



EUROPEAN COMMISSION

Internal Market DG

FINANCIAL MARKETS

Summary Record of the 27th Meeting of the European Securities Committee / Alternates

23 February 2005 (ESC 13/2005)

The meeting was chaired by David Wright, Director of Financial Markets.

1. ADOPTION OF AGENDA

The draft agenda was adopted. No further suggestions were made by delegations on A.O.B. (any other business).

2. MiFID

2. 1. Implementation deadline extension

The Chairman presented the Commission's intentions with respect to extending the implementation deadline as well as the other adaptations to other deadlines included in the Directive (i.e. reporting obligations). A new proposal for a Directive will be submitted to the Commission for adoption by beginning of the summer. The formal proposal will then have to be adopted by the Council and the European Parliament through co-decision, possibly by end of this year.

This proposal will grant Member States six more months to implement the Directive (until 30 October 2006). It would give firms and markets another 6 months (until 30 April 2007) to adapt their structures and procedures. There would be other technical adaptations concerning e.g. the timing for the derogation of the current Investment Services Directive (which is replaced by the MiFID) or the timing of a number of evaluation reports concerning the application of the MiFID.

Given the close interaction between the various parts of the MiFID, these proposals should apply to the whole Directive (and not just those provisions which must be supplemented by implementing measures).

The Chairman emphasized that this is a very limited exercise; the Commission does not intend to allow any debates to be re-opened or deals re-negotiated. The modifications which will be included in our proposal will be technical and only extending deadlines; the Commission does not envisage further grandfathering or transitional provisions. Consequently, discussions in Council and EP should be restricted only to those purely technical modifications. He also insisted that this is an exceptional case and is not a precedent.

Delegations and CESR generally agreed with the proposal. One delegation expressed its doubts on this initiative; they consider that it might slow down the completion of the FSAP and the integration of markets. To avoid this, they consider that the debate within the Council and the EP should be clearly restricted to the technical points highlighted by the Commission. An important number of delegations supported this approach, i.e. that the debate should be limited issues linked to the deadlines. One delegation suggested that the pattern of CAD III should be followed in this respect. The extension of deadlines concerning the reporting obligation was also welcomed. The ECB suggested that concerning the report related to securities other than share developments in the bond market in the US should be taken into consideration.

It was further suggested that coherence be ensured between the transposition deadline of the level 1 directive and those of the level 2 measures. Some delegations pointed out that the extended timetable for transposition is still too short; they will need more than one year for transposition after the level 2 has been finalised because of their internal legislative processes.

The Chairman received that this is an exceptional case of “force majeure”; he agreed that sufficient motivation should be provided in the proposal justifying this extension in line with the real needs of the industry. He added a lot of pressure is building up on the Commission – and the ESC – to complete discussions on the level 2 implementing legislation by the end of this year and to finalise the adoption process by beginning of next year in order to give Member States and the industry sufficient time to comply with their respective obligations.

2. 2. Extension of deadline for CESR mandates

The Chairman drew delegations’ attention to the draft additional mandate supplementing the formal mandate granted to CESR in June 2004 which was circulated to delegations ahead of the meeting. This provides for an extension for delivering advice on three issues, linked to the requests for technical advice on articles 19 (7) (professional client agreements), 13 (3) and 18 (investment research) and 40 (admission of financial instruments to trading). CESR should deliver its advice on these issues by the end of April 2005, together with the rest of the technical advice under MiFID. The Commission considers that an extension of this deadline is reasonable and justified. The issues for which CESR has decided to delay delivering its advice are extremely complicated; an additional analysis will need to be conducted by CESR during this additional period of time.

No objections were raised by delegations. CESR drew delegations attention that there might be some delay (but only of a couple of weeks) with respect to some parts of the advice linked to the second set of mandates.

2. 3. Possible timetable for adoption of level 2 legislation

Pending the discussion with the Commissioner, the Chairman provided delegations with some initial thoughts and a rough estimate on the timetable for adoption of the MiFID level 2 legislation.

