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General introduction

This report provides with a first indication of the institutional reforms in the securities sector since the so-called Lamfalussy report (section B). It sets out further how the research design has been elaborated in order to compare the Lamfalussy regulatory approach to other institutional arrangements regarding comitology and to evaluate the wider implications of this approach for European governance (sections C and D). And finally, it describes the specific work programme and allocation of tasks for the coming months (section E).

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A. Project overview

This inter-disciplinary research project combines a political science and legal perspective on an economic issue that is at the core of the EU single market project: the creation of a single EU securities market. An important development in this regard was the decision taken at the European Council in Lisbon in March 2000 to set up an independent Committee of Wise Men. Its aim was to reduce the backlog in the EU securities market regulation in order to complete the integrated EU financial market by 2005. The Committee, named after his chairman Baron Lamfalussy, the respected former president of the European Monetary Institute, proposed that the EU regulatory process and the institutional framework have to be reformed and adapted to enable the speedy adoption of the required and often very technical legislative proposals in the securities sector.

A thorough and detailed investigation of the new regulatory structures in the EU securities sector is a highly relevant research objective since it has been considered as a model for the transformation of EU governance in other policy areas. The reform of the EU securities market might indeed be considered as one facet of a general trend or a pilot for changes, which are likely to follow in other fields of European public policy.

This research project is aimed at assessing the effectiveness as well as the democratic legitimacy of this new approach of governance and at comparing it to similar governance structures across different policy sectors. It analyses further the wider implications for European governance of this system of delegated powers to the Commission and comitology.

B. The Lamfalussy reform

1 The Lamfalussy reform seen in its political context

1.1 The institutional balance of powers

The Council is the main legislative body in the EC, cooperating to a large extent with the European Parliament. However, Article 202 of the Treaty establishing the European Community (ECT) states that the Council shall confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down. The European Court of Justice has declared that the Council is only obliged to provide the essential elements of the legislation, and that the Commission shall be in charge of the implementation.¹ In practice, these rules have the effect that the Council and the European Parliament pass so called framework legislation, which later is clarified/complemented in implementing legislation adopted by the Commission.

The Commission cooperates with so called comitology committees when adopting implementing legislation. The committees consist of representatives from national authorities. The relation between the Commission and the committees is commonly referred to as comitology. The cooperation between the Commission and the committees was first formalised in a Council decision from 1987.² On 18 July 1999, the decision was replaced by Council decision EEC/99/468 - the so called comitology decision.³ According to the comitology decision, the implementing measures of the Commission shall be outlined in the basic Council legislation. These are normally included in one of the last articles of the basic legal act, and state that regulations concerning the implementation of the act shall be adopted by the Commission in cooperation with a certain committee. In most cases, the committee procedure to be used is also stated.

There are three types of comitology procedures: the advisory procedure (type I), the management procedure (type II), and the regulatory procedure (type III). The procedures are distinguished by the extent to which their opinions are binding for the Commission. According to the least binding procedure, the advisory procedure (type I), the Commission shall take the

¹ Judgment of the Court of 17 December 1970. Case 25/70 Einfuhr- und Vorratsstelle für Getreide und Futtermittel v Köster et Berodt & Co.

² 87/373/EEC: Council Decision of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission.

³ 1999/468/EC: Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission.

utmost account of the opinion delivered by the committee, and it shall inform the committee of the manner in which its opinion has been taken into account. According to the management procedure (type II), the Commission shall adopt the implementing legislation which shall apply immediately. However, if the implementing legislation is not in accordance with the opinion of the committee, the Commission shall inform the Council, where a different measure can be adopted. According to the regulatory procedure (type III), the Commission shall adopt the implementing legislation if it is in accordance with the opinion of the committee. If that is not the case, the Commission shall submit the proposal to the Council as well as inform the European Parliament.⁴

Since the governments are represented in the committees, they can supervise the implementing legislation even though it has been delegated to the Commission. Furthermore, the very existence of the committees is based on a governmental need for political control or supervision of delegated legislation. For this reason, the Council has often demanded a more binding committee procedure – management (type II) or regulatory (type III) – since it increases its possibilities of control. The European Parliament has, on the other hand, no such possibility to supervise the Commission legislation, not even in the fields where the legislative power is shared between the Council and the Parliament. Therefore, the Parliament has systematically demanded that the least binding committee procedure should be applied.⁵

Thus, the institutions have different interests concerning delegation and comitology. The Council is prepared to delegate legislative power to the Commission to a large extent if it has the possibility of supervision through a more binding committee procedure. In that case the Council can delegate not only issues of a technical and routine like character but also issues that can be of more political importance. The Parliament, on the other hand, is less eager to delegate legislative power to the Commission if a more binding committee procedure is used. For the institutions the comitology gives raise to at least three questions: if a certain field should be subject to delegation, which type of committee procedure should be used, and the scope of the delegation in each case. These questions have led to disputes between the Council and the European Parliament in the field of the financial market.

The third main actor, the Commission, has a very clear agenda when it comes to delegation and comitology. In short, the Commission puts forward proposals leading in the direction of

⁴ See Articles 3, 4 and 5 of Council Decision 1999/468/EEC.

⁵ See Bergström, C-F., *Comitology – Delegation of Powers in the European Union and the Committee System*, (Stockholm University 2003), chapter 4.

getting rid of comitology at the same time as the Commission over and over again stresses the need for the legislators, the Council and the Parliament, to focus more on the essential elements of the legislation and leave more room for the Commission to adopt secondary legislation. The Commission uses, *inter alia*, its proposals on increased consultation to legitimize this shift of powers.⁶

1.2 *The securities market and conflict of interest between the institutions*

The financial market consists of the activities of banks, insurance companies, stock brokers and securities managers. According to the Treaty, the market should have been harmonised by 31 December 1992.⁷ Some directives were passed to fulfil this objective. However, they were not far-reaching enough.⁸ During the 1990's several actions has been taken in order to achieve the goal of an integrated financial market. The Commission, *inter alia*, presented an action plan in May 1999 in which 42 measures concerning the financial market were presented.⁹ As mentioned, the Lamfalussy report only deals with the securities market.

The financial market has been subject to co-decision procedure since 1993. Within the area of co-decision the legislative power is shared between the Council and the European Parliament. The Commission's legislative proposals are simultaneously sent to both legislative institutions for a first reading. If the Parliament passes the proposal, the legal act can be approved by the Council acting by qualified majority. If the Parliament suggests amendments, the Council may accept the amendments and pass the act with the amendments included. Further, the Council shall adopt a common position which shall be communicated to the Parliament, which will consider the common position at a second reading, and, if it is accepted within three months, the act is passed. If a qualified majority of the Parliament rejects the act, the legal act is deemed not to have been adopted. The Parliament may also amend the common position of the Council. After the Commission has considered the amendments, and if they are accepted by the Council, the legal act is deemed to have been adopted. If the Council on the other hand does not accept all amendments, a conciliation committee shall be appointed. In the conciliation committees the institutions shall agree on a common draft, which, if it is ac-

⁶ See Bergström, C-F., *Comitology – Delegation of Powers in the European Union and the Committee System*, (Stockholm University 2003).

⁷ See article 14 of the EC Treaty.

⁸ For example, see directive 85/611, 73/183, 92/96 and 92/49.

⁹ COM (1999) 232, 11.05.99, *Financial Services: implementing the framework for financial markets: Action Plan* Communication from the Commission. See also the Commission General Report on the Activities of the European Union, 1998 p 25.

cepted by both the Parliament and Council, may be adopted. If a common draft is not agreed upon within the timeframe, or if one of the institutions does not accept the draft, the legal act shall be deemed not adopted.¹⁰

In other words, the Parliament can block legislation that the Council aims to adopt and this, of course, gives the Parliament a considerable amount of power. However, between 1993 and 1999 negotiations between the Council and the Parliament in the conciliation committee, has failed to lead to the adoption of the legislative act in question only on three occasions.¹¹ One of these occasions concerned amendments of Council directive 93/6/EEC on the capital adequacy of investment firms and credit institutions and Council directive 93/22/EEC on investment services.¹²

These directives constitute the cornerstone of the regulation of the securities market. The original directives were adopted by the Council before the co-decision procedure came into force. The Commission's original proposal included a proposal for the setting up of a securities committee, which would act as a regulatory committee (type III) which would cooperate with the Commission in the application and updating of the directives in question.¹³ When the Council adopted the directive, the issues were divided and the Council chose to keep the implementation authority to itself for the time being.¹⁴ Thus, the Commission's proposal to set up a securities committee was postponed, which indicates that the governments considered the field too politically sensitive to be delegated to the Commission. Even though a securities committee was suggested in order to secure the interests of the governments, they apparently wanted to keep full control of the legislation. This was however intended to be only a temporary solution.¹⁵

¹⁰ See article 251 of the EC Treaty.

