

**Inter-institutional Monitoring Group**  
**Final Report Monitoring the Lamfalussy Process**

**Brussels, 15 October 2007**

## **Inter-institutional Monitoring Group**

**Johnny ÅKERHOLM (Chairman)**

**Karl-Peter SCHACKMANN-FALLIS (Vice Chairman)**

**Mark HARDING**

**Pierre DE LAUZUN**

**Rainer MASERA**

**Freddy VAN den SPIEGEL**

### **Secretariat**

Manica Hauptman, Patrick Starkman (European Parliament)

Jean-Luc Filippini (Council)

Tereza Výborná (European Commission)

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

## TABLE OF CONTENTS

RECOMMENDATIONS AND CONCLUSIONS BY THE IIMG .....	4
1. INTRODUCTION .....	6
1.1. General introductory remark .....	6
1.2. Aim of the final report .....	6
2. DEVELOPMENTS AND STATE OF PLAY .....	6
3. ADOPTION OF LEGISLATION .....	8
4. IMPROVING ENFORCEMENT .....	11
5. FUNCTIONING OF THE LEVEL 3 COMMITTEES .....	13
5.1. Introduction .....	13
5.2. Technical advice to the Commission .....	14
5.3. The convergence and cooperation role of the Level 3 Committees .....	15
5.3.1. Progress .....	15
5.3.2. Challenges posed by integrated markets .....	15
5.3.3. "Equipment" .....	17
5.4. The Level 3 Committees and the supervisors' contribution to the EU framework for crisis management .....	19
ANNEX 1: Mandate .....	21
ANNEX 2: Feedback Statement .....	22

## Recommendations and conclusions by the Inter-institutional Monitoring Group

### **Adoption of legislation and implementing measures and enforcement (Levels 1, 2 and 4)**

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

“Regulatory self-restraint” must be applied at all levels of the Lamfalussy process so as to avoid excessive detail.

Distinction between Level 1 and Level 2 measures should be done in a practical, flexible way, aiming at efficiency, which is more suitable than a "one size fits all" approach.

The Level 1 legislation should as far as possible be restricted to framework principles whilst Levels 2 and 3 must strictly adhere to the adopted principles and to the implementing powers set out at Level 1.

#### *Parallel working*

Level 2 implementing measures should be "sketched" at the same time as the Level 1 rules are being established, with the finalisation of the Level 2 provisions taking place only after the formal adoption of Level 1 legislation.

#### *Time constraints*

Transposition and implementation deadlines both for Level 1 and Level 2 legislation should be set more realistically. In particular, any significant work at Levels 2 and 3 must be taken into account before setting the transposition and implementation periods.

#### *Directive vs. Regulation*

The choice of legal instrument in itself is not paramount to the outcome. It must be established in a flexible, "case by case" way taking into account, in particular, differences in national legislative and constitutional arrangements and thus the feasibility of direct application in Member States.

#### *Consultation*

Consultation should be kept at all levels of the Lamfalussy process, but it should be better coordinated in order to both reduce the number of consultations at each level and to avoid overlaps.

Whenever the Commission launches additional consultation on issues that have already been consulted on by the Level 3 Committees, its questions should be limited to the issues where its proposal deviates in any material respect from the technical advice.

The Commission should provide explanatory statements in all the cases where it deviates from the Level 3 Committees' technical advice.

The Commission and the Level 3 Committees should make further efforts to ensure adequate input from users of financial services. The creation of web-based “single access points” covering their active consultations, along with an increased use of surveys might allow the consumers to make a greater contribution to policy making.

#### *Impact assessment and evaluation*

Impact assessments should also be carried out in the case of any significant measure being proposed at Levels 2 or 3.

A comprehensive approach to evaluate ex post the impact of the whole financial services regulatory portfolio should be adopted by the Commission and, where appropriate, by the Level 3 Committees.

#### *Enforcement*

The timing of implementation of EU legislation to date has not lived up to the expectations raised by the Lamfalussy process

Transparency of national transposition and implementation through disclosure mechanisms could curb regulatory additions and enhance convergence of practices through peer pressure.

- Legal texts should (a) clearly spell out the level of harmonisation to be achieved; and (b) contain provisions requiring the Member States to report on any regulatory add-ons they intend to adopt.
- Member States should be obliged to provide transposition tables in a common format and in one of the Commission languages. In light of CEBS' existing work on the CRD, all Level 3 Committees should (further) develop similar disclosure tools.
- Improving enforcement of agreed legislation should become a common objective of all stakeholders. The Commission should play the principal role by using all available tools. Member States, the European Parliament, supervisors and the private sector should put forward complaints, information and concrete cases of incorrect implementation of EU rules. Any possible reservations about coming forward with such information should be looked into.

Sufficient Commission staff must be allocated to the task of checking the accurate transposition of EU Directives and to infringement procedures in the event of faulty implementation.

### **Functioning of the Level 3 Committees**

#### ***Progress***

Continuing integration of European financial markets and changes in regulations will require further development of the functioning of the Level 3 Committees, improvement in their performance and possibly new ways of working.

The Group appreciates the important advisory work of the Level 3 Committees. It also notes the progress made towards supervisory cooperation and convergence.

#### ***Challenges***

The Level 3 Committees should serve as a platform for the coordination of supervision and regulation, facilitating the development of supervisory tools and methods, and strengthening the trust between national supervisors. They should aim to achieve the following objectives:

- Contribute to full and high quality implementation of the EU legislation. This implies: assistance to national competent authorities when they implement EU legislation, agreement on implementing guidelines in order to achieve consistent application of EU law across Member States and the identification of any legislative or practical obstacles to cooperation. Self-monitoring of the Level 3 Committees is needed via in-depth peer reviews of national legislation.
- Enhance supervisory convergence and cooperation. The Committees must identify and eliminate any duplications or gaps in supervisory practice or, in specific fields, identify opportunities for delegation of tasks. At the same time, their work on programmes aimed to develop efficient frameworks for cooperation (e.g. training, joint visits, staff exchanges) should be carried forward vigorously.
- Improve (cross-border) group supervision in the banking and insurance sectors so that it is consistent and coherent in all Member States. The concept of consolidating/group/lead supervisor for large cross-border groups and financial conglomerates needs to be more precisely defined and take into account the potential financial and political impacts.

- Facilitate market infrastructure/transactions oversight. The Committees should serve as a platform for exchange of information between national supervisors on a range of issues including national markets, cross-border activities and specific technical expertise.

#### ***Equipment***

The Level 3 Committees should be provided (a) with a clear EU mandate, complemented by an annual work programme, which should be endorsed by the European Parliament, the Council and the European Commission, and (b) with a sufficient legal basis covering their activities.

At national level, a clear requirement to cooperate at EU level and to support the EU convergence process should be included in mission statements of national regulatory and supervisory authorities.

Decision making procedures of the Level 3 Committees should differ depending on the type of activity.

- When providing technical advice to the Commission, the Level 3 Committees are (already) able to use a qualified majority voting procedure.
- The Group agrees that the Committees should be permitted to use qualified majority voting for a limited number of tasks which are of a highly technical nature and where a delegation is given to the Committees in Level 1 or (with the exception of one Member) Level 2 legislation.
- Other decisions on supervisory convergence should be taken by consensus and their implementation ensured by a strong "comply or explain" mechanism.

The Committees should each review their decision-making rules with the objective of better operational effectiveness.

The Level 3 Committees most likely need a considerable uplift of their financial means and resources to be able to perform their tasks. As a result, the current model of financing may need to be revised accordingly.

#### ***Crisis management***

Although not strictly within the Group's mandate, the Group notes there is no water-tight separation between the phases of crisis prevention and crisis management, considering the pivotal role of supervisors and colleges in detecting crisis situations. The Group therefore stresses the importance of the work aimed to improve crisis management arrangements.