The Commission services intention is to split the work into several parts, i.e. present several working documents in order to facilitate discussions within the ESC – although, the number of the texts also needs to be decided by the Commissioner. The Commission services envisage starting presenting working documents for discussion to the March

ESC; these documents will also be made public on the Commission's website. The Commission announced its intention to have informal discussions within the ESC until July; the formal comitology phase should start after the summer holidays and run from September till December this year; this implies that adoption by the Commission could take place by beginning of next year at the latest. Vote should take place on the entire "package" of measures to facilitate global compromises.

The Commission attached great importance in building consensus within the ESC and with CESR but also with the EP and the industry practitioners.

2. 4. Discussion on the CESR advice (first part)

The Chairman announced his intention to have a general discussion on whether the level of detail and the scope of the advice are sufficient and appropriate for the Commission to prepare level 2 implementing legislation. He explained that a certain legislative fatigue is being expressed lately by both the industry and the Member States; to this end the Commission would like to achieve the right level of harmonisation and avoid over-regulation.

CESR recalled the principles of the Lamfalussy process; whereas level 1 contains general principles level 2 should contain detailed technical rules. A balanced solution is needed in this respect: A certain degree of detail is unavoidable if the rules are to be sufficiently clear. Nevertheless they agreed that there is a legislative fatigue and that overregulation should be avoided. Differing calibration is needed depending on the nature of the product or the services, the type of client, etc. Concerning this first part of advice CESR considers that it is well balanced and the right length. The advice is presented in the form of an articulated – but not legal – text following the Commission's request. CESR also explained that the advice builds on current common well accepted market practices while ensuring a high level of investor protection. Sufficient explanation on the choices made in the advice are provided in the feedback statement. Furthermore, CESR highlighted a particular problem they have been facing with respect to client agreements, i.e. how to ensure transition between the existing and the new regime; they consider that there is not sufficient calibration in the final advice. Finally, they recognised that the most difficult issues are coming in the second wave of mandates.

Delegations expressed general satisfaction with the work carried out by CESR at this stage; some concerns were voiced with respect to the second set of mandates, for instance related to the advice under preparation concerning pre-trade transparency and the "standard market size".

Delegations were split with respect to the level of detail: some delegations considered that some parts of the advice were too detailed; market led solutions or supervisory practices should be preferred or details should be included at level 3 whereas level 2 legislation should be principle based. Some issues need to be treated in a more flexible way - or be left to level 3 – referring for instance to the identification of the most relevant market in terms of liquidity, compliance (mainly with respect to accounting policies), safeguarding clients assets, etc. Some delegations agreed that some measures could be taken at level 3 provided that convergence is sought in a non legislative context - and that Member States do not simply want to escape from being subject to new obligations. The lack of a cost benefit analysis by CESR was also highlighted.

Some other delegations expressed satisfaction with the current degree of detail. They consider that level 2 should be sufficiently exhaustive to achieve the necessary degree of

harmonisation. They recalled that extensive mandates were given to CESR reflecting clear policy choices and making explicit the need to adopt level 2 implementing legislation for certain parts of the Directive. The work carried out by CESR reflects a consensus that should not be neglected. To this end they also insisted that policy choices made at level 1 should be respected at level 2: the Directive sought to establish a high degree of harmonisation which should also be reflected in the level 2 implementing legislation. They also added that shifting technical details at level 3 is not a satisfactory solution since the level 3 is not compulsory and there is no guarantee that it will operate if there are shortcomings at level 2.

A third group of delegations positioned themselves between 2 positions: they consider that the advice should be carefully scrutinised to get rid of unnecessary detail; level 2 measures should be limited only to those cases where this is really necessary for the functioning of the level 1 Directive. In any event, adoption of level of measures is in most cases at the discretion of the Commission according to the level 1 directive (“may” provisions).

