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The Law Society of England and Wales is responsible for the representation and regulation of approximately 120,000 solicitors in England and Wales. The Law Society regularly comments on domestic UK legislation as well as EU legislative initiatives, through its Brussels Office. In doing so, the Law Society’s comments are aimed at ensuring laws are clear and workable.

In the most general of terms, the Law Society would like to welcome the Commission’s Green Paper. First, it gives those with an interest in commenting, another opportunity to comment on the orientations of the Commission’s policy-making for the coming five-year period. Second, the emphasis on better regulation, the intention to allow the Financial Services Action Plan (“FSAP”) legislation time to “bed in” and the focus on targeted measures in the retail financial services market are all appreciated.

“The Commission would be interested to hear from stakeholders:
- whether they agree with the overall objectives for the Commission’s policy over the next 5 years;
- whether they agree with the key political orientation described above.”

1. Key political orientation

1.1. The Commission states that its focus for the coming five years will be: consolidation of existing legislation, with few new initiatives; ensuring effective transposition of European rules into national regulation and 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.

1.2. The Law Society is supportive in general terms of the overall objectives and key policy orientation outlined. We welcome the Commission’s commitment to limit the amount of new legislation and its focus on the harmonisation of implementation, application and enforcement.

1.3. The Law Society would like to endorse, in particular, the strong emphasis on adopting a better regulation / better law-making approach to any new initiatives contained in the Green Paper. The Commission would appear to have set an appropriate agenda in this respect. The Commission will, however, be judged on how these political objectives are put into effect.

1.4. Given the large number of measures adopted under the original FSAP, it is important to focus resources on the ongoing process of implementation. Notwithstanding the benefits intended to flow from the FSAP measures, implementation is proving painful and expensive for those affected. To achieve the Commission’s laudable aim properly, some fundamental changes set out further below are required.

1.5. In particular, business and the legal profession are still adapting to the implementation or imminent implementation of FSAP measures, such as the second and third Money Laundering Directives and the Market Abuse Directive. Proposing further such measures at this time would risk placing further compliance burdens on business. Existing measures must be evaluated fully before new measures in the same subject area are proposed.
1.6. Clearly there are a number of different elements to the better regulation agenda, on which we comment in more detail in section 2. The Law Society welcomes, however, the focus of the Commission on consolidation of the existing legislative framework, coupled with the effective transposition of existing EU legislation and rigorous enforcement. As well, continuous ex-post evaluation is essential in ensuring both the continuing relevance of EU law and the need to amend or repeal it. In that sense we welcome the readiness of the Commission to propose to amend, or even repeal, existing EU rules that are not working.

1.7. The Law Society welcomes the Commission’s intention to review legislation on asset management but is not convinced that further legislation is needed as such, although existing legislation does need improvement. We look forward to commenting on the Commission’s green papers in the areas mentioned.

1.8. We agree that EU legislation in the field of financial services should, in general, create a legal framework that enables cross-border and pan-European provision of financial services. We would encourage the Commission to ensure that any forthcoming proposals have the objective of facilitating the cross-border provision of financial services and not burdening business with additional overly prescriptive rules that will only act as a deterrent.

1.9. As regards corporate governance, we strongly support the non-binding “comply or explain” approach which the Commission has adopted in this area.

"The Commission would be interested to hear from stakeholders:
-whether they agree with the priority measures identified; and
- which additional measures should be taken to foster consistent application and enforcement of European legislation."

2. **Better Regulation, transposition, enforcement and continuous evaluation**

2.1. The section on better regulation gives the Commission’s commitment to rigorous better regulation, transposition, enforcement and continuous evaluation. It says it will continue with transparent and evidence-based policy-making in the Lamfalussy process, and with thorough and wide consultation and economic impact assessments. Simplification and consolidation is also an objective.

2.2. As stated above, the Law Society endorses this emphasis on better law making. We would like to take this opportunity, however, to highlight some of the following concerns.

2.3. In relation to consultations and economic impact assessments, it is not only essential that these are carried out, but that they are carried out in an appropriate manner. The Commission must consult fully on every aspect of the process including in particular, its impact assessments, which should be consulted on before legislation is drafted, not put out with the legislative proposal.

2.4. The Commission also needs to take steps fully to engage with relevant interested parties which it has identified through its impact assessment.
Identifying ‘impacts’ should also identify those parties that could be affected and as such should be consulted on the substance of a forthcoming proposal. Although the Commission might expect that these stakeholders would wish to respond, in practice, they will not necessarily do so. Therefore, the Commission should be taking further steps to seek their views and input. Merely stating that a consultation will be open, transparent and posted on the internet does not guarantee that it will elicit the appropriate responses. A similar approach should be adopted in relation to ex-post evaluation.

