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PRELIMINARY INPUT TO THE INTER-INSTITUTIONAL MONITORING GROUP (IIMG)[1]

ON THE OCCASION OF THE 13 OCTOBER 2006 HEARING

I. Introduction

1. The Federation of European Securities Exchanges (FESE) represents operators of the European regulated markets and other market segments, comprising the markets for not only securities, but also financial, energy and commodity derivatives. Established in 1974 as a small forum of stock exchanges in Europe, FESE today has 24 full members representing close to 40 securities exchanges from all the countries of the European Union (EU) and Iceland, Norway, and Switzerland, as well as several corresponding members from other non-EU countries.

2. FESE has participated in the process of the IIMG consultations in the past and very much welcomes the current consultation. We believe that the IIMG has played a very positive role in the process of improving the Lamfalussy structure since its establishment in 2003. We welcome the newly constituted group and wish them success in carrying out their new mandate.

3. The following document is structured as follows: First, we provide our general views; then we set out our responses to the IIMG's specific questions.

II. General Remarks

4. Our general assessment of the application of the Lamfalussy structure to capital markets is so far **quite positive.** The implementation of the Process has improved continuously since the start, thanks among others to the continuing process of reviewing and fine-tuning put into place by the Commission and the periodic reports of the Inter-institutional Monitoring Group (IIMG). As FESE, we have contributed to both processes and are happy to see that many of our suggestions for improvements have been taken on board.

Benefits:

5. The use of the Lamfalussy process in securities markets has so far led to a **greater involvement of market expertise** via more structured consultations and use of expert groups**; clearer primary legislation** in the form of Level 1 text; and a potential (if untested) **possibility to bring legislation up-to-date** (or rectify problems) via use of the Level 2.

[1] The present document forms the basis of the testimony presented by Judith Hardt, Secretary General of FESE, at the IIMG Hearing of 13 October 2006 in Brussels.

Improvements Needed:

6. In general, the **problems** we have observed – e.g. an excessive focus on speed, excessive detail and ambiguous language in some cases, inefficient/nontransparent practices in the consultation processes - were the result of factors extraneous to the design of the Lamfalussy process itself – above all **tight timetables, the lack of a structured application of a better regulation approach, and occasional lack of transparency of the legislative procedure.** Going forward, we support improvements in the process to take full advantage of the Lamfalussy Process, in particular:
    - **Realistic timetables** that take into account the need to prepare and implement high-quality legislation; and
    - Pre-legislative consultation that is composed of two legs: a) a comprehensive study of all the options and involving all stakeholders, including **a full regulatory impact assessment (RIA) on an *ex ante* basis**; and b) a transparent and extensive consultation with all stakeholders. This process should be complemented by a robust ex-post impact assessment.
7. At the same time, care should be taken to prevent the principle of impact assessment from leading to more time-consuming legislative processes as a result of controversial issues being re-opened for discussion at every stage. This would slow down the process and might bring it to a complete standstill, erasing all gains in efficiency. Thus we do not support, for example, an extensive RIA for the amendments to be proposed by the Parliament or the Council during co-decision. Instead, we support a comprehensive RIA to be carried out by the Commission which looks into all foreseeable regulatory options to be **complemented** by greater transparency in the co-decision process where it is particularly lacking right now, i.e. within the **Council.** Improvements are needed in the transparency of a range of institutions related to Member States, including the European Securities Committee (ESC).
8. It is also important to introduce standard procedures and principles regarding how a RIA should be conducted and what kind of consultation mechanisms should be carried out in order to complement it.
9. The examples of excessive level of detail in Level 1 can be seen as the result of controversial questions on principle that have not been satisfactorily settled during the pre-legislative consultation process. To avoid this, the Commission needs to make **a rigorous effort** to ensure that the legislative proposal it comes up with after consulting all parties on controversial subjects is not in any way unduly biased in favour of any side, and that is thoroughly **balanced and proportionate.**
10. Going forward, the success of the Lamfalussy process depends directly on the **sufficiency of the resources** made available to **Level 3 and Level 4**. Level 3 and Level 4 must work compatibly. Certain **Level 3 Committee tools** – such as the CESR Review Panel or the Mediation Mechanism - can make a significant contribution to the process of **enforcing correct application.**
11. CESR has already been doing a very good job in both its Level 2 and Level 3 roles. **Strengthening CESR in Level 3** will require above all **practical measures**, such as providing CESR and its members with the resources necessary to bring to life their many plans for supervisory cooperation (such as staff exchange programs). The success of Level 3 also depends on updating Level 3 measures

whenever unforeseen areas emerge where divergences among supervisors threaten the proper functioning of the Directive in question. To this respect, we would favour the continuation and expansion of co-operation among the Level 3 Committees with the aim to ensure that all regulated financial market activities and entities are sufficiently -and with progressive convergence- supervised in the various Member States. Working towards the direction of cross-sectoral supervisory convergence, equivalence of powers among various national regulators would merit further examination.

