

**Inter-institutional Monitoring Group**

**Second Interim Report Monitoring the Lamfalussy Process**

**Brussels, 26 January 2007**

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### **Abstract**

In this second interim report monitoring the implementation of the Lamfalussy process, which is addressed to the European Parliament, the Council and the European Commission, the Inter-institutional Monitoring Group (the Group) has observed with satisfaction the overall progress of the Lamfalussy process. The report nevertheless identifies some aspects of the process that need to be improved and/or adapted in order to make the Lamfalussy approach work to its full potential. The Group welcomes public comments on its second interim report, which will be taken into account for the determination of the Group's final recommendations and conclusions scheduled to be presented in the form of a final report in autumn 2007.

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.

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## Preliminary recommendations and conclusions by the Inter-institutional Monitoring Group

### Level 1 and Level 2

#### *Excessive detail and separation of Levels*

- Level 2 and Level 3 should strictly adhere to the framework principles and technical implementing powers set out at Level 1 in order to avoid material additions at the lower levels.
- The Group calls for 'regulatory self-restraint' at all levels so as to avoid excessive detail.
- The Group recommends a practical, flexible distinction between Level 1 and Level 2 measures, aiming at efficiency and concentrated on those issues that are politically meaningful, rather than a 'one size fits all' approach.

#### *Parallel working*

- The Group believes that Level 2 implementing measures could be sketched while the work on Level 1 legislation is still ongoing – provided that this parallel working does not pre-empt the decision making process at Level 1.

#### *Time constraints*

- While agreeing on the transposition deadlines the Institutions should carefully consider the amount of rules to be transposed into national legislation as well as the time necessary to adopt the implementing measures in order to make the deadlines more realistic and appropriate.
- All bodies involved at Level 2 should invest more time and resources to shorten the time necessary for the adoption of the Level 2 legislation.

#### *Directive vs. Regulation*

- The Group is not convinced that the choice of instrument in itself is paramount to the outcome and suggests some guiding principles for the choice between Directives and Regulations:
  - ◇ Measures that target a specific area of the Internal Market would seem more appropriate for the use of a Regulation whereas measures that would affect a whole sector could rather take the form of a Directive.
  - ◇ Regulations could be used when an action requires immediate effect and actions that need more time for Member States to adapt could better take the form of a Directive.
  - ◇ Directives could be used in areas where legislation based on local specificities exists which might differ substantially between Member States, or in areas where this is required on the basis of the subsidiarity principle.

#### *Consultation*

- The Group believes that consultation should be kept at all levels, but that their number might be reduced where they overlap. In particular, the Commission should work closely with Level 3 Committees when working on Level 2 measures in order to reduce overlap between both processes.

- The Commission should provide explanatory documents on the cases where it deviates from the Level 3 technical advice.

#### *Impact assessment*

- The Group supports clear and transparent ex ante impact assessment and recommends that impact assessments are carried out at all levels in the case of any significant measure being proposed at Level 2 and 3.
- The Group suggests a broad approach to evaluate ex post the impact of the whole financial services regulatory portfolio.

### Level 3

- The Group believes that an additional effort is needed to increase cooperation between supervisors. Supervisors should step up progress in this field and national governments should provide the necessary political support. The Group intends to pay particular attention to this issue in its final report.
- The Group suggests to include in the mission statements of the relevant supervisory authorities a clear task to support the European convergence process.

### Level 4

- The Group concludes that the timing of implementation of EU legislation to date has not lived up to the expectations raised by the Lamfalussy process.
- The Group believes that transparency of national transposition and implementation through disclosure mechanisms could curb regulatory additions and enhance convergence of practices through peer pressure.
- The Group urges Member States to provide transposition tables in one of the Commission languages and in a common format.
- Transposition workshops are a powerful tool in the transposition process and the Group encourages their continued use at an early stage.
- The Group recommends that sufficient Commission staff is allocated to the task of checking the accurate transposition of EU Directives and to infringement procedures in the event of faulty implementation.
- Member States, the European Parliament, supervisors and the private sector play an important role in improving enforcement of agreed legislation by putting forward complaints, information and concrete cases of incorrect implementation of EU rules and possible reservations about coming forward with such information should be looked into.

## Part I: Introduction

### I.1 General introductory remark

1. According to its mandate (see Annex 1), the Inter-institutional Monitoring Group (IIMG) "should assess the progress made on implementing the Lamfalussy process to secure a more effective regulatory system for financial services (investment services, banking and insurance" and "identify any possible emerging bottlenecks in this process".
2. Following the Inter-institutional Monitoring Group's first report of 22 March 2006, the Group has conducted a systematic evaluation of the evidence from stakeholders involved in, or associated with, the Lamfalussy process to assess the progress achieved and it has tested some of its preliminary suggestions to improve the process with selected stakeholders<sup>1</sup>.
3. In its first interim report, the Group indicated that it intends to maintain some continuity with the former Group's analysis. While some problems identified in the former Group's reports have waned, others persist and some new issues have arisen. In particular, the Group notes that in the post-FSAP<sup>2</sup> period there is a shift in focus with less emphasis on regulation and more emphasis on transposition and enforcement of existing measures<sup>3</sup>.

### I.2 Aim of the second interim report

4. Based on the analysis in the first interim report and evidence given by the stakeholders closely involved in the Lamfalussy process and market participants, this second interim report will focus on preliminary suggestions for the improvement of the process. Indeed, the first interim report focussed on specific, existing issues and reflected questions raised during the consultation phase, held from November 2005 to January 2006. This report identified a number of unresolved questions and uncertainties surrounding the procedure. Although the first interim report included some "preliminary reflections", it did not provide any conclusions at that early stage.