2.5. The Law Society also believes that the responses to a consultation should be seen to be considered by the Commission. In other words, the Commission should publish its analysis of responses and should give explanations (at least in general terms) as to why certain comments were taken on board by the Commission and others were not.

2.6. A full cost-benefit analysis should accompany any legislative proposal and should be consulted on.

2.7. We agree that the three EU institutions with legislative roles should observe the disciplines discussed on impact assessments. In the context of this Green Paper, the institutions should undertake to ensure that any forthcoming legislative proposal is adopted in full compliance with the Inter-Institutional Agreement on better law-making. We would also comment that Parliament and Council cannot be expected to accept Commission impact assessments unconditionally when the Commission is responsible for their content. The institutions must continue to work to find a mutually acceptable solution to the question of reliance on impact assessments in the context of the Inter-institutional agreement.

2.8. Poor drafting of European legislation leads to unnecessary difficulties and expense for the financial services industry and increases the scope for inconsistent application across the Member States. The partial definition of “offer of securities to the public” found in Article 2(1)(d) of the Prospectus Directive is a recent example of very poor drafting, which has led to numerous problems. The definition of “transferable securities” in Article 1(4) of the Investment Services Directive is another example; some, though not all, of its difficulties have been carried over into the equivalent definition in the Markets in Financial Instruments Directive. The well-recognised practical disagreements and difficulties thrown up by the UCITS Management Directive and the UCITS Product Directive also demonstrate what happens when legislation is imperfectly considered.

2.9. We do not believe that legislation should necessarily be drafted by those officials that are involved in developing and setting policy. Indeed we would recommend that the Commission consider the use or creation of a specialist legislative drafting service, which would act on the written instructions of policy officials. Such a system helps to ensure a clearer articulation and greater consideration of policy objectives and should help to ensure consistency of approach. It should also assist with ensuring that such fundamental questions as territorial application and jurisdiction are considered and appropriately catered for. (Why, for example, does it make sense for a company with multiple listings to have to comply with the insider list requirements of each Member State – see Article 6(3) of the Market Abuse Directive – when the home state notion used in the Prospectus Directive and the Transparency Obligations Directive could have been used?) While we recognise the
specificities of the EU legislative system and its multilingualism, we would ask the Commission to consider the findings of Robin Bellis in his 2003 report.

2.10. We endorse wholeheartedly the Commission’s comments on gold-plating but would highlight the following point. While some gold-plating is due to Member State’s desire to “add on” elements, it can also be attributed to a need to remedy the failings of poorly drafted EU legislation. Better drafting at the EU level ought to minimise any need by Member States to gold plate.

2.11. While facilitation of cross-border business and enhancing the competitiveness of Europe’s financial markets are clearly important yardsticks in determining whether legislation may be desirable, cultural differences must also be taken into account. The answer to the factual question whether there is any cross-border business occurring is not sufficient; it is necessary to establish exactly why this is the case. Cross-border business may not be occurring, not because there are barriers which the Commission needs to tear down, but for cultural reasons.

2.12. There needs to be a prima facie assumption that those parts of the financial services industry which are harmonised make appropriate provision for relevant consumer protection measures and the facilitation of the provision of services cross-border and that therefore these harmonised areas should be excluded from general consumer protection measures. The present situation where the Investment Services Directive, the E-commerce Directive, the Distance Marketing of Financial Services Directive and the Unfair Commercial Practices Directive all impose overlapping, cumulative and sometimes inconsistent requirements is most unsatisfactory. It is expensive for businesses to work out how to comply and then to do so and it is unlikely to contribute in the most efficient and effective way to consumer protection. This is an internal political question for the Commission to address and then explain to the other institutions with legislative powers. We hope that the Commission’s proposed review of inconsistencies between directives will help to resolve such matters.

2.13. The approach to who is the appropriate regulator is inconsistent. Sometimes it is home state, sometimes it is country of origin (which is not the same thing) and sometimes it is host state. This increases the risk of practical difficulties for businesses in seeking to comply. We do not believe that strengthening host state regulatory powers would facilitate the cross-border provision of financial services. We do, however, believe that the Commission (and the other legislative institutions) needs to decide which approach to take and to apply that approach consistently across relevant directives.

2.14. Whether or not the preceding points are accepted, there needs to be a harmonised approach to the classification of those who need retail protection and those who do not. The Markets in Financial Instruments Directive recognises a category of expert individual, who can be reclassified as a professional customer, based on their experience and understanding. This is helpful as far as it goes, but should be applied more broadly across relevant consumer protection measures. Otherwise the benefits in terms of procedure, systems and controls of being able to treat these persons as if they were professional customers may not fully be achieved.

