



Finanzgruppe

Deutscher Sparkassen- und Giroverband

**Comments
of the Deutsche Sparkassen- und Giroverband (German Savings
Banks Association - DSGV)¹
on the
preliminary progress report by CESR:
“Which supervisory tools for the EU Securities Markets?”**

January 2005

¹ The Deutscher Sparkassen- und Giroverband (German Savings Banks Association, or DSGV) is the umbrella organisation of the Sparkassen-Finanzgruppe (Group of savings banks, Landesbanken and associated companies) that is made up of about 700 enterprises including 489 savings banks, 11 Landesbanken, the DekaBank, 11 Landesbausparkassen (building and loan associations), 15 regional public direct insurance groups and numerous other financial services providers. The savings banks alone employ over 270,000 people in some 17,000 branches. Their aggregate balance sheet total came to more than € 3,300 billion at the end of 2003.

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A. Summary

1. The Deutsche Sparkassen- und Giroverband (German Savings Banks Association - DSGV) agrees with CESR that the full and consistent implementation as well as effective enforcement of all measures included in the Financial Services Action Plan (FSAP) is a central task in the modernisation of the legal framework for the EU single market for financial services.
2. In this process, CESR will play a key role. It is therefore basically correct that CESR considers ways which shall allow the Committee to meet its tasks in the most efficient way.
3. We welcome the fact that CESR plans to define its role based on a review of the degree of integration of sub-markets. E.g. fully integrated wholesale markets require a higher level of harmonisation of the supervision regime than retail markets with a strong regional orientation. One further aspect which should be taken into account in this regard is the principle of competitive neutrality.
4. Already today, CESR has wide-ranging tools for efficient Level 3 cooperation. We feel it is helpful that in the preliminary progress report "*Which Supervisory Tools for the EU Securities Markets*" (hereinafter the "*Report*") CESR provides a comprehensive analysis of these tools and submits creative solutions as to how these processes might be further developed on the basis of the presently existing (!) legal and political framework (the Lamfalussy process).
5. Yet, at the same time the *Report* remains unconvincing in material parts. In our view it features the following **fundamental shortcomings**:
 - a) Should the *Report* call into question the efficiency of tools for implementation and enforcement of the FSAP measures, it has been prepared at a premature point in time. The practical test of the tools which are available under the Lamfalussy process is still pending. The implementation of the individual FSAP measures is far from being finalised; instead, this will still require a considerable

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amount of time. Therefore, neither CESR nor the European Institutions or market participants can come to any empirically validated analysis of the efficiency of existing tools. A discussion on the need for **further instruments and powers for CESR** would therefore be **premature**.

- b) By (tacitly) insinuating that the tools made available at Level 3 are inefficient, the *Report* threatens to pre-empt the failure of the Lamfalussy process (self-fulfilling prophecy). Given the outstanding practical tests at Levels 3 and 4 as well as the broad political consensus that has moved the Lamfalussy process along over the past years, we feel that this is the **wrong political signal**.
- c) Instead of suggesting that these success factors are unattainable, the priority should be on calling upon the European institutes and market participants to make a joint and concerted effort so as to realise - on the basis of the existing regulatory framework (!) - the critical success factors which have been correctly identified by CESR for the Lamfalussy process.
- d) In terms of the methodology, the *Report's* scope is too narrow. There is a conspicuous absence of a reflection of the **Commission's Role at Level 4** of the Lamfalussy process. As long as the role of the Commission at Level 4 is not taken into account, any discussion on the existing tools for implementation and enforcement of the FSAP measures is incomplete. We are convinced that the **interaction of Level 3 and 4** provides considerable leverage for an efficient and targeted application of the Lamfalussy process.
- e) To date, CESR does not take into account that, both in their home Member State as well as in the respective host Member State, multi-jurisdictional market participants have to compete with local contenders offering financial services. Segregation between the supervisory practice concerning multi-jurisdictional players and the supervisory practice in relation to regional players gives rise to the risk that this might lead to different supervision levels for both groups. Hence, the principle of a **level playing field** for all market participants must inform any further debate on the potential creation of a special supervisory

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regime for cross-border scenarios. At the same time, the principle that the home Member State's supervisory authority shall be exclusively in charge of supervising regional players needs to be safeguarded.

6. At present, we cannot immediately understand how a centralisation of supervisory mandates at the level of CESR may generate any significant gain in efficiency or value added for the harmonisation of the EU single market in financial services.

