A: THE FSAP

Promoting the smooth and efficient flow of capital from savings to investment is a policy priority for governments around the world. An important aspect of this policy agenda is the development of securities markets to facilitate issuers’ access to capital.

Within the EU enthusiasm for improving issuers’ access to capital is entwined with interest in building a properly integrated pan-European financial market. Such a market, it is believed, will offer a range of benefits including lower capital costs for issuers and better returns for investors that should, if projections are right, impact positively on the real economy.

The Financial Services Action Plan (FSAP) was an attempt by the European Commission to equip the Community better to meet the challenges of monetary union and to capitalise on the potential benefits of a single market in financial services. The FSAP set out a detailed action plan for the adoption by 2005 of legislative measures to support a single, integrated financial market in which a strong securities market was envisaged as a major component.

The FSAP led to extensive change in securities market regulation: new laws; new law-making processes; and more attention to the mechanisms for the supervision of securities market activity and enforcement. With the FSAP nearing completion, it is now a good time to take stock of what has been achieved, and to identify challenges that lie ahead. Paradoxically, the programme of activity that was heralded by the FSAP is vulnerable to charges of both excess – that there has been intervention that is liable to inhibit legitimate business activity – and underachievement – that the reality of a common regulatory system, embracing common supervisory standards and practices as well as common legal rules, is still much further off than some political rhetoric might suggest.

Concern about what has been created by the FSAP is evident in a number of recent reports. This book shares the concerns and identifies problems in three key areas: the balance between regulatory harmonisation and diversity, where some recent changes have shifted the bar too far in favour of a standardised approach; excessive reliance on regulation as the first-choice policy tool at the expense of due attention to supervision; and insufficient regard to the consequences of EU regulation on the global competitiveness of its securities markets.

Although this book acknowledges some serious deficiencies in the recent developments, it does not see a pan-European securities market regulator and supervisor as offering a superior way forward. The preferred option is to build upon and refine the existing regulatory and supervisory framework. The book suggests that a dedicated pan-
European securities regulatory and supervisory agency would not solve existing problems and that it could generate a host of new concerns about transparency, accountability, efficiency and effectiveness.

The FSAP was wide-ranging in scope but this book concentrates particularly on how the new legal framework will affect issuers’ access to the primary and secondary securities market. Since any market would struggle to grow without a good supply of its basic commodities, the attractiveness, or otherwise, of a securities market to issuers, that is to the providers of fundamental securities, is a crucial determinant of its likely success. In line with international norms, disclosure is the primary regulatory strategy within the EU for regulating issuers’ access to securities markets. The essays in this book therefore pay special attention to the new issuer disclosure regime. Examining such an intrinsically important area provides an opportunity to assess the achievements and failings of the FSAP more generally.

B: GENERAL BACKGROUND TO THE DEVELOPMENT OF THE FSAP

A properly integrated financial market is one where capital can move freely within the economic area and in which investment services are generally available. Free movement of capital implies the removal of barriers hindering issuers from raising capital from wherever they like within the economic area and investors from investing anywhere they like within the economic area. Freedom to provide services, and the associated freedom for people to establish businesses, imply the removal of barriers hindering financial intermediaries and market infrastructure providers (trading systems, settlement services and so forth) from operating throughout the economic area. Free movement of capital, services and persons are freedoms enshrined in the Treaty Establishing the European Community. This Treaty provides the base for Community legislative competence in the economic field.

The creation of a strong, deep securities market to facilitate the free movement of capital and pan-European provision of investment services and products was on the policy agenda of the central institutions by the 1960s but it was not until 1979 that the first legislative measure directly relating to issuers was adopted – a Directive on admission to official listing. The fairly narrowly confined area of admission of securities to official listing remained the focus for centralised legislative activity during the first part of the 1980s.

A significant expansion in securities laws emanating from the central institutions resulted from the drive towards the establishment of the single market that was launched by the European Commission in the mid-1980s. The Directives adopted during this second phase of securities law-making within the EU included the Investment Services Directive, often described as the cornerstone of EU securities regulation, and the Public Offers of Securities Directive. These Directives made use of the passport concept. The essence of the passport concept is that issuers, investment firms and market structure providers authorised in one Member State can gain access to other Member States without the need for further, local regulatory approvals. The passport concept was conceived as being crucial to the development of a properly integrated pan-European financial market in which issuers, investment firms and investors could operate freely and seamlessly, unimpeded by national boundaries.
Despite these developments a new mood of pessimism took hold during the latter part of the 1990s. There was a widespread view that insufficient had been done to equip the European Community to meet the challenges of monetary union and to capitalise on its benefits. The European Commission felt that Europe was still a long way from realising the potential benefits of the single market in financial services. Although some progress had been made in the previous decade, the passage of time had exposed deficiencies in laws that often had been political compromises representing the lowest common denominator on which the Member States could agree. Member States retained much discretion to add to the centralised requirements and to interpret them in different ways, and this practice was felt to hinder the realisation of an effective integrated market. One of the more obvious failures of the existing regime was the passport provision for securities offerings. Host Member States could require issuers seeking to rely on the passport to translate the prospectus into the local language and to add additional information for local investors. These additional requirements added significantly to the transaction costs of a cross-border issue making the passport route unattractive to issuers with the result that for most practical purposes it became irrelevant. The passport regime for investment services providers was plagued by similar problems in that passported firms were generally subject to host Member State conduct of business rules which were not harmonised and which could therefore differ from State to State.

