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AFG's response to Inter-institutional Monitoring Group Second Interim Report: *"Monitoring the Lamfalussy Process"*

Dear David,

The Association Française de la Gestion financière (AFG)[1] is very pleased to have the opportunity to comment on the second consultative report from the IIMG on the Lamfalussy Process.

Last year, AFG replied to the IIMG's questionnaire and is happy to provide its comments on this Second Interim Report.

[1] The Association Française de la Gestion financière (AFG)[1] represents the France-based investment management industry, both for collective and discretionary individual portfolio managements. Our members include almost 400 management companies and more than 700 investment companies. They are entrepreneurial or belong to French or foreign banking, insurance or asset management groups.

AFG members are managing more than 2500 billion euros in the field of investment management, making in particular the French industry the leader in Europe in terms of financial management location for collective investments (with nearly 1500 billion euros i.e. 22% of all EU investment funds assets under management, wherever the funds are domiciled in the EU) and the second at worldwide level. In the field of collective investment, our industry includes – besides UCITS – the employee savings schemes funds and products such as regulated hedge funds and a significant part of private equity funds.

AFG is of course an active member of the European Fund and Asset Management Association (EFAMA) and of the International Investment Funds Association (IIFA). AFG is also a member of the European Federation for Retirement Provision (EFRP).

You will find below our detailed answers to the specific questions addressed through the different points of the Second Interim Report.

As you will see, our general wish is to get a more efficient process, which could be obtained by more transparency as well as more transversality in the way the European institutions tackle the issues at stake.

It implies in particular:

- more resources in all institutions, including CESR and CESR members
- better consultation processes within institutions, in particular when topics concern several internal entities. For instance in the case of MiFID as applied to investment managers, we have the feeling that the coordination between the different European Commission's units as well as the different CESR working groups was improved only very recently and we cannot take it for granted that severe inconsistencies will be at the end avoided
- ensuring more consistency between the implementation processes in practice and the possible use of the mediation mechanism

1. What are your views on the Group's preliminary recommendations and conclusions?

Recommendations at Level 1/Level 2:

- *Excessive detail and separation of levels:*
  - we strongly support 'regulatory self-restraint' as legislation must be provided only where strictly needed – it is even more true for European legislation, which must be provided only where the goal to be reached cannot be achieved with the same efficiency by national legislations only (subsidiarity principle);
  - in addition, as far as possible, *Level 1 must be stabilised before launching the work at Level 2 and Level 3*, as legal certainty and legal consistency must be privileged as compared to speed. Let us recall that the Lamfalussy Report asked for Level 1 texts strictly limited to 'essential principles'. If European institutions accept to comply with such an approach of limiting Level 1 to 'essential principles', the drafting and adoption of such Level 1 would be faster;
  - it was for instance the case for the Market Abuse Directive, the very first case of Lamfalussy Directive. By strictly limiting Level 1 to pure 'essential principles' (only 22 Articles, equivalent to 10 pages in the OJEU, in its final version), it was made possible to get it finally adopted in December 2002 - after two readings both by the Council and the European Parliament – i.e. less than 18 months after the draft proposal had been officially submitted by the European Commission.

- *Directive vs. Regulation:*
  - as a principle, and *in line with the Recommendations of the Lamfalussy Report itself, we would encourage the use of Regulation versus Directives,*

since we think that the first legal instrument is more adapted to the Lamfalussy process:

- Regulations ensure in principle a higher degree of pan-European harmonisation of national provisions, by avoiding the step of national transposition. National transpositions may lead to two drawbacks from this point of view, stressed by the Lamfalussy Report:
  - uneven transposition between Member States (in particular with the risk that national parliaments in some countries may try to orientate the Directives to put them more in line with their existing national legislation);
  - delay for the practical implementation of the provisions, as the transposition process usually requires at least 18 months – in this view, the use of Regulations would answer the concern expressed by the IIMG monitoring group in para 30 related to transposition periods: the IIMG states that "*short deadlines could lead to significant delays in transposition, which is indeed one of the major bottlenecks in the Lamfalussy process*". In our view, it is not completely correct to state that it constitutes a bottleneck in the Lamfalussy process: a *pure* Lamfalussy process, following the Lamfalussy Report, should favour Regulations – solving then the transposition delay issue

