

The necessary evolution of Level 1 of the European legislative process
Clarifying the stakes in order to no longer evade the political hurdles related to the adoption of Legislation by the European Institutions.

The Lamfalussy Process is subject to a first evaluation based on a wide consultation carried out by the Inter-Institutional Monitoring Group (IIMG). The proposals which are frequently submitted concerning the improvement of this Process are structural in nature: conferring wider powers to Level III committees (CESR, CEBS, CEIOPS), introduction of a European mandate for national regulatory bodies, possibility of delegation of tasks amongst national regulatory bodies, elimination the unanimity rule for decision-making at the level of such committees, adoption of the 'comply or explain' principle, desirable level of details of Level 1 legislations, adjustment of the implementation programme in light of the extent of evolution undertaken.

The working of the Level 3 of the Process is subject, in this report, to necessary developments so as to improve the European legislative process as far as financial implications are concerned.

This present note is focused on the assignment of Level 1 of the Process as it impacts significantly on the quality of the European legislation.

1. In the context of accelerated globalisation and innovation of financial activities, the enhancement of the international consistency of legislative provisions is a priority.

The setting up of the Lamfalussy Process seeks to ease the integration of Europe in the financial services. This work is being carried out in a context of growing globalisation which must be recalled inasmuch as this will help to shed light on the legislative priorities of Europe with regard to the financial markets.

First and foremost, financial activities are global. Consequently, 'users' of the European financial markets – investors, issuers and intermediaries - are not exclusively Europeans; also, the products and EU marketplaces are, henceforth, competing with those of other continents, particularly on the wholesale markets.

Moreover, financial activities benefit from great innovation. This is coupled to a growing complexity of products and associated risks and generates a real process of making products opaque.

The relocation of activities and financial stakeholders and, hence, of risks and delinquency, requires from legislators and regulators a synchronous, homogeneous and coherent approach. This is a necessary prerequisite to counterbalance the cross-border spread of risks and to setting up an appropriate climate for sound competition for the stakeholders as well as for the markets.

Also, growing cooperation among legislators at European level is of utmost importance; the same applies at a global level. Europe will carry much weight in the global debate if it succeeds in harmonizing its financial legislation.

2. Priority should be given to legislation relating to markets and wholesale financial products and those relating to the financial stability. The 'retail' markets should not be an obstacle to this effort.

Banks and insurance companies follow the trend of internationalisation of financial activities. They require to this end, and as far as their solvency and liquidity is concerned, a firm

internationalised approach to regulation. This regulation should be free from any provisions which cannot be applied internationally, especially within the European Union.

On the other hand, Financial products and markets for individuals, and more generally 'retail', follow a different trend. Consumption of these products still remains firmly grounded on proximity and advice; it is more often impregnated in a bundled client/financial institution relationship. Moreover, national habits in financial products consumption are still very specific; for example, banking customer behaviour is different and therefore consumer protection is still governed by heterogeneous legal provisions within the countries of the European Union. Thus harmonization will take more time. Additionally, the Lamfalussy process does not apply to the retail financial sector since it is difficult to identify the appropriate representatives from Member-States to set up the Level 3 committee.

In any case, the 'Europeanisation' of the financial products in 'retail' should not lead to the slowing down of the process related to the definition of the legal provisions necessary for wholesale financial market players and activities. As such, a clear indication of the respective stakes of the retail markets and the wholesale markets is vital in order to avoid the adoption of the 'one size fits all' regulations. Moreover, the legislator should shoulder properly his responsibilities by taking into consideration the demarcation line between wholesale and retail.

Everything said and done, the improvement of the Lamfalussy Process must focus primarily on the regulation of wholesale financial markets and their intermediaries, the investment funds and the regulation of risk.

3. As from the Level 1, it is necessary to define explicitly the objectives of legislative Bills

The setting up of a single European market for financial activities constitutes the primary basis of the European regulation and legislative duty. Its aim is and must be to facilitate access of the intermediaries and of all the users to all the markets of the European Union. Fierce competition and the creation of bigger markets are, in fact, recognized as the two fundamental factors necessary for the promotion of the economic dynamism of Europe, of its different economic stakeholders as well as its citizens.

Legislation and regulation constitute the key elements of competitive differentiation for Europe on a global scale, inasmuch as it optimally combines three objectives:

- the benefits of the expansion of the single market and competition;
- the reliability and security of its markets and of its stakeholders; and
- the reactivity and flexibility in the wake of innovation.

The economic weight of the financial sector in Europe makes this legislating and regulating objective one of the most important issues for Europe in general and for certain countries particularly. In the context of global competition, national legislators and regulators tend naturally and implicitly to favour the reactivity and flexibility of their own market place or national stakeholders and even to protect the latter from competition brought about by market places and by stakeholders of other countries.

