



Fédération Bancaire Européenne
European Banking Federation

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Subject: FBE Response to the FSAP Evaluation Part I: Process and Implementation

Dear Sir/Madam,

Please find enclosed for your information the FBE Response to the FSAP Evaluation Part I: Process and Implementation, which has been sent to Commissioner McCreevy on 28 February 2006.

Yours faithfully,

Tanguy van de WERVE
Head of Department

Robert PRIESTER
Head of Department

Encl.: 1



Fédération Bancaire Européenne
European Banking Federation
Le Secrétaire Général

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E-mail

Mr Charlie McCreevy
Commissioner
Directorate-General Internal Market and Services
B – 1049 Brussels
markt-fsap-evaluation@cec.eu.int

Brussels, 28 February 2006

Subject: FSAP Evaluation Part I: Process and Implementation

Dear Mr McCreevy,

The European Banking Federation (FBE)¹ welcomes the opportunity to comment on the European Commission's first report on the Financial Services Action Plan. We apologise for the late response and thank the Commission for granting us an extension of the deadline.

On the whole, we assess that the FSAP has had a positive impact on the European Single Market, and we wish to commend the Commission for the amount of work delivered in a short period of time. Whilst we have identified some shortcomings of the FSAP as regards both substance and consultation practices, we believe that considerable improvements have already been made in these respects over the last years. In this light we continue to support the Commission's "better regulation" approach as well as the Lamfalussy procedure, which has great potential to further improve and eventually also speed up European legislation in the field of Financial Services.

Going forward, we would encourage the Commission and other parties involved in the decision-making process to put a particular stress on the early and comprehensive consultation of stakeholders, and to ensure that impact studies are carried out on a systematic basis.

Please find our detailed comments attached ([enclosure 1](#)). For your information, we also attach our response to the Inter-Institutional Monitoring Group's questionnaire on the functioning of the Lamfalussy procedure ([enclosure 2](#)).

Please don't hesitate to contact me for any questions you may have.

Yours sincerely,

Guido Ravoet

Encl.: 2

¹ Set up in 1960, the European Banking Federation (FBE) is the voice of the European banking sector. It represents the interests of over 4,500 European banks, large and small, with total assets of more than €20,000 billion and over 2.3 million employees.



Fédération Bancaire Européenne
European Banking Federation

Response to FSAP Evaluation Part I: Process and Implementation

General comments

The European Banking Federation (FBE) welcomes the opportunity to comment on the first part of the European Commission's evaluation of the Financial Services Action Plan¹. We find this evaluation very useful and see it as a valuable step in the Commission's better regulation approach and its efforts to enhance the dialogue with stakeholders. In general, we find both the analytical approach and most of the conclusions appropriate. We also welcome the Commission's intention to follow up the present report with a second part to analyse the impact of the FSAP measures in more depth.

Throughout the last years the FBE followed closely the Commission's activities and has provided thorough feedback to the Commission's proposals on a continuous basis. We have furthermore been involved in the Levels 2 and 3 of the Lamfalussy process.

The FBE supported the FSAP's objectives from the outset. We believe the FSAP to have been a very ambitious programme and we wish to commend the Commission for the amount of work delivered in a short period of time. Whilst we also consider that at large, the issues tackled under the Plan were appropriately chosen, we assess that from a substance point of view the measures adopted in this framework were of varying quality. Whereas some took good account of the market environment, others seemed to lack to a certain degree consideration of the views of market participants.

However, we believe that the Commission's commitment to follow a "good regulation" approach has already brought about some improvement in this regard. This went hand in hand with the more systematic carrying out of consultations with market participants. The Lamfalussy process has certainly been a factor that contributed to this development. We appreciate the Commission's acknowledgement that going forward, consultations with market participants should be carried out at every occasion.

Given the complexity and the cost implications of the issues at stake, we call on the Commission to additionally base legislative proposals on *ex ante* impact studies on a systematic basis to assess both general consequences and whether the benefits of envisaged measures outweigh the costs involved. Among other things, the competitive implications on firms active in a global market have to be taken into account. We look forward to seeing this comprehensive approach reflected in the Commission's regulatory impact assessment on the clearing and settlement of securities. Impact studies should furthermore assess which instrument would be most appropriate to achieve the desired objectives. We note that besides directives and regulations, the range of possible measures includes the encouragement of self regulation and the use of recommendations.

¹ The FBE represents the interests of over 4500 European banks, large and small, from 28 national Banking Associations, with assets of more than EUR 20 000 billion and over 2.3 million employees.

While these are admittedly time-consuming exercises, we reiterate that the focus should be on quality rather than on speed. Given the extensive amount of measures initiated as part of the FSAP programme, bottlenecks became apparent at several occasions. In this light and with a view to not only the Commission's own resources, but also those of the Member States and stakeholders, the Commission will need to increasingly identify clear priority areas.

In addition, considering the many complex interdependencies and the possible synergies between different issues it is preferable to first assess the wider impacts of adopted measures, and to only address new topics when these are sufficiently known. To this goal we would request the Commission to make enhanced and systematic use of the possibility to review already adopted legal acts after a defined period of time. We furthermore believe that going forward the Commission should combine its priorities with clear and realistic timetables to constantly deliver the high quality of legislation it is aiming for.

