

Inter-institutional Monitoring Group

IIMG-2005-2007@ec.europa.eu

DIRECTOR GENERAL

27 March 2007

## Evaluation of the Lamfalussy process

The following observations have been prepared in cooperation between Denmark, Sweden and Norway

**DANISH FINANCIAL  
SUPERVISORY AUTHORITY**  
Gl. Kongevej 74 A  
DK-1850 Frederiksberg C

Tel +45 33 55 82 82  
Fax +45 33 55 82 00  
finansstilsynet@ftnet.dk  
www.dfsa.dk

### Introduction and main conclusions

The Ministries of Finance/Ministries of Economics and Business Affairs of Denmark, Sweden and Norway have discussed the experience from the Lamfalussy process and prepared the observations below. As an EFTA/EEA state, Norway has added some supplementary comments concerning the EFTA/EEA aspects of the Lamfalussy process.

**MINISTRY OF ECONOMIC  
AND BUSINESS AFFAIRS**

Denmark, Sweden and Norway congratulate the IIMG on the second interim report on the experience on the use of the Lamfalussy process. The main characteristics of the process, namely greater transparency in the drafting of new EU legislation on financial services and the extensive consultations of interested parties, form an important step forward in the process of attaining better regulation.

We agree with the main conclusions in the IIMG draft report.

Experience shows – based on the first four years of operating the Lamfalussy procedure in the securities sector and two years experience for the banking and insurance sectors – that the Lamfalussy procedure has become a process. Improvements have been made when the original blue print was put to the test of the market and institutional forces.

Transparency has increased due to the extensive consultation procedures at Level 3. On the other hand, it is difficult to conclude that the time for adopting an EU measure under the full Lamfalussy process is speedier than before the introduction of the process.

The main conclusion in this paper is that there is a need to streamline and to reach a common agreement on the roadmap for each directive or regulation in order to establish realistic deadlines.

## **Comments to the specific questions from the IIMG**

### **Questions for consultation**

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

We agree with the main conclusions in the IIMG draft report.

We agree that particular attention should be paid to the purpose, the nature and the legal form of each draft directive or regulation on Level 2. The traditional view, that it is easier to issue a regulation than a directive, is correct – but only seen from the point of view of the EU legislator. For the financial sectors this approach is not very well balanced. A more nuanced approach is to focus on the preferences of the users of the new rules, primarily market actors and national authorities. This approach could be a way of implementing the Lamfalussy spirit in the work methods of the EU institutions.

For the financial industry the question of speed in the adoption of a regulation is of short term importance. The quality of the rules is of greater importance, and the rules in questions should fit into an over all legal framework. This approach means that regulations are most relevant for issues which concern market issues and which are not already regulated by directives.

We agree that "regulatory self-restraint" must be applied at all levels in the EU rulemaking decision process in order to avoid excessive details in EU legislation. It must be clear from the start: What is the scope of the initiative? Rules beyond, as well as rules which are not strictly necessary within the scope, should be avoided.

In the draft report IIMG defines "gold-plating" as "*regulatory additions made while implementing in national law rules which were adopted at European level under the maximum harmonisation regime*". This definition differs from our understanding of gold plating. Gold plating means in our interpretation national rules which go beyond what is absolute necessary in order to implement the relevant rule of an EU directive.

We do not find that the role of the Level 3 committees formally should be extended to include "some autonomous capacity". The Level 3 may

already point out to the Commission inconsistencies they come across in the EU legislation.

It is important that there is a realistic roadmap for each initiative, not only for the benefit of the EU institutions but also for the national administrations and the national parliaments.

### **Transposition and translation in the Member States**

The Basel II (CRD), MIFID and the Transparency directives have caused problems in several Member States due to long translation procedures in the EU institutions and late publication in the Official Journal.

For Member States it is necessary to adopt implementing measures on a text of a directive which has been published in the Official Journal. It is not possible to finalise the draft acts which must be presented to parliaments until the text is available. If the official text of a directive has not been published the parliaments may have to adopt implementation measures on a preliminary basis. The preliminary basis may mean that a subsequent amending implementation act may be required in order to comply with the wording of the directive. This is not in line with the principles for better regulation. This means that the time frame work for a draft directive or regulation must cater for an adequate period of time for national legislative procedures.

The question of publication and translation becomes even more important when the EU measures are adopted in several stages, for example MIFID. In those situations Member States may have to postpone implementing the full set of implementing measures until the publication of the last measure. Such a postponement implies considerable risks for delays in the implementation process. Otherwise the implementation must be carried out in two or more stages, which is a very ineffective use of sparse resources.

The national legislative time periods apply notably to directives. However the periods/deadlines apply to regulations as well if the regulation implies that the national legislation must be amended or revised in order to harmonise national law with the regulation. For Norway, and other EFTA/EEA states, regulations do not have direct effect, which means that regulations too must be implemented, as such, into national legislation before becoming effective.

