Ecofin

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UNICE COMMENTS ON

1) THE COMMISSION STAFF WORKING DOCUMENT "THE APPLICATION OF THE LAMFALUSSY PROCESS TO EU SECURITIES MARKETS LEGISLATION"

2) THE THIRD REPORT OF THE INTER-INSTITUTIONAL MONITORING GROUP

General comments

UNICE appreciates the opportunity to comment on the working of the Lamfalussy procedure to the European Commission and to the Interinstitutional Monitoring Group (IIMG). Companies as issuers and as important users of financial services have welcomed implementation of the Lamfalussy procedure designed to make EU securities markets legislation more flexible and thus further the integration of EU financial markets. Given the overall positive results of the procedure, Europe`s companies also embrace its extension to other areas of financial markets legislation. They have a strong interest in ensuring that this procedure leads to high-quality results that truly promote market integration and companies` access to capital.[1] To this end, UNICE`s comments focus on the following points :

- The procedure has contributed to speedier adoption of EU securities markets legislation. Whether the expected benefits can be realised now depends on timely transposition and consistent application in member states.
- CESR can make a significant contribution to consistent implementation of EU securities markets law. It must, however, focus on the interpretation and application of existing law and must not impose new rules on market participants.
- Consistent implementation may also be facilitated by aligning national regulators` competences. At the same time, this opportunity should be used to take a critical look at the realm of powers that regulators currently have at their disposal, in particular rule-making powers.
- The Commission and CESR must put more emphasis on consulting market participants before proposals for legislative texts or technical advice are drawn up. This will avoid the need for ex-post amendments to the legislative proposals.

[1] The BDI is of the opinion that the Lamfalussy procedure as it is practised is causing overregulation and contains constitutional deficits. It has to be restricted to technical details.

- A mediation role for CESR may enhance convergence between supervisory approaches in the member states and thus facilitate enforcement of EU law. Market participants and their professional associations should have a right of referral of a member state`s practice to CESR.
- CESR standards and guidelines should, as a general principle, not become EU law through endorsement by the European Commission. In exceptional circumstances it might, however, be necessary to give greater political authority to CESR measures in order to ensure consistent implementation of EU law.

Detailed comments

1. **The Lamfalussy procedure and flexibility in EU financial markets legislation**

More flexibility in EU financial markets legislation is deemed to arise mainly from the speedy adaptability of level 2 implementation measures. So far, in spite of the implementation deadline of October 2004 for level 1 and 2 legislation regarding Market Abuse, almost no member state has yet even transposed these measures into national law. Thus, in order to evaluate the contribution the Lamfalussy procedure makes to flexibility of legislative processes, one needs to wait and see how these implementing measures work in practice. Should the need for adaptation arise, the procedure will be put to the test as regards flexibility.

In general, legislative adaptations at level 2 must, however, not lead to an increase in the legislative burden. They should aim at simplifying or, where indispensable, at complementing existing legislation. The procedure should also be used by CESR, where appropriate, to recommend that certain level 1 or level 2 provisions, which during the implementation phase prove to be counterproductive, are eliminated. In this regard, UNICE welcomes CESR`s intention to alert the Commission to necessary adjustments to level 2 and level 1 measures.

2. **CESR`s role at level 3**

Level 3 of the Lamfalussy process is designed to ensure consistent implementation of EU financial markets law in the member states. CESR must respect its mandate in this regard and focus on the implementation of existing rules. In no way must guidance on level 3 issues impose new rules on market participants or integrate requirements that for important purposes have been left out of EU legislation. For example, it could be argued that CESR`s *Standards on Investor Protection* which de facto establish minimum harmonisation of conduct of business rules for investment

firms are not required to secure convergent application of EU law. Guidance that contains more detail than the corresponding legislative measures runs the risk of needlessly adding to the requirements market participants have to comply with without fulfilling its original aim of promoting convergence of regulatory practices.

3. Convergence among powers of national regulators

In UNICE`s view, the coordinated implementation of EU law could be further facilitated through the alignment of certain rule-making and supervisory competences of CESR members. However, this exercise should be taken as an opportunity to conduct a substantive review of national regulators` powers. It should not be ruled out that in some areas powers need to be reduced. Extending all powers that currently reside with national regulators in member states to all national regulators would widen their competences too far. This is true in particular in cases where the regulator has rule-making powers that he might use to increase his own competences. Powers of regulators should be set by parliament and not by the regulators themselves.

There are, however, also other ways to facilitate the convergence of regulatory decisions among CESR members within the framework of current, divergent powers between regulators. For example, national regulators should provide CESR with annual reports on the administrative rules and practices they have adopted on the basis of EU legislation, accompanied by their reasoning as to why a specific practice or approach has been adopted. This would provide CESR with important information before it creates common approaches in the form of guidance or standards.

In general, CESR should be rather restrictive when issuing guidance and standards. As these measures should provide for clarification in cases where national regulators are uncertain about implementing EU law measures, they should only be developed once a potential problem of interpretation has emerged. Thus, CESR must not issue guidance and standards in areas where level 1 and level 2 legislation has not yet been adopted.

