



Date: November 2003

Ref: 03-483

**“CESR’s role in creating the pan European rules”**

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**APCIMS 2003 ANNUAL CONFERENCE**

**LONDON, 5 NOVEMBER 2003**

Ladies and Gentlemen,

I am very pleased to be able to speak to you at this 2003 annual conference of APCIMS and grateful to Angela Knight, Chief Executive of APCIMS, for inviting me. In front of this distinguished and knowledgeable audience, I want to table four issues which are sometimes ignored in the rule making process, but - in my view - are key for future success. After all, CESR is still an experiment and serves as a guinea pig. Before I will present these issues, I will give you a very brief update on where CESR is, on our way to the completion of the 2005-agenda. Following-up, I will say a few words on:

- The goal of an integrated market
- The consultation process
- The role of normative effects of decisions in individual cases
- An exploration of levels 3 (cooperation of regulators) and 4 (strengthened enforcement)

**CESR’s update**

Since more than two years, CESR is well under way with the operation of its virtual network. We have our network in place at chairmen’s level and at the levels of our permanent and expert groups, consultative working groups, Market Participants Consultative Panel and Review Panel. In addition, we have created several other sub-networks with staff of CESR members to deal with legal, consumer, macro-economic and press-related issues.

On substance and in a nutshell, CESR:

- has completed its advice on **market abuse**;
- is preparing a third set of advice on **prospectus**;
- consults about the ways to coordinate decisions on **enforcement of accountancy standards** and on practical implications how to manage and communicate the **transition to new IAS**;
- has just opened a consultation on the organisation and areas of work in **asset management**;
- is ready to start work on the soon-to-come **ISD-mandates**;



- and is reviewing - together with our ESCB-colleagues - responses on the consultation paper in the area of **clearing & settlement**.

To contribute to the evaluation of the Lamfalussy-process, CESR has made suggestions to the Inter Institutional Monitoring Group as to how to improve the Lamfalussy-approach, especially at level 2 and 3 which are core for CESR. In this respect CESR has - among others - emphasized the importance of Regulations as a tool for harmonization and the need for convergence of local jurisprudence at level 3. We await the second interim report of this Group, later this month.

### **The goal of an integrated market**

Now you know where CESR is today, we can move on and focus on the future. I have noticed from the proposal of last September that APCIMS already presented some ideas on how to proceed after FSAP. One of the drivers to sustain success with any future FSAP agenda is - in my view - the focus on goal-orientation. Whilst preparing for a post-FSAP agenda, we should bear in mind that our approach should remain functional and goal-oriented and not institutional and based on dogmatism. What do I mean by goal-oriented? By goal-oriented I mean: are we (EU-institutions, ESC and last but not least CESR) able to offer you, as market participants, enough legal certainty “to make the jump” and to do business in other member states. Harmonisation of rules can never be the ultimate goal of this process, nor is it intended to take away all business risks. If we do that, we would drown in a sea of European details.

### **The consultation process**

Based on our experience with the consultation process over the last two years, we have seen quite a few examples of requests for “adding just another detail”, in short; an “insatiable hunger” for consultation. There seems to be a need to be consulted ahead of CESR’s consultation process or even when CESR has completed its advice. Should this “hunger” be satisfied at all times, it is obvious that this could seriously undermine CESR’s role in the Lamfalussy-process. I believe that in this respect more discipline is needed from all participants in order to be able to maintain a manageable process. It is not for CESR alone to have duties in this process. Representative organisations, considering taking part in any consultation, have - in my view - a duty to consider when and where interests could be pooled with those of other organisations. To date, joint responses hardly happen, but could contribute to a higher level of efficiency in the consultation process.

### **The normative effects of decisions in individual cases**

Apart from the top-down approach in a regulatory process with Directives, Regulations and implementing measures, there is another approach which will have a major impact in “real life”. This second (bottom-up) approach relates to the normative nature of the concrete decision-making activities of the supervisory authority. This normative effect, or the impact of precedents on decisions in (similar) future cases, cannot be fully controlled by the legislator, for the supervisory authority will be forced by the law to take account of and weigh up the concrete facts. Since that effect is inevitable, it would be wise to take account of it when drawing up the European regulations themselves, using as it were an experienced eye, and to determine where latitude can be given and where not to the normative effect that arises from practice.

### **The exploration of levels 3 and 4**

Again, with due respect to all that has been (and will be) done on levels 1 and 2, please keep in mind that supervisory authorities still set standards, even if they do not make the rules, because, as I just have explained, each concrete decision has a normative effect. This effect should not be neglected, but managed from a European perspective. In the past, there has been clear evidence of the need to coordinate decisions between European supervisory authorities and to develop recommendations, guidelines or even standards for these decisions. This is how we started as FESCO. We need room for level 3 measures and we need to manage that room.

The report of the Lamfalussy Committee underlined the need for much greater practical coordination on a day-to-day basis. Nowadays we can perceive that the Wise Men were right at that time, as - for instance - the home-country-control-principle has become so preponderant. How will



we operate and cooperate as regulators when substantial home/host differences in practice emerge between CESR-members? Should we not create a mechanism for dealing with such differences? These questions not only relate to level 3, but probably also to level 4.

Although all players now have gained some experience with levels 1 and 2, levels 3 and 4 are to a large extent still untested waters. I hope we can answer these questions in the near future - partly based on a joint analysis with the Commission - to safeguard a future efficient operation of the Lamfalussy-approach.

### **Conclusion**

To conclude; at the end of the tunnel we see some light. In practical terms I hope that in the year to come, you can perceive the following. CESR is not only there to advise the Commission, Council and Parliament on level 1 and 2 matters, but is now preparing to set up sub-committees to monitor market developments in a coordinated way, to solve differences and to provide adequate coordinated enforcement. We have already one committee in place: CESR-Pol which will expand into matters pertaining to market abuse and CESR-Fin is moving into a comparable direction. Soon we will discuss what more needs to be done. We will not overstep our mark. First, we need to have agreement about the respective roles there are to play, especially between the Commission and us. As you probably can remember, we CESR, started on the assumption that our common goal can only be achieved if we are playing a “co-operative game”. I am modestly of the opinion that until now, we - CESR, the Commission, the ESC and Parliament - have proved that we are able to do so. We have no complaints about you either. Your input improved our advice substantially, so I am optimistic. Now that we have experience, we should re-invest that in improving and intensifying the process. The only real danger that I see is - as often - that the better will become the enemy of the good. Improvement should be the name of the game, not re-thinking.

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