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ABA PROJECT ON THE EU ADMINISTRATIVE RULEMAKING PROCESS

FINANCIAL SERVICES FIELD REPORT

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I. Introduction

This paper describes the administrative rulemaking process in the European Union ("EU") in the area of financial services. In accordance with the design of this project, the description focuses on the administrative process by which the European Commission proposes EU legislation on financial services in the form of directives or regulations - for adoption by the Council of Ministers and, in most cases, the European Parliament - and by which the Commission adopts implementing measures under powers conferred by that legislation. It does not seek to describe the legislative process by which the Council of Ministers and, where relevant, the European Parliament adopt legislation proposed by the Commission.

The description of the EU rulemaking process in the area of financial services is inevitably linked to a description of the development and implementation of the European Financial Services Action Plan ("FSAP"), launched in 1999.¹ The FSAP set out a framework for action by 2005 on 42 legislative and non-legislative measures aimed at achieving progress towards a single financial market in the EU. For the most part, these measures have now passed through the EU legislative process² and the development and implementation of the FSAP is a working illustration of how the EU creates and implements policy through legislation in a particular sector.

The description also discusses the recommendations made in 2001 by the Committee of Wise Men on the Regulation of European Securities Markets, chaired by Baron Alexandre Lamfalussy.³ The Lamfalussy report has had a significant impact on the rulemaking process, in particular because of its emphasis on the need for greater consultation and on the greater use of so-called "comitology" powers, under which EU legislation would give the Commission powers to adopt implementing measures in conjunction with new advisory and regulatory committees.⁴ Although the Lamfalussy report focused on securities market regulation, it has also had a wider impact on the regulation of other areas within the financial services sector.

In addition, it is not possible to describe the EU rulemaking process in the area of financial services without placing it in an international context. Discussions and recommendations in international fora have had a significant influence on the development of EU policy. The most striking example is the development of the new capital framework for EU banks and investment firms where the EU rulemaking process has worked in parallel over an extended period with the development by the Basel Committee on Banking Supervision (the "Basel Committee") of its new capital adequacy framework for internationally active banks, commonly known as Basel II.⁵ However, there has also been a significant relationship

¹ Commission Communication, Financial Services: Implementing the Framework for Financial Markets: Action Plan, COM(1999)232, 11.05.99.

² See the Commission's Tenth Progress Report on the FSAP, Turning the Corner - Preparing the challenge of the next phase of European capital market integration, 2.11.2004, available on the Commission's website at http://europa.eu.int/comm/internal_market/securities/overview_en.htm

³ Final Report of the Committee of Wise Men on the Regulation of European Securities Markets, 15 February 2001 (the "Lamfalussy report"), available on the Commission's website at http://europa.eu.int/comm/internal_market/securities/lamfalussy/index_en.htm

⁴ Under Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ L 184, 17.7.1999, p. 23.

⁵ Basel Committee on Banking Supervision, International Convergence of Capital Measurement and Capital Standards: A Revised Framework (June 2004).

between the development of EU policy and the policy initiatives of other bodies, such as the International Accounting Standards Board ("IASB"), the International Organisation of Securities Commissions ("IOSCO") and the Financial Action Task Force ("FATF"), as well as those of regulators in other jurisdictions, notably the United States.

It is also important to see the rulemaking process against the backdrop of recent market shocks. For example, the technology stock boom and bust, the terrorist attacks on the US on 11 September 2001 and corporate scandals in the US (Enron, Worldcom) and Europe (Parmalat) all have had an influence on the ongoing EU rulemaking process in financial services. One outcome of these events has been a broader international regulatory and industry debate about a diverse range of subjects, including research analysts, market abuse, money laundering and terrorist finance and corporate governance that has been reflected in the EU policy making process.

Similarly, changes in the industry and market structure have had a major influence on regulatory policy. For example, the blurring of boundaries between banking, securities and insurance businesses, the formation of financial conglomerates, the mergers or proposed mergers of stock exchanges (e.g. the formation of Euronext and the unsuccessful bids by Deutsche Börse for the London Stock Exchange), the integration of clearing and settlement systems (e.g. in Euroclear and Deutsche Börse Clearing and Cedel International to form Clearstream) and the threatened rise in importance of alternative trading systems have all provided their own stimulus to the policy making process.

Moreover, in recent years, there have been changes in national regulatory structures in Europe, reflecting developing domestic regulatory agenda or scandals, as well as in response to developments at the EU level. In particular, the consolidation of separate domestic banking, securities and insurance regulators has changed the institutional structure of financial services regulation in a number of member states, most notably in the UK and Germany with the formation of the Financial Services Authority and the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*) with responsibilities across all three financial services sectors.

The EU rulemaking process is thus intertwined with the wider national and international regulatory debate. The EU process sometimes leads. At other times, it works in parallel or lags behind and is informed by developments elsewhere. This reflects the nature of the financial services industry and markets, which are both global and highly localised. This has implications for interested parties seeking to participate in the rulemaking process, because it emphasises that it is usually not enough merely to participate in the EU process or to treat the European Commission as if it were a wholly independent regulatory actor. Participation in the policy formation process requires participation in discussions in a range of fora, both within member states and third countries and at the EU and international level.

The rulemaking process has particular current significance as the European Commission sets its policy agenda for 2005-10 for financial services in the wake of the FSAP. The Commission's 2005 white paper places a better regulation agenda at the heart of the policy process for the post-FSAP era and includes a commitment to:

"deploy the most open, transparent, evidence based policy-making based on a dual commitment to open consultation and impact assessments, so to ensure sound rules are drawn up, adding value to the EU's financial services sector and consumers."⁶

⁶ European Commission, White Paper on Financial Services 2005-10 (December 2005), COM(2005) 629 final p. 4.

II. The Financial Services Action Plan

A. The Development of the FSAP

The financial services sector had already been the subject of previous EU legislative initiatives, notably as part of the so-called 1992 programme, which had led to the adoption of extensive legislation in the late 1980s and early 1990s covering the banking, securities and insurance sectors. At the core of much of this legislation was the idea of harmonising essential elements of the authorisation and prudential systems in member states with a view to achieving the mutual recognition of those systems. In particular, the aim was to give banks, securities firms and insurance companies authorised in one member state a "passport" to operate throughout the EU on the basis of their authorisation in their "home member state" without the need for further authorisation in other member states.⁷

Nevertheless, it was clear that the EU's financial markets remained segmented and that the EU was still a long way from achieving the potential benefits of the single market in financial services.⁸ Integration of financial markets was seen as offering opportunities to foster economic growth. Financial services firms were major employers in their own right and integration of financial markets was seen as creating new business opportunities, while increased competition would give users of financial services better value for money. Financial markets were also seen as important in optimising the allocation of capital and facilitating access to equity finance and risk capital to small and medium sized enterprises ("SMEs") and start-up companies.

The introduction of the euro as the single currency of eleven member states on 1 January 1999 reduced the importance of one major source of segmentation - separate currencies - and increased the potential benefits of further integration. However, it also created an impetus to readdress the issue of financial sector integration. A single currency needed a more integrated financial market.

These considerations and the actions to be taken in response to them emerged as a result of a process instituted by the European Commission in the mid-1990s following the implementation of the earlier financial services directives, including public consultation on the proposed direction of financial services policy.⁹ The European Council reinforced the process at its meeting in Cardiff in June 1998 when it invited the Commission "to table a framework for action ... to improve the single market in financial services",¹⁰ in response to which the Commission published a communication identifying a range of issues which, in its view, called for urgent action.¹¹ The European Council meeting at Vienna in December 1998 called for this process to be translated into a concrete and urgent work programme and a Financial Services Policy Group ("FSPG") was constituted, consisting of representatives of ECOFIN

⁷ See e.g. Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions, OJ L216 26.5.2000, p. 1, consolidating several earlier directives and Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field, OJ L141 6.11.1993, p. 27 .

⁸ See discussion in Commission Communication, Financial Services: Building a Framework for Action COM(1998) 625, 28.10.1998.

