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Summary

On July 17, 2000, the Economics and Finance Ministers Council appointed a Committee of Wise Men on the Regulation of European Securities Markets, chaired by Alexandre Lamfalussy, former President of the European Monetary Institute. It proposed a four-level system to improve the legislative process, while ensuring a democratic and institutional balance. Our paper questions how far two basic modes of delegation – agency and trust relationships – are appropriate to interpret the new structure set up by the Committee. It formulates hypotheses as regards concrete implications of the Lamfalussy process both in terms of policy effectiveness, and in terms of changes in the balance of power between Community institutions. Evidence based on the four main directives adopted according to the new procedure seems to validate the agency hypothesis, namely that the Lamfalussy process has reduced the average time taken in order to negotiate and adopt the first framework directives at Level 1 compared to the normal co-decision procedure, and that it has facilitated the removal of bottlenecks in the process through parallel working at the levels 1 and 2. In this sense, we may conclude that delegation has enhanced the policy effectiveness in the securities sector. But it is much more difficult to assess the validity of the trustee hypothesis, namely, whether the Commission and the Committee of European Securities Regulators (CESR), in fact, act as trustees of the Member States for the benefit of market actors. For the time being, whether CESR might evolve into a European securities regulator remains an open question.

Contents

I. INTRODUCTION ..............................................................................................................................................4

II. THE LAMFALUSSY REFORM .............................................................................................................................6

III. INTERPRETING THE NEW REGULATORY FRAMEWORK: AGENCY OR TRUST MODES OF DELEGATION? ............................................................................................................................................10
  III.1. AGENCY RELATIONSHIP ............................................................................................................................10
  III.2. TRUST RELATIONSHIP ...............................................................................................................................15

IV. WORKING HYPOTHESES FOR THE EMPIRICAL ANALYSIS .............................................................................17
  IV.1. STATUS QUO: MEMBER STATES PREDOMINANCE .....................................................................................17
  IV.2. AGENCY RELATIONSHIP: COMMISSION AS AGENT, ESC AS SUB-AGENT ..................................................18
  IV.3. TRUST RELATIONSHIP: COMMISSION AND CESR AS TRUSTEES .............................................................19

V. EMPIRICAL TEST OF THE HYPOTHESES ............................................................................................................20

VI. CONCLUSION ..............................................................................................................................................22

VII. BIBLIOGRAPHY ........................................................................................................................................25

Table of Figures and Graphs

GRAPH 1: RELATIONSHIPS BETWEEN POLICY ACTORS IN THE LAMFALUSSY REFORM ........................................8
GRAPH 2: A FIRST APPROACH OF THE LAMFALUSSY REFORM (L1 AND L2) – AGENCY RELATIONSHIP ..................12
GRAPH 3: A SECOND APPROACH OF THE LAMFALUSSY REFORM (L1, L2 AND L4) – TRUST RELATIONSHIP AND REVISED AGENCY RELATIONSHIP ........................................................................................................................................6
GRAPH 4: A THIRD APPROACH OF THE LAMFALUSSY REFORM (ALL LEVELS) – REVISED TRUST AND AGENCY RELATIONSHIPS .............................................................................................................................................17
TABLE 1: HYPOTHESES ON THE IMPLICATIONS OF THE LAMFALUSSY REFORM .......................................................20
I. Introduction

Financial services, i.e. the banking, insurance and investment services (securities and investment funds) sectors, were one of the policy areas where the single market was still incomplete by 1993 (Young, A.R., 2005: 109), especially in the investment services sector. According to article 8A of the Treaty establishing the European Economic Community (EEC) as revised by the Single European Act, the EEC financial markets should be integrated by December 31, 1992. Legislation had been enacted since 1964 (Directive 64/225/EEC), but differences in national regulations, on the one hand, and sensitivity of these fields due to their impact on the economy and savings, on the other hand, curbed its development.

In the perspective of the introduction of the euro, financial markets regained attention (Commission, 2005b: 5). This led the European Council of Cardiff to request, on June 15-16, 1998, the Commission to establish a framework for action to improve the single market in financial services. This framework, adopted by the Commission on October 28, 1998, listed several points of action to that end and proposed the creation of a Financial Services Policy Group (FSPG), which would “identify and prioritise a set of actions by June 1999 to be presented to the Council (...) [and] define a number of immediate priorities to guarantee momentum to the process” (Commission, 1998: 25, points 58 and 59). Based on the recommendations of the FSPG and the “Framework for Action”, the Commission then drafted the Financial Services Action Plan (FSAP) (Commission, 1999: 19-31), which contained 43 measures to be taken in order to further the integration of the European Union (EU) financial markets. Backed by the European Council of Cologne on June 3-4, 1999, the FSAP had to be implemented by 2005, following the deadline set by the European Council of Lisbon on March 23-24, 2000.