¹¹ See Dahlman, T., Förlikningsinstitutet – från Maastricht till Amsterdam, *Europarättslig tidskrift* nummer 1, 2000, årgång 3, page 55. One case concerned a directive on voice telephony, the other a proposal for a directive on biotechnology, and the third the amendment of two directives concerning the securities market.

¹² Council directive 93/6/EEC of the 15 March 1993 on capital adequacy of investment firms and credit institutions Official Journal L 141/93 p 1-26 and Council directive 93/22/EEC of the 10 May 1993 on investment services in the securities field Official Journal L 141/93 p 27-46.

¹³ COM (1990) 141 final, Proposal on a Council directive on capital adequacy of investment firms and credit institutions Official Journal C 152/90 p 6. COM (1992) 13 final, Amended proposal for a Council directive on capital adequacy of investment firms and credit institutions Official Journal C 50/92 p 5. COM (1988) 778 final, Proposal for a Council directive on investment services in the securities field Official Journal C 43/89 p 7. COM (1989) 629 final, Amended proposal for a Council directive on investment services in the securities field Official Journal C 42/90 p 7.

¹⁴ According to article 202 of the EC Treaty the Council may reserve the right, in specific cases, to exercise directly implementing powers itself instead of delegation the implementation to the Commission.

¹⁵ Explanatory Memorandum COM (1995) 360 final. Proposal for a European Parliament and Council Directive amending Council Directive 93/6/EEC of 15 March 1993 on the capital adequacy of investment firms

On 17 July 1995 the Commission proposed a number of changes in the new directives in order to set up a securities committee.¹⁶ At that time the field was subordinated the co-decision procedure. The Parliament made four amendments in the Commission's proposal following the first reading,¹⁷ which all concerned the committee procedure and delegation to the Commission.

The Commission made another proposal on 20 June 1996 which took one of the Parliament's suggested amendments into account. However, the Parliament's proposition concerning an amendment of the committee procedure was not taken into consideration.¹⁸ Thereafter, on 16 December 1996, the Council agreed on a so-called common position,¹⁹ according to which the purpose of the amendment of the directives was to establish a committee for securities and to give the Commission the authority to update and adapt the directives in question.²⁰ On 9 April 1997, the Parliament proposed further amendments following its second reading. Also this time, only the committee procedure was discussed.²¹

The Commission presented a draft opinion on 10 July 1997, after having considered the common position of the Council as well as the Parliament's proposal, in which the Parliament's proposal concerning the committee procedure was still not accepted. The Commission still considered the regulatory procedure (type III) as most appropriate, while the Parliament

and credit institutions and Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field, Official Journal C 253/95 p 19.

¹⁶ COM (1995) 360 final. Proposal for a European Parliament and Council Directive amending Council Directive 93/6/EEC of 15 March 1993 on the capital adequacy of investment firms and credit institutions and Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field, Official Journal C 253/95 s 19.

¹⁷ A4-0034/96, first reading resolution of Proposal for a European Parliament and Council Directive amending Council Directive 93/6/EEC of 15 March 1993 on the capital adequacy of investment firms and credit institutions and Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field (COM(95)0360 - C4-0305/95 - 95/0188(COD)), Official Journal C 152/96 p 18.

¹⁸ COM (1996) 292 final. Amended proposal for a European Parliament and Council Directive amending Council Directive 93/6/EEC of 15 March 1993 on the capital adequacy of investment firms and credit institutions and Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field, Official Journal C 221/96 p 31.

¹⁹ C4-0005/97 - 95/0188(COD), Council Common Position. Common position (EC) No 8/97 of 16 December 1996 adopted by the Council with a view to adopting a European Parliament and Council Directive amending Directive 93/6/EEC on the capital adequacy of investment firms and credit institutions and Directive 93/22/EEC on investment services in the securities field, Official Journal C 69/97 p 1.

²⁰ See Bulletin EU 12-1996, internal market (22/29), point 1.3.38.

²¹ A4-0093/97, Decision on the common position adopted by the Council with a view to adopting a European Parliament and Council Directive on amending Council Directive 93/6/EEC on the capital adequacy of investment firms and credit institutions and Directive 93/22/EEC on investment services in the securities field (C4-0005/97 - 95/0188(COD)) (Codecision procedure - second reading), Official Journal C 132/97 p 83.

still advocated the management procedure (type II).²² A conciliation committee was set up on 10 February 1998 in order to bring the different opinions of the Council and Parliament in line with each other, but the parties could not agree on a common proposal.²³ The Commission's suggestion to set up a securities committee was rejected also this time. As mentioned, the failure at the first occasion was due to the fact that the governments did not want to transfer the implementing authority to the Commission, and at the second occasion the Parliament could not accept the regulatory procedure.

This case illustrates both the difficulties for the institutions to agree on a system for the adoption of legal acts in the securities market, and the general conflicts of interest between the institutions concerning comitology. When the governments finally agreed to delegate to the Commission, the condition was that a more binding procedure would be used. The governments were prepared to delegate legislative powers, even though the field was politically sensitive, since they realised that this was a necessary step in order to be able to adapt the legislation rapidly enough to the fast-changing securities market. The Parliament maintained its view that a less binding procedure should be applied since many political issues would be discussed implying the importance of democratic control. It was in general terms agreed that a delegation should take place. The discussion concerned which committee procedure to be applied.

The two directives were amended a number of times, but the original articles on implementing authorities were kept unchanged. Thus, the initial temporary solution became permanent for more than ten years, due to inter-institutional disputes.²⁴

1.3 Institutional deadlock – the Lamfalussy Committee is set up

Thus, there was a deadlock on the securities market. The Council and the Parliament could not agree on a system of delegation in this field. For the time being the Council kept the implementing power concerning the application the directive on investments services and all legislation had to be passed through the time-consuming co-decision procedure. This was not

²² COM (1997) 355 final. Opinion of the Commission pursuant to Article 189b(2)(d) of the EC Treaty, on the European Parliament's amendment to the Council's common position regarding the proposal for an amendment of the European Parliament and Council Directive 93/6/EEC on the capital adequacy of investment firms and credit institutions and Council Directive 93/22/EEC on investment services in the securities field.

²³ See Bulletin EU 4-1998, internal market (16/21), point 1.2.34.

²⁴ Directive 93/22 has been amended by 95/26, 97/09 and 00/64, Directive 93/6 has been amended by 98/31 and 98/33. Article 29 and 10 of the directives reads: "*Pending the adoption of a further Directive laying down provisions adapting this Directive to technical progress in the areas specified below, the Council shall, in accordance with Decision 87/373/EEC (15),²⁰ acting by a qualified majority on a proposal from the Commission, adopt any adaptations which may be necessary...*" (author's italics).

acceptable since it meant that the legislation could not be adapted rapidly enough to new developments on the securities market.

In a resolution on 4 May 1999, the Parliament stated its view on comitology in general and the financial market in particular. The Parliament stated in the resolution that it was sceptical to a legislation which only deals with essential principles and leaves the details to the Commission. Legal rights cannot be guaranteed in this way. The Parliament refers to its attitude towards the comitology that has been expressed by the Parliament many times and to promises from the Commission to diminish the democratic deficit. The delay of reforms on the financial market was due to the fact that the Council lacked political will, according to the Parliament.²⁵

On 8 February 2000, the Financial services policy group,²⁶ met to discuss the securities market. The group stated that it was necessary to improve the financial market, and on 17 July 2000 the EcoFin Council²⁷ decided to set up the Lamfalussy Committee.²⁸

1.4 *The Lamfalussy report*

1.4.1 Financial Services Action Plan

The main reason for appointing the Lamfalussy committee was, seen against the background of the need to have an integrated financial market, thus, the institutional deadlock and the difficulties for the legislators to adopt and change the necessary legislation for the market of securities, *i.e.*, the problems addressed by the committee were mainly procedural. At the same time, though, the Commission itself had dealt with the more substantive matters of the financial market in the so called Financial Services Action Plan (FSAP) that was presented by the Commission on 11 May 1999. Before explaining the proposals in the Lamfalussy report a short mentioning should therefore be made of the FSAP.²⁹

²⁵ A4-0175/99 resolution (COM 0625- C4-0688/98), OJ C 279 1999 s. 97.

