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**Financial services policy**

# **FSAP Evaluation**

## **Part I: Process and implementation**

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## 1. INTRODUCTION

The Financial Services Action Plan (FSAP), launched in 1999, was largely completed by its 2004 deadline, with 39 of the 42 measures adopted<sup>1</sup>. This is “considered a success in legislative procedural terms”<sup>2</sup> for a programme of this scale, which included landmark legislative initiatives, introduced a new regulatory process and had to respond to unprecedented market events in the financial services area.

To achieve this extremely wide-ranging programme required a tremendous effort on the part of all institutions with relatively few resources. The range of activities from ex-ante consultation exercises to drafting of legislative proposals by Commission personnel and inter-institutional negotiations was extremely wide-ranging.

The FSAP has already been the subject of considerable analysis by various parties, including the ten Progress Reports on the FSAP (hereafter referred to as the “Progress Reports”)<sup>3</sup>, the Financial Services Committee report on Financial Integration (the “Asmussen report”)<sup>4</sup>, the Reports of the Four Independent Groups of Experts on European Financial Integration (“expert group” reports)<sup>5</sup>, the European Parliament’s Economic and Monetary Affairs Committee’s draft report on the Current State of Integration of EU Financial Markets (“van den Burg report”)<sup>6</sup>, to name but a few. Once the final deadline for the completion of the FSAP had been reached, it was important for reasons of political accountability, to evaluate objectively the degree of achievement of the FSAP measures and to *draw lessons for the future*.

This evaluation report marks a necessary step in responding to the call for an exhaustive ex-post evaluation analysis by the Commission services of the impact of the Action Plan. This “*FSAP Evaluation*” is being carried out in two parts. In this report, the manner in which the various measures, legislative and non-legislative, were adopted, is analysed. This text therefore examines the procedures, framework and working methods. Part II of the Evaluation, which will be carried out over the 2007-2008 timeframe once the FSAP measures have been implemented in the Member States and there has been an opportunity to assess their effectiveness on the ground, will deal with the economic impact of the various measures introduced under the Action Plan. The usefulness of such a review has clear political backing, as the European Parliament’s Committee on Economic and Monetary Affairs has requested a “full and public impact study on the current FSAP”.

By looking back and analysing the processes that went into the finalisation of the FSAP, this Part I of the Evaluation aims to draw conclusions that will contribute to the

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<sup>1</sup> Two further measures were adopted in the course of 2005, bringing the completion rate to 98%.

<sup>2</sup> The European Parliament’s Economic and Monetary Affairs Committee’s report on the Current State of Integration of EU Financial Markets (report A6-0087/2005), available on the website of the European Parliament Economic and Monetary Affairs Committee at <http://www.europarl.eu.int/activities/expert/committees/reports.do?WS=10&SV=10&language=EN>

<sup>3</sup> Available on the DG Internal Market website at [http://europa.eu.int/comm/internal\\_market/finances/actionplan/index\\_en.htm#action%20plans](http://europa.eu.int/comm/internal_market/finances/actionplan/index_en.htm#action%20plans)

<sup>4</sup> FSC 4156/04

<sup>5</sup> Available on the DG Internal Market website at [http://europa.eu.int/comm/internal\\_market/finances/actionplan/stocktaking\\_en.htm](http://europa.eu.int/comm/internal_market/finances/actionplan/stocktaking_en.htm)

<sup>6</sup> cf. note 2

preparation and design of future policy interventions and improve their quality and assist in designating appropriate resources for future actions.

## **2. SCOPE AND METHODOLOGY**

The scope of this review is limited to the 42 measures included in the original Financial Services Action Plan, as well as those closely related legislative and non-legislative measures allied to these items that were adopted in the course of the period under review (1999 to 2004).

Based on information available at the time of writing<sup>7</sup> it includes a breakdown of the adoption process of each of the measures from their initial inclusion in the 1999 Action Plan through to their completion (for non-legislative measures) or implementation in the Member States (for legislative measures) – see Annex A. A distinction is made between legislative measures (directives and regulations), recommendations and other actions, in order to weight the effect of each measure on businesses and consumers in the Internal Market.

Primary sources of information have been the Commission's Progress Reports, the Asmussen Report and van den Burg report, as mentioned above. The wide-ranging post-FSAP consultation exercise, including the conclusions of the Commission expert groups from the banking, insurance, securities and asset management industries and individual contributions have also been drawn upon.

## **3. ANALYSIS OF THE STRUCTURE OF THE FSAP**

### **3.1. Action Plan framework**

During most of the 1990s, efforts in the financial services sector were largely focused on achieving a smooth transition to the single European currency, with the broader issue of the functioning of the EU financial markets taking a back seat. Once the introduction of euro was secured, however, political attention turned to making improvements to the single financial market. It was understood that greater integration in the financial markets was crucial to the success of the euro and to European Economic and Monetary Union.

When it invited the Commission to “table a framework for action... to improve the single market in financial services” at its summit in Cardiff in June 1998, the European Council recognised that action was required on a number of fronts in order for the EU to exploit to the fullest extent possible the potential offered by the completion of a functioning single market in financial services.

On 28 October 1998 the European Commission adopted a Communication "Financial Services: building a Framework for Action"<sup>8</sup> containing a series of measures that would allow the European Union's financial services sector to realise its full potential, notably with the introduction of the euro.

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<sup>7</sup> December 2006

<sup>8</sup> [http://europa.eu.int/comm/internal\\_market/finances/docs/actionplan/index/fs\\_en.pdf](http://europa.eu.int/comm/internal_market/finances/docs/actionplan/index/fs_en.pdf)

At the suggestion of the European Commission and the request of the Vienna European Council in December 1998, the Financial Services Policy Group, a group composed of personal representatives of EU Finance Ministers and the European Central Bank and chaired by then Internal Market Commissioner Mario Monti, was created in January 1999 to identify priorities amongst the measures outlined in the above October Commission Framework for Action.

The Commission's response to the above mandate from the Cardiff European Council and subsequent developments was the Financial Services Action Plan, which was notable in that it was announced as a *package*, as stated in the original Action Plan document<sup>10</sup>: "The [...] Framework for Action is an aspirational programme for rapid progress towards a single financial market". All of the initiatives were therefore enveloped in one overarching framework, geared towards a core objective, namely to create a single deep and liquid financial market to serve as a motor for growth, job creation and improved competitiveness in the European economy.

It is difficult to quantify the effect that launching these initiatives within the structure of the Action Plan had. It is, however, certain that it was extremely important for its eventual success. The fact that the FSAP was so wide-ranging, with significant potential consequences for the financial services industry in Europe, attracted considerable public attention, with the result that *political and market pressure* came to bear on the institutions to achieve its realisation. If individual initiatives had been singly pursued, it is probable that there would not have been the same momentum to reach the deadlines. It also tied in very closely with the Lisbon strategy launched in 2000 to breathe new life into Europe's economy. The Lisbon objective of becoming "the world's most dynamic knowledge-based economy by 2010" was one that the world's press, public leaders and private individuals all came to know, and as the FSAP was named as a major contributing factor to achieving the Lisbon goals, this additional glare of public attention helped. Two other crucial factors came into play. Firstly, the successful launch of the euro helped create a strong logic for financial services integration. Secondly, the Commission supported its programme with economic analysis which was welcomed by the EU's top financial economists, the result being that there was strong support for the thesis that integration would bring major benefits.

All of this led to an unprecedented degree of *co-operation 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<sup>11</sup>. Among the 21 directives contained in the Action Plan, the average timeframe for adoption by the European Parliament and Council was just short of 22 months. This was a significant achievement for a programme of this scale, much shorter on average than before, and is testament to, among other factors, the quality and quantity of the communication on each measure between the Commission and the European Parliament and Council.

<b>Examples of adoption of "blocked" legislative proposals under the FSAP:</b>
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<sup>9</sup> [http://europa.eu.int/comm/internal\\_market/finances/actionplan/policygroup\\_en.htm](http://europa.eu.int/comm/internal_market/finances/actionplan/policygroup_en.htm)

<sup>10</sup> Financial Services: Implementing the Framework for Financial Markets: Action Plan, 11 May 1999, (COM (1999) 232), Section I

<sup>11</sup> See also Section 4.1: Lamfalussy

- **The Directives on the Reorganisation and Winding-Up of Credit Institutions and Insurance Undertakings**<sup>12</sup>. These had originally been proposed in 1985 and 1986 respectively and had languished without any further progress from 1993 until 1999. Further to their inclusion in the FSAP, both directives were adopted within a period of six months.
- **The Council Regulation on the Statute for a European company (SE)**<sup>13</sup>. This had originally been proposed by the Commission in the early 1970s. This proposal had not progressed in the European Parliament and Council due to issues of employee representation (“Mitbestimmung”); nor, subsequently, had any of the proposals with similar ambitions. Once included in the FSAP, the political pressure to arrive at a solution meant that this issue was returned to and the regulation adopted. A supplementary directive with regard to the involvement of employees<sup>14</sup> was adopted on the same date as the Regulation, having been first proposed 30 years previously.

### 3.2. Priority setting and Timeframes

Each of the measures set out in the original 1999 Action Plan was given a *specific priority level*, from 1 to 3. This was deemed essential in view of the quantity of measures included in the FSAP running concurrently and “reflect[ed] the priorities as suggested by discussions in the Financial Services Policy Group and the European Parliament”<sup>15</sup>.

All but one of the Priority 1 legislative proposals had been adopted by the Commission by the time of the Mid-Term Review of the FSAP in April 2002. The exception was the Take-Over Bids Directive which had been completed by the deadline for completion of the FSAP in 2004.

Of the Priority 2 measures (both legislative and non-legislative), only one measure had not been completed by the 2004 cut-off date, namely the Capital Requirements Directive<sup>16</sup>. However, the work going on in parallel in the Basel committee meant that it would have been premature to proceed with capital requirement legislation any earlier, as it may not have fitted into the global framework. In addition, in the original Action Plan, the objective had simply been to “amend the directives governing the capital frameworks for banks and investment firms”, therefore it is not surprising that a new directive of the breadth and depth of the Capital Requirements Directive took slightly longer to adopt.

