

# Inter-Institutional Monitoring Group

*First Interim Report Monitoring the New Process for  
Regulating Securities Markets in Europe  
(The Lamfalussy Process)*

*May 2003*

## ***First Interim Report***

- **Understanding the Lamfalussy Process Today**
- **Work Programme and Assessment Criteria**
- **Initial Observations on Progress and Bottlenecks**

Michel Prada (Chairman)  
Graham Bishop (Rapporteur for this Report)  
Mario Draghi  
Kari Lotsberg  
Walter Van Gerven  
Norbert Walter

This Report is the first of the half-yearly reports of the Inter-institutional Monitoring Group. It is addressed to the European Parliament, the Council and the European Commission and is publicly available for comment. The opinions expressed in this report are solely those of the members acting independently and do not necessarily reflect those of their employers or their nominating institution.

INTRODUCTION.....	4
EXECUTIVE SUMMARY.....	5
INVITATION TO THE PUBLIC TO MAKE COMMENTS .....	11
PART I: UNDERSTANDING THE LAMFALUSSY PROCESS TODAY .....	12
1. THE FOUR-LEVEL APPROACH AND RELATED OBJECTIVES.....	12
1.1. <i>The starting point of the Committee of Wise Men</i> .....	12
1.2. <i>The Four-Level Approach as a concept</i> .....	12
1.3. <i>Objectives of the Lamfalussy Process in summary</i> .....	13
2. IMPLEMENTATION OF THE RECOMMENDATIONS BY THE EUROPEAN INSTITUTIONS .....	14
2.1. <i>Endorsement by the European Council</i> .....	14
2.2. <i>Endorsement by the European Parliament</i> .....	14
2.3. <i>Endorsement and actions taken by the European Commission</i> .....	15
2.4. <i>Establishment of the Inter-institutional Monitoring Group</i> .....	16
3. MEASURING PROGRESS UNDER THE FOUR-LEVEL APPROACH.....	17
PART II: WORK PROGRAMME AND ASSESSMENT CRITERIA .....	18
1. SPEED AND EFFICIENCY.....	19
2. TRANSPARENCY AND CONSULTATION .....	20
3. IDENTIFYING BOTTLENECKS.....	21
4. IMPLEMENTATION .....	22
PART III: INITIAL OBSERVATIONS ON PROGRESS AND BOTTLENECKS .....	23
1. PROGRESS AND ISSUES.....	23
1.1. <i>Speed of the Lamfalussy Process to meet target dates</i> .....	23
1.2. <i>Parallel Working</i> .....	25
1.3. <i>Issues specifically related to Level 1 of the Lamfalussy Process</i> .....	26
1.4. <i>Issues specifically related to Level 2 of the Lamfalussy Process</i> .....	28
1.5. <i>Content of Level 3</i> .....	29
1.6. <i>Content of Level 4</i> .....	30
1.7. <i>Transparency and consultation of the public</i> .....	31
2. POSSIBLE BOTTLENECKS IN THE LAMFALUSSY PROCESS .....	35
2.1. <i>Article 202 and the Sunset Clause</i> .....	35
2.2. <i>Impact of Parliamentary Elections and appointment of a new Commission</i> .....	36
2.3. <i>Commitment of Resources</i> .....	37
2.4. <i>Capacity of Jurist Linguists</i> .....	38
2.5. <i>The Aerosol Clause</i> .....	39
BRIEF GLOSSARY OF TERMS.....	40
ANNEX.....	42
FIGURE 1: THE 4-LEVEL APPROACH RECOMMENDED BY THE COMMITTEE OF WISE MEN .....	42
FIGURE 2. COMMISSION PROPOSAL FOR A LEVEL 1 MEASURE.....	43
FIGURE 3. LEVEL 1 – CO-DECISION PROCEDURE IN THE EUROPEAN PARLIAMENT AND COUNCIL .....	44
FIGURE 4. LEVEL 2- PREPARING IMPLEMENTING MEASURES: TECHNICAL ADVICE FROM CESR .....	45
FIGURE 5: LEVEL 2 – ENACTING IMPLEMENTING MEASURES: THE COMITOLGY FRAMEWORK .....	46
FIGURE 6. LEVEL 3 - ENSURING CONSISTENT IMPLEMENTATION OF COMMUNITY LAW: CESR.....	47
FIGURE 7. TRANSPOSITION OF COMMUNITY LAW IN MEMBER STATES AND LEVEL 4 OF THE LAMFALUSSY PROCESS (ENFORCEMENT OF COMMUNITY LAW) .....	47

## Introduction

This is the first interim report of the Inter-institutional Monitoring Group (the Group) on the Lamfalussy Process. The reference to the Lamfalussy Process pays tribute to the Final Report of the Committee of Wise Men in February 2001 which provided, under the chairmanship of Alexandre Lamfalussy, recommendations on the future regulation of European securities markets.

The Group presents this interim report in accordance with a mandate agreed between the European Parliament, the Council of Ministers (ECOFIN Council) and the European Commission (the Institutions) in July 2002. The Group's mandate is to assess the progress made on implementing the Lamfalussy Process to secure a more effective regulatory system for securities markets, and to identify any possible emerging bottlenecks in this process. The Group has been asked to make its reports public – underlining the Institutions' wish to promote openness and transparency. It has been invited to report results to the Institutions twice a year. Its mandate lasts until at least 2004, when the Institutions intend to conduct a full review of the Lamfalussy Process.

The Lamfalussy Process has been up and running only for a relatively short period. Therefore, the Group is not in a position to present firm findings or definitive conclusions on what has been achieved. That will be the purpose of its final report in 2004. Since the complexity of the process has often been underlined, the Group considered it helpful to provide in Part I a description of the Lamfalussy Process, as it stands in April 2003. In Part II, the Group sets out the criteria against which it intends to assess the Lamfalussy Process until 2004. Part III contains the Group's first tentative conclusions. It pinpoints new issues, in particular such as the use of regulations and Article 202 of the EC Treaty, which were not, or not fully, addressed in the Report of the Committee of Wise Men.

The Group wishes to thank the Institutions for their openness in providing information and facilities to fulfil its mandate. It was in particular grateful for the comments received from the Chair of the European Parliament's Committee of Economic and Monetary Affairs, Christa Randzio-Plath; and for the opportunity to discuss the Lamfalussy Process with David Wright and Pierre Delsaux from the European Commission as well as with Arthur Docters Van Leeuwen and Fabrice Demarigny from the Committee of European Securities Regulators (CESR). It is also grateful for all the contributions and comments received from associations and others from outside. Last but not least, it wishes to thank the secretariat, Tomas Brannstrom (Council), Anders Ganten (European Parliament) and Jürgen Tiedje (European Commission).

Michel Prada  
(Chairman)

Graham Bishop  
(Rapporteur)

## Executive Summary

The Inter-Institutional Monitoring Group (the Group) implements the mandate conferred by the European Parliament, the Council of Ministers, and the European Commission, with respect to the Lamfalussy Process, which aims to secure a more effective securities market regulatory system. In order to fulfil this mandate, an analysis of legislative acts following the Lamfalussy Process in all its aspects is required at this stage. Therefore, the Group has chosen four legislative initiatives under the Financial Services Action Plan. These initiatives are also considered by all stakeholders (including financial markets) as those operating under the Process: the Market Abuse Directive, the proposed Prospectus Directive, the proposed Investment Services Directive and the proposed Directive on Transparency Obligations for Issuers. The Group's choice comprises not only monitoring the different stages for enacting legislative initiatives, but also the overall progress to secure their consistent implementation and their enforcement in the medium term.

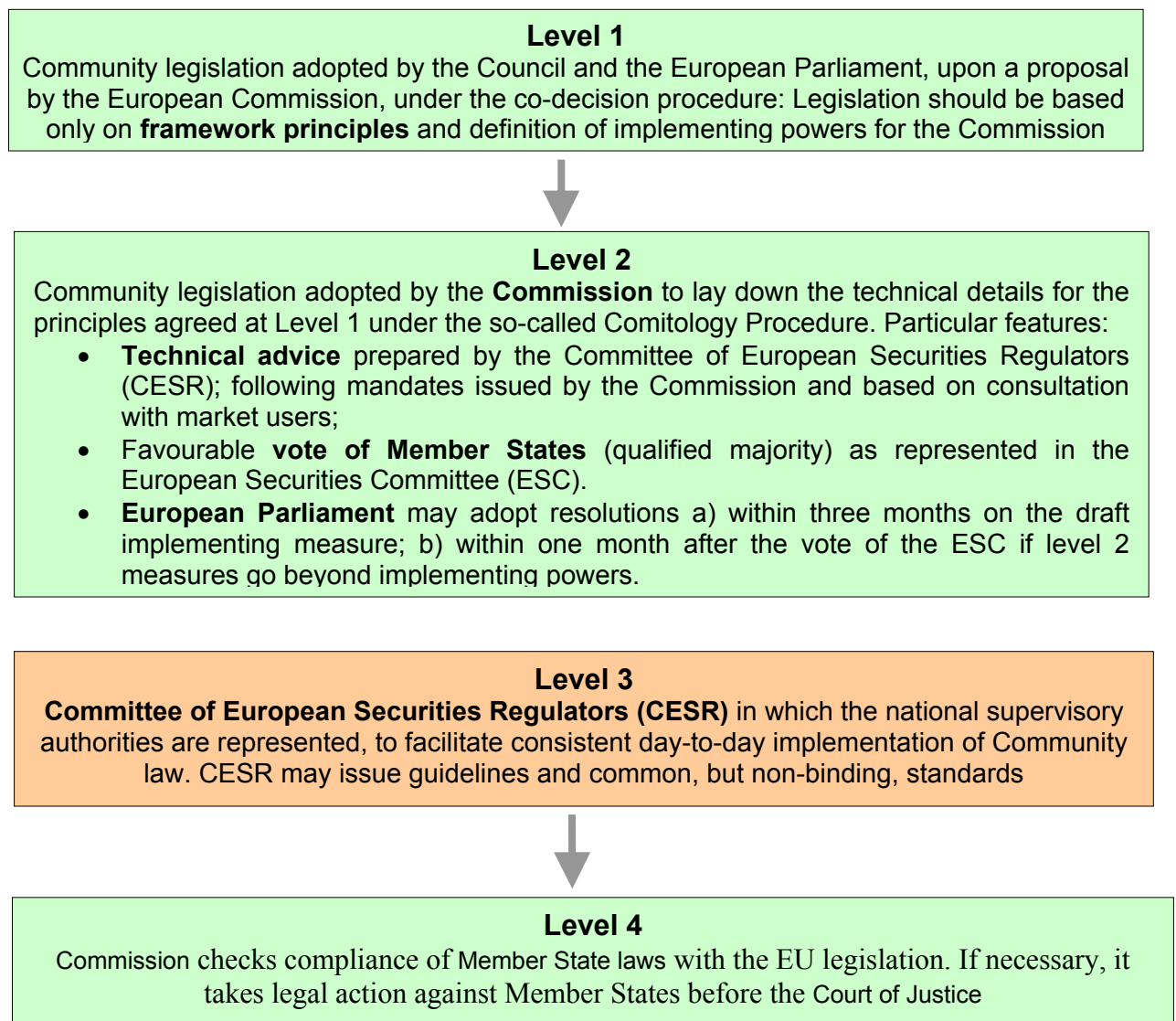
As of today, only one of these four directives has entered into force, and none of them has been developed from the very beginning as well as enacted and implemented under the Lamfalussy Process. Nevertheless, the Group will, for each of these directives, follow step by step the ongoing Process until its final report in 2004. To date, all the evidence given to the Group has been strongly supportive, though all parties recognise that they are in a “learning by doing” phase and that further improvements can still be made. The Group has noted at least five challenges for all stakeholders ahead:

1. **Continued pressures to make swift progress in order to stay ahead of European Parliament elections** and the appointment of a new Commission. In the same vein, Heads of States and Government expressed their expectation in March 2003 that the Prospectus Directive will still be adopted in 2003, as well as the Investment Services and Transparency Directives by April 2004.
2. **Satisfactory solution to the Comitology issues** stemming from Article 202 of the EC Treaty.
3. **Degree of detail in Level 1 legislation**, raising the question whether enough delegation has taken place to allow implementing rules to be adopted at Level 2.
4. **More frequent use of the “fast track facility”** for the adoption of a Level 1 measure (adoption on the basis of a single reading in the European Parliament).
5. **Adequate resources** must be made available to CESR and the Commission to fulfil their respective obligations related to consistent implementation and enforcement of European securities market legislation. In its own interest, the private sector, too, must make available sufficient resources to play its full role.