²⁶ The members of the policy group are representing the ministries of finance of the Member States. The group meets regularly in order to discuss the reform of the FSAP. See http://www.europa.eu.int/comm/internal_market/en/finances/general/pogroup.htm.

²⁷ See www.europa.eu.int/comm/internal_market/en/finances/general, 2002-08-15, Financial services policy group discusses securities markets.

²⁸ 10328/00 (Presse 263), ECOFIN, Brussels on 17 July 2000, mandate to the Wise Men Committee.

²⁹ The FSAP was adopted on the background of a Communication from the Commission entitled “Financial Services: Building a Framework for Action” presented 28 October 1998. In this Communication the Commission concluded that “...compared to the situation in other industrialised countries, the EU financial services sector is still lagging behind.” In the Communication the Commission presented a number of “action-points”, inter alia, that “the Council and the European Parliament are invited to work together with the Commission to explore a possible inter-institutional agreement enshrining the modalities for *stream-lined, flexible*

The Action Plan set up three strategic objectives for the following years in order to create an integrated financial market in the EU. The three objectives were; to create a single EU whole-sale market, an open and secure retail market and state-of-the-art prudential rules and supervision. Furthermore, the Commission included a general objective to be achieved and that was wider conditions for an optimal single financial market.³⁰ Most of the recommendations presented in the Action Plan concerned the updating of different directives in the field and the adoption of new directives needed. But the Commission also suggested that a securities committee should be created. The reason for this was that “A formal regulatory committee in this field will contribute to the elaboration of EU regulation in the securities area.” According to the Commission, this would require “...willingness on part of EU institutions to agree an appropriate comitology procedure.” The Commission planned to present a proposal in the end of 2000 and adoption in 2002.³¹

Since the adoption of the Action Plan ten progress reports have been presented. In the latest one, presented 1 June 2004, it was stated that “the completion on schedule of nearly all (93%) of the legislative measures in the Financial Services Action Plan (FSAP) has been a major success for the EU.[...] However, it is much too early to evaluate whether the FSAP has achieved its stated objectives: that will depend on the correct and timely implementation and enforcement of all FSAP measures.”³² According to the report the Commission should only propose legislation “where this is clearly of significant benefit to the functioning of financial market. Regulation at European level must be both effective and proportionate, respecting the subsidiarity principle. It must avoid distorting legitimate competition between market players and be attentive to European competitiveness in a global market place. Commission proposals are and will continue to be based on wide consultation and on impact assessments.”³³

and speedier legislation in the single financial services market [and] should be committed to exercise a degree of *self-restraint in the legislative process to avoid over-complex legislation.*”, see p. 8 of the communication.

³⁰ FSAP pp. 22-31.

³¹ FSAP p. 30.

³² Press release, Reference: IP/04/696 Date: 01/06/2004

³³ Press release, Reference: IP/04/696 Date: 01/06/2004. “ A Directive to restructure European regulatory and supervisory committees in the banking, insurance and investment funds sectors has also been endorsed by the Council, thus extending to legislation in those sectors the four-level approach already in use for adopting EU securities legislation (see [IP/02/195](#)). There has been good progress on implementing measures for the securities Directives already adopted under this four-level approach. The European Securities Committee (ESC) has agreed the second set of implementing measures for the Market Abuse Directive and a first set of measures for the Prospectuses Directive (see [IP/04/563](#))”, see Press release, Reference: IP/04/696 Date: 01/06/2004

The Action Plan addresses the need for reform of the financial market in general. The Lamfalussy report, on the other hand, was focusing on the area of securities and procedural reform.

1.4.2 The main features of the proposal in the Lamfalussy report

The final report of the Lamfalussy committee was presented on 5 February 2001. In the report a number of proposals were made on how to reform the securities market. The underlying problem was that the regulatory framework was too rigid, too slow and overall not very well adapted to the needs of the fast changing and developing securities market.³⁴ The proposed remedy for this was to introduce a four-level system for adoption, implementation, transposition, and monitoring of the legislation. The four-level system now implemented and in force (see *infra* part 2.5), is based on an extensive use of comitology and consultation with market practitioners and end-users. The basic idea of the system is the same as that underlying the Commission's own proposals presented, *inter alia*, in the White Paper on Governance,³⁵ the legislators, the Council and the European Parliament, should focus on the essential elements of the legislation leaving the details and technical measures needing to be implemented to the Commission. This is combined with an institutional reform and recommendations on compulsory consultations, *i.e.* again very similar ideas as the ones put forward by the Commission itself, for example, in the White Paper.

At level one, the initiation phase, the Commission adopts a proposal for a directive or a regulation after a full consultation process. The proposal is thereafter sent to the European Parliament and the Council who together adopt the legislative act and reach agreement on framework principles and definitions of implementing powers according to the co-decision procedure.

At level two, the implementing phase, the Commission adopts the implementing measures decided at level one in cooperation with two committees, the European Securities Committee, ESC, and the Committee of European Securities Regulators, CESR, (see *infra* section 2.6). The Commission first consults ESC and after that requests advice from CESR on the implementing measures. CESR prepares the advice in consultation with market practitioners, end-users and consumers and submits its advice to the Commission. On the basis of the advice from CESR the Commission then makes a proposal to ESC. The Commission adopts the implementing measures after an approving vote from ESC.

³⁴ See Final Report of the Committee of Wise Men, pp. 13-14.

³⁵ See the Commission's White Paper on Governance, Almer, J and Rotkirch, M, *European Governance – An Overview of the Commission's Agenda for Reform*, Sieps 2004:1u.

At level three, the transposition phase, CESR works to ensure consistent implementation and application of EU legislation in all member states, for example by adopting guidelines and common standards.

At level four, the monitoring phase, the Commission fulfils its function as guardian of the treaty by checking compliance with EU legislation in member states and, if necessary, by legal action if a breach is suspected.³⁶

The main difference between the proposals of the Lamfalussy report and the earlier proposals of the Commission was that the cooperation between the Commission and the market practitioners of the securities market was formalised by the establishment of CESR. Otherwise, the Lamfalussy report was in accordance with the Commission's earlier proposals.

The Parliament's position was 'secured' by its right to adopt a resolution and demand reconsideration of the Commission's proposals. But this right was already stated in Article 8 of the comitology decision. According to this Article the European Parliament has the right to demand that the Commission reconsiders its proposal if the Parliament considers that the Commission has exceeded its powers. However, in 1998 the Council and the Parliament could not agree on establishing a securities committee or formalising the delegation to the Commission. Was there any reason to believe that the Council and the Parliament were prepared to carry out the Lamfalussy reform 2001, only three years later?

1.5 An Institutional Compromise – the reforms are implemented

One important thing that had happened since the negotiations in the conciliation committee broke down in 1998 was that the new comitology decision had entered into force. This decision met some of the Parliament's demands, see for example above regarding Article 8 of the decision. However, the Lamfalussy report was meant to be applicable not only on two directives but on the whole of the securities market and the negotiations were to be tough.

A summit meeting were to be held in Stockholm on 23-24 March 2001 where the governments were to put the reforms into force. However, when the Ecofin Council met in the middle of March to prepare the meeting, the ministers could not agree. The governments were afraid that too much power was to be given to the European Securities Committee (ESC). Although the Ecofin Council welcomed the Lamfalussy report it could not iron out the disagreements. The Council entrusted to the Economic and Financial Committee to try to solve

³⁶ See Final Report of the Committee of Wise Men, p. 6.

the problems before the summit in Stockholm the week after. The day before the summit meeting an agreement was still not reached. Germany was opposed to an agreement reached by the other governments. Sweden held bilateral talks with Germany in order to be able to put forward a compromise.³⁷ Finally, after *the Commission had promised not to go against the predominant view of the governments when passing secondary legislation*, Germany agreed and a compromise was presented at the summit meeting in Stockholm.³⁸

At the summit meeting the governments agreed to pass a resolution on a more effective securities market. In the resolution they stressed that a dynamic securities market was an important part of the implementation of the Commission's action plan for the financial market. The legislation procedure must be speeded up. The governments welcomed the Lamfalussy report and the proposed four-level system. In the resolution the Commission was encouraged to inform the Council and the Parliament about legislative proposals at an early stage. The division of the legislation in basic legislation on one hand and secondary legislation adopted by the Commission on the other should be decided on a case-by-case basis, according to the resolution. The European Parliament should always be informed of comitology measures. If the Parliament would be of the opinion that the Commission exceeds its powers the Commission must take this into consideration and reconsider the matter and state the reasons for the proposal.³⁹ The governments, as well as the Lamfalussy committee thus, only pointed at the Parliament's rights already stated in the comitology decision. Furthermore, the governments stressed the importance of early consultations with market actors in order to achieve an effective legislation. Also the establishment of a supervisory body and the proposal that the whole system would be overhauled in 2004 was welcomed. Thus, the governments could, after two months, agree on a resolution which welcomed the proposed reforms. It took much longer time before the European Parliament accepted the proposals.