12. Enforcement of transposition requires adequate resources to be allocated within the Commission. The industry should be more closely involved in the monitoring and rectifying of any problems identified during transposition. We would support, for example, a **consultation process for Level 4.** Moreover, it is very important for the Commission to have in place **a more structured mechanism** for bringing complaints to the attention of the Commission and to allocate more resources to enforcement.

13. Finally, given the positive role played by the European Parliament in many of the Lamfalussy directives (in particular with regard to the Prospectus Directive and MiFID), and given the importance of ensuring an inter-institutional agreement to the continuation of the Lamfalussy process, we welcome the recent revision of the 1999 Council Decision on Comitology**.** We feel that there would be a benefit **to continuing this process of balancing the roles of the institutions in the process** and could envisage, for example, benefit in modifying the composition of observers within the ESC to allow the Parliament to follow the Level 2 process more closely.

III. Answers to the IIMG's Questions

LEVEL 1 VERSUS LEVEL 2 LEGISLATION

Parallel work

1. What are the benefits – if any – to the parallel work as defined above in terms of process? And what are the risks?

2. What should the process of parallel work look like? Could you give possible examples? In particular, how could the process be worked out in practice? What practical consequences may arise when working in parallel? How could the information flows be worked out?

3. Do you think the distinction between Level 1 and Level 2 could be made on the basis of the expected "life cycle" of the rule, i.e. the shorter the time horizon of the rule, the lower the level at which it should be adopted?

4. How frequent are cases of perceived excess of detail in Lamfalussy legislative measures? What are the reasons behind them? How can this problem be avoided in the future?

5. Is there sufficient transparency at subsequent levels? If not, how could it be improved? How can confidence in the Lamfalussy process be increased?

14. Parallel work was carried out in concrete cases during the adoption of the FSAP, extensively for the Prospectus Directive, the Level 1 work on which was protracted (with the proposal being amended after 1st Reading), as well as for the other capital markets directives. There are several risks:

    - The main risk is to undermine the democratic process: If the Level 2 discussions, which require a certain assumption about the Level 1 framework, are carried out for a length of time with Level 1 not settled, this might create a natural bias in favour of the assumed Level 1 model;
    - There will be a waste of resources and time if the parallel Level 2 work has to be re-done as a result of new developments in Level 1.

15. Despite these risks, the industry generally backed the practice, subject to certain conditions, because it was felt that in certain cases starting Level 2 only after Level 1 is finished would have slowed down the process too much. We agree that in certain cases parallel work can help gain time. Moreover, one can inquire, theoretically, whether there is another benefit to the practice, namely that of avoiding excessive detail in Level 1 by foreseeing and agreeing on the scope of details that might be put into Level 2 while Level 1 is being negotiated. While we see some potential benefit in this area, we think that subjects at Level 2 should not be included in the Level 1 political process, and should rather flow from Level 1 organically.

16. Based on this assessment, we believe that parallel work should be carried out on an exceptional basis and only on those issues where the political guidance on the framework principles is clear. In this sense we fully support the recommendations made in earlier IIMG reports[2], in particular the principle **that no parallel work on Level 2 should be started on issues that are controversial among the co-legislators**.

17. As for the broader question on detail of Level 1, we would tend to sympathize with the observation that excessive detail exists in many measures of the FSAP. Almost all Lamfalussy directives were less principle-based than intended by the original Lamfalussy report, and contain rules on specific situations and issues. The primary reason for this was the lack of confidence in the Level 2 in the early stages of the process and in particular the uncertainty over the role that the Parliament could play in overseeing this level. Since some general principles of Level 1 could have been interpreted in different ways depending on Level 2, there was some pressure for the texts to be rather detailed at Level 1 to avoid leaving what was considered an excessive room for interpretation at Level 2.