If one wants that the legislative duty to go beyond the sole issue of security (scale of sanctions in case of market abuse, regulation of risk, accounting standards), the Lamfalussy Process should emphasise the clear identification - and this as from the Level 1 - of the objectives and the stakes of the work undertaken, among the three objectives previously mentioned.

The more issues raised by new laws are 'political' in nature, the more their resolution must be undertaken at the first Level of the process; for example, while working on the Mif, obligations related to the transparency of execution conditions had, for long, been kept aside, leading to late - and probably imperfect – modifications of the Bills proposed by Level 1.

In these conditions, the political aim must be to identify the expected outcome of the legislative thrust. This duty must enhance the impact assessment work by contemplating the development of a comprehensive set of common objectives which are qualitative, quantitative and explicit:

- The extent of the competitive advantages provided to different stakeholders (Brokers-Dealers of different scales of activities, Asset Managers, market and post market Infrastructures, the Intermediaries of post market....) and to European financial markets, by the new legislation and in a general way, the main expected outputs for these different stakeholders.
- The importance of growing competition and accessibility to different products or markets.
- The level of reliability aimed by the provisions in the risk regulation_(for example Solvency II set the target of solvency for European insurance stakeholders to a probability of a one-year defect inferior to 1/200)
- The possible bounds between the wholesale and the retail markets.
- The possible implicit options on which the stakeholders or the members-states are divided, by trying to establish the characteristics of the stakes and the consequences.
- And in a general way, the explicit description of the context created by the legislative proposals, and that of the new context that they are expected to create: problems which should be addressed, new operating modes expected, probable evolution of products, stakeholders and financial markets...

Such an approach will force consideration as early as possible, of the strategic difficulties encountered by the stakeholders and the member-states, in order to allow representatives of the Member States of the Union to transcend their specific interests by deriving the benefits of the European construction. As such:

- The Commission, which takes initiatives and undertakes consultations and further development of legislative issues, plays a key role in the identification of the different stakes and in the display of a real common interest capable of giving rise to a consensus.
- Parallel working of Levels I and II (this is one of the key evolutions proposed in the IIMG report) must also allow shedding very concrete light on the orientations and principles under consideration at Level I. For example, the gauging works of standards models of Solvency II and some of the impacts forecast made, in consultation with the Commission, by the CEIOPS and the professionals, shed light essential at Level I concerning the relevance of the orientations retained.

This evolution will deflect national legislators from downgrading the effectiveness of common interest work, by attempting implicitly to favour their national champions. Such an attempt will also favour in-depth and concrete debates on political orientations in the Council the earliest possible during the drafting of European Bills. It will accelerate the institutional process and will avoid that strategic or political problematic being deferred to the second or third Levels of the Process due to failure to reach an agreement at Level 1.

The clarification of the legislative objectives must, moreover, reduce the need to list and to enrich unnecessarily the modes of institutional operations, inasmuch as some details may constitute actual safeguards implicitly placed to limit or restrict the significance of the European Bills.

This may avoid the many criticisms made, for example, on the legislative job done on Mifid:

- Too specific on levels of detail
- Late additions and modifications
- Insufficient consideration to recommendations of professionals
- No reasons put forward regarding adopted and/or ignored trends.
- Too much time for the drafting and the adoption of the Bill at Level I

Moreover, one may consider setting up a genuine reporting system at Levels III of the Lamfalussy Process to the Commission, Parliament and the Council. These Levels should then show that their work is, in fact, contributing to achieve the specified objects of Level I and that it is included in the Bills.

4. Four proposals to obtain an explicit political ambition: a clear object of Level I in terms of value creation and an obligation for assessment and reporting on the effectiveness of the provisions put forward by the following Levels:

1. The setting up of these orientations requires, at Level I of the Lamfalussy Process, and on the basis of wide consultation, a framing of the legislative orientations by the identification of:

- The fields of general interest which one is attempting to reach:
 - o Setting up of a single European financial market by the introduction of a more pronounced competition and an eased access to the different financial market.
 - o Areas of solvency, of security and of financial stability impacted
 - o Integrated repression of financial delinquency
- Impacted markets, countries, and stakeholders of the Union.
- Commercial and strategic stakes systematically placed in a global perspective.
- Economic objectives, extent of harmonization and expected levels of solvency, of security and of financial stability.
- New modes of operation expected and probable evolutions of products, of stakeholders and of market places.
- Possible implicit options on which the stakeholders or the members-states are divided, trying to identify related stakes and consequences.

2. Moreover, in addition to assessing legislation costs, the impact assessment must give rise to an agreement at European level on value creation expectations.

3. A parallel working of Levels I and II must also be systemised in order to allow the shedding of concrete light on the orientations and the principles under discussion at Level I.

4. Finally, the concrete reporting which will be requested at later Levels of the Lamfalussy Process must be laid out by Level I.

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