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<sup>1</sup> The Group held two non-public hearings to which representatives from the following interest associations were invited: Federation of European Securities Exchanges (FESE), European Savings Banks Group (ESBG), European Banking Federation (FBE), European Insurance and Reinsurance Federation (CEA) and FIN-USE Forum of user experts in the area of financial services. The hearing was also attended by Baron Alexandre Lamfalussy and representatives from the Level 3 Committees (CEBS, CEIOPS and CESR), the European Parliament, Council and Commission.

<sup>2</sup> The Financial Services Action Plan (1999-2005) consists of a series of policy objectives and specific measures to improve the Single Market for financial services.

<sup>3</sup> See the Commission's White paper on Financial Services Policy 2005-2010, available at [http://www.ec.europa.eu/internal\\_market/finances/docs/white\\_paper/white\\_paper\\_en.pdf](http://www.ec.europa.eu/internal_market/finances/docs/white_paper/white_paper_en.pdf)

### I.3 Invitation to the public to comment

5. The Inter-institutional Monitoring Group welcomes views from the public on the progress made on the implementation of the Lamfalussy process and on the preliminary views expressed by the Group in this report.
6. **With a view to its next and final report the Group invites interested parties to send contributions by Monday 26 March 2007 to the following address: IIMG-2005-2007@ec.europa.eu.** Responses will be placed on the Commission's website – unless there is an explicit request to the contrary.

Following the forthcoming assessment period, the third and final report of the IIMG will be presented in autumn 2007.

## Part II: Developments and state of play

### II.1 Developments since the last IIMG report published on 22 March 2006

7. At the time of publication of the first interim report of this Group, the open comitology issue threatened the future of the Lamfalussy process. The Group, therefore, urged all parties involved to find a sustainable resolution as soon as possible. Following a new agreement on comitology between the Institutions in June 2006, the Council amended<sup>4</sup> on 17 July 2006 the comitology decision. The Group welcomes this new agreement, which it considers to be of crucial importance for the continued functioning of the Lamfalussy process.
8. In the context of the extension of the Lamfalussy framework to all financial sectors, the ECOFIN Council called for a review of the framework in spring 2006. On 12 May 2006 the Financial Services Committee (FSC) adopted a note evaluating the progress made on the implementation of the Lamfalussy process in all sectors. The FSC's overall assessment of the Lamfalussy framework is positive although "all weaknesses and uncertainties have not disappeared". The framework is described as a "learning-by-doing process" which "has to continue to stand the test of market and institutional developments".

### II.2 Concrete achievements and current situation

9. In line with the shift in focus from the legislative part of the Lamfalussy process (Levels 1 and 2) to implementation and enforcement (Levels 3 and 4), no Level 1 legislation has been adopted since the publication of the first interim report. In the insurance sector, however, the work on the Directive codifying existing insurance Directives as part of the Solvency II project has progressed. The Commission is to present its proposal in July 2007.

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<sup>4</sup> Council Decision of 17 July 2006 amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission (2006/512/EC), OJ L 200 of 22 July 2006, p. 11

10. At Level 2, the work on implementing measures under the MiFID was finalised. Both the Commission Regulation (EC) 1278/2006 and Commission Directive 2006/73/EC were adopted on 10 August 2006. The Commission further proposed formal draft measures implementing the Transparency Directive<sup>5</sup>, which were approved by the European Securities Committee (ESC) on 17 November 2006. With regard to the Prospectus Directive<sup>6</sup>, the Commission presented – and the ESC approved – two formal draft Regulations amending the Commission implementing Regulation<sup>7</sup> to include specific provisions in respect of issuers with a complex financial history and to postpone the equivalence decision of third country accounting standards and IFRS. On 17 January 2007, the ESC voted in favour of a Commission proposal for implementing measures on eligible assets for UCITS on the basis of the UCITS III Directive from 2001, which allows for a quasi-Lamfalussy procedure at Level 2.
11. The type of activities of Level 3 Committees still differs depending on the regulatory stages and ongoing projects in the different financial services areas. With the legislative phase of the FSAP now almost in place, CESR announced<sup>8</sup> that it will concentrate its resources on operational issues intended to promote supervisory convergence. CEBS' activities are still dominated by work related to the CRD (standards, guidelines), work on a common reporting framework, but also drawing inspiration from CESR's work on a mediation scheme and shifting to issues of operational supervision. CEIOPS' major area of work remains its contributions at Level 1 and advice at Level 2 in the Lamfalussy process for the creation of a new prudential insurance regulatory framework (Solvency II project).
12. The work between CESR, CEBS and CEIOPS has been intensified following the signing of a Joint Protocol on cooperation between the three committees and the adoption of a joint annual work programme. Following the adoption of the work programme, CEBS together with CEIOPS have set up an 'Interim Working Committee on Financial Conglomerates' (IWCFC), of which CESR is an observer. As a first priority, the IWCFC will assess the current status of the Financial Conglomerates Directive's transposition and assist in the consistent application of the Directive for the conglomerates identified.
13. Following an invitation by the ECOFIN Council<sup>9</sup> "to further develop procedures and, as appropriate, general principles for resolving crossborder financial crises in the EU" the Economic and Financial Committee (EFC) has established an Ad Hoc Working Group with a view to enhance the effectiveness of EU arrangements for financial stability.
14. At Level 4, significant progress has been made regarding the transposition of Lamfalussy Directives. As at 16 January 2007, all Lamfalussy Directives<sup>10</sup> due to be transposed are now implemented into national law by all but one Member State<sup>11</sup>. The number of infringement proceedings has correspondingly decreased. There remains now only one

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<sup>5</sup> (2004/109/EC)

<sup>6</sup> (2003/71/EC)

<sup>7</sup> (EC) 809/2004

<sup>8</sup> See the 2005 Annual Report of the Committee of European Securities Regulators (CESR). This new focus of work is reflected in CESR's new Charter of July 2006.