With this prospect and taking account of the institutional dispute between the Commission, the Council and the European Parliament on the creation of a Committee on Transferable Securities, the Economics and Finance Ministers (ECOFIN) Council appointed a Committee of Wise Men (CWM) on the Regulation of European Securities Markets on July 17, 2000, to assess how to best adapt the securities regulation and the cooperation between national regulators to market evolution (such as alternative trading systems) and to ensure a more effective transposition and implementation of the regulation. The Committee was chaired by Alexandre Lamfalussy, former President of the European Monetary Institute and Member of the Segré Committee on the development of a European capital market (Commission, 1966: 5).

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1 The authors would like to thank Alexandre Lamfalussy, Jörn-Carsten Gottwald, Daniel Mügge, Emiliano Grossman, officials of the Commission and the Council, Members of the Committee of European Securities Regulators, of the European Parliament and of European permanent representations to the European Union, and the Journal of Public Policy peer-reviewer for their helpful comments.

2 The single market was almost achieved for the banking sector, some barriers remaining to the provision of cross-border services and the implementation of Directive 94/19/EC being delayed until June 30, 1995. As far as the insurance sector is concerned, it was achieved in most Member States on July 1, 1994, thus with a delay of 18 months. The investment services sector was the last sector in which integration was achieved, with a delay of three years. Compliance with the last directive adopted (Directive 93/22/EEC) was indeed required by December 31, 1995.

3 The group was created in January 1999 at the request of the European Council of Vienna. It was composed of personal representatives of the EU Finance Ministers and of the European Central Bank, of the Director-General of the Directorate General (DG) G – Economic and Social Affairs of the Council, and of the Internal Market Commissioner, which held the chairmanship.

4 This committee was to be set up in accordance with article 7, § 1(b) of Directive 93/22/EEC of 10 May 1993 on investment services in the securities field.
In its initial report, the Committee of Wise Men identified the functioning of the institutional framework as the main shortcoming of the Community regulation: it was too slow, the texts adopted were sometimes ambiguous, transposition deadlines were often not respected, some sensitive issues were not covered properly (pension funds, international accounting standards and the European company statute for instance), there was no rapid mechanism to update the legislation and the obligations to cooperate were insufficient (CWM, 2000: 18-19). As was mentioned in the final report, “the problem is the system itself” (CWM, 2001: 13). The Committee therefore proposed a four-level system that would speed up the legislative process and provide the Community institutions with the expertise of European regulators, while maintaining a democratic and institutional balance (CWM, 2001: 24-25). The system was agreed by the ECOFIN Council on March 22, 2001 and mostly endorsed by the European Council of Stockholm on March 23-24, 2001 and the European Parliament on February 5, 2002.

The relevance of the analysis of this new regulatory framework stems from the fact that it might be considered a model for the transformation of EU governance in other policy areas, which is in line with the Commission White Paper on European Governance (Commission, 2001: 33-34). The present article seeks to describe and interpret the Lamfalussy reform in the securities sector from the theoretical perspective developed in the introductory article of this special issue, “New Modes of Governance and the Shadow of Hierarchy”. Our argumentation is structured as follows. The first chapter briefly presents the Lamfalussy reform. It summarizes the policy process according to its four-level approach (CWM, 2001: 19), presenting the actors and the subsequent institutional safeguards. The second chapter focuses on the configuration of actors involved in the Lamfalussy scheme. It sheds light on the fiduciary delegation mechanisms, suggesting that both the agency model and the trust model are useful to understand the relationships between these actors at the various decision-making and implementation phases. The third chapter formulates three working hypotheses on the policy effectiveness of the Lamfalussy scheme and the resulting balance of power between Commission, Council and European Parliament. The first hypothesis argues that the status quo might still prevail if there is a predominance of the Member States. In the agency hypothesis, the policy effectiveness should on the contrary increase and the balance of power be in favor of the European Parliament. The trust hypothesis also posits an increase in the policy effectiveness, but a balance of power in favor of the Commission. The fourth chapter continues with a first empirical test of these three hypotheses.

