



**FEFSI COMMENTS
ON
CESR'S ANALYTICAL PAPER
"WHICH SUPERVISORY TOOLS FOR THE EU SECURITIES MARKETS"**

FEFSI welcomes the possibility to comment on the preliminary report also known as the "Himalaya Report". From our point of view, this document provides a good analysis of the problems of supervision in an integrated market and we support the core recommendations on convergence of supervisory powers and responsibilities. We agree with CESR that the system can only work, in particular at Level 3, if there is a certain level of consistency.

However, notwithstanding this general agreement, we have some comments of a more general nature and a number of specific comments, questions and concerns.

GENERAL COMMENTS

Financial services, in particular investment management (collective and mandate-based individual portfolio management), reach beyond CESR: at the European level it encompasses issues linked with pensions, including second pillar pension provision and certain issues under the coverage of CEBS, and it has a significant global dimension. Thus if we speak about supervision in an integrated European single market, we must also speak about collaboration between the three Lamfalussy pillars CESR, CEIOPS and CEBS. Against this background it is evident that the three must work together to create within the EU a level playing field for competing products and services, and further, because of the global dimension.

The global dimension of financial services, in particular investment management, makes it necessary for European supervisory authorities not only to oversee European markets, but also bear in mind that the European investment management industry can only thrive if it remains globally competitive. Therefore two things are necessary for European regulators:

- no regulation without looking beyond the European borders and considering the impact of the envisaged regulation on the global competitiveness of the concerned European industry;
- collaboration with other non-European regulators, in particular IOSCO and the SEC. As regulation becomes more global, CESR members need to develop their ability to work together in order to influence regulatory thinking at a broad international level.

SPECIFIC COMMENTS

▪ *Ia) Degree of market integration*

We agree that retail markets are not integrated. It should be acknowledged, however, that cross border registration and – to a lesser extent – placement has developed significantly under the UCITS regime and that certainly investment funds are the only retail financial products that have achieved a notable degree of cross-border provision.

▪ *Ib) The degree of legal integration*

We are not sure whether the distinction between supply side, demand side and intermediaries/infrastructure is the ideal analytical framework to analyse legal integration.

For the investment management industry we would assess legal integration as follows:

- on the **provider side** investment management companies are regulated both under UCITS and under MiFiD (as far as discretionary portfolio management is concerned);
- **products** are regulated mainly in UCITS, to a lesser extent in MiFiD and – as far as investment manager may offer occupational pension solutions – in the IORPD;
- the **demand side** (including intermediaries, i.e. distributors) is regulated partly in UCITS (product disclosure, partly in MiFiD (investment advice), partly under insurance intermediation directive, partly in a range of horizontal directives (e-commerce, distance marketing directives);
- the **buy side** is regulated through market participants- oriented regulation such as Market Abuse Directive, MiFiD, etc.

We therefore tend to believe that the legal framework is rather fragmented.

▪ ***IIb) Challenges when the FSAP is implemented IIIa) Mutual recognition***

We fully agree with CESR's analysis of challenges after the FSAP implementation and the clear remarks on mutual recognition and home/host relationship.

We must remember that our current financial services regulation is built on the principle of mutual recognition which again cannot function without trust in the system; that means both trust between market participants and supervisors, but more importantly trust between supervisors themselves.

For the fund industry it is of key importance that home/host arrangements function effectively in the EU. This is best exemplified by the experience with the transitional problems linked with the implementation of the new UCITS Directive. We are of the very strong opinion that many current problems, e.g. in the field of UCITS, would be easily solved, not to say disappear altogether, if there would be a higher level of trust between the various national competent authorities. But trust cannot be created by regulatory measures and it is debatable whether this could even be achieved through a maximum harmonisation approach.

▪ ***IIc) Regulatory tools under the current legal framework***

A first step: exploiting the current framework for action

We understand that IIc) describes tools applicable under the current legal framework. We believe that this should indeed be a priority. As a lot can be achieved without any further legislation, CESR from our point of view should first exploit the possibilities it has before looking for further possibilities.

We believe that the tools proposed by CESR are appropriate. We would stress that developing more trust between supervisors and improving cooperation is of the utmost importance for the single fund market. However, the analysis of tools should include some additional issues. If improvement is achieved within the network of securities regulators and – as a result – Level 3 work will have more impact, the following three questions emerge:

- What is the benchmark for CESR to be measured against? What is “good”, what is “bad”? From our point of view, there are two such benchmarks: the first can only be the single market idea, including the creation of a level playing field and investor protection. Thus, any CESR activity must always be cast with the aim of furthering the single market in all its aspects. The second benchmark should be the reinforcement of European competitiveness vis-à-vis the rest of the world.

- To whom is CESR accountable? If CESR, and the related national authorities, have more power, this question must be addressed. A powerful regulatory body should not be working in a no man's land.
- While the question of accountability is included in the CESR document, we think that this legislative act must also include a clear description of CESR's Level 3 competences.

