

RESPONSE

THE INTER-INSTITUTIONAL MONITORING GROUP'S SECOND INTERIM REPORT MONITORING THE LAMFALUSSY PROCESS

I. Introduction

1. The Federation of European Securities Exchanges (FESE) represents the 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 submitted input to Inter-institutional Monitoring Group (IIMG) consultations in the past, and appreciates the opportunity it was provided to express its views both during the October 2006 Hearing and 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. The mandate of the newly constituted group is also significant given the application of the Lamfalussy Process to the additional fields of banking supervision and insurance and the need to review the range of new developments that have taken place over the last few years. Thus, we consider the autumn 2006 report of the IIMG very important.
3. In this response, we will focus on the area which relates directly to the activities of our members: **securities markets**. However, we believe that many of our remarks are directly relevant to the other two fields. At the same time, we point to issues where we believe a distinction needs to be made among these three sectors.
4. Our response is structured as follows: First, we provide our **General Remarks** and an **Executive Summary** of our submission. In the section entitled **Detailed Remarks**, we comment on the preliminary recommendations and conclusions of the IIMG, and then answer the specific questions posed at the end of the Report. The final section **concludes**.

II. General Remarks and Executive Summary

5. 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 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.

6. 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.
7. 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.**
8. We are content to see that an inter-institutional agreement has been reached leading to the 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 to ensure the stability of the process.**
9. Against this background, the **highlights** of the comments we make in this Response are as follows:
 - a. We fully endorse the IIMG's call for **regulatory restraint**. A robust pre-legislative consultation that builds a clear consensus on the appropriate solutions to all the controversial questions will help **avoid excessive levels of detail** in Level 1 and Level 2.
 - b. Any parallel work on Level 2 while Level 1 is ongoing should only start after the 1st Reading at the European Parliament and Council Common Position. Such work, under a provisional mandate for Level 1 advice, should focus on the issues that are agreed to among the Institutions. In addition, CESR's proposal of a type of "**sketching**" of Level 2 rules – which would not amount to provisional technical advice – could be an innovative and potentially constructive way of identifying those elements of a Level 2 measure that would have to be developed further for each of the main options being discussed, but not yet concluded, at Level 1. This should be done taking care not to favour one option over another or reach definitive conclusions about the final shape of the Level 2 measures, and should involve the **industry and be made public.**
 - c. We agree that the **transposition deadline** for each Directive/Regulation should be decided on a case-by-case basis. The entry into force of the Level 1 and Level 2 measures should be better coordinated and the industry should be given a standard (and sufficient) amount of time that after the finalisation of the final Level 2 measures. In addition, it is important that there be full certainty as to whether a Level 2 Regulation is to be considered as entered into force in a Member State when the Level 1 Directive has not yet been transposed into the national law of that Member State.
 - d. We support the IIMG's nuanced and case-by-case approach to the choice of **legal instrument**. Among others, whether the targeted area is "**self-contained**" and whether "any deviation from the EU law could significantly undermine the use of the passport" should be considered as a basis to prefer Regulations.

