



FEFSI COMMENTS ON
CESR'S CALL FOR EVIDENCE
ON ITS
AGENDA AND WORK PROGRAMME FOR INVESTMENT MANAGEMENT

The European investment management industry represented by FEFSI¹ welcomes the establishment of an Expert Group on Investment Management and of a dedicated Consultative Working Group. FEFSI also welcomes the fact that CESR has put out a call for evidence on its proposed mandate and work programme of the Expert Group on investment management.

We fully agree that CESR's work in this field, including the Consultative Working Group, will concentrate initially on the two most urgent issues, which were inherited from the UCITS Contact Committee: the application of the transitional provisions of the two amending Directives and the clarification of some key definitions in the Directives. We need not repeat the urgency of both topics since they are issues to which we have been drawing the attention of both the European Commission and the UCITS Contact Committee since summer 2002. Against this background and bearing in mind that the new Directive has applied in most Member States since the early months of this year, we believe that the proposed target date of March 2005 for publication of the guidelines is too late.

In both areas – but in particular with respect to the application of transitional rules, a number of very practical problems have already arisen because of contradictory implementation and interpretation of the directives' requirements and others might follow. There is a real danger that the intention of the new Directive - to liberalise the market - is thwarted and freedoms are restricted as compared to before, rather than extended. There is a real risk that fund promoters relying on the UCITS implementation in the fund's country of domicile when adapting existing funds or launching new funds might find out that the passport is refused by host country authorities who apply a different interpretation; it appears that a number of such cases have already occurred in relation to the launch of new umbrella funds.

For the industry this is an unacceptable situation and we believe that everything should be done to end the existing confusion and legal uncertainty as soon as possible. We therefore strongly urge CESR to take an approach which considers the market liberalising intentions of

¹ FEFSI, the *Fédération Européenne des Fonds et Sociétés d'Investissement*, represents the interests of the European investment management industry (collective and individual portfolio management). Through its member associations from 19 EU Member States, Liechtenstein, Norway, Switzerland and Turkey, FEFSI represents the European asset and fund management industry, which counts about 41,000 investment funds with EUR5.0 trillion in net assets under management. For more information, please visit www.fefsi.org.

the new Directives and to apply a step-by-step approach, issuing guidance on common interpretations to some of the known and acute problem areas as soon as and wherever these can be achieved. As a principal rule, FEFSI continues to advocate the recognition of country of origin regime by the host country supervisor as the simplest solution to overcome the confusion that has emerged as a result of the grand-fathering clauses and transition provisions of the new Directive.

We also encourage CESR to consider what method of communication of such clarifications and common interpretations is appropriate to provide certainty to the industry.

FEFSI will fully support this work and keep CESR informed of any new developments in this respect. In addition, we very much hope that the CESR Task Force working on these transition issues will also inform the FEFSI secretariat about its findings to enable us to comment, if necessary, without losing any further time.

Regarding the remaining areas of work as identified by CESR, FEFSI by and large concurs and we very much welcome the fact that CESR has taken on board many issues considered as key issues from the Commission's report on the work of the Asset Management Experts Group. On the details concerning these points in the CESR mandate we have, however, a number of comments:

Simplification of the registration procedure for UCITS

The simplification of registration requirements is a priority issue and a certain standardisation and streamlining of processes would provide a significant benefit to cross-border distribution of UCITS. However, this undertaking can only be a first step in the right direction. Ultimately, the notion of a single market must mean marketing across borders without any registration – a passport should be sufficient.

Furthermore, attention should be paid to avoid the introduction of the management company passport and any ensuing registration duties annulling any efficiency gains that may be achieved in the fund registration area. Needless to add that FEFSI urges CESR to avoid the disparity of management company's registration requirements from arising/growing by agreeing, at this early stage, on standardised requirements and formats that are shared by all Member States.

Conduct of business rules

We welcome the outlined working programme. In fact, the level 2 rules under the FIM/ISD2 mandate will be applicable to investment firms conducting asset management. They should be consistent with any conduct of business rules applicable to fund management. Therefore input

from the expert group (as well as, of course, from the industry) will be required. We would urge CESR to take account of the particular nature of asset management in considering the conduct of business rules since rules for investment firms such as brokers or stock exchanges are not always “transferable” to investment management without adaptation or due consideration.

In this respect, we wish to draw CESR’s attention to the fact that FEFSI is in the process of drawing up a comprehensive code of conduct for the European investment management industry (covering both individual and collective portfolio management). We believe that this work can provide a very valuable support for any regulatory effort regarding conduct of business rules for investment management and we strongly encourage regulators to take FEFSI’s work into account wherever possible.

In our view, such rules must include general principles as well as sufficient specification. On the one hand, they should lay down very clear and comprehensive general principles. On a more detailed level, they should, however, avoid being unnecessarily prescriptive and take into account the diversity of the European investment management industry. We are confident that the FEFSI code of conduct can show a way of coping with these requirements.

Outsourcing

Again, we agree that there should be consistency between regulation under the FIM/ISD2 Directive and the UCITS Directive. But this is not enough: on 30 April the Committee of European Banking Supervisors (CEBS) issued a Consultation Paper on High Level Principles on Outsourcing, which illustrates how CESR needs to consider carefully the work being undertaken by other Lamfalussy committees and, wherever appropriate, to provide consistency.

Any further work by CESR in this field should take account of Article 13g of the new UCITS Directive, which already sets out a number of principles that govern outsourcing in the investment management context.

Common approach to non-harmonised funds

FEFSI very much welcomes CESR’s interest in this issue, which was considered to be key also by the Commission’s Expert Group on Asset Management. FEFSI is also prepared to support CESR’s work, in particular with respect to the inventory. It should, however, not be forgotten, that most of the non-harmonised funds currently cannot be marketed across borders.

