

PAN-EUROPEAN CORPORATE TREASURERS MAY QUESTION WHETHER THEY ARE TRULY OPERATING IN A SINGLE EUROPE. BUT FOUR MAJOR EUROPEAN BODIES ARE NOW WORKING ON A NUMBER OF EU-WIDE REGULATORY INITIATIVES TO ENSURE A MORE LEVEL PLAYING FIELD ACROSS THE CONTINENT. PIERRE PONCET REPORTS.

Who's pulling

Executive summary

- The European Council, European Parliament, European Committee and Committee of the Securities Regulators (CESR) all play a key role in the proposal, approval and implementation of EU-wide directives and regulation relating to finance. Many EU directives are now going through a co-decision process – being approved by both the European Council and the European Parliament.
- A number of initiatives all point to the establishment of a more uniform, regulatory environment across the EU in the future. These include the introduction of the euro, the Financial Services Action Plan (FSAP), the New Legal Framework for payments and the new International Accounting Standards (IAS).
- Nearly all measures in the Financial Services Action Plan, which aims to provide a legal and regulatory environment supporting the integration of financial markets across the EU, have been approved. But most of them are not yet written into the national laws of member states.
- The Transparency Directive, covering information on major holdings etc, must be enforced by the end of 2006. The Prospectus Directive, which provides a common format for listings on all European markets, must be enforced by all member states as of 1 July 2005.
- Directive 2003/49/EC, which abolishes withholding taxes on inter-company loans within the EU, is of particular relevance to treasurers managing centralised treasuries. However, this directive is not yet written into the laws of all member states and its translation has proved different from one member state to another.
- In December 2003, the EU Commission issued a consultative document on a New Legal Framework (NLF) for payments in the Internal Market which establishes principles guiding future legislation and proposes 21 measures. An alternative approach to harmonising payment instruments is the creation of a new payments vehicle with its own legal framework.



the strings in Europe?

The corporate treasurer, who deals with branches and affiliate companies in more than one European Union country, may well be forgiven for questioning whether the EU actually does exist as a single entity. This is particularly the case when considering the regulatory environment in which his/her treasury operation must operate.

The introduction of the euro, which is expected to become the currency used by most EU countries in the next five years; the Financial Services Action Plan (FSAP); the first proposals for the New Legal Framework (NLF) for payments in the EU; and the introduction of International Accounting Standards (IAS) from

2005 onwards, are all major positive moves towards the establishment of a uniform regulatory environment in the EU.

But it will take a good few years to see relevant European directives implemented in each country. Some countries are slower than others when it comes to introducing new laws and, in some cases, the final implementation of a directive or regulation may be slightly different from the original version. Legal recourse in the European Court of Justice is possible but, from an economic point of view, often not justified and, in any case, lengthy.

For fiscal matters, it is still the unanimity rule that applies, and this is likely to be the case well into the future, even if the new constitution is approved. Fiscal aspects of treasury and finance operations are, therefore, unlikely to be harmonised in the EU for many years.

By around 2010, however, the EU is expected to have a single regulatory environment in place for the vast majority of treasury activities.

SELECTED AREAS OF HARMONISATION. A number of initiatives have been taken to achieve greater harmonisation across the EU. The Financial Services Action Plan (FSAP), which aims to provide a legal and regulatory environment that supports the integration of financial markets, was launched in May 1999, and nearly all its measures have since been approved (37 out of 42). But their implementation and, moreover, their enforcement, are yet to happen.

In the case of the Market in Financial Instruments Markets Directive (MiFID), the Committee of the European Securities Regulators (CESR) is currently working on two sets of implementing measures to be finalised in January and April 2005. MiFID is of principle relevance to financial services companies and mainly covers subjects such as conduct of business obligations when providing investment services to clients, transaction reporting, lists of financial instruments and definition of investment advice.