However, the biggest share of the necessary legislative actions has by now been accomplished. Apart from the finalisation of some remaining FSAP projects and carefully targeted legislation in some other areas, further market integration must at this stage be brought about through the correct and timely transposition, implementation and enforcement of the adopted measures. In addition, we would encourage the Commission to review at this stage the measures adopted under the FSAP with a view to harmonising the definitions and core concepts. This is for example necessary in the case of the definition of country of origin in the Prospectus directive against the one used in the MiFID Level 2 measures.

Specific comments

ANALYSIS OF THE STRUCTURE OF THE FSAP

- **What has been your personal experience of the implementation process of the FSAP measures?**
- **Do you consider any of the measures introduced under the FSAP redundant or ineffective?**
- **Do you agree that the fact that the FSAP was introduced as a package was a key driver in the programme being largely adopted by the target date?**
- **Please rank the three elements of the process involved in adopting the FSAP programme that you would consider the most important.**

The FSAP was an ambitious programme which was based on clear political goals and key principles for the proper regulation of financial services. Its adoption as a package underlined the concerted nature of the Plan and helped to create a general atmosphere of reform. We wish to commend the Commission for its role in ensuring that most of the measures have been adopted in line with the set timetable.

It is at this stage too early to fully assess the implications of the individual measures taken in the framework of the Plan. In many cases the effects of new provisions, such as those on financial reporting included in the Directives on transparency, market abuse, prospectuses and MiFID, will only become apparent after a considerable period of time. However, we assess that time pressure has at times worked to the detriment of

quality. In the case of the preparation of the MiFID Level 2 measures by CESR, e.g., the timetable was so tight that stakeholders did not have the time to sufficiently analyse the provisions against the data provided by the stock exchanges. Similarly, very little time was given for feedback on the implementing measures of the Market Abuse Directive. When agreed for a long period of time, timetables should be subject to review and, where necessary, adaptations.

As a core element for successful legislation, we believe that early and comprehensive involvement of the industry, investors and consumers alike is essential to ensure that priorities and deadlines are adequately chosen, and that each of the measures complies with the overarching goals. We believe that unfortunately, this was not the case for all FSAP measures. By way of example, we would mention the Directive 2002/87/EC on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate. Given the complexity of the issue, industry believes that the act would have benefited from extensive prior analysis on how the methods of measuring capital contained in the Directive would work and what their impact would be in practice.

In addition, against the background of the fast moving global market environment flexibility of legislation must at all times be ensured. As one possible tool to deliver this flexibility, increasing use should be made of the Lamfalussy procedure. However, we also note that unfortunately, the day-to-day practice of Lamfalussy falls short of the objectives of the process.

INFLUENCES ON THE TIMING OF THE ADOPTION OF MEASURES

- **What is your assessment of the workings of the Lamfalussy structure thus far?**
- **Do you think the system allows for adequate input from stakeholders?**

The FBE has been a keen supporter of the Lamfalussy process and its extension to banking, insurance and pensions from the outset. Despite having been in place for a short period of time, the process has already had important beneficial effects in that it has improved consultation practices.

However, we regret that CEBS has on occasions chosen to follow the recommendations of experts nominated by the Consultative Panel over the largely shared sentiments of the broad spectrum of respondents. While the input of the Consultative Committee's experts is useful, it is not representative of the industry as a whole. We feel that this is a dangerous development and is not in line with the spirit of public consultation supported by the Commission and central to the Lamfalussy process.

While it is too early to make a definitive assessment of the success of the Lamfalussy process at this stage, we expect that the higher level of consultation will result in higher quality of legislation. Despite the more labour intensive procedure, time savings should become apparent as and when Level 2 measures will be adapted. Admittedly, this will not immediately be the case and the process should not be subject to overly tight time schedules.

In addition, there are other areas of attention. First, this concerns the level of detail that was in some cases included not only in Level 1, but also in the Levels 2 and 3. In the

absence of a clear methodology it is difficult to strike the right balance in this regard, but we expect that experience will to some degree help to deliver appropriate results. In our view, the appropriate amount of detail on each Level should be determined on a case-by-case basis. In some cases, aspects might be generally supported by all stakeholders and would therefore not delay the adoption process on Level 1. On other matters, details might necessitate further study and consultation with market participants. These should be dealt with under the Levels 2 and 3. It should also be ensured that no new substantive regulation going beyond the legal framework set at Level 1 is adopted at subsequent levels. Finally, the work of CESR and CEBS at Levels 2 and 3 should be made even more transparent.

We have noted the Commission's assessment that the functioning of the Level 3 is still an unknown factor, and that the Member States would therefore tend to include more details at Level 3. We believe that, besides mandatory supervisory disclosure, the Level 3 guidelines deliver a powerful tool to enhance convergence in the implementation of Lamfalussy legislation. As shown by the example of the Market Abuse Directive, it is impossible to address all relevant issues at Level 2, and even less so at Level 1. Remaining inconsistencies and ambiguous provisions have to be tackled under Level 3.