<sup>9</sup> doc. 13547/1/06 REV 1 ECOFIN 318 ENER 221 COMPET 260 of 5 October 2006 (Council conclusions)

<sup>10</sup> The Lamfalussy Directives due to be transposed are the Market Abuse Directive (2003/6/EC) and its implementing Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, which had to be transposed by 12 October 2004; and the Prospectus Directive (2003/71/EC), with transposition deadline 1 July 2005. Two remaining Lamfalussy Directives, the MiFID (2004/39/EC) and the Transparency Directive (2004/109/EC), have to be transposed by Member States by 31 and 20 January 2007, respectively.

<sup>11</sup> See [http://ec.europa.eu/internal\\_market/securities/docs/transposition/table\\_en.pdf](http://ec.europa.eu/internal_market/securities/docs/transposition/table_en.pdf)

non-communication case – where a Member State has failed to adopt and communicate to the Commission national legislation implementing a Directive after the deadline for implementation has passed – with regard to the Prospectus Directive, in comparison to 75 open infringement procedures in March 2006. However, this figure might increase again following the expiration of the transposition deadlines of the MiFID and the Transparency Directive in January. Also, infringement proceedings regarding cases of incorrect implementation might become more frequent when more experience is gained with the implementation of Lamfalussy measures in Member States.

15. The transposition deadlines for the Transparency Directive and MiFID passed in January 2007<sup>12</sup>. Since January 2005, seven MiFID transposition workshops<sup>13</sup> have taken place. With regard to the Transparency Directive two transposition workshops were organised by the Commission on 26 June 2006 and 17 October 2006. On 1 December 2006, CESR arranged for an "implementation forum" with the competent authorities interested. Apart from that, the Commission organises bilateral meetings with some delegations who have requested assistance in country specific issues and/or replies bilaterally to questions put by Member States.

### **Part III: Preliminary suggestions for the improvement of the Lamfalussy process**

#### III.1 The Lamfalussy process at large

16. In general, the Group was strengthened in its view that the Lamfalussy process has the potential to make the rulemaking process faster and more efficient. This was supported by the views expressed by respondents who generally supported the process and welcomed the progress made so far. Improved consultation and transparency were seen as some of the most prominent achievements of the Lamfalussy process.

#### III.2 Issues specifically related to Level 1 and Level 2

##### *III.2.1 Separation of levels and the organisation of work at subsequent levels*

17. The Committee of Wise Men in its final report recommended a split between basic political choices to be laid down in a Level 1 measure and more detailed technical measures to be decided at Level 2.
18. The former IIMG in its third report concluded that "the consensus view that it is useful to restrict Level 1 measures to framework principles does not seem to sit well with the current degree of detail at Level 1." The former Group expected "that practical experience of using Level 2 in the future to amend existing legislation *and* of using Level 3 to co-ordinate detailed implementation will foster sufficient confidence that stakeholders would be prepared to accept less detail at Level 1." The Group agrees that practical experience at Level 2 and Level 3 can develop the trust and confidence needed to avoid excessive detail

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<sup>12</sup> See also footnote 10. The measures will take effect as from 1 November 2007, the application date of MiFID.

<sup>13</sup> Transposition workshops on 21 January 2005, 11 April 2006, 19 May 2006, 4 July 2006, 4 October 2006, 16 November 2006 and 24 January 2007

at Level 1, whilst adding that **Level 2 and Level 3 should strictly adhere to the framework principles and technical implementing powers set out at Level 1 in order to avoid material additions at the lower levels.**

19. The Group would like to point out that the problem of excessive detail is not limited to Level 1, but is an issue at all levels of the Lamfalussy process. This statement should not be understood as a fundamental criticism of the process. However, all parties involved in legislation and regulation must resist the temptation to regulate more than necessary. The Group concludes therefore that **regulatory self-restraint, as practiced now as part of the better regulation agenda, is essential for all levels of the Lamfalussy process** (including Level 3) and will continue to be so.
20. In its first interim report, this Group raised the question whether the distinction between basic and technical rules is a workable distinction and what mechanisms could be developed to distinguish between them. The Group has been presented with the general view that some technical issues will always be part of the political negotiations at Level 1 because of their direct economic consequences. This view should be balanced against the concern raised of excessive detail in Level 1, but also Level 2 measures. Whilst these concerns are all valid, the Group finds it crucial not to lose sight of the basic objective of the Lamfalussy process to have a rapid mechanism in place to update Community technical implementing measures to changing market conditions. **The Group recommends a practical, flexible approach, aiming at efficiency and concentrated on those issues that are politically meaningful, rather than a 'one size fits all' approach.**
21. The Group considers that even though they might be technical, some measures have a direct and substantial economic impact, which makes them politically sensitive, and will therefore be adopted at Level 1. The Group notes that in those cases Level 1 measures might not be strictly limited to pure framework principles but might pertain to other aspects substantively affecting the EU or local economy. Whilst the Group considers this to be inevitable in view of the political process, it strongly urges all involved parties to limit such cases as much as possible. In addition, consideration has to be given to those measures that require regular updates in view of new market developments, technical changes and product innovation in the financial markets, which should as much as possible be adopted at Level 2 to allow for such flexibility to adapt quickly to rapid market changes.
22. Another issue that the Group considers relevant in this respect is the sequencing of work at Level 1 and Level 2, in particular as regards parallel working. Parallel working is defined as starting preliminary work on Level 2 measures while some components of the Level 1 measure are still under debate. Although parallel working was not expressly foreseen in the report of the Committee of Wise Men, the Committee suggested that "the European Commission, whenever possible, should indicate the type of implementing details that could be covered in Level 2."
23. The benefits and problems associated with parallel working have been extensively dealt with in the former Group's reports. In its second interim report the former Group recommended "that provisional mandates for level 2 technical advice should be limited to subject matters already acceptable to the European Parliament, the Council and the Commission after the first Parliamentary reading. Provisional mandates should not be granted where issues remain still controversial."