However, as a first step CESR should analyse with respect to each product whether there is a need for a common approach – in other words, whether the benefits of creating a single EU-wide marketplace would exceed the costs that the establishment of a common approach might impose.

Wherever a common approach is regarded as reasonable, we would urge CESR not necessarily to opt for product regulation as the main approach but to also consider alternatives - e.g. a possible harmonisation of private placement rules, which might provide an easier solution at first than product harmonisation.

Consistency with other EU Directives

FEFSI appreciates that CESR takes on board this issue. A particular inconsistency persists notwithstanding FEFSI's protestations at the time in the interaction between the UCITS Directive and the e-Commerce Directive 2000/31 (*OJ L 178 of 17 July 2000*).

FEFSI has repeatedly urged the European Commission to solve the problem of total inconsistency, which resulted from a specific exemption for funds (*et al.*) in the e-Commerce Directive. The ensuing Communication on the application to financial services of Article 3(4) to (6) of the e-Commerce Directive, which the Commission released in May 2003, clarified many aspects, but left the fund problem untouched. To date the e-Commerce Directive favours – provided it occurs via Internet - the cross-border marketing of non-UCITS over that of UCITS, which can be considered a most curious outcome, and has given rise to situations where Member States have implemented the e-Commerce Directive with at times conflicting interpretations. Once more this creates a legally uncertain situation for investment funds destined for cross border marketing in the EU and thus, at best, allows UCITS to find themselves subject to two sets of rules (both home and host State) or, at worst, to refrain from such marketing opportunities altogether.

We invite CESR urgently to have a closer look at this issue and in doing so, to move away from the “host country control” approach that permeates the UCITS Directive in the cross-border marketing context towards a “home country control”.

Convergence of supervisory systems

Without more convergence of supervisory principles and practices, the single market for investment management will never really work. Many problems with the “old” UCITS Directive would not have existed had the competent authorities worked together more efficiently. Inconsistent supervisory systems may – in the end – lead to supervisory arbitrage in a similar manner as inconsistent interpretations and implementations of the UCITS Directive may lead to regulatory arbitrage. For more than ten years FEFSI has urged in particular the UCITS Contact Committee to pay greater attention to this issue. We can

therefore only welcome CESR's interest in the issue and emphasise the importance that FEFSI attaches to advances in this field.

Accounting rules for investment funds

We can only repeat what we had already underlined in prior statements that FEFSI has issued – with the participation of all major audit firms - last autumn; in particular its Discussion Document on the “*Conditions for the application of International Accounting Standards for investment funds in the European Union*”. This documents concludes:

“IAS can only meaningfully be applied if and insofar as they are in line with these basic UCITS fundaments. Against this background the FEFSI Experts Group is of the clear opinion that certain changes or interpretations with respect to the current IAS must take place to allow the latter's meaningful application to the European investment funds industry. Only in this case and in this sense may IAS rules constitute the nucleus of a comprehensive and common accountancy standard for all economic operators in the European Single Market.”

Simplified Prospectus

One area that we feel has not been given sufficient attention in the call for evidence is the simplified prospectus.

We trust that the transition problems are sufficiently documented and already form the object of CESR consideration. The publication of Commission Recommendation 2004/384EC of 27 April 2004 can be seen as the culmination point of comprehensive discussions in the Contact Committee and was welcomed by FEFSI as such. Nonetheless, FEFSI does not consider the recommendation complete for several reasons. Firstly, the recommendation has no binding force on Member States. Secondly, it only fleshes out some contents of the simplified prospectus and thirdly, within that restricted scope still allows Member States to opt on certain aspects and interpretations (such as whether or not to apply a synthetic risk indicator, the mandatory use of a benchmark for all funds, whether or not to exclude entry and exit fees in the calculation of fund performance), which opens the door to variations in the information given to investors in the EU. Lastly, in some aspects the recommendation appears very detailed and complex resulting in a prospectus that can no longer be qualified as “simplified” and therefore fails to achieve the goals this investor information instrument was designed to fulfil.

FEFSI has urged the Commission and the Contact Committee since the adoption of the FEFSI Model Simplified Prospectus in 1999 for the greatest degree of uniformity and considers the common interpretations of key concepts as indispensable for the sake of investors' ability to compare products from other countries in the EU to those in her/his own domicile.

FEFSI urges CESR to take this quest to heart once more and to continue the regulatory convergence towards a truly simplified prospectus that is comparable in form and substance, while also recognising the need for a “settled” regime with which the industry and investors can become familiar. Moreover, the emphasis on the “simplified” nature can only be stressed whilst calling on regulators to resist the temptation merely to compile all national particularities in EU regulation.

In addition, given the delay in issuing the Commission Recommendation 2004/384/EC, some real practical issues arise because a number of regulators have justifiably waited to see the recommendations before drawing up their own rules on the subject. This is likely to give rise to further transitional problems, which will require a flexible approach by the regulators.

Fund mergers and pooling techniques

We would also note that while two other areas from the Asset Management Expert Group’s report are mentioned in the second paragraph of CESR’s consultation – fund mergers and pooling techniques – and while we appreciate that further work is required to define exactly what needs to be done at EU level in these areas, we urge CESR not to lose sight of them and to leave time in their timetable to work on them in the short to medium term.

We hope that our comments may contribute to the direction and content of CESR’s work on investment management and are appreciative of your consideration. Should you wish to discuss some aspects in more detail, please do not hesitate to contact us.

Steffen Matthias, 6 July 2004

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