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[2] IIMG Third Report, 17 November 2004" (p. 17) stated: "Nonetheless, parallel legislative action should be avoided when it threatens to pre-empt the views of Parliament," while the IIMG Second Interim Report, 10 December 2003 (p. 6) noted: The Commission should issue provisional mandates for level 2 technical advice only on subject matters already acceptable to the EP, the Council and the Commission after the first Parliamentary reading. Provisional mandates should not be granted where issues remain controversial."

18. We welcome the new agreement (Council Decision of 17 July 2006) on comitology creating "the regulatory procedure with scrutiny" which gives an equal role to the European Parliament to that of the Council. This should strengthen the involvement of the Parliament in the process. Now that an inter-institutional agreement has been achieved and the Lamfalussy process has reached a degree of maturity, **more confidence in the Level 2 process can be expected to lead to less detail in Level 1.** In a similar vein, we feel that there would be a benefit to continuing this process of balancing the roles of the institutions in the process and could envisage, for example, benefit in modifying the composition of observers within the ESC to allow the Parliament to follow the Level 2 process more closely (to avoid, for example, the problems experienced during the intensive MiFID Level 2 process).

19. Another reason for excessive detail so far may that the act of harmonising EU laws has spurred a need for a certain degree of detail in binding EU law. This has led to certain technical rules that were not in EU law at all to be put in Level 1 or Level 2. For example, some of the rules that we find at present in the rulebooks of exchanges (e.g. deferred publication of transactions in the context of MiFID) are now to be found at EU level (Level 2). There might well be disadvantages to having this level of detail codified in Level 2, and the ongoing review of the legislation needs to place a special emphasis on trimming down unnecessary detail in either Level 1 or Level 2.

20. Since a basic advantage of the 4-level process was to allow adopting the regulations to changing conditions, as a rule of thumb, we would agree that anything with a "short lifespan" should be in the "lower levels" of the process. However, we would not go so far as to say that the lifetime of a rule is the only criterion to determine which level of the process is best suited to it. Another important factor is the degree of flexibility needed to adapt the principle to market conditions; hence, issues that show great variance across markets better suited to being handled in Level 3 or national transposition, rather than Level 1 or Level 2.

21. Above all, the examples of excessive level of detail in Level 1 can be seen as the result of controversial questions on principle that have not been satisfactorily settled during the pre-legislative consultation process. To avoid this, the Commission needs to make a rigorous effort to ensure that the legislative proposal it comes up with after consulting all parties on controversial subjects is not in any way unduly biased in favour of any side, and that is thoroughly balanced and proportionate. In the absence of such a balance, it is inevitable that the lobbying by the stakeholders representing different interests may at times push unnecessary detail into the draft law during the co-decision process.

HARMONISATION AND GOLDPLATING

Level of harmonisation

The Group considers that the desired level of harmonisation should ultimately depend on the question of what regulation is intended to achieve (objectives). The level of harmonisation should avoid market distortions while allowing for some degree of flexibility. In any case, regulation should not dictate market instruments and details.

1. Do you agree with this view?

Regulation versus Directive

2. On what factors, in your view, should the choice between Regulation and a Directive depend?
3. There seem to be hardly any Level 1 legislative texts that were designed as a Regulation. Why do you think this is? In particular, what are the difficulties?
4. Do you think that the CRD or Solvency II could have been drawn up as a Regulation? If not, why?

Goldplating

5. To what extent do additional national provisions generate an obstacle to a proper functioning of the Lamfalussy process? What possible additional and practical solutions may help to prevent unnecessary regulatory additions, addressing both existing and future legislation?

Level of harmonisation:

22. We agree with the general statement on the level of harmonisation.

Regulation versus Directive:

23. While Regulations might in some cases lead to more consistent national application than Directives, the specific circumstances of each case need to be considered before determining whether a Regulation is indeed warranted and will lead to a smoother and speedier implementation process. Some general principles to guide this choice:

    - Any choice between legislative measures should be preceded by a consideration of the non-legislative measures that are available – such as recommendations and "best practice" or self-regulation options. This process should take into consideration the suitability of the instrument to the objective at hand, in particular whether the goal of achieving a level playing field necessitates the binding nature of a legislative instrument.
    - There are advantages and disadvantages associated with each instrument (Regulation/Directive) depending on the case at hand which should be assessed on a case-by-case basis, once the major outlines of a proposal are in place. (It would be

helpful for meeting implementation deadlines if clear and early guidance were given as to the choice of instrument.)