⁹ See e.g. Commission Green Paper on financial services: meeting consumers expectations, COM(96) 209, 22.5.96, calling for responses by 15 October 1996 and the follow up Commission Communication, Financial Services - Enhancing Consumer Confidence, COM COM(97) 309, 26.6.1997.

¹⁰ Point 17 of Presidency Conclusions, Cardiff European Council, 15 and 16 June 1999, available on the Council website at http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/54315.pdf

¹¹ Commission Communication, Financial Services: Building a Framework for Action, supra note 8.

ministers and the European Central Bank, under the chairmanship of the European Commission, to assist the Commission in selecting priorities.

The Commission set out the output of this work in May 1999 in a communication¹² containing a possible work programme, which aimed to confirm the objectives to guide financial services policy over the coming years, to assign a relative order of priorities and an indicative timescale for their achievement and to identify a number of mechanisms which may contribute to their realisation. The key part of the document was its annexed action plan, which represented an "aspirational programme for rapid progress towards a single financial market".¹³ The action plan set out in the annex:

- identified a series of 42 individual legislative and non-legislative measures that would contribute to the achievement of the objective under the broad headings of wholesale markets, retail markets and sound supervisory structures;
- prioritised those actions as priority 1 (calling for immediate attention), priority 2 (important) or priority 3 (requiring new work with a view to finalising a coherent policy);
- identified the principal bodies required to act; and
- set a timeframe for each step towards adoption of the relevant measure (including a timetable for preliminary consultation, the submission of a formal legislative proposal and the formal adoption of the measure).

The Communication also indicated that it was not enough to identify and prioritise specific policy initiatives. It sought to initiate a change in the process by which financial services legislation was developed. Specifically, it sought to identify mechanisms which would avoid a piecemeal and reactive approach, protracted decision making processes and inflexible and overly prescriptive legislative solutions. The Commission indicated that it would seek to consider steps to update priorities and identify future challenges, using a forum group like the FSPG as well as a high level forum to take soundings from principal interest groups, working with the national regulatory bodies and industry experts to develop technical solutions and seeking to implement agreed solutions speedily, to speed up the legislative process and to develop legislative drafting techniques to minimise inflexibility.

The FSAP received political support from the European Council at its meeting in Cologne in June 1999¹⁴ and from the European Parliament. This political support was given renewed emphasis at the Lisbon meeting of the European Council in March 2000 at which the Council declared that the EU had:

"set itself a new strategic goal for the next decade: to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion."¹⁵

¹² Commission Communication, Financial Services: Implementing the Framework for Financial Markets: Action Plan, supra note 1.

¹³ Commission Communication, Financial Services: Implementing the Framework for Financial Markets: Action Plan, supra note 1, p 4.

¹⁴ Points 25 and 26 of Presidency Conclusions, Cologne European Council, 3 and 4 June 1999, available on the Council website at http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/57886.pdf

¹⁵ Point 5 of the Presidency Conclusions, Lisbon European Council, 23 and 24 March 2000, available on the Council website at http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/00100-r1.en0.htm

At the Lisbon summit, the European Council identified reform in the financial services sector as a key step towards this overall stated goal. It emphasised the importance of efficient and transparent financial markets in fostering growth and employment by better allocation of capital and reducing its cost and their essential role in fuelling new ideas, supporting entrepreneurial culture and promoting access to and use of new technologies. Most importantly, it required the acceleration of the programme for completion of the single market in financial services and set a deadline for completion of the FSAP by 2005.¹⁶

B. Steering the Implementation of the FSAP

The implementation of the FSAP by 2005 clearly represented a major challenge. The Commission had relatively limited resources and the timetable was demanding. In the past, directives had sometimes taken several years just to pass through the legislative process and many of the initiatives identified in the FSAP required significant policy development before they could even be the subject of a formal legislative proposal.

In order to assist the Commission in this task, the FSPG was given a renewed mandate to work with the Commission and to develop consensus between national ministries involved in financial services regulation and to monitor progress on the implementation of the FSAP. The discussions of the FSPG were the subject of public communications in order to inform interested parties of the general nature of the issues discussed.¹⁷

The Commission reported regularly to the Council and the European Parliament on the progress on implementing the FSAP.¹⁸ These published progress reports aimed to highlight the Commission's views on obstacles arising in the implementation programme, including failures to meet the timetable, as well as new issues or additions to the plan.

At an early stage, the Commission announced the creation of a number of "Forum Groups" of market experts to assist the Commission in identifying imperfections and practical obstacles to the functioning of specific areas in the single market.¹⁹ These forum groups involved selected representatives of market participants in discussing the possible broad outlines of policy on a number of selected topics within the FSAP, including the reform of the Investment Services Directive, market manipulation, the cross-border use of collateral, information for purchasers of financial services, barriers to retail financial services and facilitating cross-border corporate financial services. Although the groups were free to discuss other topics, the discussions were based on issues papers presented by the Commission.²⁰

The development of the FSAP is chronicled in the Commission's progress reports, which illustrate the use of a range of different techniques for managing the process:

- The European Council and the Council of Ministers (Ecofin) remained engaged throughout the process, regularly receiving reports and issuing guidance and resetting priorities.

¹⁶ Points 20 and 21 of the Presidency Conclusions, Lisbon European Council, supra note 15.

¹⁷ The communications relating to the first meeting (28 January 1999) to the fifteenth meeting (17 May 2002) of the FSPG are available on the Commission's website at http://europa.eu.int/comm/internal_market/finances/actionplan/index_en.htm

¹⁸ The Commission's ten Progress Reports on the Financial Services Action Plan (from December 1999 to June 2004) are available on the Commission's website at http://europa.eu.int/comm/internal_market/finances/actionplan/index_en.htm

¹⁹ See the Commission's first Progress Report on the Financial Services Action Plan, 29.11.1999, see supra note 18.

²⁰ These issues papers are available on the Commission website at http://europa.eu.int/comm/internal_market/finances/actionplan/index_en.htm

- The Commission also engaged in a continuous resetting of short-term and longer term priorities for action, identifying specific steps for it and other actors and a timetable for taking those steps, as well as identifying where slippages were occurring in the process.²¹
- A high level group (the "2005 Group") was set up to help improve institutional co-ordination between the Commission, the Council of Ministers and the European Parliament.²² The informal group comprised the chair of the Economic and Monetary Affairs Committee, representatives of the then current and incoming presidencies and the Commissioner in charge of financial services.
- There was also a process of interim stocktaking on progress, most notably the mid-term review in February 2002, at which industry and user representatives were able to engage in a dialogue with the Commission on the progress on the FSAP to date.²³
- The process was informed by a number of reports which highlighted particular policy perspectives or approaches. For example, the Economic and Finance Committee's report on financial stability which was endorsed and published by the Ecofin Council at its informal meeting in Lisbon in 2000 was cited as supporting the need to strengthen co-operation between national regulators to respond to cross-border problems and to develop common supervisory approaches.²⁴ The Commission itself made much of the findings of a research paper prepared by London Economics, an independent consultancy, as part of the mid-term review, to demonstrate the economic benefits of financial integration.²⁵

III. The Lamfalussy Report and the Committee Architecture for Financial Services

A. The Lamfalussy Report

However, the Lamfalussy report represents the most significant development in the various stages of the FSAP. The background to this report was a sense that the FSAP was not adequate to respond to the pace of change in EU and international securities markets and that there was a need to achieve a single market in securities more rapidly than envisaged by the original FSAP timetable. There was also some debate at the time as to whether the integration of EU securities markets required the creation of a single EU regulator.

²¹ See e.g. the Financial Services Action Plan Implementation (FAPSI) index in the Commission's fourth Progress Report on the FSAP, Political Challenges, COM(2001)286, 1.6.2001, p. 5, see supra note 18.

²² See the Commission's third Progress Report on the FSAP, Financial Services Priorities and Progress, COM(2000)692/2, 8.11.2000, p. 2, see supra note 18.