- e. We would find it useful for the Commission to provide an **explanatory statement** when it deviates from the technical advice of CESR. Moreover, although the Commission may not need to seek comments on those issues that were already in the Level 2 advice, the industry should be free to provide input on any issue, including those that were in the advice of CESR.
- f. In our view, **pre-legislative consultation** should include a comprehensive study of all the options on an ex basis and involve all stakeholders through an extensive consultation with all stakeholders; this should be complemented by an ex-post impact assessment. If an independent **"Impact Assessment Board"** is created, such a body should itself operate transparently and incorporate the views of the market participants.
- g. The **role of CESR (and the other Committees)** at Level 3 should be strengthened, above all by taking **practical measures** such as providing CESR and its members with the resources necessary to bring to life their many plans for supervisory cooperation. Moreover, we support the practice of **updating Level 3 measures** on an ongoing basis and welcome CESR's work in this area both for the Market Abuse and Prospectus Directives (as well as the use of innovative methods such as "Frequently Asked Questions"). However, the use of any innovative method should be complementary, and not be considered as an alternative to the elaboration of Level 3 guidelines.
- h. At Level 4, we think that the **industry should be involved** in all the actions taken by the Commission in relation to transposition and it should also be more closely involved in the monitoring and rectifying of any problems identified after transposition. We welcome suggestions from the IIMG as to how this can be done best. We would see the Commission as best placed to tackle transposition.
- i. Taken as a whole, **the regulatory/supervisory structure in securities markets is sound and should be allowed to deliver its maximum potential before any major changes are introduced**. Thus, any changes that may be justified in the context of banking/prudential supervision after careful reflection should be considered separately from securities markets and not be extended unless they are proven to address deficiencies specific to the securities markets.
- j. Having said that, there are a few exceptions to this generally positive picture which pose specific problems and which should be addressed: Cases where **the Level 3 process is not yet complete or is not sufficiently comprehensive**; cases where **the EU legislation does not establish a clear competent authority whose rules should be followed**; and cases of **multi-jurisdictional exchanges (or banks)**. We outline both short-term and long-term suggestions to address these cases in the next section.
- k. While we fully agree that the boundaries between the three sectors (banking, insurance and securities) are getting increasingly blurred and that a wholesome overview both at the regulatory and supervisory levels is necessary, we do not believe that a new group needs to

be set up for this purpose. Rather, we would favour the continuation and expansion of **co-operation among the Level 3 Committees**.

- i. Finally, we agree with the IIMG that **Level 3 Committees should be able to take initiative** and provide advice and **propose amendments to legal texts** as long as this is subject to proper consultation and the results are made public without delay.

10. In the next section, we provide our views on each of the recommendations and conclusions in order.

III. Answers to the IIMG's Questions

What are your views on the Group's preliminary recommendations and conclusions?

1) Level 1 and Level 2

Excessive detail and separation of Levels

- Level 2 and Level 3 should strictly adhere to the framework principles and technical implementing powers set out at Level 1 in order to avoid material additions at the lower levels.
- The Group calls for 'regulatory self-restraint' at all levels so as to avoid excessive detail.
- The Group recommends a practical, flexible distinction between Level 1 and Level 2 measures, aiming at efficiency and concentrated on those issues that are politically meaningful, rather than a 'one size fits all' approach.

11. We agree with the recommendation that “Level 2 and Level 3 should strictly adhere to the framework principles and technical implementing powers set out at Level 1 in order to avoid material additions at the lower levels” and the call for 'regulatory self-restraint' at all levels to avoid excessive detail.

12. Our view is that a robust pre-legislative consultation that builds a clear consensus on the appropriate solutions to all the controversial questions will help avoid excessive levels of detail in Level 1 and Level 2. The primary responsibility lies with the Commission, which needs to ensure that its legislative proposals follow adequate analysis and consultation and that they are thoroughly balanced and proportionate.

13. We agree with the IIMG's general approach to the distinction between Level 1 and Level 2. A degree of flexibility must be exercised to meet the needs of each individual case. We also agree that the instances of Level 1 containing a technical point, if it holds sufficient significance, must be accepted, but kept to a minimum.

Parallel working

- The Group believes that Level 2 implementing measures could be sketched while the work on Level 1 legislation is still ongoing – provided that this parallel working does not pre-empt the decision making process at Level 1.

