

**UNICE COMMENTS ON THE FIRST INTERIM REPORT  
OF THE INTERINSTITUTIONAL MONITORING GROUP (“LAMFALUSSY APPROACH”)**

UNICE appreciates the opportunity to respond to the Interinstitutional Monitoring Group (IIMG) Interim Report. Companies as important users of financial services have welcomed implementation of the Lamfalussy procedure designed to assure speedier legislation regulating securities markets while being based on extensive consultation with market participants. They have a strong interest in ensuring that this procedure leads to high-quality results that promote the integration of financial markets in Europe.

**Answers to the IIMG's questions:**

**1. *What are your views on the Group's assessment criteria? Are they sufficiently precise and complete?***

- In UNICE's view, the group should add the *quality of legislation* that results from the process as an additional assessment criterion. The enhanced speed of the legislative process must not come at the expense of the effectiveness of legislation in reducing barriers to the cross-border provision of financial services which should in turn lead to lower financing costs for companies, lower trading costs for investors, increased rates of return on capital and increased systemic stability of European financial markets. The effectiveness of financial services legislation should be increasingly monitored via regulatory impact and cost-benefit analysis.
- The group may also want to take into account global regulatory issues when evaluating the procedure in order to ensure the competitiveness of EU companies and markets.

**2. *Are you aware of any obstacles obstructing or hampering the swift and efficient adoption of securities markets legislation at European level?***

- The FSAP deadline and the deadlines foreseen in the comitology procedure have prompted CESR and the Commission to draft and amend legislative proposals speedily. The time CESR and the Commission can devote to a thorough exchange of views with market participants is thus limited. For example, at level 2 there is hardly any time – one month for CESR to evaluate the comments by market participants and two months at best for a second round of consultation - to make substantial changes to the general approach to legislation favoured by CESR in its consultation document after the first consultation round. Alternative options proposed by market participants in the consultation round that might ultimately lead to better legislation may not be explored fully by CESR because of these tight deadlines.
- Level 2 legislation should be restricted to measures where harmonisation would yield true benefits to the European financial market. It is to be recommended particularly

where there is wide theoretical and empirical knowledge about “best” market and supervisory practices. It must be ensured, however, that the institutional decision-making process will lead to the adoption of that best practice. To this end, market participants must have the opportunity to comment directly to the Commission on the draft implementation measures. In this context, UNICE welcomes the recent move by the Commission to allow market participants to review the first three draft legal implementing measures for the Market Abuse Directive before it submits the proposals to the ESC.

- Level 2 legislation should focus on truly significant issues deriving from the principles established at level 1 for which harmonisation is required. This will improve the quality of legislation while sacrificing little in terms of speed of legislation
- Consequently, the consultation procedures at level 2 should not be burdened with issues for which harmonisation is not required.

**3. *Is the system of parallel working with provisional mandates granted to CESR efficient?***

- Parallel working can be positive, if it allows for longer consultation periods. Because of the tight timetables imposed by the FSAP and the comitology procedure it seems difficult to wait for level 1 measures to be adopted before work at level 2 can begin.
- There are benefits to be derived from the interaction between work at level 1 and level 2. The reflections of CESR’s technical committees and of market participants at level 2 can highlight new aspects of level 1 considerations that may help to avoid the adoption of legislation that may ultimately prove inadequate.
- However, important changes in draft level 1 legislation bring into question the conclusions of level 2. Market participants should therefore have the opportunity to comment again on draft level 2 measures. In general, unnecessary consultation rounds should be avoided at level 2 if it is impossible to foresee whether the specific standards under discussion will be consistent with the legal act at level 1.
- CESR gives advice on different parts of the same mandate or on different mandates at different points in time. Market participants prefer to see the advice in its entirety, since aspects of CESR’s advice published at a later date may impinge on issues addressed in earlier pieces of CESR advice. It would be useful if CESR were able to modify its earlier advice if required based on consultation with market participants and if the Commission were to wait for the complete advice before it submits its proposals to the ESC.

**4. *Is the scope of delegation of implementing measures at level 1 sufficient, too limited, or too wide in order to reach the objective of more efficient securities markets legislation at European level?***

- The efficiency of legislation may be impeded by leaving too many details to be resolved at level 1. Level 1 discussions and legislation should be restricted to fundamental principles. Level 2 discussions and legislation should concentrate on the implementation of these principles. Otherwise, because a lot of detail contains political significance, level 2 discussions risk being burdened with protracted political discussion. Conversely, level 1 discussions sometimes deal with technical questions that should be left to the technical experts at level 2. In both cases, valuable time is lost that might be better used for discussions with market participants. Also, the discussion of details with high political significance at level 2 yields political

compromises that affect the quality of legislation. To this end, the distinction between principle and implementing measure needs to be clarified further.