We finally call on all parties involved to ensure that there is as much transparency in the process as possible. This concerns in particular the European Banking Committee and the European Securities Committee.

We have set out our position and concerns around the Lamfalussy process in detail in our response to the questionnaire of the Inter-Institutional Monitoring Group which is annexed to this paper.

CONSULTATION

- **What has your perception been of the volume of consultation involved in the elaboration of the FSAP measures?**
- **Have consultation exercises been specific enough in their focus for your area of interest/ business/ expertise?**
- **What is your view on the potential benefit of consumer input to consultation exercises?**
- **Would you be willing to make yourself available for involvement in forum groups/ working parties/ advisory panels on future policy developments?**

Early and comprehensive consultation with market participants is essential to ensure that legislative proposals are technically sound, proportionate and aligned with the defined objectives. We welcome the Commission's recognition of the importance of consultation and its commitment to further enhance the use of this instrument. We concur with the Commission that its consultation practices were at times insufficient, especially at the early stages of the FSAP. We also agree however that this has improved throughout the implementation of the Plan and – in spite of the tight time schedules - would mention as a good example for this the Commission's consultation on the MiFID draft Level 2 measures. Going forward, it must be ensured that industry representatives and other stakeholders be consistently given appropriate consideration in this process.

At this occasion, we underline the paramount importance of consultation periods being sufficiently long, so as to allow stakeholders to analyse relevant proposals and studies in detail.

We broadly believe that consultation exercises have been specific enough. However, to ensure that this is constantly the case we would suggest that consultations be increasingly carried out through all possible channels, and in particular both formal and informal ones. We strongly support the drawing up of feedback statements, as suggested by the Commission. This should lead to a continuous exchange of views and information between policy makers and industry.

Regarding the representation of consumers at EU level, we agree that all stakeholders should sufficiently be involved in the decision making process. It is however important to identify the correct consumer groups. For example, retail consumers are not directly involved in wholesale markets but are represented through professional fund managers. On a general note, it must be ensured that the input from consumer groups is to a large degree representative to adequately reflect differences of opinion. Apart from that, we note that consumer interests are also represented by both the European Parliament and the regulatory authorities.

The FBE stands ready to draw on its wide membership to provide technical input to the Commission's work, as we have done in the past.

LEGISLATIVE PROCEDURES

- **What is your impression of the use of directives versus regulations? Has the introduction of the Lamfalussy structure improved the application of directives in the Member States?**
- **Have you been affected by amendments to proposals made by the European Parliament or Council? What impact do you think these amendments have had on the effectiveness of the adopted measure?**

We agree that one of the benchmarks to assess the success of the Lamfalussy process should be the correct and timely implementation of the rules at domestic level, convergence of practices and proper enforcement. However, all Community action should respect the principles of subsidiarity and proportionality as laid down in the Treaty. While we acknowledge that Point 6 of the Protocol on the application of these two principles provides that "other things being equal, directives should be preferred to regulations", we believe that there are valuable arguments for the use of both legislative instruments. The choice of the instrument should be made on a case-by-case basis.

As regards the use of fast track procedures, we agree that this procedure has clear advantages. It seems notably suitable for legislative projects where there is a broad political agreement from the outset. However, it has become apparent that the shortened and informal procedure makes it by and large inaccessible to stakeholders. To deliver a sufficient level of transparency we suggest that each EU institution's discussion documents be made publicly accessible before such three-way discussions take place.

Drawing on our experience to date, we would assess that the amendments made by the European Parliament and the Council were of varying quality but contributed in a

number of cases to the delivery of a more balanced political approach. In the case of the European Parliament, this is partly due to its more open and transparent working processes.

Naturally, when it comes to technical details the European Parliament is not always in the position to draft amendments of a secondary order in an entirely correct way. The increased use of the Lamfalussy process and the strict application of the rule that only framework principles should be set at the first level of the procedure should minimise this problem. However, to ensure that democratic principles are respected this must not interfere with the institutional balance. Swift(er) updates and adaptations in line with market developments need to be based on a strong political mandate. To this effect the European Parliament must be fully involved in setting the framework principles and feel confident that the technical adaptations on Level 2 are and remain at all times in line with these principles.

Concerning the perceived risk of “gold plating”, we concur with the Commission that legislative add-ons which are not necessary to transpose the Directive concerned must be avoided. We consider enhanced requirements of disclosure and explanation the most important instrument to ensure this. However, we note that gold plating might in some cases simply be an attempt by Member States to clarify EU texts. We therefore encourage the Commission to ensure that the EU legislative text is sufficiently clear from the outset, and that the clarity is maintained throughout the legislative process.