## **1. INTRODUCTION**

### **1.1. General introductory remark**

1. The Inter-institutional Monitoring Group (IIMG) was re-established in 2005 following the extension of the Lamfalussy process, now covering all relevant financial services areas. According to the mandate given by the European institutions (see Annex 1), the IIMG "should assess the progress made on implementing the Lamfalussy process to secure a more effective regulatory system for financial services (investment services, banking and insurance)" and "identify any possible emerging bottlenecks in this process".
2. In March 2006 and January 2007, the Group published its first and second interim reports respectively, addressing existing, problematic issues and potential bottlenecks in the process and focusing on preliminary suggestions for the improvement of the process. The reports took into account evidence given by stakeholders and market participants during the Group's hearings and via written submissions.
3. Following the Inter-institutional Monitoring Group's second report, all interested parties were invited to comment on the preliminary views and recommendations expressed by the Group as well as on the overall implementation of the Lamfalussy process. The Group received 34 contributions (see Annex 2) which it carefully considered while drafting its final report.
4. Although the Group's assessments are broadly in line with those of the former IIMG, it notes that European financial markets have changed considerably since the publication of its reports. At the same time, with the completion of the FSAP, the regulatory focus shifted to give greater emphasis to the implementation and application of adopted measures. Therefore, some problems identified in the former IIMG's reports are no longer so pertinent, whereas others have remained and many new issues have arisen.

### **1.2. Aim of the final report**

5. The Group's third and final report aims to provide a general assessment of the Lamfalussy process, evaluate its ability to deliver the expected results and look at the malfunctioning elements. Based on the preliminary suggestions as presented in the second report and issued for public comment, the Group presents concrete recommendations to improve both the adoption of regulation and its enforcement (Levels 1, 2 and 4). The Group notes that Level 3 of the Lamfalussy process and, in particular, the work of the Level 3 Committees on supervisory cooperation and convergence has been the subject of less analysis so far, both by the IIMG and other EU bodies. This final report focuses therefore on the workings of Level 3 and on the Level 3 Committees' capacity to cope with the challenges they are expected to face.

## **2. DEVELOPMENTS AND STATE OF PLAY**

6. The major project currently under preparation at Level 1 of the Lamfalussy structure is Solvency II in the insurance sector. The work on the Directive codifying existing

insurance Directives has been progressing on schedule; the Commission tabled its proposal<sup>1</sup> in July 2007.

7. At Level 2, the Commission completed work on the implementing measure for the Transparency Directive when it adopted Directive 2007/14/EC<sup>2</sup> in March 2007. In February 2007, the Commission amended its Regulation<sup>3</sup> implementing the Prospectus Directive to include specific provisions in respect of issuers with a complex financial history. With regard to the issue of equivalency of third country accounting standards applying both to the Prospectus and Transparency Directives, the Commission published informally<sup>4</sup> the draft implementing Regulation to be adopted before the end of 2007 and which establishes a definition of equivalence and a mechanism for the determination of the equivalence of third country accounting standards. Following the ESC's favourable vote in January 2007, the Commission adopted in March 2007 Directive 2007/16/EC<sup>5</sup> on eligible assets for UCITS.
8. The Level 3 Committees have made significant progress in many areas. In the securities sector, CESR produced several guidelines, recommendations and protocols with regard to the implementation of securities directives (for example, Protocol on MiFID Passport Notifications, Guidelines concerning eligible assets for investment by UCITS, second set of guidance and information on the common operation of Market Abuse Directive to the market etc.). In the banking sector, CEBS *i.a.* advanced in work on mediation and published in September a protocol on mediation mechanisms aimed to facilitate and speed up the supervisory procedures set out in the Capital Requirements Directive (CRD). It also amended the Guidelines on Financial Reporting (FINREP). In the insurance sector, CEIOPS continued to provide technical advice to the Commission in the framework of the Solvency II project and also contributed to assessing its economic impact by organising rounds of Quantitative Impact Studies.
9. As for cross-sector cooperation between CESR, CEBS and CEIOPS, several projects have been on-going. In May 2007, the three Level 3 Committees published a joint consultation paper on draft Impact Assessment Guidelines. These guidelines should be used by the Committees' Expert Groups as a practical tool when an

---

<sup>1</sup> Proposal for a Directive of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance – Solvency II (COM (2007) 361 final, Brussels, 10.7.2007)

<sup>2</sup> Commission Directive 2007/14/EC of 8 March 2007 laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market

<sup>3</sup> Commission Regulation (EC) No 211/2007 of 27 February 2007 amending Regulation (EC) No 809/2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards financial information in prospectuses where the issuer has a complex financial history or has made a significant financial commitment

<sup>4</sup> [http://ec.europa.eu/internal\\_market/securities/docs/transparency/draft\\_reg\\_equivalence\\_en.pdf](http://ec.europa.eu/internal_market/securities/docs/transparency/draft_reg_equivalence_en.pdf)

<sup>5</sup> Commission Directive 2007/16/EC of 19 March 2007 implementing Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards the clarification of certain definitions

impact assessment is needed as part of their policy analysis and in the course of formulating recommendations. At the same time, the Committees launched a common project aimed at establishing a cross-sectoral training platform.

### 3. ADOPTION OF LEGISLATION

10. The Lamfalussy process has proven to be beneficial. It helped to deliver the Financial Services Action Plan (FSAP) on time, and has contributed to the improvement of the quality of legislation through improved consultation processes. Now, when the regulation is in place and the European financial markets have been integrating, market participants and authorities have to adapt to the new landscape. The success of the Lamfalussy arrangements will depend on their flexibility and capacity (i) to help identify and deliver prompt and efficient solutions when European financial regulation needs to be adapted to new circumstances and (ii) to deal with implementation. Having this in mind, the Group deliberated extensively in its second interim report on adjustments it considers appropriate to bring about improvements and greater efficiency at Levels 1 and 2.
11. The Lamfalussy approach provides for the possibility of less detailed, principle based financial services legislation, especially at Level 1. Excessive detail, though, has not been fully avoided either in Level 1 legislation or in measures taken at subordinate levels. The Group recommends as a general principle that **all rule-making bodies within the Lamfalussy framework (adopting both binding and non-binding rules) commit to "regulatory self-restraint"** which is consistent with the principles of better regulation.
12. The fundamental question of how to distinguish in practice between basic principles on the one hand, and technical implementing measures on the other, remains an important and open issue that is closely related to the level of detail in legislation. This is a key element of the Lamfalussy process given the objective of having a responsive mechanism in place to adapt Community technical measures to quickly changing markets. The Group believes that the European co-legislators should avoid to the greatest extent possible the inclusion of technical rules in framework legislation. However, as some apparently technical rules will inevitably be of high political importance or sensitivity, the Group recognises that there may be circumstances where these need to be dealt with at Level 1. It recommends therefore that **a practical, flexible approach is adopted, aiming at efficiency, rather than a 'one size fits all' approach. In any case, it is crucial that while the Level 1 legislation should as far as possible be restricted to framework principles, the Level 2 and Level 3 rules must strictly adhere to the adopted principles and to the implementing powers set out at Level 1** in order to avoid the creation of additional underlying principles at the lower levels, or material amendment to the principles set out at Level 1.
13. Parallel working on Level 1 and Level 2 measures could in the view of the Group have a positive impact on the efficiency of the legislative process and also facilitate the practical distinction between framework principles and technical measures. Furthermore, it could lead to time savings and help to avoid over-prescriptive Level 1 rules as this approach should lead to the identification of the technical issues to be dealt with at Level 2 as well as any practical or political problems that Level 2 has in dealing with these at an early stage. The Group suggests **a parallel**

**"sketching" of Level 2 provisions as Level 1 rules are being established, with the finalisation of the Level 2 provisions taking place only after the formal adoption of Level 1 legislation.** In practical terms, the sketching should explore available options for dealing with technical issues. This "sketching" would not be as comprehensive and detailed as the work on formal Level 3 technical advice for implementing measures, which should be provided only after completion of work at Level 1. However, it would offer some concepts and building blocks to help the co-legislators understand the practical consequences of the framework legislation under discussion. Meanwhile, Level 3 preparatory work could start on the basis of provisional mandates where appropriate (see below).

