessment and taken into account by the Panel and the CESR Secretariat in the review of the responses (see Annex).

In order to enable all Members to re-assess their initial responses in the light of the methodology agreed on and to provide for a consistent approach in all responses, the Members were given the opportunity to look again at their correspondence tables after the first meeting of the Review Panel. Most of the Members felt the need to make amendments to their initial responses.

The report on the initial steps of the Review Panel was circulated among members of the CESR Market Participants Consultative Panel, who took note of these achievements.

In turn, the CESR Secretariat conducted an additional review of the revised correspondence tables and prepared “Synthesis Tables” for the two sets of Standards. These synthesis tables set out Standard/Rule by Standard/Rule, whether the implementing measures contained in the corresponding response of each individual Member would – according to the methodology agreed by CESR – be regarded as “implemented”, “partly implemented” or “not implemented”.⁴ For getting an accurate overview of the status of implementation as to each Standard/Rule in a specific Member State, the synthesis table should be read in conjunction with the responses provided in the correspondence tables. It should also be taken into consideration that the implementation process is an on-going process, so that it is only possible to present the status of implementation at a given point in time, though the tables will be up-dated by the Review Panel on a regular basis.

In addition, it has to be taken account of the fact that the content of the correspondence tables and the synthesis tables for each Member State is based on the responses by the respective Member; therefore, content and accuracy are strictly the responsibility of each Member. At this stage, the Review Panel and the CESR Secretariat were only in a position to consider the compliance with the methodology agreed and the consistency of all responses in this respect, without going into the substance of the responses and without conducting a cross-review of all responses. It is however envisaged that the next step in the process of monitoring the status of implementation is going to be a common and collective exercise by the Review Panel, which could be targeted on a list of prioritised areas identified by the Panel. (This is foreseen by the Lamfalussy Report and explicitly provided for in the European Council Resolution of March 2001, which states that CESR “[...] should also play an important role in the transposition process (level 3) by [...] carrying out peer reviews and promoting best practice, so as to ensure more consistent and timely implementation of Community legislation in the Member States.”) Therefore, the Review Panel will conduct a common review of the responses from all Members, likely to be finalised already in the first half of 2004.

² Since CESR wished to have a complete, EU-wide picture of the implementation of those standards, the Latvian Financial and Capital Markets Commission and the Polish Securities and Exchange Commission, which are not CERS Observers yet, were also invited to participate in this important exercise.

³ For reasons of simplicity, the term “Member” in this context refers to all participants in the Review Panel, i.e. CESR Members, CESR Observers, and the Latvian and Polish securities regulators, unless it is provided otherwise; this applies to the term “Member State” in the same way.

⁴ A Standard/Rule is considered “implemented” if all the requirements of the Standard/Rule in question are covered by the implementing measures of the Member State concerned and no derogation to their application is provided for.

A Standard/Rule is considered “partly implemented” if some but not all the requirements of the Standard/Rule in question are covered by the implementing measures of the Member State concerned.

A Standard/Rule is considered “not implemented” if none of the requirements of the Standard/Rule in question is covered by the implementing measures of the Member State concerned.

Footnotes are added to some responses to show any current initiatives as to the (full or partly) implementation of Standards/Rules.



The responses in the correspondence tables and the assessment in the synthesis tables are only of preliminary nature at this juncture. The responses can only be regarded as having informative character and therefore must not be regarded as having any legal effect at all. In particular, the responses cannot be considered as being fully accurate, and they do not present any interpretation of or definitive position on existing law in a specific jurisdiction. As a consequence, they cannot be taken to restrict competent authorities in taking regulatory or enforcement actions.

Finally, CESR would welcome comments from interested parties on this first exercise of the Review Panel, with a view to securing consistent implementation.

3. Interim Results

For the reasons set out above, the results of the first exercise of the Review Panel, presented in the following, provide an interim overview of the status of implementation. In particular, account of the developments with respect to the ISD2 should be taken.

Responses and results as to individual Standards/Rules or as to individual Member States are set out in the following documents: the completed correspondence tables of each Member can be found in CESR/03-134/*Country* (as to the CESR Standards on Investor Protection) and in Annex CESR/03-135/*Country* (as to the CESR Standards for ATs). The responses by all Members set out Standard/Rule by Standard/Rule are compiled in CESR/03-416b to CESR/03-423b (as to the CESR Standards on Investor Protection) and in CESR/03-415b (as to the CESR Standards for ATs; CESR/03-497b, for information purposes, contains a preliminary list of Alternative Trading Systems, as defined in the CESR Standards, authorised in Member States). The synthesis table as to the CESR Standards on Investor Protection is provided in CESR/03-427b; the synthesis table as to the CESR Standards for ATs is provided in Annex CESR/03-432b.

A full set of explanatory notes accompanies the correspondence tables and synthesis tables.

A. General

All CESR Members and CESR Observers, and also the Latvian Financial and Capital Markets Commission and the Polish Securities and Exchange Commission, have fully and comprehensively participated in this exercise, which is even more noteworthy as each Member had to assess the implementation of some two hundred Standards and Rules in its jurisdiction.