5 “Mostly” because the final report of the Committee of Wise Men as adopted by the European Council was slightly revised; an “aerosol clause” was indeed introduced (see point I below) (Lamfalussy, A., 2001: 9, 26, 28).

6 The European Parliament “recommends that the “better regulation” programme be piloted in certain fields and be carefully assessed before wider use; considers the experience with the Lamfalussy procedure in financial markets legislation, and the dialogue between regulators and market participants, in particular, to be a valuable test case for a dynamic legislative process” (Report on Better Lawmaking 2004: Application of the Principle of Subsidiarity, 2005/2055(INI) (Luxembourg: European Parliament, http://www.europarl.europa.eu/omk/sipade3?PUBREF=~/EP/NONSGML+REPORT+A6-2006-0082+0+DOC+0+PDF+0+V0/EN&L=EN&LEVEL=0&NAV=S&LSTDOC=Y, March 23, 2006, point 4). It should however be stressed that the Lamfalussy approach “is not the result of putting into practice pre-conceived ideas about the generally desirable features of European governance” (Lamfalussy, A., 2001: 27) and was thus not initially meant to be extended to other policy areas.

7 The term “delegation” will be used in a non-judicial sense, to refer to the general transfer of tasks.
II. The Lamfalussy Reform

In its report of February 15, 2001, the Committee of Wise Men proposed to introduce a four-level system for adoption of framework legislation (Level 1 – L1), adoption of implementing measures (Level 2 – L2), consistent and equivalent implementation (Level 3 – L3) and monitoring of the enforcement of the Community legislation in the securities sector (Level 4 – L4) (CWM, 2001: 19). This system is based on the extensive use of comitology and consultation with market practitioners (intermediaries), end-users (issuers of securities) and consumers (investors) (Lamfalussy, A., 2001: 12; CWM, 2001: 6, 32).

At L1, the initiation phase, the Commission adopts a proposal for a directive or a regulation after a full consultation process of market actors (CWM, 2001: 25). The proposal is thereafter sent to the European Parliament and the Council, which adopt, according to the co-decision procedure, the legislative act containing the framework principles and the definition of the implementing powers to be conferred on the Commission.

At L2, the implementing powers phase, the Commission adopts the measures implementing the L1 directive or regulation on the basis of the comitology process established in Council Decision 1999/468/EC. Before proceeding with the elaboration and adoption of L2 measures, the Commission first consults the European Securities Committee (ESC), which is the relevant regulatory committee in the field of securities. The ESC was created by a Commission decision on June 6, 2001 (2001/528/EC). In addition to its regulatory committee function, the ESC is also a policy advisor, notably on envisaged L1 legislation and on Commission services mandates (CWM, 2001: 6, 29). The ESC is composed of representatives of the Member States and chaired by a representative of the Commission services. Before the ESC was created, there was no effective L2 committee. Next, the Commission also requests advice from the Committee of European Securities Regulators (CESR), which is an independent advisory group, composed of national regulators designated by their respective Member State. More specifically, following a mandate granted by the Commission, CESR prepares a technical advice in consultation with market practitioners, end-users and consumers and forwards it to the Commission. On the basis of the advice of CESR, the Commission draws up draft im-

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8 For practical reasons, we use the term “level” according to the original language of the Lamfalussy reform. However, the four levels identified in the Community vocabulary correspond de facto to the subsequent phases of the classic policy-making cycle.

9 Comitology refers to the procedures used for the exercise of implementing powers granted by the Council to the Commission, assisted by a committee, in accordance with article 202, third indent, of the Treaty establishing the European Community (EC Treaty) as revised by the Treaty of Nice.

10 See the end of this point on changes brought by Council Decision 2006/512/EC.

11 Comitology includes four procedures: advisory procedure, management procedure, regulatory procedure and regulatory procedure with scrutiny. The latter procedure was added by Council Decision 2006/512/EC. The ESC is then meant to become a “regulatory procedure with scrutiny committee” in the “Lamfalussy directives”.

