

31 January 2005

Dear Mr. Secretary General,

In the final quarter of 2004, the CESR published a preliminary progress report (the “Himalaya report”) analysing which supervisory tools will be necessary for implementing the Financial Services Action Plan, for ensuring effective enforcement and for anticipating the evolutions of the next five years (“Which supervisory tools for the EU securities markets”).

We are grateful that we now have the opportunity to participate in this debate and we welcome the prospective approach initiated by CESR to take into account the increasing integration of the European financial markets.

As mentioned in the consultation, it is difficult to predict the speed of integration of the specific areas of the securities market before contemplating the progressive effects of the entry into force of the directives and provisions recently adopted in the framework of the Financial Services Action Plan (FSAP). It is still too early to assess the practical implications and the limits of FSAP and issuers’ potential needs with regard to the evolution of European legislation.

However, at present it appears that the current legislation has established the level of harmonisation necessary for the application of the principles of the Home Member State and mutual recognition, which it is now appropriate to implement.

In this context the convergence of the supervision, which is both necessary and useful, must at this stage essentially aim to use the supervisory methods/tools within the current legal framework of FSAP. Furthermore, we consider that the evolutions in the area of regulation will have to be developed in stages, taking into account on the one hand the systems, legal frameworks, legislations and practices, and on the other hand the progressive integration of the markets.

At present favour strengthened cooperation and mediation

The focus should now be largely on strengthening cooperation and coordination between securities regulators rather than taking single decisions on a European scale or modifying EU “legal tools” (European legislative or regulatory frameworks). These evolutions require prior harmonisation of the legislations, competences and enforcement/decision-making methods established at the national level.

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Aside from possible collective decisions, there are a large and increasing number of multilateral regulatory issues that do not affect the EU as a whole. For these issues it is useful and necessary to maintain or develop mechanisms for multilateral cooperation and mediation between the national securities regulators concerned.

Progressively harmonise national regulations and enforcement/decision-making methods, with the goal of implementing a single European regulation

Considering that the final goal is to implement a single European regulation, the progressive harmonisation of national regulations should be one of the greatest priorities of the Member States and, concerning national administrative regulations, of the CESR. Furthermore, the deliberations should be extended in order to make more coherent or even collective decisions, at the EU level, whether these are day-to-day enforcement decisions made by securities regulators or general technical interpretation decisions. Moreover, the latter, in the field of securities regulation, require the implementation of a specific system which other market participants should also take part in and access; in the accounting and IFRS domain they should remain the responsibility of accounting organisations.

We do not feel it is necessary to modify the allocation of competences specified in the Lamfalussy approach or to consider granting new legal powers to the CESR, particularly with regard to provisions that it develops (guidelines, standards and recommendations). The granting of new competences or powers to national regulators, within the responsibility of the Member States, must essentially be included in an objective for the convergence of the application of European legislation and of supervision. Such an approach should not lead to the development of new national regulations, initiated by CESR at Level 3 (reinforced cooperation) that would add to the European Commission's already detailed implementing measures, as this would make convergence and evolution difficult.

Explore possibilities for delegation between national regulators after harmonisation of legislations, competences and enforcement/decision-making methods

In order to avoid any uncertainty for market players we do not feel it is appropriate at this stage to consider any delegation between national securities regulators, as legislations, competences, and enforcement/decision-making methods, and even the effect of decisions, vary from one Member State to another, making it difficult for market participants to anticipate, assess or implement them. A delegation presupposes that these elements are harmonised, securities regulators have exclusive competence, and the conditions and responsibilities concerning delegation are clarified. If applicable, collective decision-making would moreover only be appropriate for issues or operations that are of general interest, that are significant for the entire European Union and correspond to a high degree of integration.

At the end of the harmonisation process, consider the creation of a European securities regulator while maintaining national entry doors

The creation of a European regulatory body could occur following the harmonisation of legislations, competences and enforcement/decision-making methods. In areas that have achieved a high degree of integration, it would then be possible to consider the gradual

transfer of the competences of national securities regulators to the European regulator. The national securities regulators would then be national entry doors to a pan-European securities regulatory system, which would allow the market participants who want it to have close and direct contact with a securities regulator, notably concerning consultations, the instruction of cases and operations and also mediation.

A mediation function between market participants and securities regulators should, in this respect, be implemented at a European level for multilateral or EU issues, and in the shorter term at a national level, for country-specific issues.

Reinforce the due process and place evolutions in a longer term perspective

Considering the volume of work to be carried out, its interactions with national systems and the stakes and consequences for market participants, we believe that is highly desirable to assure the credibility of the process and to develop it based on a few key principles, while placing evolutions in a longer term perspective.

At the European level and at the national level alike, it is important both to closely involve the market participants in the work along with its associated directions and proposals, and to maintain realistic timetables for the consultations and, as applicable, for the development and the enforcement of legislation.

Your attention to these issues is much appreciated. Please feel free to contact us for further elaboration.