²³ See Commission press release, Financial Services Action Plan: Mid-Term Review emphasises need for swift progress, 22.2.2002, MEMO/02/36.

²⁴ See the Commission's second Progress Report on the FSAP, Progress on Financial Services, COM(2000)336, 31.05.2000, p. 10, see supra note 18.

²⁵ See Commission press release, Financial services: integration of EU markets will boost growth, jobs and prosperity says new research, 12.11.2002, IP/02/1649. The report by London Economics, in association with PricewaterhouseCoopers and Oxford Economic Forecasting, Final Report to The European Commission – Directorate-General for the Internal Market, Quantification of the Macro-Economic Impact of Integration of EU Financial Markets, November 2002, is available on the Commission's website at http://europa.eu.int/comm/internal_market/securities/overview_en.htm

Accordingly, the EU's economic and finance ministers, at their meeting on 17 July 2000,²⁶ decided to set up a committee of independent persons - dubbed the committee of wise men - under the chairmanship of Baron Alexandre Lamfalussy with terms of reference that called on the committee:

- to evaluate the state of the regulation of Europe's securities markets;
- to evaluate how the regulation of Europe's securities markets should respond to developments (in particular stock exchange alliances and technological developments such as alternative trading systems to ensure an effective functioning of the markets and a level playing field); and
- with the aim of eliminating obstacles, to propose scenarios for changing practices to ensure greater convergence and better co-operation in the day-to-day implementation of regulation.

However, the committee's brief did not include prudential supervision issues.

The committee set to work by launching a process of consultation, including an online questionnaire,²⁷ meetings with interested parties and the publication of its initial report in November 2000 which itself called for a wide debate on its preliminary conclusions.

The committee released its final report in February 2001.²⁸ Its main conclusion was that principal cause of the problems in the regulation of EU securities markets was the EU legislative process itself. The system was too slow and too rigid. It led to inconsistent implementation and was overly reliant on inflexible and ambiguous EU directives, which failed to distinguish between essential principles and day-to-day implementing rules.

The committee did not suggest that the solution was to set up a European SEC with power to apply a single European rulebook. This would not work without more harmonisation of national laws. Creating a new agency would also take too long; speedy action was needed within the current EU treaty. However, the committee signalled that if its proposed reforms failed to deliver, the EU should consider creating a single European regulatory authority for financial services generally, not just the securities business.

Instead, the committee's proposed approach focused on four levels within the regulatory process:

- **Level 1:** EU legislation in the form of directives should state key principles rather than detailed rules. This should speed up the process of agreeing and adopting directives and make them more flexible to deal with changing circumstances.
- **Level 2:** A new securities committee, comprising the European Commission and national representatives, should have powers to make and update the technical rules implementing those principles, supported by an advisory committee of national securities regulators. The report effectively envisaged that the Level 1 directives would confer powers on the European Commission, acting in conjunction with the new securities committee, to adopt implementing measures under the so-called "comitology" process envisaged by article 202 of the EC Treaty.

²⁶ The committee's terms of reference are set out in Annex 1 to the Initial Report of the Committee of Wise Men on the Regulation of European Securities Markets (7 November 2000) which is reproduced as Annex 5 to the final Lamfalussy report, see supra note 3.

²⁷ The questionnaire is available on the Commission's website at http://europa.eu.int/comm/internal_market/securities/lamfalussy/index_en.htm

²⁸ See supra note 3.

- **Level 3:** There should be enhanced cooperation and networking among EU securities regulators to ensure consistent and equivalent transposition of Level 1 and Level 2 legislation.
- **Level 4:** There should be strengthened enforcement of EU rules to ensure greater consistency and timeliness in the implementation of directives.

The Lamfalussy committee also recommended that the EU should make greater use of regulations, rather than directives, when legislating in the securities area. Regulations could speed up the implementation process because they are directly applicable in the member states, whereas directives require member states to adopt national implementing rules.

In addition, the committee also said that there should be a strong commitment to transparency and consultation throughout the rulemaking process. This reflected the concerns expressed, particularly from the industry, that new flexible powers had to be balanced by a real opportunity for the industry and other affected persons to make a meaningful contribution to the development of new legislation. The committee recommended that the Commission should, before it draws up a legislative proposal, consult in an open, transparent and systematic way with market participants and end users, including through the use of open hearings and the Internet. It also recommended that a summary of the consultation process should be made available when the final proposal is made. In addition, the Commission should continue to consult member states and their regulators on an informal proposal as early as possible and inform the European Parliament on an informal basis of forthcoming proposals.

The committee recommended that this commitment to transparency and consultation should also apply at Level 2. The advisory committee of securities regulators should involve market practitioners and end users at every level in a continuous process. In the case of complex issues, the advisory committee should consult first on the basis of a concept release, followed by a draft proposal once a regulatory approach is decided. The committee should use hearings or roundtables, as well as the Internet, and a summary of the public comments should be appended to the final recommendations. Recognising the need for speed the Lamfalussy committee recommended that the maximum comment period should be three months.

Finally, the committee recommended accelerating the timetable for adoption of the FSAP. The EU should adopt key parts of the FSAP for securities markets by the end 2003.

B. The Response to the Lamfalussy Report

The committee's recommendations received widespread support. The European Council, at its meeting at Stockholm in March 2001, resolved that the four level approach should be implemented, including the recommendations on transparency and consultation.²⁹ It also asked for full implementation of the FSAP by 2005, with every effort to be made by all parties concerned to achieve an integrated securities market by the end of 2003 by giving priority to securities markets legislation provided for in the plan, including those steps endorsed in the Lamfalussy report.³⁰

²⁹ Resolution of the European Council on More Effective Securities Market Regulation in the European Union Stockholm, Annex 1 to the Presidency Conclusions, Stockholm European Council, 23 and 24 March 2001, available on the Council website at http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/00100-r1_ann-r1.en1.html.

³⁰ Point 19 of the Presidency Conclusions, Stockholm European Council, 23 and 24 March 2001, see supra note 29.

The European Commission moved quickly to establish the European Securities Committee (the "ESC")³¹ and the advisory Committee of European Securities Regulators ("CESR").³²

The ESC was formed with the task of advising the European Commission on policy issues and draft legislative proposals. In addition, it was envisaged that the ESC would function as a regulatory committee in accordance with the Council's 1999 decision on comitology,³³ to assist the European Commission when it takes decisions on exercising the powers conferred by directives to adopt implementing measures under article 202 of the EC Treaty. The ESC is composed of high level representatives of member states, mainly representatives of finance ministries, chaired by a representative of the European Commission.

CESR effectively replaced the former Forum of European Securities Commissions ("FESCO"), an informal grouping of national securities regulators. CESR's stated task was to act as an independent advisory group with the role of advising the Commission, either at the Commission's request, within a time limit laid down by the Commission, or on CESR's own initiative. In particular, it was envisaged that CESR would advise the Commission on draft implementing measures. CESR is composed of high level representatives of national securities regulators and is chaired by one of its members. The Commission attends its meetings and can participate in its discussions. CESR is based in Paris and has its own secretariat. CESR adopted its own charter³⁴ and, after a period of consultation, a public statement of consultation practices.³⁵

However, the proposal to make wider use of the comitology process ran into difficulties with the European Parliament. Most EU legislation in the securities area is adopted by the co-decision process under article 251 of the EC Treaty, where the European Parliament acts as the co-legislator with the Council of Ministers. In contrast, the European Parliament has no formal role in the adoption of implementing measures under article 202 of the EC Treaty.³⁶ Thus, the extension of the comitology process created a perceived threat to the legislative role of the European Parliament and the inter-institutional balance between the Parliament, the Council and the Commission. This was reinforced by the comment in the European Council's Stockholm resolution, which it was argued indicated that the Commission was giving priority to the Council's views over those of the European Parliament:

"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

³¹ Commission Decision of 6 June 2001 establishing the European Securities Committee (2001/528/EC), OJ L 216, 13.7.2001, p. 45.