### Understanding the Lamfalussy Process Today

In the light of its future work, the Group felt it important to clarify for all stakeholders, i.e. not only for the European Institutions, but also for the financial markets and the wider public what exactly the Lamfalussy Process means in practice. Merely referring to the recommendations of the Committee of Wise Men is not sufficient. The conditions under which the European Council, the European Parliament and the European Commission agreed to implement these recommendations must also be taken into full account.

In substance, the Process is centred on a four-level approach, as summarised in the diagram below. The essential novelty consists in adding two intermediary levels (Level 2 and 3), each of them to be supported by a new committee – the European Securities Committee (ESC), in which representatives from national ministries are enabled to represent Member States in the formal decision-taking process at European level, and the Committee of European Securities Regulators (CESR) in which the national securities regulators provide technical input to the decision-taking process and enhance co-operation and networking amongst national securities regulators to ensure common implementation standards.



## Work programme and assessment criteria

The Group agreed three criteria for assessing the progress in enacting Community legislation, adding a fourth to review implementation when it becomes relevant:

1. Has the Lamfalussy Process proved capable of speeding up the legislative process for regulating securities markets? Is the Process efficient both in terms of use of resources and in terms of flexibility to keep pace with market developments?
2. Does the Lamfalussy Process make sufficient use of open and consistent consultation processes that are able to produce “reasoned” responses by the Institutions and CESR? Are the consultation processes “representative”, i.e. do they lead to responses covering both the entire spectrum of relevant actors on financial markets, and actors from many Member States of the European Union?
3. Have bottlenecks or blockages appeared, with particular regard to timetables?
4. Has implementation lived up to the expectations raised by the Lamfalussy Process? Has the Process yielded better results than the procedures applied before the Lamfalussy Process started?

## Progress under the Lamfalussy Process

The Group greatly welcomes the firm intention of the European Council to insist on the target dates for completion of the Financial Services Action Plan. In the Presidency’s conclusions of 20/21 March 2003, the European Council “*invited the Council to rapidly complete the Financial Services Action Plan. This will require proper and effective implementation of existing Directives and the adoption by end 2003 of the pensions and prospectuses directives and by April 2004 on the investment services and the transparency directives.*”

Progress has been made on the four Directives which are the focus of this report: (i) The Market Abuse Directive entered into force on 12 April 2003. (ii) The initial proposal for the Prospectus Directive ran into controversy but an amended Commission proposal was issued in August 2002, reaching common position in the Council on 24 March 2003. A Second Reading in the Parliament is now underway. (iii) The Investment Services Directive proposal was made on 19 November 2002. (iv) The proposal for the Transparency Directive was issued on 26 March 2003.

**The Group is of the opinion that it will be possible to meet the deadlines set by the European Council in March 2003, provided the current pace of negotiations and the current degree of political willingness are maintained.**

## Issues

When discussing its work programme and its criteria for assessing the Lamfalussy Process, the Group received comments in writing from outside as well as during meetings with representatives from the Committee of European Securities Regulators (CESR), the European Commission, and also from several European and International Associations, representing a broad spectrum of market participants and end-users of financial markets. In these discussions, the Group noted a number of issues surfacing in the current Process:

1. **Meeting the deadlines set by the European Council** necessarily implies that technical details of associated implementing measures at Level 2 need to be available rapidly. The future Prospectus Directive will even contain a 180-day deadline for the adoption of such implementing measures once the Directive has come into force. Whilst recognising the current political momentum, such deadlines should not result in any sacrifice to the quality of measures agreed under the Lamfalussy Process.
2. **Parallel working, in the technical preparation of Level 2** measures at the level of CESR while the final details of some components of the Level 1 measure are still under debate, appears to be inevitable. There is a need to observe strict timetables; as a consequence, the Commission is required to ask CESR to prepare, and submit, its provisional advice as early as possible (i.e. after the end of the first reading of a Level 1 measure in the European Parliament).
3. **The Fast Track Facility has not been used for the adoption of Level 1 legislation** for any of the four Directives under scrutiny here yet. It would appear that expectations of widespread use of this facility may be unrealistic, save for proposals that are not controversial.
4. **Too much detail in Level 1 legislation would defeat the whole Lamfalussy Process** which aims at responding flexibly to rapidly changing markets. The Group was made aware of the fact that there might still be too much detail. However, so far only one Level 1 measure has been adopted by the European Parliament and the Council, and it is too early to draw final conclusions.
5. **Level 2 legislation should not become an amalgam of already existing detailed rules.** This was a source of concern expressed by some market participants. However, the Group noted that the Commission has not presented any formal draft for Level 2 legislation. Working documents published by the Commission in March 2003 were commendably brief.
6. **The use of regulations or directives at Level 2:** From a practical viewpoint, the use of regulations at Level 2 would speed up and simplify the transposition process, as regulations contain binding rules which are directly applicable in the Member States. In the only example so far, the Commission intends to consider using a regulation for the implementation of safe harbour rules under

the Market Abuse Directive. The Group will follow up this matter in its following reports with respect to further Level 2 initiatives.

7. **CESR's role at Level 3:** CESR as such does not enact binding rules, but simply offers non-binding common standards. This has an impact on the ability of CESR to ensure full compliance with Level 3 standards at the national level. In this context, the Group noted CESR's recently adopted set of standards for enforcing the application of international accounting standards at national level.
8. The Commission reports a “sea change” in their **methods of consultation** – as required by the Final Report of the Committee of Wise Men. All participants acknowledged that they are in a “learning by doing” mode which is still in the process of being developed. As regards CESR, the Group was informed that there were problems in timetabling deadlines and meetings during the consultations; the Group's attention was also drawn to the length of consultation papers concerning the Market Abuse and Prospectus Directives.

### **Possible Bottlenecks**

The Group interprets this part of its mandate in a wide sense. At this stage, two bottlenecks are of relevance: the first relates to a possible need for a change to the Treaty, without which the Lamfalussy Process might be difficult to sustain in the long run. The second relates to the time taken to formally adopt the common position on the Prospectus Directive in the Council. There are also some other points to which the Group wishes to draw the attention of the Institutions as they may become important bottlenecks from the point of view of financial markets and market participants.

1. **Impact of Parliamentary Elections and appointment of a new Commission in 2004:** The European Parliament will complete its final session in April 2004 and the Commission's term will come to an end in November 2004. Concern has been expressed to the Group that uncompleted legislation may be lost, or significantly delayed. Since the Brussels European Council has set April 2004 as a target date for the proposed Investment Services and Transparency Directives, the problem should not arise. In the event of delays, the effect of the parliamentary elections will depend on the stage that has been reached in the co-decision procedure at the moment that the European Parliament is dissolved. This underlines the necessity of speeding up the first reading by European Parliament, and the subsequent discussion of a common position by the Council, on any pending Level 1 legislation.
2. **Article 202 and the Sunset Clause:** The Lamfalussy Process is based on a temporary agreement between the three Institutions as a result of the so-called Sunset Clause – which, it has been agreed, will be inserted into each Level 1 measures. The Sunset Clause provides the Commission with a delegation to enact Level 2 measures, but only for a limited time. The Clause is intended to

preserve the European Parliament's request for a change to Article 202 of the EC Treaty. In this way, the Parliament wishes to achieve an equal role as the Council in controlling the Commission in the exercise of Comitology powers. To address this problem adequately, there is an urgent need to find a solution during the ongoing Treaty revision. This is key to the long-run future of the Lamfalussy Process.

3. **Commitment of Resources:** Given the workload on CESR at this stage of generating advice for the Level 2 measures, there might be a particular risk of general overload for all CESR activities under the Lamfalussy Process. In addition, the current state of financial markets means that both associations and market participants are finding it hard to get additional resources. The Commission may also need additional resources to enforce Level 4 implementation effectively.
4. **Capacity of Jurist Linguists:** The European Parliament pointed to the delays that were taking place within the Council, preventing it from moving from the political agreement to the formal adoption of a common position. For example, the formal adoption of a common position on the Prospectus Directive took five months. The delay in Council in this specific case was the result of the requirements which the Copenhagen Summit decisions imposed upon the Jurist Linguists of the Council in connection with the Accession Treaties. These requirements made it impossible for them to respect their normal deadlines. Avoiding such a problem in future will be conducive to the objective of meeting deadlines set by the European Council.
5. **The Aerosol Clause:** That clause commits the Commission “to avoid going against predominant views which might emerge within the Council”. The lack of clarity about what is meant by “predominant,” may hamper the legislative process on some future occasion. That said, the Group is not aware of any intention, on the part of any Member State, to put the clause into operation.

### **Future Work towards the next interim report of the Group**

The Group intends to submit its next interim report in autumn 2003. The Group wishes to continue its work in an open and transparent manner and encourages all interested parties from outside to make comments and observations. A first invitation for more detailed comments is therefore set out below.

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### **Invitation to the public to make comments**

*The Inter-institutional Monitoring Group welcomes views from the public on the progress made on implementing the Lamfalussy Process, in order to secure a more effective securities markets regulatory system, and on any bottlenecks possibly emerging in this Process. It is particularly interested in receiving feedback and comments on the following questions:*

1. *What are your views on the Group's assessment criteria? Are they sufficiently precise and complete?*
2. *Are you aware of any obstacles obstructing or hampering the swift and efficient adoption of securities markets legislation at European level?*
3. *Is the system of parallel working with provisional mandates granted to CESR efficient?*
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?*
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?*
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?*
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?*
8. *What are your views on the Group's preliminary observations on possible bottlenecks?*
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?*

*The Group invites interested parties to send contributions to the future assessment via a dedicated e-mail address ( [IMG-monitoring-group@cec.eu.int](mailto:IMG-monitoring-group@cec.eu.int) ) by 7 July 2003 at the latest, for consideration in the next report.*

## **Part I: Understanding the Lamfalussy Process Today**

*The public, and in particular financial market participants, should have a clear understanding of what the Lamfalussy Process stands for. Its blueprint has been devised in the Final Report of the Committee of Wise Men. The conditions set by the European Council, the European Parliament and the European Commission for implementing the Report, such as the “aerosol clause” for Member States and the “sunset clause”, added by the European Parliament, are also of crucial importance. A further feature of this Process is the need for co-operation between the three Institutions; their decision to set up an Inter-institutional Monitoring Group should be seen in this context.*

### **1. The Four-Level Approach and related objectives**

#### **1.1. The starting point of the Committee of Wise Men**

In its Final Report, the Committee of Wise Men identified shortcomings in the regulatory system as the major problem in integrating EU financial market. In their view, the system:

- was too slow: the adoption of key Commission proposals often took many years;
- was too rigid and unable to react speedily enough to changing market conditions. Every change, however small or technical, required a full Commission proposal, to be negotiated by co-decision;
- failed to distinguish between core, enduring, essential framework principles and practical, day-to-day, implementing rules; and
- produced too much ambiguity. In addition, directives were often ambiguously implemented – partly due to the texts themselves, but also due to the lack of co-ordination by an effective network of European regulators.