B. Detailed comments

1. CESR's tasks

CESR has been assigned an important role for FSAP success. FSAP success and the success of the Lamfalussy process that is aimed at FSAP implementation will depend on full and consistent implementation and on effective enforcement of the FSAP measures. In this process, the fine-tuning with the national supervisory authorities at Level 3 shall play a pivotal role. The danger of supervisory arbitrage must be offset by equivalent implementation of the Level 1 and Level 2 rules across all Member States.

2. Need for differentiation on the basis of market integration – securing a level playing field

We welcome the fact that CESR differentiates between the degree of integration in retail markets that tend to have a strong regional focus and in wholesale markets that tend to be marked by a strong degree of cross-border transactions. This makes sense because the specific problems that arise from the fact that cross-border services become exposed to more than one national supervisory system do not exist for transactions which are not cross-border by nature.

CESR should also take account of the following issue which is important under competition aspects: During their domestic transactions, market participants

engaged in cross-border activities have to compete with regional players (e.g. in Germany's retail market there is competition between domestic and foreign investment firms engaged in cross-border activities and savings banks and cooperative banks that have an exclusive focus on their respective regional market). If the supervisory regime for multi-jurisdictional players were to become divorced from the supervisory regime for regional players with regard to domestic transactions this might lead to different supervisory practices for both groups: In terms of their domestic business, pursuant to the CESR supervision regime, multi-jurisdictional players fall under the supervisory practice for multi-jurisdictional players whilst regional players shall only be subject to the respective national supervisory practice of the competent supervisory authority. Whenever there is a significant difference between both supervisory levels this may lead to unjustified competitive advantages for one of the two groups. This must be prevented. In all further deliberations on the creation of a special supervisory regime for cross-border issues we therefore urge CESR to take account of the **level playing field** principle. In doing so it is necessary to maintain the principle that the supervision of local players shall be exclusively incumbent upon the Home State's supervisory authority. With other words: The solution to the problem cannot consist in establishing one uniform supervision regime for regional players and multi-jurisdictional players alike.

In the absence of a satisfactory solution to this matter, for the time being we have difficulties in backing CESR's proposals which are specifically geared towards addressing cross-border scenarios at Level 3.

One first step for remedial action could consist in enshrining in CESR's mission statement the principle that the level playing field between multi-jurisdictional players and regional players needs to be preserved.

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3. Use of the existing instruments

- Fundamental comments

We recognise that meeting the task assigned to the Committee and its Members in an adequate manner constitutes a major challenge for CESR – last but not least given the EU enlargement to 25 Member States.

We feel that the **analysis of the success factors** carried out by CESR under IIb) (page 12 f. of the *Report*) which CESR must realise for an appropriate fulfilment of its tasks (convergence of supervisory approach, fair application of EU directives, sufficient coordination of decisions) is correct.

Also the **analysis** on pages 14 ff of the *Report* that deals with the further development of CESR's available **supervisory tools** contains a number of interesting aspects that are worth considering. We should like to encourage CESR to continue along this road and to develop creative ideas for a more efficient cooperation at Level 3. Here, We should like to recall once more that pursuant to the report of the Committee of Wise Men, CESR can *inter alia* already draw upon the following tools:

- Administrative Guidelines,
- Joint Interpretative Recommendations,
- Comparison and Review of Regulatory Practices.
- Peer-Reviews.

The efficient use of these tools is a central task in the application of the Lamfalussy process. Before contemplating the possibility of creating new and further reaching supervision powers for CESR, the efficient use of these tools should be given absolute priority.

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- Fair implementation of Directives

In our view the efficient use of the existing tools involves that CESR should fulfil an important role in safeguarding a uniform interpretation of Level 2-rules and potentially also of Level 1-rules. Yet, we feel it is not very fruitful to dub this function as the role of a **supervisor of national supervisors**. In terms of technical and legal matters, the national supervisors are being supervised by the Member States' national treasuries – and this should also remain the case in future.

- Development of a mission statement

We commend CESR on its attempts to develop an understanding of its own role and responsibility under the Lamfalussy process. In this context we should like to particularly highlight the usefulness of a definition of the fundamental objectives of CESR. Such a definition embeds individual measures into a broader context and can thus help to better structure the discussion with market participants on the benefit and costs of individual regulations; simultaneously, it may serve as a reminder for CESR members that their course of action should be informed by the 'spirit' of the Lamfalussy process.

