

## **FESE response to Green Paper on Financial Policy (2005 – 2010) Com (2005) 177**

FESE is the representative organisation of Europe's Regulated Markets offering trading in securities and derivatives and has incorporated EACH, the European Association of Central Counterparty Clearing Houses. Our Membership comprises all Members States of the EU as well as the countries of the EFTA.

We welcome that the Commission has published an extensive consultation paper on financial policy for the years 2005 - 2010. Members of the Federation have consistently been supportive of efforts to create and improve the internal integrated capital market and their efforts relating to legislative and policy measures at the EU level have focused on the creation of a level playing field on which competition could have its beneficial effects. We appreciate the opportunity to submit comments.

We are aware that several of our Members have made individual comments. We expressly refer to these submissions; they do in certain cases focus on particularities in our Members' environment and may therefore provide additional specific insight to the Commission.

### Ad.1 Key Political Orientation

FESE and its Members wish to take this opportunity to congratulate the European Commission on the major progress towards an integrated European capital and financial services market. Most of the legislative programme of the Financial Services Action Plan (FSAP) has been agreed on time and is now in the phase of preparing or effecting implementation.

Continued systematic cooperation has indeed developed between the European institutions and market participants. Such cooperation is beneficial to both parties as it allows making sure that rules are compatible with the market practice.

We agree with the Commission's evaluation that at present the focus should be on:

- The consolidation of existing legislation, with only few new initiatives,
- Ensuring the efficient transposition of European rules into national law followed by more rigorous enforcement by supervisory authorities, and
- Continuous ex-post evaluation whereby the Commission will monitor carefully the application of these rules in practice – and their impact on the European financial sector.

There are however other issues, partially covered by the above mentioned objectives that also deserve highest attention:

- The competitiveness and the attractiveness of the European capital market in the global economy should come higher on the agenda and become one of the prime criteria for assessing rule setting. In this context, FESE supports the efforts of the Commission and CESR to develop systematic cooperation with international authorities with a view to avoiding conflicting regulation and to achieving regulatory equivalence.

- The proper functioning of the Lamfalussy process at levels 2, 3 and 4 is key to the success of implementation exercise. Previous experience shows the danger of over-prescriptive legislation and inconsistent transposition by Member States. Therefore national implementation is key now.
- Beyond their remit as advisors for level 2 and actors on level 3 of the Lamfalussy process, reinforcing the cooperation between national regulators is an urgent necessity for supporting the development of genuine cross-border initiatives. The home country control falls short of recognizing a growing number of situations where market participants or market infrastructure providers actually organize themselves on a cross-border basis with a view to delivering integrated services and economies of scale – both of which are themselves powerful contributions to the single market. This new dimension calls for a revised approach of cooperation between regulators based on enhanced trust and concrete common action.

## Ad. 2 Better Regulation, Transposition, Enforcement and Continuous Evaluation

We agree with the Commission's evaluation that consolidation in the financial sector should be driven by market forces. Consumer protection and enhanced choice of products and services is driven by competition. Competition, in turn, is a condition sine qua non to the achievement of the goals set out in the Lisbon Agenda.

The Federation would like to stress the importance of consultation processes and the necessity that they be continued in the Lamfalussy process and beyond. We would like to strongly reiterate here the comment that we have made on numerous occasions, notably to the IIMG: for an efficient and successful legislative process it is indispensable that Member States, in the form of the Council and its highly relevant sub-groups (EFC, FSC but also ESC) will move to a greater degree of transparency. Where the Commission serves as the Secretariat of these groups, we rely on Commission services to identify and implement truly appropriate level of transparency.

Although measures under the FSAP have been completed, an even greater challenge remains: implementation and enforcement of new legislation. Implementing regulation in the EU Member States must be a top priority. The Federation also supports the Commission's and the Council's intentions to intensify their work on measuring the integration European capital markets.

FESE also supports the clear intention of the European Commission to use the "better regulation" principles for future legislative process. This procedure requires intensive cooperation of the involved parties, especially those companies affected by possible legislative actions. A pro-active regulatory policy aiming for the qualitative improvement of regulation is needed in the European Union and in each of its Member States. An excessive burden by European and national regulation must be avoided.