### **Transposition for the industry**

The financial sectors require time to adjust to new rules. The time needed depends on the consequences for the industry. This should also be taken

into consideration when deciding at what time the directive or the regulation shall enter into force.

### **Overlapping consultations**

Members of the financial services industry have indicated that the consultations under the Lamfalussy process are overlapping. The experience on this issue is until now not sufficient to form a firm opinion. The present experience has been gained on directives which have not been prepared under the full Lamfalussy process.

The Lamfalussy process has been in force for more than four years in the securities sector and more than two years in the banking and insurance sectors. The process has been applied to the draft directive at the stage in the decision making process for each draft at the moment the process was adopted for each sector. This means that none of the directives adopted until now have been prepared from the start under the Lamfalussy process.

The first major directive/complete project which has been prepared under the full Lamfalussy process will be Solvency II. The Commission and CEIOPS have worked on the draft for several years. Extensive consultations have taken place during 2005 and 2006. This work has enabled a dialogue between the Commission, CEIOPS, the European insurance sector and other interested parties. When the Commission presents the formal draft in July 2007, all parties involved at the drafting stage of the directive have gained a considerable insight into the elements of the directive. The involvement includes inter active in the preparation of the proposal – notably through the quantitative impact studies (QIS).

The Solvency II process has until now meant a considerable involvement of the industry. It is not our impression that comments point to overlap but rather to the magnitude of the project.

In one of the Member States behind this paper (Denmark) interested parties have appointed "informal liaison persons" for dealing with financial directives. Such arrangements have shown very useful notably for consultations where deadlines have been short.

### **Resources**

The Lamfalussy process has triggered a considerable increase and reshuffle of the costs for the legislative process. For the Member States the costs are twofold. Firstly, the extensive consultations require more resources than the consultations for similar previous draft directives and regulations. Secondly, work in the Level 3 committees has required far more resources than anticipated. This development means that the burden

on supervisory authorities is relatively large for small Member States. Those authorities must allocate a far higher percentage of their resources to co-operation and common rulemaking rather than on supervision, including on-site inspections. One should not forget that the primary responsibility of the supervisory authorities is supervision of the national financial markets, and imposing further rulemaking tasks on the supervisory authorities should be carefully considered against their ability to conduct sound supervisory functions. Furthermore small Member States will have to opt out participating in a number of groups and/or sub groups as they do not have sufficient resources.

#### SUGGESTIONS:

- The translation of draft directives should be presented well before the vote at Level 2.
- The time for implementation of Level 1 legal acts could be decided when the last Level 2 measure is adopted. An alternative is to decide that the Level 1 directive shall be implemented within a specified number of months after the adoption of the last Level 2 implementing measure

***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?***

#### **Political issues should be dealt with only at Level 1**

Any wish to delegate or pass on political questions to Level 2 may incur bigger delays than it contributes to reduce the overall speed for the adoption of the rules in question. Firstly, political issues must be resolved within the EU institutions. Secondly, political issues should not wholly or partially be passed on to the Level 3 in the Calls for Advice from the Commission. Such a situation will make it difficult for Level 3 to act only as technical adviser to the Commission. However, in the end it is not possible to exclude that Level 2 or Level 3 may have to handle also political issues since any technical issue unexpectedly can turn into a political one.

The full implementation of the Lamfalussy process will increase focus on the preparation in working groups under the Commission of new draft rules. This focus may bring political issues into the open at an earlier stage than has been the case under the previous process.

The principles for working parallel at Level 1 and Level 2 should be considered carefully. The EU institutions could try to isolate and agree

issues for Level 2 rules at an early stage, subject to that a clear mandate may be drafted.

The practice of working in parallel between the Council working group and the relevant committee of the European Parliament should also be considered. We invite the IIMG to include this aspect in the final report .

### **Level 1**

The time needed to agree a draft directive in the Council working groups has in general been reduced. However, it has become clear that several factors are playing a large role on the overall timeframe for adopting a directive. Late publication may not leave sufficient time to respect time deadlines in the national parliaments. There is relatively little time for meaningful debates in the national parliaments. In extreme cases a delay of one month in the EU institutions may postpone national implementation timetables by 6–9 months because of procedural rules.

### **SUGGESTIONS**

- Realistic timetables for the adoption and for the implementation of directives should be agreed.
- Time tables for the consultation of the industry should be revised.
- The aim should be that Level 1 deals with political issues and Level 2 with technical issues only.
- An understanding should be agreed between the EU institutions that all implementation measures should be published before the national parliaments receive the implementation measures.
- The time for implementation of Level 1 legal acts could be decided when the last Level 2 measure is adopted. An alternative is to decide that the Level 1 directive shall be implemented within a specified number of months after the adoption of the last Level 2 implementing measure.
- Implementation of EU rules should leave national parliaments with sufficient time for consideration.
- Impact assessment on the whole project should be conducted before initiating any legislative measure.

