

# EU Financial Services BRIEFING



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## 1. Industry Reports on EU Investment Fund Framework

On 4 July, the Commission published three industry reports analysing different segments of the EU investment fund industry. The reports, prepared by expert groups, on investment fund market efficiency and alternative investments, follow the 2005 Green Paper on the enhancement of the EU framework for investment funds and long-term savings vehicles. In summary:

- The report on market efficiency suggests that fund managers should be able to provide core management services to funds domiciled in other Member States by:
  - removing the 'head office' principle or replacing it with a 'key activities' or similar concept;
  - providing clarity on the activities and services which the management company can provide on a cross-border basis.
- The report on hedge funds recommends that European authorities and supervisors allow the provision of investment services in respect of the full range of hedge funds and related products by investment firms authorised in accordance with MiFID – without imposing additional restrictions or formalities at the level of the fund, its manager or other participants in the value chain. In particular, the report recommends that regulators should avoid control of sales and distribution through product regulation or registration.
- The report on private equity funds encourages EU institutions and Member States to consider establishing – in non-legislative form – a common understanding

of the term 'private placement'. Subject to criteria based on experience and dealing frequency, this term could draw on existing provisions of Community law as regards the notion of 'qualified investors' who can be approached without triggering mandatory disclosure or conduct of business rules.

**Timeline:** *The reports are an important contribution to the forthcoming White Paper on strengthening the single market framework for investment funds, scheduled for publication in November 2006.*

## 2. Proposed Regulation on Information on the Payer accompanying Transfers of Funds

On 6 July, the European Parliament agreed at first reading the Commission's proposal for a Regulation to tighten controls on money transfers. This proposal is part of the EU Action Plan to Combat Terrorism and will bring EU policy into line with the recommendations of the Financial Action Task Force (FATF), the international body that sets standards to combat money laundering and terrorist financing.

In order to trace money transfers, the proposed Regulation introduces new obligations for banks and money remitters involved in the payment chain. The requirements apply to transfers of funds sent or received in any currency by a payment service provider in the EU. The name, address and account number of the sender of the transfer must always be transmitted together with the funds. Disclosure is required whatever the amount.

This information will only be provided to the competent authorities for the purposes of preventing, investigating, or detecting money laundering or terrorist financing.

**Timeline:** *The Regulation is expected to enter into force by 1 January 2007 at the latest.*

## 3. Financial Integration Monitor (FIM) 2006

On 26 July, the Commission published its third annual monitoring report for the financial services sector - the Financial Integration Monitor (FIM) 2006. The report covers the following areas:

- The EU financial sector in the global context: the EU is a major player in global financial

markets, comparable to the US, and a net exporter of insurance and other financial services. Depending on the market segment, its share in the global market varies from 20% to 40%.

- The EU insurance and pension funds sector: this has been and is still growing in importance. The sector is increasingly organised on a cross-border as well as a cross-sector basis but, for customers, insurance largely remains a 'domestic' service as access to retail insurance markets is mainly, although not exclusively, through local establishments.
- The EU investment funds sector: in the past decade, EU investment funds have more than quadrupled their assets under management. In 2005, two thirds of EU-wide sales took place on a cross-border basis and true cross-border funds represented 17% of all UCITS in the EU. There is a lack of competition in distribution which is reflected in high charges imposed by distributors.

## 4. Infringement Proceedings

### 4.1 German *Kreditwesengesetz*: qualification as *Sparkasse*

On 28 June, the European Commission issued a reasoned opinion requesting Germany to amend legislation which provides that the name '*Sparkasse*' (savings bank) may be used only by publicly owned banks.

The Commission considers that the German legislation (Article 40 of the *Kreditwesengesetz*) is in breach of EC Treaty rules on the freedom of establishment (Article 43) and on the free movement of capital (Article 56). In the Commission's view, the fact that a private investor cannot acquire the name '*Sparkasse*' in the event of a bank's privatisation is liable to hinder the free movement of capital, as it prevents these investors from making use of the goodwill attached to the name '*Sparkasse*' and therefore discourages them from acquiring this type of bank.

**Timeline:** *Germany has two months to reply to the Commission's reasoned opinion. If it fails to reply or the reply is not satisfactory, the Commission may decide to refer the matter to the European Court of Justice.*

## 4.2 Outbound Dividend Payments

On 25 July, the Commission sent Belgium, Spain, Italy, Luxembourg, the Netherlands and Portugal a reasoned opinion under Article 226 of the EC Treaty requiring them to amend their tax legislation regarding outbound dividend payments to companies.

Outbound dividends are dividends paid by domestic companies to persons in other States. Domestic dividends are dividends paid by domestic companies to other domestic persons.

Belgium, Spain, Italy, Luxembourg, the Netherlands and Portugal have national rules which provide for no, or very low, taxation of domestic dividends, while outbound dividends are subject to withholding taxes ranging from 5% to 25%. As regards Belgium, Spain, Italy, the Netherlands and Portugal the discrimination concerns outbound dividends paid to Member States and to the three EFTA countries which are parties to the EEA. In the case of Luxembourg the discrimination only concerns the EFTA countries.

