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STATEMENT

on

CESR Consultation Paper on
“The role of CESR in the regulation and supervision of UCITS
and asset management activities in the EU”

Both FEFSI¹ and EAMA² have always been firm supporters of the European Commission’s efforts to make financial market regulation faster, better and more efficient, and therefore have welcomed the new rule-making process for securities markets based on the ‘Lamfalussy Report’ when it was approved by the European Parliament in February 2002.

FEFSI in principle also welcomed the inclusion of UCITS under the Lamfalussy procedure as it would clearly help to achieve an integrated European market in investment funds, one of FEFSI’s main political goals. Also, new procedures will be introduced with the aim to ensure a more timely and efficient adaptation of the regulatory environment to the current rapid and constant market changes.

However, FEFSI and EAMA remain concerned that there should be a full understanding of the particularities of investment management (comprising all types of collective and individual portfolio management) and recognition of managers’ fiduciary duty towards their investors and the difference between these duties and the duties of, for example, broker-dealers towards their clients. The preferred solution within the European investment management industry has been for a “separate pillar” for investment management (including management of pension vehicles) but this has not found favour.

¹ FEFSI <http://www.fefsi.org/>, the *Fédération Européenne des Fonds et Sociétés d’Investissement*, represents the interests of the European investment fund industry. Through its members, the national associations of the 15 EU member states, the Czech Rep., Hungary, Liechtenstein, Norway, Poland, Slovakia and Switzerland, FEFSI represents some 900 management companies and about 41,100 investment funds with EUR4.5 trillion in investment assets.

² EAMA (www.eama.org), the European Asset Management Association, promotes the common interests of European authorised asset management organisations. Its members comprise both European authorised asset management companies and national trade associations representing the interests of asset management organisations in Europe.

FEFSI and EAMA, therefore, welcome the fact that CESR has proposed working groups which will specifically consider investment management and buy side issues and propose that the status of these groups should be strengthened further.

In the meantime, FEFSI has had intensive and productive discussions with CESR and the Consultation Paper of 30 October on ***the role of CESR in the regulation and supervision of UCITS and asset management activities in the EU*** takes into account many of the issues raised in the course of these discussions.

While in principle supportive of CESR's approach, we have a number of comments to make.

1. BACKGROUND

We fully accept that the ECOFIN Council of 3 December last year endorsed not only the extension of the Lamfalussy procedure to other financial services, but also the subsequent arrangements in particular with respect to UCITS. However, some of the points on page 3 need further consideration.

ON THE DISTINCTION BETWEEN COLLECTIVE AND INDIVIDUAL PORTFOLIO MANAGEMENT ACTIVITIES, we would note that there are specific issues which relate to collective portfolio management and not to individual portfolio management and vice versa.. With respect to the EU regulatory environment, there are two different legal frameworks for collective and individual portfolio management: the UCITS Directive³ and the ISD⁴.

If a UCITS management company does discretionary asset management, this activity is covered by the ISD and we fully agree with the conclusion of the Consultation Paper that we would urgently need consistency between regulations applicable to both collective and individual portfolio management which both together make up investment management. Consistency, however, does not mean that rules for fund management and asset management are always the same.

ON THE SPECIFICITIES OF THE SO-CALLED "BUY-SIDE", we agree that there are certain good arguments for not fully separating the buy-side from the sell-side, in particular in order to have a more complete and coherent regulation of capital markets. We also agree that from the business point of view, both activities are more and more "interlinked".

³ With respect to its Article 1, 27, 28 collective portfolio management can be defined as "*investment of capital raised from the public in operating on the principle of risk spreading as described in the fund prospectus*"

⁴ With respect to its Article 1 (1) in connection with Section A (3) of the Annex "asset management means: "*managing portfolios of investments in accordance with mandates given on a discriminatory, client-by- client basis*"

However we continue to insist that investment managers acting as fiduciaries of their clients (investors) have – as market participants on the buy-side – very different interests compared to those of the sell-side. There must therefore be a strict distinction between fiduciary activities and transaction-oriented trading activities covered by the ISD; different fields of activity need different treatment.