On 15 March 2001, before the summit in Stockholm, the Parliament passed a resolution which welcomed the Lamfalussy report.⁴⁰ However, the Parliament thought that negotiations were needed with the Council and the Commission about certain inter-institutional problems still remaining. Among other things, the Parliament considered that openness was important and that the new committees should be democratically responsible. The Commission must send proposals for the committees to the Parliament at the same time as they were sent to the

³⁷ 'Power struggle over financial services?' www.EurActiv.com.

³⁸ 'Agreement on Lamfalussy proposals' www.EurActiv.com. A so called Aerosol-clause.

³⁹ Stockholm European Council (23-24 March 2001): Presidency conclusions

⁴⁰ B5-0173/2001

Council. If the Parliament or the Council were negative the Commission must withdraw the proposal and start a call-back procedure. The Parliament concluded that it could control the new regulatory committee in two ways: by deciding the scope of the delegated powers to the Commission and by *refusing delegation next time*. According to the Parliament a harmonized securities market could come into force in 2003 if the inter- institutional debate was speeded up.

On 5 April 2001, after the summit in Stockholm, the Parliament passed another resolution concerning the Lamfalussy report.⁴¹ In this resolution the Parliament again emphasized the importance of an effective democratic control of the secondary legislation. Also, the Parliament stressed the importance of getting all documents that are sent to the new committees. The Commission must not oppose a resolution of the Parliament but start a legislative procedure according to the co-decision procedure if the Commission in the Parliament's opinion has exceeded its powers of implementation. The Parliament welcomed an overhaul of the system in 2004 and emphasized that *it will use its powers according to the co-decision procedure in the meantime* to make sure that the Commission does not exceed its powers.

In January 2002 the Parliament issued a report on the reform of the legislative procedure on the securities market.⁴² On 5 February 2002 the Parliament passed a resolution according to the proposals of the report. Again the resolution emphasized the Parliament's right to get the documents on the same time as the Council. The Commission promised the governments not to go against the dominant will of the governments when passing secondary legislation; the Parliament wanted this promise to be applied also to the Parliament. If the three institutions cannot agree on delegated legislation the Parliament wanted informal negotiations to be held in order to try to find a compromise. Furthermore, the Parliament wanted a so called *sunset clause* to be included in all basic legal acts which means that articles on delegation to the Commission expire after four years.

The Parliament's report was welcomed by Romani Prodi, president of the Commission at the time. In a speech held at the Parliament's plenary session on 5 February 2002 Prodi urged the Parliament to pass the resolution. The Parliament did so the same day. Prodi declared that the Parliament is guaranteed the right to be informed and consulted on implementing legislation on the securities market. The Council and the Parliament was going to be treated in exactly the same way by the Commission. The Commission approved of the inclusion of a sunset

⁴¹ B5-0244/2001

⁴² A5-0011/2002

clause according to the Parliament's proposal. Furthermore, members of the Parliament were guaranteed the right to overhaul proposals of implementing legislation. The Parliament was guaranteed openness and consultation concerning proposed legislation.⁴³ After the solemn declaration of Prodi and the adoption of the resolution, the proposed reforms of the Lamfalussy report could, at last, be implemented.

1.6 *The institutional framework of the Securities Market*

The proposed four-level system of the Lamfalussy committee was, thus, implemented and approved by the institutions on 5 February 2002, almost one year after the presentation of the report. The structure of the four-level system has been described above (see *supra* section 2.4.2). Before an example is given on how the system works it is necessary to describe the committees in some greater detail.

The European Securities Committee, ESC, was established by a Commission decision in June 2001.⁴⁴ The decision established ESC in its advisory capacity. According to Article 2 of the decision "The role of the Committee shall be to advise the Commission on policy issues as well as on draft legislative proposals the Commission might adopt in the field of securities". This means that the Committee shall advise the Commission in level one initiatives, during the initiation phase. In level two, the implementing phase, the Committee functions as a regulatory comitology committee. ESC is composed of representatives of the member states and chaired by a representative of the Commission.⁴⁵ As of February 2004 the ESC has held 18 meetings. Summary records of all meetings are made available on the ESC website.⁴⁶

The Committee of European Securities Regulators, CESR, was also established by a Commission decision in June 2001.⁴⁷ CESR is an independent advisory group and its two main tasks are to:

⁴³ SPEECH/02/44 Romano Prodi, "Implementation of financial services legislation in the context of the Lamfalussy Report" Intervention by President Romano Prodi to the European Parliament's plenary session Strasbourg, 5th February 2002. 'MEPs obtain democratic control over financial securities legislation' www.EurActiv.com 6 February 2002.

⁴⁴ See Commission Decision 2001/528/EC of 6 June 2001 establishing the European Securities Committee (OJ 2001 L 191/45). In November 2003 Article 2 of the Decision was amended by Commission Decision 2004/8/EC of 5 November 2003 amending Decision 2001/528/EC establishing the European Securities Committee (OJ 2004 L 3/33) extending the role of the Committee to advise the Commission not only in the field of securities but also on undertakings for collective investment in transferable securities (UCITS).

⁴⁵ See Article 3 of Decision 2001/528/EC.

⁴⁶ See http://www.europa.eu.int/comm/internal_market/en/finances/mobil/esc_en.htm

⁴⁷ See Commission Decision 2001/527/EC of 6 June 2001 establishing the Committee of European Securities Regulators (OJ 2001 L 191/43).

- advise the Commission on level two measures, and
- co-ordinate national implementation on level three.⁴⁸

CESR is composed “...of high-level representatives from the national public authorities competent in the field of securities”.⁴⁹ The Committee shall consult extensively at an early stage with market actors, consumers and end-users before giving its advice to the Commission. CESR shall also submit an annual report to the Commission. The Committee meets at least four times a year and a member of the Commission is entitled to participate in all meetings. CESR produces guidelines, recommendations and standards. The work is prepared by expert groups established on a non-permanent basis.⁵⁰

The Inter-institutional Monitoring Group was also established in 2001. The Group consists of six independent experts; the Council, the Parliament and the Commission appoint two representatives each. The Monitoring Group held its first meeting on 7 October 2001. It is the task of the Group to follow the development in the field and identify possible bottlenecks in order to ensure a more effective legislation. The Group reports to the institutions twice a year. By the establishment of the Inter-institutional Monitoring Group, the last piece of the Lamfalussy structure was in place.

2 An example of how it has worked so far: the Market Abuse Directive

2.1 Level one: initiation and adoption

The market abuse directive was adopted by the Council and the European Parliament in January 2003⁵¹ following a proposal from the Commission in May 2001.⁵² The proposal was the result of extensive consultation procedures held in 1999-2000, *i.e.* before the implementation of the Lamfalussy proposals.⁵³ According to Article 17 of the Market Abuse Directive the Commission, assisted by the European Securities Committee, shall adopt implementing

⁴⁸ See <http://www.cesr-eu.org>.

⁴⁹ See Article 3 of Commission Decision 2001/527/EC.

⁵⁰ See Articles 5 and 6 of Commission Decision 2001/527/EC; and CESR’s website <http://www.cesr-eu.org>.

⁵¹ See European Parliament and Council Directive 2003/6/EC of 28 January 2003 on insider dealing and market manipulation (market abuse) (OJ 2003 L 96/16).

⁵² See Proposal for a Directive of the European Parliament and of the Council on insider dealing and market manipulation (market abuse), COM (2001) 281 final.