- While we have some experience with the use of either instrument at Level 2 (Prospectus Directive and MAD), this experience is too new to be the basis of a judgment regarding the relative effectiveness of the instruments and can only serve as the basis of tentative observations of an unfolding process.
- We agree that consistent implementation could be easier to achieve with a Regulation, which however also has some disadvantages (e.g. a Regulation may not serve the "educational purpose" involved in the local transposition of EU legislation, which allows the local regulators and governments to consider in detail the changes brought on by the new EU legislation; there can be more ambiguities in a Regulation and/or it may require more negotiation and thus lead to a more protracted political process; the implementation of a Regulation may not be as smooth as a Directive in those cases where local law has to be adjusted, especially when the regulation touches on local civil and contract law).
- It should also be noted that if the Level 1 instrument is a Directive and the Level 2 instrument a Regulation, there might be inconsistencies in the legal application of the overall regime that could lead to unexpected delays.

Gold-plating:

24. National provisions that contradict or go beyond the principles agreed to at the European level generate a major obstacle to the proper functioning of the Lamfalussy process.

25. We need new mechanisms to directly involve market input in assessing and improving transposition of EU legislation. This could take a variety of forms, from regular workshops with stakeholders to discuss experience with the transposition to an alternative mediation/ombudsman mechanism as outlined in our response to CESR's recent consultation on the subject.

26. Finally, certain Level 3 Committee tools – such as the CESR Review Panel or the Mediation Mechanism - can also make a contribution to the process of enforcing correct application.

FUNCTIONING OF LEVEL 3 COMMITTEES

In their contributions to the Group's consultation exercise, the representatives of the Level 3 Committees raised the problems that they face due to non-equivalence of their Members' supervisory powers.

6. What are the real problems related to the non-equivalence of supervisory powers? In particular, which activities are being impeded? Are there national legislative hurdles or a lack of legislation/political motivation to further enhance cooperation?
7. What do you think should be done do improve cooperation and convergence at the supervisory level. In particular, which positive incentives could be provided?
8. The question of a lack of means to finance cooperation tools foreseen in the legislation was brought to the Groups attention. Do you think that such difficulty could impede the cooperation between regulators?
9. In its First Interim Report the Group expressed concern over the fact that the results of the Level 3 Committees might be more "consensus" than "best practice" driven. Does the current framework allow for the development of a "common good" or "European reflex" by national supervisors?
10. Do you think industry could benefit from the implementation of a mediation mechanism, or other cooperation tools, by Level 3 committees? If so, in what ways?

27. First of all, it is our view that CESR has already been doing a very good job in both its Level 2 and Level 3 roles. This should be kept in mind when identifying areas where CESR can make further improvements.
28. The functioning of CESR depends to a large extent on the strength of its members individually. In principle, it is important for members of CESR to have equivalent powers to achieve the tasks set to them by the FSAP directives. It is imperative that CESR members should above all coordinate among themselves the handling and assignment of all the relevant supervisory tasks. Considering this, some FESE members would be favourable to members of CESR to have equivalent supervisory tools. However, this does not require all supervisors having exactly the same structures and powers.
29. The new Charter of CESR specifies that technical advice can now be agreed on with the help of a qualifying majority vote. This is a welcome step in preventing what is described by the IIMG as potentially “consensus-driven” advice. Moreover, the involvement of the industry in CESR’s work needs to continue in a variety of ways.
30. The success of Level 3 also depends on updating Level 3 measures whenever unforeseen areas emerge where divergences among supervisors threaten the proper functioning of the Directive in question.

31. Practical steps should be taken to make supervisory cooperation a reality. For example, practical (fiscal, operational) obstacles to the staff exchange programmes within CESR members should be identified and such exchanges should be accelerated. We therefore fully support the call for greater resources to put cooperative tools into action.

32. In principle, we support the basic features of the Mediation Mechanism as established by CESR. One of the key issues we had stressed with regard to the Mediation Mechanism was the involvement of market participants (being able to trigger mediation, to provide input to an ongoing mediation where appropriate and to receive anonymous feedback on the outcome of a mediation case.) Of these requests that we had made, the only one where CESR's protocol does not fully address our concern is the inclusion of market experts in the mediation panels. Nonetheless, we accept the design of the mechanism as concluded and would like to keep this feature involving market experts in mind for the review that will take place in two years.