Those measures with Priority 3 status included the two remaining actions out of the 42 that had not been completed by the 2004 deadline; namely proposed directives on cross-border mergers and cross-border transfer of seat. However, progress has been made in these areas. They were the focus of additional attention in the Commission Communication on Company Law and Corporate Governance published in May 2003 and this, combined with the negotiations on employee participation that led to the adoption after many years of the European Company Statute (see above) meant that there was renewed impetus to adopt these proposals. The momentum generated by the Action

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<sup>12</sup> Directive 2001/24/EC, Directive 2001/17/EC

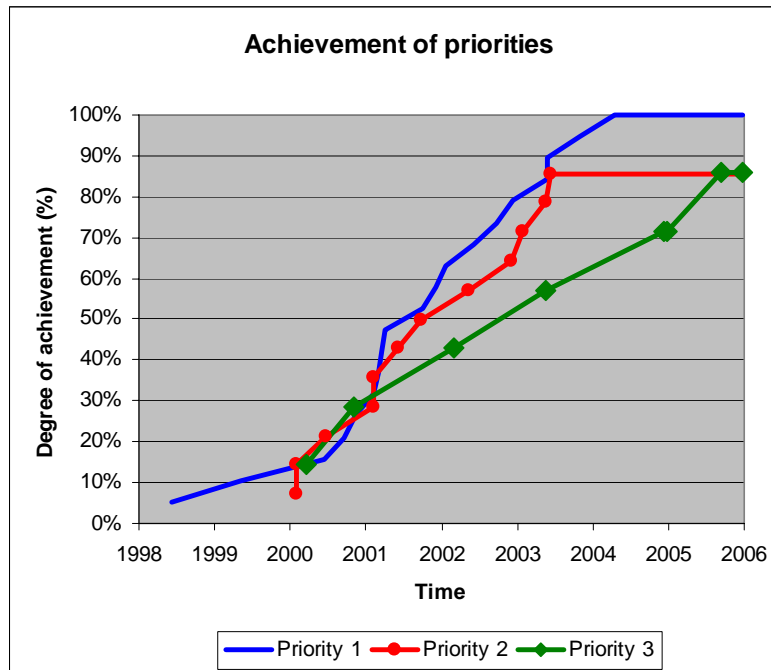
<sup>13</sup> Regulation 2001/2157

<sup>14</sup> Directive 2001/86/EC

<sup>15</sup> COM (1999) 232, section 1.

<sup>16</sup> Subsequently approved by the European Parliament on 28 September 2005.

Plan has had a lasting effect: the directive on cross-border mergers was adopted in a single reading at the Council of 19 September 2005, after a positive vote in the European Parliament on 10 May. On 21 November 2006, Commissioner McCreevy announced<sup>17</sup> that he planned to come forward with a proposal for a directive on the cross-border transfer of seat in the spring of 2007.



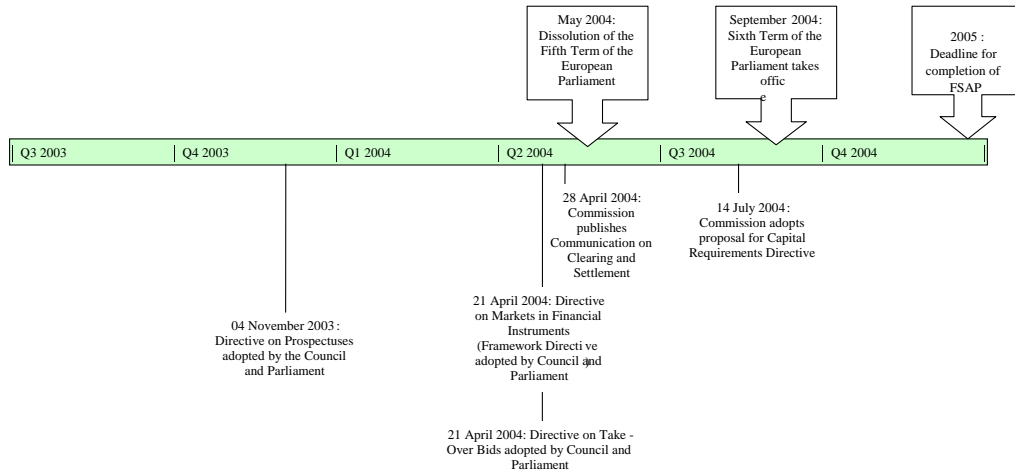
Although many of the Priority 1 measures (particularly the non-legislative ones) may have been given this billing because of the fact that they were already relatively well advanced at the time the Action Plan was drawn up in 1999, the fact that every Priority 1 measure was completed within the given timeframe is still indicative of how effective realistic priority setting and timetabling can be when drawing up a wider programme of measures, provided there is strong political support for the overall progress (See Annex A).

In addition, the Lisbon European Council of March 2000 stated that “steps should be taken to set a *tight timetable so that the Financial Services Action Plan is implemented by 2005*”. In this context, it is worth noting that almost half of the legislative measures were completed between 2003 and 2004, by the end of which the Action Plan was scheduled for completion. See also section 4.3.2.3, below.

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<sup>17</sup> In the context of a speech to the European Parliament Legal Affairs (JURI) Committee

## Measures adopted Q4 2003 -Q4 2004



*Recommendation 1: When drawing up policy programmes, ensure that the measures contained therein are prioritised appropriately and, where relevant, are subject to strict deadlines which are politically agreed as widely as possible by European Parliament / Council and supported by all stakeholders, including market participants and users. Strong monitoring mechanisms are required.*

#### 4. INFLUENCES ON TIMING OF THE ADOPTION OF MEASURES

The timing of the introduction of the various measures under the FSAP was influenced by a number of factors, including the application of the “Lamfalussy” approach to the drafting of legislation, the extensive consultation carried out for many of the measures, external events that may have triggered a shift in priorities and the pressure to meet the deadline.

#### 4.1. Lamfalussy

During the period up to the end of 2004, the Lamfalussy process<sup>18</sup> (established in 2001) was applied only in the area of securities market legislation and therefore to four of the measures under the FSAP: the Market Abuse Directive, the Prospectus Directive, the Markets in Financial Instruments Directive and the Transparency Directive<sup>19</sup>. The effectiveness of this process has been the subject of considerable analysis elsewhere, notably Commission Staff Working Document “The Application of the Lamfalussy Process to EU Securities Markets Legislation” (hereafter referred to as the “Lamfalussy Review”)<sup>20</sup> and the Inter-Institutional Monitoring Group’s Third Report monitoring the Lamfalussy Process (“IIMG report”)<sup>21</sup>, both of which were published in November 2004. However, it may be useful in the context of this analysis of the process and implementation of the FSAP to recall a few salient points.

The Lamfalussy process was not introduced in order to spark a revolution in financial markets. On the contrary, it was launched in response to the call for an integrated approach to supervision and regulation based on an evolutionary method. By being involved in the legislative process at the various stages, Member States should feel more comfortable with and aware of the ongoing adoption of European rules. Moreover, the strengthened co-operation and creation of common ground among regulators should facilitate the consistent transposition of directives into national legislation.

The two above-named reports both highlight the fact that the introduction of the Lamfalussy process (itself one of the 42 FSAP measures – the “creation of two securities committees”) was successful in that it led to *shorter timeframes* for the adoption of directives; the close co-operation between supervisors meant that the content of the draft legislation was more likely to be *acceptable to the Member States*, and the committee structure led to *improved working relationships* between the various institutions and a greater level of transparency.

For instance, the IIMG report states that “the Lamfalussy Process is working well overall and has led to swifter preparation of legislation. There is better inter-institutional working and transparency”<sup>22</sup>. The Lamfalussy Review, for its part, comments on the quality of the proposals: “The open and transparent way in which work on delivering the

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<sup>18</sup> The Lamfalussy process is a 4-level approach to elaborating legislation. At **Level 1**, framework legislation setting out the core principles is adopted by normal co-decision after a full consultation process. At **Level 2**, technical implementing measures are adopted by the Commission, on the advice of the relevant advisory committee, after a binding vote of the competent regulatory Committee representing the Member States and taking into account the European Parliament’s view. At **Level 3**, the appropriate advisory committee, made up of representatives of national supervisory bodies, draws up common interpretation guidelines and common standards and compares regulatory practice in the various Member States to foster convergence of supervisory practices. **Level 4** is where the Commission enforces the timely and correct transposition of EU legislation into national law. A full description can be found in the Lamfalussy report, available at:

[http://europa.eu.int/comm/internal\\_market/securities/lamfalussy/index\\_en.htm](http://europa.eu.int/comm/internal_market/securities/lamfalussy/index_en.htm)

<sup>19</sup> Directives 2003/6/EC, 2003/71/EC, 2004/39/EC and 2004/109/EC respectively.

<sup>20</sup> SEC(2004)1459

<sup>21</sup> Available on the DG Internal Market website at

[http://europa.eu.int/comm/internal\\_market/securities/monitoring/index\\_en.htm](http://europa.eu.int/comm/internal_market/securities/monitoring/index_en.htm)

<sup>22</sup> IIMG report, Executive Summary, Point 1.

Lamfalussy measures has been pursued has resulted in an improvement in the quality of legislation and an acceleration of the legislative process”<sup>23</sup>. Market participants were invited to comment on the contents of the Lamfalussy Review in a consultation launched in November 2004. In their responses, they were also generally supportive, with the London Stock Exchange, for instance, commenting that “It has helped to make Community legislation on securities markets more flexible and the quality of legislation has been improved by the involvement of regulators and external stakeholders.”<sup>24</sup> In the consultation on the draft of this report, too, many contributors expressed their views on the Lamfalussy process. As stated in the summary of contributions, comments are generally positive, with some key issues raised.

On the issue of timing, as stated in the IIMG report, the timeframe for negotiation of the four above-mentioned Framework Directives from the date of the Commission proposal to the publication of the directive in the Official Journal averaged 20 months (a figure which is reduced even further to 16.5 months if based on the date from the revised Commission proposal for the Prospectus Directive). This compares very favourably to the timeframes involved in adopting previous securities legislation such as the 1989 Insider Dealing Directive (2.5 years), 9 years for one of the forerunners of the Prospectus Directive, the 1993 Investment Services Directive (4.5 years), and 3 years for the Interim Reports Directive, a precursor to the Transparency Directive<sup>25</sup>.

In addition to the shorter frameworks for the overall adoption of legislation, the Lamfalussy process has also had a positive impact on the vote in the Council. Commission proposals have been broadly supported and the Markets in Financial Instruments Directive was even adopted unanimously.

The above timing indicators refer to the Framework (Level 1) legislation. The more detailed Level 2 implementation measures also have to be finalised, adopted and applied in the Member States within the transposition deadline for the Level 1 measures, which is usually between 18 and 24 months. The reports note that one of the complications experienced in the implementation process was that the European institutions experienced some difficulty in limiting the Level 1 legislation to the framework level and leaving the detailed implementing measures to Level 2, which in some cases meant that there was an *excessive level of detail at Level 1*. For instance, the Lamfalussy Review states that “the level of detail contained in legislative measures [...] is a particular concern at Level 1, where it is arguable that some measures contain details that, according to the underlying logic of the four-level regulatory approach, ought to have been left to Level 2”. And the IIMG report notes “the consensus view that it is useful to restrict Level 1 measures to framework principles does not seem to sit well with the current degree of detail at Level 1. This could jeopardise the Lamfalussy Process”.