12 There existed two formal contact committees, the Securities Contact Committee (1979) and the Undertakings for collective investment in transferable securities (UCITS) Contact Committee (1985) (Commission, 2000: 32, 36-40, 58; Moloney, N., 2002: 851-852, 856). Both committees had an advisory function. The Securities Contact Committee had a comitology function (Directive 79/279/EEC, article 21), which was never exercised. Similarly, the UCITS Contact Committee was given a comitology function in 2001 (Directive 2001/108/EC, article 2, § 22); however, it only held one meeting in 2004, without adopting implementing measures (Commission, 2003b: 43-44; Commission, 2005d: 26). Its functions were later transferred to the ESC (Commission, 2006c: 28; Commission Decision 2004/8/EC, article 1).
implementing measures, which are then submitted to the ESC for vote. The Commission adopts the implementing measures after an approving vote of the latter.

If the ESC does not approve the measures or does not deliver an opinion, these are referred to the Council, which has two main options. First, it can adopt them by a qualified majority vote, or not adopt them while not opposing them – in the second case, the measures are adopted by the Commission. Second, the Council can prevent their adoption by a qualified majority vote. In that case, the Commission can submit amended implementing measures to the Council, submit the initial draft measures anew, or submit a legislative proposal to the Council and the European Parliament (Council Decision 1999/468/EC, article 5, § 4 and § 6). During the L2 process, the European Parliament is kept fully informed of the development of the implementing measures (CWM, 2001: 36). In accordance with its right of scrutiny and if the case arises, the European Parliament can indicate in a resolution that the draft implementing measures the Commission has submitted to the ESC for approval exceed the implementing powers conferred on the Commission in the basic instrument. Such a resolution is however not binding, the Commission being able to keep on requesting a vote from the ESC if it deems it necessary (Council Decision 1999/468/EC, article 8). The procedure for regulatory committees adds that the European Parliament informs the Council of its position, which can take it into account when deciding whether or not to adopt the referred measures (article 5, § 5 and § 6). The right of scrutiny was explicitly mentioned in the Lamfalussy reform (CWM, 2001: 30).

At L3, the implementation phase, CESR works to ensure that convergent application and day-to-day practice are established in the Member States. For instance, it issues administrative guidelines, joint interpretation recommendations and common standards in areas not covered by Community legislation. CESR was also created by a Commission decision on June 6, 2001 (2001/527/EC). A member of the latter is entitled to participate in all meetings, unless they deal with confidential matters (CESR, 2006: article 3, § 1). The work is prepared by expert groups established on a non-permanent basis and by permanent groups (CESR, 2006: articles 5, § 3 and 5, § 4).

Finally, at L4, the enforcement phase, the Commission monitors consistent transposition and subsequent application of measures adopted at L1 and L2. The Commission exercises its function of guardian of the Treaty establishing the European Community by checking the compliance of the Member States with Community legislation and, if necessary, starting proceedings for failure to fulfil an obligation if a breach is suspected (CWM, 2001: 6, 27, 36-37, 39).

The Lamfalussy process was formally extended to banking, insurance and occupational pensions, and UCITS in 2005, but its application differs according to the financial sector (IIMG, 2006: 7; IIMG, 2007: 3). In the securities sector, four directives have passed through that legislative process: Transparency (2004/109/EC), Prospectus (2003/71/EC), Market Abuse (2003/6/EC) and Markets in Financial Instruments (MIFID; 2004/39/EC). However, in the banking sector, the activities of the Committee of European Banking Supervisors (CEBS) have been concentrated on the implementation at L3 of the Capital Requirements Directive (CRD; 2006/48/EC and 2006/49/EC), which is besides not a Lamfalussy directive. Furthermore, in the insurance sector, the Committee of European Insurance and Occupational Pen-

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13 EC Treaty, articles 226 and 228.
sions Supervisors (CEIOPS) was involved at L1 in the technical aspects of the Solvency II project, which led to a Lamfalussy directive proposal on July 10, 2007\textsuperscript{14}.

The final element of the Lamfalussy structure to be established was the Inter-Institutional Monitoring Group (IIMG), created in July 2002. The IIMG consists of six independent experts appointed by the Commission, the Council and the European Parliament (two representatives each)\textsuperscript{15}. Its task is to evaluate the implementation of the Lamfalussy process in terms of effectiveness and detect possible dysfunctions (IIMG, 2003: 4, 16). It produced three reports between 2003 and 2004. Following the above-mentioned extension of the Lamfalussy process to the other financial sectors, the IIMG was re-established under an extended mandate to consider developments in the three sectors (banking, insurance and investment services). The relationships between the actors of the process can be summed up as below.