⁵³ See the Commission’s website on market abuse http://www.europa.eu.int/comm/internal_market/en/finances/mobil/market-abuse_en.htm.

measures according to the regulatory committee procedure provided that the measures do not modify the essential provisions of the Directive.⁵⁴

2.2 *Level two: implementation*

According to the four-level system the Commission shall ask for technical advice from CESR before adopting implementing measures. The Commission sent its first request for technical advice on implementing measures to CESR in March 2002. This request was based on an agreement between DG Internal Market and ESC on 5 December 2001. In order to meet the deadline of an integrated market by the end of 2003, the Commission and ESC considered it to be important that CESR should start the work immediately, *i.e.* even before the final adoption of the Directive in question.⁵⁵

CESR established one internal expert group on market abuse. This group has published 14 papers on market abuse and recommendations on how to regulate market abuse. The first paper was published in September 2000 and the last one in September 2003.⁵⁶ Since CESR is an independent body the Commission guidelines and recommendations do not apply to CESR. To meet the recommendations for openness and transparency recommended in the Lamfalussy report, CESR has adopted its own standards for consultations practices.⁵⁷

The consultation practice applies to all work carried out by CESR (including the ad hoc expert groups). CESR shall consult interested parties (including market practitioners, consumers and end-users), make consultation proposals widely known, in particular by using the Internet and finally consult at all levels; national, European and international according to the consultation practice. Furthermore, the Committee shall publish an annual work programme in order to let interested parties know when to expect output from the Committee. The Committee shall also publish mandates given by the Commission, organise informal discussions at an early stage upon request and consult at a sufficiently early stage in the decision-making process. When CESR consults it will aim at releasing its thinking at various stages, produce reasoned consultative proposals, establish working consultative groups of experts and use face to face meetings if necessary for any particular target group. The responses to the consultations are made public and the Committee publishes reasoned explanations addressing all major

⁵⁴ In Articles 1, 6, 8, 14 and 16 of the market abuse directive there is a reference to Article 17 and the Commission shall accordingly adopt the necessary implementing measures in accordance with these articles.

⁵⁵ See Provisional Request for Technical Advice on Possible Implementing Measures on the Future Directive on Insider Dealing and Market Manipulation (Market Abuse), Brussels, 18 March 2002.

⁵⁶ See <http://www.cesr-eu.org>.

⁵⁷ See Public Statement of Consultation Practices, December 2001, CESR/01-007c.

points raised, consults for a second time if it seems necessary and publish all formal proposals and advice given under level two.⁵⁸

When CESR received the request for advice from the Commission, a call for evidence was requested.⁵⁹ CESR received around ten submissions from trade associations representing banks, issuers and investment firms, as well as a number of submissions from individual organisations. On the basis of the first set of evidence received CESR started to work on a consultation document. Furthermore, CESR established a Consultative Working Group which held three meetings with the expert group on market abuse and gave advice on the drafting of the consultative document. In its consultation paper CESR set out its proposed advice to the Commission. The consultation was launched on 1 July 2002 and closed on 30 September 2002. Moreover, a number of open meetings and bilateral meetings were held in order to receive input on specific aspects of the proposal. CESR received over 100 responses, all of which were made public on CESR's website. The responses received were sorted under ten headings, for example banking, investment services, issuers, legal professions, government, regulatory and enforcement. On the basis of the responses received the expert group redrafted the consultation paper in October and November. An open meeting was held with market participants in order to discuss the modifications made to the paper. The participants at the meeting were able to give more written contributions to CESR. In December 2002 the final Advice on Level 2 Implementing Measures for the proposed Market Abuse Directive was published.⁶⁰

2.3 *The Commission adopts a first set of implementing measures*

In March 2003 the Commission published three working documents on the basis of the recommendations given by CESR on implementing measures. The public was invited to give comments on the technical drafting of the implementing proposals. All comments were made public on the Internet and the Commission started drafting its formal proposal in the end of April. The Commission received 23 comments from the public on the first draft and one

⁵⁸ It should be noted that the consultation practice adopted by the Committee is a guideline that the Committee should try to follow but if it is not possible to follow the practice CESR shall publish its reasons for that. See Public Statement of Consultation Practices.

⁵⁹ The first paper was published on 27 March 2002 and the deadline for the contributions was set at 26 April 2002.

⁶⁰ See, in general, <http://www.cesr-eu.org>. See also Possible Implementing Measure on Market Abuse request for Advice and Call for Evidence, 27 March 2002, CESR/02-047; Results of CESR's public consultation on possible measures of the future Market Abuse Directive, 13 November 2002, CESR/02-226c; and CESR's Advice on Level 2 Implementing Measures for the proposed Market Abuse Directive, December 2002, CESR/02-089d.

comment from the European Parliament's Committee on Economic and Monetary Affairs.⁶¹ In July 2003 the Commission adopted the formal draft on implementing measures that was submitted to the European Securities Committee for a vote.⁶² ESC received two revised versions of the document from the Commission until it reached majority and approved the Commission's final version of implementing measures on 29 October 2003. DG Internal Market could then start to work on the first implementing measures in November 2003. DG Internal Market published an informal working paper in order to receive some more comments on the technical drafting. In January 2004⁶³ the first implementing measures were adopted by the Commission in the form of two Commission Directives and one Commission Regulation.⁶⁴

Parallel to this, the Commission started working on a second set of implementing measures in November 2003. It should be noted that there is no need to consult CESR again but the ESC has to vote on both measures. A working document was published in November and comments were made public in January 2004. Following the 19 responses to the second set the Commission published a formal draft on 27 January 2004. In February 2004 a revised version was published following the comments from the European Securities Committee.⁶⁵ In April 2004 the Commission adopted a second set of implementing measures for the market abuse directive.⁶⁶

⁶¹ See http://www.europa.eu.int/comm/internal_market/en/finances/mobil/marketabuse/2003-05-consult-contrib_en.htm.

⁶² See the ESC website, http://europa.eu.int/comm/internal_market/en/finances/mobil/esc_en.htm.

⁶³ One more regulation in 2004.

⁶⁴ See Commission Directive 2003/124/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation; Commission Directive 2003/125/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the fair presentation of investment recommendations and the disclosure of conflicts of interest; and Commission Regulation (EC) 2273/2003 of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards exemptions for buy-back programmes and stabilisation of financial instruments.

⁶⁵ See comments from the public on http://www.europa.eu.int/comm/internal_market/en/finances/mobil/marketabuse/2004-01-consult-contrib_en.htm. See also Formal Commission draft on second set of measures implementing the European Parliament and Council Directive 2003/6/EC on insider dealing and market manipulation, submitted to the European Securities Committee, ESC document Nr. 48/2003. In April 2004 the Commission adopted the second implementing measure, see Commission Directive 2004/72/EC of 29 April 2004 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards accepted market practices, the definition of inside information in relation to derivatives on commodities, the drawing up of lists of insiders, the notification of managers' transactions and the notification of suspicious transactions.

⁶⁶ Commission Directive 2004/72/EC of 29 April 2004 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards accepted market practices, the definition of inside information in relation to derivatives on commodities, the drawing up of lists of insiders, the notification of managers' transactions and the notification of suspicious transactions.

2.4 *Level three: transposition*

At level three of the Lamfalussy process, the transposition phase, CESR shall work to ensure consistent application of the legislation in all Member States. In April 2004 CESR published a consultation document on the role of CESR on level three under the Lamfalussy process. On 11 May 2004 an open hearing was held and the consultation was open until 1 June 2004. The consultation paper aims at presenting the views on how CESR should organise its work at level three. Regarding the Market Abuse Directive CESR has, so far, discussed potential problems with the Review Panel and established guidance on the definition of “accepted market practices” under the Directive.⁶⁷

2.5 *Conclusion*

The Commission presented its proposal for the Market Abuse Directive in May 2001 and the directive was adopted in January 2003, the first set of implementing measures were adopted by the Commission one year later, in January 2004 and parallel to this the Commission started drafting the second set of implementing measures. This process, from adoption of the proposal to the implementing of the Directive has taken approximately three years. This is a relatively short period of time for legislation under co-decision.⁶⁸ During this time several consultations were held in different forms and at different stages in the process. One of the most important proposals in the Lamfalussy report was the one on consultation. According to the report, the consultations need to be a process, a dialogue and furthermore, transparency is essential for the system to function properly. As has been showed by the above example, the consultations conducted after the adoption of the Market Abuse directive on level two implementing measures seem to fulfil these requirements. CESR and the Commission have consulted interested parties at different times in the process and all relevant documents have been made available on the Internet. So far, the Lamfalussy structure seems to be an improvement of the system. It remains to be seen what will happen on level three (the transposition phase) and level four (the implementing phase); it is still too early to tell how it will work. Some concerns remain; first, the framework directives adopted are still very detailed in some areas although the idea is that the legislators should only deal with the essential elements; second, concerns has been raised that staffing is inadequate both in the Commission and in CESR for dealing with these extensive consultation procedures. Consultations are very time-consuming

⁶⁷ See The Role of CESR at “level 3” under the Lamfalussy process, CESR/04-104b.

⁶⁸ According to the Lamfalussy report the average time for the adoption of legislation under co-decision is over two years. See Final Report of the Committee of Wise Men, pp. 13-14.

and this is true also for the counter-parts in the consultation process, *i.e.* banks, investment firms and private actors, the ones being consulted.⁶⁹

3 Developments in the securities sector

Since the implementation of the Lamfalussy proposals three directives have been adopted in the field of securities, the market abuse directive, a directive on prospectus and an investment services directive.