However, the issue of level of detail at Level 1 of the Lamfalussy structure is more complex and cannot be simply described as a complication that has arisen. We must bear in mind that European legislation is adopted by bodies consisting of representatives of various legal systems and different legal schools. While adopting a piece of legislation it is necessary to accommodate the views of the different Member States, some of whom

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<sup>23</sup> Lamfalussy Review (SEC(2004)1459), point 47.

<sup>24</sup> Full comment available on the LSE website at <http://www.londonstockexchange.com/en-gb/about/Newsroom/regulatorypolicy/Lamfalussyprocess.htm>

<sup>25</sup> Council Directives 93/22/EEC, 89/592/EEC, 89/298/EEC and 82/121/EEC, respectively.

are inclined towards greater harmonisation, and others who favour the lighter touch principles. Moreover, the functioning of the Level 3 is still developing. Before the co-operation between national supervisors becomes more established it may be that, owing to a lack of confidence in these structures, Member States may tend to include more details at level 1.

The IIMG is due to come forward with a second Interim Report in January 2007 that will set out preliminary suggestions for the improvement of the process, including the separation of Levels 1 and 2.

The influence of the Lamfalussy process on speeding up the timing of adoption of legislation, while being lauded as a positive development, was also cause for some concern. Transposition deadlines (for instance for the MiFID) have been considered too short. Preparation of advice by CESR as well draft implementing level 2 legislation by the Commission had to take place consequently within a very limited timeframe; along the same lines some further concerns were expressed: The BNP Paribas response to the Lamfalussy Review, for instance, notes that “time allocated for consultations is too short (it often includes periods of holidays)”. The European Banking Federation, in its submission, sets out that “we must *set future timetables more realistically*, in order to avoid the problems caused by the FSAP”. The Association françaises des entreprises d’investissement, for its part, states even more starkly in its contribution that “quality must always take precedence over speed”. This message is also echoed in the contributions to the consultation on the first draft of this report.

It is worth noting here that in November 2003, one year before the end of the term of the FSAP, the Commission launched a package of measures designed to *extend the Lamfalussy process to the areas of investment funds, banking and insurance*, including a directive which was adopted by the European Parliament and Council in March 2005<sup>26</sup>. The fact of this extension is a positive reflection of the effect that the Lamfalussy process is perceived to have had in the area of securities, where it was first used. The parties involved were clearly confident in the ability of the Lamfalussy process to achieve its aim of being “sufficiently flexible to be able to respond to market developments, while recognising the need for transparency and legal certainty”<sup>27</sup>

*Recommendation 2: Continue to apply Lamfalussy approach to the elaboration of financial services legislation, giving due regard to appropriate timeframes for transposition and consultation and appropriate calibration between the different levels.*

## 4.2. Consultation

### 4.2.1. Support for consultation

When the FSAP was being drawn up, heavy emphasis was placed on the fact that consultation would be undertaken as widely as possible, with the original FSAP stating

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<sup>26</sup> See [http://europa.eu.int/comm/internal\\_market/finances/cross-sector/index\\_en.htm#committee](http://europa.eu.int/comm/internal_market/finances/cross-sector/index_en.htm#committee) for further details on this package of measures, including the Directive (Directive 2005/1/EC) and six Commission Decisions.

<sup>27</sup> Statement from 2001 Stockholm European Summit, available on the European Council website at [http://ue.eu.int/ueDocs/cms\\_Data/docs/pressData/en/ec/00100-r1.%20ann-r1.en1.html](http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/00100-r1.%20ann-r1.en1.html)

that “a more inclusive and consensual approach in shaping policies from an early stage and in advance of drafting legislation will deliver dividends when it comes to completing formal (co-decision) procedures. This *inclusive approach* should extend to all EU institutions, but also to representatives of market practitioners, consumers, users and employees”<sup>28</sup>. This emphasis on consultation has not been limited to the financial services area, with the publication of two Commission Communications in 2002, focusing on this aspect of law-making – “European Governance – Better Lawmaking” and “General Principles and minimum standards for consultation of interested parties by the Commission”<sup>29</sup>. Consultation also forms a core element in the Commission’s March 2005 Communication “Better regulation for Growth and Jobs in the European Union”, in which the key message is that consultation should be incorporated into the elaboration of all Community policies.<sup>30</sup>

Consultation is also a key element in the Lamfalussy process. The final report of the Lamfalussy Committee of Wise Men<sup>31</sup> includes a reference to the need for consultation, including the principles that “market participants must be involved at every level in a continuous process, with particular weight given to those with knowledge and expertise on the subject in question, in an open process, using, inter alia, the Internet, with end-users being considered at the same time”. The principle was therefore applied to each of the Lamfalussy directives, but there was also significant consultation on many other FSAP measures.

#### 4.2.2. *A learning process – steady advances in consulting practices*

At the outset of the FSAP, the practice of wide public consultation was not yet standard practice in the elaboration of legislative proposals. Consultation was limited to the sounding out of specific, hand-picked industry representatives and also Member State experts through the various contact committees, such as the Financial Services Policy Group (subsequently to evolve to the Financial Services Committee), EU Committee on Auditing, the European Securities Committee and the UCITS Contact Committee.

In specific instances, this lack of industry and the public consultation led to delays in adopting the text and to considerable objections being raised by the European Parliament and Council. The initial work on the Prospectus Directive was an example of a legislative proposal not subject to public consultation procedures. The first proposed text, which was adopted by the Commission on 30 May 2001, was drawn up in close co-operation with FESCO<sup>32</sup>. However, industry participants and the public at large were not formally consulted on the proposal and the Commission made a serious error in not doing so particularly because it was the first “new” Lamfalussy Directive. The argument made at that time that it was better to “demonstrate” as soon as possible a new Lamfalussy Directive to dynamise the process was, in retrospect, not the best approach. As a result,

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<sup>28</sup> COM (1999) 232, section IV.

<sup>29</sup> COM (2002) 275 and COM (2002) 704 respectively.

<sup>30</sup> COM (2005) 97

<sup>31</sup> Available on the DG Internal Market website at [http://europa.eu.int/comm/internal\\_market/securities/lamfalussy/index\\_en.htm](http://europa.eu.int/comm/internal_market/securities/lamfalussy/index_en.htm)

<sup>32</sup> Forum of European Securities Commissions, later to become the Committee of European Securities Regulators (CESR) – made up of representatives of the supervisory authorities in the EU Member States.

the European Parliament, Council and markets had serious objections to the contents of this text, which the Commission took into account when drafting an amended proposal which was eventually adopted by the European Parliament and Council on 4 November 2003. This fracas reflected badly on the new legislative process. The opinion of the European Parliamentary Financial Services Forum was that “the European Parliament played an important role in correcting *technical problems which arose because of the lack of formal pre-consultation*”<sup>33</sup>.

These difficulties in reaching agreement on the Prospectus Directive meant that the Commission was keen to avoid this situation in preparing subsequent legislative proposals, and the practice of consultation was applied much more widely thereafter.

However, another of the measures that constituted an exception to the transparent, consultative approach was the 2<sup>nd</sup> Money Laundering Directive<sup>34</sup>. No formal consultation was undertaken here either, as it was pushed forward as a priority in response to the request from the European Parliament and the Council for urgent and additional measures to enhance the European Union’s anti-money laundering defences. This was in the context of the post-September 11<sup>th</sup> environment when money laundering and the financing of terrorism were at the forefront of legislators’ minds. As a result, the 2<sup>nd</sup> Money Laundering directive may not have been comprehensive enough to tackle the many challenges in this area. The 3<sup>rd</sup> Money Laundering Directive, which extends the scope of the earlier Directive, was adopted by the European Parliament on 25 May 2005 and by the Council on 7 June 2005<sup>35</sup>.

Consultation is a key feature of the White Paper on Financial Services Policy 2005-2010 (White Paper)<sup>36</sup>, which was published in December 2005 and which sets out the Commission's strategy in the area of financial services for the coming years. The commitment to consultation is clear: "Open consultations (including with stakeholder groups) will continue to play a central role and will be required before any legislation is deemed necessary. The Commission will continue to publish responses received to its consultations, practical summaries and feedback statements."

#### 4.2.3. *Methods of Consultation*

As the practice of consultation became a more standard feature of legislative preparation, it became typical for the Commission services to consult with industry experts before drafting any legislative proposals. Indeed, the FSAP programme itself was driven by consultative input; the conclusions of the first “Forum Groups of Market Experts”, which were set up in October 1999 in order to assist the Commission in identifying imperfections and practical obstacles to the functioning of specific areas in the single market<sup>37</sup>.

In many of the cases, the expert groups produced reports containing recommendations for action, on the basis of which the proposals were prepared. This principle was applied

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<sup>33</sup> EPFSF Briefing: The Lamfalussy Process – Is it working? March 2005

<sup>34</sup> Directive 2001/97/EC

<sup>35</sup> Directive 2005/60/EC

<sup>36</sup> COM(2005)629, see [http://ec.europa.eu/internal\\_market/finances/policy/index\\_en.htm](http://ec.europa.eu/internal_market/finances/policy/index_en.htm)

<sup>37</sup> [http://europa.eu.int/comm/internal\\_market/finances/actionplan/forumgroups\\_en.htm](http://europa.eu.int/comm/internal_market/finances/actionplan/forumgroups_en.htm)

in the cases of, for example, the Regulation on the European Company Statute<sup>38</sup>, the Takeover Bids directive<sup>39</sup> and the Collateral Directive<sup>40</sup>.

In some cases, these methods were combined in a four-step approach.

- Firstly, expert groups were consulted on their views on the topic under discussion;
- Secondly, the expert group produced a report on the perceived hurdles and recommendations for resolving these issues;
- Thirdly, a public consultation was conducted on the expert group’s findings; and
- Finally, on the basis of all this input, the Commission drafted the proposal.

This approach was taken in the cases of, for instance, the Company Law Action Plan (Commission Communication modernising Company Law and enhancing Corporate Governance in the EU<sup>41</sup>). It is worth noting that this approach was deemed to work well in bringing together disparate stakeholders to steer the proposals effectively and has also been applied to consultation on the post-FSAP priorities, for example in the area of Mortgage Credit and investment funds.