European regulators and authorities

Four major bodies play a key role in the proposal, approval and implementation of EU-wide directives and regulation relating to finance and treasury. They are:

- The European Council – It approves – either alone or in co-operation with the European Parliament – directives, regulations and recommendations.
- The European Commission – It proposes directives and recommendations and can issue regulations which apply immediately. One example of this is regulation 2560/2001 EC on cross-border payments in the euro which says that the cost of cross-border bank transfers below €12,500 euros must be the same as the domestic cost of such transfers, provided that International Bank Account Numbers (IBAN) and Bank Identifier Codes (BIC) are known.
- The European Parliament and its Monetary and Economic Commission – It approves directives when a co-decision with the European Council is required.
- The Committee of the European Securities Regulators (CESR) – It is involved in implementation measures and the enforcement of financial directives.

Regulations and directives

Where European legal initiatives take the form of a recommendation, they do not have to be implemented into member states' local law. Regulation, meanwhile, can have an immediate and direct effect on the national law of a member state, but, like a recommendation, does not need to be specifically implemented.

However, member states are required to take whatever steps are necessary to implement the provisions set out in directives into their national law. Whereas some directives, such as maximum harmonisation directives, set out proposals which must be implemented by member states in full, others merely set out minimum standards which each member state must meet. In the latter case, it is up to member states themselves to decide whether they want to introduce tougher measures than those laid down in the directive.

Certain directives include derogations. These are the equivalent of permitted exemptions which enable member states to disapply certain specific aspects of the directive's provisions. The use of such derogations by member states must be carefully monitored since, if the member state chooses to, it can use derogations to establish a limited but effective form of protectionism.

The Transparency Directive, together with its implementation measures (which CESR must complete by June 2005), must be enforced by the end of 2006. Measures mainly cover disclosure of information about major holdings, election of the home member state, nature of the auditor's review, content of the half-yearly report and equivalence between third-country Generally Accepted Accounting Practice (GAAP) and International Financial Reporting Standards (IFRS).

The Prospectus Directive, meanwhile, was published on 31 December 2003, and followed by implementation measures in April 2004. Here, a common format has been established in the EU so that it can be used for listings on all European markets, thereby eliminating the need for separate applications. The package (directive and implementation measures) should be enforced by all member states as of 1 July, 2005.

However, further guidance on disclosure requirements is required. In March 2005, CESR will propose recommendations for the consistent implementation of this directive. A consultation paper was published in June 2004.

CESR is also responsible for the effective day-to-day operation of the Market Abuse Directive. It will soon produce guidance on accepted market practices and the reporting format of suspicious transactions (level 3). This directive was expected to have been written into national laws by 12 October 2004.

On 16 March 2004, the European Commission adopted a directive aimed at ensuring the objectivity and independence of statutory auditors – Statutory Audit Directive. This states the auditor's full responsibility when auditing consolidated accounts. Independent audit committees will be required for listed companies. Audit firms will also publish yearly transparency reports.

The European Commission, meanwhile, is working on a proposal reviewing capital requirements for financial institutions, which should be consistent with the Basel II ratios and ready for the end of 2006. It is also preparing the third money laundering directive.

CESR is proposing that further legislative measures should be

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worked on in the area of clearing and settlement, corporate governance and Undertakings for Collective Investment in Transferable Securities (UCITS).

WITHHOLDING TAXES ON INTER-COMPANY LOANS. The directive 2003/49/EC abolishes withholding taxes on inter-company loans within the EU. It should have been translated into national laws by January 2004, but Germany and Italy have not yet done this.

The directive is important for treasurers managing centralised treasuries. However, its implementation is restricted to inter-company loans between two companies, where one has at least a 25% direct holding in the other, or they share a common EU-based parent owning at least 25% in each.

This directive illustrates the difficulties of reaching a uniform regulatory environment. First of all, it is not yet written into the national laws of all member states. Secondly, its translation is different from one member state to the other. For example, in Belgium, it applies to all companies, while in France some are excluded.