The most important element of a better regulation is the use of impact assessments. FESE is of the opinion that impact assessments are a useful tool to enhance the quality of the political decision-making process. Impact assessments could contribute to a more targeted approach to achieve a balanced new legislation. A regulatory policy, which aligns itself consistently to the fact that law measures should be applied only if there is evidence for their necessity, will enhance the quality of regulation. It is an important step to prevent unintentional side effects of the financial market regulation, as for instance the impairment of the competitive ability of European financial service providers. However, an impact assessment is not a panacea by itself, which could halt a flow of burdensome regulation.

The use of an impact assessment is restricted by a variety of methodological shortcomings, notably by the fact that quantifications in the field of financial market legislation are difficult to ascertain. Qualitative aspects such as financial market stability, or investor and consumer confidence are difficult to gauge in a satisfying manner.

Against this background, the real value of an impact assessment lies in the process of quantifying costs and benefits of a proposed legislation rather than its concrete results. Impact assessments constitute an add-on to the political decision-making process and contribute to set this process on a more objective basis. They cannot serve as a substitute for a diligent political judgment.

We also would like to point out that regulatory impact assessments should be launched at a very early phase of the legislative process. For practical reasons, it would seem advisable to decouple the publication and discussion of impact assessments from the final legislative proposal. Instead, an impact assessment may be commissioned already for drafting the early stages of fact finding, i.e. communications. The goal at this stage should be to get a better understanding of the market structure and its dynamics and test a variety of concrete regulatory options. Should it be necessary, an additional impact assessment could be initiated in the context of the publication of a possible draft directive.

On the issue of implementing deadlines, FESE and its Members agree with the Commission that allocating sufficient time to Member States and market participants to apply Community rules is important. In the future, more care is needed to work out the necessary time for implementation of Directives and the implementing measures. The Commission should apply pressure on Member States to implement legislation on time. Timely implementation by all 25 Member States is a corner stone of the proper functioning of the internal market legislation.

A continuation of transposition workshops with Member States and European regulators to iron out, ex-ante, the main problems by providing explanatory guidance to the Member States certainly play an important role.

FESE and its Members understand that, at this stage, national regulators have national responsibilities and national accountability towards their governments and parliaments. At the same time, in order to be effective, regulators and supervisors have to be flexible and place the greatest possible trust in their colleagues. The fact that several regulators are involved in the supervision of an entity providing services across European borders should not result in each of these regulators acquiring a veto right on each and every action of such entity.

At this juncture we would like to draw the Commission's attention to the proposal to establish a European complaints procedure to handle cross-border disputes between businesses and national regulators' on issues such as passporting. Disputes could occur in the areas of securities markets, investment banking and fund management. Once the Lamfalussy process is fully applied to banking and insurance, mediation should be extended to these areas as well. Hence it is important to establish the role well in advance of such extensions of the process. A flexible and voluntary service, such as a European complaints procedure, is indeed necessary in order to offer anonymous, independent and expeditious procedures. Moreover, such a service would gain extensive and up-to-date knowledge of the various financial sectors. The Federation has carried out a feasibility study which is available from the FESE website<sup>1</sup>. We welcome comments and criticisms of our proposal. We do believe it will, if correctly implemented, further assist and reinforce the formal powers of CESR and of the European Commission.

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<sup>1</sup> [http://www.fese.org/initiatives/fese\\_consultations/index.htm](http://www.fese.org/initiatives/fese_consultations/index.htm)

We strongly support the Commission's commitment to continue to report on an annual basis on the state of financial market integration, also addressing competitive structures in Europe, the efficiency gains of integration and related financial stability issues. The review procedures as foreseen will play an important role in identifying such flaws. Given the speed with which FSAP legislation was rushed through in some cases, it seems likely that several unwanted and unforeseen consequences will arise. Swift and appropriate legal action will be necessary, even on level 1 where non-Lamfalussy parts of legislation are affected. The Federation wishes to emphasise the need for the industry to be an important part of the review process assessing whether the various Member States have correctly implemented level 1 and 2 and possibly level 3.

The underlying principle of the financial markets legislation should always be economic benefits whether direct or indirect. Only such an approach would ensure sustainable developments of financial market in Europe.

#### Ad. 3 Consolidation of Financial Services Legislation over the 2005 – 2010 Period

FESE is closely following the developments related to clearing and settlement in Europe. The domestic processes of clearing and settlement are very efficient in all Member States. Although there are different approaches, today's processes are fast, relatively cheap, secure and tested for extraordinary circumstances. The process of modernisation that was started in the early nineties by Europe's Exchanges has extended to the areas of clearing and settlement as well. In some jurisdictions this has led to an integration of the entire process from order origination to final client statements; in other jurisdictions degrees of specialisation and roles of independent institutions have been strengthened.