Transparency towards the public has also improved over the course of the FSAP period, primarily through the publication of legislative proposals and consultative documents on the Internet, where they were available to comment from all. Examples here include the Conglomerates Directive, the proposal for the Capital Requirements Directive and the Pensions Directive<sup>42</sup>. All draft proposals for the ESC Comitology process and for the Accounting Regulatory Committee are published in advance to facilitate public access, and contribution, to the process.

Extensive consultations were also undertaken in the context of the preparation of level 2 implementing legislation for the Prospectus and the Market Abuse Directives: a broad transparency exercise was launched by placing all informal working documents and subsequent formal proposals for level 2 implementing legislation that were presented for discussion to the European Securities Committee also on the Commission’s website in order to allow to all interested parties to provide the Commission with their views.

The practice of consultation has therefore grown over the course of the FSAP period, to the extent that it is now deemed a standard element in the preparation of financial services legislation. The various methods of consultation used in the drafting of FSAP measures is attached as Annex C.

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<sup>38</sup> Competitiveness Advisory Group, Enhancing European Competitiveness, Second Report to the President of the European Commission, the Prime Ministers and Heads of State, December 1995 (“Ciampi report”) and Group of Experts “European Systems of Worker Involvement” (with regard to the European Company Statute and other pending proposals), Final Report, May 1997 (“Davignon Report”)

<sup>39</sup> High Level Group of Company Law Experts: Report on issues related to takeover bids

<sup>40</sup> Forum Group on the Cross-Border Use of Collateral; preparatory work.

<sup>41</sup> COM (2003) 284

<sup>42</sup> Directive 2002/87/EC, COM(2004)486 and directive 2003/41/EC respectively.

#### 4.2.4. Effectiveness of Consultation

Where consultation was conducted, the general reaction was that it had an **overwhelmingly positive influence** on the resulting legislative texts. The reports of the Four Independent Groups of Experts are unanimous in their praise of this approach. The Banking Expert Group, for instance, stated “transparency of policy implementation [...] is essential to gather support and understanding from stakeholders and to ensure common application of that policy in practice. The Commission’s services [...] are encouraged to continue their policy of openness and continuous engagement with industry and consumer representatives”, while the Insurance Expert Group was of the opinion that “extensive industry and user consultation is a *sine qua non*”.

Other commentators introduce a negative note here, however, with a report by the Centre for European Policy Studies arguing that “Owing to the requirement to consult at several stages, the process has become very laborious and complicated. It is both very time-consuming and resource-absorbing, for regulators as well as for the private sector, let alone for consumers, to be informed in all the stages. This is especially the case for smaller Member States, small firms and less powerful interest groups”<sup>43</sup>. Both of these viewpoints were also reflected in contributions to the consultation on the draft of this report.

Preparing, undertaking, responding to and drawing conclusions from consultation exercises undoubtedly added to the **length of time** required to prepare legislative proposals, and drew heavily on resources not only within the European institutions, but also among industry stakeholders. However, it can be argued that the effect of consultation was that the proposals submitted were of a higher quality, and that, because interested parties had been involved from an early stage, different viewpoints were already built in to the proposed texts, meaning that **new objections were less likely to arise** at the stage of reading in the European Parliament and Council. As such, the time required to conduct the consultation is offset by the gains made at the stage of the deliberations in the European Parliament and Council. In any case this method of working is now a *sine qua non*.

*Recommendation 3: Continue to consult widely before and during the introduction of new legislative proposals, in accordance with the Commission’s “better regulation” policy, keeping in mind the practical constraints of the exercise, setting realistic timetables, and drawing up feedback statements.*

#### 4.2.5. Consultation with users and customers

User and customer consultation is an area that is regarded as having been lacking. Many commentaries make this point, for instance the van den Burg report which “regrets the **lack of input from consumers and users** with regard to financial services legislation”,

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<sup>43</sup> EU Financial Regulation & Supervision beyond 2005; Report of a CEPS Task Force, Centre for European Policy Studies, January 2005, pg 7

and the report from the FIN-USE forum on the four expert groups' reports<sup>44</sup>, which notes that "the absence of meaningful research on consumers' experience of financial services in the markets across Europe is regrettable and urgently needs to be remedied". It goes on to recommend that improvements need to be made in the consultation processes, "in particular through the inclusion and participation of users and other stakeholders in financial services".

Obtaining greater input from, and sharing information with, consumers and users is also a key feature of the White Paper, and a number of the initiatives contained therein are already underway, such as the constitution of a permanent group of consumer representatives from across Europe, a periodic newsletter on financial services issues of interest to consumers and the organisation of a conference on increasing consumer financial capability.

Input to the consultation on the draft version of this report drew attention to the fact that "users" of financial services are not always consumers, but may be issuers, institutional investors or wholesale financial services institutions, and urged that this be borne in mind when seeking user input to policy making.

*Recommendation 4: Take steps to encourage the participation of the appropriate consumers and users of financial services in consultation.*

### **4.3. Responses to external events**

#### *4.3.1. Unpredictable events*

Certain of the initiatives undertaken in the context of the FSAP received added impetus from market events that took place during the term of the programme, in particular accounting scandals in the United States and Europe, especially *the Enron affair* and the US government's response to it (*2002 Sarbanes Oxley Act*), and then the *Parmalat scandal*. These events and circumstances focused the attention of the public and policy makers on issues of corporate governance, company law and the role of statutory auditors. The initiatives already being undertaken in these areas were given added momentum, particularly after the Commission report outlining an initial analysis of the repercussions of the Enron collapse presented to the ECOFIN council of April 2002 in Oviedo<sup>45</sup> and the recommendations made in November 2002 by the High-Level Group of Company Law Experts chaired by Professor Jaap Winter<sup>46</sup>.

Although some of the measures undertaken had all been planned since the outset of the FSAP, the speed with which they were adopted by the Commission was an indication of the additional drive given to their introduction in the aftermath of the corporate scandals.

### **Measures adopted in the wake of the corporate scandals:**

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<sup>44</sup> 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

<sup>45</sup> [http://europa.eu.int/comm/internal\\_market/company/docs/enron/ecofin\\_2004\\_04\\_enron\\_en.pdf](http://europa.eu.int/comm/internal_market/company/docs/enron/ecofin_2004_04_enron_en.pdf)

<sup>46</sup> [http://europa.eu.int/comm/internal\\_market/en/company/company/modern/consult/report\\_en.pdf](http://europa.eu.int/comm/internal_market/en/company/company/modern/consult/report_en.pdf)

**Commission Recommendation on statutory auditors' independence in the EU:** A set of fundamental principles (16 May 2002). This Recommendation deals with two key independence issues raised by the bankruptcy of Enron, i.e. "provision of additional services" by auditors and their "employment with the audit client". Although not legally binding, the Recommendation constitutes guidelines for good practice.

**Commission Communication reinforcing statutory audit in the EU** (21 May 2003), setting out ten priorities to improve and harmonise the quality of statutory audit throughout the EU and to protect investors and other interested parties.

**Directive on statutory audit** (Approved by the European Parliament on 28 September 2005, agreement reached with Council on 11 October 2005, formal adoption expected by end 2005) – revision of the 8<sup>th</sup> Company Law Directive. Although largely prepared well in advance of the Parmalat scandal, the proposal was adjusted to take into account the specific implications of that case.

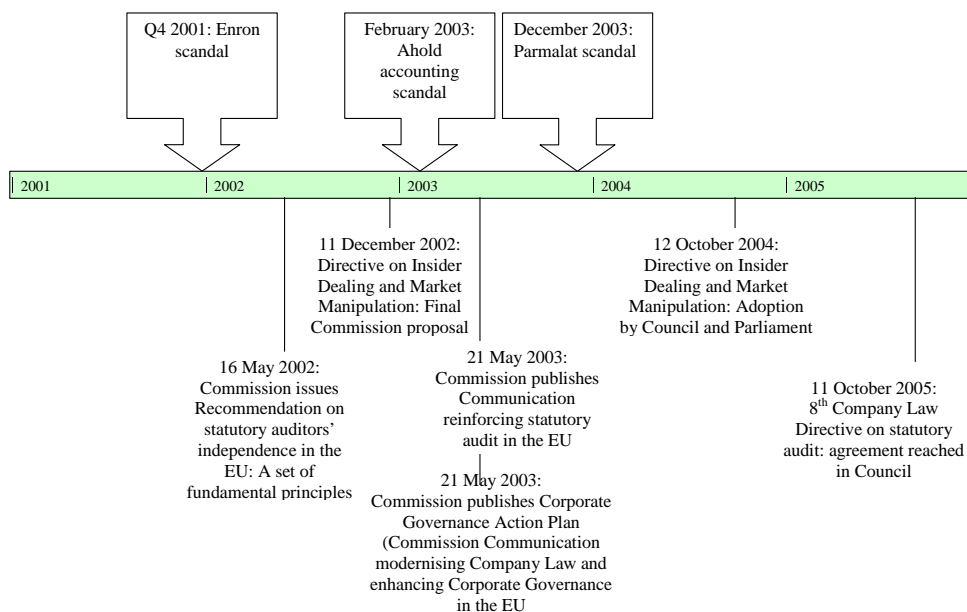
On 21 May 2003 the Commission adopted its **Action Plan modernising Company Law and enhancing Corporate Governance in the EU**. First initiatives in the field of corporate governance followed in 2004:

(i) in October 2004 the Commission tabled a **proposal for amendments to EU accounting directives** (the 4<sup>th</sup> and 7<sup>th</sup> Company Law Directives) in order to confirm the board's collective responsibility for financial statements, to require full disclosure of off-balance sheet arrangements and to enhance transparency of related party transactions; in the case of listed companies, the Commission also proposed adding the obligation to insert a corporate governance statement in annual reports based on the "comply or explain principle";

(ii) the same month, the Commission adopted two recommendations aimed at enhancing corporate governance standards in the EU: recommendation on the remuneration of directors and recommendation on the role of non-executive independent directors.

The **Market Abuse directive** (Directive on Insider Dealing and Market Manipulation) (final Commission proposal adopted on 11 December 2002, adopted by the European Parliament and Council on 12 October 2004) is one of the major steps towards integrated financial markets that investors and the public can trust. This framework Directive covers all financial instruments admitted to trading on at least one regulated market in the EU, including primary markets, and applies to all transactions concerning those instruments, whether those transactions are undertaken on regulated markets or elsewhere.