QUALITATIVE ASSESSMENTS OF THE FSAP PROCESS

- **What is your assessment of the balance reached between the quantity and quality of the measures adopted?**
- **What is your assessment of the appropriateness of the adopted measures compared to the initial proposals?**

Whilst we welcomed the FSAP programme as a whole, we agree with the Commission’s view that the need for and the scope of legislative action are not always predictable and that adaptations might therefore have to be made in the course of events. We believe that the Commission’s strategy was broadly appropriate in this regard. However, we note that some of the measures of the Plan were not entirely compliant with the overarching goals. This was for example the case for the Prospectus Directive, which implied considerable additional costs for the industry. We believe that the needs of retail clients were at this occasion misinterpreted and not appropriately balanced against the financial and administrative burden that the Directive imposed on issuers and credit institutions alike.

As regards the balance between the quantity and the quality of the measures adopted, we would broadly support the findings of the Expert Groups. While we continue to support the ambition of the programme at large, in some instances the time pressure seems to have had adverse consequences as regards quality. Both industry consultation and impact assessments should indeed at all times precede legislative measures.

We find the Commission’s recommendations appropriate to tackle the mentioned difficulties. We furthermore recommend the enhanced use of review clauses which would further allow an *ex post* assessment of the consequences of legislative measures before new action is taken.

In this context, we would add that going forward “non-action” might in many cases be the preferred option. Before starting new legislative projects it should always be scrutinised to what extent market solutions can be encouraged, or alternatively whether the issue can be resolved at Member State level or through cooperation arrangements.

TRANSPPOSITION OF FSAP MEASURES

- **Can you recommend any further practical steps that could encourage greater compliance with the requirement to transpose and implement legislation in the Member States?**

The FBE welcomes the efforts undertaken by the Commission to ensure the timely and correct transposition of Directives into national law. In addition, particular attention must in this process be given to the delivery of convergent practices. Transposition workshops, carried out in a transparent and open way, technical assistance and Level 3 guidelines seem adequate tools for achieving these goals. The Commission should focus on the reasons why Member States are not able to deliver the transposition in the required way and on finding collaborative solutions. However, infringement proceedings should be pursued vigorously where no other solution seems viable.



RESPONSE

INTER-INSTITUTIONAL MONITORING GROUP QUESTIONNAIRE FOR INDUSTRY

1. The European Banking Federation (FBE) is the voice of the European banking sector.¹ The FBE has been closely involved in all of the consultations held by the various institutions over the last four years aimed at identifying and implementing further improvements to the functioning of the Lamfalussy Process.
2. The FBE has also provided input to CESR's consultations on its role at Level 3 and its proposed mediation mechanism as well as to CESR's "Himalaya Paper".
3. Notwithstanding FBE's support for the Lamfalussy Process since its inception, we remain committed to provide constructive criticism as regards how implementation of the new regulatory framework as established by the Lamfalussy process could be improved and refined. In this regard, the FBE welcomes the IIMG's questionnaire for industry as a stock taking exercise of experience on the Lamfalussy process to date.

A. GENERAL QUESTIONS

The Lamfalussy approach is aimed at creating a new regulatory system which would allow the European legislation to respond rapidly and flexibly to developments in financial markets.

Is it your perception that the Lamfalussy approach has brought greater speed and more flexibility into the process? If so, in what way? If not, what are your suggestions for improvements?

4. While we appreciate the importance of speed of adapting regulations to changing conditions, we continue to believe that speed is less important than quality as a criterion with which to judge the effectiveness of the Lamfalussy process. The Lamfalussy process is certainly an improvement in respect of consultation practices and is therefore justifiably more labour intensive, but at least in the first instance does not lead to any time savings.
5. The true savings in time to be achieved by the process are not yet fully visible since the amount of time taken for a Level 2 measure, for example, does not fully reflect the amount of time that will be saved in the future when the measure will be adapted by using a speedier procedure than the co-decision mechanism.
6. Moreover, it could be argued that whereas the Lamfalussy process has enabled greater speed political pressure to meet FSAP deadlines has been largely responsible for actually speeding up the process of completing the legislative measures of the FSAP. In any event, assessment of the speed of the Lamfalussy process should take into account the total time, that is the time from impact

¹ The FBE represents the interests of over 4500 European banks, large and small, from 28 national Banking Associations, with assets of more than EUR 20 000 billion and over 2.3 million employees.

assessment to the completion of guidance for supervisors at Level 3 and evaluated against the benefits the approach can deliver. Based on members' experiences of implementing Lamfalussy Directives, in particular the Market Abuse Directive, we also make the IIMG aware that slippage in the timetable of national implementation can also undermine any potential time savings the Lamfalussy process was designed to deliver.

Has the Lamfalussy process improved the quality of legislation?

7. The overall verdict on the Lamfalussy Process so far is broadly positive. In practice, it is still too early to assess the quality of the legislation and at this stage we would have to underline our reservations regarding the amount of detail at Level 1, the extra costs incurred, and unforeseen detail appearing in Levels 2 and 3.
8. The value the Lamfalussy process adds in terms of quality will only be realised if the Level 3 Committees respect the correct order of the process. For example, no Level 3 work should pre-empt decisions taken at Level 1, which has been the case in CESR's work on the CESR-ESCB standards for Clearing and Settlement. We therefore welcome the fact that work on the Standards has been frozen pending decisions to be taken at Level 1 in this case and guidance from the Commission to CESR in the future.
9. Industry would be better placed to answer this question after implementation and once legislation has been allowed sufficient time to deliver on the objectives it was designed to address. Only then can we truly comment on the quality of the legislation.