14. We appreciate the IIMG's effort to combine an approach that is both pragmatic and principle. We find the proposal of a type of “sketching” of Level 2 rules that would not amount to technical advice rather innovative and potentially constructive. By definition, we understand that sketching would be exercised for subjects on which there is no political consensus at the stage of the launch of the work (assuming that the political process is already past the 1st Reading at the Parliament, this would be because the issue in question has not been agreed to among the three institutions). The advantages of such a work are obvious but the drawback – that Level 2 work might be pre-empting Level 1 – should not be

underestimated. With this concern in mind, we have long supported the recommendation made by the previous IIMG in its second interim report "that provisional mandates for level 2 technical advice should be limited to subject matters already acceptable to the European Parliament, the Council and the Commission after the first Parliamentary reading. Provisional mandates should not be granted where issues remain still controversial." The current Report re-states this principle in Paragraph 23, but it is not clear whether it is endorsed and if so how it would interact with the proposal of sketching. Thus, we encourage the current IIMG to re-state this principle in its Final Report.

15. Subject to the principle above, we could see benefit in sketching under certain circumstances. For the practice to lead to a result that is within the political boundaries of Level 2 and that does not lead to a waste of resources and time, it is very important that the following conditions are met:
16. First of all, the **scope of "sketching"** must be limited to identifying those elements of a Level 2 measure that would have to be developed further for each of the main options being discussed at Level 1, taking care not to favour one option over another or reach definitive conclusions about the final shape of the Level 2 measures. The IIMG refers to "building blocks to help the Institutions understand the practical consequences that could arise as a result of the framework legislation under discussion". We find that such a formulation in the final Report of the IIMG could create confusion about this issue: After all, what would be carried out by the Level 3 Committee should not be a "cost-benefit" or "impact" analysis of the options considered at Level 1. Such an analysis, important as it may be, is not the proper role of a Level 3 Committee, but should rather be incorporated in the pre-legislative analysis to be carried out by the Commission (please see our response to the section on impact assessments). Rather, the sketching should help the Institutions better understand the depth and scope of Level 2 work that would (probably, but not definitively) result from the choices they are about to make at Level 1.
17. In this sense, we would re-formulate the statement made by the IIMG that there must be "sufficient (political) guidance throughout the process". Given the presumed scope of sketching (issues that are not yet politically decided on) the guidance referred to above can only help the Level 3 Committee the direction that its analysis should go in order for it to be of most help to the Institutions. In the absence of a clear political decision, one cannot speak of any preliminary "guidance" without pre-judging the final outcome.
18. Moreover, the **industry should be involved** in the preparation of the work, following the same principles of consultation as would be the case for a formal mandate (even if shorter deadlines may be justified under certain circumstances).
19. Except under exceptional circumstances, sketching should **not start before the 1st Reading** at the European Parliament/Political Agreement at the Council.
20. Finally, sketching should be used in a way that is **complementary** to the regular parallel work based on provisional mandates. For a subject that is self-contained (i.e. not linked to any other pending decision within the framework legislation under discussion) and all the main elements of which are already decided on at the end of the 1st Reading at the Parliament, a provisional mandate for a Level 2 measures should be issued (if it is deemed necessary to gain time; otherwise Level 2 advice can also wait until

after the Level 1 is finalised). For a selected number of issues that may not have been decided on, but could benefit from sketching, this method should be used subject to the conditions above. At the same time, it should be recognised that certain areas of work that are not settled at Level 1 are not suitable to sketching, which may be because, for example, any work on these subjects would risk pre-judging the Level 1 outcome.

Time constraints

- While agreeing on the transposition deadlines the Institutions should carefully consider the amount of rules to be transposed into national legislation as well as the time necessary to adopt the implementing measures in order to make the deadlines more realistic and appropriate.
- All bodies involved at Level 2 should invest more time and resources to shorten the time necessary for the adoption of the Level 2 legislation.

21. As the experience of MiFID transposition demonstrates, timetables should be realistic and take into account the need to prepare and implement high-quality legislation. In the case of MiFID, despite a longer period of transposition than the usual 18 months and an extraordinary extension of nine months beyond this period allocated to the Member States, the great majority of the national governments have missed the transposition deadline, and some are expected not to be ready even at the time of the deadline of implementation by the industry. While the argument could be made that all of the players involved should allocate more resources to this process, the undeniable fact is that the original deadline foreseen for this directive did not take into account **the time that would be required for transposition**. The **industry will be greatly disadvantaged** in this case, since many of the decisions relating to the system changes and adaptations can only be taken once the EU law is fully implemented (and in some cases even the choices made at Level 3 many have to be taken into account, as is the case for a number of areas within MiFID.)