All delegations agreed that level 2 must be in legal conformity with level 1. Another group of delegations pointed out that the level of acceptable detail depends on whether the proposed measure will be a Regulation or a Directive. CESR recalled the need for not using level 3 to escape from political decisions at level 1 and 2. Any transfer to level 3 should be clearly explained: is it a willingness to delete rules? Is it a decision of not harmonising? Or is it the willingness to leave it to supervisory convergence? In the later case CESR asks that the level 2 measure explicitly calls for level 3 work in order to have the political backing of the 3 EU Institutions.

Some further technical comments were delivered concerning for instance :

- Article 13 (7) (safeguarding client assets): according to some delegations this is an issue that should be settled by national civil law,
- outsourcing and coherence with the work of CEBS
- asset management and coherence with the work of the CESR Asset Management Expert Group
- sufficient calibration for small firms should be also provided.

Delegations were invited to present further written comments by 4th March.

3. LEVEL 4 OF THE LAMFALUSSY PROCESS

3.1. Transposition of the MAD Directives

The Chairman drew the delegations attention to the poor results with respect to the transposition of the MAD directives:

- So far, only 4 Member States have notified the transposition of all four directives. (Austria, Germany, Slovakia and Slovenia).
- 2 Member States (Lithuania and Czech Republic) have notified transposition of the level-1 directive and two out of the three level-2 directives

- 1 Member State (Poland) has notified the transposition of the level-1 directive and one out of three level-2 directives.
- 2 other Member States (Spain and Latvia) have notified the transposition of the level-1 directive.
- Only 2 transposition tables (1 of them unofficially) have been made available from those Member States having notified complete or partial transposition. The level 1 directive does not directly require such tables; however, all level-2 measures require them and MS have agreed to provide such tables for the level 1 directive as well. The Commission services again insisted that these tables are crucial for accurate work at level 4 under the Lamfalussy procedure.

The Chairman drew delegations attention that on 15 December 2004 letters of formal notice for non-transposition were sent to all those Member States not having fully notified the transposition of all four Directives. The Chairman urged delegations to proceed as rapidly as possible with transposition in order to stop these procedures. CESR agreed on the necessity not only to establish but also publish correspondence tables.

3. 2. Compliance with Securities Directives: Powers of competent authorities.

The Commission services explained that the purpose of this agenda item is to invite Member States to use the tables contained in Working Document ESC/2/2005 as a framework for assessing whether their competent authorities designated for the purposes of the Securities Directives have the regulatory tools and the full range of powers which they are required to have under those Directives. This forms part of the Commission's practical response to CESR's 'Himalaya' Paper with a view to assess the efficiency of the existing "legal toolbox". The Commission expressed its wish to launch a debate as to whether the authorities of Member States do (or will) effectively have the powers indicated in the tables. This exercise is also in line with discussions that are currently taking place in the FSC subgroup on supervisory convergence.

CESR welcomed this mapping exercise; they agreed that it is useful in order to check the efficiency of the network of regulators; they also promised to send written comments. One delegation drew the participants' attention that the competences provided for the in the securities Directives were negotiated and agreed among Member States; in this context no debate should be reopened on whether these competences are necessary.

4. PROSPECTUS: DISCUSSION ON COMPLEMENTARY LEVEL 2 LEGISLATION

The Commission services presented the issue at stake:

This question concerns the kind of financial information which should be included in a prospectus in the case of a 'complex financial history'. The Commission considers that Regulation 809/2004 implementing the level 1 Prospectus Directive contains a loophole regarding the information which has to be included in a prospectus in a case where the issuer has a "complex financial history".

CESR stated in its consultation paper on prospectus level 3 published in June 2004, that CESR Members could not reach a consensus on the nature of recommendations to be provided in respect of that kind of historical financial information. The issue was discussed at the CESR meeting in Amsterdam in June 2004, where DG MARKT expressed the firm view that level 3 guidance could not be used to require a prospectus to

include information relating to the business of an issuer with a complex financial which went beyond the requirements of the Prospectus Regulation. The Commission also sent a letter to CESR dated 18 June 2004, explaining, that the only way to extend the disclosure requirements is to modify the level 2 Regulation.