24. **The Group sees merit in parallel working at Level 1 and 2 – provided that it does not pre-empt the decision making process at Level 1.** The Group refers in this respect to Parliament's right to 'call back' implementing measures in line with the new inter-Institutional agreement on comitology. The Group considers that parallel work on Level 2 measures while the final details of some of the components of the Level 1 measures are still under debate might not only be useful in terms of timing, but could also help to avoid excessive detail in Level 1 measures as it will uncover the aspects to be dealt with at Level 2 at an early stage, and the possible consequences Level 1 measures might have at Level 2. The Group considers that such parallel work could have been particularly beneficial in the case of MiFID, given its volume and complex nature. **This parallel working could be defined as a "sketching" of Level 2 rules** with the finalisation and formal adoption of such rules to take place only after the Level 1 texts have been formally agreed. **Such parallel working requires that Level 3 Committees get sufficient (political) guidance throughout the process** to avoid unnecessary work.
25. This sketching of Level 2 rules should explore the possibilities without trying to reach consensus on all issues. It should thus not take the form of technical advice per se, but could offer some building blocks to help the Institutions understand the practical consequences that could arise as a result of the framework legislation under discussion. At the same time, this work could serve as a basis for the final and formal technical advice after the adoption of the Level 1 measures. In order to guide this form of parallel working, the Commission should as much as possible try to indicate the type and scope of implementing details that could be covered in Level 2 in the form of a provisional mandate and EU Institutions should provide the necessary political guidance to the Level 3 Committees.
26. Despite the obvious advantages of a certain degree of parallel working at Levels 1 and 2, the Group explicitly points out that a situation has to be avoided where technicalities start to pre-empt political decision making. Conversely, the Group notes that transferring political issues that cannot be solved at Level 1 to Level 2 may endanger the Lamfalussy process. Passing on politically difficult issues to Level 2 in order to get agreement at Level 1 is just a temporary way of shifting these problems. Moreover, it imposes unsolvable difficulties on Level 3 Committees, which are not mandated to solve political issues.
27. In its first interim report, the Group noted "that the cooperation between the different bodies involved in the Lamfalussy process has largely been smooth and satisfactory" but "that there is still room for improvement". This view is in line with evidence from stakeholders, who mention in particular the timing issue as an improvement point. The Group further considers the positive impact of the new agreement on comitology on the inter-institutional cooperation.
28. The Group notes that, whilst a solution to the comitology issues was found in July 2006, the "sunset clauses" – suspending the Commission's power to adopt implementing measures several years after the entry into force of a given Directive – are still under debate. In this respect, the Group welcomes the statement by the European Parliament, the Council and the Commission which recognises "that the principles of good legislation require that implementing powers be conferred on the Commission without time-limit. However, where an adaptation is necessary within a specified period, the European Parliament, the Council and the Commission consider that a clause requesting the Commission to submit a proposal to revise or abrogate the provisions concerning the

delegation of implementing powers could strengthen the scrutiny exercised by the legislator."<sup>14</sup>

29. Time constraints at different levels of the Lamfalussy process remain an important bottleneck in the process. The former Group's conclusions in its third report anticipated "that all actors – the Institutions, market participants and end-users – will need to invest more time and resources to meet the overall objectives of the Lamfalussy process" and that "lawmakers should pay due attention to the constraints market participants face in terms of time and resources."
30. Against this background, many stakeholders have stressed that **speed of the regulatory process should not come at the expense of the quality** of the legislation. The Group agrees with this view. The Group notes that speed is not an aim in itself, whilst recognising that one of the main reasons why the Lamfalussy process was put in place was to have a rapid mechanism in place to update technical implementing measures to changing market conditions. In this respect, the Group realises that there are advantages and disadvantages related to short transposition deadlines on the one hand and allowing Member States a long time for transposing EU Directives on the other. Short deadlines could lead to significant delays in transposition, which is indeed one of the major bottlenecks in the Lamfalussy process (see also section III.4.1). Long transposition deadlines on the other hand could result in outdated rules even before they enter into force and could put EU businesses at a competitive disadvantage. The Group therefore recommends a case by case approach, considering that **deadlines should be realistic and appropriate** to ensure the transparency of the process and the quality of legislation, and allow Member States enough time for transposition, whilst taking into account the topicality of the rules and the competitive position of EU financial markets.
31. At the same time, the Group believes that a rationalisation of the consultation process (see section III.2.3) and of the regulatory procedure at Level 2 of the Lamfalussy process (*i.e.* screening of Commission draft proposals by Member States<sup>15</sup>), as well as parallel working, could speed up the regulatory process without harm to the quality of the rules in question. This would require strong commitment from all parties involved to ensure an efficient process, without unnecessary delays or duplication of work and without jeopardising the transparency and openness of the process.

### *III.2.2 Regulations versus Directives*

32. In its final report, the Committee of Wise Men considered that Regulations rather than Directives could speed up and improve the transparency and accuracy of transposition and implementation. The Committee considered that Regulations should be used whenever possible, but noted that this will not resolve all the problems. This latter argument is indeed why **this Group takes a more nuanced view on the choice of instrument** than that of the Committee.
33. The Group shares the view of the Committee in its final report that **the choice of instrument should be made by considering the pros and cons of each measure on a**

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<sup>14</sup> Statement by the European Parliament, the Council and the Commission concerning the Decision of 17 July 2006, OJ C 255 21.10.2006, p. 1

<sup>15</sup> In the case of the Transparency Directive, all of the revised draft implementing measures were submitted for screening by the Member States via the ESC, taking approximately 6 weeks each time.