- however, we agree that the use of Regulations versus Directives should be assessed on a case-by-case basis:
  - we agree with IIMG in para 34 (i) that Regulations are more appropriate than Directives for measures that target a specific area. Nonetheless, we saw that the European Commission decided – contrary to what was initially expected – that a very targeted implementing measure of the UCITS Directive, i.e. an implementing measure on eligible assets for UCITS, was finally delivered by the European Commission under the legal format of a Directive and not a Regulation (with the subsequent risks of uneven and delayed transpositions in Member States). The position of the Legal Service of the European Commission, which apparently was at the origin of such a change of legal format, did not appear very clear to us; indeed it might be helpful for the IIMG to get more information on this specific case, for further thoughts on this topic;
  - regarding para 34 (ii), in order to take into consideration the potential issue of immediate effect of Regulations (which might raise problems when Member States need some time for national adaptation), we think it might be possible to provide for postponing the entry into force of Regulations later than their date of publication?

- *Consultation:*
  - we agree that the European Commission should work more closely with the Level 3 Committees to avoid any overlap in the consultation process;
  - *language versions* for draft Level 1 working documents and Level 2 official draft proposals:

- draft Level 1 working documents:
  - in the very recent case of the revision of the UCITS Directive, the consultative working documents issued by DG Internal Market services on 22 March 2007 are *only available in English language*. It seems to constitute the most recent step illustrating *a very dangerous trend followed by DG Internal Market services: less and less pre-legislative texts are available in other languages than English*
  - it might lead to two significant drawbacks:
    - it will inevitably bias the geographical representation of respondents
    - and therefore will inevitably bias the orientation of the forthcoming formal legislative actions by the European Commission
  - it is even more worrying in areas where English-speaking industries clearly do not represent the majority of the European industry, e.g. for the investment fund industry in the case of the UCITS Directive consultation
  - we therefore ask the European Commission to make at least *pre-legislative* consultative documents available *in all official languages of the EU or in the three official working languages of the European Commission*. In the case of the UCITS Directive consultative document, legal amendments of the UCITS Directive are proposed: it is crucial for stakeholders in all Member States to know the exact wording of the relevant provisions in their own language, in order to understand their exact *meaning in their own language* and to avoid any ambiguity of understanding. It would be fully consistent with the aim of the Lamfalussy approach to get a better input from stakeholders, through a better consultation process
- level 2 official draft proposals:
  - based on the case of the MiFID, we wish to express here as well a strong concern regarding the language versions available. In the case of the MiFID Level 2 official draft proposals, only the English language version was made available by DG Markt services when they issued the official draft Level 2 measures to send them officially to the European Parliament, in spring 2006. Due to reaction from different stakeholders in several Member States, the European Parliament decided finally to postpone its official scrutiny of the Level 2 measures until some other language versions were available: this mistake should not occur again
  - we therefore ask the European Commission to commit to provide for *all language versions (or at least for the three official working languages of the European Commission) at the same time*, when issuing official draft Level 2 measures. As Level 2 measures deal with "technical details", and as already mentioned for draft Level 1 measures (see above), it is crucial for stakeholders in all Member States *to know the exact wording of the relevant provisions in their own language, in order here to be able to compare them precisely with the existing national provisions*

- if such a path were not to be followed by the European Commission for draft official Level 2 measures, it would create an uneven treatment between stakeholders with a national legislation drafted in English as compared to the stakeholders with a national legislation drafted in another European language.