**Timeline:** *If the Member States do not reply satisfactorily to the reasoned opinion within two months, the Commission may refer the matter to the European Court of Justice.*

## 5. Developments in Lamfalussy Committees

### CESR

- On 18 July, CESR launched a consultation on the details of CESR's work programme for a new MiFID 'Level 3' Expert Group. In CESR's view, supervisors need to ensure convergence in practices for four categories of issues of 'Level 3' work under MiFID. These include 'best execution' where, for example, it may be useful to develop a convergent view amongst supervisors on the best execution requirement for non-equity markets in particular.
  - CESR has decided to wind up the previous three Expert Groups and its MiFID Steering Group which prepared and submitted its Level 2 technical advice on implementing measures. In its place, CESR has established a new single 'MiFID Level 3 Expert Group' that will undertake work to deliver supervisory convergence in the day-to-day application of the legislation. Two sub groups, an

'Intermediaries sub-group' and a 'Markets sub-group' will report to the MiFID Level 3 Expert Group.

- On 2 August, CESR published its amended charter which includes:
  - a more straightforward decision making procedure;
  - a mediation mechanism between members to facilitate a rapid outcome. The procedure provides for a timeframe of a maximum of 6 months, but cases can be completed within 6 weeks or shorter;
  - the integration of the Review Panel which will permit a more thorough cross examination on the way in which members apply the new legal framework (a specific protocol will be published shortly); and
  - stricter confidentiality to allow the secretariat to assist members on operational issues.
- On 2 August, the Commission published a joint work plan for the CESR and the US Securities and Exchange Commission (SEC). It will be implemented immediately.

The main focus of the work plan is the application by internationally active companies of US Generally Accepted Accounting Principles (GAAP) in the European Union and International Financial Reporting Standards in the United States, respectively. The CESR and SEC will establish protocols for the sharing of confidential information between staff.

### CEBS

- On 4 August, CEBS published a review of methodologies used by the three external credit assessment institutions ('ECAIs', i.e. Fitch, Standard & Poor's Ratings, and Moody's Investors Service). The assessment applies criteria of objectivity, independence, ongoing review and transparency and considers whether their ratings meet the requirements of credibility and transparency. Furthermore, the review considers which 'risk weights' should be attached to ratings (mapping'). On the basis of CEBS' guidelines, all competent authorities shared the view that credit institutions and investment firms could use the ratings of all three agencies for determining the risk weights of their

exposures. Competent authorities have also reached agreement on mapping. Since Member States have not completed implementation of the Capital Requirements Directive, the shared view is informal but forms a solid basis for a final decision on formal recognition of ECAIs in each jurisdiction.

- On 22 August, CEBS published a questionnaire on current industry practices and thinking in relation to the measurement and management of commodity risk for internal purposes. Questions also cover industry's experience of the current regulatory framework and how a future regulatory regime would affect commodity firms and commodities business. The result of this inquiry will form part of the Commission's review of commodities business under the Capital Requirements Directive ('CRD'). The CRD obliges the Commission to consider the question of an appropriate prudential regime for firms carrying out business in relation to commodities derivatives and certain other derivatives contracts

**Timeline:** *The consultation period runs until 20 October.*

#### CEIOPS

- CEIOPS has issued Consultation Papers 13 and 14 in relation to Solvency II. Paper 13 is draft advice to the Commission on internal risk and capital assessment requirements, supervisors' evaluation procedures and harmonised supervisors' powers. Paper 14 considers sub-group supervision, diversification effects, cooperation with third countries and issues related to MCR and SCR.
- CEIOPS has published the programme for its 2006 Conference on 14 November in Frankfurt am Main, Germany. The main purpose of the 2006 Conference is to increase the transparency of CEIOPS' work and progress and to strengthen communication with industry and all interested parties in order to help CEIOPS react better to stakeholders' expectations. The main topics for discussion will be covered in four Panel sessions on progress of the Solvency II Project, implementation of the supervisory regime for pension funds, management and supervision of operational risk, and enhancement of consumer protection.

## 6. Other recent Developments

### 6.1 SWIFT

On 23 June, the Commission reacted to a New York Times article describing a U.S. programme initiated after 11 September 2001, which consists of secretly accessing financial data held by the SWIFT consortium (Society for Worldwide Inter-bank Financial Telecommunications). A Commission spokesman explained that, upon preliminary review, it would appear that there is no EU legislation covering transfers in the context of SWIFT.

On 23 August, the Data Protection Commission for the German *Land* of Schleswig-Holstein released its legal analysis of the SWIFT transfer of transactional data to the US Government. The Schleswig-Holstein authorities conducted the analysis on the ground that SWIFT processes data on behalf of German banks. The analysis concludes that the transfers breach German and European data protection law. The analysis sees no reason why intra-EU transactions should be processed at the SWIFT data processing offices in the US and therefore concludes that the SWIFT operations in Europe do not need to be held by the SWIFT offices in the US through any form of 'mirroring'. As such, the data on intra-European transfers should never be within the jurisdiction of the US Government.

