

Financial Market Supervision
EuropeanIssuers' Response to the European Commission's Consultation
concerning its Communication of 4 March 2009 and the de Larosière Report

POSITION
15 April 2009

I. OBSERVATIONS CONCERNING THE GENERAL APPROACH

Listed companies are in favour of the rapid implementation of measures to restore confidence in the financial system, improve conditions of access to financing for all businesses and better prevent, identify and manage systemic risks.

Prioritise non-regulated elements and systemically-important financial sector entities

In line with the conclusions of the G20 ministerial meeting of 14 March and the conclusions of the European Council of 19 and 20 March, we believe that regulatory measures should *prioritise non-regulated markets, financial instruments and actors and systemically-important financial sector entities*.

Favour enforcement over creating new regulations

With regard to elements which are already regulated, we particularly welcome the notion which emerges from the de Larosière report whereby the *enforcement* of regulations is *generally preferable to creating new regulations* (“*the enforcement of existing regulation, when adequate (or improving it where necessary), and better supervision, can be as important as creating new regulation*”).

Seek out consistent solutions at international and EU levels

Given the international scale of the crisis and ongoing financial market integration, globally and in the EU, it is essential to seek out *consistent solutions at international and EU levels*, avoiding favouring the least amount of regulation, ensuring a level playing field for issuers and an equivalent level of protection for investors and other stakeholders.

As a result, we lament the fact that there is no single set of regulations or consistent enforcement in the EU. Along the lines of the de Larosière report, we would like to see the *gradual harmonisation of applicable regulations, national supervisors' powers, supervisory methods and (in the framework of the EU institutions) sanctioning regimes, excluding civil sanctions* (sanctions for failures to meet obligations laid down at EU level, excluding civil sanctions).

Organise EU supervision of national supervisors, avoiding any unnecessary overlap

It appears realistic, at this stage, to rule out the idea of setting up EU regulatory bodies to replace national regulators/supervisors and instead to focus on transforming *EU committees of national regulators/supervisors into supervisory authorities*, tasked with supervising the consistent application by national regulators/supervisors of regulations laid down exclusively at EU level.

However, these authorities should be able to perform this role of supervising national regulators/supervisors effectively, to avoid this dual level being unwieldy and counter-productive for the proper functioning of the markets and the regulation.

In the opinion of issuers, it is essential to *leave general responsibility for day-to-day supervision up to the national supervisors, without contemplating applying the system of colleges of national supervisors to actors other than large cross-border financial sector entities (banks and insurance companies).*

II. COMMENTS CONCERNING SPECIFIC POINTS

1. Powers and governance of EU supervisory authorities: involve issuers in standing committees and in the processes

In order to meet their objectives, it is essential for the EU supervisory authorities to be given adequate powers and resources and for them to have genuine decision-making capabilities in their spheres of competence. In particular, this involves establishing qualified majority rules and, in the case of colleges of supervisors alone, powers of mediation which are legally binding on national supervisory authorities.

These powers must go hand in hand with the implementation of strict governance regulations for the EU supervisory authorities, in their relations with the EU institutions and market actors:

- as regards relations with the EU institutions, it is necessary for these authorities to be accountable to the European Parliament and for a clear distinction to be made between their competences and those of the European Commission, particularly in terms of regulation and implementation;

- as regards relations with market actors, it is essential for the working processes of the authorities to involve business communities *at all times*, so that the interpretations and decisions of these authorities are tailored to the business models and activities of companies and do not needlessly discourage their expansion. What is true for the governance of the IASB¹ or the IAASB is also true for the EU supervisory authorities.

With specific regard to stock market supervision, the authority which takes over from the CESR should have standing committees which, in particular, include a substantial number of issuers' representatives from other than financial sectors.

2. Taking into account sector-based specifics and systemic risks: do not generalise the rules which apply to the banking sector

The de Larosière report and the European Commission Communication mention the need to take specific measures for “financial institutions or firms” and “systemically-important market actors”, without defining them specifically.

We are of the opinion that it is essential for the terms used in future EU laws, regulations and standards to be unambiguous regarding the fact that companies other than those in the financial sector² are not being referred to, except in relevant cases which would be explicitly defined.