22. Therefore, we believe that the transposition deadline for each Directive/Regulation has to be decided on a **case-by-case basis**. Moreover, the entry into force of the Level 1 and Level 2 measures should be better coordinated and the industry should be given a standard (and sufficient) amount of time that after the finalisation of the final Level 2 measures. Since the latter date cannot be known in advance, one might consider fixing the date of effectiveness of the legislation as a function of the date of adoption of the Level 2 measures. This would obviate the need to postpone the transposition deadline with the use of the co-decision procedure, as was the case for MiFID, since the commitment that the industry would have sufficient time for implementation would be agreed to within the Level 1 measure as a principle. Finally, we note that there is no certainty as to whether a Level 2 Regulation is to be considered as entered into force in a Member State in which the Level 1 Directive has not yet been transposed into the national law.

Directive vs. Regulation

- The Group is not convinced that the choice of instrument in itself is paramount to the outcome and suggests some guiding principles for the choice between Directives and Regulations:
- Measures that target a specific area of the Internal Market would seem more appropriate for the use of a Regulation whereas measures that would affect a whole sector could rather take the form of a Directive.
- Regulations could be used when an action requires immediate effect and actions that need more time for Member States to adapt could better take the form of a Directive.
- Directives could be used in areas where legislation based on local specificities exists which might differ

substantially between Member States, or in areas where this is required on the basis of the subsidiarity principle.

23. We have long supported a **case-by-case approach** to the **choice of legal instrument** and find the IIMG's suggestions for criteria (and the nuanced approach to the choice of legal instrument) quite helpful. Nonetheless, we have some comments on the specific criteria proposed, as follows:
24. We do not agree that "[m]easures that target a specific area of the Internal Market would seem more appropriate for the use of a Regulation", since this is quite difficult to assess. A more precise way of expressing this principle might be to say that the area covered is self-contained. Similarly, we disagree with the reference to speed (immediacy) as a criterion. Rather, we would recommend adding a criterion linked to "whether any deviation from the EU law could significantly undermine the use of the passport", in which case a Regulation may be preferable (as was the case with the disclosure schedules under the Prospectus Directive or the Stabilisation Safe Harbour under the Market Abuse Directive, both of which were contained in a Regulation).
25. We would also find it useful for the IIMG to recommend that, in order for Regulations to avoid clashing with the local legal framework, a thorough legal analysis should be carried out.
26. Although we do not have a clear answer to this question, we believe that it may be worthwhile for the IIMG to study whether the choice of legal instrument may affect the way future claims related to the EU law will be addressed (i.e. recourse to court versus measures to be taken by the supervisor).

Consultation

- The Group believes that consultation should be kept at all levels, but that their number might be reduced where they overlap. In particular, the Commission should work closely with Level 3 Committees when working on Level 2 measures in order to reduce overlap between both processes.
- The Commission should provide explanatory documents on the cases where it deviates from the Level 3 technical advice.

27. We agree with the recommendation made by the IIMG in this area. An **explanatory statement** by the Commission would be a helpful guide both for the Level 3 Committees and the industry.
28. As for the consultation by the Commission preceding the formal proposal for a Level 2 measure, we note the IIMG's proposal regarding the structure of such a consultation: "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 considers that should the Commission ask specific questions in its consultation documents, these questions should only concern the issues where the Commission's proposal deviates in any material respect from the Level 3 Committees' technical advice."
29. While we could agree that the Commission should not openly seek comments on those issues that were already in the Level 2 advice, we would disagree if that were to mean that the public discussion at that stage should only be limited to those issues which deviate from CESR's advice. Naturally, there may be instances when the Commission agrees with CESR on an issue where industry input may not have been