Subsequently the issue was raised again when responses from market participants to CESR's consultation on the Level 3 guidance strongly recommended that the loophole regarding "complex financial history" should be addressed in that context. However, the Commission maintained its view that this issue cannot be addressed at level 3; the right way to proceed would be by amendment of the Regulation. In addition, CESR has recently undertaken a fact finding exercise among its members to establish the current practices and whether there is such a consensus.

CESR said that they would be happy to present the results of this exercise in the next ESC meeting.

Several delegations expressed the view that discussions on the Regulation should not be reopened unless there are no other means to remedy to this apparent problem, for instance through interpretation. It was also agreed that it would be helpful to wait for the outcome of the CESR consultation exercise. One delegation strongly opposed an amendment to the Regulation on the grounds that this should not be done in any circumstances before the entry into force of the Prospectus Directive: in their experience, issuers were nervous at the prospect of a modification to the Regulation, and an amendment to deal with this point might result in additional legislative complexity. A limited number of delegations expressed themselves directly in favour of amending the level 2 Regulation. The Commission services confirmed that the problem cannot be solved by interpreting the scope of the definition of the "issuer" in a way going beyond the limits set in the level 1 Directive.

It was agreed that this discussion would be pursued in the next ESC meeting.

5. TAKE-OVER DIRECTIVE: DISCUSSION ON POSSIBLE LEVEL 2 MEASURES

The Commission services invited delegations to provide their views as to whether a mandate to CESR and subsequent level 2 implementing legislation are needed for this Directive. They took the view that, taken into consideration the general legislative fatigue, there is no reason for legislative intervention at this stage. Article 6(3) of the Directive – which is the only Article which includes a comitology provision – provides for extensive harmonisation since it lists **14 mandatory elements** the offer document should contain and compares to the most demanding requirements presently existing in Member States' legislations.

The majority of delegations agreed that no level 2 legislation is needed – at least at this stage; Article 6 provides for sufficient harmonisation. They also consider that given the abundant fatigue, they should concentrate on the other priorities they have set. A small group of delegations questioned the approach proposed by the Commission claiming that the objective behind the adoption of this Directive was to ensure the highest possible degree of harmonisation in order to provide more transparency to the market.

CESR agreed with the Commission that Article 6 of the Directive provides for a right degree of harmonisation; however it stands ready to provide its technical advice if requested with a formal mandate. They further suggested that, since this Directive is closely linked to the Prospectus Directive, taking stock on whether legislative

intervention is needed at level 2 should be checked after both Directives have entered into force. The Commission services agreed with this approach.

Taking into consideration the complexity of the options included in this Directive, some delegations asked the Commission services to provide some information on Member States transposition. The Commission services responded that this point is included on the agenda of the next meeting of the Company Law Expert Group which is planned for April; following this discussion and the information provided in this Expert Group a debate could be envisaged in the ESC. Furthermore, the Commission services promised to circulate a document to ESC delegations providing information on the transposition process in the various Member States.

6. MARKET INFRASTRUCTURE

6. 1. Clearing and settlement

The Commission services updated delegations on the following issues:

The Legal Certainty Group (LGC)

The Group has held its first meeting on 31 January in Brussels. It was decided to embark without delay on the process of analysing the current legal regimes and to identify where the key problems arise. The Group aims to advise on the results of this, and to make proposals for how the problems should be solved, by the autumn of this year. The Group note that its mandate requires it to liaise with others and to conduct its work openly, to which end active use of the Commission's website and a culture of transparency were agreed upon by all. The Group will also liaise with the UNIDROIT initiative.

The Fiscal Compliance Experts' Group

The Group will focus on discovering the range of fiscal procedures that are relevant to EU clearing and settlement, and identifying where the most problematic disparities lie. The group will be chaired by the Commission. The Commission services are currently working on the composition with a view to identify the best experts, drawn from across the EU, and have the group membership ready as soon as possible to hold a first meeting in spring. It will be important to draw participants both from the industry and outside the industry, including from accountancy and legal firms.