In fact, in organising regulation and supervision, it is necessary to take into account sector-based specifics and the differing systemic risk levels associated with activities.

In this regard, we do not see the need for new regulatory measures for companies other than those in the financial sector, since they are unlikely to be the cause of significant systemic risks; for those companies the emphasis should instead be placed on harmonising regulations and applying them consistently at EU level.

In more specific terms, with regard to the supervision carried out by stock market regulators, we consider that the EU passport system which applies to issues of securities appropriately incorporates cross-border considerations, as the approval by the regulator of the home Member State enables issues in other EU Member States without additional controls by other regulators.

Therefore, the fact that the supervision, authorisations and investigations relating to the prospectus, information and transparency lie within the remit of the national authorities in the target schema of the de Larosière report³ is, in our opinion, quite right.

Finally, as regards insurance activities, the report⁴ rightly mentions that it is necessary to complement the Solvency II Directive to draw the lessons from the crisis and put in place a group support regime.

¹ De Larosière report/Recommendation 4

² In particular, those financial services providers that could cause systemic risks: insurance companies do not generally present any systemic risk as their business model is characterised by an inverted economic cycle.

³ De Larosière report/“Annex V: The allocation of competences between national supervisors and the Authorities in the ESFS/Securities Supervision/Stage 2”

3. Harmonisation of approaches as regards investigations and sanction regimes: link with supervisory competences to implement them

It is worth examining the conditions and extent to which the approach applied to investigations and sanction regimes could, in turn, be harmonised (sanctions for failures to meet obligations laid down at EU level, excluding civil sanctions).

However, it is necessary to clarify that investigation powers and exercising sanctions as regards market actors are linked to supervisory competences and, with regard to market actors, therefore lie within the remit of the competent national authorities.

4. Nature and scope of the binding technical decisions of the EU supervisory authorities:

The de Larosière report recommends that EU supervisory authorities be given the power to “adopt binding technical decisions applicable to individual financial institutions”⁵, without specifying the nature and scope thereof.

Moreover, it states⁶ that, in case disputes arise between the supervisors of a cross-border institution, the authorities should be able to take certain supervisory decisions directly applicable to the institution concerned (e.g. specific decisions or resolving disputes about different legal interpretations relating to supervisory obligations).

Since the term “cross-border institution” and the nature of the decisions are not defined either, there is a question mark over the exact import of the recommendation.

We understand that the EU supervisory authorities should be able to take general technical decisions.

However, we are of the opinion that it should only be possible for these authorities to take binding technical decisions applicable (or directly applicable) to individual companies if these companies are supervised by a college of national supervisors (i.e. only for large cross-border financial sector entities).

5. Regulations and interpretations: eliminate national exceptions in EU spheres of competence and clarify the interpretation role of the EU supervisory authorities

Eliminate national exceptions in EU spheres of competence

⁴ De Larosière report/ Recommendation 5

⁵ De Larosière report/§ 211/Recommendation 21

⁶ De Larosière report/§ 205) i) In relation to cross-border institutions

In EU spheres of competence, issuers lament the tendency among some Member States to supplement existing EC regulations with national provisions with a similar aim (referred to as “*gold plating*”). This goes against the stated objectives of facilitating cross-border financial activity in the European Union, creating a single European market and ensuring a level playing field for all actors. Moreover, maintaining national exceptions is liable to complicate those supervisory tasks which would lie within the remit of the EU supervisory authorities.

In this context and in EU spheres of competence, listed companies favour maximum harmonisation and the gradual elimination of specifically national exceptions or regulations:

- Binding rules should be drafted *exclusively* at EU level, either by the EU institutions or by the CESR, *in the framework of a delegation and under the supervision of these institutions*. If applicable, the CESR should *involve market actors* in the drafting of the regulations which would be imposed on them, ensuring that these regulations are proportionate to their objective and are not excessive;
- Exceptions should be referred to the European Commission and eliminated under its supervision. The *only* grounds for maintaining certain national exceptions should be the need to safeguard financial stability.