Yours sincerely

Alexandre TESSIER
Director General

SUPERVISION OF FINANCIAL MARKETS BY STOCK MARKET REGULATORS

RESPONSE TO THE CESR CONSULTATION

EXECUTIVE SUMMARY

1. THE REGULATORS AND THE REGULATIONS

As a priority harmonise national regulations, while avoiding “over-regulation”

The harmonisation of national regulations and participation in information exchanges sometimes require securities regulators to possess equivalent powers at a national level, which is not generally the case.

The granting of new competences or powers to the regulators in these areas, matters handled exclusively by the Member States (sometimes in application of FSAP directives), should, however, essentially aim to achieve a convergence in the application of European legislation and supervision. This should not lead to a situation where new national rules, following the provisions developed by CESR at Level 3 of the Lamfalussy approach (reinforced cooperation), are added to European legislation that is already very detailed at Level 2 (implementing measures issued by the European Commission) or to the creation of a third level of legislation.

This situation would favour maintaining the differences between Member States, would halt any adaptation of legislation at Level 2 to actual situations and evolutions and would increase the already significant costs and restrictions related to market access.

In terms of legislation and regulation, at the European and national levels, take existing systems, legal frameworks, legislations and practices into account

In seeking harmonisation of national legislations or regulations, as well as in the development of European regulations, whether applicable EU-wide or no, it is necessary to analyse and consider existing systems, legal frameworks, legislations and practices at the national level before deciding whether or not it is necessary to modify the overall legal or regulatory framework.

At the national level such an approach should in particular make it possible to ensure the legal security of operations carried out by the issuers while avoiding any incompatibility between the provisions of European legislation and the provisions of national legislation, some of which are of public order or are not entirely within the competence of the securities regulators.

At the European level, it should make it possible to adopt the pertinent provisions while taking into account established provisions or practices, or, if applicable, after a detailed and systematic analysis of the barriers to market integration.

2. REGULATORS WITHIN THE EUROPEAN FRAMEWORK

Maintain the distribution of competences specified in the Lamfalussy approach

In order to ensure the coherence of the legislation, a single European regulation should be developed by the European Parliament and the European Union Council acting in co-decision or, for implementing measures, by the European Commission. As it is already possible for the CESR to issue advices for the purposes of the Commission (at Level 2), and to alert the Commission on any need to update EU legislation, we do not feel that it is necessary to consider giving new legal powers to the CESR, particularly with regard to the provisions that it is developing (guidelines aimed at its members ; recommendations and standards for the areas that are not covered by Community legislation).

Furthermore, it is appropriate to make a clear distinction between, on the one hand, the general implementation and, the transposition of European legislation, which are the responsibility of the Member States and for the purposes of enforcement, the responsibility of the European Commission and, on the other hand, day-to-day consistent enforcement of the legislation in individual cases, which is the responsibility of the securities regulators, when it is not a question of the formal technical interpretation of this legislation.

Clarify the respective roles of European institutions, the CESR and other market participants in terms of technical interpretation

The future development, existence and/or future enforcement of a number of European legislation, directives and regulations raises the issue of their formal technical interpretation as actual situations bring up questions of principle and general scope.

It therefore seems advantageous for European institutions to consider setting up a system that would make it possible to quickly issue formal technical interpretations that are compatible with those of the operations. Such a system, which market players and particularly the issuers would have to participate in and have access to, could be included in the comitology procedure framework.

In terms of accounting rules or IFRS, likewise applicable to companies that do not offer a public issue (for IFRS, depending on the decisions taken by the Member States), it is the responsibility of accounting standards setters and organisations, rather than securities regulators, to implement the appropriate organisation for providing interpretations in due time. The securities regulators or the CESR may contribute to this work and act as observers within the competent organisations.

Market supervision and crisis management : consider European coordination

Without overloading the structures currently in place at the European level, we consider it important to create a high level European crisis management unit that can *coordinate the market supervision actions in an emergency situation*. Such an initiative appears to be essential in certain situations similar to those that we have already seen, notably in 2001.

3. RELATIONS BETWEEN SECURITIES REGULATORS**Strengthen the cooperation between securities regulators to facilitate the harmonisation of existing administrative regulations, approaches and enforcement/decision-making methods**

Companies support the members of CESR deepening the cooperation arrangement under the FSAP's current legal framework to enhance the relationships between Home and Host Member States and to improve the convergence of existing administrative regulations, approaches and decisions. This convergence is based in particular on the harmonisation of enforcement methods for the application of European legislation and the coordination of enforcement/decision-making methods rather than the development of new provisions or regulations at the European or national levels.

Seek the convergence of the various decision-making methods, while individual decisions remain the responsibility of the national competent authority

For identical legislations and situations, we feel it would be appropriate to seek the convergence of the approaches/methods implemented by national regulators for decision-making, as their harmonisation would improve the coherence of decisions at the European level.

However, companies do consider that individual decisions should continue to be the responsibility of the national competent authority, as decision-making at the European level still seems difficult to envision in the majority of cases. We think it is only conceivable to replace the current mutual recognition system by a single EU decision-making system for certain issues.

A joint approach by the regulators presupposes that various conditions are fulfilled at the same time:

- exclusive competence of the stock market regulators;
- identification of planned operations or players, applicable laws (general and specific) and decision-making methods/procedures;
- comparable effect of decisions.