## Timeline FSAP Company Law Measures



*Recommendation 5: Make full use of the flexibility of the Lamfalussy process in providing adequate legislative responses to unexpected external events, but avoiding knee-jerk legislation.*

### 4.3.2. Predictable events

#### 4.3.2.1. Basel II

With regard to the predictable events, the timing of specific FSAP initiatives was also influenced by the global nature of financial services. A notable example of this is the Commission proposal for the **Capital Requirements Directive**. This piece of legislation, which was in preparation for almost the entire timeframe of the FSAP from 1999 to 2004, is intended to better align financial institutions' capital with the risks that they face. Its drafting tied in closely with the work being done by the Basel Committee on Banking Supervision in preparation of the International Convergence of Capital Measurement and Capital Standards: a Revised Framework, the capital adequacy framework commonly known as Basel II. Considerable input to the Basel II guidelines was given by EU members of the Basel Committee and the European Commission as an observer to the process. These requirements apply on a global level. It was necessary to ensure that EU legislation, while being fully compatible with the Basel II requirements, would also reflect the specific features of the European context. As such, the timing of the proposal for the Capital Requirements Directive, which was made on July 14 2004, had to be very close to the publication of the Basel II guidelines on June 26 2004. As

stated above, the Capital Requirements Directive<sup>47</sup> was approved by the European Parliament in September 2005, and was formally adopted in June 2006.

#### 4.3.2.2. Introduction of the single currency

The introduction of the euro was another predictable event that influenced measures to be taken, particularly in the area of *cash withdrawals, payments and credit transfers*. With the introduction of the euro for payments in 1999, the impetus to facilitate consumers carrying out these transactions within the euro area was considerable, and this became even more noticeable after euro notes and coins came into circulation and price differences became even more tangible.

In January 2000, the Commission had set out its objectives with regard to retail payments in the internal market in a communication<sup>48</sup>, but instead of introducing a raft of legislative measures, left the focus very much on a “market-led approach requiring voluntary co-operation by the banking sector”. However, this Communication did not produce any tangible improvements. Subsequently, the Commission came forward with the Regulation on Cross-Border Payments in euro<sup>49</sup>, in order to bring Europe closer to becoming a single payment area.

This regulation, which was not originally foreseen in the FSAP, was introduced to bring the cost of cross-border card transactions, electronic cash withdrawals and bank transfers in euro in line with the cost of national transactions. It was adopted under the “fast-track” approach in December 2001, just before the introduction of euro notes and coins and a mere 5 months after having been adopted by the Commission. Most of the Regulation’s provisions have been effective since 1 July 2002, when its necessity became even more tangible for European citizens, as the euro notes and coins had been in circulation for six months by then.

The sector responded in May 2002 with a roadmap to ensure the realisation of a Single Euro Payments Area by 2010<sup>50</sup>, and work is ongoing towards the goal of achieving SEPA. In order to complement the industry action and with the aim of establishing a modern and comprehensive set of rules applicable to all payment services in the European Union, the Commission came forward with a proposal for a New Legal Framework for Payments in December 2005<sup>51</sup>.

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<sup>47</sup> Comprising Directive 2006/48/EC and Directive 2006/49/EC

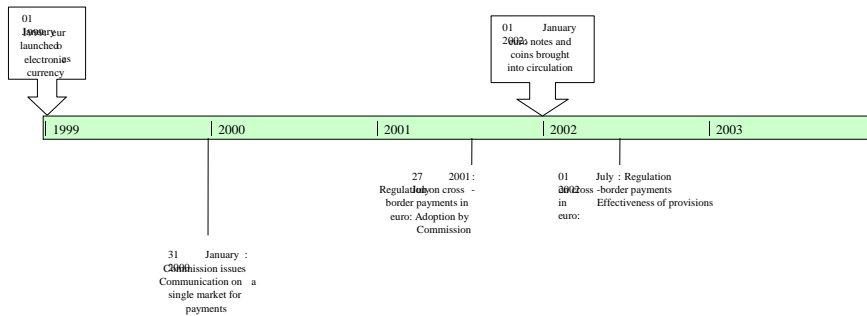
<sup>48</sup> COM (2000) 36

<sup>49</sup> Regulation (EC) 2560/2001

<sup>50</sup> European Banking Federation white paper “Euroland: Our Single Payment Area”

<sup>51</sup> COM(2005)603, available at [http://ec.europa.eu/internal\\_market/payments/framework/index\\_en.htm](http://ec.europa.eu/internal_market/payments/framework/index_en.htm). At the time of writing (December 2006), the proposed Payments Directive is currently under active discussion in the European Parliament and the Council and all parties are committed to striving for rapid adoption of the proposal through a single reading.

## Timeline FSA Payment Measures



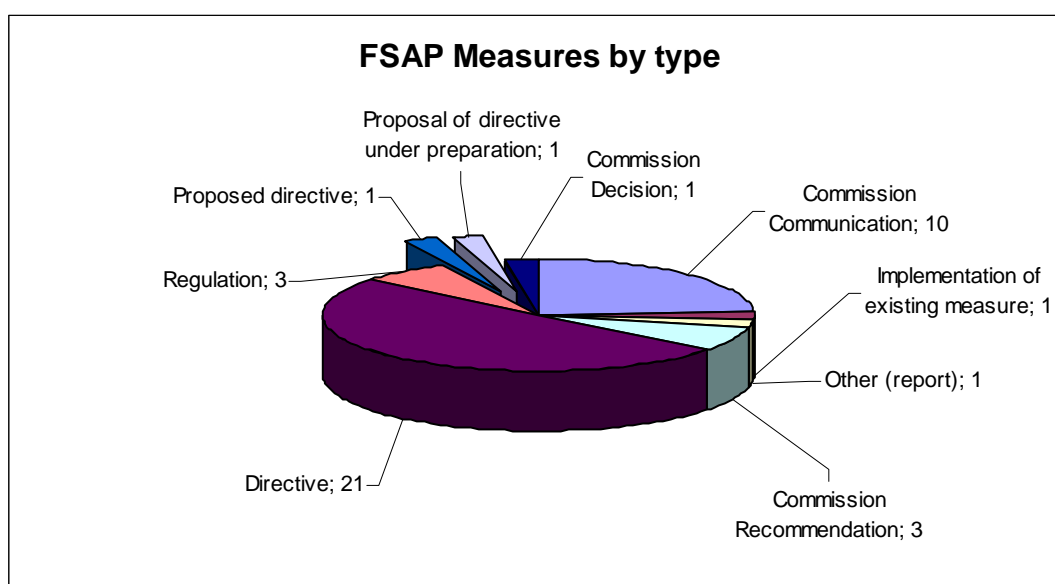
### 4.3.2.3. 2005 deadline

Another predictable event that influenced the timing of the introduction of FSAP measures was the pressure of the deadline for completion of the programme, as set out in section 3.2, above. This combined with the additional pressure of the end of the legislature of the sixth European Parliament and the end of the President Prodi Commission's term. In this context, 3 *major directives* were adopted by the European Parliament and Council between the fourth quarter of 2003 and the end of 2004 (Prospectuses, Markets in Financial Instruments Directive (MiFID), and Take Over Bids). In the same timeframe, the Commission adopted one additional, wide-ranging proposed directive (Capital Requirements) and published a Communication on Clearing and Settlement. In the case of two of the directives, the MiFID and the Take-Over Bids Directive, it had been particularly difficult to reach agreement, but this was finally achieved ahead of the end-2004 deadline.

When one compares the wording of the original Action Plan with that of the 10<sup>th</sup> Progress Report (published in June 2004), it is clear that most of the actions have morphed into other measures, usually of a much *broader scope*. This has had an effect on the timing needed to complete the measures set out in the FSAP, as it was not possible simply to adopt the 42 measures listed therein without significantly broadening their reach in order to achieve the FSAP's overarching objectives (see section 6, below).

## 5. LEGISLATIVE PROCEDURES

### 5.1. Choice of legislative instrument



Of the 42 measures contained in the FSAP, a little over half are legislative. The others are mostly Commission Communications or Recommendations, either setting out planned actions in the specific areas or making non-binding recommendations to the Member States.

Of the legislative measures in the original Action Plan, only 2 are Regulations (the Regulation on the European Company Statute and the Regulation on International Accounting Standards<sup>52</sup>), the Regulation on Cross-Border Payments in euro<sup>53</sup> was added later, with all the rest being Directives. In the case of the regulations, this particular legislative instrument was chosen as it was essential for their proper working that the provisions contained therein were applied exactly the same in each Member State. Whereas with the Directives, Member States were freer to reconcile achieving a level playing field for financial services in Europe with their national particularities.

The issue of which legislative instrument to use drew very diverse responses to the draft of this report, with the general consensus being that the decision on whether to use regulations or directives should be on a case-by-case basis, with regulations only being used in specific cases where the material is of a technical nature or where the scope is clearly limited. However, responses varied from those who strongly endorsed the use of regulations as a means to ensure that each member state's application of the legislation was identical, to the opposite end of the spectrum, with one national authority calling for directives to be the only instrument used. Several submissions added that the choice of legislative instrument should come only after a consideration of possible non-legislative measures such as self-regulatory codes of conduct, recommendations or best practice.

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<sup>52</sup> Regulations (EC) 2157/2001 and Regulation (EC) 1606/2002 respectively.

<sup>53</sup> Regulation (EC) 2560/2001

*Recommendation 6: Assess the appropriate use of regulation or directive on a case-by-case basis.*

## 5.2. Number of readings/ amendments made by the European Parliament and Council

Use of the “fast-track” procedure, whereby a legislative measure can be approved by the Council on the basis of a single reading by the European Parliament, was made for almost half of the legislative measures under the FSAP. It is difficult to draw conclusions from the types of proposal that were approved at first reading, as they are a highly diverse group. Some of the proposals were already in an advanced stage of preparation by the time of the launch of the FSAP and represented either measures updating legislation already in place or technical amendments to reflect international developments. Examples here include the directives amending the insurance directives and the ISD to permit information exchange with third countries and the directive amending the 4<sup>th</sup> and 7<sup>th</sup> Company Law Directives to allow for fair value accounting<sup>54</sup>.

Others were key initiatives with considerable political backing and seen as essential for the creation of a true single market in financial services, such as the Regulation on IAS, and the Transparency Directive.

The Take-Over Bids Directive and the Regulation on the European Company Statute are examples of follow-ups to proposals that had been rejected at previous attempts. The compromise reached to approve the Take-Over Bids Directive at first reading was not regarded as a success by the Commission, however. In the 10<sup>th</sup> Progress Report on the FSAP, it is described as “a de minimis optional outcome [which] does not underpin a level playing field and is a retrograde step in terms of economic reform”<sup>55</sup>. In the case of the European Company Statute, the text approved at first reading was the result of many years of negotiations between the institutions, and the adoption of a revised proposal from the Commission in 1991. As stated in the IIMG third report therefore, there are reasons to believe that “strong reasons of institutional balance *preclude the fast-track procedure from becoming the general norm*”.