### **Level 2**

In general the fundamental approach of Level 2 functions as intended.

However, work at Level 2 has not always developed as smoothly as intended. The time needed for adopting Level 2 directives and regulations takes longer time than estimated in the Lamfalussy report. It is difficult to formulate Calls for Advice – Cfa – in due time to allow

sufficient time for the Level 2 and Level 3 preparation. If the Council and the European Parliament have not already finalised the Level 1 text on the issues subject for the CfA the Commission can often not issue the CfA until very late in the negotiations between Council and Parliament. Consequently the Level 3 committee has little time to prepare the consultations and give the advice to the Commission. The consultation procedure requires more time than earlier anticipated. Furthermore, the introduction of the amended comitology procedure adds 2 months to the timetable for adopting implementing measures. Documents at Level 2 should be distributed with realistic deadlines for observations.

An impact assessment may be desirable for certain Level 2 measures.

#### SUGGESTIONS

- The deadlines for Level 2 procedures should be revised.
- Documents at Level 2 should be distributed in such a time that Member States could make the necessary consultations and analysis.
- Impact assessments for Level 2 measures should be conducted if technical issues involve costly choices.

#### ***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?***

In order to increase the transparency of consultations the relevance for interested parties may be pointed out more clearly in consultation papers. Equally, impact assessments should be easily comprehensible for all interested parties.

Consultation papers are normally prepared and published by CEBS, CEIOPS and CESR on the homepages of those organisations. Further targeting of the distribution of such papers may be practised in order to reach all interested parties – notably in the Members States. The consultative committees of those committees include representatives of consumer and investor groups.

Further contributions should be restricted to existing foras. Additional foras will probably not add more value to the consultations.

#### ***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?***

The Lamfalussy process has meant a considerable extension of contacts and cooperation between supervisors. As for Denmark, Sweden and Norway the cooperation between the supervisory authorities was well developed also before the Lamfalussy process. It is therefore difficult to say to what extent the Lamfalussy process has contributed to further cooperation between the supervisory authorities in our countries. However, issues regarding supervisory convergence have indeed gained in importance and have become an integrated element in the work in the Level 3 committees. The work at Level 3 has therefore further increased contacts and cooperation between supervisory authorities in our countries and their relations with supervisory authorities in other Member States.

In relation to suggestions to increase supervisory convergence we are looking forward to the results of the work of the FSC subgroup on Long Term Supervisory Issues.

The work at Level 3 is in general more intensive than foreseen in the Lamfalussy report. The tasks of the Level 3 committees have expanded. The consultation procedures in the Level 3 committees require longer deadlines than originally anticipated. This is partially due to the number of consultations and the size and complexity of the consultation papers. The Commission also tends to ask for more general advice, than advice on mere technical issues as originally intended. The amount of work has put strains on the inter organisational structures in the financial services organisations. The size of the consultation documents/advice from the Level 3 committee implies that the Commission must devote more resources to the draft text and spend more time on the preparation of the draft directive.

#### SUGGESTIONS

- The financial services organisations should appoint liaison persons or committees for the consultations.
- The time limits for the Level 3 consultations should be set to a realistic length, taking into account the type of consultation.

***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?***

The Commission is the Guardian of the Treaty. It is important that this role is not changed. The financial services industries may point out

uncertainties and incorrect implementation in Member States to the Commission.

The constant initiatives and updating of Commission guidelines, homepages etc. makes it very easy to check implementation of EU rules. No further initiatives seem to be needed.

*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?*

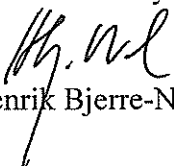
Same comments as for no. 5.

We find that the existing framework for putting forward complaints and improving enforcement is functioning well. No further initiatives seem to be needed.

#### **EFTA/EEA observations**

Apart from the final decision making in the European Parliament and in the Council, Norway – as party to the EEA agreement together with Iceland and Liechtenstein – participates in the legislative procedure in the same way as the Member States, and implements and adopts the same Lamfalussy-legislation as the Member States, within the same time frames. Norway participates in the Lamfalussy committees where the draft legislation is discussed, and therefore gets a good picture of the legislation in process until the Commission puts forward the final proposal for a directive or a regulation before the European Parliament and the Council. Major changes in the proposed legislation by these EU-institutions may on the other hand cause some challenges for Norway in the implementation phase, as Norway has not been part of the debates in these EU institutions, and therefore needs more time to “adapt” to the final legislation. It is however difficult to see how to remedy this challenge within the scope and the structure of the EEA-agreement.

Yours sincerely



Henrik Bjerre-Nielsen