Furthermore, collective decision-making would only be appropriate for issues or operations of general interest, with an EU scope and having a high degree of integration.

Maintain or reinforce mechanisms for multilateral cooperation and mediation between the national securities regulators concerned

In addition to any possible collective decisions, there are a large and increasing number of multilateral regulatory issues that do not affect the EU as a whole. For these issues it is useful and necessary to maintain or develop mechanisms for multilateral cooperation and mediation between the national securities regulators concerned, as such mechanisms also constitute an additional vector of convergence between national systems, legislations and practices.

4. PROSPECTS FOR REGULATION

Seek eventual harmonisation of the powers and resources of regulators in the areas of supervision and enforcement

Companies support harmonisation of the powers and resources devolved to national regulators in the areas of supervision and enforcement. However, such harmonisation can only be sought, by conducting in-depth analysis and comparing existing national systems, taking into account any role which may be played by participants other than securities regulators (other financial regulators, judicial authorities, stock exchanges, auditors, etc.), all the resources used, and provisions related to the application of texts which are not completely within the competence of the regulators.

Maintain, in any case, the possibility of contact with the national securities regulator for possible single EU decisions and for multilateral regulatory issues.

For decisions to be made at the EU level by securities regulators, and for multilateral regulatory issues, it is important in any case to preserve national entry doors, so that market participants may, if they wish, have close and direct contact with a securities regulator. Such contact could be particularly useful in the following fields:

- consultations/rescript procedure or advance rulings ;
- preparation of documents, files and transactions ;
- mediation.

Consider the implementation of mechanisms for mediation between regulators and also between regulators and market players, at the European and national levels

The convergence of opinions and practices can only be promoted by implementing a mechanism for mediation between national securities regulators. Such a mechanism should focus on factual situations, with issues pertaining to principles and of general significance being left to the realm of interpretation.

Similarly, we believe that the eventual implementation of a mediation function at the European level should be considered so as to deal with the relationship between market

participants, i.e. issuers in particular, and the relevant securities regulators. Such a function should provide a means for examining at short notice the issues inherent to the assessment of trans-European transactions, when this assessment is devolved to several securities regulators. The time scale involved should be such as to respect the constraints of the issuers, and should among other things be compatible with the time scales stipulated in the Prospectus Directive.

Such a function could be implemented in the very short term in each Member State, for both national and trans-European transactions.

Strengthen the consultation process with market participants at the European and national levels

We support the principle of public consultations set up by the CESR.

However, we consider that the amount of work to be done, the issues at stake and the usefulness of establishing the credibility of the process justify the implementation of considerable arrangements based on several essential principles and require more developments to be placed in a longer term perspective (see the Detailed Reply).

New public consultations should be organised at the European and national levels on the themes, which are the subject of this consultation, in particular in the following cases :

- proposal to consider the CESR guidelines, recommendations and standards in European legislation, and even in national administrative regulations;
- developments being considered in the areas of supervision and enforcement that affect fields other than that of securities regulation;
- directions and proposals, from the CESR in particular, that follow up on the present consultation.

In addition, the composition of the consultative groups formed by the CESR should be adapted to the subject being addressed and provide the broadest representation of interested parties. For example, for the Prospectus, almost half of a consultative group should consist of members drawn from the corporate world or from institutions that represent the corporate world.

SUPERVISION OF FINANCIAL MARKETS BY STOCK MARKET REGULATORS
RESPONSE TO THE CESR CONSULTATION

SUMMARY OF THE DETAILED COMMENTS

1. REGULATORS AND REGULATIONS

One priority: gradual harmonisation of national administrative regulations

2. REGULATORS WITHIN THE EUROPEAN FRAMEWORK

- 2.1 Avoid extending European regulatory power outside the three institutions of the European Union
- 2.2 Role of the CESR at Level 3 and of the European Commission at Level 4 : define the concept of regulatory convergence and stress the competence of securities regulators (day-to-day enforcement of texts in individual cases)
- 2.3 Clarify the respective roles of European institutions, other organisations and the CESR in the matter of technical interpretations
- 2.4 The role of securities regulators in the field of financial and accounting information: take into account the work performed by auditors
- 2.5 Market supervision and crisis management: consider European coordination

3. RELATIONS BETWEEN SECURITIES REGULATORS

- 3.1 Strengthen cooperation between securities regulators to facilitate the harmonisation of existing administrative regulations, approaches and decision-making methods
 - Powers and resources in the area of enforcement: first continue the comparative analysis of national systems

- 3.2 Seek the convergence of the various decision-making methods, while individual decisions remain the responsibility of the national competent authority
- 3.3 Continue to explore the possibility of making single EU decisions on certain issues
- 3.4 Maintain mechanisms for multi-lateral cooperation between interested national securities regulators
- 3.5 At this stage, do not consider a delegation of powers between securities regulators at the European level

4. PROSPECTS FOR MARKET REGULATION

- 4.1 Maintain contacts with the national securities regulator for multilateral issues and possible decisions made at the EU level
- 4.2 Seek eventual harmonisation of the powers and resources of regulators, in the areas of supervision and enforcement
- 4.3 Consider the implementation of mechanisms of mediation between securities regulators and also between regulators and market participants, at the European and national levels
- 4.4 Continue consultations on elements of the CESR's work programme
- 4.5 Strengthen the consultation process with market participants at the European and national levels

DETAILED COMMENTS

Faced with very varying degrees of integration depending on the sectors and categories of market⁶ participants considered, the CESR's report suggests that securities authorities develop a *flexible strategy*, with a range of *supervision tools* (a "tool box"), new ones in some cases, allowing a response adapted to the changing reality of integration. It is not, however, out of the question that these tools could include the possibility of the CESR making *decisions on the European scale*, without the creation of new European institutions, such as a European regulator, being proposed.