However, the intra-EU cross-border processes are less efficient mainly due to legal and tax barriers.

Therefore, FESE very much supports the ongoing work of various experts groups initiated by the European Commission in that respect. FESE itself is a member of CESAME and also supports the Legal Certainty Group, or the Fiscal Compliance Group/FISCO to remove barriers on cross-border transactions of securities within the EU wherever possible on a self-regulatory basis.

FESE also strongly welcomes the fact that the Commission has embarked on a detailed impact assessment for post-trade services regulation. Such an impact assessment would need to be published and open for discussion prior to the start of the legislative process given the complexity of the issue and ongoing work on definitions. We support the Commission's continuing effort for open consultation and ongoing dialogue with market players in this area. Should the Commission consider legislative action to be required, a functional approach would need to underpin all measures in order to protect the competitive level-playing field.

In this respect, FESE supports the Kauppi Report<sup>2</sup> on clearing and settlement. The report clearly states that there is direct competition between all service providers.

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<sup>2</sup> P6\_TA-PROV(2005)0301, Clearing and settlement in the EU, Committee on Economic and Monetary Affairs, PE 353.491, European Parliament resolution on clearing and settlement in the European Union (2004/2185(INI)).

Furthermore, this report demands a functional approach to legislation, regulating services rather than entities in order to assure a level playing field between different types of service providers, which is a much more sensible way to look at this subject.

Should there be a case for a directive, we believe that specific legislation relating to ownership structures, corporate governance, user representation and to hands-on supervision is not necessary, does not serve a public interest, and might block further integration progress. Moreover, questions of equitable access, including the difficult issue of unbundling, should only be addressed where conflicts of interest may arise and a level playing field and true competition could be at stake.

We support the Commission's proposals on efficient and effective supervision. The European Union needs to press forward the Lisbon Agenda and maintain the highest, most up-to-date standards of regulation, oversight and supervision. Also convergence of supervisory practices in all financial sectors should remain one of the key functions of the Lamfalussy process. FESE agrees that removing inconsistencies within and between Directives, paying particular attention to cross-sectoral issues is of utmost importance. Also, achieving greater clarity in the roles and responsibilities of supervisors as well as convergence of supervisory practices is highly desirable.

The area of regulation of credit rating agencies is certainly a very sensitive market issue. These private sector institutions function today as an oligopoly. They provide, however, an important role in market transparency. The Federation believes that at this juncture no European legislation is necessary but that the rating agencies could themselves provide a greater degree of transparency about their own functioning.

We acknowledge the objectives identified and the progress made in building open, ex-ante regulatory dialogues with the US and China. We are glad that the Commission would also like to deepen financial relations with other countries, like Japan. We would however advise against giving too little importance to India, as it is currently a promptly developing market. At this juncture we would like to stress our recognition of the efforts made by the European Commission in the trans-Atlantic dialogue with the US Treasury as well as between CESR and SEC/CFTC and last but not least between European parliamentarians and Members of the US Congress. We trust that all the efforts made will contribute to the resolution of the issue of cross-border positioning of trading screens without artificial barriers.

We would also like to draw the Commission's attention to the fact that over the last 16 years, a considerable number of mostly large European and other non-American companies have sought a registration with the SEC and often a listing on the New York Stock Exchange or NASDAQ. A much smaller number of companies from the US has sought and gained a listing on EU Exchanges. The current interpretation of American securities legislation that essentially blocks a non-American company from de-registering from the SEC and thereby from leaving the American jurisdiction is such that no company in practice will ever qualify, even if such a company has publicly and transparently offered to buy out each and every American investor. We trust that this issue will be further pursued in the framework of the trans-Atlantic dialogue.

#### Ad. 4 Possible, Targeted New Initiatives

It is true that the approach of creating pan-European passports for businesses and consumers seems to be the most beneficial one. However, possible alternative regimes, such as the so-called "26th regimes" for those operators and consumers who want to be active across borders, leaving the 25 sets of national rules untouched, should be further debated.

FESE supports the Commission proposal to launch a feasibility study as well as the establishment of the Forum groups for specific retail products, consisting of experts in the field, representing industry and consumer interests, to identify any barriers and examine possible solutions. FESE would gladly participate in such an enterprise.

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