Recommendations at Level 3:

- We agree with all the functioning problems identified by the IIMG;

- However, the current experience of MiFID shows that *Level 3 guidance is probably more difficult to manage when Level 1 and 2 are Directives and not Regulations*:
  - the aim of Level 3 is – in line with the Lamfalussy Report – to provide for common standards to regulators. It is more difficult to ensure for common drafting and implementation of such standards when Level 1 and 2 are Directives, as there is a risk of discrepancies from one Member state to another one in the national transposition of the Level 1 and Level 2 Directives;
  - therefore, in order to improve the functioning of Level 3, the use of Regulations at Level 1 and Level 2 should be favoured;

- Another major issue is the remaining uncertainty on the implementation of Level 3 standards by regulators at national level:
  - some regulators will implement Level 3 standards through binding texts while others will implement them through non-binding texts: an uneven approach from one regulator to another one might harm the aim of convergence;
  - even if all regulators decide to implement Level 3 standards through binding texts for instance, to which extent will they enforce them in practice in the same way? There is some risk of discrepancy of application here as well
  - apart from deciding to launching a process for setting up a single regulator, for each financial sector (securities, banks, insurance), at European level (that AFG wishes, in order to get a real Single Market in the EU and to get a stronger European position at global level), we don't see how these major risks of discrepancies in the legal force of national texts and in practical enforcement by regulators might be solved in the future.

Recommendations at Level 4:

- Goldplating: we agree that some mechanisms are necessary to prevent Member States from 'goldplating' the directives. We agree to mention the level of harmonisation in each Directive (as it was done for instance in the Level 2 MiFID);

- Transposition tables: although we agree that Member States should timely provide transposition tables to the European Commission, we are not sure whether it would be

easily feasible for smaller Member States to translate their national texts in one of the three working languages of the Commission. This requirement could be extremely burdensome. The translations should be ensured at the European level instead;

- We agree that more staff, at the European institutions level, should be allocated to the task of checking the accuracy of the translation. This issue would be solved if the translation were ensured by the European Commission itself.

Specific Requests:

- We ask for an improvement of the Lamfalussy process with a better transparency of the work at Level 1, 2 and 3;

- We ask as well for *a better 'transversal' approach of the topics at European level*, in particular within the European Commission in the preparation of Level 1 and within CESR in the preparation of Level 2 and 3 texts. For instance, the investment management is deeply impacted by the MiFID but it appeared that this impact had not been taken into account as much as it should have been by the Commission and CESR in the elaboration and drafting of the MiFID;

- We note a lack of human resources in the different European institutions involved in the Lamfalussy process, as well as at CESR's level and among its members;

- We regret that the report does not say anything about the way national regulators will implement the Lamfalussy process, not only for Level 3 standards but also for Level 1 and 2 provisions once transposed.

2. *The Group is interested in further concrete indicators that could help while separating Level 1 and Level 2 measures. What would be your suggestions?*

In order to better make the separation between Level 1 and Level 2 measures, we would suggest making a difference between what consists of *objectives/aims* of measures and what consist of *content* of such measures. In the case of the so called 'Simplified Prospectus' for UCITS, such a clear cut could be made between on the one hand the aim and use of such Simplified Prospectus (drafted by Management Companies and disseminated to clients by distributors), and on the other hand the format and content of it. The aim and use of the Simplified Prospectus should be defined at Level 1, contrary to the format and content which should be set up at Level 2, in line with the aim and use defined at Level 1 – it is why we ask for a stabilised Level 1 before launching the work at Level 2 (or Level3) (see our comments on Level 1 and Level 2 above).

3. *Do you believe a direct approach could help to improve consumer input in the consultation process? Do you have any other suggestions on how to get end-users' input?*

It is true that consumers should be better involved in the consultation process. A way to get their input would be to organise public hearings and/or workshops tailored for consumers' associations.

However, some existing professional stakeholders already express the concerns of consumers. In our own case, as our association represents the interests of third parties – including retail investors – through the asset managers having a duty to act for their best interests, we consider that we are already in a position to express the interests of such consumers.