### Number of readings required for legislative proposals to be adopted

1	2	3
Amendment of the insurance directives and the ISD to permit Information exchange with third countries	E-Money Directive	2nd Money Laundering Directive
Amendments to 4th and 7th Company Law Directives to allow fair value accounting	Adoption of the proposed directive on the winding-up and liquidation of Insurance undertakings	

<sup>54</sup> Directive 2000/64/EC and Directive 2001/65/EC

<sup>55</sup> [http://europa.eu.int/comm/internal\\_market/finances/docs/actionplan/index/progress10\\_en.pdf](http://europa.eu.int/comm/internal_market/finances/docs/actionplan/index/progress10_en.pdf), section II.

Regulation on European Company Statute	Adoption of the proposed directive on the winding-up and liquidation of banks
Amend the solvency margin requirements in the insurance directives	Two directives on UCITS
Regulation on IAS	Collateral directive
Directive on the taxation of savings income in the form of interest payments	Directive on the Distance marketing of Financial Services
Modernisation of the accounting provisions of the 4th and 7th Company Law Directives	Directive on insurance mediation
Take Over Bids Directive	Conglomerates Directive
Transparency directive	Regulation on Cross-Border Payments in Euro
10 <sup>th</sup> Company Law Directive on cross-border mergers	Market Abuse Directive
	Directive on the activities and prudential supervision of pension funds
	Prospectus Directive
	Markets in Financial Instruments Directive

Input to the consultation on the draft of this report indicated that many stakeholders felt strongly about the positive influence on the final result that derived from amendments introduced by the Council and (particularly) the European Parliament's, expressing the view that their contribution to the legislative process has usually led to significant improvements, as they have addressed concerns not dealt with initially in the Commission's proposals.

*Recommendation 7: Limit the use of the “fast track” procedure to those proposals with strong prior inter-institutional backing.*

## 6. FINAL OUTPUT FROM FSAP COMPARED TO INITIALLY DRAWN UP ACTION PLAN

There are quite some differences between the original contents of the Action Plan and what was carried out. These generally arose as a result of a perceived need for many of the legislative measures and communications to be more extensive in scope than originally set out in the Action Plan. Those measures that did not change between their inclusion in the Action Plan and their eventual introduction were largely those that were already at an advanced stage of preparation by the time of the publication of the Action Plan or that did not require the full legislative process to be gone through (Commission Communications and Recommendations).

A majority of the actions of the original Action Plan spawned follow-on activities, including other extensive action plans (for instance in the areas of corporate governance and fraud prevention). The fact of a measure's inclusion in the Financial Services Action Plan on many occasions merely highlighted an area of the internal market where further work needed to be done, and the FSAP was by no means simply a precise “to do” list of actions to be undertaken. The wording of the original FSAP document underlines this:

“the ... Framework for Action is an aspirational programme for rapid progress towards a single financial market. It is an illustrative plan which may be pursued by the next Commission, which will of course need to decide conditions under which the different actions will be initiated”<sup>56</sup>.

**Measures where the original FSAP called for Political Agreement to be reached and where, in the end, new legislative instruments were introduced:**

- Take-over Bids Directive
- Directive on the Distance Marketing of Financial Services
- Regulation on the European Company Statute
- Two directives on UCITS

**Measures where the original FSAP called for amendments to existing legislation and where, in the end, new legislative instruments were introduced as simply amending the existing legislation was not deemed to go far enough to meet the policy objectives:**

- Directive on Insurance Mediation
- Prospectus Directive
- Transparency Directive
- Directive amending the 4<sup>th</sup> and 7<sup>th</sup> Company Law Directives to allow for fair value accounting
- Markets in Financial Instruments Directive
- Capital Requirements Directive

**Measures whose scope goes far beyond that set out in the original FSAP:**

- Communication on an e-commerce policy for financial services
- Commission Communication modernising Company Law and enhancing Corporate Governance in the EU
- Conglomerates Directive
- Market Abuse Directive
- Introduction of Lamfalussy process (including the creation of the two Securities Committees)
- Regulation on International Accounting Standards

Other measures mentioned in the FSAP did not go far enough to reach the goals of the FSAP and *further follow up was needed*. Although not strictly within the 42 measures set out in the original plan, the following are closely related and their introduction cannot be ignored when considering the implementation of the FSAP as a whole:

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<sup>56</sup> COM(1999)232, section I.

## Clearing and Settlement

Clearing and Settlement had originally featured in the Action Plan only in the relatively narrow perspective of the Implementation of the Settlement Finality Directive and the Directive on the Cross-Border use of Collateral. Over the course of the FSAP, consultation and the findings of expert committees<sup>57</sup> made clear that Clearing and Settlement was an issue that may have been overlooked when the original FSAP had been drawn up and needed to be addressed more comprehensively. This led to the eventual publication of the **Communication on Clearing and Settlement**<sup>58</sup> in April 2004 and to the subsequent implementation of the detailed actions. This ultimately led to the adoption in November 2006 of the industry-led Code of Conduct for Clearing and Settlement<sup>59</sup>, which is aimed at enhancing transparency and increasing competition in the post-trading sector.

## Corporate Governance & Company Law

In the light of the report of the High Level Group of Company Law Experts published in November 2002 and corporate scandals in the US and in Europe, the issue of corporate governance began to take on greater urgency and importance. As a result, the Commission in its **Action Plan on Modernising Company Law and Enhancing Corporate Governance in the European Union**<sup>60</sup> (published in May 2003) proposed a number of additional measures which were not included in the FSAP: e.g. Recommendation on independent directors, Recommendation on directors' remuneration, corporate-governance related amendments to accounting directives, etc.

This work has also extended to the Commission's current actions in this area. In 2006, the Commission carried out a consultation on the future priorities for the Company Law Action Plan. In a speech to the European Parliament Legal Affairs on 21 November 2006, Committee, Commissioner McCreevy announced that the future priority lies in increased mobility of companies within the EU, focus on SMEs and simplification of the Company Law acquis.

## Single Market for Payments

At the beginning of 2000, as already mentioned above, the Commission adopted a Communication setting out its objectives for the retail payments in the internal market<sup>61</sup>. Nearly two years later, one of the major steps towards European single payments area was made with the Regulation on Cross-Border Payments in euro adopted in December 2001<sup>62</sup>. However, by 2002, it had become clear that further efforts needed to be made to

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<sup>57</sup> The review of the Investment Services Directive in late 2000 and the recommendations made by the Committee of Wise Men, headed by Alexandre Lamfalussy, in their report published in February 2001; the first and second report of the Giovannini Group on Clearing and Settlement Arrangements in the EU in November 2001 and in April 2003.

<sup>58</sup> COM(2004)312

<sup>59</sup> See [http://ec.europa.eu/internal\\_market/financial-markets/clearing/index\\_en.htm#code](http://ec.europa.eu/internal_market/financial-markets/clearing/index_en.htm#code)

<sup>60</sup> COM(2003)284. See above under 4.3.1

<sup>61</sup> See above under 4.3.2.2.

<sup>62</sup> Ibid.

achieve the FSAP's objective of a truly integrated retail financial market, and a "roadmap" to set out the way forward was drawn up, which led to the publication in December 2003 of a consultation document, the **Commission Communication on a Legal Framework for Payments in the Internal Market**<sup>63</sup>. This Communication outlines a number of suggestions for future legislative measures to be taken to improve the legal environment in single payments. Although not strictly part of the FSAP, these measures count as an inevitable follow-on from it.

As mentioned in section 4.3.2.2, above, the Commission made a proposal for a New Legal Framework for Payments in December 2005, as a complement to industry initiatives in working towards the Single Euro Payments Area and with the aim of establishing a modern and comprehensive set of rules applicable to all payment services in the European Union. At the time of writing (December 2006), the proposed Payments Directive is currently under active discussion in the European Parliament and the Council and all parties are committed to striving for rapid adoption of the proposal.

### Payment Fraud Prevention

One of the measures under the FSAP was the Action Plan to prevent fraud and counterfeiting in payment systems, also known as the **Fraud Prevention Action Plan**<sup>64</sup> (FPAP), which ran from 2001 to 2003 with the aim of establishing a number of preventative measures to combat fraud and counterfeiting in payment systems. A follow-up plan, for the period 2004-2007 was launched in October 2004. Initiatives under this action plan include the establishment of the Fraud Prevention Expert Group (FPEG,) an independent group established by the Commission whose main aim is to intensify cooperation between all those in the payment chain especially cross-borders. Two FPEG seminars were held in the course of 2006.

### FIN-NET

One of the recommendations contained in the Commission Communication on e-commerce and financial services, published in 2000, was the establishment of "a Community-wide network of financial services complaints bodies [...] to provide effective and rapid out of court redress on a cross-border basis" whose purpose it would be to "encourage consumer confidence in cross-border redress and internet payments", which in 2001 was launched as the **FIN-NET** network for settling cross-border financial disputes out of court.

### Insurance

During the term of the FSAP, a number of issues arose in the area of Insurance which had not been included in the original Action Plan; Insurance Solvency, Insurance Guarantee Schemes, which offer protection to policy holders in the event that an insurance provider is wound up, and Reinsurance Supervision. All three issues were addressed during the term of the FSAP and subsequently.

- The ongoing Solvency II initiative aims to bring about major changes in the overall approach to insurance regulation in the EU, in particular as far as capital requirements

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<sup>63</sup> COM(2003)718

<sup>64</sup> COM(2001)11

and supervision of insurance undertakings are concerned. Solvency II will introduce a new risk-based approach. The Commission is aiming for a Directive to be adopted in July 2007.

- A Commission Working Group started work on Guarantee Schemes, and in 2006 the Commission issued a call for tender to engage an external consultant to carry out a comparative analysis of existing insurance guarantee schemes in the EU, with an analysis of problems and evaluation of options and their feasibility.
- In 2005, the Directive on EU-wide reinsurance<sup>65</sup> was adopted. The framework established by this Directive means that reinsurers are supervised by competent authorities in their "home" country, on the basis of which they can operate throughout the EU.

In conclusion, it would appear that Clearing and Settlement was one area where the original FSAP did not go far enough in analysing the barriers to integration of the financial services market in the EU and its addition in the latter stages of the Action Plan shows that upon examination, this area should have warranted attention earlier in the process. The other measures were added in order to achieve the broader objectives set out in the original FSAP.