**Graph 1: Relationships between Policy Actors in the Lamfalussy Reform**

![Diagram of relationships between policy actors in the Lamfalussy Reform](image)

From the point of view of new modes of governance (see the above-mentioned introductory article), in the Lamfalussy process, both public (national securities regulators) and, to a lesser extent, private actors (market actors) are entitled to participate in the policy-making in a functionally clearly delimited area, that of securities – later extended to the whole financial services. This reform falls within the scope of the 2001 White Paper on European Governance; it has in addition brought about adjustments in favor of both the Council and the European Parliament.


\textsuperscript{15} “Given the fact that the Council of Ministers, European Commission and the European Parliament have equivalent stakes in the process, the Committee suggests that the Monitoring Group should be composed of two external nominees (i.e. not drawn from the membership of the Institutions) of the Council, European Parliament, and the European Commission” (CWM, 2001: 41).
Three control mechanisms have been added to the original Lamfalussy model at L2. Firstly, in order to secure an agreement on the Lamfalussy reform, the Commission reaffirmed to the ECOFIN Council, on March 22, 2001, its commitment not to go against “predominant views” within the Council when passing L2 measures. This clause is known as the “aerosol clause” (IIMG, 2003: 14, 40). The European Parliament considered it was therefore no longer treated on an equal footing with the Council and requested additional rights to its right of scrutiny. A compromise was reached and confirmed in the declaration by Romano Prodi, the President of the Commission, to the European Parliament on February 5, 2002. It was decided, secondly, that each L1 directive or regulation adopted under the Lamfalussy process would include a “sunset clause”, that is to say, a clause limiting to four years, from the entry into force of the directive or regulation, the time the Commission has to exercise implementing powers. Thirdly, it was agreed that the European Parliament would have a three-month period (except in urgent cases), from the transmission of any draft implementing measures, to react to them and, if need be, indicate that they exceed the implementing powers delegated to the Commission. The European Parliament would also continue having a one-month period (except in urgent cases), from the transmission of final draft measures, to indicate that the Commission has exceeded its implementing powers. However, it was not granted the “call-back right” it regarded as the equivalent of the aerosol clause for the Council. That right would have allowed the European Parliament to block the adoption of implementing measures (IIMG, 2003: 14-15, 40-41). A provision granting a general call-back right to the European Parliament was inserted in the 2004 Treaty establishing a Constitution for Europe (article I-36, § 2(a)), but given its rejection in France (May 29, 2005) and the Netherlands (June 1, 2005), it has not entered into force. As a result, new discussions between the Commission, the Council and the European Parliament on the reform of comitology started in September 2005, leading to the creation of a new type of comitology committee, the “regulatory procedure with scrutiny committee” (Council Decision 2006/512/EC, article 1, § 7). The procedure for this committee

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16 There was opposition, notably from the German Government, regarding the unchanged application of the comitology procedure to L2 (Quaglia, L., 2007: 278).

17 “From a historical point of view, predominant views might be interpreted as a simple majority of Member States. For the time being, this is not established in law” (IIMG, 2003: 40).


19 In accordance with the agreement between the Commission and the European Parliament on Decision 1999/468/EC, the European Parliament has one month, from the receipt of the final draft measures, to draw up a resolution indicating that the Commission has exceeded its implementing powers, except in urgent cases where that period can be reduced (Agreement between the European Parliament and the Commission on procedures for implementing Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, [Official Journal of the European Communities](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:256:0019:0026:EN:PDF), L 256/19, October 10, 2000, points 6 ad 7).

20 “The rejection of the proposed Constitutional Treaty in France and the Netherlands has implications for the Lamfalussy approach (…) in that it delays an institutional solution to the European Parliament's request to have equivalent control powers as its co-legislator” (Commission, 2006a: 3).

21 A group, called “Friends of the Presidency”, was set up by the British Presidency of the Council in September 2005 to discuss the reform of comitology (Commission, 2006b: 8). The idea of this reform is not connected to the Lamfalussy reform; it was initiated by the Commission in its White Paper on European Governance (Commission, 2001: 31).
provides the European Parliament with the right to oppose the adoption of draft measures implementing directives or regulations adopted under the co-decision procedure. The deadline for such a decision is three months following the referral to the European Parliament of measures approved by the regulatory committee with scrutiny, or four months following the referral to the Council of measures which were either not approved or for which the committee did not deliver an opinion. It applies only to future directives. In order to apply to already existing directives, the Council and the European Parliament have called upon the Commission to come forward with an alignment proposal. The new procedure, establishing equal control rights for these two institutions, renders the use of sunset clauses unnecessary.