In particular, the prospects of *convergence* of supervision on the scale of the European Union are dealt with. Thus, the options considered assume *enhanced cooperation* between securities regulators and, sometimes, *changes in legislative or regulatory frameworks* aimed, in particular, at giving equivalent powers to regulators, in the areas of rulemaking, supervision, investigations, sanctions, exchange of information, etc.

In particular, the use of the possibilities offered by Level 3 of the Lamfalussy process and deepening of cooperation between securities regulators are proposed.

It is still early to judge the practical effect and the limits of FSAP and the possible needs of issuers

As the CESR notes, it is difficult to predict the speed of integration of the specific areas of the securities market before contemplating the progressive effects of the entry into force of the various Directives of the Financial Services Action Plan (FSAP). *Apart from the Directives, European regulations adopted by co- decision and the implementing measures of these texts, some of which are in the course of being drawn up (Transparency Directive, Markets in Financial Instruments Directive "MiFID"), should also be taken into account.*

Together, these various provisions have established the level of harmonisation necessary for the application of the principles of the Home State Members and for mutual recognition.

As for issuers, the consultation reports that, apart from debt markets, which are often highly integrated, the degrees of market integration in markets for equity markets still differ very much. It also stresses that retail investors tend to operate in their national markets, while professional investors increasingly tend to consider the European Union as a single market and to manage their priorities on the basis of indexes and other instruments.

1. REGULATORS AND REGULATIONS

One priority: gradual harmonisation of national administrative regulations

We support a gradual approach in the area of regulation.

In order to facilitate the development of cross-border operations, to ensure the consistency of controls within the European Union and thus to avoid distortions in it, it seems to us *advantageous to first pursue the convergence of national administrative regulations.*

Indeed, as the eventual objective is to promote a single set of European regulations, the gradual harmonisation of national administrative regulations should be among the greatest priorities of CESR. Such regulations should not form a third level of texts, or be added to the already very detailed European texts of Level 2 (for example the Prospectus regulation, regulations on the execution of international accounting standards).

This would, moreover, only deprive the texts of Level 2 of their necessary adaptability to situations of fact and to changes, risk the maintenance of differences between Member States, and strengthen restrictions on market access, which are already very burdensome and costly.

In this context, and in accordance with the objective of converging application of European legal provisions and the objective of convergent, consistent and effective supervision, the granting of equivalent rulemaking powers to regulators should be aimed essentially at harmonising existing national administrative regulations, thus facilitating the eventual drawing up of a single set of European regulations (according to the conditions described in the next paragraph on the non-extension of rule-making powers). Moreover, in all cases such regulations should not be excessively detailed.

In this effort to harmonise national administrative regulations, as well as to create a single set of European rules, it is necessary to take into account the systems, legal framework, texts and practices existing on the national level. Such an approach should, in particular, make it possible to ensure the legal security of issuers' operations, by avoiding inconsistency between the provisions of European legislation and the provisions of national legislation, some of which are of public order in nature. Besides, it should make it possible, on the European level, to adopt relevant texts taking existing provisions or practices into account.

2. REGULATORS WITHIN THE EUROPEAN FRAMEWORK

2.1 Do not extend European regulatory powers beyond the three institutions¹ of the European Union

In order to ensure the consistency of the texts and the political accountability of the process, mentioned by the CESR (p. 10), the development of a single European legislation should be carried out by the European Parliament and the Council of the European Union, acting in co-decision, or, for implementing measures, by the European Commission. With the provision that the CESR, within the framework of the Lamfalussy approach, gives advices to the Commission (at Level 2), and can alert the Commission to any need to update EU legislation (at Level 3 ; see below).

It does not therefore seem necessary to us to consider giving new legal means to the CESR (see p. 10) and it does not seem appropriate to define regulatory convergence as the “process of creating common rules”; see CESR /04-104b and our comments on Level 3 below).

2.2 Role of the CESR at Level 3 and of the European Commission at Level 4: define the concept of regulatory convergence and stress the competence of securities regulators (day-to-day enforcement of texts in individual cases)

Content of the Lamfalussy Report

According to the Lamfalussy Report, the role of the CESR at Level 3 consists, in particular, of :

- formulating consistent administrative guidelines for the adoption of *administrative* regulations on the national scale;
- issuing joint interpretative *recommendations* and establishing common *standards regarding matters not covered by EU legislation*; if necessary, these can be integrated into EU legislation using a Level 2 procedure;
- comparing and re-examining regulatory practices in order to ensure effective enforcement of rules throughout the whole EU and identify best practices.