incorporated sufficiently in the process of consultation on the Level 2 advice or where the conclusions reached by the Level 3 Committee might nonetheless still require improvement. The debate at the level of the Commission should continue to provide **an opportunity to resolve such issues**. Not providing such an opportunity would ignore the different roles of the Commission and CESR in this process and contradict the democratic right of the industry to express its views at the stage preceding the formal adoption of a proposal. We presume that the IIMG agrees with our view as we note the statement that “[s]takeholders are free to provide any comment they find relevant on the basis of the consultation document.” We would find it useful for the IIMG to incorporate this principle more clearly in its final Report.

Impact assessment

- The Group supports clear and transparent ex ante impact assessment and recommends that impact assessments are carried out at all levels in the case of any significant measure being proposed at Level 2 and 3.
- The Group suggests a broad approach to evaluate ex post the impact of the whole financial services regulatory portfolio.

30. We agree with the principles outlined in this section of the Report. In our view, **pre-legislative consultation** should include a comprehensive study of all the options in the framework of a regulatory impact assessment (RIA) on an ex ante basis and involve a transparent and extensive consultation with all stakeholders. This process should be complemented by a robust **ex-post impact assessment**.

31. At the same time, care should be taken to prevent the principle of impact assessment from leading to more time-consuming legislative processes because 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).

32. It is also important to introduce standard procedures and principles regarding how an RIA should be conducted and what kind of consultation mechanisms should be carried out in order to complement it. In this sense, we find the reference to the creation of “an independent Impact Assessment Board (IAB)” useful. Any such body to be created should itself operate transparently and incorporate the views of the market participants.

Level 3

- The Group believes that an additional effort is needed to increase cooperation between supervisors. Supervisors should step up progress in this field and national governments should provide the necessary political support. The Group intends to pay particular attention to this issue in its final report.
- The Group suggests to include in the mission statements of the relevant supervisory authorities a clear task to support the European convergence process.

33. Going forward, the success of the Lamfalussy process depends directly on the **sufficiency of the resources** made available to **Level 3 (and Level 4)**. In fact, Level 3 and Level 4 must work compatibly. CESR has already been doing a very good job in both its Level 2 and Level 3 roles. Today, CESR does

not have enough means, although it is arguably better established than its two other peers. **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). 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**. These tools are new and should be allowed to develop; we need to monitor how well they function and what contribution they make to supervisory convergence.

34. The success of Level 3 also depends on updating Level 3 measures whenever unforeseen areas emerge where divergences among supervisors would threaten the proper functioning of the Directive in question. In this context, we laud the recent efforts of CESR to review the supervisory functioning of the Market Abuse and Prospectus Directive regimes. We also support the use of innovative methods such as Frequently Asked Questions (FAQ). Even if the FAQ as currently conceived for the PD, for example, may not yet point to definitive conclusions among the regulators, we find it a useful and flexible first step in the right direction. However, we also consider that the use of any innovative method should be complementary to the established Level 3 process and not be considered as an alternative to the elaboration of Level 3 guidelines. This is particularly important considering the limitations of the methods such as FAQ.

Level 4

- The Group concludes that the timing of implementation of EU legislation to date has not lived up to the expectations raised by the Lamfalussy process.
- The Group believes that transparency of national transposition and implementation through disclosure mechanisms could curb regulatory additions and enhance convergence of practices through peer pressure.
- The Group urges Member States to provide transposition tables in one of the Commission languages and in a common format.
- Transposition workshops are a powerful tool in the transposition process and the Group encourages their continued use at an early stage.
- The Group recommends that sufficient Commission staff is allocated to the task of checking the accurate transposition of EU Directives and to infringement procedures in the event of faulty implementation.
- Member States, the European Parliament, supervisors and the private sector play an important role in improving enforcement of agreed legislation by putting forward complaints, information and concrete cases of incorrect implementation of EU rules and possible reservations about coming forward with such information should be looked into.