TRANSPOSITION AND ENFORCEMENT

The former IIMG attached much weight to the significant threat which Member States' non-compliance with the obligation to transpose Directives on time may represent for the whole Lamfalussy process. The Group is aware of this problem and would like to come forward with recommendations on how to enhance proper and timely implementation by Member States.

11. What are possible reasons for delayed transposition and possible remedies?

12. Do you agree that Member States should report on how a Directive is being transposed into national law by providing concordance tables that contain the national transposing text juxtaposed the EU directive, if possible in one of the Commission working languages?

13. What actions can be taken at the national level to ensure consistent transposition across Member States? What actions do you currently take? What actions could the Commission take to facilitate the transposition process?

14. Have you had any problems related to the transposition or implementation of EU legislation in Member States? If so, did you file a complaint? (If no, why not?)

15. What steps could be taken to facilitate the complaints process?

16. The Group considers that more transparency regarding cases of incorrect transposition might help produce better results. Which body is best placed to provide information about such cases – the Commission as guardian of the Treaty or the Level 3 Committees as part of their day-to-day activities?

Delay in Transposition:

33. Indeed, as we approach the deadline for transposition of MiFID (January 2007), it is expected that several Member States, and perhaps the majority, will miss the deadline. This raises both general and specific concerns. In general the Lamfalussy process relies on predictable and timely transposition. In the case of MiFID, which requires substantial investments from the industry in a short amount of time, the lack of uniform transposition might undermine the ability of market participants to benefit from the passport, even if their own authorities transpose the Directive on time. Moreover, any lag in the transposition risks curtailing the time available to the industry, which should nonetheless be allowed the amount of time (nine months) foreseen in the amended timetable.

34. The difficulty with MiFID demonstrates above all the importance of accurate predictions in terms of how long transposition and implementation will take. If the guesses are not accurate, then delays are inevitable. Therefore we support more realistic timetable in the future. The timing in particular needs to be based on a realistic appreciation of the time needed by industry/governments to adapt to the new legal framework (and include the time needed for the national parliamentary processes to adjust the national legal framework where needed).

Content of Transposition and Enforcement of EU law:

35. The serious deficiencies in the translation quality – together with the fact that translation can have significant effects - render it very important to receive precise, rapid and practicable guidance from the Commission. To date, this has not been as forthcoming as one would have hoped for.

36. We also wish to stress the importance of national legislative actions to clean up national statute books, which the Commission, citing direct applicability, at times tends not to take into account as much as necessary.

37. We fully agree that Member States should report (on a website that is made available by the Commission) on how a Directive is being transposed into national law by providing “concordance tables” that contain the national transposing text juxtaposed the EU directive and we would definitely find it useful for this to be done in one of the working languages of the Commission.

38. Another potential tool to improve the timeliness and accuracy of transposition is to provide additional incentives to Member States. Apart from the already existing tools – e.g. the transposition workshops or the transposition tables - the Commission could also consider employing additional, more positive, mechanisms, such as conferring to the best performers “priority places” in certain events/groups. More importantly, the work of the transposition workshops should be made public. This work is very important and should be transparent. Moreover, we would support a consultation process for Level 4.

39. It is also very important for the Commission to have in place a more structured mechanism for bringing complaints to the attention of the Commission. It should be possible for the industry to come to the Commission with a case in a confidential and streamlined mechanism, using a centralized, structured and predictable mechanism. The Commission needs additional resources to fulfil this important role.

40. Finally, the success of transposition depends ultimately on the legislation itself. While the Lamfalussy process has already improved the clarity of legislation in a way that will make consistent implementation more likely, it is useful to stress that the impact of the wording of legislation on the transposition should take centre stage throughout the co-decision procedure. In addition, it should be borne that excessive detail in EU law, even though it provides higher harmonisation, can make national transposition more difficult.

CONSULTATION

One of the problems that were brought to the attention of the Group is the issue of overlapping consultations. Also, the Group considers that the number of consultations at each level may be reduced, without reducing the overall level of consultation. Also, the Group is interested to learn whether and how it may be possible to improve the process of producing technical advice.

17. Do you agree that the Commission should become more involved in the work of Level 3 Committees (i.e. cooperating more intensively with the Level 3 Committees whilst they are drafting their technical advice), so as to make the process more efficient? If yes, how could the process be changed?
18. Do you agree that the Commission should become more involved in the work of Level 3 Committees in drafting their technical advice, so as to make the process more efficient? If yes, how could the process be changed?
19. Are you satisfied with the current form of the technical advice delivered by Level 3 Committees? If not, how may it be improved?

