

IMA RESPONSE TO CESR'S CONSULTATION ON THE ROLE OF CESR AT LEVEL 3 OF THE LAMFALUSSY PROCESS

The IMA welcomes the opportunity to comment on CESR's consultation paper on how CESR should develop its role in level 3 of the Lamfalussy process. The IMA represents the UK-based investment management industry. Our members include independent fund managers, the asset management arms of banks, life insurers and investment banks, and occupational pension scheme managers and are responsible for the management of over £2 trillion of funds (based in the UK, Europe and elsewhere). The role of CESR, as the Lamfalussy committee for the securities pillar encompassing UCITS and asset management, is therefore of critical importance to our members.

Now that 38 of the 42 FSAP measures have been adopted in the EU, the need for effective mechanisms to ensure the consistent implementation of these measures across Member States is greater than ever. We support CESR's aim to clarify and establish what level 3 means for CESR and its members. Given that level 3 does not emanate from the Treaty and depends on national regulators working together, it is essential that the arrangements and mechanisms used to deliver level 3 are fully transparent and open to the comment and scrutiny of market participants.

Question 1: Do you agree with the described role of CESR with respect to the coordinated transposition and application of EU law?

Answer: As stated in the consultation paper, the coordinated implementation of EU law covers both the legal transposition process into national law and/or rules and the day-to-day application of the EU legislation. We strongly believe that if an effective single market is to be established it is important that there should be as much convergence of interpretation of legislative measures and the application of those measures as possible. This is particularly important for cross-border activity. Differences of interpretation of the new UCITS directives are already giving rise to concern and creating potential barriers to cross-border business.

As noted, with respect to the legal transposition process, CESR members may intervene in the process where delegated by national legislators to transpose certain technical measures and/or act as advisors either formally or informally to the respective governments. Even where CESR members do not have legislative or rulemaking powers, they can play an important role in helping to shape legislation and should therefore be involved early on in the process. We therefore believe that CESR should urge the Commission to make more extensive and early use of "package" meetings during the transposition process where Member States and national regulators can discuss transposition problems and examine preliminary drafts of transposition measures. In addition, we believe it is essential for market participants to be involved at this early stage. If consultation with market participants is left to a later stage in the implementation process, there is a risk that legitimate concerns cannot be taken into account by CESR members whose scope for

interpretation may be restricted by how national legislators have converted EU legislation into national law.

With respect to the day-to-day application of the EU legislation, largely the responsibility of CESR members, we also support CESR continuing to coordinate ad hoc sessions of national regulators to discuss implementation issues and monitor instances of regulatory divergence, particularly where differences of interpretation may be causing problems for cross-border activity or creating an unlevel playing field. We also urge CESR to allow for consultation with market participants at this stage as well.

Finally, we agree with CESR that it could be useful for CESR members to be given similar rulemaking powers to be used in particular to implement level 2 measures. We believe that this would allow EU legislation to be implemented more quickly and consistently and to adapt any subsequent changes more easily.

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

Answer: See answer to Q1.

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

Answer: By allowing market participants and investors to rely on common rules, regulatory convergence seeks to promote the single market. One aspect of regulatory convergence where CESR could play a role is in streamlining or simplifying rules where those rules impede, rather than foster, EU integration and where the original justification for their adoption no longer exists. One example of this that has been identified by the IMA and recognised in the recent report of the Commission's Expert Group on Asset Management is the case of UCITS registration requirements. One of the original reasons for requiring a fund to be registered separately in each market after it has received its UCITS authorisation in its country of domicile was that funds were assumed to be marketed cross-border directly to retail investors. The host state authority needed therefore to be able to oversee the marketing arrangements in relation to the fund. This is not, however, now the model - funds are almost always sold via a local representative who will be subject to local marketing rules and not directly from manufacturer to retail investor. As a result, registration is no longer justified and has in fact been used as a barrier to efficient cross-border business.

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

Answer: With respect to non-harmonised sectors as well as new services or products, we believe that CESR could play a role in providing coordinated opinion, provided those areas are identified and developed in response to industry concerns and in cooperation with market participants. We believe that CESR should only focus on those areas identified by market participants as areas where the current rules hinder cross-border business and where a coordinated opinion would help facilitate

pan-European activity. We would however caution against the development of prescriptive product rules or product approval.

One example of an area where CESR could play a helpful role in providing coordinated opinion is the rules of private placement for non-harmonised funds.

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?

Answer: CESR members introduce level 3 guidance, recommendations and standards in their national regulatory practices on a voluntary basis. They are “binding” only in so far as CESR members have committed themselves to the process and are subject to peer pressure. While we would obviously prefer for the voluntary approach to succeed, we believe that the endorsement by the Commission could, in difficult cases, be a helpful tool in making common guidance more “binding” where the voluntary basis has proven to be ineffective. One way of doing this might be for the Commission to issue a communication or recommendation, subject to proper consultation with market participants and others.

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

Answer: We support CESR’s proposals for enhanced supervisory convergence.

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

Answer: We believe that the kind of mediation role you describe for CESR could be helpful in resolving disagreements among Member State regulators, as long as all CESR members sign up to a mediation agreement which clearly outlines how the process will operate in practice.

Question 8: Do you have comments on the catalogue of all mutual recognition and cooperation obligations under the Directives where CESR is active (see Annex 4)?

Answer: No comment.

We hope these comments are helpful. Should you like to discuss any of these points, please do not hesitate to contact me.

Yours sincerely,

A handwritten signature in dark ink, appearing to read 'Ilene Hersher', with a stylized, cursive script.

Ilene Hersher
Adviser, EU Legislation