4. Regulatory dialogue with third countries

In the consultation process, attention should be paid to the effects of EU legislation on global financial markets. In this regard, UNICE welcomes the recent initiation of a regulatory dialogue between CESR and the SEC. CESR should use this forum to form its view on how EU financial markets legislation might affect EU companies`

access to global capital markets. This aspect should be consistently explored in CESR`s consultation papers in order to collect the views of affected market participants.

5. Involvement of external stakeholders

Consultation of market participants can improve the quality of the legislation if the proposals become more attuned to market realities. Emphasis should be put on timely ex-ante consultation before the legislative proposals are drawn up so as to avoid an unnecessary request of ex-post amendments. 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. Equally, CESR should consult on its draft level 3 measures before they are completed by the CESR committee.

In order to elicit the widest possible response from market participants, the Commission should approach those mainly affected directly with its request for input and not restrict itself to advertising a consultation on its website. Also, the advisory panels to CESR, CEBS and CEIOPS should in each case convene those market participants that are really affected by the respective measure on the agenda.

6. "Parallel working"

On the one hand, drafting level 1 and level 2 legislation in parallel has provided market participants with more time for consultation on level 2 measures. 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. Also, the reflections of CESR's technical committees and of market participants at level 2 can highlight new aspects of level 1 considerations helping to avoid the adoption of legislation that may ultimately prove inadequate.

On the other hand, there have been instances where CESR`s advice in response to provisional mandates from the Commission might have had an effect on the institutional decision-making process on level 1 measures. Also, 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 provisions 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.

In UNICE`s view, the benefits to be derived from the interaction between work at level 1 and level 2 outweigh its disadvantages. In the area of securities markets legislation, the problem should anyhow abate in the near future: to the extent that level 2 measures are taken in order to adapt legislation to current market developments there seems to be no issue with parallel working. The issue will, however, remain predominant with regard to banking, insurance and asset management legislation.

7. Level of detail in level 1 and 2 measures

In UNICE`s view, despite recent improvements there is still too much detail in some level 1 legislation – a case in point are the provisions for pre-trade transparency of MiFID. Detail is necessary in many instances to provide market participants with legal certainty. However, a high level of detail in level 1 legislation defeats the purpose of flexibility and speediness the Lamfalussy was supposed to bring to EU securities markets legislation in the first place. Detail is what needs to be adjusted in a timely manner to reflect market developments. The co-decision procedures of level 1 do not allow for that.

The political significance contained in a lot of detail not only risks to produce political compromises which work to the detriment of market participants; it can also burden level 2 action with protracted political discussion. Also, level 1 measures have in the past dealt with technical questions that are best resolved by the technical experts at level 2.

It is therefore necessary to further clarify the distinction between principle and implementing measure. The Commission might also identify in advance where Council members have different views and take that into account in its proposals and its mandates to CESR, for example by asking CESR to comment in more detail on alternative options. Better knowledge of different views between Council

members might allow the Commission to formulate framework principles in level 1 proposals acceptable to all member states without adding details that might be used as political bargaining mass by national and industry representatives.

8. Use of regulations at level 2

When there is no need for flexible interpretation of EU, level 2 regulations should be recommended as they minimise the risk of divergences in national transposition and increase legal certainty for market participants. Regulations avoid the need for timely transposition of level 2 measures into national law. The downside is that the required immediate adaptation of national rules after the regulation enters into force might be a problem when the respective level 1 measure is a directive. If market structures are highly divergent and fast-moving, a directive might be the better solution because flexibility in implementation and adaptation may be necessary. In those cases, it is of utmost importance that CESR ensures consistency in national implementation.

9. A mediation role for CESR

Enforcement at level 4 might greatly benefit from a meditation role for CESR as this will contribute to greater supervisory convergence by providing an effective means to solve conflicts between national regulators. It should apply to cases where national regulators have not implemented level 1 and level 2 measures in line with CESR standards and guidelines, and where they do not comply with the provisions for mutual recognition of national regulatory decisions and for cooperation between national regulators as foreseen in level 1 and 2 legislation.

It may be considered whether CESR should also have a mediation role with regard to cross-border disputes between companies and national regulators. Market participants and their professional associations should have a right to refer a member state`s practice to CESR. Such a mediation mechanism can, in UNICE`s view, provide for speedy settlement of conflicts as compared with infringement action before the European Court of Justice.

10. Commission endorsement of CESR level 3 measures

CESR standards and guidance are developed by national regulators to promote convergent application of EU law and supervisory practices. UNICE acknowledges that a question of democratic accountability arises at level 3 as CESR is a network of regulators and not an institution with a legal personality. This leads to a lack of

legal certainty for market participants as CESR`s non-binding rules are not enforceable by the courts.

However, decision-making by administrative agencies must not impede on the prerogatives of national governments and parliaments nor the judicial branch. Inconsistent implementation of EU legislation which seemingly arises from the non-binding character of CESR`s guidelines and recommendations a level 3 might in reality originate from problems intrinsic in level 1 or 2 legislation. Thus, it is to be assumed that adaptations at level 2 might be more useful to solve these difficulties.

For these reasons, and as a matter of principle, they should not be turned into EU law. Moreover, they must remain easily adaptable and not add to the legislative body surrounding the underlying matter. There might, however, be cases where greater political authority of these measures is required for legal reasons, such as a need for implementation of level 3 instruments in member states where national regulators do not have the powers to do so, or a need for enforcement of level 3 instruments in national courts.

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