It was thus largely out of a desire to redress the deficiencies of the existing regulatory regime as a pan-European integration mechanism that the FSAP was born. This marks it out as unusual. Revisions of securities laws are more typically driven by market collapses or major scandals that unmask deficiencies in existing law and generate strong political imperatives for governments to be seen to be moving quickly to correct the mistakes of the past and to repair investor confidence. Although various crisis-response measures were grafted onto the detail of the FSAP during its life, its priorities and principles were originally shaped in a different environment. This is a relevant consideration in assessing the achievements of the FSAP.

C: FROM FSAP TO LAMFALUSSY AND CESR

One of the complicating aspects of studying the development of securities law and supervision within the EU is the bewildering array of acronyms and other terms whose meaning is not immediately obvious. Alongside ‘FSAP’, there are two other terms whose significance is such that they merit an early introduction.

The first is the ‘Lamfalussy’ law-making process. In 2001 the process for making securities laws within the EU was overhauled with a view to providing a more nimble legislative machinery that would be better-adapted to the pace of global financial market change. The need for change in the legislative process, and a model for its achievement, had been laid out in a powerful report from an influential committee headed by Baron Alexandre Lamfalussy, a Belgian central banker and distinguished economist. It has been said of Baron Lamfalussy’s achievement in this field that he is one of very few people outside the world of politics to have an eponymous legislative process.

The Lamfalussy process was applied to many of the new EU laws that are considered in this book. However, those laws were first formally proposed in the FSAP, an initiative which preceded the adoption of the new legislative process. This sequence
of events deserves emphasis. Whilst it is legitimate to ask whether the adoption of the Lamfalussy process has helped produce better-quality laws governing securities market activity within the EU, it is important also to bear in mind that the Lamfalussy process came late, after certain important strategic policy decisions had been made and, crucially, after the timetable for the adoption of the FSAP had been set. These considerations must qualify whatever blame for the substantive quality of the recent laws is laid at the feet of the legislative process.

The second significant term is ‘CESR’, which stands for the Committee of European Securities Regulators. This Committee, which comprises the heads of the securities regulators from the EU Member States and certain other European countries, was established as part of the adoption of the Lamfalussy process. CESR performs a range of functions, including participating in the process whereby laws are made and helping to develop pan-European consistency in supervisory practices and policies.

D: EU SECURITIES LAW – EXPLANATION FOR TERMINOLOGICAL APPROACH

It is now widespread practice for legal instruments relating to the securities market that emanate from the central institutions to be described as “EU” measures. Thus, for example, the index to regulation on the European Commission’s website proclaims that “EU Directives ensure the development of a single securities market for both new issues and trading of securities”. Likewise CESR’s website describes it as an advisor to the Commission “in particular in its preparation of draft implementing measures of EU framework Directives in the field of securities”. The strict technical position is that securities laws are made within the legal framework of the European Community (EC, formerly European Economic Community or EEC), which is a Community within the common structure of the European Union. The EU, as such, has a limited role, although this will change if the draft Constitutional Treaty for the EU is adopted because this is intended to confer legal personality and powers on the EU and to provide for it to succeed to all of the rights and obligation of the EC. This book generally follow the looser practice that has developed in the securities field but references are made to EC law or to the EC Treaty where technical accuracy is demanded by the context.

3 Title III.


The landmark decision of the European Court of Justice in Case 120/78, *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein* (*Cassis de Dijon*) 1979] ECR 6 marked a general shift in the internal market harmonisation programme, away from the imposition of the same standards in all Member States to mutual recognition regimes whereby Member States were obliged to accept compliance with the regulatory requirements of other Member States: G. Hertig, ‘Imperfect Mutual Recognition for EC Financial Services’ (1994) 14 *International Review of Law and Economics* 177, 178.


14 European Commission, *Financial Services: Building a Framework*, pp. 11 – 12; European Commission, *Upgrading*, p. 3 (‘the usefulness of the single passport has been impaired by extensive exemptions from its scope and widespread application of host country requirements’).


16 ‘The Tower of Babble’, Economist, 31 July 2003 notes that this is a general problem within the EU, it being a key EU strategy, honed over many years, ‘to avoid calling anything by a name that might let an outsider guess what is being talked about’.

17 The adoption of the new legislative process is considered in detail in ch. 3.


Baron Lamfalussy was the one-time general manager of the Bank for International Settlements, and president of the European Monetary Institute, the forerunner of the European Central Bank.


20 See further ch. 3.


The draft has not been agreed by the EU Heads of State/Government at the time of writing (April 2004). If/when it is so agreed, it will then need to be approved unanimously by Member States. Various Member States have indicated their intention to hold a referendum on the issue. Since the process of securing all of the necessary approvals is likely to be time-consuming and politically contentious, with no guarantee of eventual success, the essays in this book refrain from speculating on how the new constitutional framework may affect securities law.