The Report also says that the conclusions of this work are not binding, which CESR mentions in its consultation (p. 10).

¹ European Commission, European Council and European Parliament

Finally, as CESR noted in an earlier consultation, discussion at Level 3 cannot be held without taking into account the other components of Lamfalussy's approach, and for this CESR's efforts should be closely coordinated with the role of the Commission at Level 4.

In this respect, the Treaty gives the Commission the essential role, acknowledged by the Lamfalussy Report, of checking Member States' compliance with EU legislation and identifying misapplication of directives and regulations.

Analysis of the Lamfalussy Report

Analysis of the provisions of the Lamfalussy Report gives rise to several essential points:

- the *guidelines*, on the one hand, and the *recommendations and standards*, on the other hand, *do not have a general and identical effect* as the first are aimed at the adoption of *administrative regulations on the national scale* and the second concern matters *not covered by European legislation*. It should, moreover, be noted that, *according to the CESR's Charter, these guidelines, recommendations and standards are applied by its members on a voluntary basis*;
- the CESR's role at the EU level consists of ensuring the *enforcement* of regulations, rather than their *implementation* or checking of their implementation by Member States, this latter being in the competence of the European Commission;
- the formulation of administrative guidelines is a useful instrument for developing *national administrative regulations consistent with non-binding conclusions established on the EU level*.

Thus, by its role at Level 3, the CESR implements mechanisms intended, to enhance *day-to-day* consistent supervision and enforcement, thus *contributing* to the consistent and timely implementation of EU legislation. *This does not mean, for all that, that the members of the CESR should themselves proceed to implement and transpose EU legislation.*

In this respect, the European Commission, as part of its enforcement duties, also facilitates coordination between Member States and can establish transposition guidelines.

Proposals of the CESR

Mention is made (on p. 11 of the consultation) of “Member States’ governments and *national regulators transposing into national laws/rules the EU law*” and also “Recommending that CESR members all be given similar powers to implement both EU legislation and CESR standards and guidelines”.

These standards and guidelines, which could have a general scope (“Embed common approaches into Guidelines, Recommendations or Standards”), could, moreover, according to the CESR, be given more authority by the Commission (“Support the initiatives of the EU Commission to give, where appropriate, more authority to CESR common approaches”).

Moreover, more intensive use of the Review Panel² to check the transposition of standards, recommendations and guidelines is being considered (p. 15) (“a more intensive use of the Review Panel to check the transposition of standards, recommendations and guidelines”).

Role of the CESR at Level 3: define the concept of regulatory convergence

The proposals made for coordinated implementation and regulatory convergence (consultation document, p. 11) appear to us to be ambiguous, or even inappropriate.

In our opinion, it is *necessary to make it clear that the concept of “regulatory convergence” has the sole objective of contributing to the efforts of the three Community institutions³ to ensure day-to-day consistent enforcement of the legislation that they adopt and, for the CESR, essentially takes the form of the following activities:*

- seeking gradual harmonisation of *national administrative regulations*;
- *for this purpose, drawing up, for the exclusive use of members of the CESR, common guidelines, which therefore are not transposition guidelines*;
- *regarding matters not covered by EU legislation, drawing up joint interpretative recommendations and common standards, intended for members of the CESR and not enforceable against third parties*;
- *in the case of real need, formulating a proposal, for the European Commission, for the incorporation of a recommendation or a standard into Level 2 EU rules, via a Level 2 procedure*;
- *if appropriate, alerting the European Commission on any need to update EU legislation.*

On the last two points, as the CESR notes, obstacles to the integration of securities markets need to be systematically analysed in depth before deciding whether it is necessary to change the legal framework. (p. 8)

² Review Panel, composed only of representatives of members of the CESR

³ European Commission, European Council and European Parliament

Considering the possible consequences of taking guidelines, recommendations and standards into account in European texts, or even in national administrative regulations, it remains desirable for draft documents drawn up by the CESR to be submitted to prior public consultation (see the “Due process” section below) and for the CESR’s definitive documents to be made public.

Stress the competence of securities regulators for the day-to-day enforcement of texts in individual cases

The fact that the CESR contributes to the consistent and timely implementation of EU legislation does not, for all that, mean that the members of the CESR should themselves proceed to implement and transpose EU legislation.

It appears to us that a clear distinction should be made between, on the one hand, the general implementation and the transposition of European texts, which is in the competence of Member States and, for enforcement, of the European Commission and, on the other hand, the day-to-day enforcement of texts to individual cases, which is in the competence securities regulators, when it is not a question of the formal interpretation of these texts (see below discussion of formal interpretations).

2.3 Clarify the respective roles of European institutions, other organisations and the CESR in the matter of technical interpretations

The drawing up, existence and/or imminent implementation of many European texts, directives and regulations raises the question of their formal technical interpretation, when situations of fact give rise to questions of principle and general scope.

As for international accounting standards, it seems appropriate to use the organisation chosen by the European regulation on the application of international accounting standards (see below). Indeed, it already provides, in matters of interpretation, the application of a comitology approach, providing an EC decision based on the advices of committees (equivalents of the European Securities Committee and the CESR).