The changing EU regulatory environment

Two major developments have taken place in the EU regulatory environment over the last few years that look set to become commonplace in the future. In the first instance, more and more directives are now following the co-decision process, meaning that they must be approved by both the European Council and the European Parliament. This has been the case with the Financial Services Action Plan (FSAP) directives, which aim to support the integration of financial services across the EU. It was also the case with the directive on Market in Financial Instruments Directive (MiFID), which, a year ago, still had not been approved in the same terms by both the European Council and the European Parliament. As a result, the European Commission, acting as a go-between, had to propose a new version of the directive, which could be adopted by both European bodies; this was achieved in the spring of 2004.

Secondly, at the end of the 1990s, the slow progress of the FSAP led a committee, chaired by Baron Lamfalussy, to establish the Committee of the European Securities Regulators (CESR) and introduce a four-levels approach:

- Level 1 – Framework directives describing the high-level obligations of member states;
- Level 2 – Implementing measures proposed by CESR through consultation with market participants;
- Level 3 – Improved voluntary co-operation between European regulators to ensure consistent implementation;
- Level 4 – Strengthening of enforcement by national regulators.

Level 1 and 2 measures have to be implemented by member states within two years.

This approach applies to all FSAP directives, and CESR is currently consulting and working on implementation measures for the MiFID as it is clear that the real impact of this directive will largely depend on the technical implementation measures as well as their enforcement.

The Market Abuses Directive, adopted (level 1) on November 2003, was completed in 2004 by two sets of implementation measures drawn up by CESR, covering areas such as disclosure requirements for different products, definition of inside information and notification of suspicious transactions (see *Technical Update*, page 51).

In the future, CESR will be more involved in levels 3 and 4. As FSAP directives impose increased co-operation between European national regulators, CESR is likely to propose supervisory tools, the same regulation capacity for each national European regulator and joint inspections. The European Parliament may also have its word.

The European Parliament's importance in the shaping of directives is also likely to grow with the European Commission

Table 1. Internal Market (European Commission) figures showing overdue implementation of directives.

Country	ES	DK	UK	IE	FI	AT	PT	SE	BE	IT	EL	NL	LU	DE	FR
Number	8	10	18	19	20	28	30	30	43	43	46	48	50	51	61

keeping its crucial role here too. But when it comes to the detailed implementation and enforcement of directives, it is the CESR that will play an increased role, harmonising enforcement tools and the methods used by European national regulators.

The Internal Market (European Commission) table above indicates the number of directives which were overdue for implementation on 22 March 2004. A total of 134 (9% of Internal Market rules) are late in their implementation – although these are not solely related to corporate finance.

As a revision of this directive is possible before the end of 2006, the EACT is looking to present a new proposal and is insisting on its consistent translation in all member states.

NEW LEGAL FRAMEWORK (NLF) FOR PAYMENTS. In December 2003, the EU Commission issued a consultative document on a New Legal Framework (NLF) for payments in the Internal Market. The NLF excludes cheques and bills of exchange, focusing on credit transfers, direct debits, card and electronic payments.

At present, the objectives of a single payment area cannot be achieved as the legal environment for payment instruments differs from one EU country to another, and payment systems are also difficult to interlink.

The document establishes the principles guiding future legislation and proposes 21 measures. Alongside the principles, such as efficiency, security, establishment of a level playing field and high levels of customer protection, the document defines the process by which an NLF could be established. It is clear that, in several areas, regulation will be preferred over a directive or recommendations, because of its direct and clear application.

An alternative approach of trying to harmonise national regulations on payment instruments – which will take time – is via the creation of a new payments vehicle with its own legal framework. This is the case with the Pan-European Direct Debit (PEDD) which should, in the medium-term, replace national direct debit schemes. But it does look as if this is going to be more difficult to build than originally thought and, for several years, it is likely to co-exist with national direct debit systems.

Whatever the evolution of payment instruments and payment systems, it will be a lengthy process. The European treasurer will have to work in a world in which there are different initiatives from payment services providers for the same payment instruments, differing regulations and, in some other instances, European payment instruments competing with national ones.

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