Further, the Committee of Wise Men expressed the view that policy makers were not equipped with sufficient resources to fulfil their tasks.

#### **1.2. The Four-Level Approach as a concept**

The four-level approach is the key to the Lamfalussy Process. In the past, securities markets legislation was adopted by the Council and (since 1997) by the European Parliament under the co-decision procedure. Thereafter, the Member States were tasked with transposing such Community legislation into national law. If Member States did not comply, the Commission would take, where necessary, legal action before the Court of Justice. The old system involved only two Community levels:

- Community legislation adopted by the European Parliament and the Council,
- Enforcement by the European Commission in the case of late or incorrect national transposition.

The Final Report of the Committee of Wise Men emphasised the need for more transparency and openness at all levels, throughout the legislative process. The essential novelty of the recommendations of the Committee of Wise Men relative to traditional Comitology is addition of two intermediary levels, supported by two committees – the European Securities Committee (ESC) in which representatives from finance ministries vote on implementing measures, and the Committee of European Securities Regulators (CESR), successor to the existing Forum of European Securities Commissions Organisations (FESCO), in which the national securities regulators have a seat. This underlying concept led to the proposal of a four-level approach, which is set out in the Annex (**Figure 1**).

The Committee of Wise Men expected the following benefits from this approach:

- A faster legislative process – because the key Level 1 political co-decision negotiations between the Commission, the Council and the European Parliament would focus solely on the essential issues and not on technical implementing details.
- The legislative process would be more responsive to swift market developments as technical amendments to existing legislation would not have to follow the co-decision procedure, but could be enacted within the Comitology framework (Level 2 of the Lamfalussy Process).
- The process would be democratic – with the range and scope of implementing powers being defined by the Council and the European Parliament by co-decision on a case-by-case basis for each Level 1 proposal.
- The European Institutions would be able to benefit from the technical and regulatory expertise of European regulators, with the European Commission fully retaining its right of initiative.

### **1.3. Objectives of the Lamfalussy Process in summary**

The four-level approach is not a stand-alone concept. In view of the need to explain clearly the shortcomings of the previous regulatory process and the expected benefits from a new approach, the Committee of Wise Men dovetailed its four-level approach with clear objectives. These can be summarised as follows:

- (a) Promoting the completion of the European Union's single market in financial services;
- (b) Acceleration of the legislative processes;
- (c) Establishing a more flexible framework for legislation and implementation;
- (d) Retention of the democratic legitimacy of policy making;

- (e) Promotion of the quality of legal acts and implementing decisions;
- (f) Ensuring consistent implementation of EU legislative acts through greater co-ordination between national regulators;
- (g) Promotion of co-ordination between policy makers and exploitation of synergies, especially among regulatory authorities and with the European Institutions;
- (h) Sufficient and efficient allocation of resources to the Institutions and bodies involved.

## **2. Implementation of the recommendations by the European Institutions**

### **2.1. Endorsement by the European Council**

The Heads of State and Government of the Member States essentially agreed with the four-level approach recommended by the Committee of Wise Men. The Resolution of the European Council on More Effective Securities Market Regulation in the European Union – adopted at the Stockholm summit on 23 March 2001 – was of crucial importance for the entire Lamfalussy Process, including the idea of establishing a monitoring system.

The European Council reinforced the role of Member States in the adoption of Level 2 implementing rules. The Committee of Wise Men initially recommended applying the Comitology procedure under which Member States can block adoption of draft Level 2 measures only if there is no qualified majority in the European Securities Committee in favour of such a draft and subsequently a qualified majority in Council against it. A further option was added, which was previously only current practice in other areas of Community legislation, in particular on health issues. This option is known as the Aerosol Clause. The terms of this Clause are not clearly defined. In particular, there is no indication as to the number of Member States necessary to make the clause effective. The Group therefore simply recalls the text of the Stockholm Resolution of the European Council which states that the “European Council noted that the Commission has committed itself, in order to find a balanced solution for those cases of implementing measures in the field of securities markets acknowledged in the light of discussions to be particularly sensitive, to avoid going against predominant views which might emerge within the Council, as to the appropriateness of such measures”.<sup>1</sup>

### **2.2. Endorsement by the European Parliament**

The Aerosol Clause under the Stockholm Resolution led to discussions on an equivalent treatment of the European Parliament. In February 2002, a compromise was found. This compromise did not include the possibility for the European Parliament to block the adoption of Level 2 measures, or to “call them back” from the Commission to the

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<sup>1</sup> This commitment flows from the existing Comitology framework, see Commission statement No 3 to the Council Decision 1999/468/EC, OJ C 203 of 17 July 1999, page 1.

Parliament, since this would have implied a change to Article 202 of the EC Treaty. However, the compromise preserved the Parliament's request for a role equal to that of the Council under a future revision of the EC Treaty. As a result, the Lamfalussy Process is no longer subject just to a review in 2004, as recommended by the Committee of Wise Men but, in addition, each Level 1 measure passed under the Lamfalussy Process is also subject to agreement on its prolongation between the Council and the European Parliament, in accordance with a so-called "sunset clause".

The overall compromise<sup>2</sup> notably consists of the following components, set out in the statement made by Commission President Prodi on 5 February 2002:

- A Sunset Clause will be inserted in each Level 1 legislative act. Accordingly, the duration of any "Level 2" powers conferred on the Commission would be limited to four years from the entry into force of a Level 1 directive, unless this is prolonged by the European Parliament and the Council;
- The European Parliament will benefit from a three-month period to react to draft implementing measures. To this end, it should receive any first draft implementing measure sent by the Commission to the Member States for a later vote in the European Securities Committee. In addition, it will have one month from the receipt of the final draft measures to react where it considers that the Commission has exceeded its implementing powers;
- The Commission committed itself to full transparency vis-à-vis the European Parliament right up to the final adoption of Level 2 measures;
- A market participant's consultative panel established by CESR, should support the new policy through ensuring broad and systematic consultation.

### **2.3. Endorsement and actions taken by the European Commission**

The European Commission plays a pivotal role in facilitating the completion of the Financial Services Action Plan. It agreed the conditions for implementing the Lamfalussy Process with the European Council and the European Parliament. Moreover, it took the necessary steps within its powers and adopted two decisions in June 2001 to establish the two Committees proposed by the Committee of Wise Men.

#### **2.3.1. The European Securities Committee (ESC)**

The ESC has been operational since September 2001. It is composed of high level representatives of the Ministries of Finance within the Member States. Until April 2003, the ESC acted as a purely "advisory committee" to the European Commission. The ESC members meet in Brussels at least twice a year; the alternate members discuss technical

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<sup>2</sup> Resolution of 5 February 2002, OJ C 284 E of 21 November 2002, page 115.

issues on a more regular basis. In January 2003, the ESC adopted its rules of procedures and started to publish summary reports of its meetings on the Internet. In April 2003, it has, in addition to its advisory functions, taken on the function of a “Regulatory Committee” under the Comitology framework. This function currently applies with regard to the Market Abuse Directive. Accordingly, the ESC will be called on to vote, by qualified majority as in the Council, on draft Level 2 legislation implementing this Directive. Its function as a “Regulatory Committee” will be extended to at least the other three Directives which the Group is considering in this report, once these Directives have entered into force. As a consequence, the ESC can be expected to play a much more active role in the coming months.

### **2.3.2. The Committee of European Securities Regulators (CESR)**

The Committee of European Securities Regulators (CESR)<sup>3</sup> is the successor of the Forum of European Securities Commissions (FESCO), which was created in December 1997. In contrast to FESCO, CESR is more rooted in the process of regulating and implementing securities markets at Community level. On Level 2 measures, it offers technical advice to the Commission. At Level 3, it will deepen its co-ordination of the day-to-day implementation of new Community law and reinforce, through peer review, on correct implementation across Member States.

CESR members – the heads of the national securities regulators - meet every three months. The first meeting was in September 2001. They elect their own chairman from amongst themselves. The CESR secretariat is located in Paris. CESR's internal functioning is laid down in a Charter, adopted at its first meeting. In December 2001, CESR approved a Public Statement of Consultation Practices. As requested by the European Parliament, it also set up a Market Participants Consultative Panel in July 2002 which, while not replacing proper public consultation, acts as a “sounding board” on CESR’s work programme, major financial market evolutions and other subjects. The panel has met twice so far.

### **2.4. Establishment of the Inter-institutional Monitoring Group**

The Lamfalussy Process is based on the understanding that only smooth and efficient co-operation between the European Parliament, the Council of Ministers, and the European Commission can drive it forward. In view of this, the three Institutions considered efficient monitoring by external experts necessary. For this second reason, the three Institutions agreed in July 2002 to set up the present Group. Each Institution nominated two independent experts. The Group's mandate is to:

- assess the progress made on implementing the Lamfalussy Process to secure a more effective securities markets regulatory system, and
- identify any possible emerging bottlenecks in this process.

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<sup>3</sup> The Final Report initially suggested the name “European Securities Regulators Committee” (ECSR).

The Group has been invited to report results to the Institutions twice a year and to make its reports public on the Internet. The Group's mandate may be discontinued or revised as part of the full review to be carried out in 2004.

### **3. Measuring progress under the Four-Level Approach**

Measuring progress towards a political agreement, and the completion of the legislative procedure at Levels 1 and 2, requires more than simply following legal texts (such as the Treaty or Council Decision 1999/468/EC on Comitology). Legal texts only provide limited insight into what actually happens, particularly with regard to how the Institutions, the ESC and CESR actually work together. For this reason, each of the two levels has been broken down into a series of procedural templates which are attached in the Annex (**Figures 2 to 5**). Those templates show clearly the many detailed steps that are required to agree a legislative measure.

Level 3 is of great practical importance because it should ensure consistent implementation of Community law across Member States. Measuring progress at Level 3 is less easy than at Levels 1 and 2. The various forms which Level 3 might take are also set out in the Annex (**Figure 6**). Although each Member State takes full and sole responsibility for the transposition of Community law on its territory, communication amongst national securities regulators and co-operation between Member States' legislators should take place prior to a transposition deadline. That would avoid ambiguities in the future implementation of Community law in Member States. It may also reduce instances of incomplete or incorrect implementation of Community law, and thus reduce legal actions being brought against Member States before Community or national courts under Level 4 (see **Figure 7** in the Annex).