**case by case basis.** This choice should depend on the policy objective pursued and should be related to the ease with which a rule may be implemented at the national level (*e.g.* rules that pertain to criminal or tax law would be difficult to implement because of large differences between Member States in these areas). Directives allow Member States to adopt national implementing measures that take into account their regulatory system. Indeed, according to Article 249 of the Treaty establishing the European Community "a regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."

34. Because of the vast and diverse nature of the Internal Market, the Group believes that the choice of instrument should remain flexible. In fact, **the Group believes that the choice of instrument in itself is not paramount to the outcome** and considers that a (maximum harmonisation) Directive could in certain instances have the same result as a Regulation. The Group considers it nevertheless useful to identify some **guiding principles** for the choice between Directives and Regulations.
- i. Measures that target a specific area of the Internal Market would seem more appropriate for the use of a Regulation than measures that would affect a whole sector (*e.g.* the technical Regulation (EC) 809/2004 implementing the Prospectus Directive 2003/71/EC). Such rules would have to be legally and technically exhaustive to allow direct application in Member States.
  - ii. Because they might be quicker to become applicable, Regulations could be used when an action requires immediate effect. Actions that need more time for Member States to adapt, could better take the form of a Directive. The Group notes in this respect that European law is not being created on a green field. It is almost always confronted with mature legal structures and a plethora of existing regulations. If a Regulation is directly applied, the resulting time gap could temporarily leave in place existing conflicting legislation, posing – in the absence of a decision by the courts – a problem of legal certainty.
  - iii. In areas where legislation based on local specificities exists which might differ substantially between Member States Directives should be used to allow Member States to take account of their regulatory system when implementing those rules. Moreover, the subsidiarity principle, which is intended to ensure that decisions are taken as closely as possible to the citizen, requires that careful consideration is given to the question of whether the use of a Regulation is justified. However, the Group notes that this flexibility to adopt rules that take account of local specificities should not jeopardise competition under the new rules, *e.g.* by restricting market access or by promoting 'national champions'. In relatively new policy areas or areas in which a high degree of harmonisation already exists, the use of a Regulation could be considered. Also, the Group considers that in the case of measures that aim to apply standards agreed by international organisations, the use of a Regulation might be considered (*e.g.* the IAS Regulation (EC) 1606/2002 concerning the application of international accounting standards).
35. By way of testing its views, the Group has asked stakeholders whether the CRD could instead have been drawn up as a Regulation. It was said that this would have been partly possible, but not in one piece of legislation. The reason for this would be the existence of

minimum harmonisation requirements, options and national discretions in the current text, which would be inappropriate to use in a Regulation. Maximum harmonisation requirements could have been included in a Regulation, but the latter would then have covered only a small part of the legislation. This was considered suboptimal in view of the principles of better regulation, in particular as regards transparency.

### *III.2.3 Consultation*

36. Consultation is the cornerstone of the Lamfalussy process. Stakeholders expressed strong support for improved consultation under the Lamfalussy process. The Group shares this positive view and offers suggestions for a rationalisation of the consultation process. The Group is not convinced that with the completion of the legislative phase of the FSAP, concerns related to timing and resources needed for consultation are still a problem today. The recommendations in this section should therefore be seen as suggestions to fine-tune the process.
37. All respondents were generally positive about the improved transparency and consultation mechanisms, which were seen as a major achievement of the Lamfalussy process. The Group agrees with those who believe that **consultation should be kept at all levels**, but considers that **the number of consultations at each level might be optimised** to avoid overlaps. In fact, as one contributor put it, it is the end result that counts.
38. The preparation of technical advice requires broad consultation of market participants by the Level 3 Committees. CESR informed the Group that it has a three level system in place for consultation. As soon as CESR receives a mandate from the Commission to provide technical advice, this mandate is published to collect views from all interested parties. CESR then prepares consultation papers for public comments. If considered necessary, CESR might even re-consult the public before the final technical advice is transmitted to the Commission. Subsequently, it is up to the Commission to draft legally-binding rules, taking full account of the technical advice but without losing its right of initiative. Such draft texts are then made available to the public for comments before a formal draft of Level 2 legislation is submitted for scrutiny by the relevant Level 2 Committee. This invitation to the public to comment on Commission draft legislative proposals is usually free of any format and does not ask respondents to reply to specific questions. Stakeholders are free to provide any comment they find relevant on the basis of the consultation document. The Group considers that should the Commission ask specific questions in its consultation documents, these **questions should only concern the issues where the Commission's proposal deviates** in any material respect from the Level 3 Committees' technical advice.
39. The Group notes that the Commission has underlined the different role<sup>16</sup> of the Commission and the Level 3 Committees in the Lamfalussy process and noted that the consultations are based on different documents and occur at different stages in the process. The Group takes note that the Commission is strongly in favour of keeping a full consultation process on Commission proposals on possible implementing measures. The Group further notes that the draft working documents setting out the Commission's ideas for a proposal are often accompanied by an explanatory statement setting out the principal

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<sup>16</sup> The Commission has a right of initiative at Level 1 and a legislative role at Level 2. It is in that context that the Commission consults stakeholders on the basis of its own consultation documents. These documents may deviate from the Level 3 Committees' advice. The Commission then draws up formal draft measures.

differences between the working documents and CESR's technical advice<sup>17</sup>. **The Group urges the Commission to provide such explanatory statements in all cases where it deviates from the Level 3 Committee's advice.** The Group considers that the close cooperation between the Commission and the Level 3 Committees should be continued at all levels, in particular during the time when the Level 3 Committees are working on the Commission's mandate. It could facilitate the work of the Level 3 Committees in their advisory role and that of the Commission at Level 2 by increasing mutual understanding of what is expected in terms of output, without dictating the outcome of the decision making process at Level 2.