Rationalising Consultations:

41. Consultations – at any level of the Lamfalussy process - can in certain cases be rationalised with little effort or change, as demonstrated by the Commission's current consideration of grouping the MiFID Article 65 studies by subject rather than carrying out several studies on the same subject. While reserving our judgement on the structure of that specific plan, which has not been made public, we consider in principle that revising the structure of a study or consultation can already save time and increase efficiency but this should be done in a way that does not reduce the ability of the stakeholders to study and react to the proposals.
42. We see it as important for all interested stakeholders to be able to participate in the process to an adequate level. It would undermine the sustainability of the outcome of consultation if important voices were left out (due to lack of resources or organization etc).

CESR's Technical Advice:

43. We are satisfied in principle with the advice generated by CESR, which is the main Level 3 committee with which we cooperate.

44. With regard to CESR's advice, the major problem that CESR has had with regard to its consultations is lack of time. We strongly support the IIMG's rule of thumb regarding what is a sufficient amount of time for technical advice – 12 months for new subjects3 - and believe that it should be upheld by the Commission. Since the IIMG made its recommendation, it was not followed in a few limited cases (e.g. MiFID Level 2 mandate published in June 2004) which led, in our view, to CESR being more constrained in its ability to study the subject fully.

45. We accept, as a consequence of the division of responsibilities, the possibility of CESR advice being rejected by the Commission, which has occurred on several occasions. However, if important elements of CESR's advice are consistently set aside without an adequate explanation for the reasons for doing so, this approach risks thwarting the very rationale of the Lamfalussy process by ignoring the contribution made at the advisory committee level and could lead to a waste of resources, loss of institutional motivation, and confusion regarding the usefulness of the consultation process. In order to minimize such cases, there needs to be a greater clarity in terms of the distinction between the technical issues to be determined by CESR and the policy choices to be made by the Commission. On those issues where the Commission sees a range of technical options, it might be helpful for the Commission to request CESR to provide information on the relative costs and benefits expected from the different policy choices at hand.

46. We do not think that the Commission should be more involved in Level 3 Committees. Such involvement would undermine the independence and call into question the expertise of the Level 3 Committees. The Commission's main role in the process should be to ensure that the Level 2 process does not contradict Level 1 (and that Level 3 does not contradict Level 1 or Level 2), but it should not get involved in "making it more efficient". Thus the Commission's current participation in the CESR public hearings, supplemented by its role as an observer in CESR's meetings, is sufficient to carry out these tasks.

TIMING

The Group considers that the process of adopting implementing measures should leave enough time for Member States to transpose the texts into national law – setting deadlines that are realistic and appropriate to ensure the transparency of the process and the quality of legislation.

Do you think parallel and more integrated work at Level 1 and Level 2 could lead to time savings in the overall process of adopting legislation?

[3] IIIMG Second Interim Report, 10 December 2003 (p. 6) stated: "CESR should be given twelve months for completing pieces of technical advice, as a general rule."

47. Please see our response to the first set of questions for a full answer on this point. If not handled well, parallel work or more integration of Level 1 and Level 2 can actually lead to a waste of time. In addition, we would like to stress here that timing is of a secondary concern in this context; the appropriate level of detail/clarity in Level 1 and Level 2 and the respect for democratic control are of a greater significance.

FINANCIAL CONGLOMERATES

In its First Interim Report, the Group considers it important to reach a quick decision on how the work on financial conglomerates should be organised. In their Work Programme for 2006, the three Level 3 Committees agreed to set up a new interim committee to work in this area.

20. What are your views on the way the Conglomerates Working Group has chosen its priorities, focusing on the implementation of the Financial Conglomerates Directive (i.e. predominantly prudential issues)?

48. Not applicable.

IMPACT ASSESSMENT

The Group noted with interest the commitment of the Commission to following the better regulation principles and understands that there is general support for these principles. The Group notes however, that there are questions regarding the practical aspects of this exercise, in particular regarding the impact assessments.

21. Do you consider the current impact assessment effective? If not, how may it be improved? How do you compare their effectiveness to the costs of preparing an impact assessment?