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## Part II: Work programme and assessment criteria

*To assess progress achieved, the Group is applying an analytical approach based around the objectives of the Lamfalussy Process. This is primarily a systematic evaluation of evidence from the stakeholders involved in, or associated with, this Process. The Group adopted three criteria for assessing the progress of enactment of new Community law, adding a fourth to review implementation when it becomes relevant:*

- 1. Has the Lamfalussy Process proved capable of speeding up the legislative process regulating securities markets? Is this Process efficient both in terms of use of resources and in terms of flexibility to keep pace with market developments?*
- 2. Does the Lamfalussy Process make sufficient use of open and consistent consultation processes that are able to produce "reasoned" responses by the Institutions and CESR? Are the consultation processes "representative", i.e. do they lead to responses covering both the entire spectrum of relevant actors on financial markets, and actors from many Member States of the European Union?*
- 3. Have bottlenecks or blockages appeared, with particular regard to timetables?*
- 4. Has implementation lived up to the expectations raised by the new Process? Has the Lamfalussy Process yielded better results than procedures applied before the Process started?*

The Lamfalussy Process has only been running for a short time. The Group therefore decided to focus only on four legislative initiatives under the Financial Services Action Plan labelled by all the stakeholders as operating under the Lamfalussy Process. The Level 1 legislative measures already adopted or proposed are:

- Directive 2003/6/EC on insider dealing and market manipulation (**Market Abuse Directive**), which is the first Lamfalussy-type measure adopted at Level 1. It was adopted on 3 December 2002 and entered into force on 12 April 2003 with its publication in the Official Journal of the European Union. This Directive should be transposed by Member States within 18 months, i.e. by 12 October 2004;
- Proposal for a Directive on the prospectus to be published when securities are offered to the public or admitted to trading (**Prospectus Directive**). The proposal was made by the Commission in May 2001. On 9 August 2002, the Commission presented an amended proposal; on 24 March 2003, the Council adopted its common position;

- Proposal for a Directive on investment services and regulated markets (**Investment Services Directive**) was made by the Commission on 19 November 2002. In the conclusions of its Brussels summit in March 2003, the European Council expressed its wish for adoption of the Commission proposal by April 2004;
- Proposal for a Directive on transparency requirements for issuers whose securities are admitted to trading on a regulated market (**Transparency Directive**) was presented by the Commission on 26 March 2003; the European Council also called for its adoption by April 2004.

Since only one Level 1 type legislative act has been adopted so far, the Group wishes to proceed step-by-step towards a final report in 2004. A clear and consistent set of assessment criteria needs to be applied from the outset. These criteria should be turned into concrete questions so that responses can help identify progress made in the Process. These criteria follow from the objectives set out by the Committee of Wise Men.

## **1. Speed and efficiency**

**Has the Lamfalussy Process proved capable of speeding up the legislative process for regulating securities markets? Is this Process efficient both in terms of use of resources and in terms of flexibility to keep pace with market developments?**

The Group constructed a timeline for a complete legislative iteration – from the initial decision that action was required to the final promulgation at Level 3 of detailed national laws, rules and non-binding standards. In due course, the timeline will also cover the Commission's activities in terms of strengthened enforcement at Level 4. All of this follows the template set out in the Annex; a full timeline for each of the four Directives is available in a Working Paper, which is being published at the same time as the interim report.

The timeline set out in the Group's Working Paper was constructed in light of the Financial Services Action Plan and the priority setting recommended by the Committee of Wise Men – which quoted 2003 as a target date - and comprises three facets:

(a) *Will the Institutions meet the target dates of 2003 and April 2004?*

Following a recommendation of the Committee of Wise Men, the European Council endorsed 2003 as the target date for the Lamfalussy Process at its Stockholm summit in March 2001. It reaffirmed this one year later at its Barcelona summit. In March 2003, the Heads of State and Government called for an adoption of the Investment Services Directive and the Transparency Directive by April 2004. In all these documents reference is made to “key steps”, which the Group interprets as including the Level 1 legislation – the framework Directives or Regulations – as well as the Level 2 implementing measures.

(b) *Are the Institutions using the new mechanisms to speed up the process?*

Is the split between Level 1 and Level 2 legislation functioning? Is the distinction between basic and technical rules a workable distinction? How many referrals to Level 2 were finally made? What use was made of Regulations to speed up the implementation process compared to Directives? What use was made of “fast track” agreements to legislate new measures with only one reading?

(c) *Has "parallel working" assisted the speed? Was it efficient?*

Was there appropriate preparation of Level 2 legislation even where the Level 1 legislation had not yet formally been adopted? Is parallel preparation of legislation a workable solution? How has it been balanced with the requirement for thorough consultation and the need for reasoned responses and clear texts?

Efficiency has several facets. It refers to productivity, but also flexibility, the ability to respond adequately and rapidly to market developments, and to the quality of the process.

(d) *Do the Institutions act more speedily compared to negotiations on legislative initiatives before the Lamfalussy Process was conceived in 2001?*

Until a legislative measure has moved through the complete process, it is not possible to make a final judgment in this respect.

## **2. Transparency and consultation**

**Does the Lamfalussy Process make sufficient use of open and consistent consultation processes that are able to produce “reasoned” responses by the Institutions and CESR? Are the consultation processes “representative” , i.e. do they lead to responses covering both the entire spectrum of relevant actors on financial markets, and actors from many Member States of the European Union?**

The second set of criteria includes a review of comments from respondents to the Group to see whether there are areas where they felt that their views – on both policy and drafting - had not been considered – irrespective of whether they liked the proposal. Due to time limits in preparing this Interim Report, the Group has only been able to take account of specific comments sent in, and of reactions from a limited number of pan-European trade associations.

The European Council asked for “early, broad and systematic consultation” in its Resolution of March 2001. Getting used to a new way of developing legislation for the securities markets may have produced “teething problems”, which underlines the need to consider carefully the overall result: the openness of the process is a key part of the Lamfalussy Process. Speedy legislation is not the only objective; the process must also be perceived by all stakeholders as fair and as enhancing the legitimacy of the measures agreed. Particular questions to be asked in this respect are:

- (a) *How do the Institutions ensure transparent decision-taking process so that the public understands what is done by whom and for what reasons? Is the work of the two committees (ESC and CESR) transparent?*
- (b) *Do the Institutions and CESR ensure consistent public consultations? If not, why not? In the light of the views expressed in a consultation, is there evidence that the stakeholders in the Process effectively review their initial suggestions? What types of consultation were used? Is a satisfactory balance between consultation and speed being reached? At the right moment, in the appropriate form and with sufficient flexibility to upcoming events? Are the consultations representative, i.e. do they lead to responses by the whole spectrum of actors, and by actors from many Member States?*

### **3. Identifying bottlenecks**

#### **Have bottlenecks or blockages appeared, with particular regard to timetables?**

The criteria to assess these questions require an examination of the timetabling of the legislative process and then an examination of any shortfalls.

Strictly speaking, the Group's mandate refers to bottlenecks only. However, in practice, it is difficult to distinguish bottlenecks (which imply that the process is delayed) from blockages (which means that the process stops). In the Group's view, there is no reason why both impediments should not be considered.

- (a) *What criteria should be used for labelling something as a "bottleneck"?*

One bottleneck might be failure to meet the deadlines established by the European Council at their summits at Lisbon, Stockholm, Barcelona and Brussels between March 2000 and March 2003. Instances may occur where the Institutions (and the relevant committees) do not meet recommended deadlines for action to be taken or where Member States do not comply with transposition periods laid down in legislation.

- (b) *Should bottlenecks be identified solely as a function of deadlines to be respected, or also on the basis of a qualitative assessment of how all parties involved are co-operating, and/or are perceived to co-operate, jointly, in driving the Process?*

Such a qualitative assessment may show that the perception of the Institutions, on the one hand, and the financial markets, on the other, as to each other's role in the process, are completely different. For example, the Institutions may believe that the discussion of institutional issues (such as the use of the "aerosol clause") is a legitimate concern whereas financial operators may perceive such discussion as unnecessarily slowing down the decision-making process.

#### 4. Implementation

**Has implementation lived up to the expectations raised by the Lamfalussy Process? Has the Lamfalussy Process yielded better results than the procedure applied before the Process started?**

The Group's mandate currently lasts until 2004 so it may have little opportunity to review implementation and enforcement of Community-level measures – although that is a vital step in the whole process. Another no less crucial aspect will be how well the national securities regulators co-ordinate with one another. Questions that may arise are:

- (a) *Which legal instruments were used at Level 2 (regulations or directives?) and how long were the recorded delays in transposing directives?*
- (b) *Were transposition deadlines met? At Level 1? At Level 2? Were mechanisms put in place for preparing timely implementation of Level 1 and Level 2 legislation at national level?*
- (c) *How will Level 3 be implemented?*
- (d) *How will active enforcement be organised at Level 4?*

***Question 1:***

***What are your views on the four assessment criteria chosen by the Group? Are they sufficiently precise and complete?***

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## Part III: Initial observations on Progress and Bottlenecks

*The observations in this report - though still tentative - are drawn up in the spirit of the Final Report of the Committee of Wise Men: “Be blunt: where are the bottlenecks and who is responsible?”*

*The Group is encouraged that all the Institutions as well as CESR and market participants are actively engaged in the spirit of “learning by doing”. Indeed, there is no other option because of the groundbreaking nature of the Process. Evidence of the performance of the Lamfalussy Process will become more conclusive the longer it has been operated. The Group recognises the immense political effort that has gone into the creation of the Process. Moreover, the influences may spread wider as supervisory structures continue to converge.*

*This co-operative attitude is likely to be of the utmost importance in the next twelve months, as the deadline imposed by the European Parliament elections and the designation of a new Commission looms. The European Union has raised great expectations of open, transparent public involvement as a way of enhancing legitimacy. So any perception of opacity will be much more noticeable.*

In the next section, the Group reviews the degree of progress – thereby identifying a number of issues – the first element of the mandate. The second section considers whether any possible bottlenecks have emerged – the second aspect of the Group's mandate.

### 1. Progress and Issues

#### 1.1. Speed of the Lamfalussy Process to meet target dates

The Heads of State and Government not only set the 2005 target date for the Financial Services Action Plan at the summit of the European Council at Lisbon in March 2000<sup>4</sup>. In the light of the Final Report of the Committee of Wise Men, they even advanced it for securities markets<sup>5</sup>, reaffirmed their commitments one year later<sup>6</sup>, and set a slightly shorter deadline for securities markets of March 2003.<sup>7</sup>

<sup>4</sup> The conclusions of the Presidency of March 2002 (see <http://ue.eu.int/en/info/eurocouncil> ) stated in Paragraph 21: To accelerate completion of the internal market for financial services, steps should be taken to set a tight timetable so that the Financial Services Action Plan is implemented by 2005.