Have you been affected and/or involved by the Lamfalussy process? If so, in what way?

10. As regards the four Directives which have been subject to the Lamfalussy process to date,² the FBE has lobbied for the position of Europe's banking sector during each stage of negotiations and implementation.
11. As for how the industry has been affected by the Lamfalussy process, it has without question generated significant additional costs and required high levels of investment for financial institutions and related sectors. This is one of the many reasons industry has consistently called for there to be demonstrable benefits arising from the Lamfalussy process both in terms of cost savings after implementation and an increased ease at which banks can do business cross-border in a Single Market.

Have you perceived any significant changes since the Lamfalussy process has been launched? If so, do you consider them improvements? Please describe your concrete experience.

12. Overall, the consultation processes have definitely improved. It is too early to judge the results, but we remain very strong supporters of the Lamfalussy process and believe that the results, when available for a full evaluation, will be positive. This support is very much subject to the condition that we do not rush things at the detriment of quality. Therefore, any evolution of the Lamfalussy process (i.e. as proposed in CESR's "Himalaya Report") should be undertaken with careful consideration.

² Prospectus, Transparency, Market Abuse and Markets in Financial Instruments Directives.

13. Many problems concerning consultation both past and present, are a result of insufficient time being allocated to the process. We fully support CESR's scheduling plans and the IIMG's recommendation that CESR should be given 12 months for completing pieces of technical advice, as a general rule, and that it should allocate three months to the market for consultation on each given mandate, to be supplemented with a second round of consultation. That said, CESR is strongly encouraged to allow stakeholders reasonable additional time to provide comments over the generally accepted holiday season in Europe, July and August.

The Lamfalussy regulatory system distinguishes between Level 1 legislation (framework principles) and Level 2 legislation (technical implementing measures). In practice, there is some uncertainty as to what should be included in the Level 1 framework principles and what should be left to Level 2.

a) What would be your suggestions to resolve this?

14. The FBE takes the view that all decisions of material significance must be taken at Level 1. As yet, however, no methodology has been established for differentiating between material questions and questions of detail.
15. It should also be ensured that no new substantive regulation going beyond the legal framework set at Level 1 and the basic principles contained therein is adopted at subsequent levels. Level 3 should only be a question of interpreting and applying the regulation adopted at Levels 1 and 2, not of introducing additional legislation. Therefore, there should be no discussion of implementing measures at Level 2 until Level 1 measures have been adopted. This has not always been the case in the past; Level 1 regulation has sometimes been heavily influenced by the discussion of Level 2 measures.
16. We agree with the IIMG's previous statement that the Commission "should keep Level 2 measures as lean as possible." At the same time Level 2 measures should contain unambiguous rules in order to ensure consistent implementation in the Member States."
17. We also believe that, especially given the current lack of convergence in market and regulatory practices throughout Europe, there needs to be a balance found at Level 2 between sufficiently high-level and clear principles that do not dictate a rigid structure and sufficient certainty to ensure consistent implementation across the Single Market.
18. Finally, the work of CESR and CEBS at Levels 2 and 3 should be made even more transparent. Transparent supervision is, on the one hand, a prerequisite for the involvement of market participants and, on the other hand, highly important in its own right. CESR and CEBS are already striving to enhance transparency by operating websites and publishing annual work programmes. Nevertheless, it would be highly desirable to have further information on both the results of deliberations at committee and working group level and on the Committees' internal working practices.

b) Do you have any concrete examples of excessive detail in Level 1 legislation and/or over-regulation?

19. In some cases, the early examples of the Lamfalussy Directives have exhibited excessive detail but not sufficient clarity. The first Lamfalussy directives (Market Abuse and Prospectus Directives) contained more details than an 'ideal'

Lamfalussy directive should (while not being as clear on some issues). The high level of detail in the Prospectus Directive and MiFID (i.e. client classification rules) was also a testimony to this problem.

20. It would, however, be a mistake to assume that only Level 1 suffered from too much detail. This is illustrated by the rules in Directive 2003/125/EC on the appropriate provision of investment recommendations and on the disclosure of conflicts of interest. Regrettably, both sets of rules are so highly detailed that they have already proved to undermine the Directive's objectives.

How do you perceive the co-operation between the European Institutions (EP, Council, EC) themselves; between the European Institutions and Level 2 Committees (ESC, EBC, EIOPC); between the European institutions and Level 3 Committees (CESR, CEBS, CEIOPS) as well as between Level 3 Committees themselves?

