

COMMENTS ON THE “HYMALAYA” REPORT (“Which supervisory tools for the EU securities markets?) FROM CESR

1. Introduction

The Himalaya report is an important step forward in assessing the role of securities regulators regarding implementation and enforcement of the FSAP measures in the area of securities. It is an impressive document, based on detailed mapping of the different supervisory powers of the competent authorities in the Member States. It timely opens the debate on how to exploit further the supervisory tools and gives a clear push in the right direction towards continued exploitation of the actual powers given to the various players in the Lamfalussy process and the necessary cooperation between the “level 3” Committees. Fortis appreciates the work of CESR and the thus far delivered efforts enhancing the integration of financial markets.

Fortis likes to add some comments that relate to Chapter II and III of the Himalaya paper.

We also join the comments we’ve made on the reports of the European Commission and of the Inter Institutional Monitoring Group (IIMG) on the Lamfalussy process, as these reports cover common items with the Himalaya report.

2. Comments

2.1. Regarding II. The network of the EU securities regulators: challenges and improvements

We fully agree with the heart of CESR’s mission, i.e. to deliver convergence of policy, supervision and enforcement.

- In the description how to deliver more convergence in supervision, enforcement and decision making (section II b) i)), CESR proposes additional tools to be developed. One of these is the “coordinating supervisor”, to be defined where necessary, on a case by case basis, by the relevant supervisors, in an attempt to enhance supervisory convergence.

Comment

1. For cross-border institutions, there is a clear need for one entrance gate to prudential supervision. A coordinating supervisor is a step in the right direction.

However, the concept of the coordinating supervisor does not go far enough (see 2.).

Standard MoU’s will, as suggested by CESR, facilitate the coordination among the national supervisors, and thus the task of the coordinating supervisor.

2. For trans-European market players in the securities markets (as Euronext or an international Clearing & Settlement infrastructure), for cross-border institutions (banks, investment firms, insurance companies) and for conglomerates, there is a need for **a fully empowered lead supervisor**, leading the whole supervisory process and taking decisions.
The mandate of the lead supervisor goes further than that of the consolidating or coordinating supervisor.
Home/host issues should be discussed in a College, in which all involved supervisors participate and in which one supervisor takes the lead.

- Regarding the improvements that might be considered by EU Institutions (section II b)), CESR considers that in some cases the tools available could be complemented by the legal possibility for the Network to take single EU decisions.

Comment

Changes in the mandate or structure of CESR will probably be necessary in the future as European markets get more and more integrated and cross border issues become still more important.

However, a number of remarks can be formulated in this respect.

- a) In terms of priority there is still a lot of progress which can be made under the actual set up of CESR.

- b) A more extensive role and a different legal set up of CESR should be based upon a detailed case by case study, illustrating how changing the role of CESR will improve the functioning of European markets.
- c) The level 3 committees (CESR, CEBS, CEIOPS) are responsible for sector specific issues, while the EU model of financial institutions is predominantly a cross-sector set up. The same issues, touching the same integrated financial institutions are discussed by two or three level 3 committees, which may lead to inconsistencies and at least inefficiencies. In order not to create further divergence between the level 3 committees, it seems advisable not to change the set up and role of one committee, without looking at the effects for the other committees and before having defined a more definitive global architecture for financial supervision in Europe.

2.2. Regarding III. Mutual recognition: the challenges posed by multi-jurisdictional market players.

CESR has rightly identified the challenge of the Home/Host cooperation in cases where different powers are legally attributed to each of the authorities. The differing powers of the CESR Members are clearly illustrated in Annex III to the Hymalaya paper.

The challenges are evidenced especially with the emergence of significant multi-jurisdictional market players. For a proper supervision f.i. of trans-European exchanges or trans-European investment firms, equivalence of powers, given to the competent authorities, is a prerequisite.

In III b) "Possible improvements of the Supervision of multi-jurisdictional market players, CESR gives a preliminary list of complementary supervisory tools, presented as 3 categories of cooperative arrangements: that "can rapidly put in place", "to be considered", and "that might be activated in the future".

Comments

- Some arrangements must be activated immediately: the "cooperative arrangements to be considered" (2nd list) and "cooperative arrangements that might be activated in the future" (3rd list), can indeed be put in place very rapidly, as they fall in the scope of CESR's actual mandates and thus are possible without legal modifications.

In this way a lot of problems can already be solved and the actual lack of harmonisation improved.

- Furthermore cooperation between the level 3 committees should be enhanced. Already now some issues that are treated by CEIOPS, CEBS and CESR, are clearly overlapping (examples: Outsourcing, CRAs). Therefore, in the light of the future European financial model, the coordination of their activities, should improve rapidly.

RESPONSE TO THE 3RD IIMG REPORT MONITORING THE LAMFALLUSSY PROCESS AND TO THE COMMISSION STAFF WORKING DOCUMENT “THE APPLICATION OF THE LAMFALUSSY PROCESS TO EU SECURITIES MARKETS LEGISLATION”

1. Introduction

In November 2004 both the IIMG and the EC published a report on the Lamfalussy process applied to EU securities markets.

Both reports give a clear overview of the achievements of the Lamfalussy process and formulate some recommendations for the future.

Fortis commends both working groups on their analytical work and supports the recommendations that have been made.

Fortis agrees that the Lamfalussy process is a good approach to EU legislation preparation, decision and implementation. It offers the possibility to include more detail in a flexible and rapid procedure with different stages (levels 1, 2, 3 and 4) and enhances also the cooperation between supervisors.

Fortis likes to add some comments which are common to both reports, more particularly concerning the cooperation between the “level 3”-committees (CEIOPS, CESR and CEBS), and the approach of supervision of markets and institutions in a EU perspective.

We also refer to our comments on the Himalaya report of CESR, which covers issues that are also described in the EC report and the IIMG report on the Lamfalussy process.

We therefore join our comments on the Himalaya report.

2. Comments

We agree with the concerns expressed about level 3 and 4, where the experience is lacking. The level 3 Committees and the EC will have to carefully guide the consistent implementation (level 3) and enforcement (level 4) in order not to undermine the effectiveness of the rules established under level 1 and 2.

To reach this objective, cooperation between the different supervisors of the level 3 committees is necessary. However, cooperation has its limits and we refer to the Himalaya report of CESR where these limits of supervision and cooperation in regulation are described.

The reason is that cross-border institutions are becoming more and more the standard and national supervisors and regulators have their legal possibilities but also limits to tackle the issues for cross-border activities.

We agree with CESR that convergence of powers and practices of competent authorities is a must.

Disturbing inconsistencies have to be inventorized and solutions proposed. This could be a task for the level 3 committees.

Before a fundamental change in the mission of CESR, CEBS, CEIOPS, can be agreed on, a new architecture for supervision in the EU must first be defined. Even if this is not realisable in the immediate future, the picture must be drawn and timing has to be discussed.

The sequence of the actions is therefore:

1. In the short term: exploit fully the capacity to act on level 3
2. Enhance the cooperation between the level 3 Committees in order to avoid overlaps and grey areas as much as possible. Examples: a consultation paper on consultation practices was separately published by CEBS and CEIOPS: such consultations should be published in common as much as possible; the consultation paper on CRAs by CESR covers also competences of CEBS (example: recognition of CRAs under CRD)
3. The role and powers of CESR and other committees can only be modified after a debate about the global architecture of supervision.