4. *How much progress has been made in achieving appropriate supervisory cooperation and how far should supervisory convergence extend? If appropriate, what can be done to enhance cooperation and what are the obstacles?*

In the case of CESR, supervisory cooperation seems to function rather well in the context of elaboration of Level 2 technical advice and Level 3 standards.

The issue is probably more at the level of implementation and enforcement of transposed Level 1 and Level 2 measures as well as Level 3 standards. In the case of CESR, in particular for the MiFID, we have concerns that the implementation of Level 3 standards might be different between Member States (e.g. some Member States might decide to transpose them through binding texts; some other Member States might decide to transpose them through non-binding texts), as well as diverging approaches at national level for the enforcement of such Level 3 standards (see our comments in answering question 1).

We therefore suggest that in particular Level 3 standards should impose the binding nature of the relevant standards at national level, in order for stakeholders to get a higher certainty on the uniform implementation of such standards in Member States.

Unfortunately, this possible improvement will not solve the issue of uneven enforcement – which could be solved only through the creation of a *single* securities (or, respectively, banking or insurance) regulator in the EU.

5. *Which body is best placed to provide information on cases of incorrect transposition by Member States – the Commission as a guardian of the Treaty or the Level 3 Committees as part of their day-to-day activities, and why?*

Legally speaking, the European Commission is the only body in charge of monitoring how Member States implement the European legislation. However, we think that the Level 3 Committees should report to the European Commission the cases of incorrect or lack of implementation by Member States. There should be a co-operation between the European Commission and the Level 3 Committees. However, giving such power to Level 3 Committees will be difficult as long as such Level 3 Committees are kept as mere networks and don't get autonomous powers.

6. *How could the role of Member States, the European Parliament, supervisors and the private sector in improving enforcement of agreed legislation by putting forward complaints, information and concrete cases of incorrect implementation of Community rules be further enhanced?*

We support the idea of facilitating actions of complaints before the European Commission.

Another, additional solution could be for the European Parliament, based on information provided by the industry, to draft reports about incorrect implementation by Member States and/or supervisors.

Those two complementary ways for action would facilitate the targeted exercise of infringement procedures by the European Commission under Article 226 (for Member States' failure to fulfil their obligations under the Treaty).

In addition, the *multiplicity of regulators* in Level 3 Committees as mere networks currently slows down the process for an even implementation and enforcement at European level. We are afraid that 'peer pressure' between Level 3 Committee members might not be enough to ensure such an even enforcement in particular. Real powers of enforcement have to be given to Level 3 Committees as such. In fact, the most efficient tool would be to give enforcement and regulatory powers to Level 3 Committees – paving the way ultimately to *single* Level 3 Committees in their respective area, as single sectorial European regulators are more and more necessary for the building of a true Single Market, for the benefit both of European investors and industries.

Last, having single sectorial Level 3 Committees with real regulatory and enforcement powers would be the most efficient approach for the industry at EU level 1.

To sum it up, the most efficient regulatory approach would consist of:

- Regulations at Level 1 and 2, based on principles rather than rules;

- Complemented by single Level 3 Committees in charge of providing Level 3 guidance at EU Level;

- And these Level 3 Committees could ensure an even implementation and enforcement at EU level, by:
  - Being single regulators at European level in their relevant area
  - And having regulatory and enforcement powers.

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If you wish to discuss the content of this answer with us, please contact myself on 00 33 1 44 94 94 14 (e-mail: p.bollon@afg.asso.fr), our Head of International Affairs Stéphane Janin on 00 33 1 44 94 94 04 (e-mail: s.janin@afg.asso.fr) or his deputy Catherine Jasserand on 00 33 1 44 94 96 58 (e-mail: c.jasserand@afg.asso.fr).

Yours sincerely,

(signed)

Pierre Bollon