The CESAME GROUP

The Clearing and Settlement Advisory and Monitoring Expert (CESAME) Group will meet for the third time on 7 March 2005. The main points resulting from the discussion on 25 October are now taken further for the next meeting on 7 March 2005. In particular:

Definitions: COM has started to work on this issue; a first draft has been prepared which is currently being discussed with stakeholders.

Giovannini Barriers: Group members will continue to work on the identified issues;

- in January 2005 SWIFT has produced a document on standard protocol for consultation;
- further work on the elimination of two other barriers (*operating hours and intra-day finality*) is expected to be presented and assessed during the next meeting;

- another key area is the handling of corporate actions (barrier 3) on which additional reports are expected.

Impact Assessment

Currently, the Commission is screening the available studies on the issue. Moreover, a steering group comprising people from 6 DGs has been created. Finally, the Commission services are currently analysing the 82 responses they received to the consultation process and are about to finalise the synthesis of responses.

6. 2. The Hague Securities Convention

This point was included in the agenda in order to: (i) update the group on the latest developments concerning the possible signature of the Hague Securities Convention in the light of the outcome of the meeting of the COREPER held on 20 of January 2005, and (ii) exchange views on the way forward following the concerns raised by France, Poland and Spain, as well as the (joint) positive reaction from the UK, Sweden and Denmark.

The Chairman indicated that the discussion on this issue was without prejudice to the Commission position to sign. He informed the group that the COREPER of 20 January 2005 was decided, following a Commission proposal, to consult the ECB. The Central Bank has been given until 31 March 2005 to provide its opinion.

Views among Member States are split as to whether an impact analysis is needed before the Convention is signed. A group of delegations defended the view that there has been very little time to analyse the impact of the Convention on the “*acquis*”. They also want an impact assessment be carried-out “*before signature*”. One delegation suggested that for them the priority issues to be examined should be: (i) “Ordre Public” (Money laundering and Market abuse), (ii) Clearing & Settlement and Prudential risk, and (iii) Substantive laws on securities property.

Another group of delegations considered that the Convention is not perfect but that it is a rare and unique opportunity to solve the conflict of laws issue. Moreover, they do not see any need to carry-out an impact assessment 3 years after the event. Some delegations considered that this subject should be discussed exclusively at the Council Civil Law Committee (CCLC). However, for some of these delegations, Finance Ministries should also work closely on the topic.

A third group of delegations considered that, given the opposing views, the Commission should provide “an objective position”. We should take a “*wider view*”, including the forthcoming activities of the Legal Certainty Group and of UNIDROIT. As study needs to be carried out on the impact of the Convention on EU law and on other aspects the Convention may touch upon. It should also include an analysis of the economic consequences. All this may be done by the Commission with the help, if needed, of experts from the Member states.

The ECB delegate informed delegations that the Central Bank opinion will have to be approved by the ECB Governing Council. In his view there may be also problems there to agree on the final text of the opinion. The document is expected to analyse the question from two main angles: (i) risk management by financial institutions and systems, and (ii) financial stability implications, including legal risks for the financial

system as a whole (is it going to increase, decrease, remain equal, etc) and impact on public policies related to financial stability.

The Chairman concluded by reminding delegations that all EU Member States agreed in December 2002 with the text of the Convention; moreover, the Commission received in 2003 (before presenting its proposal) strong signals from all Member States to move forward. There was seemingly little or no co-ordination between delegates in the Hague and officials in the Ministries; there has been afterwards lack of inter-Ministerial co-ordination resulting in late change of position at the CCLC by some delegations. The Commission is now waiting for the ECB opinion. The Chairman also emphasized that he favours having debates at the ESC, in addition to those at the CCLC; preparatory discussions on these matters will also take place with the Commissioner and with the current and forthcoming Presidencies (LUX + UK). He promised to come back on this issue at the ESC meeting of 21/22 April 2005 with information and proposals on the best way forward.