14. The Group understands that there are two concerns related to working in parallel. These are the risk of pre-empting the decision making process at Level 1, and the risk of wasting resources should coordination end in failure. However, since parallel working seeks to increase the awareness and knowledge of European co-legislators as they examine the legislative options before them, by providing them with additional information on regulatory implications of the proposals in question, the Group believes that these concerns will turn out to be unfounded. As to the question of how to avoid unnecessary work in particular by the Level 3 Committees, the Group recommends that the Committees get sufficient guidance – and especially political guidance – throughout the "sketching" process. The principal means of providing this will be the Commission's provisional mandate about the type and scope of implementing details that could be covered by Level 2.
15. Time constraints at the different levels of the Lamfalussy structure remain an important bottleneck in the process. The Group recommends that **transposition deadlines both for Level 1 and Level 2 legislation are set more realistically**, reflecting the need to ensure up-to-date and properly developed technical regulation as well as allowing Member States sufficient time for transposition, and firms sufficient time for implementation. The timing for the implementation of Level 1 and Level 2 measures and its effects on actors and users should be properly assessed by EU Institutions before defining the deadlines for implementation. **Where the Level 1 proposals imply significant work at Levels 2 and 3 before national transposition is possible, this should be taken into account in setting the transposition and implementation periods selected** so that the proper consideration, development and adoption of Level 2 and 3 measures is appropriately fostered. That said, there is potential for some rationalisation of the consultation (see paragraph 18), as well as parallel working between Level 1 and Level 2. This will lead to some time savings, which should mean that these recommendations should not result in undue delay to the overall process while ensuring the quality of the overall result.
16. **The Group is not convinced that the choice between Regulations and Directives in itself is key to the transparency, accuracy and consistency of implementation. It favours a flexible case by case approach, considering the pros and cons of each measure.** In particular, it has been suggested<sup>6</sup> that the use of Regulations should be preferred so as to curb the unwarranted divergence in transposition between Member States and to enhance the level of harmonisation

---

<sup>6</sup> Inter alia by the Wise Men Group and the former IIMG.

brought about by Single Market legislation. The Group believes this divergence, where detrimental to markets and consumers, can be prevented in other, less radical ways (see the following section). The Group deliberated on some guiding principles to govern the choice of legal instrument and notes that **differences in national legislative and constitutional arrangements and therefore the feasibility of direct application in Member States must be carefully considered on a case by case basis**. The Group believes that where Member States need more time to adapt to new requirements or where legitimate local specificities of legal or regulatory systems exist, Directives should be used. At the same time, Regulations seem to be more suitable for technical measures of a limited and definite scope, as well as where, in areas that are already subject to a sufficient level of harmonisation, immediacy of effect is required. The Group notes, however, that the subsidiarity principle, which is intended to ensure that decisions are taken as closely as possible to the citizen, requires that careful consideration is given to the question of whether the use of a Regulation is justified.

17. Improved consultation is one of the major achievements of the Lamfalussy process and the Group regards the current situation as largely satisfactory. Its recommendations should therefore be understood as suggestions for further rationalisation and optimisation of the process. Some stakeholders have reported that consultation has become an excessive burden for the industry considering in particular the number and volume of consultation papers. This is not, however, the majority view – which is not to say that the process cannot be further improved. The Group considers that **there should be no change in the requirement to consult at any of the levels of the Lamfalussy process. However, it calls for the better coordination of consultations in order to both reduce the number of consultations at each level and to avoid overlaps**.
18. Indeed, the Group heard some reservations with regard to the layering of consultation where the Commission receives technical advice based on broad consultation with stakeholders conducted by the Level 3 Committees, and the Commission then conducts its own further consultation when it subsequently drafts legally binding rules. Such draft texts are then made available to the public for comments before a formal draft of Level 2 legislation is submitted for scrutiny by the relevant Level 2 Committee. This invitation to the public to comment on Commission draft legislative proposals is usually free of any format and does not ask respondents to reply to specific questions. Stakeholders are free to provide any comment they find relevant on the basis of the consultation document. The Group does not believe it necessary for the Commission to launch a further formal consultation on an issue that has already been consulted on. To the extent that the Commission considers that further consultation is desirable, the Group recommends that **the Commission's questions are limited to the issues where its proposal deviates in any material respect from the technical advice it has received from the Level 3 Committee**.
19. While drafting legislative proposals, **the Commission should be obliged to provide explanatory statements in all cases where it has not followed the Level 3 Committees' technical advice**. The Group attaches much importance to close cooperation between the Level 3 Committees and the Commission in particular during the time when the Committees are working on the Commission's mandate.

20. The Group has looked at the issue of consumer involvement in consultation processes and, in particular, has examined the possibility of obtaining direct input. It has observed that consumers are recognised both by the Commission as well as by the Level 3 Committees as one of the targets in their consultation processes. The Group also recognises that it is difficult to interest consumers in some issues of a highly technical nature, and that it is necessary to be realistic about the extent to which consumers can collaborate in the development of technical requirements. Nevertheless, **the Group encourages the Commission and the Level 3 Committees to make further efforts to ensure adequate input from users of financial services. The creation of web-based “single access points” covering the active consultations both of the Level 3 Committees and of the Commission, along with an increased use of surveys might allow the consumers to make a greater contribution to policy making.** Seeking consumers' direct opinions will require considerable resources (in particular due to the methods needed to reach them appropriately and especially the need for translations and for adequate publicity). The Group considers that a cost-effectiveness analysis prior to the launch of such consultation could prove useful to identify those areas where consumers can most realistically make a real contribution to the debate.
21. Regulatory impact assessments are an indispensable part of the legislative and regulatory processes. In relation to the Lamfalussy process, the Group recommends that **impact assessments are carried out not only for Level 1 legislation but also in a case of any significant measure being proposed at Level 2 and 3.** In this respect, the Group welcomes the development of Level 3 Committees' impact assessment methodologies and capacities. The Group particularly welcomes the collaboration between the Committees in establishing joint methodologies.
22. Similarly, the Group attaches much importance to a **series of regular and rolling ex-post evaluations both by the Commission and – where appropriate – by the Level 3 Committees** – to assess whether and how both individual measures of financial regulation and the corpus of EU regulatory measures are achieving their objectives.

#### 4. IMPROVING ENFORCEMENT

23. **The Lamfalussy process has not so far led to the expected improvement of transposition performance.** Delayed and imperfect transposition is a major bottleneck in the development of the Single Market and in realising its benefits, although the Group notes that substantial progress has been made on the implementation of FSAP Directives. The Group notes excessive detail in legislation and overly tight timeframes for implementation as some of the reasons. In any case, the timing for implementation of Level 1 and Level 2 measures and its effects on institutions, market participants and other users, should be properly assessed by EU-institutions before defining the deadlines for transposition and implementation. The main responsibility for timely and correct transposition will then lie with the Member States. The Group also notes the threat that potential "goldplating" of EU Directives represents for the success of the Single Market. **The Group sees merit in practical mechanisms to enable and enforce transparency in how Member States transpose, and also in demonstrating differences between national approaches to implementation.**

24. Firstly, at the Directive level the Group recommends that **legal texts clearly spell out the level of harmonisation to be achieved**, that is whether the measure is a minimum or maximum harmonisation measure. Simultaneously, where a minimum harmonisation approach is adopted, the European co-legislators are invited to **introduce in Directives provisions requiring the Member States to report on any regulatory add-ons they intend to adopt**.
25. Secondly, the Group attaches much importance to tools that lead to the disclosure of national implementing measures and other information on the transposition of European Directives in Member States. Comparability and ease of use is important to make these tools useful. The Group believes that **Member States should be legally obliged to provide transposition tables in a common format that shows the provisions of an EU Directive and the national transposing text juxtaposed** as is already the case, for example, in MiFID implementing Directive 2006/73/EC<sup>7</sup>. In addition to the national language versions, transposition tables should also be elaborated in one of the Commission's working languages. The Group welcomes the Supervisory Disclosure framework under the CRD which it considers to be an excellent example of such practice. **It invites CEBS to extend its work to disclose information relating to prudential supervision that is not part of the CRD, and the other Level 3 Committees to develop similar tools for other financial services Directives**.
26. Thirdly, the Group believes that increasing vigilance for and transparency about cases of incorrect transposition and implementation is necessary to correct the transposition and implementation deficits. The gathering of evidence on faulty implementation has long proved problematical. There is also the issue of which body within the Lamfalussy framework is best placed to do this. Although the Level 3 Committees' work focuses on national implementation, the Group doubts that reporting on transposition failures can be their responsibility, even if the Level 3 Committees can and should be used to provide peer group review and to highlight and discuss transposition issues between supervisory authorities. In this context, the Group notes with interest the recent strengthening of the CESR Review Panel's role.
27. The Group believes that **improving enforcement of agreed legislation should become a common objective of all stakeholders including the European institutions, Member States, supervisors and industry**. In this context, the Group welcomes the recently launched debate in the European Parliament on how it could contribute to proper implementation of Community law. However, the Commission, as guardian of the Treaty and as the institution that is responsible for Level 4, should have the principal role here. The Group recommends that the Commission should make full use of the tools at its disposal to improve the quality of transposition and implementation.
28. Tools would include the use of comparative studies conducted by expert third parties, and mandating the Level 3 Committees to conduct and report on peer group analysis of the transposition of specific Community measures as part of the advisory