EU Institutions

21. As for the Level 2 of the Lamfalussy process, the FBE calls on the EU institutions to come to an (Inter-Institutional) agreement to put the European Parliament in the same position as co-legislator as it would have been under Article I-36 of the Constitutional Treaty. This would *inter alia*, avoid that the sunset clauses start to take effect as of April 2007 (Market Abuse Directive).
22. Where directives are concerned, the fast-track procedure appears to have become the norm in the co-operation between the European Parliament, Council and Commission. This procedure is generally suitable for achieving swift political agreement on major legislative projects on the basis of the positions adopted by the EU institutions. It is therefore an appropriate instrument for introducing effective and efficient regulation.
23. At the same time, the shortened procedure and the informal three-way discussions between the EU institutions are by and large inaccessible to key stakeholders such as industry. The most important compromises are agreed at these informal meetings, often leading to results that are neither understood nor expected in the public arena. At the very least, each EU institution's discussion documents should be made publicly accessible before such three-way discussions take place.

The Level 3 Committees

24. The FBE further supports, and encourages, full co-operation among the supervisory committees in banking, securities and insurance. The quality and timeliness of the work of the Level 3 committees is of great importance to ensure consistent application of the rules across the board. The Joint Protocol on Cooperation between CESR, CEBS and CEIOPS of 24 November 2005 was welcomed by industry as a concrete statement of intent for greater co-operation going forward. We look forward to seeing the results of this stated commitment coming to the fore in 2006 and beyond.

What bottlenecks have you identified and what would you suggest to improve the process?

25. Concretely, in the context of the MiFID Level 2 preparations, the timetable became a major bottleneck. During the July 2004 hearings organised by CESR on MiFID, in the face of a unanimous request from the industry to extend the deadline of 17 September, CESR's response was to say that if the deadline were to be extended, a second round of consultation would probably not be possible. This clearly

signalled a bottleneck. In the event, we appreciated CESR's decision to allow two more weeks' consultation for two issues (best execution, transparency).

26. However, as the problem certainly goes beyond a matter of a few weeks, we believe that there must also be the willingness to re-visit the overall timetable if it proves impossible for CESR to conduct the adequate groundwork and proper consultation on its advice. Quite apart from the impact of inadequate time on CESR's consultation is its impact on the other stages of the preparation of implementation; on the Commission's work, ESC's deliberations, as well as national implementation and the industry's own adoption of new technology and procedures to comply with the new framework.
27. As regards what can be done to improve the situation, we continue to believe that it is up to the Commission and the ESC to ensure that imaginative solutions can be found to ensure that quality does not suffer as a result of timetables. We therefore expressly welcome the statement in the Commission's mandate: "[N]evertheless, in exceptional cases and subject to adequate justification, CESR should have the right to ask the Commission to defer the deadline set in the mandate for delicate and problematic issues." We have urged CESR to make use of this right if it feels that the time available to it is not sufficient to carry out an adequate consultation and to reach a satisfactory result for its final advice.
28. Equally, we believe that transitional and grandfathering provisions will have to be considered in specific cases where the market transition will otherwise be too disruptive. We would like to stress the need for transitional measures for various aspects of a Directive which will require the industry to make organisational and technological changes. The Commission has said that such measures, where not already contemplated in the Directive, would be difficult to bring about in the absence of a political decision. We therefore urge the Commission, Council and European Parliament to consider transitional measures well in advance of the implementation date.
29. In the context of allowing industry sufficient time to make the requisite organisational and technological changes, we warmly welcomed the result of the European Parliament's vote of 13 December 2005 to extend the deadline for firms to become compliant with MiFID. This is a pragmatic solution to a problem foreseen and one that could have been resolved earlier had greater consideration been given to the scale and nature of the technical detail contained within Levels 1 and 2 of MiFID.
30. Finally, translation bottlenecks, as has been the case in MiFID and potentially the CRD, must not be allowed to impact on the legislative timetable. Industry often faces a very demanding timetable to implement legislative measures. Its preparedness to comply with EU legislation should not be compromised by what amounts to a resourcing issue at the European Commission.

Do you see a risk of the Lamfalussy process leading to overregulation (regulatory burden)?

31. Implementation of Lamfalussy directives is confronting providers and users of financial services with an unprecedented level of detail, especially in the wholesale markets. It is true that directives should be principles-based at Level 1. However, it is the sum total of rules and regulations from Level 1 through to Level 3 which matters to the banks in practical terms. The rules at Levels 2 and 3, in particular,

are often far too detailed and there is therefore there is a real danger of overregulation.

32. The Commission has responded appropriately by stressing that better regulation principles will be applied in future. These principles should be used by the European Parliament and the Council as well. The better regulation approach should also be applied in all comitology procedures. The principles should be satisfied not only by future, but also by existing legislative projects (e.g. the new Consumer Credit Directive).
33. We have mentioned our concerns regarding too much detail in the Levels 1, 2 and 3. Level 1 sets the principles reflecting a political decision whereas as Level 2 sets out clear measures to implement the high level principles at Level 1. We would add in respect to Level 3 that this was conceived above all to align regulatory and administrative practices on the ground that might stand in the way of cross-border provision of services. We believe that Level 3 should not become a new layer of regulation. The need to achieve consistency on the ground must be balanced against the need to retain flexibility.

Is appropriate use now being made of regulatory impact analysis tools? How effective are such analyses and do you have any concrete suggestions for improvement?