³² Commission Decision of 6 June 2001 establishing the Committee of European Securities Regulators (2001/527/EC), OJ L 216, 13.7.2001, p. 43.

³³ Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (1999/468/EC), OJ L184, 17.7.1999, p. 23.

³⁴ Charter of the Committee of European Securities Regulators, which took effect on 11 September 2001, available on the CESR website at <http://www.cesr-eu.org/>

³⁵ CESR, Public Statement of Consultation Practices, December 2001 (CESR/01-007c), available on the CESR website at <http://www.cesr-eu.org/>

³⁶ The Stockholm resolution envisaged that the Parliament would be kept informed of the ESC's proceedings and would receive all documents and, if the Parliament considers that the draft implementing measures would exceed the powers conferred by the relevant directive, the Commission would re-examine its proposals expeditiously. See paragraph 5 of the Resolution of the European Council on More Effective Securities Market Regulation in the European Union, see supra note 36.

to be particularly sensitive, to avoid going against predominant views which might emerge within the Council, as to the appropriateness of such measures."³⁷

This resulted in prolonged discussions between the Commission, the Parliament and the Council which led to the President of the Commission making a solemn declaration in the European Parliament in January 2002, confirming that the Commission favoured an amendment to article 202 of the EC Treaty to give the European Parliament an equal role with the Council in controlling the Commission as it carries out its executive role.³⁸ In the meantime, the declaration indicated that the Commission was in a position:

- To note Parliament's intention to include a four year "sunset clause" in all legislation conferring implementing powers on the Commission;
- To ensure that Parliament is given three months to examine any proposed implementing measure;
- To ensure full transparency to Parliament throughout the whole procedure for adopting implementing measures and to ensure that there is wide public consultation before implementing measures are drawn up;
- To support Parliament's wish to see CESR form an advisory market participants' group;³⁹
- To reaffirm its commitment "to take the utmost account of the Parliament's position and any resolutions that it might adopt with regard to implementing measures exceeding the implementing powers provided for in the basic instrument and the Commission's aim of reaching a balanced solution in such cases".

This declaration broke the logjam which had held up the practical implementation of the Lamfalussy proposals. It paved the way for the Council's subsequent call in April 2002 for a review of the committee architecture for other financial services sectors, which led, after further prolonged discussion,⁴⁰ to the creation, in 2004, of a parallel architecture of advisory and regulatory committees for the banking and insurance and occupational pensions sectors as follows:⁴¹

³⁷ Paragraph 5 of the Resolution of the European Council on More Effective Securities Market Regulation in the European Union, see supra note 29. See also the European Parliament report on the implementation of financial services legislation (2001/2247/(INI)), Committee on Constitutional Affairs, Rapporteur: Karl von Wogau, 23 January 2002 (Final A5-0011/2002).

³⁸ See Commission press release, Mr Romano Prodi President of the European Commission "Implementation of financial services legislation in the context of the Lamfalussy Report" Intervention by President Romano Prodi to the European Parliament's plenary session Strasbourg, 5 February 2002 (SPEECH/02/44) and Commission press release, Financial markets: Commission welcomes Parliament's agreement on Lamfalussy proposals for reform, 5 February 2002 (IP/02/195).

³⁹ CESR announced its formation of its market participants consultative panel on 10 July 2002. See press release CESR/02-111.

⁴⁰ See e.g. European Commission, Note to the Ecofin Council, Financial Regulation, Supervision and Stability (December 2002), available on the Commission website at http://europa.eu.int/comm/internal_market/finances/docs/cross-sector/consultation/ecofin-note_en.pdf

⁴¹ See Commission Decision of 5 November 2003 establishing the Committee of European Banking Supervisors (2004/5/EC), OJ L 003, 07.01.2004, p. 28; Commission Decision of 5 November 2003 establishing the Committee of European Insurance and Occupational Pensions Supervisors (2004/6/EC), OJ L 003, 07.01.2004, p. 30; Commission Decision of 5 November 2003 amending Decision 2001/527/EC establishing the Committee of European Securities Regulators (2004/7/EC), OJ L 003, 07.01.2004, p. 32; Commission Decision of 5 November 2003 amending Decision 2001/528/EC establishing the European Securities Committee (2004/8/EC), OJ L 003, 07.01.2004, p. 32; Commission Decision of 5 November 2003 establishing the European Insurance and Occupational Pensions Committee (2004/9/EC), OJ L 003, 07.01.2004, p. 34; 2004/10/EC: Commission Decision of 5 November 2003 establishing the European Banking Committee (2004/10/EC), OJ L 003, 07.01.2004, p. 36; and Directive 2005/1/EC of the European Parliament and of the Council of 9 March 2005 amending Council Directives 73/239/EEC,

	Banking	Insurance and Occupational Pensions	Securities⁴²
Advisory and regulatory committee	European Banking Committee (EBC)	European Insurance and Operational Pensions Committee (EIOPC)	European Securities Committee (ESC)
Committee of supervisors	Committee of European Banking Supervisors (CEBS) ⁴³	Committee of European Insurance and Occupational Pension Supervisors (CEIOPS) ⁴⁴	Committee of European Securities Regulators (CESR) ⁴⁵

IV. Transparency and Consultation in the Level 1 Process

A review of the adoption and implementation of the FSAP and of the agenda for the post-FSAP era highlights the growing importance of transparency and consultation in the processes by which the European Commission makes policy and develops and adopts legislative proposals for consideration by the Council and the European Parliament (at Level 1, in the terminology of the Lamfalussy report). It also illustrates the importance of a number of specific processes and techniques, which are reviewed in the following sections.⁴⁶

A. Political Direction and Support

However, while the focus of this paper is on the European Commission's processes in developing policy and legislative initiatives, the political direction from the member states, through the European Council and the Council of Ministers, was essential to the initiation and carrying through of the FSAP. The initial call for and endorsement of the plan in 1998 and 1999, the reinforced impetus given by the adoption of the Lisbon agenda in 2000 and the sense of urgency behind the appointment of the Lamfalussy committee and the endorsement of its recommendations in 2000 and 2001 underpinned the Commission's initiatives by creating the essential expectation of eventual support for the resulting legislative proposals.

This support was also matched by the support from the European Parliament, whose influence grew significantly throughout the period because of its role in the co-decision process for adopting legislation.

85/611/EEC, 91/675/EEC, 92/49/EEC and 93/6/EEC and Directives 94/19/EC, 98/78/EC, 2000/12/EC, 2001/34/EC, 2002/83/EC and 2002/87/EC in order to establish a new organisational structure for financial services committees, OJ L 079, 24.03.2005, p. 9.

⁴² Including Undertakings for Collective Investments in Transferable Securities (UCITS), representing the asset management sector.

⁴³ For more information, see <http://www.c-eps.org/>

⁴⁴ For more information, see <http://www.ceiops.org/>

⁴⁵ For more information, see <http://www.cesr-eu.org/>

⁴⁶ See also European Commission, FSAP Evaluation Part I: Process and Implementation (November 2005), available on the Commission's website at http://europa.eu.int/comm/internal_market/finances/actionplan/index_en.htm

Most of the legislative measures under the FSAP were adopted by the co-decision process and the European Parliament's role as co-legislator with the Council on these measures significantly enhanced its authority. In particular, on a number of occasions, there was a perception that the Parliament's role in proposing amendments was decisive, e.g. in resolving the technical problems with the Commission's draft of the Prospectus Directive.⁴⁷ Also, in order to meet the plan's deadlines, the institutions needed in some cases to approve a legislative measure using the "fast track" procedure, when a legislative measure can be approved by the Council on the basis of a single reading by the European Parliament, increasing the Parliament's influence over the final shape of the proposal.⁴⁸

Indeed, the most significant political impediment to the implementation came not from the content of the Plan but from the proposals to implement the Lamfalussy recommendations for more comitology. As already noted, this triggered an inter-institutional debate which could have derailed significant parts of the plan, but in the end did not.