---

<sup>7</sup> In its Communication of 5 September 2007 (COM/2007/0502 final), the Commission announced that it "will continue systematically to include an obligation for a correlation table to be communicated in each new proposal for a directive. It will insist on this during the legislative process."

function of the Committees. With regard to the current process for filing complaints that may lead to enforcement proceedings and despite its confidentiality, the Group has observed some reluctance of the private sector to come forward with complaints for fear of jeopardizing business opportunities or suffering retribution. **The Group therefore invites the Commission to consider ways to address such concerns within the framework of the current complaint networks.**

29. To ensure the proper execution of these tasks, in addition to implementing the recommendations in the paragraphs above, **the Group urges the Commission to allocate more resources for transposition and enforcement files to ensure that sufficient staff is available** to check the accurate transposition of agreed legislation and where necessary to initiate infringement procedures in the event of faulty implementation.

## **5. FUNCTIONING OF THE LEVEL 3 COMMITTEES**

### **5.1. Introduction**

30. While many European markets still function on a national basis, European financial markets have become significantly integrated over the past years and, with the implementation of new legislation, this trend is expected to continue. This is in no small measure as a result of the successful implementation of the Lamfalussy process. The number of cross border players and international activities has increased substantially, and financial services infrastructure issues have also acquired a strong international dimension. The environment has become highly competitive with more interactions between traditional markets and with new financial players active at the international level. Product innovation has intensified and the number of new financial products has been increasing rapidly. A comprehensive EU regulatory framework has been put in place that has harmonised financial services regulation practice across Member States to a very significant extent.
31. As a result of these developments, EU financial supervisors and regulators have increasingly to oversee the activities of companies established in other Member States and to deal with large cross-border groups. In both cases this requires close cooperation with other European supervisors. Market developments noted above have also resulted in a need for more coordinated work between national supervisory authorities and have underlined the importance of the consistent application of EU regulation between jurisdictions. As noted in preceding section, this has resulted in a strong drive towards a progressive convergence of supervisory practices. Further efforts to develop this convergence will be required in order to meet the challenges sketched above, and if the full benefits of the Single Market are to be realised.
32. Despite these dynamic changes, some words of caution seem to be necessary. In some areas, Europe must indeed aim to ensure that similar problems receive similar supervisory answers. In other areas, this might not be necessary or advisable, for example where legitimate differences in national market characteristics need to be taken into account. In the European market a very significant number of small and medium-sized banks operate only locally or regionally. These raise at times different supervisory concerns than large global players. European legislation and

its implementation must therefore stay neutral vis-à-vis the different players in the market. Proportionality of supervisory measures is essential in this respect, particularly to ensure a level playing field for all market participants.

33. Cooperation has already progressed. Under the Lamfalussy framework, networks of national supervisory authorities have been established<sup>8</sup> allowing for regular and frequent structured contacts between the EU supervisors. The Committees have embarked on a significant number of initiatives to increase co-operation and convergence. The Group has observed, however, that **continuing changes in markets and regulations will require further development of the functioning of the Level 3 Committees.**
34. The roles and functions of the Committees are varied, and the Group believes that the different roles need to be analysed and addressed separately. The original report of the Wise Men Committee foresaw two principal roles for the Level 3 Committees: a technical advisory role in respect of the European Commission in particular with a view to the development of technical implementing measures on the one hand, and a role to contribute to the consistent implementation of Community directives and to the convergence of supervisory practices in the European Union on the other. The Group notes that there is no legislative competence at the European level for a supervisory function. The question has therefore been raised, whether the Committees should have specific supervisory responsibilities as institutions in their own right, and what role they should play in times of stress in the markets.

## 5.2. Technical advice to the Commission

35. The primary responsibility of the Lamfalussy Level 3 Committees is to use their experience and expertise to provide advice on technical issues to the Commission when the Commission drafts Level 2 measures and, as extended in practice, proposals for Level 1 legislation. This is the role that was most conceptually developed, elaborated and considered by the Committee of Wise Men. It is also the role that, given the demands of the Commission's legislative programme, has dominated the work of most of the Level 3 Committees since their inception.
36. The positive appraisal of the Lamfalussy process as a whole is to a large extent due to and supported by the advisory work of the Level 3 Committees and their valuable advice to the European Commission on many occasions. CESR assisted the Commission when drafting its proposals to all Lamfalussy Level 1 directives as well as Level 2 legislation. In the insurance sector, CEIOPS has responded to three waves of Commission requests and has contributed significantly to the Solvency II project. While CRD is not distinguishing between Levels 1 and 2, CEBS has played an important role in assisting the Commission in its work and afterwards in giving advice on further improvements of CRD.

---

<sup>8</sup> Committee of European Securities Regulators (CESR) set up by Commission Decision 2001/527/EC of 6.01.2001, Committee of European Banking Supervisor (CEBS) set up by Commission Decision 2004/5/EC of 5.11.2003, and Committee of European Insurance and Operational Pensions Supervisors (CEIOPS) set up by Commission Decision 2004/6/EC of 5.11.2003.

37. **The Group appreciates and applauds the important advisory work of the Level 3 Committees.** The Group considers that in this respect the Level 3 Committees are meeting the original expectations of the Wise Men Committee. We have already recommended some relatively minor improvements with regard to consultation with stakeholders, especially in terms of coordination of consultations to avoid any overlaps (see paragraph 17).

### **5.3. The convergence and cooperation role of the Level 3 Committees**

#### *5.3.1. Progress*

38. Besides their advisory role, the Committees have responsibility to foster the consistent and effective implementation of European regulation by issuing standards and guidelines and by securing effective cooperation between national supervisory authorities ("Level 3"). They have presented and developed programmes to encourage cooperation e.g. training, seminars, joint visits, staff exchanges and joint cross-sectoral programmes. These also have as their further objective the promotion of convergence of regulatory and supervisory practice. However, given that most of the Committees have been required to focus on their advisory role, most of the programmes are still at an early stage. **The Group recommends that, as the development of efficient regulatory networks and frameworks for cooperation are of prime importance in securing the benefits of the Single Market, these programmes should be progressed without further undue delay.**
39. The three Level 3 Committees have also produced guidelines for the implementation of framework and implementing rules as well as developed standards and other Level 3 measures<sup>9</sup>. There have been numerous initiatives and activities to increase cooperation and promote convergence across sectors. The Committees have either created new or have improved existing convergence tools such as peer reviews, the CESR Review Panel as well as a framework for mediation. In addition, they have established operational networks such as, for example, the CEIOPS coordination committees (Co-Cos) for insurance groups with cross border activities, and the CEBS in starting an "operational network" project for 10 major cross border banks. Staff exchanges have been launched and the Committees are working on a common cross-sectoral training platform. As recommended above, **this work should be carried forward vigorously.**

#### *5.3.2. Challenges posed by integrated markets*

40. The Group has noted, however, that the increasing speed of market integration requires a faster development of cooperation between supervisors. The changes in the EU financial markets are posing new challenges for national supervisory bodies as they undertake the supervision of cross-border groups and markets. **An effective regulation of such an integrated system in a Single Market context requires an improvement in the performance of the Level 3 Committees and potentially new ways of working.**

---

<sup>9</sup> For example, CEBS adopted 12 guidelines with regard to the implementation of CRD; the number of CESR's recommendations, guidelines and standards exceeds 20.