A directive on Investment services was adopted by the Council and the European Parliament on 21 April 2004. In the preamble of the directive a reference is made to the Lamfalussy agreement reached by the Council, the European Parliament and the Commission. In Article 64 the committee-procedure is stated, according to this, the Commission shall be assisted by the European Securities Committee working according to the regulatory committee-procedure. Furthermore, a sunset clause is included in the directive, in accordance to the agreement made between the institutions.

“Without prejudice to the implementing measures already adopted, on the expiry of a four-year period following the entry into force of this Directive, the application of its provisions requiring the adoption of technical rules and decisions in accordance with paragraph 2 shall be suspended. On a proposal from the Commission, the European Parliament and the Council may renew the provisions concerned in accordance with the procedure laid down in Article 251 of the Treaty and, to that end, they shall review them prior to the expiry of that period. 4, the Commission may submit proposals for related amendments to this Directive.”

It was such a clause that the Parliament demanded in order to pass the Lamfalussy reforms. Since the Parliament did not get a legally binding call-back mechanism the Parliament was obliged to protect its rights by stipulating a time limit. The Commission is aware of that the Parliament will not renew its powers if the Commission does not take the wishes of the Parliament into consideration. Thus, according to the Parliament, the time limit guarantees that a call-back mechanism is included next time.⁷⁰

On 25 June 2004 the Commission sent its formal request for technical advice to CESR.

⁶⁹ Speech by Baron Alexandre Lamfalussy, Seminar on The Integration of Financial Markets in Europe, Stockholm, 21 April 2004.

⁷⁰ 2001/117 (COD).

The so called prospectus directive was adopted on 4 November 2003. Also here a reference is made to the agreement in the preamble and Article 24 regulates the committee-structure and includes a sunset-clause.

“Without prejudice to the implementing measures already adopted, on the expiry of a four-year period following the entry into force of this Directive the application of its provisions providing for the adoption of technical rules and decisions in accordance with the procedure referred to in paragraph 2 shall be suspended. On a proposal from the Commission, the European Parliament and the Council may renew the provisions concerned in accordance with the procedure laid down in Article 251 of the Treaty and, to that end, shall review them prior to the expiry of the four-year period.”⁷¹

For an overview of the committee structure before and after Lamfalussy and the extension of Lamfalussy, see Annex I. For an overview of the legislation in the securities market and the banking sector, see Annex II.

C. Policy evaluation of the Lamfalussy process (*versus* “normal comitology”)

1. Research design

As stated in the general project description, a double comparative research design is proposed in order to evaluate the new institutional developments within the EU securities markets sector. This research design is based on a comparison to similar arrangements in other sectors. First, an intra-sectoral comparison investigates the divergent institutional developments between two subsectors (securities and banking) within the financial services. Whereas in the banking area the advisory and decisional competencies are concentrated within the same committee (BAC), in the securities area the Lamfalussy approach has established two separate committees (ESC and CESR). While the functions of the committees in the two sub-sectors are rather similar, important differences exist in the overall institutional setup and the consultation process with interested parties. In addition, it is often said that in the banking sector there has been a long standing tradition of (not very conflictual ?) cooperation with supervisors and regulators (“Groupe de contact” created in 1972, the BAC in 1977), whereas the need for consultation emerged more recently in the securities sector.

⁷¹ Commission Regulation (CE) 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements.

Subsequently, the comparison will be extended to the foodstuff sector. Even if there are fundamental differences between the two sectors with respect to subject-matter, *prima facie* there are several similarities with respect to the overall institutional setup and the consultation process. Perhaps most notable in that respect are the Standing Committee on the Food Chain and Animal Health (SCFCAH), the Scientific Foodstuff Committee (ScFC) and the Consumer Committee (CC). The experience gained in the foodstuff sector, the role of comitology and consultation process, can offer a basis both for understanding the implications of the reform in the securities sector and for assessing to what extent that reform is genuinely new. Here again, the comparison is based on two sub-sectors presenting divergent institutional arrangements regarding comitology procedures. The choice of these two sub-sectors has yet to be made.

<i>COMPARATIVE RESEARCH DESIGN</i>			Before Lamfalussy reform	After Lamfalussy reform
<i>Inter-sectors comparison</i> ↑ ↓	Financial Sector <i>Intra-sector comparison</i> ↑ ↓	Banking Sub-sector	BAC	
		Securities Sub-sector		ESC CESR
	Foodstuff sector <i>Intra-sector comparison</i> ↑ ↓	N. Sub-sector?	?	
		N. Sub-sector?		SCFCAH ScFC CC
<i>before-after comparison</i> ←→				

For the selection of the criteria assessing the impacts or changes within each sector or between them, we may refer to those mentioned in the reports of the Inter-Institutional Monitoring Group⁷²: speeding up of legislation, flexibility, use of resources (workload for market participants and civil servants), openness of consultation, possible bottlenecks because of parallel working between levels 1 and 2, effectiveness of policy outcomes. These criteria are to be set in accordance with our own research perspective, namely that of assessing the effectiveness as well as the democratic legitimacy of the Lamfalussy approach compared to other institutional arrangements within and between sectors.

⁷² See e.g. Inter-Institutional Monitoring Group, *Second Interim Report Monitoring the Lamfalussy Process*, Brussels, 10 December 2003.

As mentioned before (see section B), very few measures have still gone through the new four-level regulatory approach of the Lamfalussy process. This limits severely the number of cases that can be dealt with: three directives have been adopted at level 1 (Market Abuse Directive, Directives on Prospectus and on Investment Services), and with regard to level 2, a first cycle of decision-making has been completed for two packages of implementing measures of the Market Abuse Directive. Since none of these measures have effectively come into force in the member states, it makes no sense to include the levels 3 and 4 in our evaluation. We therefore limit our investigations to the levels 1 and 2 (or to their equivalent in other regulatory approaches).

	Regulatory approach (Lamfalussy process or other similar institutional arrangement)	
	LEVEL 1 Framework principles	LEVEL 2 Technical implementing measures
(Transaction) costs <i>versus</i> expected benefits		
1/ Effectiveness <ul style="list-style-type: none"> • Speed of the process • Bottlenecks during the process (e.g. due to parallel working) • Use of resources (workload) 		
2/ Input legitimacy <ul style="list-style-type: none"> • Openness of the process (relevant actors and member states) • Frequency of consultation • Trust building among actors 		
3/ Output legitimacy <ul style="list-style-type: none"> • Quality of policy outcomes 		

D. Evaluation of the institutional balance of powers

Several political situations could be characterized as *principal-agent* relationships. For example, the ideal-type of parliamentary democracy is illustrated by a *chain of delegation and accountability* between principals and agents (Strøm 2000). Agency theorists usually discuss two main types of *agency loss*. Because of hidden information, principals may select agents who have preferences that are bound to conflict with theirs (*adverse selection*). Because their action may also be hidden whilst in office, they may even not be sanctioned for acting detrimental to the principal's welfare (*moral hazard*).

However, a key assumption of the principal-agent approach is that political actors should be able to design *specific institutional rules and arrangements* guiding delegation and accountability in response to these agency problems. These devices include *ex ante* contract design, screening and selection on the one hand and, *ex post* monitoring, reporting and institutional checks on the other hand.