III. Interpreting the New Regulatory Framework: Agency or Trust Modes of Delegation?

The following section seeks to identify whether the relationships between the actors involved in the securities regulation after the Lamfalussy reform occur within an agency or trust model. There are two reasons for choosing these approaches. First, the Lamfalussy reform develops the practice of delegation of tasks, on account of the technicality of securities policy. For that purpose, the Commission relies on the advice of the ESC and CESR acting within their respective ambit. Second, agency and trust are two basic modes of delegation, which are complementary approaches to the study of EU governance: “while agency theory can be legitimately used to analyse the comitology system – i.e. the system of control by committees of national representatives – in areas where the Commission has been delegated implementing powers (Franchino, 2000), the same theory cannot satisfactorily explain the treaty-based independence of the Commission in initiating legislation and in monitoring compliance with European law by the member states. The real purpose of delegating such autonomous powers, it should be noted, is to enhance the credibility of the member states’ commitment to the integration process” (Majone, G., 2001: 104).

Methodologically speaking, agency and trust models view actors as acting as a whole; this does not mean that before reaching a decision, institutions are not subject to diverging interests. For instance, the Council may experience struggles between Member States, relaying each the stands of their financial companies. Key centers such as London, Paris, Frankfurt and Amsterdam, are indeed in competition with each other. Furthermore, London, the most important of them, sees itself as a wholesale market for professionals competing in a global market place; which gives regulation a relatively different perspective, when compared with Member States where the regulator is concerned with domestic retail investors.

III.1. Agency Relationship

The agency theory is derived from the law of contracts. Under the American Third Restatement of the Law of Agency, agency is defined as “the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall
Newgov - 07 - D7a - The Lamfalussy Reform in the EU Securities Markets.doc

act on the principal’s behalf and subject to the principal’s control, and the agent manifests consent or otherwise consents so to act” (§ 1(1))\(^{24}\). The fact that agency is a fiduciary relationship implies that the interest of the principal prevails over that of the agent\(^ {25}\).

The concept of agency was applied in economics\(^ {26}\) and political science\(^ {27}\) in the 1970s (Kiser, E., 1999: 149; Shapiro, S.P., 2005: 271). Several political situations can be characterized as principal-agent relationships. For example, the ideal type of parliamentary democracy has been illustrated by a chain of delegation and accountability between principals and agents (Strom, K., 2000: 266-268). 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 (problem of adverse selection). Because their action may also be hidden whilst in office, agents may not be sanctioned for acting to the detriment of the principal’s welfare (problem of moral hazard). Thus, the asymmetry of information between the principal and the agent allows the latter to engage in non-fiduciary behavior (shirking) that is harmful to the principal and, at the same time, difficult to detect (Kassim, H., and Menon, A., 2003: 122). To prevent such behavior, political actors are likely to design specific institutional rules and arrangements guiding delegation and accountability. These devices include both ex ante contract design and agent’s screening, and ex post monitoring and sanctions (Pollack, M.A., 1997: 108-109).

At first sight, the general framework of the principal-agent theory seems appropriate to describe the content of the Lamfalussy reform. Generally speaking, one could argue that, first, the Council (principal P\(_1\)) and the European Parliament (principal P\(_2\)) delegate implementing powers to the Commission (agent A) at L2\(^ {28}\), by assigning it the implementation of the regulatory measures decided at L1, which also define the limits of this delegation. Structurally, this represents a case of dual agency (\(d\)), that is, an agency relationship where the agent has two principals (Gregory, W.A., 2001: 14, 142)\(^ {29}\). Second, the Commission as a principal (P),

\(^{24}\) The term “person” refers both to natural and legal persons (Gregory, W.A., 2001: 23-24).

\(^{25}\) A fiduciary relationship is a relationship in which “one party (the "fiduciary") acts on behalf of another party (the "beneficiary") while exercising discretion with respect to a critical resource belonging to the beneficiary” (Smith, D.G., 2002: 1402). The “on behalf” characteristic distinguishes a fiduciary relationship from other delegation relationships. For instance, the landlord-tenant relationship contains the two other characteristics: discretion of the tenant over a critical resource of the landlord, the rental property. However, the tenant does not manage the property primarily for the benefit of the landlord (Ib.: 1402-1403).