So as to avoid the risk of regulatory competition between supervised entities, all supervised entities (including purely national entities) should be able to refer those situations to the European Commission where they feel that they have been discriminated against as compared with an entity supervised by another regulatory authority. This referral power should not be limited to financial institutions and/or cross-border entities⁷.

Clarify the interpretation role of the EU supervisory authorities

National supervisors need to have a common understanding of EU legislation or regulations and how to apply them. From this point of view, EU supervisory authorities have an important role to play.

However, it is essential to avoid drafting a new layer of provisions in addition to level 1 and 2 provisions (Directives and Regulations), which are often already detailed. Moreover, even though the provisions laid down by the current level 3 committees are, in principle, not binding on supervised entities, in practice they lead to disparities because of different degrees of implementation by national supervisors.

In the same way as for drafting legislation, we believe that it is vital to avoid interpretations which are not proportionate to their objective, are excessively detailed or even, at times, inappropriate, as a result of having been adopted urgently, without any real dialogue (e.g. level 3 CESR’s recommendations concerning the prospectus). To this end, it is necessary for the EU supervisory authorities to *involve market actors* in drafting interpretations *in the framework of standing committees*.

⁷ As suggested in § 205) i) of the de Larosière report.

On the subject of accounting⁸, we have concerns about the EU supervisory authorities, in particular the market supervision authority – or even national supervisors - being able to adopt “binding recommendations” for two reasons. Besides the fact that these terms appear to be contradictory and that accounting lies within the remit of legislators and accounting standard-setters, we would like to underline the following two points:

- in terms of the binding rules which apply to the consolidated accounts of listed companies, we do not think that there is any need to supplement the large volume comprised of the IFRS and the interpretations issued by the IASB (and approved by the European Commission⁹), as well as the countless resulting obligations on issuers, with general recommendations issued at EU or national level (at the risk of moving closer towards a “rule-based” system and threatening the overall consistency);
- in terms of the rules which apply to other accounts, not laid down at EU level, it would even be less legitimate for the EU supervisory authorities to define binding positions.

Moreover we strongly support statements 74, 77 and 79 of the de Larosière Report. Issuers agree on the need to revise ‘the mark- to-market principle’. Though it may not have triggered the crisis, the accounting standard (IAS 39) aggravated its consequences by creating a downward spiral in the prices of financial assets, prompting banks to proceed with capital increases in a difficult environment. European Issuers support the revision of IAS 39 at least for assets held for the long term and for the valuation of assets in illiquid markets.

6. Credit rating agencies: do not call the current model into question for issuers of financial instruments other than structured financial instruments

Listed companies are in favour of the recommendations of the de Larosière report concerning registering and supervising agencies, reducing the use of ratings in financial regulations, separating rating and advisory activities and differentiating between structured financial products and other products in rating categories¹⁰.

However, we are of the opinion that, at least for conventional (non-structured) products, there is no need to call into question the issuer-pays model.

Besides the need to take into account the upcoming reinforcement of certain regulations (regulations concerning independence, supervision carried out by agencies and regulators and publication of rating histories enabling their long-term performance to be assessed), companies would also like to point out that payment by the investor, something which is already possible, entails the following risks:

- risks identical to those linked to ratings unsolicited by issuers;

⁸ De Larosière report/“Annex V: The allocation of competences between national supervisors and the Authorities in the ESFS/Securities Supervision” /Stage 1 & Stage 2

⁹ See Regulation (EC) N° 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards

¹⁰ De Larosière report/Recommendation 3

- lack of independence with regard to the investor or conflicts of interest with the latter (as the investor may initially have an interest in obtaining a low rating and/or subsequently a non-deterioration in the rating provided);
- lack of widespread communication to the public (other investors, other stakeholders, shareholders, suppliers, etc.);
- increase in costs or lack of consistency as a result of a range of different ratings published for the same instrument or the same issuer;
- difficulty in dividing the costs equitably between investors on the primary and secondary markets.

For these reasons, listed companies are calling for greater caution on this matter in the framework of finalising the inter-institutional negotiations underway concerning the proposal for a regulation, as well as concerning future reflections on this subject.

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