It should also be noted that in all Member States initiatives have already been taken for further steps towards (full or partial) implementation of the CESR Standards (at different levels, such as the creation of internal working groups, the commencement of consultations with market participants, or the initiation of discussions with national Ministries of Finance).

As a general result of this exercise, it can be noted that the status of implementation of CESR Standards/Rules has already progressed quite well and reached a very high level in a number of Member States.

From the responses given in the correspondence tables and from the discussions in the Review Panel it can be observed that differences in the status of implementation are mainly due to:

a) the issue of divergent implementing powers of CESR Members, which range from authorities having the powers necessary to implement more or less all CESR Standards to those that have rather limited powers for the adoption of implementing measures, requiring them to turn to other national institutions responsible (e.g. Ministry of Finance or Parliament).

b) in some cases, the wish to wait for the ISD2, in particular if there is a need for legislative action: national authorities responsible for the implementation try to avoid the extra effort of having to start – often lengthy and intensive – procedures for regulatory changes again, as the ISD2 could bring about changes to the CESR Standards.

B. CESR Standards on Investor Protection

The paper “A European Regime of Investor Protection – The Harmonization of Conduct of Business Rules” (CESR/01-014d), adopted by CESR in April 2002, is composed of several chapters; each



chapter contains Standards, which are intended to be the key parameters for a harmonised conduct of business regime, which are followed by Rules that clarify the scope and practical meaning of the Standards.⁵

The three main aims of the Standards and Rules are:

- a) to ensure that investors throughout the EEA enjoy an equivalent degree of protection, irrespective of the means used by investment firms to provide investment services;
- b) to improve the flow of financial services within the EEA by reducing impediments to competition and competitive distortions between investment firms;
- c) to foster mutual understanding and co-operation between the competent authorities as regards the interpretation and implementation of conduct of business rules.

These Standards and Rules are complemented by the paper “A European Regime of Investor Protection – The Professional and the Counterparty Regime” (CESR/02-098b), adopted by CESR in July 2002, which contains core conduct of business rules which should apply to investment services between investment firms and professionals, core standards for “counterparty relationships”, and an Annex on the categorisation of investors for the purpose of conduct of business rules.

As to the results of the review process concerning the CESR Standards on Investor Protection, it can be noted that the main principles of conduct of business rules (such as “best execution”, “know your customer”, or conflicts of interests) concerning the retail investor regime are (fully or partly) implemented in most countries (including the Accession Countries), providing for a harmonised legal framework across Europe.

The situation in some jurisdictions with respect to those Standards and Rules of the retail regime, which contain more detailed requirements, is not completely satisfactory (although it can be noted that a lot of Members are currently taking steps for enhanced implementation in this respect). This concerns in particular:

- The offering and receiving of inducements, in particular as regards the disclosure to customers, which is not yet provided for in several Member States (Standard 6 and Rule 8).
- Several jurisdictions impose for a general prohibition of “Cold Calling”, as defined in the CESR Paper (Ref. CESR/01-014d), or as to particular techniques covered by the definition, or prohibit “Cold Calling” when addressed to consumers (Standard 18 to Rule 24).
- In a few Member States implementing measures are missing as to some requirements concerning marketing communications (Rule 32, 33 and 34).
- With respect to the information on financial instruments and investment services the issue of a fair and adequate description of a compound product (Rule 43), the question of guarantees for the performance of services or an investment (Rule 44) and of the information provided as to tax treatment (Rule 45) are not yet satisfactorily implemented in several Member States.
- On specific requirements regarding customer agreements involving trading in derivatives, in particular as regards confirmation of derivatives transactions (Rule 88), the issue of margin requirements (Rule 89) and the warning to be given to customers (Rule 90), still more effort is needed in a number of Member States.
- As regards customer agreements for discretionary portfolio management the level of implementation on the issues of discretionary authority as to high-risk transactions (Rule 120), indication of a benchmark (Rule 121), valuation of financial instruments (Rule 122), and specific reporting in the event of losses (Rule 123), is not satisfactory in quite a few Member States.

⁵ The implementation of both Standards and Rules is intended to be mandatory.



As to the conduct of business rules for the professional investor regime, the status of implementation can be considered to be in a satisfactory stage, too. (Since the majority of these Standards replicate Standards of the retail investor regime, reference can be made to the list above which also covers areas where improvement of the level of implementation regarding the professional investor regime is important.) However, for a general assessment of the professional investor regime the conduct of business rules for professional investors have to be read in conjunction with the categorisation of investors, where further effort is needed to fully implement the latter Standards, since only few Member States have done so up to now.

The Standards on the counterparty regime are not implemented in nearly all Member States. This can at least partly be explained by the fact that the final results on this topic in the ISD2 are still unclear.

C. CESR Standards for Alternative Trading Systems

The paper “Standards for Alternative Trading Systems (CESR/02-086b), adopted by CESR in July 2002, comprises two parts: the first one deals with market integrity standards for Alternative Trading Systems (ATs), the second one with the application of conduct of business rules to ATs. The core Standards should be read in conjunction with the commentary, which provides guidance on the considerations relevant authorities will take into account in the application of the Standards.