\(^{28}\) Implementing powers are conferred on the Commission by the Council – not by the European Parliament (article 202, third indent of the EC Treaty) –, acting according to the procedure laid down in the Treaty for the matters dealt with, here the co-decision procedure. This procedure means that, although the Council can choose to delegate implementing powers or not, it has to reach an agreement about that choice with the European Parliament (Commission, 2002: 2). Failing that, the L1 measures cannot be adopted.

\(^{29}\) Dual agency is a case of what the political economy literature calls “common agency”, i.e. “a multilateral relationship in which several principals simultaneously try to influence the actions of an agent” (Dixit, A., Grossman, G.M., 1997: 752). In that conceptual framework, the Lamfalussy process involves a delegated common agency, where “several parties voluntarily (…) bestow the right to make certain decisions upon a single (common) agent” (Bernheim, B.D., Whinston M.D., 1986: 923).
delegates, at L2, advisory and approval\textsuperscript{30} tasks respectively to CESR and the ESC, which are involved in the definition of the technical measures of implementation – while keeping its right of initiative. That level of delegation constitutes a sub-agency (s)\textsuperscript{31}, insofar as CESR (sub-agent A\textsubscript{1}) and the ESC (sub-agent A\textsubscript{2}) are the agents of an intermediate agent, the Commission, and the sub-agents of ultimate principals, the Council and the European Parliament, to which they are accountable\textsuperscript{32}. This can be represented by the following graph.

\textbf{Graph 2: A First Approach of the Lamfalussy Reform (L1 and L2) – Agency Relationship}

\begin{center}
\begin{tikzpicture}[node distance=2cm,auto,thick]
  \node (council) {Council (p\textsuperscript{c}\textsubscript{1})};
  \node (parliament) [right of=council] {European Parliament (p\textsuperscript{c}\textsubscript{2})};
  \node (commission) [below of=council] {Commission (A\textsuperscript{d}, P\textsuperscript{s})};
  \node (cesr) [below of=council] {CESR (A\textsubscript{d}\textsuperscript{a1})};
  \node (esc) [below of=parliament] {ESC (A\textsubscript{d}\textsuperscript{a2})};

  \draw[->] (council) -- (commission) node[midway,above] {Implementing powers};
  \draw[->] (parliament) -- (commission);
  \draw[->] (commission) -- (cesr) node[midway,above] {Advice};
  \draw[->] (commission) -- (esc) node[midway,above] {Approval};

  \end{tikzpicture}
\end{center}

When looking more closely at the relationship between the actors, four questions arise regarding the appropriateness of the agency model to study the Lamfalussy process. First, the Commission is the agent of the Council and the European Parliament at L2, which determine the limits of the delegated powers in the L1 directive or regulation. Nevertheless, it has the right of initiative at L1 and monitors the implementation at L4. The Commission thus benefits from a substantial autonomy vis-à-vis its principals, which seems contradictory with the control dimension of the agency relationship\textsuperscript{33}.

\textsuperscript{30} Approval differs from adoption: the ESC delivers an opinion on the draft implementing measures drawn up by the Commission. The latter then adopts them if the opinion is positive, in accordance with the regulatory procedure (with scrutiny).

\textsuperscript{31} A sub-agent is “a person appointed by an agent (…) empowered to do so, to perform functions undertaken by the agent (…) for the principal (…) but for whose conduct the agent (…) agrees with the principal (…) to be primarily responsible” (Restatement (Second) of Agency, § 5, quoted in Gregory, W.A., 2001: 6).

\textsuperscript{32} “The sub-agent differs from other agents only in that he acts for and has duties of loyalty to two principals [intermediate agent and ultimate principal] who do not employ him jointly” (Gregory, W.A., 2001: 109).

\textsuperscript{33} “Control is a defining feature in the legal definition of agency. A principal has the right on a continuing basis to control the methods by which the agent achieves results, as opposed to the right simply to assess the results achieved against benchmarks established by contract” (DeMott, D.A., 1999: 233).
Second, the Commission grants a mandate to CESR for advice on the drafting of technical measures. However, the means of control of the Commission towards CESR are relatively limited. As aforesaid, the political approach of agency identifies two types of *ex post* control of the agent: monitoring and sanctions.