40. In line with its observations in the first report, the Group considered the problem of a lack of consumer representation in the consultation process and possible ways to enhance the involvement of end-users. The Group notes with satisfaction that the representation of consumers and end-users in expert groups is increasing<sup>18</sup>. It also welcomes the recent creation of the Financial Services Consumer Group (FSCG)<sup>19</sup>, aimed at setting up a forum to discuss financial services policies and proposals of particular relevance to consumers.
41. In the view of the Group, however, more needs to be done. The Group welcomes the valuable contribution of consumer groups, but is considering whether this could be supplemented by **direct consumer input**, *i.e.* not via formal panels. The Group will reflect on the advantages and limitations of such a direct approach and, in particular, with what means and methods this could be done.

#### *III.2.4 Better regulation: impact assessment*

42. In its first interim report, the Group raised the question of whether impact assessments for each individual implementing measure are possible and useful. **The Group recommends that impact assessments are indeed carried out at all levels in the case of any significant measure being proposed at Level 2 and 3.**
43. The Group was informed about the Communication 'A Strategic Review of Better Regulation in the European Union' which was recently adopted by the Commission. The Communication aims to ensure better quality of Commission impact assessments by, inter alia, the creation of an independent Impact Assessment Board (IAB) which will start work immediately. The IAB will examine draft impact assessments and provide an opinion on the quality and advice on further work that may be necessary. This work will be extended to offer advice on approach and methodology and to issue "prompt letters" on additional initiatives that could be subject to impact assessment. The IAB will consist of a group of high-level officials working under the direct authority of the President of the European Commission and should function independently of departmental influence. The opinions of the Board and its prompt letters will be made available to the general public. The Group believes that **the creation of the IAB could contribute to address the concerns raised by stakeholders**, in particular regarding the objectivity of impact assessment.

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<sup>17</sup> See for example the explanatory notes to working documents preparing for draft implementing measures for MiFID. All working documents and the explanatory notes are available at [http://ec.europa.eu/internal\\_market/securities/isd/mifid2\\_en.htm](http://ec.europa.eu/internal_market/securities/isd/mifid2_en.htm).

<sup>18</sup> e.g. on mortgage credit, asset management, and consumer mobility in relation to bank accounts

<sup>19</sup> The FSCG is a sub-group of the European Consumer Consultative Group (ECCG); it brings together representatives of consumer organisations from each of the Member States and those active at EU level. See also: [http://ec.europa.eu/internal\\_market/finances/fscg/index\\_en.htm](http://ec.europa.eu/internal_market/finances/fscg/index_en.htm).

44. The Group notes that such ex-ante impact assessment to ensure good regulation and to evaluate the need for regulation in a transparent way is part of the better regulation agenda. A no less crucial part is the broader issue of assessing if and how regulation is achieving its goals. The Group attaches much weight to this ex-post quality assessment. Instead of focussing only on individual measures, **the Group suggests a broad approach to evaluate the impact of the whole financial services regulatory portfolio**, also in the longer term. Such an analysis should take into account the broader objective of the Lamfalussy process, which includes improving the integration of the EU financial markets, as well as enhancing the soundness, safety and effectiveness of the financial sector in the EU. The Group encourages the development of a process to carry out such an ex-post quality assessment. In this respect, the Group notes the ongoing Commission's evaluation of the FSAP, which constitutes an exhaustive analysis of the impact of the FSAP<sup>20</sup>.

### II.3 Issues specifically related to Level 3

45. To date, experience with the Lamfalussy process is still limited, especially at Level 3 and Level 4. It is this part of the Lamfalussy process where much of the coming activity will be concentrated. A crucial part of the process will be how well the national supervisors organise cooperation to promote the convergence of day-to-day supervisory practices. Assessing progress made at Level 3 will be even more difficult than at Level 1 and 2.

46. Several initiatives were developed recently to underpin the work on supervisory cooperation and convergence. In February 2006 the Financial Services Committee (FSC) delivered its report<sup>21</sup> on how the existing framework for financial regulation and supervision should be developed over the next few years. This report was endorsed by the ECOFIN Council on 5 May 2006<sup>22</sup>. The report highlights the main challenges and the concrete steps that could be taken in the near future to further develop supervisory arrangements in the EU. The report proposes implementing some practical tools aimed at fostering a European supervisory culture, including a non-binding mediation mechanism for supervisors, the use on a voluntary basis of delegation between supervisors and streamlining of reporting requirements for cross border business. In line with the Council conclusions, the FSC will report to the Council annually on the progress made in implementation of the recommendations outlined in the FSC report.

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<sup>20</sup> The European Commission has published Part I of its FSAP evaluation (see [http://ec.europa.eu/internal\\_market/finances/docs/actionplan/index/051028\\_fsap\\_evaluation\\_part\\_i\\_en.pdf](http://ec.europa.eu/internal_market/finances/docs/actionplan/index/051028_fsap_evaluation_part_i_en.pdf)) which focuses on the process of adoption of the measures put forward in the Action Plan. In preparation of the second part of the evaluation of the Financial Services Action Plan, namely an evaluation of the economic impact of the FSAP, the Commission organised a Workshop on Methodology on 25 October 2006. The results of this workshop are available at [http://ec.europa.eu/internal\\_market/finances/actionplan/index\\_en.htm#actionplan](http://ec.europa.eu/internal_market/finances/actionplan/index_en.htm#actionplan).