In other fields, it would be desirable for European institutions to consider setting up a system of the same nature, in which market participants, and, in particular, issuers should take part and to which they should have access (as is the case, for example, with EFRAG in accounting matters).

For all fields, interpretation procedures should, however, make it possible to make decisions quickly or in shorter time frames.

In matters of accounts, it is up to the accounting standards setters to set up appropriate structures to provide timely interpretations of the texts which they draw up, as such texts and

interpretations, moreover, are applicable not only to the consolidated accounts of companies whose securities are publicly traded.

On the subject of the interpretation of IFRS, the regulation of the Council and the European Parliament on international accounting standards provides, in particular, for the adoption of interpretations by the European Commission according to the comitology procedure. This procedure involves obtaining the advice of the technical committee (EFRAG) and the Accounting Regulatory Committee, which are the equivalents, in the field of standards and interpretations of IASB, of the CESR and the European Securities Committee. It will also be noted that the CESR has the status of observer in the European Accounting Regulatory Committee and EFRAG.

Consequently, if IASB does not provide interpretations in good time or if the European adoption procedure proves too long for the needs of market participants, then IASB should be asked, as a priority, to enhance its interpretation resources, and the European institutions should be asked to provide a specific procedure for the adoption of interpretations of IASB. If this proves insufficient, it is up to the European institutions to prepare interpretations or, if IASB is still unable to provide interpretations in due time, to develop interpretations at the European level.

Taking into account the wide scope of the standards and interpretations of IASB and their specialised nature, such a role should be given to the organisations that have specialised technical resources, the competence of which should then be extended to interpretations of IASB's standards : European accounting standards setters or EFRAG.

2.4 The role of securities regulators in the field of financial and accounting information: take into account the work performed by auditors

In its consultation, the CESR mentions (p. 20) that certain third party countries' securities regulators, such as the SEC, have the option of requiring a change in accounting treatment, or the power to require the disclosure of non-misleading information.

Taking into account the in-depth checks carried out by statutory auditors before the publication of accounts and the fact that they express an opinion on these accounts, we consider that any examination which may be carried out by securities regulators should concern essentially the relevance and the consistence of the information given about the company's situation, without again involving authentication of the accounting and financial elements presented, or implementing cumbersome and detailed approaches.

In this context, it does not seem appropriate, either, for the securities regulators to be able to require modification of the accounts, which would cause legal problems in certain Member States, taking into account the competence of the board and the shareholders.

As for the possible publication of additional information, we consider that demands by securities regulators should be considered only in the case of significant omissions.

2.5 Market supervision and crisis management: consider European coordination

Without making the structures currently set up at the European level more cumbersome, we consider that it is important to create a high level European crisis unit allowing the *urgent coordination of actions of market supervision*.

Indeed, such an initiative seems essential in certain situations such as those we experienced, in particular in 2001.

3. RELATIONS BETWEEN THE SECURITIES REGULATORS

3.1 Strengthen the cooperation between securities regulators to facilitate the harmonisation of existing administrative regulations, approaches and decision-making processes

The directives of the FSAP, which are founded on the competence of the Home State and on its relationship with the Host Member State, call for cooperation between securities regulators.

Under these circumstances, *we are in favour of having the members of the CESR deepen the cooperation arrangement under the FSAP's current legal framework* in order to enhance the relationship between Home and Host Member States, and ensure the convergence of national administrative regulations, approaches and decision-making processes.

As a general rule, the convergence of the various approaches will require the harmonisation of existing national administrative rules, tools for enforcing European legislation and the co-ordination of individual decisions, rather than the development of new European provisions or regulations (in this sense, see our earlier comments).

Powers and resources for enforcement: first continue the comparative analysis of national systems

The new legal obligations defined by the FSAP directives, such as the passport systems, encourage securities regulators to cooperate and to acquire comparable means of taking action. Home/Host(s) relationships and the Network arrangement operate better if equivalent *control systems* are in use. This may *for instance* be the case when regulators have similar powers and resources in the field of supervision and enforcement.

We should point out at this stage that in the various existing national systems, the regulators exercise their activities within broad frameworks characterised by the presence of other players (whose powers may or may not be shared with the regulators or who may or may not be acting on their behalf) and the existence of legal provisions of a sometimes fairly general scope.

Furthermore, as indicated by Appendix 3 of the consultation document entitled “Mapping Exercise on Powers of CESR Members in the Securities Sector”, the scope of the powers of the regulators still varies from State to State, even though this is supposed to change with the implementation of the FSAP directives. (pp. 28-30)

The fields in which such powers and resources are implemented must be carefully assessed and prior comparisons must be drawn between different national systems, taking into consideration the role played and the resources wielded by players other than securities regulators (such as other financial regulators, judicial authorities, stock exchanges, auditors, etc.) and any provisions concerning the application of rules and regulations that do not concern the regulators per se.

3.2 Seek the convergence of the various decision-making methods, while individual decisions remain the responsibility of the competent national authority

The principle of mutual recognition inevitably causes the CESR to raise questions regarding the convergence of the approaches implemented by the regulators for their supervision and enforcement activities.