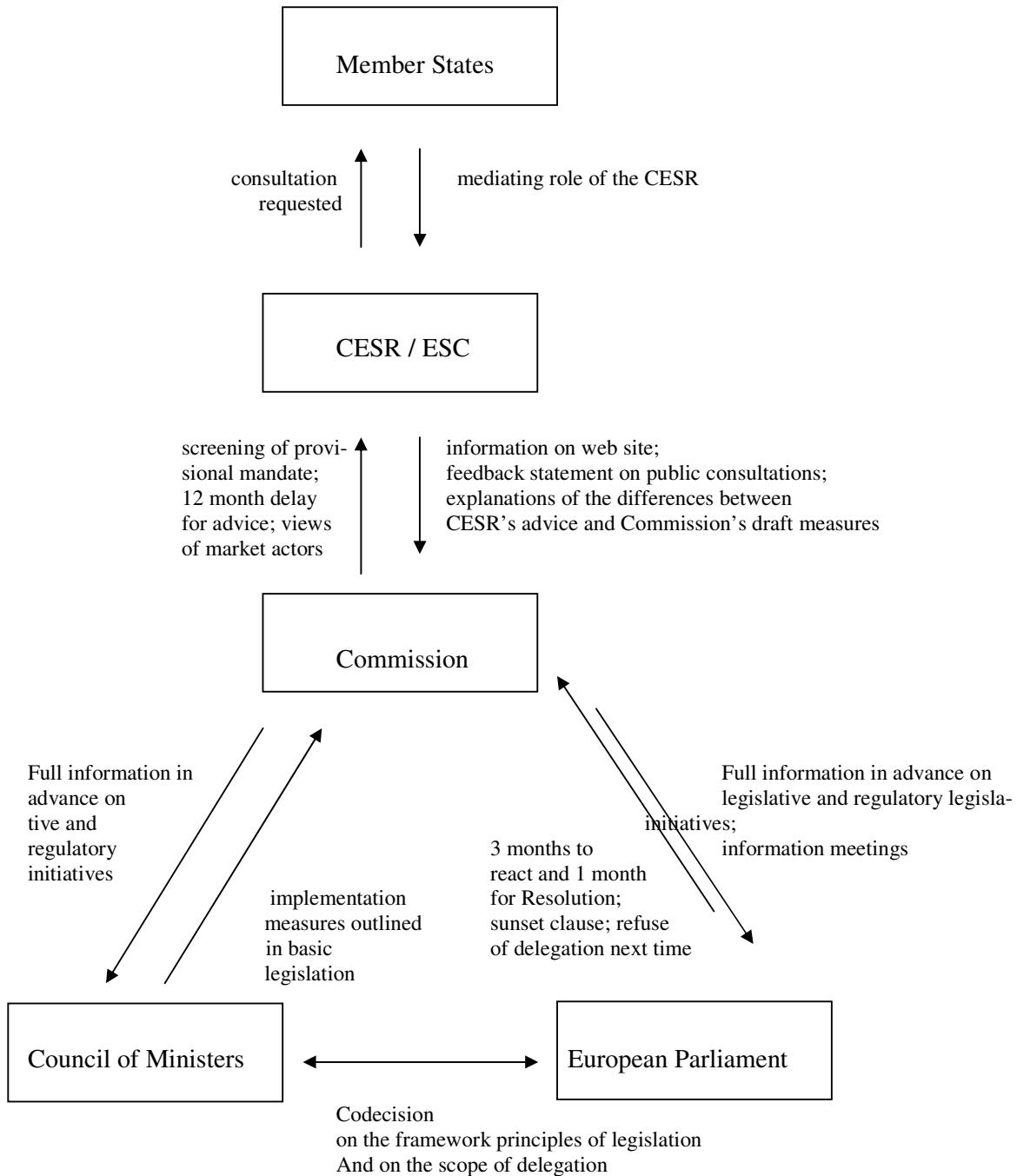
One can apply the general framework of principal-agent theories in order to describe the Lamfalussy reform and, to assess the evolution of the delegation of regulatory powers to the Commission and the accountability of the Commission towards the European Parliament and the Council of Ministers. The following graph presents a preliminary analysis of the institutional accountability mechanisms that were negotiated between the European institutions during the political debate around comitology in general and around the Lamfalussy reform in particular. They mainly concern Level 2 of the Lamfalussy process (implementing measures).

Beyond these particular accountability mechanisms, an Inter-Institutional Monitoring Group (six representatives of the Council, the Parliament and the Commission) has been established and has produced so far three reports on the practical application of the Lamfalussy reform.

In a very simplified way, one could argue that the European Parliament and the Council of Ministers (as principal) delegate regulatory powers to the Commission (as agent). Furthermore, the Commission (as principal) also delegate some power to the European Securities Committee (ESR) and to the Committee of the European Securities Regulators (CESR) as these committees are in charge to define technical implementing measures. These principal-agent relationships are (potentially) problematic as the propositions made by the Commission, the Council and the European Parliament (regarding comitology and the Lamfalussy reform) were obviously diverging. As already noted before, the Council has often demanded a more binding committee procedure (management or regulatory type), while the European Parlia-

ment has systematically asked for less binding committee procedure (advisory type). These divergent views depend clearly upon the extent to which the committee opinions are binding for the Commission and, thus, upon the possibility of effective supervision of the Commission work. In sum, each European institution tends to support the institutional control mechanisms that reduce its agency loss (adverse selection and moral hazard).

Graph: ex ante and ex post accountability mechanisms



The main task of the next steps of the research project is to further investigate these delegation and accountability rules, from both a theoretical and an empirical point of view. The following (non exhaustive list of) questions will be addressed through interviews with representative of the European institutions (see section E below):

- How do the Commission, the Council and the European Parliament evaluate the effectiveness of these delegation and accountability mechanisms?
- Which delegation and accountability mechanisms do have the greatest impact on the institutional balance of power?
- Which alternative delegation and accountability mechanisms could be introduced to reduce agency loss (for each of the European institutions)?
- What could be the impacts (on institutional balance of powers) of the (potential) extension of the Lamfalussy process to other policy sectors?

E. Work programme: from January to June 2005

- Collection of basic information; studies of literature and legal/political documents. Exploratory interviews with members of the “Committee of Wise Men” (December 2004 - January 2005)
- Interviews with institutional actors: Parliament, Council, Commission (January – February 2005)
- Sectorial analysis: case specific interviews (March – April 2005)
- Seminar: Preliminary findings to be discussed with practitioners and academics (June 2005)

Annex 1 The Committee Structure

A. The Committee Structure as of the year 2000

Source: Institutional Arrangements for the Regulation and Supervision of the Financial Sector, European Commission, Internal Market Directorate Generale, January 2000.

Institutional Arrangements for the Regulation and Supervision of Financial Institutions

Banking					Insurance					Securities				
Area	Forum	Formal institutional status	Level	Members	Area	Forum	Formal institutional status	Level	Members	Area	Forum	Formal institutional status	Level	Members
EU	BAC (Comm)	yes	senior	*Finance Ministers *Supervisors *Central banks	Regulation of prudential supervision	EC (Comm)	yes	senior	*Finance & Economic Ministers *Supervisors	Regulation of securities markets	LESS (Comm)	no	mid-rank	*Finance Ministers *Supervisors
	BSC (ESCB)	yes	senior	*Supervisors *Central banks	Supervision & prudential supervision practices	Insurance Supervisors Conference	no	senior	Supervisors	Regulation & implementation of securities legislation	Securities Council (Ch)	Yes	mid-rank	*Finance Ministers *Supervisors
	GAC	no	mid-rank	*Supervisors *Central banks with supervisory tasks	Supervision & regulation of prudential supervision practices	IAS	no		Supervisors	Regulation of prudential supervision	LCIS (Central Bank Chile)	yes	mid-rank	*Finance Ministers *Supervisors
INT	Basel Committee	no	senior	*Supervisors *Central banks with supervisory tasks						Supervision & regulation of prudential supervision practices	ESSCD	no	senior	senior supervisors

Cross sector

Area	Forum	Formal institutional status	Level	Members
EU	BAC/IC/LESS	No	Senior/nd-rank	*Supervisors and Finance Ministers *Central banks
INT	and Forum	No	Senior	*Supervisors from 13 countries *Revel IAS, IOSCO
	ESF	No	Senior	*G-10 Finance Ministers *International organizations IMF, WB, OECD, IPRD
	CFPS	No	Senior	*International standard setting (Basel, IAS, IOSCO) *G-10 central banks

B. The Committee Structure as of the year 2004⁷³

	Banking	Insurance and Occupational Pensions	Securities (including UCITS)
Advisory (Level 1) and "Comitology" (Level 2)	European Banking Committee (EBC)	European Insurance and Operational Pensions Committee (EIOPC)	European Securities Committee (ESC)
(Level 3)	Committee of European Banking Supervisors (CEBS)	Committee of European Insurance and Occupational Pension Supervisors (CEIOPS)	Committee of European Securities Regulators (CESR)

⁷³ Proposal for a Directive of the European Parliament and of the Council amending Council Directives 73/239/EEC, 85/611/EEC, 91/675/EEC, 93/6/EEC and 94/19/EC and Directives 2000/12/EC, 2002/83/EC and 2002/87/EC of the European Parliament and of the Council, in order to establish a new financial services committee organisational structure

Annex II An Overview of Legislation in Force in the Securities and Banking Sectors⁷⁴

Stock exchanges and other securities markets

1. Directives and regulations

- Directive and implementing measures (Market Abuse)

Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) (OJ 2003 L 96/16-25)