<sup>21</sup> doc. FSC 4159/06

<sup>22</sup> doc. 8798/06 EF 10 ECOFIN 141 (Council conclusions)

### III.3.1 Functioning of Level 3 Committees

47. The Group welcomes Level 3 Committees' first initiatives to enhance their common European culture and practice (*e.g.* CESR's, CEIOPS' and CEBS' initiative for a common EU training programme) and **strongly urges supervisors to make progress in these fields** and national governments to show the necessary **political commitment in monitoring and defining these EU priorities for financial supervision**. The Group also notes that the problem of costs of EU tools needed for cooperation should be addressed at the political level.
48. The Group believes that the Level 3 Committees are making real progress in achieving supervisory convergence, but notes that **an additional effort is needed to increase cooperation between supervisors**. New legislation is coming into force which lays the groundwork for further supervisory cooperation (*e.g.* CRD, MiFID) to achieve a coherent cross-border approach. The Group notes that progress in this area is a crucial part of the implementation of the Lamfalussy process in the coming period. The hearings have indicated different areas in which stakeholders believe that progress could and should be accelerated. Therefore, **the Group will reflect on this issue and come back to it in more detail in its final report**.
49. The Group stresses that **an enhancement of confidence and better incentives could improve supervisory cooperation and a stronger European commitment** by the Level 3 Committee Members. To succeed in this task, **the Level 3 Committees need to receive active political support**. The Group sees a need for a strong political commitment, setting out how this process is to progress. The Group is of the view that this necessitates a further development of Level 3 Committees' capacity to act collectively. This may imply recommendations by the relevant Level 3 Committee especially in areas where its experience, expertise or authority are unique.
50. CESR reported to the Group difficulties related to a lack of means to finance cooperation tools foreseen in Level 1 legislation. Indeed, **the budget constraint appears to be real and a prerequisite for further development is that it is solved**. The other Level 3 Committees indicated that similar financing issues have not arisen in their sectors.
51. In its first interim report, the Group noted a general acceleration in cross-sector information exchange and overall cooperation. The Group remains of the view that this is a crucial development and encourages the Level 3 Committees to continue this evolution of cross-sector cooperation. In this respect, the Group notes that to date no formal solution has been found to the organisation of work on financial conglomerates and repeats that it considers it important that a quick decision is reached on this issue.
52. The Group notes that the European financial supervisors at the national level clearly are mandated by (and accountable to) their national governments/Parliaments to protect and support the proper functioning of national financial markets. A similar clear-cut mission statement seems to be missing for the European dimension of their activities. Intensifying European market integration, however, will make it increasingly necessary that these supervisors feel their responsibilities for the European context, too. In order to highlight the European dimension of their commitment, the Group considers that it might be helpful for the further development of convergence in European supervisory practices, if at the level of the Member States **a clear task to support the European convergence process is added to the mission statement of the relevant supervisory authorities**.

### III.4 Issues specifically related to Level 4

#### III.4.1 Transposition and enforcement

53. The Group is of the view that **implementation of EU legislation to date has not lived up to the expectations raised by the Lamfalussy process in terms of timing**. As possible reasons for delayed transposition, the Group mentions excessive detail in legislation and tight timeframes for transposition of EU Directives. The translation lag may also be considered as a possible reason for delayed transposition. In any case, the timing for implementation of Level 1 and Level 2 measures and its effects on actors and users should be properly assessed by EU Institutions before defining the deadlines for implementation<sup>23</sup>. At the same time, the Group stresses that **the main responsibility for timely and correct transposition then lies with the Member States**.
54. Another issue the Group considers relevant in this respect are cases of so-called *goldplating*. According to the definition used in the Group's first interim report, the term *goldplating* generally "covers regulatory additions made while implementing in national law rules which were adopted at European level under a maximum harmonization regime." The Group noted in its first report that "this has to be distinguished from those cases where the European rules do not follow a maximum harmonization approach and leave room for adapting the European framework to national legal and market structures." In order to avoid *goldplating* as defined above, the Group believes that any Directive should always clearly spell out the level of harmonisation that it intends to achieve. The Group considers that some **practical mechanisms to enable or enforce transparency of how Member States are transposing EU legislation could be helpful in showing apparent differences between Member States** in the implementation of EU rules. Such measures could curb regulatory additions to EU legislation by Member States through peer pressure or pressure from the markets.
55. The Group considers the following to be a useful example in this respect. The CRD (Article 144) requires that supervisors disclose publicly laws, regulations and other data on prudential supervision, sufficient to allow a meaningful comparison across Member States, in a common format, and available in one electronic location (*i.e.* website). CEBS has taken on this task with its Supervisory Disclosure framework that makes public how each Member State exercises the options and national discretions available in EU banking legislation and the general criteria and methodologies used by national authorities. It provides a direct read-across between the individual articles in the CRD linked to the corresponding provisions in the national implementing laws on an article by article basis (with English translations where available). In a similar vein, the Commission has recently opened a publicly available internet database giving access to national laws implementing EU financial services Directives<sup>24</sup>. To give a complete picture, **the Group invites CEBS to extend its work to disclose information relating to prudential supervision that is not part of the CRD, and the other Level 3 Committees to develop similar tools for other financial services Directives**.

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<sup>23</sup> Cf. the case for postponement of implementation of the MiFID and the Level 2 measures implementing the Transparency Directive, which will be adopted only shortly before the expiration of the transposition deadline of the Level 1 Directive.

<sup>24</sup> [http://ec.europa.eu/internal\\_market/finances/actionplan/index\\_en.htm#transposition](http://ec.europa.eu/internal_market/finances/actionplan/index_en.htm#transposition)