In addition, there was general market support for the overall direction of the FSAP, even if some of its individual measures became controversial. The Commission's own verdict has been that the political and market pressure to achieve the implementation of the plan led to:

"an unprecedented degree of cooperation between the institutions, with much shorter than average times to adoption for many of the measures and the revival of certain initiatives which seemed to have reached a dead-end".⁴⁹

B. Consultation

The Commission's original communication setting out the FSAP envisaged the adoption of a:

"more inclusive and consensual approach to shaping policies from an early stage and in advance of drafting legislation ... [which] should extend to all EU institutions, but also to representatives of market practitioners, consumers, users and employees".⁵⁰

However, the extent and depth of the consultation process has evolved considerably over the life of the plan. As already mentioned, the Lamfalussy report emphasised the importance of consultation in the rulemaking process. The Commission also published two communications in 2002 on the importance of consultation to better regulation⁵¹ and re-emphasised this in its 2005 communication "Better regulation for Growth and Jobs in the European Union".⁵²

The Commission's own assessment is that, in the early days of the plan, there was only a limited degree of consultation.⁵³ Consultation was generally restricted to sounding out selected industry representatives and

⁴⁷ See European Commission, FSAP Evaluation, supra note 46, p. 14.

⁴⁸ See European Commission, FSAP Evaluation, supra note 46, p. 24.

⁴⁹ See European Commission, FSAP Evaluation, supra note 46, p. 6.

⁵⁰ See Commission Communication, Financial Services: Implementing the Framework for Financial Markets: Action Plan, supra note 1, section IV.

⁵¹ Commission communication, European Governance - Better Lawmaking, COM(2002)275 and General Principles and minimum standards for consultation of interested parties by the Commission, COM(2002)704.

⁵² COM(2005)97.

⁵³ See European Commission, FSAP Evaluation, supra note 46, p. 14.

member state experts through established committees. This sometimes caused significant difficulties in the process

The most notable example was the failure to conduct any formal consultation of industry participants or the public at large in advance of the adoption of the Commission's proposal of the Prospectus Directive in May 2001.⁵⁴ Although the Commission had prepared the text in consultation with national securities regulators, through FESCO, the Commission's own assessment⁵⁵ is that the failure to consult more widely contributed to the delays in the legislative process and the need for the Commission to submit a revised legislative proposal, which was eventually adopted, after amendments, in 2003.⁵⁶

The consultation process can take a number of forms but it is possible to see some specific techniques developing.

At the earlier stages, the Commission made use of the publication of green papers - to elicit views of interested parties - followed by white papers, setting out its adopted policy direction.⁵⁷

As the FSAP progressed, the Commission has made wide use of expert groups, selected from market and industry participants from across the EU, to help form policy and identify issues and objectives. As already noted, the Commission made use of "Forum Groups" at the outset of the FSAP. In 2001 the Commission set up a high level group of company law experts to report on aspects of the law of takeovers and, subsequently, more generally on issues relating to company law and corporate governance.⁵⁸ In 2002, it set up a forum group to review the treatment of research analysts.⁵⁹ Also, in 2003, as the legislative phase of the FSAP drew to end it also set up four high level expert groups covering the sectors of banking, insurance, securities and asset management to review the outcome of the plan and to form the basis of its follow up policy action.⁶⁰

In some cases, the expert group has itself carried out a consultation on its mandate before preparing its report.⁶¹ In other cases, there has been some transparency as to the discussions in the expert group by the

⁵⁴ COM(2001) 280 final.

⁵⁵ See European Commission, FSAP Evaluation, supra note 46, p. 14.

⁵⁶ Directive 2003/71/EC of the European Parliament and of The Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC, OJ L345 31.12.2003 p. 64.

⁵⁷ See e.g. Commission Green Paper on financial services: meeting consumers expectations, supra note 9.

⁵⁸ Report of the High Level Group of Company Law Experts on Issues related to Takeover Bids, January 2002, available on the Commission website at http://europa.eu.int/comm/internal_market/company/docs/takeoverbids/2002-01-hlg-report_en.pdf and Final Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe (November 2002), available on the Commission's website at http://europa.eu.int/comm/internal_market/company/modern/index_en.htm

⁵⁹ Financial Analysts: Best practices in an integrated European financial market, Recommendations from the Forum Group to the European Commission services (September 2003), available on the Commission website at http://europa.eu.int/comm/internal_market/securities/docs/analysts/bestpractices/report_en.pdf

⁶⁰ These groups reported in 2004 and their reports are available on the Commission website at http://europa.eu.int/comm/internal_market/company/modern/index_en.htm

⁶¹ See e.g. A Modern Regulatory Framework for Company Law in Europe: A Consultative Document of the High Level Group of Company Law Experts (2002), available on the Commission website at http://europa.eu.int/comm/internal_market/company/docs/modern/consult_en.pdf

publication of issues papers on the website.⁶² In some cases, the Commission has simply published the report on the Internet and called for public comment.⁶³

In quite a number of cases, the Commission did not follow any form of public consultation before putting forward its legislative proposal, preferring to consult with selected stakeholders through committees or other means. However, in a number of cases, it did consult publicly, although the process followed has varied significantly.⁶⁴

In some of the earlier cases, the consultation simply took the form of the publication of a single consultation paper calling for public comment before the submission of the legislative proposal. This was the route followed in relation to the proposed directive on financial conglomerates, where the Commission published a consultation paper⁶⁵ in December 2000, without any detailed draft text for the proposals. The paper allowed a six week comment period and the Commission then followed up in April 2004 with a legislative proposal.⁶⁶ However, despite the fact that the proposal was based on earlier recommendations of the international Joint Forum on Financial Conglomerates, on which there had been industry consultation, the legislative proposal encountered significant issues relating to the extraterritorial impact of its proposals on US investment banks in particular, which had not been highlighted by the consultation, perhaps because the Commission did not publish draft text that would have indicated the effect of the proposals more clearly.

In other cases, the process has been significantly more elaborate, although it is still relatively unusual for the Commission to publish the full text of a proposed directive for consultation at any stage before it makes its formal legislative proposal. For example, the process for the upgrade of the Investment Services Directive⁶⁷ which eventually led to the adoption of the Markets in Financial Instruments Directive ("MiFID"),⁶⁸ involved:

- An initial communication to the Council and the European Parliament in November 2000⁶⁹ setting out initial outline proposals and calling for comment by 31 March 2001;

⁶² See e.g. the issues papers for the 1999 forum groups available on the Commission's website at http://europa.eu.int/comm/internal_market/finances/actionplan/index_en.htm

⁶³ See e.g. Commission press release, Financial analysts: Commission invites comments on avoiding conflicts of interest IP/03/1197, 4.9.2003.

⁶⁴ For a review of the consultation practices followed with respect to FSAP measures, see European Commission, FSAP Evaluation, supra note 46, Annex C.

⁶⁵ Commission Consultation Document, Towards an EU Directive on the Prudential Supervision of Financial Conglomerates MARKT/3021/00-EN (December 2000), available on the Commission website at http://europa.eu.int/comm/internal_market/financial-conglomerates/docs/consult_en.pdf

⁶⁶ Proposal for a Directive of the European Parliament and of the Council on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate and amending Council Directives 73/239/EEC, 79/267/EEC, 92/49/EEC, 92/96/EEC, 93/6/EEC and 93/22/EEC, and Directives 98/78/EC and 2000/12/EC of the European Parliament and the Council, COM(2001) 213 final.

⁶⁷ See supra note 7.

⁶⁸ Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC L145 20.4.2004 p.1

⁶⁹ Communication from the Commission to the European Parliament and the Council, Upgrading The Investment Services Directive (93/22/EEC) (November 2000) COM(2000)729, available on the Commission's website at http://europa.eu.int/comm/internal_market/securities/docs/isd/2000/com-provision_en.pdf

- The publication by the Commission in July 2001 of feedback on the initial communication together with a number of documents setting out various aspects of its proposals, including draft text for parts (but not all) of the proposed directive, expressed to be an "initial set of orientations for revision of the ISD ... without prejudice to any future decisions by the European Commission in finalising its proposals" and inviting comment by 30 October 2001;⁷⁰
- A two day open hearing on the proposed revision in September 2001.
- The publication by the Commission in March 2002 of feedback on the first round of consultation and further papers setting out a "revised orientation", including draft text for parts of the directive, and other papers and inviting comment by 31 May 2002;⁷¹
- A second open hearing on the proposed revision in April 2002.