In this respect, the CESR proposes more transparent coordination of individual decisions made by national regulators who are members of the CESR and foresees that in some cases, the CESR Network itself, rather than an individual member State, through mutual recognition, should be given the legal possibility to make single EU decisions (p. 16).

Companies are in favour of the harmonisation of the approaches implemented by the national regulators to make decisions where these are founded on identical texts and situations. Indeed such harmonisation should contribute to the coherence of decisions at the European level.

However, we consider that individual decisions must continue to be the preserve of the relevant national authority, given that it is still rather difficult to envision making decisions at the European level in most cases. We believe that it is only viable to replace the current system of mutual recognition by a single EU decision-making system for certain issues. (see below)

Several conditions need to be fulfilled in order to allow for a common approach on the part of regulators:

- the issue must be exclusively within the competence of securities regulators;*
- the transactions or players involved, the applicable texts (both general and specific) and the decision-making methods/procedures must be clearly identified;*
- the decisions must have a comparable effect.*

One wonders whether these conditions can ever apply to the vast majority of transactions or players.

The CESR states (p. 17) that so far, there has not been a unanimously voiced supervisory issue that would urgently and immediately require an EU single decision.

Furthermore, such a collective decision-making process would only be appropriate for issues or transactions of general interest and of EU scope, corresponding to a high degree of integration. In this respect a distinction should be drawn between transactions that affect most Member States and other transactions.

Where a convergence of approaches or coordination of decision-making is sought, it often seems difficult, as the consultation discloses, “to envision the obligation for a CESR member to consult the other members before making decisions that would have a significant impact on other market players”; (pp. 14 and 15) – or to foresee, among those cooperative arrangements that can be rapidly put in place, a consultation between the Home/Host regulators involved prior to decisions that might affect a multiple-jurisdictional entity.

This approach is only viable in conjunction with the approaches/methods implemented as part of decision-making processes rather than with the individual decisions per se.

In any event, the quest for convergence or co-ordination must not have any impact on the handling of transactions or documents by the national regulator or on the issuers’ timetable for financial transactions. Neither must it affect the ex post control system of the registration document to which the issuers are attached (system resulting from Article 12.3 of the Prospectus Directive).

Although we are in favour of informing the public of the approaches that are adopted by the securities regulators, we also believe that the centralised databases of decisions or the data room that is set up by the CESR (p. 21) should only be accessible to securities regulators (or enforcement authorities) who are actively involved in exchanging information and that these regulators (or authorities) should be bound by the same confidentiality requirements.

3.3 Continue to explore the possibility of making single European decisions on certain issues

According to the consultation document (p. 17), the issues for which it might be possible to envision single European decisions made by the network of securities regulators⁴ include the following:

- approval of the Securities Note for *EU-wide public offerings* of highly standardised products ;
- recognition of *financial rating agencies* ;
- operational interface at the EU level to *provide more expedient decisions on how best to apply accounting standards* for listed companies.

The CESR wonders (p. 20) whether Europe has the appropriate tools to provide *interpretations of IFRS* in time to both satisfy the markets and protect investors.

In the first two cases, one notes the probable combination, eventually, of several of the criteria that we mentioned beforehand: general interest transactions with a high degree of integration,

⁴ The members of the CESR having not, however, reached any conclusion at this stage

identical transactions or players (EU-level offerings or credit rating agencies), applicable texts (general and/or specific), and comparable effect of decisions.

However, in both cases, *the decision-making methods/procedures need to be taken into consideration, and in the case of credit rating agencies, there is no legal basis at the EU level at this point in time which would allow for recognition of these agencies.*

More to the point, for each issue that is examined, the question is what should be the respective roles of European institutions, in particular the Commission, and the CESR. For instance, one cannot rule out the possibility that, for certain transversal issues (such as those concerning credit rating agencies for instance), a decision might be made by a European institution based on an advice from the CESR and one or more other players (in the case of credit rating agencies, competent authorities mentioned in the Capital Requirements Directive).

We believe that the securities regulators should not have any decision-making powers with regard to issues of general scope or interpretation of accounting standards, even in those cases where national regulators enforce market participants' compliance with accounting texts (see below).

3.4 Maintain multilateral co-operation mechanisms between national securities regulators

As we have already shown, collective decision-making would only be appropriate for issues or transactions of general interest, with an EU scope, and with a high degree of integration.

There are a large and increasing number of multilateral regulatory issues without an EU scope. In the case of such issues, it is useful and necessary to maintain multilateral cooperation mechanisms between national securities regulators (Memoranda of Understanding, etc.).

These co-operation mechanisms constitute an additional vector of convergence between national systems, texts and practices.

3.5 At this stage, do not consider a delegation of powers between securities regulators at the European level

The CESR considers that delegation between two national authorities, which is permitted by the Prospectus Directive, should also be allowed at the European level, so as to allocate the supervisory effort and resources to the most cost efficient place according to the business model of the relevant multiple-jurisdictional market player (p. 22).