34. We are happy to note all major Level 1 measures will be subject to a regulatory impact assessment in line with the better regulation principles. The risk of overregulation should be minimised through a greater use of regulatory impact analysis and a careful case-by-case analysis of the proposed measures.
35. We have long argued that, since the legislative process may introduce significant changes to a proposal, a transparent debate about these changes was an indispensable accompaniment to a good pre-legislative consultation by the Commission. We believe that the European Parliament's transparent processes already make such a debate possible to a large extent (although improvements to make this more systematic would be welcome). However, the priority in this respect should be improving the transparency of the deliberations and contribution of the Council.
36. The economic impact of any planned regulation at an early stage must be clearly evaluated. An analysis of this kind must always examine what implications new or revised measures will have for market structures, market behaviour and market results. If a cost-benefit analysis indicates adverse effects on the diversity of competition, for example, these findings should be acted on.
37. Moreover, the results of an impact analysis must always be discussed with the parties involved before any measures are initiated. It would also be desirable for the process to examine not only the global approach of the regulation, but also major specific aspects of the planned rules. In any event, policy makers must assess how far market-led solutions could be used to remedy market failures or achieve aims that would have otherwise led to a legislative approach.
38. Industry is encouraged that the use of regulatory impact analysis is now much better than it was. Two particular current examples are:
- the Commission's consultation on clearing and settlement before it considers whether to legislate; and

- the Commission's intention to conduct a thorough economic analysis before making decisions on whether to extend MiFID market transparency provisions to non-equity markets.

B. CONSULTATION

Consultation and transparency are leitmotifs of the Lamfalussy approach. Is it your perception that:

a) The consultations are run in an open, transparent and systematic way?

39. We think that there is a need to re-visit the consultation standards established by CESR. The principles of consultation established in 2001 were welcomed universally as a very useful first step, particularly in terms of establishing benchmarks for what constitutes good consultation (e.g. a second round of consultation).
40. However, since, we have faced numerous situations in which it would have been helpful to have clearer benchmarks than those existing. In fact, as we progress in the application of the Lamfalussy process, we encounter a range of situations in which consistency seems to be lacking.³ Naturally, any re-visiting of the standards for consultation should allow for different situations and thus focus on those principles that are necessary for ensuring good consultation practices in a systematic way.
41. We endorse the use of one language for the drafting of Level 2 and 3 texts nevertheless this makes it more important to allocate sufficient time for consultation given that the majority of Member States may need to translate the text before the preparation of a response. The overall quality of CESR's output is directly related to the time stakeholders have to prepare their responses. Conscious of the fact that there will be an impact on the timetable to complete a Lamfalussy directive, on balance we feel that a one-month period for a call for evidence is probably too short.

b) The market participants and end-users (issuers and consumers) have been consulted sufficiently within the Lamfalussy framework? If not, what would be your suggestions?

42. Not always, as in the case of CESR's involvement, with the ECB, in the clearing and settlement of securities. We also share the findings of the IIMG that CESR should not go into issues that belong to Level 1 or Level 2. As mentioned above, the lack of adequate timing has been also been an important factor jeopardising the consultation period.

Have you been involved in the consultation process? If so, in what capacity?

43. The FBE has been fully involved in every consultation of the Lamfalussy process to date, be it in respect of the individual "Lamfalussy Directives" or on the Process itself. We greatly welcome the opportunity industry has under the Lamfalussy process to offer its views and we feel that "Lamfalussy legislation" has benefited

³ For example, how long should a second round of consultation be? (e.g. was CESR right to consider its consultation on the revised CESR-ESCB Standards a full second round?) Should there be an open hearing for draft Level 3 guidelines? (e.g. should there have been an open hearing for the MAD Level 3 guidelines, as there was for the Prospectus Directive guidelines?)

from being closer to the grain of the market and more finely attuned to investors' needs.

Does the practical implementation of the Lamfalussy approach allow for adequate transparency and feedback on the use of responses to consultation?

44. Yes, when used correctly. However, industry feels that CESR needs to modify arrangements for public hearings so that there is an opportunity not only to air views at an earlier stage in the process, but also for a more thorough and interactive discussion at a later stage, once respondents have had an opportunity to formulate their views.
45. Moreover, the FBE feels that feedback from CESR could be more effectively channelled in order to research workable solutions. This could be done via special meetings of respondents to the consultation (or a small group who are representative of wider interest) after the consultation has ended.
46. Feedback documents following consultation are particularly useful tools and should be used routinely, in our view. We believe all the EU institutions need to improve the way feedback documents are produced. Even though increasing use is being made of such tools, sound proposals by participants in the consultation process are not always adequately reflected and taken into account.
47. Specifically, industry feels that feedback in respect of CESR's work on the CESR-ESCB standards for clearing and settlement could have been greatly improved. In this case CESR was heavily criticised for not explaining why it had apparently not taken into account and/or not offered feedback on the position of the majority of the respondents in respect of the approach it adopted in respect of the Standards.

C. IMPLEMENTATION

The Lamfalussy structure and in particular the strengthened cooperation between national regulators (Level 3) should improve consistent and equivalent transposition of Level 1 and Level 2 legislation.