Nevertheless, the final directive proposal in November 2002⁷² did not escape controversy, due to last minute interventions in the final stages of putting together the Commission's proposals inserting proposals on pre-trade transparency which was widely perceived to be a departure from the direction developed during the consultation process.

Another example of this more elaborate framework can be found in the development of the proposed Capital Requirements Directive, where there was a series of consultations, including published draft text, from 2002 to 2005.⁷³

In addition to the use of open hearings, the Commission has also held conferences and discussion forums in which invited speakers and others are able to express views.

The transparency of the consultation process has also changed over the course of the FSAP. The Commission now, as a matter of routine, publishes its proposals and consultation documents on the Internet. In some cases, it will also publish on the Internet feedback statements summarising the responses to the consultation, as well as copies of the responses received. It also uses the Internet to publicise proposed public hearings as well as reports on meetings of key bodies involved in the management of the process. It has established a specific website, *Your Voice in Europe*,⁷⁴ as a single access point to a wide variety of consultations, not just for financial services.

The Commission has also sought to address concerns that the financial services industry, rather than end-users of financial services, predominate in the consultation process. In 2004, it established FIN-USE, a panel of ten experts with knowledge of financial services selected by the Commission from among consumer protection and small business experts, academic researchers and staff from major consumer and

⁷⁰ See Commission press release, Commission launches "Post-Lamfalussy" open consultation on Investment Services Directive, IP/01/1055 24.7.2001 and papers available on the Commission website at http://europa.eu.int/comm/internal_market/securities/isd/revision_en.htm

⁷¹ See Commission press release, Financial Services: further open consultation on revision of the Investment Services Directive, IP/02/464 25.3.2002 and papers available on the Commission website at http://europa.eu.int/comm/internal_market/securities/isd/revision_en.htm

⁷² Proposal for a Directive of the European Parliament and of the Council on Investment Services and Regulated Markets, and amending Council Directives 85/611/EEC, Council Directive 93/6/EEC and European Parliament and Council Directive 2000/12/EC COM(2002) 625 final.

⁷³ See http://europa.eu.int/comm/internal_market/bank/regcapital/impact_en.htm

⁷⁴ http://europa.eu.int/yourvoice/index_en.htm

small business organisations.⁷⁵ Its mandate is to strengthen the role of consumers and small businesses in the evolution of the EU financial services sector, by providing responses to the Commission's requests for consultation.⁷⁶ However, its own assessment is that there is a regrettable absence of "meaningful research on consumers' experience of financial services in the markets across Europe" and that there still need to be improvements to the consultative process to achieve the "inclusion and participation of users and other stakeholders in financial services".⁷⁷

Additionally, as has been seen, the FSAP placed strong emphasis on the importance of publicly scheduling actions and fixing deadlines as a means of seeking to create an impetus towards completion. These more specific actions are then reflected in the Commission's general action work programme which is published on the Internet.⁷⁸

For the most part, there is no legal mandate requiring consultation and the Commission's developing practices reflect policy decisions by the Commission rather than legal requirements. However, in some cases, the directives include review clauses which specifically require the Commission to engage in consultation. For example, the 2002 directive on undertakings for the collective investment in transferable securities required the Commission to prepare a report, by 13 February 2005, on the application of the directive with proposals for its amendment, and specifically states that "in preparing its report, the Commission shall consult as widely as possible with the various industries concerned and with consumer groups and supervisory bodies."⁷⁹ Similarly, one of the review clauses in MiFID, requires the Commission to report by 30 October 2006 to report, "on the basis of public consultations and in the light of discussions with competent authorities," to the European Parliament and the Council on the continued appropriateness of certain exemptions in the directive.⁸⁰

C. Impact Assessments

Impact assessments have not formed a major part of the rulemaking process in the FSAP. Each legislative proposal is accompanied by an explanatory statement and in many cases is accompanied by a formal, albeit relatively short, impact assessment statement.⁸¹ However, these are generally not detailed reviews of the likely impact of alternative policy options and do not contain substantive cost benefit analysis of the proposals. They are also not the subject of prior consultation.

⁷⁵ See European Commission press releases, Financial services: Commission to set up expert forum to look at policies from users' point of view (FIN-USE), IP/03/1119, 25.7.2003 and Financial services: new group will give consumers and SMEs a stronger voice in EU policy making, IP/04/450 2.4.2004, available on the Commission website at http://europa.eu.int/comm/internal_market/finservices-retail/finuse_en.htm

⁷⁶ See the FIN-USE website at http://europa.eu.int/comm/internal_market/fin-use_forum/about/index_en.htm

⁷⁷ Financial Services, Consumers and Small Businesses, A User Perspective on the Reports on Banking, Asset Management, Securities and Insurance of the FSAP Stocktaking Groups, FIN-USE Forum, October 2004, available on the FIN-USE website, see supra note 76.

⁷⁸ See e.g. Commission Work Programme for 2005 COM(2005) 15 final 26.1.2005.

⁷⁹ See article 2(1) of Directive 2001/108/EC of the European Parliament and of the Council of 21 January 2002 amending Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), with regard to investments of UCITS OJ L 041 13.2.2002 p. 35.

⁸⁰ Article 65(3) MiFID, supra note 68.

⁸¹ See e.g. Proposal for a Directive of the European Parliament and of the Council on the harmonisation of transparency requirements with regard to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC COM(2003) 138 final, 26.3.2003.

Nevertheless, there have been some efforts to carry out specific evaluations of policy initiatives forming part of the FSAP, over and above the use of general studies such as the London Economics research paper already mentioned.⁸²

In particular, the process leading up to the adoption of the legislative proposal for the Capital Requirements Directive⁸³ to implement the Basel II framework in the EU included a number of specific studies and quantitative impact assessments which sought to identify the economic impact of the proposals. The European Commission extended the Basel Committee's 40 country third quantitative impact study (QIS3) to cover EU countries not included in the Basel study.⁸⁴ In addition, at the request of the Barcelona European Council the Commission commissioned a study on the consequences of the draft proposed new capital requirements for credit institutions and investment firms in the EU.⁸⁵ Also, after the publication of the legislative proposal, the Commission also published a quantitative study seeking to analyse the impact of one aspect of the proposals on EU investment firms.⁸⁶ A similar plan is proposed for the assessment of the so-called Solvency II initiative in relation to the regulatory capital of insurance companies.⁸⁷

The Commission's 2005 white paper on financial services policy 2005-10 contains a commitment that impact assessments will accompany any new Commission proposal, focusing on costs and benefits and, where appropriate, the impact on financial stability, proper functioning of markets and consumer protection.⁸⁸ Indeed, the white paper itself includes an impact assessment presenting the parameters that influenced the choices set out in it.⁸⁹ The white paper also indicates that assessment methodologies will be shared, prior to publication, with stakeholders, although it is unclear whether this will include prior consultation on the results of the application of those methodologies.

This reflects a growing emphasis on evaluation in the rulemaking process, illustrated by a Commission communication in 2002, explaining how the process of impact assessment would be implemented in the

⁸² See supra note 25.

⁸³ Proposal for Directives of the European Parliament and of the Council Re-casting Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions and Council Directive 93/6/EEC of 15 March 1993 on the capital adequacy of investment firms and credit institutions, COM(2004) 486 final 14.7.2004.