**5. *What do you consider to be the best approach as to the choice of directives or regulations as legal instruments used at level 2 under the Lamfalussy process?***

- As regulations minimise the risk of divergences in national transposition, they are to be recommended when there is no need for flexible interpretation.
- However, when the regulation enters into force, national regulations have to be immediately adapted. This is difficult in 18 months, and particularly so if the instrument of choice at level 1 is a directive.
- If market structures are highly divergent and evolve speedily, a directive might be the better solution because flexibility in implementation and adaptation may then be called for.

**6. *Are the consultation processes sufficient? Are they satisfactory and efficient as regards the number of rounds of consultation and deadlines set? Are consultative documents balanced in terms of depth and size?***

- Companies as important users of financial services feel the need to participate more actively in the debate on the creation of a single financial market. UNICE welcomes the involvement of industry representatives in the Consultative Working Groups assisting CESR's expert groups. Issuers should also be made members of the level 2 Market Participants Advisory Committee, so that the representation of their needs is not left only to the providers of financial services as members of the committee. UNICE has expressed this concern to CESR on an earlier occasion.
- At level 1 there should be at least one round of consultation before the proposal is formally made public by the Commission.
- UNICE welcomes the fact that CESR consults with market participants not only before it drafts technical advice, but also before it submits its advice to the Commission (Market Abuse, second mandate and Prospectus) and also on draft technical advice before it is submitted by the expert group to the CESR chairmen for approval (Prospectus).
- The Commission practice, introduced for the Market Abuse Directive, of consulting with market participants on draft level 2 rules before they are submitted to the ESC should be made a feature of every level 2 procedure. UNICE is also pleased that the Commission plans an additional consultation on legislative measures relating to level 2 as approved by the ESC.
- At level 3 there should be consultation with market participants on proposals before they are completed by the CESR committee.
- Consultation documents still tend to be too long and detailed. Restricting consultation to truly important issues for which harmonisation is required will alleviate this problem (see point 4).
- The problem with short deadlines and long, complex consultation papers is that it is very difficult for companies to read and respond within the timescales. Many companies might have responded to CESR had they had more time to consider how the issues raised might affect their business. It would be helpful if the national

regulators could also publicise the work of CESR within each member state to raise awareness among companies of current consultations and deadlines.

**7. *Is there a further need to provide ex-post transparency, that is to explain to the public why proposals from market participants or others were included in securities markets legislation, or why they were omitted? Do CESR's feedback statements meet the commitments made in its Public Statement of Consultation Practices?***

- The transparency of the decision-making process needs to be further enhanced. To this end, documents by the regulation committees should be made available to the public in electronic form. CESR should publish not only the responses to the consultation, but also the reasoning as to why some responses are accepted and some rejected.
- More transparency is necessary as regards the decision-making process of the ESC. To that end, the ESC should publish not only summaries of meetings on its website, but also its reasoning as to why it adopts certain standards and rejects others.

**8. *What are your views on the Group's preliminary observations on possible bottlenecks?***

- It is vital for the efficiency of the process – in particular in view of the upcoming extension of the procedure to legislation regarding the banking and insurance sectors and pension funds - that the European Parliament continues to support the procedure. This needs to be secured by granting it an equivalent role to the Council in the comitology procedure and by providing it with genuine callback powers. To this end, Unice strongly supports an amendment of Article 202 of the EC Treaty.
- While the proposals made above will contribute significantly to improving the quality of legislation and to freeing resources at the Commission and CESR for thoroughly reviewing the proposals by market participants, it may nevertheless prove necessary to increase those resources in order to ensure a fruitful discussion between the decision-making bodies and market participants.
- There should be more project management of proposed legislation to plan for co-ordination of levels 1 and 2 and to make policymakers aware in good time of potential issues such as shortage of qualified translators, so that alternative arrangements e.g. outsourcing could be explored.

**9. *Is the current functioning of the Institutions, committees, market participants, and other parties involved in the Lamfalussy process conducive to making progress on securing a more effective securities market regulatory system? Are all these actors equipped with sufficient resources?***

- At this point, the impact of the comitology procedure on securities markets is hard to evaluate. A lot depends on how national implementation and level 3 processes will work. Commission and CESR should pay particular attention to whether the instruments currently foreseen at level 3 are sufficient to avoid national implementation with a protectionist bias and a further fragmentation of supervisory powers and practices. To date, political priorities have in various instances at level 2 procedures taken precedence over practical and efficient solutions in the interest of market participants and further integration of Europe's fragmented markets.

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