### 6.2 Publication of Money Laundering Technical Measures

The 4 August issue of the Official Journal includes Commission Directive 2006/70/EC implementing technical measures relating to the Third Directive on the prevention of money laundering and terrorist financing.

These technical measures are based on extensive stakeholder consultation and address the following:

- a definition of what should be understood by the term 'Politically Exposed Person';
- technical criteria allowing the extension of situations in which the procedures for customer due diligence may be simplified; and
- technical criteria allowing Member States to exclude from the scope of the application of the Directive those persons/entities conducting financial activities on an occasional or very limited basis.

**Timeline:** Implementation by the Member States is required by 15 December 2007.

### 6.3 Publication of Consolidated Accounts Directive

The 16 August issue of the OJ includes Directive 2006/46/EC on the annual and consolidated accounts of certain types of companies, including banks, insurance undertakings, and other financial institutions. The new Directive amends the 'Accounts Directives' 78/660/EEC and 83/349/EEC, and the corresponding Directives for banks (86/635/EEC) and insurance undertakings (91/674/EEC). The Directive provides for collective responsibility of board members for the financial statements and annual reports, and, for publicly traded companies, introduces a requirement for a corporate governance statement.

**Timeline:** Implementation by the Member States is required by 8 September 2008.

### 6.4 Internet Database on National Law Implementing Financial Services Directives

On 28 July, the Commission opened a publicly available internet database giving complete access to national laws implementing EU financial services Directives. This was one of the Better Regulation tasks contained in the White Paper on Financial Services Policy.

The database can be found at: [http://ec.europa.eu/internal\\_market/finances/acti\\_onplan/index\\_en.htm#transposition](http://ec.europa.eu/internal_market/finances/acti_onplan/index_en.htm#transposition).

## 7. European Court of Justice

### 7.1 Judgements

**Joined Cases C-295/04 to C-298/04** (Article 81 EC – Competition – Agreements, decisions and concerted practices – Accidents caused by motor vehicles, vessels and mopeds – Compulsory civil liability insurance – Increase in premiums – Effect on trade between Member States – Right of third parties to claim compensation for harm suffered – National courts and tribunals having jurisdiction – Limitation period – Punitive damages)

On 13 July, the Court delivered its judgement in a reference for a preliminary ruling by a local Italian court, the *Giudice di Pace di Bitonto*.

The Italian national competition authority had declared that the insurance companies *Lloyd Adriatico Assicurazioni SpA*, *Fondiarria Sai SpA* and *Assitalia SpA* had implemented an unlawful agreement for the purpose of exchanging information on the insurance sector. That agreement facilitated an increase in premiums for compulsory civil liability insurance relating to accidents caused by motor vehicles, vessels and mopeds which was not justified by market conditions. Mr Manfredi and others brought actions before the *Giudice di pace di Bitonto* (Italy) to obtain orders against the insurance companies for repayment of the unlawful increase in premiums.

The Court held that:

- In accordance with settled case law, Community competition law and national competition law apply in parallel, since they consider restrictive practices from different points of view.
- Therefore, an agreement or concerted practice, such as that at issue in the national proceedings, which infringes national rules on competition, may also constitute an infringement of Article 81, EC Treaty (prohibition of cartels). In the light of the characteristics of the national market at issue, there is a sufficient degree of probability that the agreement or concerted practice at issue may have an influence, direct or indirect, actual or potential, on the sale of those insurance policies in the relevant Member State by operators established in other Member States, and that that influence is not insignificant.
- Article 81(1), EC Treaty produces direct effects in relations between individuals and so creates rights for the individuals concerned which the national courts must safeguard.
- It follows that any individual can rely on a breach of Article 81 EC Treaty before a national court and therefore rely on the invalidity of an agreement or practice prohibited under that Article.

**Timeline:** The case will be referred back to the Italian *Giudice di Pace* which will apply the Court's judgement.

## 8. Calendar of Events

**20 September 2006**

European Commission meeting (Brussels)

**25-28 September 2006**

European Parliament Plenary Session (Strasbourg)

**26 September 2006**

European Commission meeting (Strasbourg) (adoption of Green Paper/consultation on EU system for attachment of ban accounts)

**27 September 2006**

CEBS meeting (London)

**2-3 October 2006**

EP Economic and Monetary Affairs Committee meeting (Brussels)

**4 October 2006**

European Commission meeting (Brussels)

**9 October 2006**

Eurogroup meeting (Luxembourg)

**10 October 2006**

Ecofin Council meeting (Luxembourg)

**10 October 2006**

EP Economic and Monetary Affairs Committee meeting (Brussels)

**11-12 October 2006**

European Parliament Plenary Session (Brussels)

**12 October 2006**

European Commission meeting (Brussels)

**18 October 2006**

CEBS Consultative Panel meeting (London)

**20 October 2006**

Informal European Council (Lahti)

**October 23-26, 2006**

European Parliament Plenary Session (Strasbourg)

**24 October 2006**

European Commission meeting (Strasbourg)

**25-26 October 2006**

CEIOPS members' meeting (Budapest)

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