41. The Group recognises that the EU supervisory system is based on a structure of national supervisors and competences. The Group therefore believes **that the Level 3 Committees should serve as a platform for the coordination of supervision and regulation, facilitating the development of supervisory tools and methods, and strengthening the trust between national supervisors.**
42. In some cases, especially where supervision of cross border financial institutions or markets is concerned, the cooperation must achieve a level and quality that results in a single agreed approach applicable everywhere in order to ensure fully coherent and consistent supervisory processes in all Member States.
43. The Group has tried to foresee and consider different kinds of situations and examine the capacity of the system to respond accordingly. In consideration of the above, the Group believes that Level 3 Committees should aim to achieve the following objectives:
44. Contribute to full and high quality implementation of the EU legislation: The Group envisages that the Level 3 Committees will be increasingly expected to **assist national competent authorities to ensure timely and harmonised implementation** of EU law at the national level. They should **identify and agree on how best to translate legislative requirements into practical implementation** and thus to ensure that application of EU legislation across the Member States takes place in a consistent manner. They should **help identify any legislative (and other practical) obstacles to cooperation**, whether coming from national or European legislation, and thus enable the Commission and Member States to propose improvements. They should **exercise self-monitoring via in-depth peer reviews of national legislation** so as to contribute to full and high quality implementation of EU legislation. In doing so, they should also assist the Member States in meeting the implementation deadlines and in exercising “regulatory self-restraint”.
45. Enhance supervisory convergence and cooperation<sup>10</sup>: The Group believes there is a **need to identify the areas of supervisory duplication or gap in the regulation of financial institutions with a view to eliminating them**, where necessary, or, in specific fields, **identifying opportunities for national supervisors to delegate tasks to each other**. This would strengthen the efficiency of the supervisory process and contribute to the development of a framework within which national supervisors can have confidence in the output of such delegated tasks. One of the areas where such rationalisation is needed is regulatory reporting.
46. Improve (cross-border) group supervision in the banking and insurance sectors: **Effective supervision of integrated cross-border financial groups means fully consistent and coherent supervisory processes in all Member States**, based on an overall vision developed at the consolidated level, under the responsibility of the home supervisor, and implemented at the local level, ensuring that the host supervisor is involved and receives appropriate information. The Group believes

---

<sup>10</sup> As to the obstacles at the operational level, cooperation between financial services practitioners should be intensified. In this context, the creation of the subgroup of operational networks as an interface between CEBS and industry is a useful example of developing frameworks for closer cooperation and the coordination of supervisory activities at the operational level and for assisting in finding pragmatic solutions.

that a **precise definition of the concept of the consolidating / lead / group supervisor for large cross-border groups and financial conglomerates is needed**<sup>11</sup>.

47. Referring to the views formulated in the above paragraph one IIMG Member argued that sufficiently developed supervisory convergence in all Member States is to be regarded as a precondition for both the proper functioning and political acceptance of any such concept in practice. A system where the home country supervisor has the ultimate decision-making power and where the host country's supervisor is only "appropriately" informed could lead – in times of a financial crisis – to unclear political and financial accountability. It could equally be argued that decisions taken by the home country authority might also lead to systemic risks for the financial system in the host country. Without having any significant say in supervising a respective financial institution, the host country would have to stand up for the consequences of decisions taken by a lead supervisor abroad (including acting as lender-of-last resort and in regard to bailing-out firms in financial difficulty).
48. Facilitate market infrastructure/transactions oversight: The Level 3 Committees should provide a **platform in which information about national markets can be exchanged and expertise on specific matters can be shared** in an open, collaborative and collegiate manner. Although the task of the Level 3 Committees is not to jointly supervise markets, such cooperation would allow national supervisors to deepen their knowledge of the cross-border activities of the regulated entities for which they are responsible and of the markets in which they are active, as well as to avail themselves of specific technical expertise that may not exist at all, or in sufficient quantity, in an individual Member State. There needs to be a clearer and binding definition of the role and responsibility of various regulators in the case of stocks traded in various countries, with the provision of appropriate tools and means.

### 5.3.3. "Equipment"

49. **The Level 3 Committees need to be appropriately equipped to deliver the above.** This in the view of the Group requires the following:
50. Mandate, Mission Statements and Work Programmes: A clearly defined **EU mandate** is required, which should be complemented by an annual work programme for each of the Committees. There must be a **sufficient legal basis to cover the work of the Level 3 Committees**, in particular to allow them to be named and given specific tasks in European legislative instruments, and for this work to be formally recognised and have appropriate status.
51. **The Mandate and Work Programme of Level 3 Committees should be endorsed by the European Parliament, the Council and the European Commission.** This would ensure political support as well as provide for their accountability at the European level. Currently, their members are formally

---

<sup>11</sup> In this respect, setting up the subgroup of operational networks (SON) as an interface between CEBS and industry was particularly important with regard to closer cooperation and coordination of supervisory activities at the operational level and for assisting in finding pragmatic solutions.

accountable at the national level, but at the EU level, Level 3 Committees have only an informal obligation to report to the European Institutions.

52. At the Member States' level, **national regulatory and supervisory bodies should have mission statements that require them to cooperate at European level, take into account the European interest and the importance of developing and strengthening an effective EU Single Market.** These bodies should be given a mandate which recognises the importance of applying standards and guidelines developed by the Level 3 Committees.
53. However, it should be clear that the Level 3 Committees are composed of financial supervisors/regulators who are fully independent from outside guidance or instructions in their day-to-day supervisory function.
54. Rules of procedure: The decision-making procedures of the Level 3 Committees should differ depending on the type and legal framework of their activities.
  - When providing **technical advice** to the Commission, the Level 3 Committees **are already able to use a qualified majority voting** procedure. This is envisaged in their respective Charters.
  - The Group believes that the Level 3 Committees may also need to be permitted to vote **by qualified majority** in a limited number of cases of a highly technical nature if in the future **a delegation is given to the Level 3 Committees in Level 1 or Level 2 legislation.** One IIMG Member argued that, for legal reasons and based on democratic principles, Level 2 legislation cannot have the power (without authorization by Level 1) to set rules for qualified majority voting on Level 3.
  - **All other decisions** with regard to supervisory convergence and cooperation should be subject to **consensus**, as is the case today. However, a strong **"comply or explain" mechanism should be developed** in order to highlight any divergence in the implementation of Level 3 Committee decisions.
55. In light of the above, the Group recommends that **the Committees should each review their decision-making rules with the objective of better operational effectiveness.** The Group believes that it is appropriate for the Committees to seek consensus as far as possible, but not to the extent that this would block decisions at Level 3.
56. Financial means and resources (staffing and others): In order to match the scale of tasks which the Group recommends be entrusted to the Committees, **it is likely that a considerable uplift in their resources will be needed.** The current model (financing by the supervisory authorities themselves) may not be sufficient to this end since it is already difficult for some Committee members to find the necessary resources. There appear to be two potential routes. One is for the budget to continue to be provided by the Member States or national authorities making additional resources available, and by project-based financing from the EU budget for any specific tasks that are allocated to the Level 3 Committees in European legislation. The other route is for funds to be provided for in the EU budget as a continuous appropriation, and for the Committees to recruit staff in their own name, where appropriate. The latter may require changes to the Level 3 Committees' legal base or

status within the EU system. The Group remains divided on the need and desirability of this step at the current stage of evolution of the Level 3 Committees.

#### **5.4. The Level 3 Committees and the supervisors' contribution to the EU framework for crisis management**

57. Analysing the inter-relationship between supervisory work and the dynamics of crisis management would go beyond the IIMG's mandate, centred on assessing the Lamfalussy process and its possible bottlenecks (see Annex 1)<sup>12</sup>. The IIMG's analysis of Level 3 work has therefore concentrated on the improvements that need to be brought about in supervisory convergence and cooperation essentially on a going-concern basis. The actual performance of supervisors on that front is key to crisis prevention. This said, the Group notes that the work undertaken in the recent years to improve crisis management arrangements, both at EU and national levels, has concrete implications for supervisors' agendas. The Group supports the importance of that work, as recent developments in financial markets have shown it is highly relevant for maintaining financial stability.
58. Indeed, it is worth noting that **no water-tight separation can be drawn between the phases of crisis prevention and crisis management**, considering the **pivotal role of supervisors and colleges in detecting crisis situations and contributing to crisis management coordination** in close conjunction with other institutional players such as central banks and finance ministries.<sup>13</sup> In particular, the tightening of the arrangements for cooperation between supervisors and central banks with reference to groups with significant cross-border business in the EU is essential to improving the effectiveness of EU arrangements for crisis management, as these are often considered to be the "weak link" in the EU financial framework by external analysts<sup>14</sup>.
59. Finally, while it is not in the Group's mandate to comment on the appropriate stance for international and EU policymakers on issues arising from the current market turmoil<sup>15</sup>, the Group notes the importance of a forward looking element to the

---

<sup>12</sup> The assessment of the current EU framework for crisis prevention has been undertaken in particular in the Council, under the aegis of the Economic and Financial Committee.