Is it your perception that the Lamfalussy process has helped to improve the timing and consistency of the transposition of Community rules? If not, what would be your suggestions to improve the process of transposition?

48. The Lamfalussy process ought to improve the consistency of transposition of Community rules. If used well and for the purpose it was envisaged in the Lamfalussy Report, Level 3 guidelines should play a significant role in facilitating the common transposition of legislation in the 25 Member States.
49. That said, industry believes that Level 3 is not a panacea when it comes to consistent transposition and more can still be done. Concretely, the FBE believes that the publication of transposition tables by the Commission is of vital importance. Providing an accurate and clear view on how far Member States have progressed in the transposition of Single Market legislation not only improves transparency, which would be in itself a positive development, but leads to greater pressure being put on laggards to improve transposition. Therefore, we welcomed a special chapter being devoted to transposition tables in the July 2005 edition of the Internal Market Scoreboard.
50. Secondly, the FBE strongly encourages the Commission to make best possible use of transposition workshops so that Member States can exchange views on how

best and how consistently to transpose Single Market legislation. The FBE very much encourages the Commission to make the outcomes of the transposition workshop meetings public.

51. In order to ensure that better regulation, transposition, enforcement and continuous evaluation is undertaken in a purposeful way, more resources need to be devoted to the relevant services of the Commission. The industry is also conscious of the role it must play as an early warning mechanism for the Commission to report delays and/or transposition of legislation in a way that could potentially negatively impact on the objectives of completing the Single Market.
52. Finally, we consider that it is of utmost importance that the Commission sets realistic transposition deadlines. Failure to do so leads to sub-optimal results which ultimately compromise the quality of the legislation underpinning the Single Market in financial services. Accordingly, we welcomed the extension of the deadline to transpose the MiFID following adoption. In the absence of legal certainty as to the content of the Level 2 measures, industry could simply not start developing MiFID-compliant systems.

Have you been involved in the process of implementation of Lamfalussy Directives? Please describe your concrete experience.

53. The FBE as a federation of member Trade Associations, one from each Member State, does not play a direct role in the implementation of Lamfalussy or any other directives in individual Member States. Rather it provides a forum to exchange views amongst its members about local implementation, the summary findings of which we are able to offer to interested stakeholders, such as the Commission.

The Lamfalussy report recommends the use of Regulations rather than the use of Directives i.e. in order to avoid uneven transposition and different interpretations. Previous IIMG reports tended to uphold this recommendation. To what extent do you agree with this statement?

54. We think that it is better not to proceed on the basis that the Commission “should make more frequent use of regulations at Level 2 and largely limit the use of directives to cases where fundamental considerations make the use of regulations undesirable, or where the need for national discretion can be demonstrated.”⁴
55. Instead we believe that the choice of instrument at Level 2 should be determined on a case-by-case basis. It should be based on several factors, which should be discussed publicly. To take a few possible factors, it would seem to us important to consider, for example, whether there is a need to adapt the rules to the local legal environment, the degree to which the rules are of a technical nature, and whether there is a risk that a deviation of the key areas may undermine the use of the single passport. These factors may also interact with each other and must be balanced for an optimal result. In the Prospectus Directive, for example, the FBE supported the choice of a regulation at Level 2 since the document (containing disclosure requirements) was quite detailed and the single passport based on these requirements had to be implemented in a strictly uniform fashion across Europe, with no room for deviation. In the case of the Market Abuse Directive, we also supported the Commission’s choice of directives for two of the Level 2 measures and a Regulation for the safe harbours, based on a consideration of the factors above.

⁴ IIMG December 2003 report.

56. What is clear to us is that the primary basis of the decision should be the coherence of the overall regime; the speed of implementation should be secondary. Moreover, it should be acknowledged that the impact of the choice of instrument on speed is not obvious in all cases. This is because a regulation, for a variety of reasons, may also take a long time to implement. Finally, if a regulation is used, the quality and coherence of the document has to be flawless from the perspective of implementation in all Member States, since there will be no room for manoeuvre once it is adopted.

D. Are there any other issues you would like to raise in respect to the Lamfalussy process?

57. The model established by the Lamfalussy report is considered to be the best way in which to facilitate the Single Market, in line with the grain of the market in what ought to be a long-run cost and time efficient way. However, the potential success of the Lamfalussy model, has in certain situations been undermined by *inter alia* the imposition of unrealistic deadlines, political intervention on technical issues and most worryingly the tendency to disrespect the clear division of detail and nature that ought to be contained in Level 1 as opposed to Level 2.
58. In an increasingly globalised operating environment, the IIMG is also encouraged to reflect on how the Level 3 Committees engage with those 3rd countries with sophisticated and/or equivalent supervisory structures.
59. As market participants' and legislators' experience and confidence in the Lamfalussy process develops further going forward we strongly urge that more time is given before definitive conclusions are drawn in respect of whether the process has succeeded or failed. For example, CESR has little experience at Level 3 in important areas such as MiFID and CESR's proposed mediation mechanism could prove to be a useful tool to reduce the band of supervisory divergence but more time is required for these areas to bare fruit.