The current "powers" for Level 3 action are described in a "Mission Statement". However, contrary to a Level 2 mandate, which is based on Level 1 EU legislation, this Level 3 mission statement is a "self-mandate". For the future the necessary legislation must therefore include a clear description of what CESR is allowed to do at Level 3 and here again, benchmarks are the interest of furthering the single market and the reinforcement of European competitiveness. Only a legal basis based on this approach can give CESR Level 3 actions the necessary legitimacy.

We believe that the following principles should apply.

a) The application of supervisory tools has to support the achievement of an efficient Single Market

Convergence, reliance and coordination are key elements but one should never forget the aim: the creation of a single market. This means that *any CESR activity must be "benchmarked" for the single market aim*. It should be clear that the benchmark for any action can only be in the interest of the single market, investor protection and competitiveness of the market players. Any protectionist body of thought should be abandoned. This thought is well expressed in the recent FSA Discussion Paper entitled "*Supervising financial services in an integrated European Single Market*". We can only agree with the FSA when they underline that "*financial institutions are keen to see greater cooperation, coordination and convergence of supervisory practice for the following reasons: efficiency, fair competition, global competitiveness and high quality, evidence-based and proportionate regulation*".

b) The application of supervisory tools should be accompanied by tools to avoid over-regulation

Also, a regulatory impact analysis approach could be introduced into CESR acting at both Levels 2 and 3 today. No legislative basis is needed for this.

In particular with respect to Level 3 it must be made clear that CESR can – whatever it does – only act on the basis of a prior impact analysis. Previous experience with European supervisors has proved that there is a tendency towards over-regulation (it is easier to reach a compromise if the compromise paper includes everybody's list of wishes).

c) The application of supervisory tools should create a level playing field

In the fields where different Lamfalussy Level 2 & 3 bodies are concerned - level playing field between financial products (investment funds vs. certain life insurance products or investment funds for second pillar pension) - CESR, CEIOPS and CEBS should cooperate as far as possible as long as the European legislator does not intervene.

d) The application should avoid one size fits all

We are of the strong opinion that a “one size fits all” solution is not only inappropriate, but also impossible. Cultural differences and difference in supervisory practices are too great. This means that a certain differentiation, even a certain level of competition, between national authorities might be necessary and even positive. We acknowledge that it is very difficult to define principles for this approach and that we might end with a “case-by-case” solution. However, any solution should ensure that the levels of protection are appropriate for the investors concerned.

e) The application of supervisory tools should give room for the voice of market participants

From the start of the discussion about more efficient regulatory procedures (before Baron Lamfalussy started to work), FEFSI has been of the strong opinion that the greatest improvement would be to give market participants a more active role in the regulatory procedure. We think that the current Lamfalussy procedure is a significant step in the right direction, but we also think that this should be furthered. Market participants must have in particular more opportunity for comment at the beginning of CESR’s work. The current procedure (call for evidence & public consultation) is not sufficient. And this is particularly true with regard to Level 3 where there is no official mandate for CESR. Practitioners’ input is indispensable to identify at a very early stage the most appropriate ways and means to devise the regulatory approaches contemplating by CESR. The consultative panels are not a sufficient solution in particular since the individuals involved are able to speak from their own personal experience, but cannot benefit from consultation with or views from a wider network of others who have an interest.

■ ***IId) Improvements that might be considered by other EU institutions***

Two important issues should not be forgotten when speaking about other EU institutions:

- How to regulate at Level 2? We would like to raise this issue, which is more a Level 2 than a Level 3 issue, because it has in fact significant

impact on Levels 3 and 4. Indeed, to reduce the scope for difficulties in the practical application of Level 2, the European Commission should generally use Regulations (rather than Directives), as also requested by the Lamfalussy Report, which was endorsed by Heads of State and Government in the Stockholm Council of 2001.

- Legitimacy, accountability and Level 3 regulatory framework: we agree that if CESR's work on Level 3 should be broadened and equipped with more power, only a European legislative act can do so. Only this would give CESR the necessary legitimacy.

▪ *IIIa) Mutual recognition: the home- host country relationship*

Based on the Post-FSAP discussion, we are of the opinion that both CESR and the European Commission should start to analyse by branch/product what measures are necessary to achieve a single market: what can be done at Level 3 under the current conditions, where is Level 1 legislation necessary and for what measures would new Level 3 means be necessary?

CONCLUSION

FEFSI would prefer a bottom-up approach: do what can be done today under the current Lamfalussy framework to approach as much as possible the single market and then see what still needs to be done and whether any additional Level 3 powers are really necessary for CESR. A sense of urgency in achieving this should not give way to rushing into matters that are of fundamental importance to the future supervisory/regulatory landscape for financial services in the EU.

Brussels, 28 February 2005