<sup>13</sup> Therefore, the Group notes with interest the extension of the **guidance role of Level 3 Committees** from going-concern to crisis management cooperation, as is illustrated e.g. by the joint guidance issued by CEBS and the ESCB's Banking Supervision Committee (BSC) In 2006, CEBS and the BSC set up a Joint Task Force on Crisis Management, in order to improve cooperative arrangements for managing potential banking and financial crises. The Task Force issued guidance for dealing with financial crises that may have a systemic cross-border impact. CEBS and the BSC are developing follow-up work in close cooperation. The Group considers this as a useful development.

<sup>14</sup> E.g. the IMF in 2007.

<sup>15</sup> The Group notes in particular the specific working group freshly set up by the Financial Stability Forum to "help formulate an appropriate and coordinated international response" for the G7 by April 2008, and notes that, at the cross-roads of contributions from the Commission, Ministries of Finance, Central banks and Level 3 committees, the Economic and Financial Committee, assisted by the Financial Services Committee, is further strengthening its role as regards assessing the implications of financial innovation for financial stability and crisis prevention and management, and the necessary policy approaches.

deliberations of supervisors and policymakers that brings together both issues arising from the supervision of individual institutions and from wider financial stability monitoring. In particular, it is important – without impinging on the dynamism of financial markets – to take the implications of financial product innovation and market developments properly into account in developing regulatory policy and in taking forward the supervision of individual institutions. The Group underscores the importance of EU and international policymakers and of all the actors in the Lamfalussy process developing and contributing to this forward looking element as part of a robust, evidence-based approach to policymaking.

## **ANNEX 1**

### **Mandate**

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

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

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

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

The Group should:

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

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

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

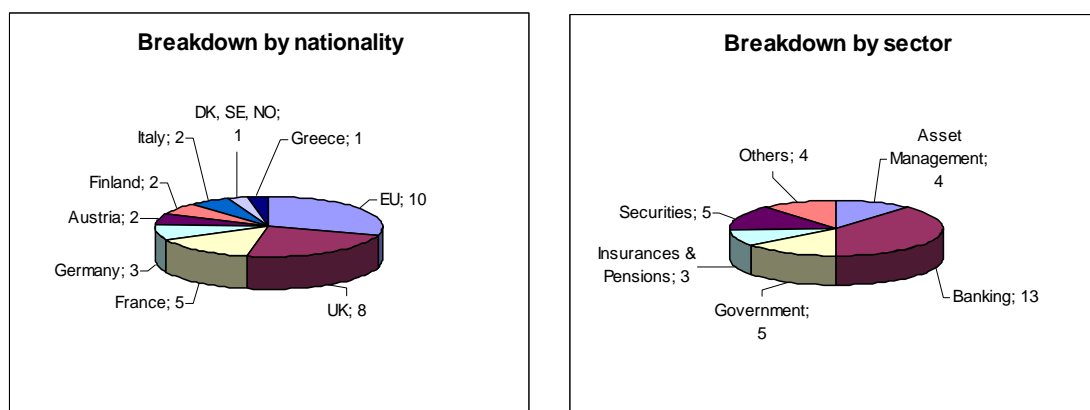
## ANNEX 2

### Feedback Statement – Summary of comments on Second Interim Report

#### 1. INTRODUCTION

In January 2007, the Inter-institutional Monitoring Group invited all interested parties to comment on the preliminary views and recommendations of its Second Interim Report as well as on the overall implementation of the Lamfalussy process.

The call for comments was open for public consultation until 26 March 2007 and the Group received 34 submissions; a list of contributors can be found at the end of this document. The following breakdowns illustrate the profile of respondents:



#### 2. LEVEL 1 AND LEVEL 2

##### 2.1. Excessive detail and separation of levels

Almost all respondents agreed explicitly with the Group's recommendation that Level 2 and Level 3 rules should adhere to the framework principles as set out at Level 1 and also with the call for "regulatory self-restraint"<sup>16</sup>. Some respondents reported that the Level 3 Committees have not always observed the latter principle and produced, in their view, unnecessary additional requirements.

One contributor suggested that any technical detail to be included in Level 1 legislation should be accompanied with a justification. Another respondent asked for regular reviews of the legal framework for financial services.

##### 2.2. Parallel working

Almost all respondents (with the exception of one) supported the Group's recommendation that the work on the Level 1 and Level 2 measures should move in

---

<sup>16</sup> Paragraphs 18 and 19, Second Interim Report

parallel. The one respondent who did not see merit in such an approach commented that this might lead to waste of time and resources (because of possible incompatibilities with Level 1 rules), confusion between the levels (instead of making the division clearer) and increase of inter-institutional tensions.

All other contributors agreed with the Group's recommendations or perceived them worth considering. Some of them stipulated, however, that the work on the implementing Level 2 rules can be launched only after a certain amount of advancement in the legislative process at Level 1<sup>17</sup>. A stricter view was expressed in one response that the scope of "sketching" should be limited to the identification of Level 2 elements that might be developed for each of the main options under discussion at Level 1. In this case, the "sketching" would help the European Institutions to better understand the depth and scope of Level 2 work that would result from the choices they are about to make at Level 1.

Two respondents did not agree with the Group's recommendation that the Commission should provide "sufficient (political) guidance" to the Level 3 Committees<sup>18</sup> which they considered to be controversial and/or against the principle of supervisory independence.

### **2.3. Indicators for separation of levels**

Some respondents came forward with ideas and/or additional indicators to facilitate the distinction between the framework principles and technical rules to be adopted at Levels 1 and 2, respectively.

The Level 1 framework rules were described as "fundamental definitions, principles and goals" covering "objectives, aims and use of measures" whereas the Level 2 covers "their format and content" and more generally "provisions on execution and implementation". The likely "shelf life" of a rule was suggested by one respondent as a possible additional criterion.

More generally, a view was expressed that the Level 1 legislation must be clearer about its intent and public policy purpose. Consequently, it should be easier to gauge the difference between core principles and technical details, and therefore more difficult for the subsequent Levels 2 and 3 to exceed their scope.

### **2.4. Choice of legal instrument**

The majority of contributors agreed with the Group's recommendations/guiding principles and favoured the suggested case-by-case approach. A small number of respondents had a preference for a more frequent use of regulations.

Only a few respondents objected to the proposed guidelines; in particular as regards the use of regulations. They considered the time criterion ("actions requiring immediate

---

<sup>17</sup> For example, after the first reading in the European Parliament and the adoption of the common position by the Council and/or after certain "stabilisation" of Level 1 rules.

<sup>18</sup> Paragraph 24, Second Interim Report

effect"<sup>19</sup>) as inappropriate and/or the criterion of limited scope ("measures targeting a specific area of the Internal Market"<sup>20</sup>) as confusing.

A view was expressed that the Level 2 legislation should be consistently adopted by one type of legal instrument; one respondent advocated for all Level 2 measures having the form of regulation. Another contributor argued that also similar issues should be covered by the same type of legal instrument.

## **2.5. Impact Assessments / Ex-post Evaluations**

Most respondents supported the Group's recommendations, and were in favour of impact assessments at all levels<sup>21</sup>. However, a small number of contributors warned of the risk of slowing down the process and one of them considered mandatory impact assessments at Levels 2 and 3 as an unnecessary additional administrative burden for the Level 3 Committees. However, another contributor called for systematic impact assessments at these Levels, which goes further than the Group's recommendation based on a case-by-case approach.

Views were expressed that the impact assessments should comprise a cost/benefit analysis as well as information on differentiated impact of legislation on different types of market participants; for example, retail and wholesale banks.