*Recommendation 8: Take into account the necessity to react and adapt existing measures after their adoption and avail of the possibilities offered by the Lamfalussy process.*

## 7. QUALITATIVE ASSESSMENTS OF FSAP PROCESS

### 7.1. Speed versus Quality

As mentioned in the Inter-Institutional Monitoring Group's Third Report Monitoring the Lamfalussy Process, over the course of the FSAP, market participants' priorities seem to have shifted from being able to enact "speedy legislation to keep regulation in line with the fast pace of market innovation", to ensuring that the "*quality of the legislative result should always take precedence over speed*"<sup>66</sup>.

However, one should keep in mind that, at the time of the adoption of the FSAP, integration of the European financial markets was clearly lagging behind other sectors. Added to the ground-breaking changes to the financial environment that had taken place over the 1990s, this situation called for a complete revamping of the European regulatory and supervisory framework. Therefore, given the context that prevailed at the time of a piecemeal Internal Market for financial services, the wide-ranging FSAP approach can be better justified.

With the finalisation of the FSAP, once the most obvious gaps had been filled and an overall framework put in place, the emphasis turned to completing unfinished business, implementing and enforcing agreed measures and ensuring that a targeted approach to new initiatives, based on better regulation and evidence-based policy making. These are the key themes elaborated in the White Paper.

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<sup>65</sup> Directive 2005/68/EC

<sup>66</sup> IIMG report, Part II, Section 1.b)

One response to this shift in emphasis (particularly at the implementation stage) has been to take stock and ensure that the implementation deadlines for the various actions remain realistic, and, if necessary, make amendments to them. This was done in the case of the Markets in Financial Instruments Directive, where a directive prolonging the implementation deadline for the Level 2 measures was adopted<sup>67</sup>, in response to market demands. However, it should be noted that this is an exceptional case, and in general, it has not been necessary to take such drastic steps.

## 7.2. Qualitative response to the Action Plan process from the contributors to the 2004 Expert Group consultation

The Expert Groups, in their reports, express broad approval of the FSAP process. Areas highlighted for praise include the fact that *priorities* were set and that widespread use was made of *consultation* with industry and consumer representatives. In addition, the introduction of the *Lamfalussy* process under the FSAP was lauded as bringing an enormous improvement to the legislative process.

However, almost all of the Expert Group reports cover the issue of the volume of measures introduced at the same time and include requests for a “regulatory pause” after the completion of the Action Plan. One group (the Securities expert group) found that “the political deadline for the FSAP put an undue emphasis on speed, making the timetables [...] too tight for sufficient industry consultation and impact assessment”<sup>68</sup>. The Asset Management expert group commented “some of the legislative measures adopted at EU level have not been as effective as expected. In some instances, [...] provisions which are intended to open markets have been watered down or suffered from ambiguities which hamper consistent implementation”<sup>69</sup>. This, again, may have been a consequence of the political imperative to complete the measures within the Action Plan, which did not always lead to their quality being of the desired level. Many of these problems have been addressed in the White Paper on Enhancing the Single Market Framework for Investment Funds<sup>70</sup> published in November 2006. The improvements set out in the White Paper aim to simplify the current Directive on investment funds in order to ensure that investors receive useful cost and performance disclosures when selecting funds, and to make it easier for the industry to achieve cost savings and specialisation benefits across the single market.

The groups stated that, with the experience of the FSAP behind them, the EU institutions should give greater consideration to *non-legislative measures* such as self-regulation by industry sectors, codes of conduct, guidelines on good practice and industry accreditation. They also mentioned that in addition to proposing new actions, efforts should be made to simplify, *correct or remove existing rules*, something that was not included in the FSAP itself. A separate reference was made to the need to *avoid conflicting or overlapping rules* to reduce the burden on industry.

These proposals have all been taken on board in the White Paper on European Financial Services Policy 2005-2010. The emphasis in the post-FSAP era is on effective

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<sup>67</sup> Directive 2005/1/EC

<sup>68</sup> Expert Group report, Securities Expert Group, Section 2.1, paragraph 12.

<sup>69</sup> Expert Group report, Asset Management Expert Group, Section 2, paragraph 23.

<sup>70</sup> COM(2006)686, see [http://ec.europa.eu/internal\\_market/securities/ucits/index\\_en.htm#061116](http://ec.europa.eu/internal_market/securities/ucits/index_en.htm#061116)

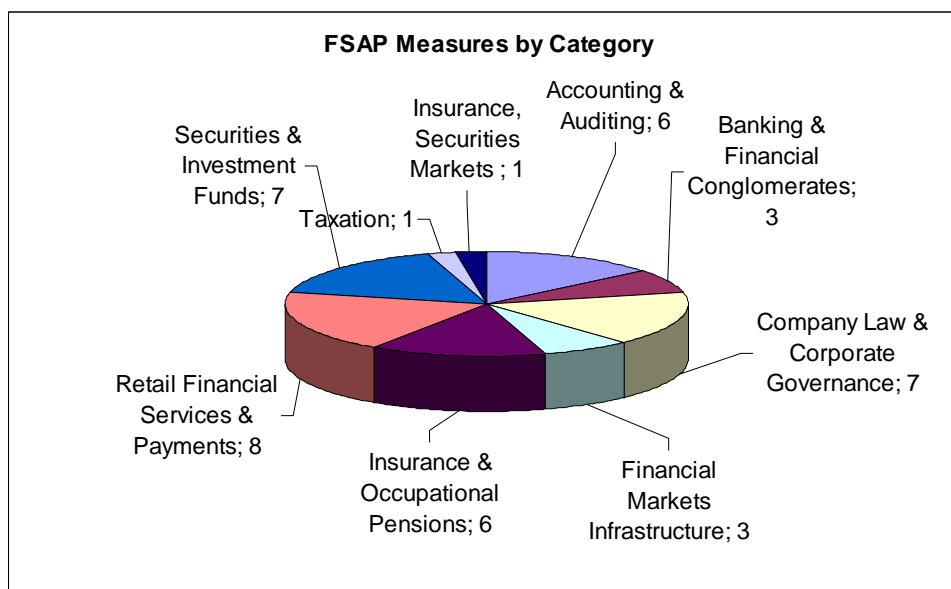
consolidation of existing legislation, rather than the introduction of a broad programme of initiatives. Simplification and consolidation of existing legislation, sectoral and cross-sectoral consistency checks and corrective action where overlaps or contradictions are identified all form part of this framework, where "better regulation" is the overarching theme.

*Recommendation 9: Through intense consultation when drawing up legislative programmes, take into account that the quality of a prospective piece of legislation should always take precedence over the speed, but ensure the ability to attain high quality also through short target timeframes. Make allowances in the programme for the annulment or simplification of existing legislation.*

## 8. SECTOR FOCUS/ ALLOCATION OF RESOURCES

When assessing the sector-focus of the FSAP measures, a distinction must be made between legislative and non-legislative measures, as obviously the process involved in preparing many of the legislative measures is more lengthy and complicated.

At first glance, the 42 measures of the FSAP seem to break down fairly evenly between the various sectors under review; namely Accounting and Auditing (6, of which 2 legislative), Banking & Financial Conglomerates (3 – all legislative), Company Law & Corporate Governance, (7, of which 6 legislative), Financial Markets Infrastructure (3, of which 1 legislative), Insurance and Occupational Pensions (6, of which 4 legislative), Insurance, Securities Markets (1 legislative), Retail Financial Services and Payments (8, of which 2 legislative), Securities and Investment Funds (7, of which 5 legislative) and Taxation (1 legislative measure).



However, the various categories should be “weighted” in view of the scale of the measure involved. For instance, the MiFID, Prospectus and Market Abuse directives (Securities and Investment Funds), the Capital Requirements Directive (Banking and Financial Conglomerates) and the Regulation on IAS (Accounting and Auditing) were all major pieces of legislation that entailed considerable consequences for the market. As such, their preparation involved widespread consultation and significant dedication of

manpower. The MiFID directive, for instance, was closely interlinked with the considerable changes to legislative decision-making brought in under the Lamfalussy process, which was itself an FSAP measure. The Capital Requirements Directive, for its part, was closely tied to the development of Basel II, and the introduction of IAS for listed companies was a global project involving the IASB.

As mentioned above, considerable activity was also carried on in the area of Company Law and Corporate Governance. Considering the financial scandals that rocked the business community during this period and the added impetus to complete the Single Market brought about by the Lisbon agenda, it is not surprising that issues such as money laundering and creating the European Company Statute were high on the priority list.

The fact that a number of directives were prepared under the new Lamfalussy process means that considerable ongoing legislative preparation work will be required for the Level 2 implementing measures, meaning that there will be an ongoing commitment of Commission staff to these pieces of legislation.

Furthermore, considerable work has been done at the legislative level, but much remains to be completed in terms of implementation, enforcement and reviewing the effectiveness of initiatives introduced under the FSAP. These are areas where much of the manpower that had been directly involved in the drafting of legislation now concentrate their energies.

*Recommendation 10: When drawing up the follow-up to a completed programme, ensure that emphasis is placed on the correct implementation and enforcement of the adopted measures and that new measures are only proposed where significant gaps have been identified.*

## 9. TRANSPOSITION OF FSAP MEASURES

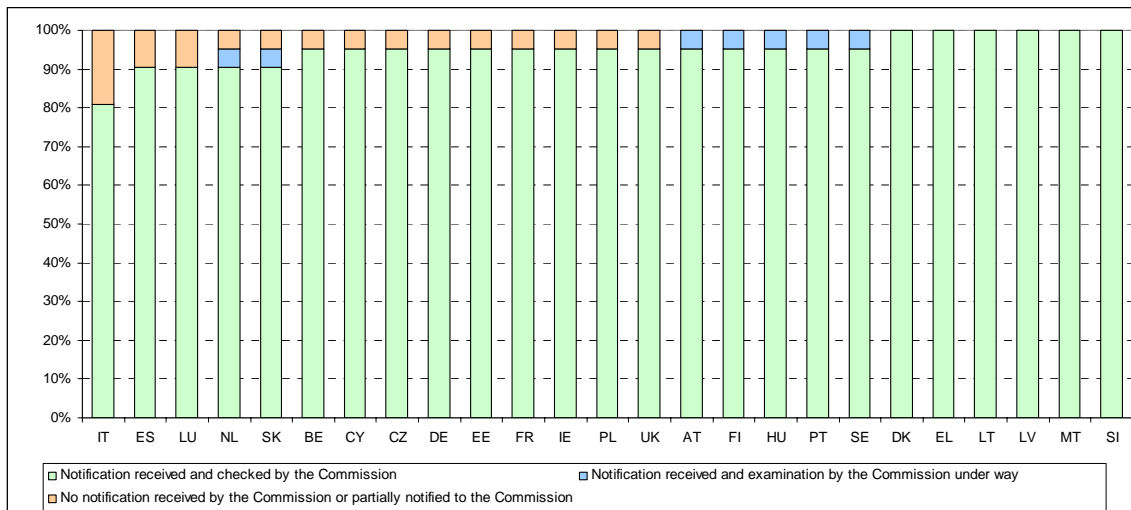
The attached transposition table (see Annex B) gives an overview of how FSAP directives have been transposed into national law in the Member States (as of 01 December 2006). While it is clear that considerable efforts have been made by the 25 Member States to transpose these directives, there is still **a lot of work to be done**<sup>71</sup>. Going on Member States' notifications to the Commission, ***only twelve of the directives have been transposed into national law in all 25 countries.***

In the case of all of the other directives, at least one Member State has failed to transpose the directive, or at least failed to inform the Commission that the directive has been transposed (which, in itself is an infringement, as Member States are obliged to inform the Commission of the manner in which they have transposed directives).