The *mission statement* should include the strict commitment of CESR members to the principle of competitive neutrality, e.g. by including the principle that market players which are not engaged in cross-border transactions shall not become subject to tighter supervision than multi-jurisdictional players. Also the question concerning whether and in which way an individual market participant shall be able to request compliance with this principle *vis à vis* his competent authority (*right of appeal*) needs clarification.

- Mutual Recognition and multi-jurisdictional players

We do agree with CESR that the activity of multi-jurisdictional market players constitutes a feasibility "test case" for the *mutual recognition* and the Home

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Member State principle. CESR therefore rightly pays heightened attention to this problem.

We believe that under IIIa and IIIb the *Report* contains important pointers as to how this challenge may be addressed on the basis of the existing regulatory framework.

With a view to the feasibility of mutual recognition we furthermore feel it is a legitimate request of CESR that all CESR members shall be empowered with **equivalent supervisory instruments** (IIIc). This firstly concerns the power to implement changes to the supervisory framework at Level 2 potentially through a regulation issued by the competent supervisory authority or by a higher ranking competent ministry without having to go through the various motions of a change in the parliamentary law in order to achieve this. Secondly, this involves an efficient implementation of supervisory powers *vis à vis* market participants as well as adequate tools for sanctions. Yet, since it unilaterally refers to the legal situation in Member States *prior* to implementation of the Directives which are subject to the Lamfalussy process, the corresponding analysis of the supervisory instruments in the *Report* is in our view only of limited use. Hence, this analysis inevitably fails to reflect possible adjustments of the individual national jurisdictions which may take place in the course of the implementation process.

Furthermore, we should like to warn against treating the topic in an excessively dogmatic manner. What is necessary is not a formal identity of the supervisory powers but an **outcome-based approach**, i.e. their practical equivalence with a view to a shared objective in terms of a homogenous and consistent level of supervision. By way of example: In the field of sanctions we feel it is not necessary that the competent supervisory authorities shall all be capable of passing *criminal sanctions*. If such serious sanctions in a Member State are not passed by the authority itself but rather by the public prosecutor or a court then this should be deemed as equivalent, as long as the net effect will be the same, i.e. as long as the aforementioned bodies will ensure effective sanctioning.

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Regarding exchange operators active in several Member States, the "*Memorandum of Understanding*" developed for the monitoring of Euronext could be used in an analogous manner also for other constellations which may occur in the course of the European consolidation process.

4. Integration of Level 4

CESR's stock taking exercise concerning the tools available for safeguarding the implementation and enforcement of community legislation is incomplete. Level 4 of the Lamfalussy process is left out almost completely.

Level 4 of the Lamfalussy process assigns to the Commission the task of securing the implementation and enforcement of Level 1 to 3 in the Member States. For this purpose the Commission can use a number of tools. We should only like to mention Commission measures against Member States whose legislators and/or supervisors refuse to ensure an enforcement of the FSAP measures that is in line with the Directives (e.g. by means of starting treaty violation proceedings). Hence, new tools in order to safeguard consistent supervisory practices at Level 3 could only be requested if it is proven that the Commission cannot meet its task with the existing tools. Yet, by default, at present there is no evidence for this. This is simply because to date none of the FSAP measures have reached Level 4 of the Lamfalussy process.

Now that the *Report* has been presented and following the subsequent discussion we feel that it would be helpful if the Commission would, in the near future, lay out its plans for meeting its task at Level 4 of the Lamfalussy process. We are confident that this may answer many of the questions which have arisen under the *Report*.

5. Conclusions

The utilisation of the existing tools for implementation and enforcement of all FSAP measures is still only in its infancy. Important individual FSAP measures, notably the Markets in Financial Instruments Directive (MiFID) – have not even arrived at Level 3 of the Lamfalussy process. CESR itself has only just completed its consultation process on its own role at Level 3 of the Lamfalussy process by presenting its document on “*The Role of CESR at “Level 3” under the Lamfalussy Process*”. In the absence of any experience with the aforementioned tools, any discussion on the creation of new tools would be premature. At the present point in time, in order to ensure the success of the Lamfalussy process, the focus needs to be on ensuring the effective use of existing tools. A discussion of other tools only detracts attention from this central task.

Currently we have no grounds to believe that the challenges cannot be mastered on the basis of the four-level-model envisaged under the Lamfalussy process. In this context the strong *political commitment* of all European institutions towards the Lamfalussy process should not be underestimated. We recommend harnessing this existing commitment – notably at Level 4 of the Lamfalussy process (cf. above 3) - before looking into a potential centralisation of supervisory powers at CESR level.

Berlin 31 January 2005