Several contributors commented on the practicalities of regulatory impact assessments mentioning in particular transparency and clear methodology, appropriate evaluation criteria and timing, sufficient technical expertise and financial support as well independence of the body carrying out impact assessments. Some replies welcomed the creation of the Impact Assessment Board; however, a doubt was expressed about its independence due to the composition.

## **2.6. Consultation**

### *2.6.1. General*

The majority of contributors shared the positive view of the Group that consultation processes have improved under the Lamfalussy framework. They also agreed with the Group's preliminary recommendations. Some of them however pointed out persisting problems and proposed additional actions.

Many respondents have observed that so far there has not been sufficient time allocated for consultation at Level 3. They suggested that timetables be proportionate to the volume and technical nature of the content matter. Communication between the Level 3 Committees and market participants could also be improved, so that consultations have more of a dialogue, rather than the unilateral provision of information which has often been prevalent to date.

There seems to be an agreement that the Commission should always provide an explanation when it deviates from the Level 3 technical advice<sup>22</sup>. On the other hand,

---

<sup>19</sup> Paragraph 34 (ii), Second Interim Report

<sup>20</sup> Paragraph 34 (i), Second Interim Report

<sup>21</sup> The Chairs of the three Level 3 Committees reported that they have not been able to carry out the impact assessments when establishing the Level 2 advice due to the tight deadlines.

<sup>22</sup> Paragraph 39, Second Interim Report

however, some contributors disagreed that the Commission should be limited to re-consulting in these circumstances only<sup>23</sup>. Moreover, they maintained that the Commission is not obliged to rely on the Level 3 advice, and should be able to consult whenever it considers useful.

To make the consultation as transparent as possible, many contributors called for systematic publication of feedback statements. Similarly, it was suggested that public hearings should be followed by an on-line publication of minutes (*e.g.* in a summarised form). Some contributors raised the issue of methods that are used for analysing comments. In particular, "weighting of responses" seems to be desirable.

A negative observation was made with regard to the level of detail in consultation documents which might lead to, in this view, overly detailed legislation. The respondent suggested therefore that the Level 3 mandates be framed in a stricter way.

### 2.6.2. *Direct consumer input*

Many contributors' views diverged on the issue of direct consumer input. Around half were supportive of seeking **direct** consumer input; however, the means to get consumers directly involved remained rather unclear. Two respondents saw merit in comprehensive surveys and/or specific studies that might be carried out either by the Commission or the Level 3 Committees. Another respondent, however, alerted to the cost-effectiveness of such solutions that, in its view, might require quite important resources while having only a limited added value.

Other respondents argued for an **indirect** consumer input via consumer organisations. Many of them considered that the existing panels, groups and fora already have provided sufficient input. In this context, it has been observed that the consumer groups within the EU are fragmented and lacking appropriate infrastructure and funding. It is therefore difficult for consumer associations to provide contributions in any meaningful and systematic way.

The issue of accessibility of consultation documents for non-specialists was raised. It was suggested that the relevance for interested parties should be better pointed out in consultation papers and consultations given adequate publicity. This could happen, for example, by creating a central reference point on the internet covering all bodies and processes within the Lamfalussy structure and providing for regular updates about forthcoming and on-going consultations.

## 2.7. **Time constraints**

Many stakeholders pointed out the problems of timing within the Lamfalussy structure. The two main concerns were transposition deadlines for Member States that are too short, resulting in insufficient time available to the industry<sup>24</sup> to comply with rules adopted at the Levels 1 and 2, and with the Level 3 guidelines. They also had concerns around deadlines for Level 3 consultation that were too short.

---

<sup>23</sup> Paragraph 38, Second Interim Report

<sup>24</sup> The MiFID was given as an example by many respondents.

The solution suggested by some respondents was to set both the transposition and implementation deadlines only after the technical measures at Level 2 have been agreed. This might mean agreeing on the transposition deadline at the moment of adoption of the last Level 2 implementing measure, or stating from the beginning that the Member States should transpose “within  $x$  months following the adoption of the last Level 2 implementing measures”. In the latter case, the timescale for transposition for both Level 1 and Level 2 measures should be agreed on a case-by-case basis. The standard 18 month deadline does not seem to be appropriate.

One respondent suggested that Member States start with their transposition only after the finalisation of the work at Level 3.

### 3. LEVEL 3

Most respondents were confident in the Lamfalussy architecture. In their opinion, the current system should be allowed to deliver its maximum potential before any major changes are introduced. Three contributors did not share this view and argued that the present structure is unable to meet expected objectives. They questioned, in particular, the effectiveness of a non-binding mechanism and pointed out the limits of a soft law approach.

#### 3.1. Functioning of the Level 3 Committees

Many contributors agreed with the Group's preliminary conclusion that there is a need for **stronger political support and commitment** by Member States to foster cooperation between supervisors. Similarly, they considered necessary that the Level 3 Committees are provided with appropriate **financial means** to carry out their tasks; for example the EU projects they have to develop.

##### 3.1.1. Problems and challenges

Some respondents identified the following issues as **problems** in functioning of the Level 3 Committees: their decisions cannot be taken by qualified majority<sup>25</sup>; their guidelines are not binding; and the current incentives and mandates of members of the Level 3 Committees follow purely national interest without any EU dimension. Accordingly, the proposed solutions would be to allow the Level 3 Committees to take binding decisions based on a majority vote and to encourage supervisors to take a pan-European view with regard to their Level 2 advice, Level 3 guidelines and supervisory practices.

Some contributors did not agree however that the Level 3 Committees should be empowered to reach binding decisions that those in the minority must comply with. Instead, some respondents suggested that the Chairs of the Level 3 Committees **report to the Council and the Parliament** on why consensus could not be reached, including the identities of those in disagreement, and justification given. In addition to this, another respondent proposed that the EU institutions fix clear targets, objectives and timelines for the work to be carried out at Level 3.

---

<sup>25</sup> Except when providing technical advice to the Commission.

Some respondents addressed the issue of including **EU tasks in the mandates of national supervisory authorities** and most of them supported the recommendation of the Group<sup>26</sup>. Only one public bank was of the opinion that there is no added value in this proposal. Other contributors expressed mixed views. Considering that national supervisors derive their powers from domestic legislation (framed in terms of national objectives) and that this is unlikely to change they asked the Group for more clarification of its proposal.

Obstacles to supervisory cooperation were addressed. Some respondents emphasised the role of systematic **programmes for staff exchanges** to enhance the spirit of cooperation and mutual trust. They called for removal of present fiscal and operational obstacles to these programmes and their acceleration.

One respondent commented that the main obstacle to supervisory convergence is differences between national legislations due to uneven transposition of EU law, believing that a better legal framework could indeed enhance convergence. In some contributions, reference was made to problems caused by **uneven regulatory powers** among the members of the Level 3 Committees.

One contributor noted that the Lamfalussy process has considerably increased costs; in particular, because of the work of Level 3 Committees and extensive consultation. The consequence was that in small Member States supervisors must allocate a far higher percentage of their resources to co-operation and common rulemaking than on the “pure” supervisory activities.

### *3.1.2. Own initiative actions of Level 3 Committees*

Many contributors commented on the question whether the Level 3 Committees should be able to act on own initiative providing advice without a Commission mandate or putting forward proposals to amend legal texts<sup>27</sup> and their views were split.

Among the respondents who were in favour of this option some suggested limiting the Level 3 discretion by additional requirements; for example, that their initiatives must comply with better regulation principles, be subject to proper consultation and their results should be made public.

The respondents who were against own-initiative actions of Level 3 Committees mention the risk of overlapping initiatives and/or excessive rule-making.

### *3.1.3. Mediation*

Some respondents raised the issue of mediation and welcomed it. One large bank considered that the "comply-or-explain" mechanism could positively contribute to enhancing transparency and facilitating the willingness of supervisors to participate in mediation. In its view, the prerequisite was that the mediated outcomes are effectively disclosed; *i.e.* full transparency about the number and subject matter of all disputes (if necessary on anonymous basis) is ensured.