6.3. UNIDROIT

The Commission services provided some explanation on the UNIDROIT draft Convention: This Convention aims to establish harmonised substantive rules regarding securities held with an intermediary. This is very similar to the Legal Certainty Group's mandate. The LCG mandate includes that it should liaise with UNIDROIT.

The draft Convention will be negotiated during a protracted process starting with an Intergovernmental Conference on 9 May 2005. The Commission was formally invited to designate observers on 31 January this year.

As the UNIDROIT Convention - at least partially - overlaps with existing provisions of Community law, the Commission has thereby legal competence to conduct negotiations on behalf of the Union in relation to those points of overlap. The Commission proposes to maintain two lines of involvement with UNIDROIT:

- the Commission, formally mandated to negotiate and
- the Commission's Legal Certainty Group will maintain a liaison role with UNIDROIT during its work.

It is necessary, before then, to achieve close co-ordination between the Commission and the Member States. To that end it would be helpful for the ESC to be aware of the draft Convention and the importance of its subject-matter to the existing Community acquis in the financial field and to the problems of legal uncertainty identified in the context of considering the way forward for post-trade in the European Union. The ESC should also discuss the necessary co-ordination modalities between the Commission and the Member States as well as between national authorities within Member States.

Delegations and the Commission agreed that there are overlaps between certain EU Directives (for instance the Settlement Finality and the Collateral Directive) that should be lifted. Clarification was sought as to whether negotiation should be carried out by the Commission or by the Member States or both. The Chairman explained that there are mixed competences in the present case; the Council needs to grant a mandate to the Commission to allow it to start negotiations. Some delegations disagreed with this approach and defended the view that no mandate should be granted to the Commission; nevertheless the Commission should ensure a coordination role to avoid problems similar

to those that arose in the context of the Hague Convention. Views were split whether this issue should be exclusively discussed in the Civil Law Committee or also in the ESC.

The Chairman ensured delegations that the Commission will follow the right institutional approach and proper cooperation.

6. 4. Settlement Finality Directive

The Commission services reminded Member States about the necessity to respond to the questionnaire concerning implementation of the Settlement Finality Directive by 21 2005 the latest. To this end, they asked Member States whether they have received the questionnaire; Member States confirmed reception of the questionnaire. They also asked whether Member States have any particular problems with the questionnaire, and if so, whether they estimate that they will be able to respond on time; no delegations reported any difficulty in this respect.

7. EXTERNAL RELATIONS

The Chairman provided an overview of recent contacts between the Commission and Chinese officials as well as further developments concerning the EU-US dialogue.

Firstly, he reported on the positive outcome of a visit of a 25-Member Chinese delegation in Brussels on 22/2/05. The main points of interest for the Chinese are accounting standards and governance of international accounting bodies, banking and insurance.

Secondly, he announced his upcoming visit in the US on 22nd March in order to meet with Treasury, Congress, CFTC SEC and Industry. The Commissioner has also planned a trip to the US on April 19-22 in order attend the “Euro-conference” in New York and meet his counterparts from Treasury, SEC etc. The major topic in these discussions will be:

- Convergence between International Accounting Standards (IAS) and US General Agreed Accounting Principles (US-GAAP)
- Delisting and deregistration procedures for EU listed companies in the US.
- Possible improvements to the EU/US dialogue on financial services and how to ensure more input from the industry

CESR also reported on the positive atmosphere in the recently held CFTC roundtable And on its contacts with the SEC and the discussions they had on specific issues, like credit rating agencies and MiFID. CESR suggested to the Commission that if the EU wants to achieve a satisfactory solution on the deregistration issue it needs to be more persuasive on the enforcement aspect. The Chairman added that the enforcement issue will also be in the heart of the discussion on accounting standards.

8. MARKET DEVELOPMENTS IN THE MEMBER STATES

It was agreed that the UK will make a presentation on bond markets in one of the upcoming ESC meetings. The Chairman expressed his wish to also have a discussion on complex financial products.

9. A.O.B

No issues were raised under this point