<sup>5</sup> In Paragraph 19 of the conclusions of the Presidency of March 2001, the European Council stated that “every effort should be made by all parties concerned to implement key steps for achieving an integrated securities market by the end of 2003”

<sup>6</sup> In Paragraph 35 of the conclusions of March 2002 at the summit of Barcelona, the European Council not only welcomed the agreement on the Lamfalussy proposals and urged for their immediate implementation, but also reaffirmed “its strong commitment to implementing the Financial Services Action Plan (FSAP) and achieving fully integrated securities and risk capital markets by 2003 and financial services markets by 2003”, and also asked “the Council and the European Parliament to adopt as early as possible in 2002 the

The summits set the basic deadlines in terms of the Directives (and other elements) that constituted the Financial Services Action Plan. In terms of the Lamfalussy Process, that requires Level 2 to be functioning fully and Levels 3 and 4 mechanisms to be underway. As the Market Abuse Directive will have to be transposed by October 2004, the Level 4 mechanisms should probably be measured within the Lisbon Summit's 2010 timescale, rather than 2003.

**Currently, the Group believes that it will be possible to meet the deadlines set by the European Council at their summits for all measures under scrutiny, provided the current pace of negotiations and the current degree of political willingness is maintained.**

Examination of the full Process shows why timetable pressures are felt so keenly by some of those who gave evidence to the Group in writing or in meetings. The Market Abuse Directive will allow 18 months for transposition into national law (i.e. by 12 October 2004). The future Prospectus Directive will include the same transposition periods. It remains to be seen whether the 18 months period proposed in the Investment Services Directive and in the Transparency Directive is satisfactory and will be accepted.

For those Member States that need primary legislation in a particular case, it is essential that full details of associated implementing measures at Level 2 are available rapidly. Timely adoption of such implementing measures is therefore of crucial importance. The forthcoming Prospectus Directive even contains a 180-day deadline for the Commission to adopt Level 2 legislation once the Directive has come into force.

Some market users have expressed their concern to the Group that the push for meeting the timetable may be at the expense of the quality of the process. The recent report by the European Financial Services Roundtable echoed these concerns. The Commission and CESR assured the Group that there would be no such sacrifice. In addition, all stakeholders have to recognise the reality of the political momentum that exists in the current members of both Commission and Parliament. This should be utilised fully – even if the pressure is intense.

***Question 2:***

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

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proposed Directives on collateral, market abuse, insurance intermediaries, distance marketing of financial services, financial conglomerates, prospectuses and occupational pensions funds and the international accounting standards Regulation".

<sup>7</sup> In Paragraph 31 of the conclusions of March 2003, the European Council "*invites the Council to rapidly complete the Financial Services Action Plan. This will require proper and effective implementation of existing Directives and the adoption by end 2003 of the pensions and prospectuses directives and by April 2004 on the investment services and the transparency directives*".

## 1.2. Parallel Working

The inevitability of parallel working flows directly from section 1.1 above. It demonstrates that it is essential to start work on Level 2 measures while the final details of some components of the Level 1 measure are still under debate. This explains the need for the Commission to request CESR to give provisional advice on the basis of a “provisional mandate” as early as possible.

Fears have indeed been expressed, with regard to the Prospectus Directive, that, if no parallel work were done, delays in the preparation of CESR advice would squeeze the remaining elements ever harder against the 180-day deadline for the adoption of Level 2 measures. The temptation might exist to shorten deadlines for public consultation to the extreme, which in the future would undermine public credibility in the Lamfalussy Process. That said, the Group noted that initial deadlines for CESR mandates on the Prospectus Directive have been postponed until July 2003 – which gives CESR more time to consult the public and to take into account relevant changes during the second reading of the Prospectus Directive in the European Parliament.

A second argument presented to support parallel working was that detailed consultations on the mechanics of Level 2 are not only inevitable, but may even help to uncover new aspects that should have been reflected in primary legislation at Level 1.

On the other hand, some market participants have argued that it is inappropriate to begin work on Level 2 measures before work on the Level 1 measure is fully completed. Indeed, those who are willing to make major efforts to participate in the consultation process will feel frustrated if their efforts appear to have been in vain. If that were to happen regularly, the Lamfalussy Process would fail the “efficiency test” referred to in Part II of this Report.

The Group agrees with those who believe that parallel working is inevitable - and may even be useful. “Provisional” mandates should be given as soon as the European Parliament has finalised its first reading, after which it can no longer change what it has then accepted. The Group finds support for this view in information provided by CESR in which it is explained that, as was shown in the context of the Market Abuse Directive and the pending Prospectus Directive, it can only start its work on the right track when the relevant Commission proposals for Level 1 legislation are in a sufficiently advanced stage. The methods of “parallel working” and “provisional mandates” might therefore also be applied with respect to the Investment Services Directive. However, it is impossible for CESR to develop solutions for areas where the Institutions have not yet found common ground.

CESR assured the Group that it would be perfectly willing to go back and redo its work should the contents of proposed Level 1 legislation change during the work on any provisional mandates. Nevertheless, in order to avoid unnecessary work for all stakeholders, there is a need to build trust in each other, and to provide greater clarity in explaining why the time is right for a provisional mandate, which may help to dispel any lingering doubts among outsiders.

In the same vein, market participants have expressed concerns to the Group that time pressures gave them insufficient opportunities to "re-think" several aspects of the Market Abuse Directive. However, for that directive, the first text of a "final" mandate was issued in December 2002. And, as it happened, the Commission proved to be correct in finding that there was no need to change the provisional mandate.

The Group looks forward to hearing whether working with provisional mandates is proving to be efficient in time and effort.

***Question 3:***

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

### **1.3. Issues specifically related to Level 1 of the Lamfalussy Process**

#### **1.3.1. Use of "Fast Track Facility"**

The Committee of Wise Men recommended the use of "fast track facilities" whenever possible, although it admitted that this legislative technique will not resolve all problems. In its Resolution of 23 March 2001, the European Council also underlined that it "takes a positive view of the possibility within the co-decision procedure for allowing speedy adoption of acts (fast track procedure)"<sup>8</sup>. The European Parliament supported this view in its Resolution of 5 February 2002 on the implementation of financial services legislation in which it stressed that legislative acts could be adopted at First Reading<sup>9</sup>.

So far, no use has been made of this facility for any of the four Directives that the Group examined. However, it should be noted that the Regulation on International Accounting Standards, which has an impact on the future Prospectus and the Transparency Directives, was enacted using "fast track" adoption based on a single reading in the European Parliament. It appears that expectations of widespread or regular use may be unrealistic, if proposals contain too many controversial issues of substance.

In practice, a fast track procedure is likely to be limited to cases where it can be expected that the Member States do not have major objections relating to the policy options pursued by the Commission and the European Parliament. Commission proposals aimed at simplifying existing legislation (such as the forthcoming Directive for amending the First Company Law Directive), or introducing a procedural framework (such as Regulation (EC) No 1606/02 on the international accounting standards), are more likely to be adopted by means of a "fast track" procedure.

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<sup>8</sup> Paragraph 3 of the Resolution

<sup>9</sup> Paragraph 4 of the Resolution

The use of “fast track facilities” has, so far, remained exceptional. Nevertheless, the Group encourages the Institutions to continue any effort to make best use of them.

### 1.3.2. Split between Level 1 and 2

In its Resolution on More Effective Regulation of Securities Markets of March 2001<sup>10</sup>, the European Council fully endorsed the recommendations of the Committee of Wise Men on the need for a split between framework principles to be laid down in a Level 1 measure and technical details to be decided at Level 2. The European Council emphasised that such a split should be agreed on a case-by-case basis between the European Parliament and the Council of Ministers at Level 1. The European Parliament took the same line in its Resolution of 5 February 2002 on the implementation the Lamfalussy Process (see also Part I, section 2.2).

As a consequence, the decisions on the final split are not a matter of institutional or legal orthodoxy. Instead, it depends on political negotiations. This creates the risk that the concept of framework principles at Level 1 is always challenged once technical issues are of imminent direct economic concern for particular market participants. The Group took note indeed in the submissions it received from outside that there is concern amongst market participants that too much technical detail is about to be incorporated in the various Level 1 initiatives, such as the forthcoming Investment Services Directive.

The entire Lamfalussy Process is based on the assumption of flexible responses to changing markets. Detail in a hard-to-change Level 1 measure risks defeating that goal. The Group looks forward to hearing specific comments on whether the choices so far meet the basic goals of the Lamfalussy Process of reserving the “framework principles” for Level 1 and leaving the technical aspects to be taken care of at Level 2.

#### ***Question 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?***

<sup>10</sup> see <http://ue.eu.int/en/info/eurocouncil/> for the conclusions of the European Council at Stockholm of March 2001 in Annex I, paragraph 3 where it is stated that : The split between framework principles (level 1) and implementing measures (level 2) should be determined on a case-by-case basis in a clear and transparent way. The split shall be decided by the European Parliament and the Council on the basis of the Commission's proposals.

## **1.4. Issues specifically related to Level 2 of the Lamfalussy Process**

### **1.4.1. Referrals to Level 2**

At the time of this report, the European Parliament and the Council have started making use of Level 2 referrals under the Level 1 Directives, such as under the Market Abuse Directive.

Referrals to Level 2 attach their own cost in terms of time utilised, even if they save time in Level 1 proceedings. CESR has informed the Group that it needs 10 to 12 months to advise on completely new subjects. This includes three to four months to draft a first consultation paper, two to three months for consultation and a further month for CESR to analyse the comments received. Where appropriate, a second consultation round of six weeks (or two months at most) may be required and the remaining time would be needed to agree the final technical advice to be transmitted to the Commission.

At its 30 January meeting, the ESC also recognised “that the time allocated to CESR for providing technical advice should be a minimum of nine months”. However, that has to be carefully balanced with the need to have translated legal texts for ESC meetings, to discuss such texts during ESC meetings, and for reasonable periods for Member States to transpose Level 2 Directives, as the case may be.

### **1.4.2. Regulations or Directives for regulating at Level 2**

According to the Resolution on More Effective Securities Markets Regulation of March 2001, the European Council agreed that “in formulating its proposals, the Commission is invited to consider more frequent use of regulations where this would both be legally possible and would help to speed up the legislative process”. In its meeting of 30 January 2003<sup>11</sup>, the representatives of Member States within the ESC also stated that “On the possible use of regulations, a majority of delegations were broadly in favour of this whenever possible, but delegations agreed that any decision on such use depends on a case-by-case analysis. Some delegations stressed their preference for directives as a starting point”.

The Group itself considered two aspects in this context:

1. The use of regulations at Level 2 could effectively speed up the entire Process in that national transposition processes would be dispensable. In contrast, the overall timespan necessary for directives at Level 2 follows a longer sequence: CESR needs to prepare technical advice whether the subsequent implementing measure is to be a directive or a regulation; the Commission then drafts legal texts and agrees them within the ESC. However, it is only in the case of directives at level 2, that Member States must transpose them into national

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<sup>11</sup> As published in the summary report available under [http://europa.eu.int/comm/internal\\_market/en/finances/mobil/esc\\_en.htm](http://europa.eu.int/comm/internal_market/en/finances/mobil/esc_en.htm)

law. The use of regulations would therefore save considerable time in the last stage – transposition by Member States.

2. Furthermore, the use of Directives entails the risk that inconsistencies which may arise during the national transposition of Level 1 directives, are enhanced by further inconsistencies resulting from the transposition of Level 2 directives. Consequently, the more that regulations are used at Level 2, the smaller the risk of inconsistencies and the higher the legal certainty for market participants active in several Member States of the European Union.