22. Who should carry out an impact assessment?

23. How and when should the impact assessment be made accessible to the general public?

24. Do you consider impact assessments for each individual implementing measure possible and useful?

Basic structure of RIAs:

49. In our view, pre-legislative consultation, which is essential to the quality and proportionality of legislation, needs to be composed of two legs: a) a comprehensive study of all the options and involving all stakeholders, including a full regulatory impact assessment (RIA) on an ex ante basis; and b) a transparent and extensive consultation with all stakeholders. This process should be complemented by a robust ex-post impact assessment.

50. Since the last IIMG report, an important new development has occurred: **the publication of the results of the Commission's regulatory Impact Assessment on C&S.** While this development has now been overtaken by other efforts launched by the Commission (notably the proposed Code of Practice), we would like to make a number of observations based on the RIA:

    a. The commissioning and results of Regulatory Impact Assessment should be transparent;

    b. There should be certainty about the publication of the entire work commissioned in a RIA;

    c. The results of the RIA should be discussed prior to the Commission deciding on the measures to be implemented.

51. First of all, as this is a precedent, it was not known in advance whether the Commission was going to publish the RIA once it was finished with its study. However, the industry was unanimous in its belief that the RIA would have to be published in advance of any legislative announcement. The industry would have strongly opposed the concept of publishing the decision on whether to take a legislative route at the same time as publishing the RIA, and it was therefore welcome that this was not the route chosen by the Commission in this case. However, we consider that in the future it would be more appropriate to have absolute clarity on the sequence of things that will be followed by the Commission: It should be a clear and standing policy to allow the stakeholders an adequate amount of time to react to the RIA after it is published (i.e. though a structured consultation) and only after that should the Commission proceed to announce its intentions based on the RIA. **In fact, consultation is so important to pre-legislative transparency that it can even identify shortcoming in the RIA or supplement its findings. Therefore a thorough consultation in the pre-legislative stage is absolutely essential.**

52. In this sense, the biggest contribution of an RIA, irrespective of its merits in substance, can be seen as triggering discussion and identifying the controversial subjects, rather than finding the absolute answers to all the questions. A clear policy within the Commission should therefore exist to standardise the process surrounding the RIA. It should incorporate a clear two-staged opportunity for the stakeholders a) to react to the parameters of an RIA before it is conducted and then b) to react to the results of the RIA.

53. As for the reliability of the RIA itself, we believe that its independence is very important, and a truly independent RIA should be conducted by a 3rd party. A second best solution is for it to be conducted by a unit within the Commission that is separate from the unit that would be involved in proposing the legislation if this route were to be chosen.

54. The same principles apply to ex-post assessments, which should be conducted ideally by a 3rd party and, if not, at least by a unit that is separate from that which conceived the RIA or the one that implemented its outcome.

Impact assessments for each individual implementing measure:

55. We see a benefit in the assessment of each separate legislative initiative that represents a distinct policy choice with an identifiable outcome. In this sense, an assessment of each of the Level 2 measures of MiFID, for example, would not have to be conducted, since many of them can be grouped together in terms of a common purpose and approach, but the assessment should be detailed enough to demonstrate whether a certain chosen approach, for which an alternative may have existed, reached its set objectives.

RIAs for the Co-decision procedure?

56. As a general principle, we believe that any major changes made to a proposal of the Commission not fully addressed at the stage of pre-legislative regulatory impact assessment has the potential of influencing the outcome of the legislation and should therefore be subjected to an open and transparent process of discussion that allows for enough time for all parties to react to and assess these changes. To this effect we support proposals to strengthen the transparency of the amendments introduced by the co-legislators. However, this does not mean that a full RIA should be conducted at every stage of the process – this would be very time consuming and inefficient and could effectively block the legislative process. Moreover, each institution in the co-decision process needs to be given a proper chance to fulfil its respective role in the democratic process.

57. Thus a more pragmatic way of ensuring the required result would be through the Commission including in the scope of its ex ante RIA the relative effects of the full range of options available so as to form the basis of a discussion during the political phase, to be supplemented by greater transparency in the Council, where it is currently lacking. By contrast we find that the European Parliament is already transparent in its deliberations and would not need to undergo any substantive changes in its methods to attain the optimal level of transparency.

58. Finally, when the scope of a Level 1 measure is extended substantively – e.g. the potential extension of the transparency requirements of MiFID to non-equity instruments – a thorough new regulatory impact assessment would be justified.