35. We reiterate the need to set **realistic transposition deadlines**. We also agree with the IIMG's views on the need to enhance the transparency of the transposition and implementation process.

36. We also want to draw attention to the so-called interpretative guidelines and the Database of Frequently Asked Questions (which are being launched for MiFID), which are linked to, but separate from, enforcement at Level 4. It is very important that the **industry be involved** in all the actions taken by the Commission in relation to transposition, whether this be in the form of transposition workshops, preparation of interpretative guidelines, or a FAQ database. While all of these measures are welcome as methods for the Commission to be proactive to prevent infringement cases, the outcome of these discussions and analyses can have significant impact on the industry and should therefore be as

transparent as possible. We invite the IIMG to propose practical ways of making this process more transparent and inclusive.

37. Finally, enforcement of transposition requires **adequate resources** to be allocated within the Commission. 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. The industry should be more closely involved in the monitoring and rectifying of any problems identified after transposition. We would support, for example, **a consultation process for Level 4** that could include an invitation for the industry to provide periodic input to the way in which the EU law is being implemented on a day-to-day basis.

The Group is interested in further concrete indicators that could help while separating Level 1 and Level 2 measures. What would be your suggestions?

38. We agree with the IIMG's basic principles on this point. Any issue that is of a fundamental nature – involving a major choice among several options – should be decided at Level 1. The policy objectives should be clearly stated and the solutions that are considered as balanced and proportionate in relation to the major trade-offs in the service of these policy objectives should also be clearly identified in Level 1.

Do you believe a direct approach could help to improve consumer input in the consultation process? Do you have any other suggestions on how to get end-users' input?

39. We agree with the importance of incorporating relevant and representative input from all sectors. It is important to be clear about who the investor is and who represents the investors – which may change from subject to subject. The retail investors' interests are particularly relevant to certain sectors – e.g. retail banking, mortgage finance – and it is in these areas in particular that their representation should be secured.

How much progress has been made in achieving appropriate supervisory cooperation and how far should supervisory convergence extend? If appropriate, what can be done to enhance cooperation and what are the obstacles?

40. Taken as a whole, **the regulatory/supervisory structure in securities markets is sound and should be allowed to deliver its maximum potential before any major changes are introduced.** Thus, any changes that may be justified in the context of banking/prudential supervision after careful reflection should be considered separately from securities markets and not be extended unless they are proven to address deficiencies specific to the securities markets.
41. When looking at the regulatory system of securities markets overall, we see that the rules applicable to the market entities (intermediaries, exchanges and issuers) are **clearly laid out in EU law.** Moreover, generally the EU laws in the securities field establish **a clear designation of competent authority based on the home competent authority principle,** which means that unnecessary regulatory burdens on the

market participants are avoided and a clear supervisory responsibility is imposed through the clear designation of the home authority in charge of each supervised entity.

42. The supervisory system based on the coordination of CESR has also proven capable of delivering effective and strong supervision that balances the need for **proximity to the local market** (which calls for retaining the national supervisors) with the need to have a consistent and coordinated approach among the supervisors across Europe. CESR has thus started shifting the weight of its activities from its role as an advisor to the Commission at Level 2 to its responsibilities as the coordinator of all supervisors at Level 3. Building CESR's full capability in this area will require additional resources but **the basic structure is essentially satisfactory**.
43. Concrete experience with the legislation that has been fully implemented (Market Abuse and Prospectus Directives) shows that the Level 3 process can deliver very useful results in terms of creating a convergence of the way in which EU law is put into practice on the ground. Although a definitive opinion cannot be delivered since some of the most extensive legislation will only be fully implemented by the end of this year or even next year (i.e. MiFID Level 3 process and TOD Level 2 and Level 3 processes are not yet completed), the work that is carried out so far is encouraging. A level playing field can thus be created and a consistent approach established by continuing to minimise differences in national implementation of EU law through Level 3 guidelines and supervisory cooperation.
44. Having said that, there are a few exceptions to this generally positive picture which pose specific problems and which should be addressed:

a) Cases where the EU legislation does not establish a clear competent authority whose rules should be followed:

- ⇒ **Problem:** This is generally the case of the Market Abuse Directive, which was drafted before the establishment of the Lamfalussy Process, and in the wake of various corporate scandals across the world; thus the Directive gave priority to making sure that all potential market abuse incidents would be subject to at least one national jurisdiction, but failed to take account of the regulatory costs and confusion that might result from imposing the rules of multiple jurisdictions on market entities. Given that the regulatory and supervisory processes have not harmonised every possible aspect of the Directive (and neither would have that have been necessarily desirable), there are some important areas where the Member States differ from one another on the implementation of the Directive which causes problems for all market participants that are active in more than one European jurisdiction. This situation is not a good use of scarce public resources and undermines the effectiveness of the Directive.¹

¹ Please note that similar concerns have been raised about the supervision of branches under MiFID, which is one of the few areas of MiFID that deviates from the home competent authority principle, but it is too early to cast a judgment about this since the Directive is not yet implemented and branch supervision is the subject of an ongoing Level 3 process.

- ⇒ **Long-term solution:** To amend the Directive to establish a clear home competent authority regime (this could be done as part of the review process of the Directive initiated by the Commission for which ESME is providing advice).
- ⇒ **Short-term solution:** To rely on CESR Level 3 guidelines to minimise the differences in implementation in key areas (this is already underway as CESR is reviewing its Guidelines; FESE and other market participants have submitted extensive feedback.)

b) Cases where the Level 3 process is not yet complete or is not sufficiently comprehensive

- ⇒ **Problem:** Entities active across Europe (such as multi-listed companies or pan-European banks or execution venues) have an interest in having rules as convergent as possible; similarly, a level playing field requires minimising supervisory divergences. This in turn is a question of not only the level of detail of Level 1 and Level 2 but also the optimal scope of Level 3 Guidelines for each Directive. CESR consults on its proposed guidelines which are then decided on a case-by-case basis. Although the wider the scope (and the deeper the level of prescriptiveness), the smaller the differences of implementation will be on the ground, a balance has to be struck with the need to take into account national market structures, traditions and investor needs. Thus the problem is not the existence of remaining differences in national implementation *per se*, but whether such differences undermine the level playing field and, in particular, hamper the ability of issuers, intermediaries and exchanges to do securities business across Europe. CESR is currently reviewing its Level 3 Guidelines for both the Prospectus and Market Abuse Directives, which as a result may be widened or deepened (FESE has contributed to both reviews). However, there are some cases where there is **no Level 3 yet**, for example the Transparency Directive: as a result, there are some important differences in the way the Directive is being implemented in different jurisdictions that could create unjustified divergences in the way the same actions by intermediaries or issuers are treated in different jurisdictions.
- ⇒ **Solution:** To ensure that the Level 3 Guidelines for each Directive are completed on time and based on appropriate feedback from the industry regarding the priority issues; these guidelines should also be revised on an ongoing basis to ensure that new problem areas can be rectified as soon as they are identified.

c) Multi-jurisdictional Exchanges (or Banks)

- ⇒ **Problem:** There are a few specific examples of entities which are subject to supervision by a group of competent authorities: among the exchanges, the two in this category are Euronext and the OMX Group (the supervisors of the former one operate in what is called a “college of supervisors”). In such cases, there are several home competent authorities even in the context of those Directives which designate only one authority (such as MiFID, Prospectus Directive and TOD). Thus by definition these entities are subject to the rules and supervision of more than one authority and are potentially exposed to the difficulty of overlapping and sometimes contradictory rules and duplicative reporting obligations. In the current structure, these authorities operate on an equal basis, without specialisation or hierarchy, which means that decision-making functions on a consensual mode. In

principle, the set-up created by these multiple supervisors is a good first step and experience has shown that it addresses many of the immediate problems associated with multiple jurisdictions. Nevertheless, the model also has some limitations and may not lead to an optimal supervisory approach, especially in the situations where a greater number of supervisors will be involved.