⁸⁴ European Commission, Review of the Capital Requirements for Credit Institutions and Investment Firms Third Quantitative Impact Study: EU Results, 1.7.2003, available on the Commission website at http://europa.eu.int/comm/internal_market/bank/regcapital/impact_en.htm

⁸⁵ PricewaterhouseCoopers, Study on the financial and macroeconomic consequences of the draft proposed new capital requirements for banks and investment firms in the EU, Final Report, 8.4.2004, available on the Commission website at http://europa.eu.int/comm/internal_market/bank/regcapital/impact_en.htm

⁸⁶ European Commission, Review of the Capital Requirements for EU Investment Firms, 2004 Quantitative Impact Study, Main Conclusions, 20.7.2004, available on the Commission website at http://europa.eu.int/comm/internal_market/bank/regcapital/impact_en.htm

⁸⁷ European Commission, Note to the Members of the European Insurance and Occupational Pensions Committee (EIOPC) on the Impact Assessment of the Solvency II Level 1 Directive - Considerations on function and possible structure - Timing and organisation of work 3.10.2005, available on the Commission website at http://europa.eu.int/comm/internal_market/insurance/solvency/solvency2-impact_en.htm

⁸⁸ See supra note 6, p. 5.

⁸⁹ See Annex II to the Commission white paper, supra note 6.

Commission, gradually from 2003, for all major initiatives.⁹⁰ This was reinforced by the Commission's publication of its revised guidelines for impact assessments in 2005.⁹¹

V. Transparency and Consultation at Level 2

The adoption of the Lamfalussy report ushered in a new era in financial services legislation. Up to then, directives had been formed and debated at a single level. Once a directive had been adopted, it was then simply down to the member states to adopt the national implementing rules.

The Lamfalussy report transformed the legislative process with its multi-level approach. Member states and the Parliament still have to agree at level 1 on the text of the directive, but now have to determine what can be left to level 2 implementing measures and the constraints that should be put around the Commission's powers. For example, the level 1 measures have to identify whether the Commission is required to adopt implementing measures or whether this is optional.⁹² They vary significantly as to the extent to which they prescribe parameters within which the Commission must act.⁹³

In addition, the member states and the Parliament have to take account of the fact that implementing measures can take the form of regulations, which will have direct effect in the member states, as well as directives. The use of regulations potentially significantly limits the flexibility of member states to take divergent approaches to national implementation.⁹⁴

Furthermore, the negotiations on the directive itself are influenced by the fact that the level 1 and level 2 processes are not always sequential, as the Commission may issue provisional mandates to the supervisory committees calling for their advice even before the directive is finally adopted.

Finally, the Lamfalussy process has made a significant change to the timing of national implementation of directives. In practice, the Commission may not formally adopt the level 2 measures until 18 months (or longer) after the adoption of the level 1 directive. If the directive only allows two years for national implementation, this places significant pressures on national processes, which (at least in the case of MiFID⁹⁵) has led to proposals to give member states extra time to implement the level 1 directive.

This section reviews the role that transparency and consultation play in the level 2 process, drawing on the experience from the four Lamfalussy-style directives adopted so far, namely the market abuse

⁹⁰ Communication from the Commission on Impact Assessment, COM(2002) 276 final 5.6.2002. See also and Commission Staff Working Paper, Impact Assessment: Next Steps, In support of competitiveness and sustainable development, SEC(2004)1377 21.10.2004.

⁹¹ European Commission, Impact Assessment Guidelines, SEC(2005) 791 15.6.2005

⁹² Compare article 4.1(2) MiFID, supra note 68, which states that the Commission "shall" determine the scope of certain provisions by adopting implementing measures, with article 4.2 MiFID which provides that the Commission "may" adopt implementing measures to clarify other definitions.

⁹³ Compare the relatively high degree of flexibility given with respect to the implementation of the conduct of business principles in article 19 MiFID, supra note 68, under article 19.10 MiFID with the relatively limited level of choice allowed with respect to the implementation of the article 27 rules on systematic internalisation under article 27.7 MiFID.

⁹⁴ See e.g. Commission Regulation (CE) 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements, OJ L 149, 30.4.2004, p. 1.

⁹⁵ See Proposal for a Directive of the European Parliament and of the Council amending Directive 2004/39/EC on markets in financial instruments, as regards certain deadlines COM(2005) 253 final, 14.6.2005.

directive ("MAD"),⁹⁶ the prospectus directive ("PD"),⁹⁷ MiFID⁹⁸ and the transparency obligations directive ("TD"),⁹⁹ although at the time of writing the Commission has only adopted implementing measures under the MAD¹⁰⁰ and the PD¹⁰¹ - the process is still ongoing under MiFID and TD. Since all the existing Lamfalussy directives concern securities markets, the discussion below focuses on the consultation processes adopted by CESR.¹⁰² However, both CEBS and CEIOPS have adopted similar statements as to their processes.¹⁰³

A. The Supervisors Committee Process

The implementation process formally starts when the Commission issues a level 2 mandate to CESR, calling for advice on the content of implementing measures under a directive. However, there are usually some informal opportunities for interested parties to seek to influence the shape of the mandate in advance. In addition, CESR publishes an annual work programme so that interested parties know when to expect output from it.

On receipt, CESR publishes the mandate as a "call for evidence" seeking initial contributions from interested parties, usually setting a comment period of one month. It may also at that stage set out its expected work programme for the particular mandate. CESR publishes the responses received on its website.

Based on these initial responses and following informal discussions with interested parties, CESR produces its reasoned consultative proposals. This may take the form of a concept release, rather than detailed proposals. Typically, CESR allows three months for consultation on the proposals¹⁰⁴ and will

⁹⁶ Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), OJ L 096 12.4.2003 p.16.

⁹⁷ Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC, OJ L 345 31.12.2003 p.64.

⁹⁸ See supra note 94.

⁹⁹ Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC OJ L 390 31.12.2004 p. 38.

¹⁰⁰ Four implementing measures have been adopted under the MAD, namely Commission Regulation (EC) No 2273/2003 of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards exemptions for buy-back programmes and stabilisation of financial instruments OJ L 336 23.12.2003 p. 33; Commission Directive 2003/124/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation, OJ L 339 24.12.2003 p. 70; Commission Directive 2003/125/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the fair presentation of investment recommendations and the disclosure of conflicts of interest, OJ L 339 24.12.2003 p. 73; Commission Directive 2004/72/EC of 29 April 2004 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards accepted market practices, the definition of inside information in relation to derivatives on commodities, the drawing up of lists of insiders, the notification of managers' transactions and the notification of suspicious transactions, OJ L 162 30.4.2004.

¹⁰¹ See supra note 35.

¹⁰² See CESR, Public Statement of Consultation Practices, supra note 35.

¹⁰³ See CEBS and CEIOPS, Public Statement of Consultation Practices, available on their respective websites at <http://www.cebs.org/> and <http://www.ceiops.org/>

¹⁰⁴ CESR aims to allow a three month consultation period on significant issues. See para 3(b)(v) CESR, Statement of Consultation Practices, supra note 35.

often organise a public hearing on the proposals during that period. Again, at the end of the period, CESR publishes the responses received.

After considering the responses, CESR will then often consult for a second time on its proposed advice or aspects of its proposed advice (providing preliminary feedback on the initial round of consultation), but will usually set a shorter period for comment on this stage (perhaps as short as one month). It may hold a second public hearing during this period. Again, CESR publishes the responses received.

Finally, following consideration of the responses to any second round of consultation, CESR will publish its final advice to the Commission, together with feedback on the consultation (and copies of all responses received not yet published).

In practice, the process can take about one year from the time of the mandate to the issue of formal advice, but the timetable is set by the Commission at the outset in its mandate and it has (sometimes) set shorter deadlines. As already mentioned, the sequence may be complicated by the Commission issuing provisional mandates in advance of the formal adoption of the relevant authorising directive. In addition, the Commission may issue more than one mandate on a single directive and may, subsequent to the issue of the original mandate, allow CESR to combine its advice on one aspect of a mandate with its response to another or allow additional time to respond.

B. Comitology in Practice

Article 202 of the EC Treaty allows the Council of Ministers to confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down, subject to requirements set by the Council in respect of the exercise of these powers. The Treaty requires procedures referred to above must be consonant with principles and rules to be laid down in advance by the Council, acting unanimously on a proposal from the Commission and after obtaining the opinion of the European Parliament.