56. A major bottleneck in this respect is the fact that transposition texts are usually only available in the national language of Member States, making it more difficult to read through and compare legal texts. Also, the absence – in most cases – of transposition tables showing the link between provisions in the Directives and the corresponding provisions in national law makes it difficult to appreciate the way in which an EU legal text has been implemented at the national level. **The Group therefore urges Member States to provide transposition tables in one of the Commission's working languages and in a common format** that show the provisions of an EU Directive and the national transposing text juxtaposed. The Group further notes that **the issue of translation is a real bottleneck in the Lamfalussy process** which draws heavily on Commission resources when assessing transposition in Member States. In addition, the translation bottleneck is observed in all three Institutions and could lead to delays in the overall process, *i.e.* when finalising Level 1 legislation. In this respect the Group strongly agrees with the former Group's conclusion in its third report that "sufficient resources must be made available within the EU Institutions to ensure that legislative and consultative processes are not jeopardised by translation delays."
57. The Group was strengthened in its view that increased transparency regarding cases of incorrect transposition could help improve proper transposition by Member States. As for the question which body is best placed to provide information about such cases – the Commission as guardian of the Treaty or the Level 3 Committees as part of their day-to-day activities, the views expressed indicated that the Commission would be best placed to collect and disclose the information, given its neutral stance regarding national interests. Whilst the Group understand this view, it sees merit in initiatives such as CEBS' Supervisory Disclosure framework. The Group therefore wishes to gather more evidence from those involved in the Lamfalussy process, before it takes even a preliminary view on this issue.
58. The Group is aware that there is strong support for the transposition workshops organised by the Commission and Level 3 Committees. The Group considers that these are a powerful tool to improve the consistency of transposition and implementation by Member States, and iron out potential problems at an early stage. **The Group encourages the Commission and the Level 3 Committees to continue this good practice and to organise transposition workshops immediately after the adoption of Level 2 implementing measures.**
59. In its White Paper on Financial Services Policy (2005-2010), the Commission indicated that its post-FSAP strategy will be characterised by greater emphasis on transposition and enforcement of existing measures<sup>25</sup>. This new focus requires more resources to be devoted to the task by the relevant Commission services and a bold reaction to breaches of Community Law. The Group is of the view that **the Commission should allocate sufficient staff to checking the accurate transposition of agreed legislation and to infringement procedures in the event of faulty implementation.**
60. The Group also stresses the role of Member States, the European Parliament, supervisors and the private sector in improving enforcement of agreed legislation by putting forward complaints, information and concrete cases of incorrect implementation of Community

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<sup>25</sup> See footnote 3

rules<sup>26</sup>. Despite the confidentiality of the complaint process, the private sector might be reluctant to come forward for fear of jeopardizing business opportunities or suffering retribution. **The Group therefore invites the Commission to consider ways to address such concerns within the framework of the current complaint networks.**

### III.5 Other issues

61. In the course of its work, the Group has come across issues which the Group believes deserve further attention, but which fall outside the scope of its mandate. In particular, the Group noted that the highly complex and heavily structured institutional set-up of the Lamfalussy process may contain points of weakness in the pursuit of the ultimate objective of securing a more effective regulatory system for financial services. More specifically, it might be appropriate to establish selected fora, drawing experience from existing institutions/levels, to consider particular issues with a view to ensuring a broad overall framework to evaluate the impact of the whole financial services regulatory portfolio. This observation is prompted by the growing interdependence of intermediaries and markets and the gradual disappearance of rigid institutional barriers. Issues which might benefit from such an integrated supervisory assessment are, for example, (i) hedge funds and their impact on financial stability; (ii) procyclicality of the financial system in light of increasing emphasis on risk-related capital requirements for financial intermediaries.
62. The Group would also like to raise the question of whether the Level 3 Committees should be able to take initiative and provide advice without a mandate from the Commission and whether they should be able to propose amendments to legal texts. Although the Group considers the issue to fall outside its remit, the Group suggests that some autonomous capacity of Level 3 Committees to draw the attention of competent authorities and notably the Commission to deficiencies in texts or their implementation could be welcome.

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<sup>26</sup> Cf. the recommendation regarding this issue in the final report of the Committee of Wise Men on the regulation of European securities markets, p. 40, available at [http://www.ec.europa.eu/internal\\_market/securities/docs/lamfalussy/wisemen/final-report-wise-men\\_en.pdf](http://www.ec.europa.eu/internal_market/securities/docs/lamfalussy/wisemen/final-report-wise-men_en.pdf)

### **Questions for consultation**

- 1. What are your views on the Group's preliminary recommendations and conclusions?*
- 2. The Group is interested in further concrete indicators that could help while separating Level 1 and Level 2 measures. What would be your suggestions?*
- 3. Do you believe a direct approach could help to improve consumer input in the consultation process? Do you have any other suggestions on how to get end-users' input?*
- 4. How much progress has been made in achieving appropriate supervisory cooperation and how far should supervisory convergence extend? If appropriate, what can be done to enhance cooperation and what are the obstacles?*
- 5. Which body is best placed to provide information on cases of incorrect transposition by Member States – the Commission as a guardian of the Treaty or the Level 3 Committees as part of their day-to-day activities, and why?*
- 6. How could the role of Member States, the European Parliament, supervisors and the private sector in improving enforcement of agreed legislation by putting forward complaints, information and concrete cases of incorrect implementation of Community rules be further enhanced?*

## **Annex 1**

### Inter Institutional Monitoring Group

#### Mandate

In line with the report of the “Wise men Group” chaired by Baron Lamfalussy, the Stockholm European Council Resolution and the Commission's commitments to the European Parliament on how to implement the Lamfalussy process, the Inter Institutional Monitoring Group should:

- Assess the progress made on implementing the Lamfalussy process to secure a more effective regulatory system for financial services (investment services, banking and insurance);
- Identify any possible emerging bottlenecks in this process.

The Group shall begin working as soon as possible, and shall function until 31 December 2007. Following the expiration of the mandate the Parliament, the Commission and the Council may agree its extension and/or revision.

The Group should report results to the Institutions annually and the reports should be made public on the Internet.

The Group should:

- Consist of 6 independent external experts of which two should be appointed by each Institution bearing in mind the multi-sectoral remit of the Group, and the need for a professional and geographical balance;
- Nominate a chairman among its members.

Members of the Group should receive travel expenses and per diem allowances paid by each Institution.

A light secretariat will support the Group in preparing their reports. The Commission will ensure the secretariat with full participation of the European Parliament and the Council.