2.15. Points like the two preceding points do support a harmonised rule book. The Commission should, however, be cautious. Any change is likely to involve

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expense, unless the previous position is permanently grandfathered. It must be clear that the expense of complying with the change does not outweigh the benefit. However, if properly carried out it should be of assistance in areas where there is overlapping regulation, such as analysts’ research, which is covered by the Market Abuse Directive and by MiFID and may be further regulated if the Commission decides to bring forward measures relating to financial analysts.

2.16. We would support a rigorous and regular ex-post facto review of the operation of directives, having witnessed the benefits of the UK Government (HM Treasury) review of the operation of the Financial Services and Markets Act 2000 two years after it came into force. One directive we think this would be likely to expose as unnecessary is the Distance Marketing of Financial Services Directive. A cost-benefit analysis might well be a helpful component of such reviews.

2.17. On the point of repealing EU legislation, appropriate provision must be made in order to avoid potential legal problems, to the extent national implementing measures remain in force. In some Member States we understand that there would be implied repeal of legislation if, for instance, the legal validity of secondary implementing legislation was dependent on the existence of the Community legislation it implemented. If inconsistencies between Member States’ legislation or problems of implementation (or lack thereof) arise during this legal vacuum, there would be no avenue of redress provided by the possibility of a reference to the European Court of Justice.

2.18. We think that the Lamfalussy process does have a role to play in better regulation, and, although in principle we support it, we think it is too early to judge whether it is as much of a success as the Green Paper suggests. CESR’s work product under the Markets in Financial Instruments Directive and the Transparency Obligations Directive shows a tendency to be over-prescriptive. For example, a market maker wishing to rely on the market-maker exemption will have to inform the relevant competent authority it is proposing to do so in relation to each share in respect of which it makes a market; the relevant competent authority being that of the issuer, not that which regulates it in carrying out its market-making business and is thus best placed to judge whether it is abusing the exemption.

2.19. Also, CESR’s output is, on occasion, arguably outside the remit of the level 1 measure to which it relates. For example the definition of when information is likely to have a significant effect on price (Article 1(2) of Directive 2003/124/EC) arguably goes beyond the text of the Market Abuse Directive in breach of its Article 17(2). We are not sure that there is an effective control mechanism in place to deal with this, but a separate drafting service, as contemplated above, might help to do so.

2.20. We also believe that there is scope for improving the Lamfalussy process at level 2 and below. It is easiest to comment on this by reference to the work of CESR, which has been in operation in this area for the longest. In our view:

2.20.1. At present, CESR’s advice tends to be an amalgam of elements from a number of jurisdictions. It does not appear to have the resources to develop an independent view of policy, drawing on the experience of its members. The fact that there is no maximum harmonised content for insider lists under the Market Abuse Directive or a statement of what constitutes evidence of identity – matters which cause practical difficulties for those issuers which operate cross-border and
businesses advising them – is an example of a hill CESR may have found too steep to climb.

2.20.2. The CESR secretariat should be more independent. The staff appears to be largely seconded from national regulators. This means that however even-handed they are being, they are likely to be perceived to be favouring their own national system of regulation.

2.20.3. CESR needs to make better use of the specialist knowledge of its members by ensuring that those most appropriately qualified are inputting into its work product. This is more difficult, but more important, than ensuring an even-handed split of responsibilities among members.

2.20.4. CESR does not consult effectively. Its working groups are given insufficient time to give quality input and it does not seem to succeed in engaging with all of those it needs to engage with - it needs to take steps to disseminate information more effectively and to seek the views of stakeholders (as was suggested in points 2.3 and 2.4 in respect of the Commission).

2.20.5. CESR does not appear to engage in constructive dialogue with the Commission. The scope of its mandates seems to be used as an excuse for not raising issues with the Commission, including problems with the level 1 text, which may be identified at level 2.

2.20.6. The level 1 legislation does not always give CESR an appropriate role. More care needs to be taken by the Commission in determining what CESR is to be asked to advise on. For example, as regards the meaning of "significant effect on price" (part of the definition of inside information in the Market Abuse Directive), as mentioned above, CESR's advice (and hence the resultant level 2 directive) arguably contradicts the level 1 text and seeks to interpret a test which has existed in EU legislation for more than ten years and should be very familiar in Member States - this will lead to confusion. By contrast, CESR was not given a role in setting down principles to determine (in the context of MiFID) when services provided by a branch are provided within the host state (where they are not, the institution's home state conduct of business rules will apply). The need for harmonisation of Member State approaches in this area is obvious.

2.20.7. CESR needs to employ more expert draftspersons and translators and to reconsider the approach taken in its consultation papers, which are often turgid and repetitive.

2.20.8. CESR needs to recognise that level 3 is not an opportunity for prescriptive standard setting.

2.21. The choice between use of a directive or a regulation at level 2 is a sensitive and important one which the Commission needs to consider carefully. There is considerable debate about this in various level 2 areas relating to the Markets in Financial Instruments Directive.