⇒ **Solution:** To optimise the functioning of supervisors responsible for multi-jurisdictional exchanges and banks – whether this involves a “college of supervisors” model or not - in a way that leads to a clearer designation of responsibilities for each area of the supervision, avoids any duplication of the regulatory burden on the entity and enhances the coordination within the group of supervisors; to encourage the regulators concerned to strengthen cooperation with a view to allowing for optimal and simplified supervision of multi-jurisdictional entities, through specialisation, delegation of tasks and co-decision. This would be an essential element of the streamlining of supervision of multi-jurisdictional entities across Europe.

Which body is best placed to provide information on cases of incorrect transposition by Member States – the Commission as a guardian of the Treaty or the Level 3 Committees as part of their day-to-day activities, and why?

45. CESR is closer to **transposition** on the ground, but the Commission has a role which cannot be carried out by the regulators. This is especially because on many issues the regulators would have a conflict of interest with the task of enforcing EU law (for example if one of their peers or their own jurisdiction is the reason for the lack of inconsistent implementation). Finally, it is the Commission as the guardian of the EU Treaty which should determine whether a legal infringement exists. Thus, we would see the Commission as best placed to tackle transposition.

46. Having said that, it is clear that the Level 3 Committees are intricately involved in the success of transposition. Some members of the Level 3 Committees are even responsible for national transposition. Even when that is not the case, the two levels are linked as convergent interpretation by a supervisor (resulting from Level 3) can reduce the instances of inaccurate transposition.

How could the role of Member States, the European Parliament, supervisors and the private sector in improving enforcement of agreed legislation by putting forward complaints, information and concrete cases of incorrect implementation of Community rules be further enhanced?

47. As stated previously, 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. The **industry should be more closely involved** in the monitoring and rectifying of any problems identified after transposition. We would support, for example, the creation of **a consultation process for Level 4** to invite the industry to provide periodic input to the way in which the EU law is being implemented on a day-to-day basis.

Other issues

48. In Paragraph 61, the IIMG notes: “(...) specifically, it might be appropriate to establish selected fora, drawing experience from existing institutions/levels, to consider particular issues with a view to ensuring a broad overall framework to evaluate the impact of the whole financial services regulatory

portfolio...prompted by the growing interdependence of intermediaries and markets and the gradual disappearance of rigid institutional barriers.”

49. While we fully agree that the **boundaries between the three sectors** are getting increasingly blurred and that a wholesome overview both at the regulatory and supervisory levels is necessary, we do not believe that a new group needs to be set up for this purpose. Rather, 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 supervised in the various Member States.
50. Finally, in Paragraph 62, the IIMG asks “whether the Level 3 Committees should be able to take initiative and provide advice without a mandate from the Commission and whether they should be able to propose amendments to legal texts.” Our view is that, if, in the course of its work CESR finds elements in Level 1 or Level 2 which are leading to problems at the level of supervision or the use of the passport, it could be beneficial for CESR to bring these to the attention of the Commission. However, such an exercise should be subject to two conditions:
- a. (i) the proposals of the Level 3 Committee for amendments to EU legislation should be **preceded by consultation** in which the Committee makes its intention clear to the industry that such amendments might be suggested to the Commission and thus invites comments;
 - b. (ii) the proposal made by the Level 3 Committee to the Commission should be made **public without delay**, and any follow-up to this suggestion should follow the usual principles of **pre-legislative consultation**.

Conclusion:

51. We hope that our comments will be of use to the IIMG as it prepares its Final Report and stand ready to provide any further assistance that may be required.