The Standards focus on the potential risks posed by ATs by adequately protecting users of “qualifying systems” and market integrity. The Standards should be imposed on investment firms operating qualifying systems by the home-country authorities responsible for the licensing and oversight of those firms.

As regards the review of the CESR Standards for ATs, it can be noted that in all Member States, where investment firms are authorised to provide AT activities, the CESR Standards have already been (fully or partly) implemented, also on the basis of ad-hoc regulatory intervention.

In the other jurisdictions the AT Standards are not implemented for the time being, because there are no ATs established within their respective jurisdictions, so that no need for legislative action has been seen.

The provision of AT activities, according to the CESR definition, by an investment firm licensed in another Member State would generally not be restricted in Member States.

4. Next Steps

It is envisaged that the correspondence tables as to the Standards reviewed (and the corresponding synthesis tables) will be updated on a regular basis, so that the progress in the implementation process can be monitored as closely as possible and facilitated by the publication of regular interim reports. Moreover, as already mentioned above, it is envisaged that the next step in the process of monitoring the status of implementation is going to be a common and collective exercise by the Review Panel, which could be targeted on a list of prioritised areas identified by the Panel. Therefore, the Review Panel is going to conduct a common review of the responses from all Members, which could be finalised during the first half of 2004.



ANNEX

Overview of methodology for completing and reviewing the correspondence tables

General points:

- The principle for completing the correspondence tables is that every single column has to be completed, so that no column is empty, even if a Standard/Rule has not been implemented (“comply or explain”).
- “Implementing authority(ies)”: for the completion of the tables the authority(ies) responsible for adoption of the measure(s) transposing the Standard/Rule should be indicated.
- “Implementing measure”: i.e. laws (e.g. Parliament) and rules (e.g. decree by Ministry, rule book issued by regulator); guidelines and circulars by regulator; rules of SROs, such as regulated markets or industry associations, if applied by a significant part of industry and if non-compliance renders enforcement action by SRO concerned. (“Soft law”, such as non-legislative circulars or guidelines by an authority, or rules by SROs, should – at least as an intermediate step - be accepted as implementing measure of CESR Standards/Rules.)
- The level of detail of each implementing measure should be equivalent to the level of detail of the respective CESR Standard/Rule. Therefore, a general principle (i.e. general principle of civil law) alone is only considered as implementing a Standard/Rule with respect to the corresponding general principle of a CESR Standard/Rule. With respect to detailed CESR Standards/Rules, only if there is clear indication that requirements (e.g. case law, the regulator’s manuals for licensing or supervision, etc.) provide for further detail to a general principle of national law the level of detail of which is equivalent to the corresponding CESR Standard/Rule, it would be considered as implementing measure. (If already tested in court, indication as to the outcome should be given.)
- Any derogation from the full application of an implementing measure or any possibility for issuing a waiver from the requirement should be stated explicitly, together with the rationale for any such exemption.
- If a Standard/Rule has not been implemented, the reason for this should be explained, what action has been taken to implement it, and what the timing for implementation is. Further details on the timing of the implementation process in each Member State should be given under the comments section for each Standard/Rule that has not been fully implemented.
- If a measure implementing a Standard/Rule is not in force but has already been formally adopted, and a concrete date of its coming into force is stated in the response, it is regarded as implemented.
- If a measure for implementation of a Standard/Rule is in the process of being drawn up, this is mentioned in a footnote, provided that this measure has already taken concrete shape (e.g. proposal to Ministry or Parliament, consultation paper, etc), provided it is mentioned in the response.

Specific points as to the Standards on Investor Protection:

- The CESR Standards on Investor Protection have not the effect of maximum harmonization. Consequently, more stringent requirements can be adopted. The mandate of the Review Panel covers the factual assessment of the implementation of the CESR Standards/Rules with respect to the question of harmonisation, however it does not cover the assessment of the level of investor protection in the Member States concerned.
- Jurisdictions encountering legal difficulties in implementing Rule 13 (obligation of an investment firm to ensure that the competent authority is informed about serious breaches of COB rules), should indicate in the section for comments in detail the reasons for those difficulties, and also further steps envisaged.
- Jurisdictions which generally prohibit cold calling (as defined in CESR/01-014d) or provide for stricter conditions than provided for in the CESR Standards/Rules should indicate this fact in the section for comments.



- Regarding the COB rules for professional investors, Members should make clear in the comments section whether only the Standards/Rules addressed to professional investors are applied, or whether Standards/Rules specifically addressed to retail investors are also applied to professional investors. The same applies to the Counterparty Regime. An indication of the timetable for introducing the professional and counterparty regime should be given.

Specific points as to the Standards for Alternative Trading Systems:

- A list of ATs authorised, according to the CESR definition, in each Member State should be indicated in the response (but not in the correspondence table itself) for information purposes (giving the name and the categories of financial instruments traded).