The Commission is currently considering a Level 2 regulation for the second reason. On 10 March 2003, its services published a working document of possible drafts for a first set of Level 2 measures implementing the Market Abuse Directive. This document includes the possibility of a regulation for “safe harbour” provisions in the context of buy-back programmes and stabilisation; the need for a regulation was explicitly justified on the grounds of full legal certainty for financial markets, which, in a context of insider dealing and market manipulation, do not want “fifteen safe harbours”, but need one “single safe harbour” across all the Member States. However, the other two draft texts were in the form of a directive.

The Group will follow up this matter in its following reports with respect to Level 2 initiatives implementing the Prospectus Directive and the Investment Services Directive.

***Question 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?***

#### **1.4.3. The role of the European Securities Committee (ESC)**

The Group cannot make any assessment yet on the functioning of the ESC in the process of creating implementing measures as none have yet gone to it for decision.

#### **1.5. Content of Level 3**

The Group can make no assessment of Level 3 activities under the Lamfalussy Process as none have occurred, as yet. However, the Group is aware of the work carried out by CESR's predecessor FESCO. In addition, it noted that preparations are underway within CESR itself: it has set up a review panel and a scoreboard. The Group also noted that CESR-POL and CESR-FIN are improving co-operation on national enforcement issues. On 21 March 2003, CESR adopted a set of standards for the supervision by national securities regulators of the application of international accounting standards by publicly traded companies. These standards are not only of relevance for the IAS-Regulation, but

also for the future implementation of the proposed Prospectus Directive and the proposed Transparency Directive.

Looking ahead, there may need to be further thought as to how to put Level 3 it into practice. Through which instruments will implementation at Level 3 be effected, knowing that shortcomings cannot be cured at Level 4, which only covers enforcement of binding Community law enacted at Level 1 and 2 of the Lamfalussy Process? The Group noted that CESR will consider this year whether it would be useful for it to set up a more general system whereby it can act as a mediator – however strictly between national regulators in their capacity as CESR members, and not between Member States.

This discussion should have an impact on the peer pressure among CESR members, i.e. amongst the national securities regulators in the Member States and should facilitate full compliance with Level 3 standards at the national level. In that regard, more far-reaching solutions in connection with the Market Abuse Directive could not be reached.

This may suggest that the role of CESR will have to be clearly implemented: its task is not to make rules, but to foster pragmatic co-operation on an *ad hoc* basis, with the likely result that supervisory convergence will occur.

## **1.6. Content of Level 4**

It is certainly premature to examine enforcement issues at this early stage. Nevertheless a number of points were put to the Group in its meetings with Commission and CESR representatives. The following aspects may prove helpful for the future:

- (a) Enforcement is the responsibility for the Commission and it will require more resources to be devoted to the relevant Commission services. Formally, a Member State can also initiate proceedings against another Member State for failing to fulfil an obligation under Community law, but Member States have used that competence only exceptionally;
- (b) The Commission communication on better monitoring of Community law of 11 December 2002 opens the way to a more systematic approach that should avoid transposition problems. As an example, discussions with Member States will be organised in advance on how they are going to transpose directives;
- (c) Level 4 will only work if the financial services industry is ready to bring forward concrete cases. The recent series of tax discrimination cases in the area of UCITS demonstrated how valuable the industry's input can be;
- (d) Though CESR has no formal authority to act at Level 4, it could also act as a valuable channel of information to the Commission, for example by pointing out concrete cases of incorrect implementation of Community rules.

## 1.7. Transparency and consultation of the public

### 1.7.1. The European Commission

Development of both the Market Abuse Directive and the Prospectus Directive started before the Lamfalussy Process had even been thought of. It should be taken into account that the consultation procedures were of the old type, when considering the criticisms of some market participants.

Their inclusion into the Lamfalussy Process reflects that the proposals were about to be issued when this Process was put into action. Nonetheless, some market participants regretted that no proper pre-legislative public consultation took place beyond the consultations organised by FESCO in this respect and the forum groups initiated by the Commission. This might also explain the number of Level 2 responses. In effect, there may have been an attempt to correct the primary problems at the secondary level, which has created the risk of unclear or inconsistent legislation.

Nevertheless, the Commission has taken this criticism to heart and has altered its consultation methods considerably - a change labelled by the representatives of the Commission whom the Group has met, as a 'sea change'. Before the Commission made a proposal for a revision of the old Investment Services Directive, two public hearings and three consultation rounds were carried out over 2 years: in July 2001, the Commission services published a consultative paper outlining its suggestions for a revision of the Directive. In the light of the reactions received, the Commission published a second consultative paper with revised orientations, in March 2002. The proposal for a Transparency Directive has also been prepared with two rounds of written consultations, one in July 2001 and a second one in May 2002.

That change made, the Commission is now devising its procedures for ensuring a transparent decision-taking process and broad consultation of market participants before Level 2 legislation is enacted. The challenge to meet is two-fold: the preparation of technical advice requires broad consultation of market participants by CESR. On the assumption that such consultation has been carried out adequately, the Commission would not start a new consultation round for the same purposes. However, there is a second aspect which has to be taken into account: In the light of technical advice given by CESR, it is up to the Commission to draft legally-binding rules. In this respect, the Commission has considered it useful to make such draft texts available to the public, and to call for comments before it submits a formal draft of Level 2 legislation to a vote of the European Securities Committee. The new standard wording<sup>12</sup> on consultation procedures

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<sup>12</sup> see point 2.2. of the mandates for CESR of January 2003 where it is stated that:

The Stockholm European Council endorsed the Lamfalussy Recommendations on consultation and transparency. In particular, it invited the Commission to make use of early, broad and systematic consultation with the institutions and all interested parties in the securities area, especially by strengthening its dialogue with consumers and market practitioners. It also stated that CESR should "consult extensively, in an open and transparent manner, as set out in the final report of the Committee of Wise Men and should have the confidence of market participants".

has been welcomed by market participants as raising the chances that legally clear texts will be adopted. In March 2003, this standard has effectively been applied with regard to the Market Abuse Directive. This appears to be a well-balanced compromise designed to ensure speedy and transparent decision-taking processes.

In overall terms, the Group is not aware of criticism of the Commission's current approach on ensuring transparency and public consultation under the Lamfalussy Process.

### 1.7.2. CESR

The change in attitudes is true not only for the Commission, but also for CESR. Moreover, CESR published its own Charter as one of its early acts, as well as a Public Statement of its Consultation Practices. Both instruments have been well received by market participants. CESR's consultations are built on three components:

1. **External experts assisting CESR in a personal capacity:** These external experts come from the financial markets and their names are made public. They should help the internal CESR experts groups in overseeing all relevant issues from the point of view of market participants. This was successfully practised when CESR experts prepared consultation papers on its advice on the Market Abuse Directive and on the Prospectus Directive.
2. **Public consultation rounds:** As soon as CESR receives a mandate from the Commission to provide technical advice, it publishes this mandate on the Internet to collect views from all interested parties. Before CESR provides its technical advice to the Commission, it prepares consultation papers which are

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Article 5 of the Commission Decision establishing the CESR provides that “before transmitting its opinion to the Commission, the Committee [CESR] shall consult extensively and at the early stage with market participants, consumers and end users in an open and transparent manner”.

In this respect, DG Internal Market also draws CESR’s attention to the European Parliament’s Resolution on the implementation of financial services legislation of 5 February 2002 and the Commission’s formal Declaration in response. DG Internal Market will ensure that the Stockholm European Council recommendations on consultation have been fully met. In particular, it will satisfy itself that CESR has consulted all interest parties on its technical advice in accordance with the CESR Public Statement on Consultation Practices. This provisional mandate will also be posted on DG MARKET website.

Once the Commission has received the CESR’s advice, it will draw up draft legal texts to put forward to the ESC and the European Parliament. It simultaneously publishes those texts on its Internet site. If the Commission amends its draft to reflect discussions in the ESC, those amended drafts will also be made public on the website.

Interested parties will have the opportunity to comment on published draft legal texts. The Commission has set up a dedicated e-mail address ( [Market-ESC@cec.eu.int](mailto:Market-ESC@cec.eu.int) ), allowing all interested parties to send their contributions to the Chairman of the ESC. All such comments will in turn be made public on the same Commission website. Interested parties will have sufficient time to participate in this exercise because the ESC will not be asked for a vote until at least three months have elapsed from the publication of initial draft implementing rules. This will also allow the European Parliament to follow the Process and, if it so wishes, to make its views known.

published on CESR's Internet site. Interested parties are invited to react in writing to these papers, but may also express their views in open hearings. In the light of reactions received, CESR revises its first views. If considered necessary, it even re-consults the public. Market participants are informed about the outcome through feedback statements. In the same context, the CESR Chairman also holds regular meetings with market participants in order to discuss CESR's consultation practices.

3. **Market Participants Consultative Panel:** Following a recommendation of the European Parliament and the Commission, a panel of high level persons has been set up. The eleven members are appointed in a personal capacity. The panel should not be regarded as a body substituting public consultation or involvement of external experts. Instead, the panel acts as a "sounding board", tasked with drawing attention to new priorities for CESR in the context of recent market developments. It also offers feedback on how the consultation practices are implemented<sup>13</sup>.

**Some market participants have nonetheless called for improvements of CESR's consultation practices.** Several issues were raised in written submissions and in the Group's meeting with International and European associations on 18 February 2003. The issues raised concerned the following:

1. **Time-tabling of deadlines set by CESR and of open meetings with CESR:** There is a widespread feeling that the consultation is rushed – which presents an acute problem for “umbrella” trade associations who have to consult their national constituents who, in turn, must consult their own members. This process cannot be shortened and may be difficult to pursue if the consultation papers are very long. Consultation on the first Market Abuse Directive was cited as a particular instance: at the end of the consultation process, CESR released some new text a few days before an open meeting – in a spirit of openness when working against a tight deadline – but the market participants were not aware of this background and felt aggrieved. This could have been avoided by better communications.

It was also suggested to the Group that the rush might stem from a process “operated with unrealistic timeframes”. But the full magnitude of the rush to complete key elements before the dissolution of European Parliament might still be ahead. Finally, some market participants stated that they are nervous that under-researched analysis will be built into overly-detailed Level 2 legislation, rather than more flexible national rules.

2. **Summary and reasoning of responses on the side of CESR:** The Group's attention was also drawn to another problem which may be the result of lack of time and resources: Respondents do not feel that CESR's feedback statements are sufficient, as they appear to be more a collection of comments, rather than to contain reasoned responses to comments made. Attention is also

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<sup>13</sup> See also CESR's press release of 10 July 2001

drawn to the possibility that under-researched analysis might lead to overly detailed Level 2 legislation rather than allowing more flexible national rules.

3. **The size of consultative papers:** The Group noted that both the Commission and CESR are fully aware of the workload for compliance officers in Europe. However, CESR's experience shows that more detailed consultation papers facilitate understanding amongst market participants across Member States, thus avoiding the risk that only national perceptions of problems are found in the responses. Moreover, respondents do not necessarily need to cover all aspects and, indeed, they often focus on particular sectoral aspects. Also, respondents do not take account of cross-sectoral repercussions.

Some market participants feel nevertheless that they are confronted with long papers, causing some discontent about too much "red tape," and raising questions as to whether the efficiency of the consultation is compromised when less well-resourced sectors of the market – at European and national level - are discouraged from participating in the consultation process. As an example, the case was cited of CESR's consultative papers on the Prospectus Directive, which was said to run to more than 1300 pages. However, it would appear that this was due to the inclusion in the document of the texts of national regulations, and that the actual size of two consultative papers which CESR published in October and in December 2002 totalled 292 pages only.