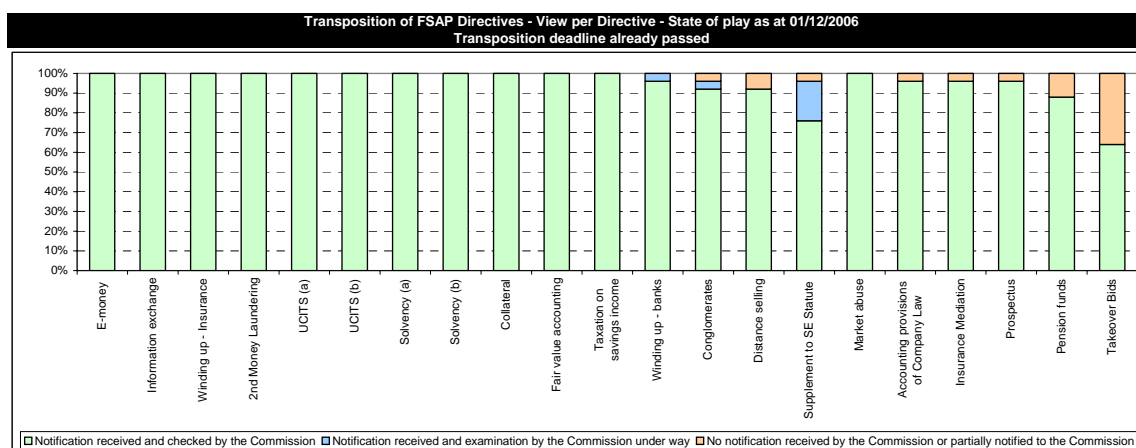
The graph below illustrates the rate of transposition of the FSAP directives whose deadline has already passed in the 25 Member States.

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<sup>71</sup> All data given here is correct at the time of writing, December 2006.



The following graph indicates the number of percentage of cases in which the transposition of specific directives (whose transposition deadline has passed) has been confirmed.



The fact that there was such a *large number of directives to pass into national law* in the same time period will also undoubtedly have had an effect on the resources available within the Member States responsible for the drafting of the national legislation.

None of the directives whose deadline for transposition has yet to expire has been confirmed as having been transposed in any of the Member States, indicating that the Member States really do need (or at least use) the full timeframe allowed to arrange for transposition.

Clearly, there is considerable work to be done in the area of transposition, as the fact that so many Member States are missing the deadlines for transposition is unsustainable if the true benefits of the single market are to be reaped. *Infringement proceedings* against Member States, while a powerful threat, remain only one tool that may be used to improve this situation. *Greater co-operation* with and between the Member States will also need to play a role. This approach was endorsed by the Financial Services Committee in its Asmussen report: “without calling into question the application of the Lamfalussy method, arrangements could be further developed to enhance the co-

operation between Member State authorities (both regulators and supervisors) in deciding how to implement directives”<sup>72</sup>.

The practice of holding *transposition workshops* with groups of Member State delegations, as were held for the Settlement Finality, Prospectus, Market Abuse and MiFID directives, and the offering of *technical assistance* with the drafting of national implementing measures should be continued and extended. This approach, too, is endorsed by the parties involved, with the Inter-Institutional Monitoring Group commenting that “The Group [...] regards these meetings as the appropriate instruments that should help to avoid the need for initiation of enforcement actions by the Commission”<sup>73</sup>. Contributors to the consultation on the first draft of this report also endorsed the practice of transposition workshops and technical assistance, and many also supported closer co-operation between national authorities when transposing into national law and implementing financial services legislation.

*Recommendation 11: Continue and extend the practice of offering transposition workshops and technical assistance to Member States in order to facilitate transposition.*

## **10. GOING FORWARD WITH FSAP MEASURES**

The measures introduced under the FSAP are not carved in stone. As the financial services environment evolves in Europe and worldwide, it is clear that the legislative environment will have to develop along with it. Among the factors that will have an impact on the future of the FSAP measures are the global nature of financial services, the simplification programme for EU legislation, the evolution of the Lamfalussy structure and how FSAP measures are implemented and enforced in Member States. All of these influences have been taken into account in the measures set out in the White Paper on Financial Services Policy 2005-2010.

Increasingly, Europe’s financial services providers operate on a global level, therefore any legislation at EU level must be drafted while bearing in mind the global context. In terms of the FSAP for instance, this external dimension has been highly relevant for the Transparency and Prospectus directives (with regard to the “equivalence” of the accounting standards used by companies from third countries) and the Capital Requirements Directive (in the framework of the Basel II negotiations). The impact of global developments on Internal Market policies, and vice versa, is only likely to increase with time.

Under the “Better Regulation” policy, the Commission is committed to a strategy of simplification of the regulatory environment. Certain of the measures introduced under the FSAP are due to be modified, simplified or even abrogated in order to codify the acquis, achieve better legislative legibility or as a result of legal incoherence. For instance, in the context of the Solvency II programme, some 14 insurance directives,

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<sup>72</sup> FSC 4164/04, Section 4, paragraph 33

<sup>73</sup> IIMG report, Section 7(b)

including the Reinsurance directive and the Life Assurance directive<sup>74</sup> which were both adopted under the FSAP, are due to be codified into one single instrument.

The Lamfalussy structure is in its infancy. Although Level 1 framework directives and Level 2 implementing measures have been successfully adopted, the longer-term practicalities of this structure have yet to be tested. As the Lamfalussy structure was designed to allow EU legislators to better respond to market events, the coming years will reveal to what extent this goal has been achieved. It will also be important that an appropriate balance be reached between the levels 1, 2 and 3 as national supervisory authorities work more closely together, especially in the drafting of Level 2 measures and in the co-operation required for Level 3 actions to ensure consistent implementation and application.

Going forward, much will rest on how the FSAP measures are implemented and how compliance with them is enforced. We have little experience of Level 4 of the Lamfalussy directives, where the Commission will have to play its part in enforcing compliance with the legislation. This will be crucial if we are to avoid national goldplating or even unintended splintering of the single market.

## **11. CONCLUSION**

The FSAP seems to have worked extremely well as an over-arching programme and its completion within the deadline is regarded as a major achievement. The political pressure to complete the Action Plan meant that timeframes were largely respected; the new approach to the preparation of legislation introduced under the Lamfalussy process brought significant improvements in terms of consultation, institutional co-operation, and (potentially) greater flexibility to respond to market events and there is a general appreciation of the quality of the measures finally introduced, which in many cases were much broader in scope than that originally set out in the Action Plan.

However, the Financial Services Action Plan presented some very specific difficulties. These largely centre on the fact that, because it was so extensive, it was a challenge to balance the requirement for high quality legislation with the tight demands on timing. This applies to the various stages in the preparation of the actions, from consultation with stakeholders and inter-institutional negotiations to transposition and implementation in the Member States. In addition, the FSAP did not address all policy areas that go towards making up a truly single market in financial services.

As stated in the introduction, this evaluation forms the first part of a more comprehensive review of the FSAP, the second part of which will be an analysis of the impact on the market and on users of the FSAP measures, once implemented in the Member States. This is scheduled to be carried out over the 2007/2008 timeframe. We believe that there are a number of lessons that can already be drawn from the process and adoption of the FSAP, and these are set out in the Recommendations to this document. Subject to the outcome of the FSAP evaluation Part II, however, these recommendations may need to be adjusted in the future.

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<sup>74</sup> Directive 2002/83/EC

## 12. RECOMMENDATIONS

- Recommendation 1: When drawing up policy programmes, ensure that the measures contained therein are prioritised appropriately and, where relevant, are subject to strict deadlines which are politically agreed as widely as possible by European Parliament / Council and supported by all stakeholders, including market participants and users. Strong monitoring mechanisms are required. .... 8*
- Recommendation 2: Continue to apply Lamfalussy approach to the elaboration of financial services legislation, giving due regard to appropriate timeframes for transposition and consultation and appropriate calibration between the different levels. .... 11*
- Recommendation 3: Continue to consult widely before and during the introduction of new legislative proposals, in accordance with the Commission’s “better regulation” policy, keeping in mind the practical constraints of the exercise, setting realistic timetables, and drawing up feedback statements. .... 15*
- Recommendation 4: Take steps to encourage the participation of the appropriate consumers and users of financial services in consultation. .... 16*
- Recommendation 5: Make full use of the flexibility of the Lamfalussy process in providing adequate legislative responses to unexpected external events, but avoiding knee-jerk legislation. .... 18*
- Recommendation 6: Assess the appropriate use of regulation or directive on a case-by-case basis. .... 22*
- Recommendation 7: Limit the use of the “fast track” procedure to those proposals with strong prior inter-institutional backing. .... 23*
- Recommendation 8: Take into account the necessity to react and adapt existing measures after their adoption and avail of the possibilities offered by the Lamfalussy process. .... 27*
- Recommendation 9: Through intense consultation when drawing up legislative programmes, take into account that the quality of a prospective piece of legislation should always take precedence over the speed, but ensure the ability to attain high quality also through short target timeframes. Make allowances in the programme for the annulment or simplification of existing legislation. .... 29*
- Recommendation 10: When drawing up the follow-up to a completed programme, ensure that emphasis is placed on the correct implementation and enforcement of the adopted measures and that new measures are only proposed where significant gaps have been identified. .... 30*
- Recommendation 11: Continue and extend the practice of offering transposition workshops and technical assistance to Member States in order to facilitate transposition. .... 32*