This is why FEFSI is of the strong opinion that when dealing with specific issues relating to investment management CESR must have clear mechanisms for taking account of the needs and voice of the “buy side” to ensure that any investment management regulation serves in the first line investors and, where necessary, protects them.

ON THE “RELATIONSHIP” WITH THE OTHER LAMFALUSSY PILLARS, it must be underlined that the separation is not always clear. Investment management underlies pensions. Therefore it will be crucial for CESR to provide for the necessary link between the two working spheres “investment management” and “pension” of the two pillars CESR and EIOPC.

One should not forget either that banks also conduct individual portfolio management. Although their activity largely falls under the regime of the ISD, it must be clear that the responsibility for asset management should be centred on CESR.

Having said this, a majority of FEFSI members believe that – in the long term - it might be worth considering whether to bring together all investment management activities under a separate roof.

We would encourage CESR to interpret as far as possible all issues of investment management – also with regard to other pillars of the extended Lamfalussy procedure.

2. AREAS OF WORK BY CESR IN INVESTMENT MANAGEMENT ACTIVITIES

On the PRIORITIES listed in the Consultation Paper (point 2.2.) we have a number of comments. In particular we are of the opinion that CESR should have a clear framework for deciding priorities. In particular it should clearly focus on those areas which would contribute to the completion of an integrated single European market for investment management (focusing on the creation of a level playing field). While investor protection will always be a consideration, we believe that CESR should also judge its actions in light of the effect on competition, on international competitiveness and on cost effectiveness.

Specifically, we believe that at this stage CESR should concentrate on the following:

- Issues where urgent action is needed and where it can help the UCITS Contact Committee (for as long as it exists) in its work to provide for a consistent transposition and implementation of the new UCITS Directive(s) in order to achieve a more efficient single market.

In fact, as the “deadline” for the application of the new UCITS Directive is approaching – less than three months are left – the consistent transposition and implementation of this Directive is at the very top of FEFSI’s agenda.

In more detail this means:

- Concerning areas where supervisory convergence should be achieved, CESR should concentrate on two topics:

One is not “listed” and we would like it to be added: it is an issue which is key for the functioning of the single market and where success only depends on the willingness of national authorities to achieve it: abolition of administrative obstruction with respect to registration of UCITS from another EU / EEA state.

- Areas where input to ensure the harmonised implementation of the UCITS Directive could be provided to the UCITS Contact Committee:

Under the current regulatory situation, we understand that the request for support should come from the Contact Committee to avoid “institutional” conflicts. However “supporting” the UCITS Contact Committee in the current situation could be a key issue for CESR.

We fully recognize the willingness of the European Commission to conclude the work of the UCITS Contact Committee in time. It has proved, however, to be a most difficult task to work out details of the political compromise struck in order to get the UCITS III Directive adopted. CESR should therefore, independent of institutional constraints, use all its possibilities to support the UCITS Contact Committee with respect to a consistent transposition and implementation of the new UCITS Directive. In this context, the use of derivatives and the simplified prospectus are of particular importance. With respect to the simplified prospectus CESR should also – once agreement is reached in the UCITS Contact Committee – work towards its “implementation” in a most harmonised way; beyond the agreement in the Contact Committee this implementation could easily be based on the FEFSI model.

On the depositaries issue, we have been waiting for months for the Commission’s Report to the European Parliament and ECOFIN on depositaries and possible action in this field. Before this report is published it seems to us not meaningful and efficient to deal with this complex issue.