These observations raise an issue of principle: Is there a risk that the Level 2 detail may turn out to be no more than an amalgam of existing detailed rules and, instead of simplifying, may end up complicating the issue of prospectuses. Some market participants feel that aggregating texts may simply be a matter of "regulatory convenience". If these assumptions were correct, it would undermine the objective of a more effective securities market. Despite these fears, the first example of working documents for Level 2 texts, which were published in March 2003, were modest in size. They ranged from 11-15 pages, of which about half consisted of recitals needed to explain the purpose and content of the ensuing articles.

***Question 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?***

***Question 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 there were omitted? Do CESR's feedback statements meet the commitments made in CESR's Public Statement of Consultation Practices?***

## 2. Possible Bottlenecks in the Lamfalussy Process

In Part II, the Group signalled that it interprets the term “bottlenecks” in a wide sense: There might be potential or actual bottlenecks where no progress can be made over a certain time or even bottlenecks blocking the whole Lamfalussy Process. The Group has identified five actual or potential bottlenecks, and has listed them in rough order of priority.

### 2.1. Article 202 and the Sunset Clause

The Lamfalussy Process is based on a temporary political compromise between the Institutions. In other words, there is no agreement valid in the long run. Each of the four Level 1 directives provides – or will provide<sup>14</sup> – for delegation to the Commission to enact Level 2 measures, but only within a limited time of four years after the entry into force of the directive concerned. Following the expiry of the delegation, it must be renewed by the European Parliament and the Council. In the case of the Market Abuse Directive, for example, effective use of Level 2 would be limited to until April 2007. This “sunset clause”<sup>15</sup> has important consequences not only for the functioning of Level 2, but for the entire Lamfalussy Process.

The Group understands that the insertion of a Sunset Clause is closely linked to the European Parliament's wish to enjoy call-back powers under the Comitology framework, in order to allow it to control the Comitology process on equal footing with the Council. However, granting such powers to the European Parliament would require an amendment to Article 202 of the existing Treaty. A call-back power would lead to a role equal to the Council, which currently exercises control on Comitology decisions taken by the Commission.

**Obviously, this issue revolves around the overall institutional relationship between the Council, the Parliament, and the European Commission. However, the inclusion of a Sunset Clause in Level 1 legislation directly affects the Lamfalussy Process in the long run. If the solution to this problem were left to the review of the Lamfalussy Process in 2004 or until the sunset clause under the Market Abuse Directive becomes effective in 2007, the Process would be seriously harmed. It is therefore necessary to address it in the ongoing work on the draft Constitutional Treaty in the course of this year, and in the subsequent Inter-Governmental Conference.**

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<sup>14</sup> See Part I, section 2.2. above, see also the brief glossary of terms

<sup>15</sup> For example: Investment Services Directive: Article 59

3. *Without prejudice to the implementing measures already adopted, on the expiry of a four-year period following the entry into force of this Directive, the application of its provisions requiring the adoption of technical rules and decisions in accordance with paragraph 2 shall be suspended. On a proposal from the Commission, the European Parliament and the Council may renew the provisions concerned in accordance with the procedure laid down in Article 251 of the Treaty and, to that end, they shall review them prior to the expiry of that period.*

## 2.2. Impact of Parliamentary Elections and appointment of a new Commission

The European Parliament will complete its final session in April 2004 and the Commission's term will end in November 2004. Concerns have been expressed to the Group that the momentum for making necessary progress on proposed Level 1 legislation will slow down considerably after April 2004. At worst, uncompleted legislation may be lost, or significantly delayed. However, the Brussels European Council has set April 2004 as a target date for the adoption of the proposed Investment Services Directive and Transparency Directive, so the risk should, in principle, not crystallise.

The risk can best be illustrated by examining the Parliament's rules of procedure, reproduced below<sup>16</sup>. Their effects vary according to the stage of the co-decision procedure reached. The inherent uncertainties underline the desirability of a rapid completion of the first reading in the Parliament and the rapid adoption of a common position in the Council, on any pending legislation.

### First Reading

Under Rule 185, at the end of the last part-session before elections (April 2004), all Parliament's unfinished business shall be deemed to have lapsed. Unfinished business would mean any legislative or other matter where the full Parliament has not taken a decision.

At the beginning of the following parliamentary term, the Conference of Presidents shall take a decision on reasoned requests from parliamentary committees and other institutions to resume or continue the consideration of such matters.

### Second Reading

If, on the other hand, the European Parliament has adopted its position at first reading, there are two possibilities:

If the Council of Ministers has not adopted a Common Position, the President of Parliament may (but is not obliged to do so) under Rule 71.1 at the request of the Committee responsible ask the Commission to refer the proposal to it again, in essence starting the Process over again. Such a request must be approved by the Conference of Presidents (The President of the EP and the Presidents of all the Political Groups).

If, however, the Council has adopted its Common Position (or if the above option is not invoked), the EP is in principle bound by its position at first reading.

In general terms, amendments at second reading may under Rule 80 only seek to:

- (a) to restore wholly or partly the position adopted by Parliament in its first reading; or
- b) to reach a compromise between the Council and Parliament; or

<sup>16</sup> The Full Text of the Rules can be accessed from [http://www.europarl.eu.int/references/default\\_en.htm](http://www.europarl.eu.int/references/default_en.htm)

(c) to amend a part of the text of a common position which was not included in - or differs in content from the proposal submitted in first reading; or

(d) to take account of a new fact or legal situation which has arisen since the first reading.

But if elections have taken place since the first reading, the Committee responsible may ask the President to waive the above criteria for determining the admissibility of amendments at second reading. The Parliament would thus have considerably wider possibilities to amend the proposal than it would otherwise have.

## **2.3. Commitment of Resources**

### **CESR**

The CESR budget for 2003 has been increased by 33%, against general trends in Member States to cut public spending. Moreover, further experts will be recruited or seconded to the CESR secretariat. About eight to ten working groups can deal with the ongoing and forthcoming workload; this calculation does not take into account CESR-POL and CESR-FIN. Other areas under the Investment Services Directive, such as internalisation of order flows, conflict of interest rules in this context, as well as pre- and post-trade transparency requirements, will require CESR to start from scratch

CESR informed the Group that it is not concerned about the future workload. Nevertheless, there is a risk of overload as regards CESR's workload relating to generating technical advice on Level 2 measures might create a particular risk of overload, about which some market participants expressed concerns.

### **European Commission**

The Committee of Wise Men paid particular attention to the shortage of staff in the relevant Commission departments. So far, the staff has been able to produce proposals on time and the Group was not made aware of any critical problems. However, it was informed that enforcement at Level 4 will be a different matter.

### **European Parliament**

The Committee on Economic and Monetary Affairs has responded to the increased workload by setting up an advisory panel of ten independent and external experts in the field of financial services. In addition, the Committee's Secretariat has been reinforced with three national experts, two of whom are from national central banks, the other from a national securities regulator.

### **Market Participants/Professional Associations**

The current state of financial markets means that both associations and direct participants are finding it difficult to get additional resources. Lengthy consultation documents pose a particular problem for the few individuals concerned. Firms are vocal in their requests for

rapid reform to create a genuinely single market in financial services. The European Financial Services Roundtable has just produced a report on this very point. The Group believes it crucial that senior management takes full responsibility, in the longer term interest of their firms, by making the necessary resources available.

## 2.4. Capacity of Jurist Linguists

The European Parliament pointed to delays occurring within the Council related to moving from the political agreement on common position to its formal adoption. The particular example of the Prospectus Directive was cited: It took five months from the Council's political agreement on a common position (5 November 2003) to its formal adoption on 24 March 2003. The Group notes that the timespan needed for a formal adoption is longer than the period of three months which Article 251 of EC Treaty grants to the European Parliament to hold its second reading.

The Council Secretariat explained in detail the reasons: The delay in Council in the specific case of the Prospectus Directive stemmed from the particular burdens imposed by the Copenhagen Summit as a result of the Accession Treaties, making it impossible for the Jurist Linguists of the Council to respect their normal deadlines. And indeed, the box below shows that a process which should have taken about twelve weeks, instead took 20 weeks (including the Christmas/New Year break). **The Group is concerned that enlargement could make such delays endemic.**

<b>Prospectus Directive: Timing from political agreement to formal adoption of the common position by the Council</b>		
<b>Dates</b>	<b>Weeks Elapsed</b>	<b>Event</b>
5 November	0	Political Agreement
29 November 2002	3	Text translated into all languages
2 December 2002	4	Transmission to legal-linguistic experts
27 February 2003	16	Text of common position finalised
11 March 2003	18	Council's reasons translated into all languages
12 March 2003	18	Approval by COREPER
17 March 2003	19	Interim committee
24 March 2003	20	Common Position adopted

## 2.5. The Aerosol Clause<sup>17</sup>

As set out in more detail in Part I, the European Council noted at the summit of Stockholm in March 2001 that “the Commission has committed itself, in order to find a balanced solution for those cases of implementing measures in the field of securities markets, acknowledged in the light of discussions to be particularly sensitive, to *avoid going against predominant views which might emerge within the Council*, as to the appropriateness of such measures”.

The clause lacks clarity as to what “predominant” means. That uncertainty may in itself hamper the legislative process on some future occasion, and may constitute an additional bottleneck. That said, the Group is not aware of any present circumstances that would prompt Member States to operate the clause.

### *Question 8*

*What are your views on the Group’s preliminary observations on possible bottlenecks?*

### *Question 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 markets regulatory system? Are all these actors equipped with sufficient resources?*

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<sup>17</sup> This method of blocking the adoption of implementing rules was used in the case of EU legislation on chlorofluorocarbon emissions from spray cans for the first time in the 1970s, hence the name Aerosol clause.

## Brief Glossary of Terms

**Fast track facility:** implies that the Council would adopt a Commission proposal after a single reading in the European Parliament. Article 251 (2) of the EC Treaty indeed provides for such a possibility. This presupposes in principle that the Council does not take a view different to both a Commission proposal and possible amendments proposed by the European Parliament in the first reading, but approves all of them without any further changes. An adoption after a first reading is in addition conceivable only if the Commission refrained from its right to present an amended proposal to the Council and to the Parliament after the first reading has been completed.

**The Comitology framework:** is laid down in Council Decision 1999/468/EC on Comitology. This Decision prescribes three different types of procedures according to which the Commission should consult representatives of Member States in the framework of committees chaired by the Commission. The so-called regulatory procedure is the most stringent one since the Commission is required to adopt implementing rules as voted under qualified majority in the so-called Regulatory Committee. The ESC operates as a Regulatory Committee. In December 2002, the Commission presented a new proposal to the Council for amending the 1999 Comitology decision, in particular the regulatory procedure. The proposal is based on the existing Treaty.