The so-called regulatory procedure laid down in a 1999 Council decision¹⁰⁵ lays down the process by which the Commission adopts implementing measures under directives. The formal process envisages that:

- The Commission submits to the regulatory committee its draft proposal.
- The committee issues its opinion on the draft, acting by the qualified majority vote laid down in article 205(2) of the EC Treaty (votes are weighted as laid down in that article).
- If the committee's opinion is in favour of the draft, the Commission can adopt the proposal.
- If the committee's opinion is unfavourable, the Commission submits the proposal to the Council of Ministers and informs the European Parliament, which can express a view as to whether the proposal exceeds the relevant implementing powers.
- The Council can then decide whether to adopt or oppose the proposal, acting by a qualified majority. If the Council opposes the proposal, the Commission may submit an amended proposal, resubmit its proposal or seek to introduce a full directive.

¹⁰⁵ Articles 5 and 7 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ L 184 17.7.1999 p. 23.

- However, if the Council cannot agree or fails to act, the Commission can adopt the proposal, meaning that, if a member state wishes to oppose an implementing measure in Council, it will require a "blocking majority" to prevent its adoption (instead of a mere blocking minority as is required for level 1 measures).

In practice, the process for adoption of level 2 measures has proceeded in the following way. Following receipt of the CESR advice, the Commission informally consults with interested parties and then prepares its draft legislative text of the implementing measures. It then publishes that text on its website for consultation. This is followed by an iterative series of meetings of the Commission with the ESC, in the light of which (and further input from interested parties) the Commission refines its proposed text, revisions of which are periodically exposed to public comment through the Commission website. At the end of this process, the Commission publishes its formal draft proposal to start the three month period within which the European Parliament can consider the proposal.¹⁰⁶ At the end of that period, the ESC votes on the proposal; it has unanimously approved the implementing measures so far proposed under these directives.

The Commission has stated that in future it will assess, on a case-by-case basis, whether it should prepare an impact assessment for level 2 measures.¹⁰⁷

C. Level 3 Work

In addition to their role at level 2, CESR and the other committees of supervisors also play an important role in coordinating implementation of the directives and developing regulatory policy more generally.

For example, CEIOPS has consulted on a protocol for the implementation of the insurance mediation directive,¹⁰⁸ CEBS has consulted on a number of issues associated with the implementation of the proposed capital requirements directive¹⁰⁹ and CESR has consulted on the cross-border notification procedure for UCITS funds under the UCITS directive¹¹⁰ and on the implementation of the market abuse directive.¹¹¹

The Commission may call on the supervisory committees for advice on particular topics, unrelated to a mandate under a particular directive. For example, the Commission called for CESR's advice on the regulatory treatment of credit rating agencies.¹¹²

¹⁰⁶ See the declaration by the President of the Commission on the implementation of financial services legislation, *supra* note 38.

¹⁰⁷ See Commission White Paper, Financial Services Policy 2005-10, *supra* note 6.

¹⁰⁸ Consultation Paper No. 8, Protocol Relating to the Cooperation of the Competent Authorities of the Member States of the European Union in Particular Concerning the Application of Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on Insurance Mediation CEIOPS-CP-05/05, available on the CEIOPS website at http://www.ceiops.org/media/files/consultations/consultationpapers/cp_0505.pdf

¹⁰⁹ Consultation Paper on the recognition of External Credit Assessment Institutions (CP07), 29 June 2005, available on the CEBS website at <http://www.c-eps.org/pdfs/CP07.pdf>.

¹¹⁰ CESR's guidelines for supervisors regarding the notification procedure according to Section VIII of the UCITS Directive CESR/05-484 (October 2005), available on the CESR website at <http://www.cesr-eu.org/>.

¹¹¹ CESR consultation paper, Market Abuse Directive, Level 3 – preliminary CESR guidance and information on the common operation of the Directive CESR/04-505 (October 2004), available on the CESR website at <http://www.cesr-eu.org/>.

¹¹² CESR's technical advice to the European Commission on possible measures concerning credit rating agencies CESR/05-139b (March 2005), available on the CESR website at <http://www.cesr-eu.org/>

In addition, the supervisory committees may at their own initiative seek to develop regulatory proposals for consideration by the Commission or for action by its members themselves. For example, CESR has sought responses to its views on the appropriateness of a mechanism for mediating between CESR members in the event of disagreement over the regulatory approach to a particular matter.¹¹³ It has also consulted on the progress in the development of the FSAP and on the choices of supervisory tools for EU securities markets.¹¹⁴

The committees would generally follow a similar process to that outlined above with respect to any such consultation.

D. Other Regulatory Techniques

As in other areas, the Commission has sought on a number of occasions to achieve its objectives without a formal legislative proposal. Thus, for example, the Commission has issued recommendations on the subject of corporate governance, rather than proposing new legislation.¹¹⁵ The Commission did consult publicly on these measures (although it only allowed a short one-month comment period). It has also issued recommendations on the implementation of the UCITS directives,¹¹⁶ after consultation with CESR.

VI. Conclusion

The history of the FSAP is a reminder of the daunting timescale in which the EU operates. The consultations of the mid-1990s set the direction of the FSAP on a number of issues where the eventual directives, such as the MiFID and the capital requirements directive, will not be fully implemented until towards the end of the current decade. A ten year process presents particular challenges for industry and other interested parties, even if there is a fully transparent and open approach to policy formation and rulemaking.

Nevertheless, despite these timescales, there has also been concern that the acceleration in pace as the FSAP deadlines became imminent led to a sacrifice in the quality of legislation.¹¹⁷ Similarly, the breadth and range of the FSAP and the complexity and iterative nature of the process has given rise to concerns about "consultation fatigue".¹¹⁸

¹¹³ CESR consultation paper, CESR Mediation Mechanism CESR/05-483c (September 2005), available on the CESR website at <http://www.cesr-eu.org/>

¹¹⁴ CESR Analytical Paper, Preliminary Progress Report: Which Supervisory Tools for the EU Securities Markets? 04-333f (October 2004), available on the CESR website at <http://www.cesr-eu.org/>.

¹¹⁵ Commission Recommendation of 14 December 2004 fostering an appropriate regime for the remuneration of directors of listed companies (2004/913/EC) OJ L 385 29.12.2004 p.55 and Commission Recommendation of 15 February 2005 on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board (2005/162/EC), OJ L52 25.2.2005, p. 51.

¹¹⁶ Commission Recommendation 2004/383/EC of 27 April 2004 on the use of financial derivative instruments for undertakings for collective investment in transferable securities (UCITS) OJ L 144, 30.4.2004 p. 34 and Commission Recommendation 2004/384/EC of 27 April 2004 on some contents of the simplified prospectus as provided for in Schedule C of Annex I to Council Directive 85/611/EEC OJ L 144, 30.4.2004 p. 44.

¹¹⁷ See e.g. Inter-institutional Monitoring Group, Third Report Monitoring the Lamfalussy Process, 17 November 2004, p.14, available on the Commission website at http://europa.eu.int/comm/internal_market/securities/docs/monitoring/third-report/2004-11-monitoring_en.pdf

¹¹⁸ See e.g. European Commission, FSAP Evaluation, supra note 46, pp. 16-17.

What is clear is that the effect of the FSAP and the rulemaking process under it has moved the EU from the periphery to the centre of financial services regulation. This seems unlikely to change in the near future, even if no further steps are taken in the direction of setting up an EU wide regulatory agency. The 2005 white paper aims at "dynamic consolidation" rather than a new action plan on the scale of the original FSAP but still lists 72 concrete tasks and activities for the Community institutions over the next five years, some of which will only come to fruition long after that.¹¹⁹ Even if there is no new FSAP, these tasks and activities will continue to test the quality of the EU's rulemaking processes.

¹¹⁹ Commission White Paper, Financial Services Policy 2005-10, Annex I, supra note 6.