Commission Directive 2004/72/EC of 29 April 2004 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards accepted market practices, the definition of inside information in relation to derivatives on commodities, the drawing up of lists of insiders, the notification of managers' transactions and the notification of suspicious transactions (OJ 2004 L 162/70-75)

Commission Regulation (EC) No 2273/2003 of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards exemptions for buy-back programmes and stabilisation of financial instruments (OJ 2003 L 336/33-38)

Commission Directive 2003/124/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation (OJ 2003 L 339/70-72)

Commission Directive 2003/125/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the fair presentation of investment recommendations and the disclosure of conflicts of interest (OJ 2003 L 339/73-77)

- Directive and implementing measures (Prospectus)

Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC (OJ 2003 L 345/64-89)

Commission Regulation (EC) No 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements (OJ 2004 L 149/1-137)

- Directives

Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ 2004 L 145/1-44)

Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate and amending Council Directives 73/239/EEC, 79/267/EEC, 92/49/EEC, 92/96/EEC, 93/6/EEC and 93/22/EEC, and Directives 98/78/EC and 2000/12/EC of the European Parliament and of the Council (OJ 2003 L 35/1-27)

Directive 2001/107/EC of the European Parliament and of the Council of 21 January 2002 amending Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) with a view to regulating management companies and simplified prospectuses (OJ 2002 L 41/20-34)

Directive 2001/108/EC of the European Parliament and of the Council of 21 January 2002 amending Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to under-

⁷⁴ Source: CELEX.

takings for collective investment in transferable securities (UCITS), with regard to investments of UCITS (OJ 2002 L 41/35-42)

Directive 2000/64/EC of the European Parliament and of the Council of 7 November 2000 amending Council Directives 85/611/EEC, 92/49/EEC, 92/96/EEC and 93/22/EEC as regards exchange of information with third countries Official Journal L 290 , 17/11/2000 P. 0027 - 0028

Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities Official Journal L 184 , 06/07/2001 P. 0001 - 0066

European Parliament and Council Directive 95/26/EC of 29 June 1995 amending Directives 77/780/EEC and 89/646/EEC in the field of credit institutions, Directives 73/239/EEC and 92/49/EEC in the field of non- life insurance, Directives 79/267/EEC and 92/96/EEC in the field of life assurance, Directive 93/22/EEC in the field of investment firms and Directive 85/611/EEC in the field of undertakings for collective investment in transferable securities (Ucits), with a view to reinforcing prudential supervision Official Journal L 168 , 18/07/1995 P. 0007 - 0013

Council Directive 88/220/EEC of 22 March 1988 amending, as regards the investment policies of certain UCITS, Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investments in transferable securities (UCITS) Official Journal L 100 , 19/04/1988 P. 0031 - 0032

Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) Official Journal L 375 , 31/12/1985 P. 0003 - 0018

2. Commission decisions

2004/7/EC: Commission Decision of 5 November 2003 amending Decision 2001/527/EC establishing the Committee of European Securities Regulators (OJ 2004 L 3/32)

2001/527/EC: Commission Decision of 6 June 2001 establishing the Committee of European Securities Regulators (OJ 2001 L 191/43-44)

2004/8/EC: Commission Decision of 5 November 2003 amending Decision 2001/528/EC establishing the European Securities Committee (OJ 2004 L 3/33)

2001/528/EC: Commission Decision of 6 June 2001 establishing the European Securities Committee (OJ 2001 L 191/45-46)

3. Proposals

Proposal for a Directive of the European Parliament and of the Council amending Council Directives 73/239/EEC, 85/611/EEC, 91/675/EEC, 93/6/EEC and 94/19/EC and Directives 2000/12/EC, 2002/83/EC and 2002/87/EC of the European Parliament and of the Council, in order to establish a new financial services committee organisational structure COM/2003/659

Proposal for a Directive of the European Parliament and of the Council on the harmonisation of transparency requirements with regard to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC COM/2003/138

Banking sector

1. Directives and regulations

Regulation (EC) No 2560/2001 of the European Parliament and of the Council of 19 December 2001 on cross-border payments in euro (OJ 2001 L 344/13-16)

Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions (OJ 2001 L 125/15-23)

Directive 2000/46/EC of the European Parliament and of the Council of 18 September 2000 on the taking up, pursuit of and prudential supervision of the business of electronic money institutions (OJ 2000 L 275/39-43)

Directive 2000/28/EC of the European Parliament and of the Council of 18 September 2000 amending Directive 2000/12/EC relating to the taking up and pursuit of the business of credit institutions Official Journal L 275 , 27/10/2000 P. 0037 – 0038

Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions Official Journal L 126 , 26/05/2000 P. 0001 – 0059

Directive 98/33/EC of the European Parliament and of the Council of 22 June 1998 amending Article 12 of Council Directive 77/780/EEC on the taking up and pursuit of the business of credit institutions, Articles 2, 5, 6, 7, 8 of and Annexes II and III to Council Directive 89/647/EEC on a solvency ratio for credit institutions and Article 2 of and Annex II to Council Directive 93/6/EEC on the capital adequacy of investment firms and credit institutions Official Journal L 204 , 21/07/1998 P. 0029 – 0036

Directive 97/5/EC of the European Parliament and of the Council of 27 January 1997 on cross-border credit transfers

European Parliament and Council Directive 95/26/EC of 29 June 1995 amending Directives 77/780/EEC and 89/646/EEC in the field of credit institutions, Directives 73/239/EEC and 92/49/EEC in the field of non- life insurance, Directives 79/267/EEC and 92/96/EEC in the field of life assurance, Directive 93/22/EEC in the field of investment firms and Directive 85/611/EEC in the field of undertakings for collective investment in transferable securities (Ucits), with a view to reinforcing prudential supervision Official Journal L 168 , 18/07/1995 P. 0007 – 0013

Repealed by... 300L0012, partial

Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes Official Journal L 135 , 31/05/1994 P. 0005 - 0014

Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC Official Journal L 386 , 30/12/1989 P. 0001 - 0013

Amendment proposed by 597PC0706..... Repeal

Council Directive 89/117/EEC of 13 February 1989 on the obligations of branches established in a Member State of credit institutions and financial institutions having their head offices outside that Member State regarding the publication of annual accounting documents Official Journal L 044 , 16/02/1989 P. 0040 - 0042

Council Directive 86/635/EEC of 8 December 1986 on the annual accounts and consolidated accounts of banks and other financial institutions Official Journal L 372 , 31/12/1986 P. 0001 - 0017

Council Directive 83/350/EEC of 13 June 1983 on the supervision of credit institutions on a consolidated basis Official Journal L 193 , 18/07/1983 P. 0018 - 0020

First Council Directive 77/780/EEC of 12 December 1977 on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions Official Journal L 322 , 17/12/1977 P. 0030 - 0037

Council Directive 73/183/EEC of 28 June 1973 on the abolition of restrictions on freedom of establishment and freedom to provide services in respect of self-employed activities of banks and other financial institutions Official Journal L 194 , 16/07/1973 P. 0001 - 0010

Council Directive 91/633/EEC of 3 December 1991 implementing Directive 89/299/EEC on the own funds of credit institutions Official Journal L 339 , 11/12/1991 P. 0033 - 0034

2. Commission directives

Commission Directive 2004/69/EC of 27 April 2004 amending Directive 2000/12/EC of the European Parliament and of the Council as regards the definition of "multilateral development banks" (OJ 2004 L 125/44)

Commission Directive 95/67/EC of 15 December 1995 making a technical amendment to Council Directive 89/647/EEC on a solvency ratio for credit institutions as regards the definition of 'multilateral development banks' (OJ 1995 L 314/72)

Commission Directive 95/15/EC of 31 May 1995 adapting Council Directive 89/647/EEC on a solvency ratio for credit institutions, as regards the technical definition of 'Zone A' and in respect of the weighting of asset items constituting claims carrying the explicit guarantee of the European Communities (OJ 1995 L 125/23-24)

Commission Directive 94/7/EC of 15 March 1994 adapting Council Directive 89/647/EEC on a solvency ratio for credit institutions as regards the technical definition of 'multilateral development banks' (OJ 1994 L 89/17)

Commission Directive 91/31/EEC of 19 December 1990 adapting the technical definition of 'multilateral development banks' in Council Directive 89/647/EEC of 18 December 1989 on a solvency ratio for credit institutions (OJ 1991 L 17/20)

3. Commission decisions

2004/10/EC: Commission Decision of 5 November 2003 establishing the European Banking Committee (OJ 2004 L 3/36-37)

2004/5/EC: Commission Decision of 5 November 2003 establishing the Committee of European Banking Supervisors (OJ 2004 L 3/28-29)