**Aerosol Clause:** Under current EU Comitology rules, a Commission draft presented to the European Securities Committee would need a "qualified majority" in favour of such draft; otherwise, the Commission draft has not reached the agreement by this Committee and has to be dealt within the Council. The possibility to block the Commission changes in the Council. If the Member States do not reach a qualified majority within three months in Council against a Commission draft, the Commission remains free to adopt the draft implementing measure which it has submitted to the Council. This is one of the essential novelties of the Comitology Decision of 1999 compared to its predecessor of 1987 where a simple majority in Council still sufficed to block the Commission. The Aerosol clause, which is laid down in the Commission Statement No 3 made at the point of the adoption of the Comitology Decision of 1999, deals with the situation where the Council might not block the Commission on the basis of a qualified majority. In such a situation, the Commission has taken the political commitment "to avoid going against predominant views which might emerge within the Council". This commitment applies in the area of public or animal health, and now also to securities markets, according to the Stockholm Resolution. From a historical point of view, predominant views might be interpreted as a simple majority of Member States. For the time being, this is not established in law. This method of blocking the adoption of implementing rules was used in the case of EU legislation on chlorofluorocarbon emissions from spray cans for the first time in the 1970s, hence the name Aerosol clause.

**Call Back Clause:** In order to achieve equivalent treatment with the Council in blocking the Commission under the aerosol clause, the European Parliament argued that

it, as co-legislator, should be given a similar right to block (or call back) implementing measures. In addition, it was also felt that this was a crucial aspect in order to approve the de facto delegation of its legislative powers that the Lamfalussy Process entails. It was, however, agreed in the end that this would not be possible for the time being as such a clause would require a change to Article 202 of the Treaty.

**Sunset Clause:** This was a compromise put forward by the European Parliament in order to move the Lamfalussy Process forward whilst at the same time ensure that the matter of revising Article 202 remains on the agenda during the next round of Treaty reforms. In short, it stipulates that the power to adopt implementing measures shall be suspended four years after the entry into force of a given directive<sup>18</sup>. Commission legislation adopted within the period of four years will remain unaffected. Thereafter, the Commission will no longer be in a position to continue unless the European Parliament and the Council prolong the delegation through a new directive adopted under the co-decision procedure. Example: Under the Directive 2003/6/EC (Market Abuse Directive), the Commission may only adopt level 2 legislation until April 2007.

**Article 202 of the EC Treaty:** The right of call back for the European Parliament requires an amendment to Article 202 of the Treaty, which is the legal basis for legislation on the delegation of implementing powers to the Commission. This can only be done by unanimous agreement amongst Member States within the framework of the next inter-governmental conference. It cannot be achieved under the pending Commission proposal for amending the 1999 Comitology Decision, but only by a change to the Treaty. The Parliament has recently adopted a submission to the Convention on the future of Europe in which it calls for a clearer typology and hierarchy of norms, as well as, a right of call back. In December, the Commission asked the Convention to discuss this matter, too. The draft provisions for a new Constitutional Treaty, which the Presidium of the Convention, chaired by Valéry Giscard d'Estaing, presented on 26 February 2003, also contains specific provisions (Articles 27 and 28). The Convention is due to address this question before end May.

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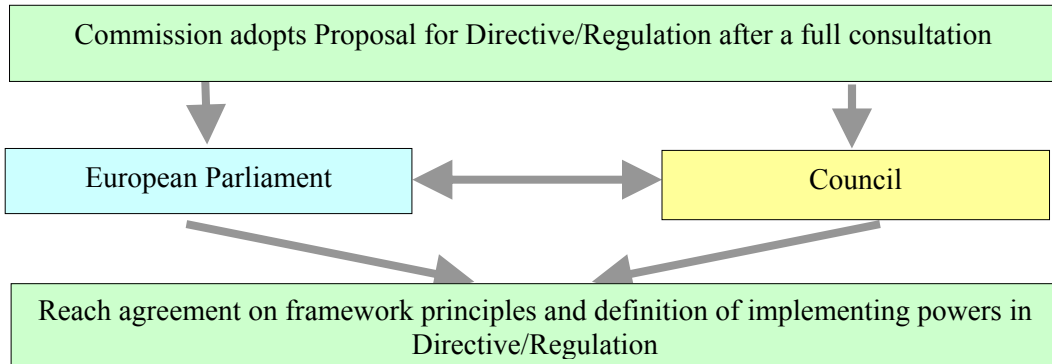
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<sup>18</sup> 'Without prejudice to the implementing measures already adopted, on the expiry of a four-year period following its entry into force the application of the provisions of this Directive stipulating the adoption of technical rules and decisions in accordance with the procedure referred to in Article ... by ... [the provision in each legislative act referring to Decision 1999/468/EC] shall be suspended. On a proposal from the Commission, the European Parliament and the Council shall renew the provisions concerned in accordance with the procedure laid down in Article 251 of the EC Treaty and, to that end, they shall review them prior to the expiry of the period referred to above';

## ANNEX

**Figure 1: The 4-Level approach recommended by the Committee of Wise Men**

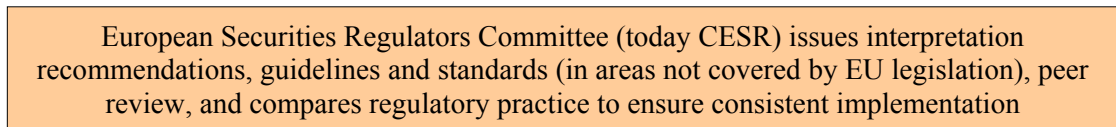
### LEVEL 1



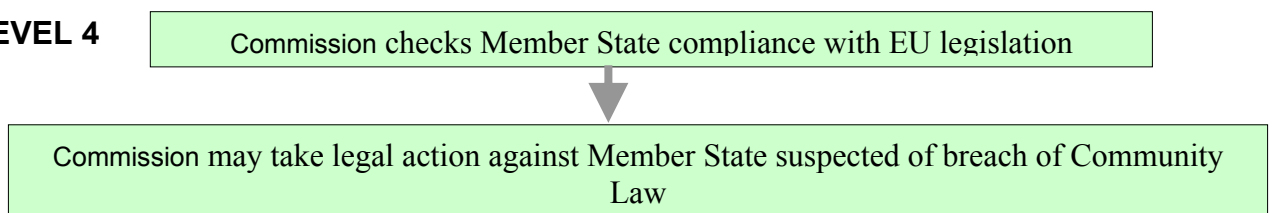
### LEVEL 2



### LEVEL 3



### LEVEL 4



**Figure 2. Commission proposal for a Level 1 measure<sup>19</sup>**

Pre-legislative public consultation by the Commission	Consultation paper
	Comment and summary of the replies
	Open hearings (possibly)
Preparation of the draft proposal	Commission consults European Securities Committee on draft proposal
	Transmission of draft legislative proposals to the European Parliament (Economic and Monetary Affairs Committee)
	Transmission of Level 1/Level 2 note to European Parliament (Economic and Monetary Affairs Committee) within 15 working days for reaction
<i>Commission proposal</i>	<i>Presentation of a formal proposal – co-decision procedure starts</i>

<sup>19</sup> The coloured boxes in figures 2 to 4 indicate the steps which are provided for in the existing legal framework; the uncoloured boxes demonstrate the additional steps vital to make political progress towards a final political agreement.

**Figure 3. Level 1 – Co-decision procedure in the European Parliament and Council**

<i>First reading within the EP</i>	<i>Actions taken by the Council</i>
First discussion in Economic and Monetary Affairs Committee (EMAC)	First meeting of the Council working party
Hearings	
Draft report of Rapporteur	
Vote of Economic and Monetary Affairs Committee (EMAC)	
Vote in the EP plenary	First meeting of the Council working party discussing EP amendments
	Report/Discussion ECOFIN Council
<i>Adoption by the Council after the first reading if it agrees with the EP (possibly) = fast track procedure</i>	
<i>Amended proposal by the European Commission (possibly)</i>	
	First meeting of the Council working party discussing amended Commission proposal
	Possible political agreement on common position by ECOFIN if no agreement with EP after the first reading
	<i>Adoption of common position by the ECOFIN Council</i>
<i>Second reading in the EP</i>	
Report of Rapporteur to EMAC	
Recommendation by EMAC to EP	
Vote of EP plenary (Second reading)	First meeting of the Council working party to examine EP amendments
	<i>Adoption of the proposal if Council agrees with EP opinion after the second reading</i>
<i>Conciliation committee if no agreement between Council and European Parliament</i>	
<i>Approval of the result of the negotiations in the conciliation committee in the EP</i>	<i>Adoption by the Council</i>
<i>If either the EP or the Council disagrees with the result of the conciliation committee, the proposal is deemed to be rejected</i>	

**Figure 4. Level 2- Preparing implementing measures: technical advice from CESR**

Preparation of CESR Provisional mandates Prior to the adoption of the level 1 measure	Consultation of the ESC on a draft mandate
	Prior information of EMAC on the draft
	Publication of provisional mandate on the Internet
<i>CESR</i> Consultation on provisional technical advice	Call for comments on the mandate
	Consultation on a draft technical advice
	Hearing
<i>CESR</i> provisional advice	Transmission of provisional technical advice to Commission
	Publication of provisional technical advice on the Internet
Preparation of <i>CESR</i> final mandate after the adoption of the level 1 measure	Same procedure as for the preparation of provisional mandates
<i>CESR</i> Final advice	Same procedure as for the preparation of provisional advice
Preparation of draft implementing measures	Preparation of formal draft implementing measure thereby taking into account the <i>CESR</i> advice
	Further call for comments by the Commission on preliminary draft implementing rules

**Figure 5: Level 2 – Enacting implementing measures: the Comitology framework**

Preparation of Comitology committee meetings	<i>Transmission of formal draft implementing measures to Member States represented in the ESC</i>
	Transmission of formal draft implementing measures to the European Parliament (= Economic and Monetary Affairs Committee) on equal terms and at the same time, European Parliament has three months to consider the draft
	Publication of draft measures on the Internet
Discussion and vote within the European Securities Committee in its capacity as Regulatory Committee	
After the vote in the ESC meetings	<i>Transmission of summary records (including voting results) to Member States and Economic and Monetary Affairs Committee</i>
	<p><i>Vote on the implementing measures:</i></p> <ul style="list-style-type: none"> <li>• <i>If the committee agrees with the draft implementing measures, one month for EP to pass an ultra vires resolution</i></li> <li>• <i>If the committee disagrees, submission of draft implementing measures to Council for decision and to EP for consultation</i></li> </ul>
Predominant views in Council against the appropriateness of implementing measures (aerosol clause)	
<i>Adoption of implementing measure by the Commission</i>	

**Figure 6. Level 3 - Ensuring consistent implementation of Community law: CESR**

Joint recommendations for interpreting EU law, guidelines, standards (not binding)
Peer reviews
Establishment of comparative regulatory practices (not binding)
Mutual information about possible breach of EU law, information to the Commission

**Figure 7. Transposition of Community law in Member States and Level 4 of the Lamfalussy Process (Enforcement of Community law)**

<p><i>In the case of Community directives, transposition by Member States into national law or other binding regulations.</i></p> <p><i>In the case of Community regulations, national law complementing Community regulations if no maximum harmonisation</i></p>
<p>Directives: Transposition into legally binding national laws or regulations within a period laid down in the level 1 directives or in the level 2 directives</p> <p>Regulations: Complementary national law only if the regulations allow national discretion</p>
<p>Period for transposing level 1 and level 2 directives will elapse at the same time. No periods in the case of regulations</p>
<p><i>Level 4: Commission checks compliance of Member States' laws with Community law; if necessary, enforcement by legal actions before the Court of Justice</i></p>