In order to avoid any uncertainty for the issuers, we are not at this stage in favour of allowing delegation between national securities regulators, given that the requirements and methods of enforcement may vary from one regulator to the next (or from one authority to the next), without the issuers being able to either anticipate, assess or implement them.

Prior to considering the possibility of delegation within the EU, we believe it would be necessary in any event :

- to complete the harmonisation of the texts, scopes of powers and enforcement terms/methods that are in force in the various Member States ;*
- to clearly stipulate which cases might warrant delegation ;*
- to clarify the terms and criteria that would be applicable to any delegation, as well as the allocation principles which might then be used ;*
- to devise principles enabling responsibility for decision-making to be identified.*

4. PROSPECTS FOR MARKET REGULATION

4.1 Maintain contacts with the national securities regulator for multilateral issues and possible decisions made at the European level

When it comes to stock market regulation, in the case of multilateral issues as well as the decisions which might be made at the European level by the securities regulators (see above), it is important to preserve national entry doors so as to ensure that market participants can if they wish benefit from proximity and direct contact with a securities regulator.

Such contact may be particularly useful in the following instances :

- consultations/rescript procedure or advance rulings ;*
- preparation of documents, files and transactions ;*
- mediation (see below).*

4.2 Seek eventual harmonisation of the powers and resources of regulators, in the areas of supervision and enforcement

We are in favour of harmonising the powers and resources that are devolved onto national regulators in the field of supervision and enforcement. However, we believe that such harmonisation can only be sought in the long term after the existing national systems have been compared, and directions and proposals have been put forward with the aim of getting them to converge.

Given the interactions that exist at the national level with fields other than stock market regulation, it is important to identify forthcoming developments in these fields and to submit first outline plans and later detailed proposals to specific consultations held at the national level. The CESR also notes (p. 23) that the decision to grant legal powers to national stock market regulators is in the hands of the Member States.

4.3 Consider the implementation of mechanisms of mediation between securities regulators and also between securities regulators and market participants, at both the European and national levels

In order to foster convergence in terms of enforcement and decision-making, the CESR is looking to create a mechanism for mediating between securities regulators.

We are in favour of implementing such a mediation mechanism, which could provide a means of correlating the positions of several national regulators and which would foster the convergence of practices. Such a mechanism should focus on factual situations, with issues pertaining to principles and of general significance being left to the realm of interpretation (see the section dealing with formal interpretations).

Similarly, we believe that the eventual implementation of a mediation function at the European level should be considered so as to deal with the relationship between market participants, i.e. issuers in particular, and the securities regulators. Such a function should provide a means for examining at short notice the issues inherent to the assessment of trans-European transactions, when this assessment is devolved to several securities regulators. The time scale involved should be such as to respect the constraints of the issuers, and should among other things be compatible with the time scales stipulated in the Prospectus Directive.

Such a function could be implemented in the very short term in each Member State, for both national and trans-European transactions.

4.4 Continue consultations on elements of the CESR's work programme

Upon completion of this consultation process, the CESR will review its tentative agenda so as to finalise it, dealing with any points that were not covered in the current consultation, such as the monitoring of powers and the legal definition of a coordinating supervisor for trans-European market participants.

Given the long-term consequences for the market participants, any concrete proposals that are formulated should also be submitted to consultation.

4.5 Strengthen the consultation process with market participants at both the national and European levels

Companies are in favour of the principle of public consultations, staged to a large extent by the CESR, and are well aware of the quality of the documents that are presented.

As for the themes of such consultations, as we have already pointed out, new public consultations should be organised at the national and European levels, in particular in the following cases :

- *proposals to take into consideration guidelines, recommendations and standards in European texts, or even in national administrative rules ;*
- *developments being considered in the field of supervision and enforcement, which affect fields other than that of stock market regulation (see the section entitled “Search for an eventual harmonisation between the powers and resources of regulators”) ;*
- *proposals that follow on from this consultation process.*

The scale of the work ahead of us, the stakes at hand and the need to establish the credibility of the process justify substantial measures based around a number of crucial principles, which means that any changes will have to take place over the long term :

- *an analysis of member States’ existing systems, legal frameworks, texts and practices;*
- *the publication of impact analyses together with the proposed measures ;*
- *setting reasonable time scales to enable the respondents to consider these analyses, to hold consultations, to assess the scope and ambit of the changes and proposals under consideration ;*
- *setting reasonable time scales between the adoption of Level 1 texts, the adoption of Level 2 texts and the drafting of Level 3 documents, which calls for specifying realistic dates of entry into force in Level 1 and 2 texts;*
- *drawing up Level 3 documents once principles (at Level 1) and regulations (at Level 2) have been adopted ;*
- *staging the CESR consultations over time and lengthening minimum response time scales, so as to ensure the broadest and most effective participation in the numerous consultations ;*
- *emulating some institutions which carry out consultations by publishing the bases for the conclusions, in terms of both the comments received and the solutions adopted to date at the national level.*

The composition of the consultative groups formed by the CESR should be adapted to the subject being addressed and provide the broadest representation of interested parties. For instance, for the Prospectus, almost half of a consultative group should consist of members drawn from the corporate world or from institutions that represent the corporate world.