2.22. Given that the Treaty on a Constitution for Europe includes important provisions for the future use of the Lamfalussy process, particularly in terms of the role of the European Parliament, and given the recent result of referendums in France and the Netherlands, we would urge the Commission to resolve such issues urgently with the European Parliament.
2.23. We are in favour of supervisory convergence, but it will be necessary to guard against the particular danger identified in point 2.20.1 that convergence leads to an amalgam of existing regulatory policy, not an independent and coherent policy, based on the experience of Member States.

2.24. One very practical step towards “better regulation”, which is of great importance for the transparency of policy-making, would be to improve the timeliness and accessibility of information on the various Commission websites (particularly that of DG Markt). Some information is not published at all until long after the event (for example, minutes of meetings of the European Securities Committee). Some is published in an uncoordinated way (for example, press releases are published stating that legislative proposals or other documents are available on the web-site some time before they actually appear). The Commission should adopt strict internal time limits for the posting of such information and documents.

"The Commission would be interested to learn from stakeholders:
- whether they agree with the identified measures where the Commission might decide to take no action, or if there are other concrete areas where the Commission should not bring forward proposals presently in the pipeline or, indeed, areas where the Commission should consider withdrawing;
- their assessment if the existing regulatory and supervisory framework is sufficient to tackle the supervisory challenges in the years ahead, what are the gaps and how these can be filled most effectively;
- what are the objectives, sectors to be covered and the priority areas in regulatory and cooperatives activities on a global scale."

3. **Finish remaining measures**

3.1. We agree with the Commission’s decision not to propose any implementing measures under the Takeover Directive.

3.2. The comments we have made above in section 2 are also of relevance in respect of the issues raised by the Commission in this section, particularly with regard to effective supervision.

3.3. The Commission also asks about barriers to cross-border investment. One drag on this, which the Commission could relatively easily do something about, is the requirement under the Investment Services Directive (carried over to the Markets in Financial Instruments Directive), the Banking Co-ordination Directive and the Insurance Directives, for regulatory consent in relation to a person who wishes to become a controller or increase their level of control. As a practical matter, if a person wishes to acquire a pan-European group, the need to seek regulatory consent at each level in the corporate tree is time-consuming and expensive. The Commission should, in these situations, consider restricting the consent requirement to a “lead” regulator (i.e. the regulator of the holding company highest up the corporate tree) which is required to consult with the regulators of the subsidiaries before granting consent.

3.4. We agree with the objectives set by the Commission in relation to its international activities and welcome the work done by it until now, particularly in relation to the equivalence of non-EU accounting systems such as US GAAP.
“The Commission would be interested to learn from stakeholders:
- whether they agree with the new identified priority areas;
- what are the (dis)advantages of the various models for cross-border provision of services, whether there is a business case for developing a 26th regime, and which business lines might benefit;
- how to enable consumers to deal more effectively with financial products and whether this means more professional and independent advice, improved education or financial literacy training are needed;
- whether they agree with the issues identified in the above list of retail products, or if they would suggest other areas where additional action at EU level could be beneficial.”

4. **Possible targeted new initiatives**

4.1. On specific areas identified by the Commission as requiring further attention, we think the Commission should be slow to conclude that further legislation is needed.

4.2. In asset management, for example, we do not believe that new legislation is required, but that the UCITS Management Directive, which does not appear to be working properly, needs to be revisited and that the UCITS Product Directive needs to be fixed, not replaced. While not wishing to prejudice our forthcoming comments on that Green Paper, we are likely to welcome generally the measured approach set out by the Commission. Likewise we look forward to commenting in detail on the Commission’s Green Paper on mortgage credit.

4.3. The Green Paper recognises that markets remain very fragmented and asks what the most effective way of tackling this would be, including suggestions of creating a “26th regime” or of using the approach of developing pan-European “passports” for businesses and consumers.

4.4. As regards retail financial services, we do not believe that a 26th regime is realistic. Regimes of this kind already in place, such as the European Company Statute, have not proved particularly popular.

4.5. While there are benefits to such systems, concerns remain over the way in which these EU-level regimes ‘fit’ with national legal systems. For instance, compliance with national taxation rules only serves to complicate the operation of EU-level regimes and the continuing reliance on national legislation to dictate the way in which the European Company operates (e.g. in relation to employee participation rules) has actually led to the creation of 25 different versions of the 26th regime, rather than one uniform EU regime.

4.6. Further, who would regulate the regime? If this is to be left to the existing 25 national regulators, and it is hard to see that there is any alternative, that will not ensure consistency of approach and a single process at the necessary depth.

4.7. In principle, we are of the opinion that the Commission’s efforts are best spent addressing existing obstacles between national regimes. We feel that more practical benefits may flow from targeting barriers (bearing in mind our comments in section 3) through harmonising directives and “passport”-type schemes and that they may result in more practical benefits.

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