---

<sup>26</sup> Paragraph 52, Second Interim Report

<sup>27</sup> Paragraph 62, Second Interim Report

## 4. LEVEL 4

### 4.1. Goldplating

Mechanisms to avoid goldplating, as suggested by the Group, were supported in many replies. Two respondents (both governmental) did not agree with the definition of goldplating<sup>28</sup>, in particular, as regards the "maximum harmonization" reference. The Group suggested in this context that all directives should spell out the level of harmonisation they intend to achieve clearly in their texts<sup>29</sup>. Only four contributors commented on this recommendation and expressed their support of the idea.

One respondent put forward that Member States should notify any regulatory add-ons to the Commission.

### 4.2. Ensuring proper transposition – transparency and disclosure tools

The IIMG was very much supported in its idea to **increase transparency** on national legislation transposing European directives. Many respondents hence called for more resources and staff to be allocated on transposition files within the Commission. Ideally, the Commission should monitor actively the implementation processes in Member States and put detailed information (evaluations, comparisons, outcomes of transposition workshops) on its website.

All contributors who commented on the Group's recommendation to extend the CEBS' **supervisory disclosure framework** beyond the scope of the CRD and to the other financial services sectors<sup>30</sup> agreed with this proposal.

#### 4.2.1. *Transposition tables*

A small number of respondents commented on the Group's recommendation that Member States should provide transposition tables in one of Commission working languages. They all agreed that the transposition tables are a very useful tool. But there was some disagreement as regards the language regime. For example, one ministry considered this idea to be pragmatic but incompatible with the principle of equal treatment of Member States. Similarly, another contributor argued that such obligation would be too burdensome for some (smaller) Member States and asked the Commission to provide translations instead.

In addition to the problems described in the Group's second report<sup>31</sup> some contributors identified two further problems related to translation. Firstly, the bad quality of translation and its impact on implementation; it has been observed that the translated texts raise additional questions and cause legal uncertainty. Secondly, the unavailability of draft Level 1 and Level 2 documents in EU languages (or at least in Commission working languages) at early stages in the legislative process.

---

<sup>28</sup> Paragraph 54, Second Interim Report

<sup>29</sup> Paragraph 54, Second Interim Report

<sup>30</sup> Paragraph 55, Second Interim Report

<sup>31</sup> The Group noted that the issue of translation is a real bottleneck in the Lamfalussy process when it comes to assessing the national transposition. It could also slow down the legislative process at Level 1.

#### 4.2.2. *Providing information about cases of incorrect transposition*

The Monitoring Groups asked stakeholders for their views about who should provide information on cases of incorrect transposition and/or application of Community law. Although the responses to this question were divided, majority of respondents considered the Commission to be better placed to gather information on such cases. Some of these respondents saw a complementary role for the Level 3 Committees to play.

In the view of four respondents (both governmental and industry representatives), the Level 3 Committees should bear this responsibility.

Some respondents favoured shared responsibility or collective effort of the Commission, Level 3 Committees and/or stakeholders.

#### 4.2.3. *Complaints*

Based on the received comments many contributors considered the existing system for **filing complaints** as appropriate. Other respondents, however, were not satisfied with the current arrangements which they consider to be either unstructured or lengthy and complicated and came forward with suggestions for improvements or new mechanisms.

It seemed that the way of submitting complaints might be an obstacle for some stakeholders. It was suggested therefore that market participants should be able to report shortcomings in the application of EU law to the Commission via an ombudsman or in an anonymous manner to avoid jeopardizing relationships with their respective domestic authorities. Another contributor proposed a 5-steps mechanism based on the principle that the Level 3 Committees are best placed to assess practical effects of implementation<sup>32</sup>.

One contributor reported that the Commission has not always respected the deadline for dealing with complaints (meaning assessing the complaint and deciding on launch of an infringement procedure within 12 months from its registration).

---

<sup>32</sup> (i) Case of incorrect transposition is identified (by industry, another Member State or supervisory authority); (ii) case is submitted (anonymously if necessary) to relevant Level 3 committee and copied for information to Level 2 Committee, Commission and relevant European Parliament's Committee (most likely ECON); (iii) Level 3 Committee conducts a swift peer review; use of mediation mechanisms at this stage is possible; (iv) if a resolution at Level 3 is not achievable, the case is referred to the Level 2 Committee; at this stage, the Commission Legal Services might provide an opinion on whether there has been incorrect interpretation and/or transposition; (v) if necessary, the Commission launches infringement procedure. Regardless of the outcome, a periodic report would be provided to the European Parliament on the operation of this process and the outcome of individual cases (anonymously where necessary).

## **5. OTHER ISSUES**

### **5.1. Creation of selected fora**

Only few respondents touched upon the idea of establishing "selected fora for particular issues"<sup>33</sup>, and were either unsupportive of it, or considered it unclear in the current text.

---

<sup>33</sup> Paragraph 61, Section III.5 other issues

## List of Respondents

*AM = Asset Management sector*

*B = Banking sector*

*C = Users and consumers of financial services*

*O = Others*

*G = Governments and supervisory authorities*

*IP = Insurance and Pensions sectors*

*S = Securities sector*

Chairs of 3 Level 3 Committees	<i>EU</i>	<i>G</i>
ECB European Central Bank	<i>EU</i>	<i>B</i>
EACB European Association of Co-operative Banks	<i>EU</i>	<i>B</i>
EALIC European Association of Listed Companies	<i>EU</i>	<i>S</i>
EAPB European Association of Public Banks	<i>EU</i>	<i>B</i>
EFAMA European Fund and Asset Management Association	<i>EU</i>	<i>AM</i>
EBF European Banking Federation	<i>EU</i>	<i>B</i>
ESBG European Savings Banks Group	<i>EU</i>	<i>B</i>
FESE Federation of European Securities Exchanges	<i>EU</i>	<i>S</i>
International Swaps and Derivatives Association (ISDA), International Capital Market Association (ICMA), Asociación de Mercados Financieros (AMF), Association of Private Client Investment Managers and Stockbrokers (APCIMS), Associazione Italiana Intermediari Mobiliari (ASSOSIM), Bundesverband der Wertpapierfirmen an den Deutschen Börsen e.V. (BWF), Danish Securities Dealers Association (DSDA), Euribor ACI European Commission Working Group, Finnish Association of Securities Dealers (FASD), Futures and Options Association (FOA), Icelandic Financial Services Association (IFSA), Norwegian Securities Dealers Association (NSDA), London Investment Banking Association (LIBA), Securities Industry and Financial Markets Association (SIFMA), Swedish Securities Dealers Association (SSDA)	<i>EU</i>	<i>S</i>
ACT Association of Corporate Treasurers	<i>UK</i>	<i>O</i>
AFEI French Association of Investment Firms	<i>FR</i>	<i>S</i>
AFG Association Française de la Gestion financière	<i>FR</i>	<i>AM</i>
ABI Association of British Insurers	<i>UK</i>	<i>IP</i>
Austrian Federal Economic Chamber (WKO)	<i>AT</i>	<i>O</i>
Austrian Financial Market Authority	<i>AT</i>	<i>G</i>
Bank of Finland	<i>FI</i>	<i>B</i>
Bank of Greece	<i>EL</i>	<i>B</i>
BBA British Bankers' Association	<i>UK</i>	<i>B</i>
City of London	<i>UK</i>	<i>O</i>
Deutsche Bank AG	<i>DE</i>	<i>B</i>
Deutsche Börse Group	<i>DE</i>	<i>S</i>
FFSA Fédération Française des Sociétés d'Assurance	<i>FR</i>	<i>IP</i>
FBF French Banking Federation	<i>FR</i>	<i>B</i>
FSA Financial Services Authority	<i>UK</i>	<i>G</i>
Finnish Ministry of Finance	<i>FI</i>	<i>G</i>
ILAG Investment and Life Assurance Group	<i>UK</i>	<i>IP</i>
IMA Investment Management Association	<i>UK</i>	<i>AM</i>
Intesa Sanpaolo S.p.A.	<i>IT</i>	<i>B</i>
MEDEF	<i>FR</i>	<i>O</i>
Ministries of Finance of Denmark, Sweden and Norway	<i>DK, SE, NO</i>	<i>G</i>
Schroders	<i>UK</i>	<i>AM</i>
UniCredit Group	<i>IT</i>	<i>B</i>
Zentraler Kreditausschuss (ZKA)	<i>DE</i>	<i>B</i>