- Areas not harmonised at EU level, but where a common approach by regulators is welcomed:

Non-harmonised funds (funds only authorised on national level and not qualified for the EU passport) such as real-estate funds or hedge funds are included in the UCITS review clause. Nevertheless, CESR should consider working towards a common approach of regulators with respect to cross-border marketing of non-harmonised funds. Many publicly offered investment funds are not harmonised and most of them cannot be marketed across borders. In any case there should be no principle differentiation between hedge funds and other non-harmonised investment funds, as long as both are regulated. We believe that it would be useful for CESR to look at the extent to which could be greater consistency within the private placement rules applicable around the EU.

- Areas where consistency with other EU directives is needed:

In speaking about the ISD we would like to propose – as already said above – to differentiate between three different approaches of the Directive:

- Issues concerning the so-called sell side (transaction-oriented trading activities)
- Issues concerning the so-called buy side (managing money for clients/ investors on a fiduciary basis)
- Market issues in which the buy-side has a particular interest.

With respect to the second point, we believe that it is important that CESR considers the particularities of the buy side in finalising, implementing and monitoring the rules (particularly the conduct of business rules) within the ISD. Rules, for example, on best execution and conflicts of interest need to be adapted to the particular circumstances of the buy-side of the market. We also agree on the need for consistency between the UCITS directive and ISD in relation to discretionary portfolio management, where two companies may be undertaking the same activity, one under the ISD and the other under UCITS.

With respect to the third point, we would note that as users of the markets, investment managers can provide useful insights into the requirements of regulations in this area.

Consistency between the Distance Marketing, e-commerce and UCITS Directives is a key issue and FEFSI urged already years ago the Commission for action. Also, new peripheral EU legislation could be reviewed to avoid intended or unintentional implications on the investment management industry (e.g. horizontal consumer protection rules, contract law, etc.).

The application of IAS to investment funds is a rather complex issue. FEFSI has worked on it and the report is attached for information.

3. ORGANISATION OF CESR'S WORK

In terms of consultation the paper proposes to apply the same way of working as currently used. We support this view and the procedures as described in annex 1 "Public Statement of Consultation Practices".

The same consultation practices say that CESR would publish an anticipated annual work programme so that all interested parties know when to expect output from the Committee. Indeed, the publication of such a working programme would be of the utmost importance, however, to date such a programme has not been published.

Carefully drafted position papers with added value for CESR are only possible if the affected industry bodies are left enough time for preparation. If not we might end up with faster regulation, but this regulation might be of an inferior quality than the current one. In a future environment with a broadly used comitology procedure and 25 Member States, working efficiently will be the key issue for all institutions involved.

In addition we emphasise that experience, but also the reaction of the industry on the Interim Report of the inter-institutional Monitoring Group chaired by Mr Prada shows that it is not sufficient to adopt procedures, they must also be "lived": it will be important for CESR to be willing to establish close, informal relationships with relevant industry bodies as well as relying on formal consultation processes. FEFSI and EAMA intend to do their part to achieve such a relationship. We believe that such a relationship can be established if CESR is willing to keep directly affected industry representative bodies:

- informed in advance of any CESR "action" with respect to investment management;
- consulted before any CESR paper with respect to investment management is drafted;
- heard whenever necessary.

Indeed, efficient work is only possible if the EU decision-making bodies work together with the European industry bodies. The European Commission has – happily – recognised this principle when setting the new FSAP stock-taking working groups. Hopefully CESR will follow this example.

The paper proposes the establishment of a new expert group dealing with investment management. We understand it will develop into a permanent CESR sub-structure – a kind of "CESR-IM", comparable to "CESR-FIN" and "CESR-POL" and going beyond task-force-type expert groups e.g. for special directives. We also support the set-up of a Consultative Working Group of the sector relating to buy-side issues.

Both the experts group and the consultative group are currently a sub-structure and in this respect are in a vertical relationship to CESR.

We believe this is an appropriate starting point. Given, however, the need for an effective regulatory structure for investment management, a more “horizontal” relationship between “CESR – IM” and “CESR-non-IM” should emerge over time.