In terms of monitoring, the Commission services participate in the CESR expert groups during the preparation of the L2 advice, but their role consist in “informing the members of the political priorities, discussing emerging ideas” (CWM, 2001: 32), not in orientating the drafting of the piece of advice. This therefore reduces the possibility for the Commission to have a monitoring role.

In terms of sanctions, four general means are at the disposal of the principal: unilateral refusal of compliance with the agent's decision, adoption of new legislation overruling the agent's action, dismissal or reappointment of the agent's personnel and cuts in the agent's budget (Pollack, M.A., 1997: 116-117). Firstly, the Commission can unilaterally refuse to comply with the piece of advice of CESR. The drafting itself of implementing measures is indeed done exclusively by the Commission services, possibly without taking account of CESR's advice which is not binding. However, this mechanism is less probable given that, on the one hand, the decision to resort to the Lamfalussy process is a decision of the Commission on account of its right of initiative at L1 and, on the other hand, this would jeopardize the smooth working of the implementation process on account of the role of CESR at L3. Secondly, the Commission could submit to the Council and the European Parliament a new legislative proposal revising the content of the advice of CESR. This control option is unlikely given that the Commission can simply refuse to comply with the piece of advice. Finally, control by the Commission is also limited by the fact that it cannot dismiss or reappoint members of CESR and has no competence over its financing, which is provided by the Member States (CESR, 2006: article 8, § 2). As a result, it is clear that CESR does not act as an agent of the Commission.

Third, the Commission also delegates to the ESC the approval of the draft implementing measures designed by the Commission after the advice of CESR (this is the function of the ESC as a regulatory committee), as well as the possibility to influence the L2 mandates of CESR (CWM, 2001: 29). The Commission has two means of controlling the ESC.

In terms of monitoring, the Commission has a representative, the Director-General of the DG Internal Market, who is, unlike the case of CESR, the chairman of the Committee and who submits the draft measures to the Committee. This provides the Commission with a control mechanism over the ESC (Dehousse, R., 2003: 802).

In terms of sanctions, the Commission can affect the budget of the ESC when it drafts the Community budget. Nevertheless, in the first place, the Commission cannot simply disregard an unfavorable vote of the ESC on its draft measures, insofar as under those circumstances these measures are automatically transmitted to the Council. In the second place, the Com-

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34 The fact that the ESC exercises the role of a regulatory committee is decided by the Council and the European Parliament, in each Lamfalussy directive (Commission, 2003a: 1, 3). The Council and the European Parliament, as ultimate principals, thus give their consent to the sub-agency both on its existence and on its functions. Given that the first Lamfalussy directive on Market Abuse (Directive 2003/6/EC) entered into force on April 12, 2003, the ESC worked as an advisory committee to the Commission at L1 until then (IIMG, 2003: 15-16), before starting exercising its “central role” of regulatory committee (CWM, 2001: 29).

35 Moreover, if the Council does not manage to gather a qualified majority of votes to either approve or indicate its intention to oppose the draft measures within the deadline set in the basic instrument, the Commission has committed itself not to adopt the measures if there are “predominant views” in the Council which are against them (aerosol clause). With the future replacement of sunset clauses by the regulatory procedure with scrup-
mission can hardly overrule the decision of the ESC. The Commission can submit a new legislative proposal, but this would have to be approved by the European Parliament as well as the Council. In the final place, the Commission does not appoint the members of the ESC, who are representatives of the Member States. In conclusion, control instruments of the Commission over the ESC exist, but are limited.

A general argument on comitology attributes a reverse control relationship, that is, from comitology committees towards the Commission. This would weaken the above conclusion. The rationale of that argument is that, given that all members of the comitology committees, except the Commission representative, are appointed by the Member States and that the type of comitology procedure, leaving more or less autonomy to the Commission, is chosen by the Council and the European Parliament (Pollack, M.A., 1997: 115), these committees are police-patrol agents of the Council overseeing the Commission (Pollack, M.A., 1997: 114; Dehousse, R., 2003: 802). In 1962, the first year of comitology before the term had been coined, there was indeed rivalry between national administrations and the Commission (Bergström, C.F., 2005: 54-56). Nevertheless, the situation quickly evolved towards cooperation. Data on the working of committees indicate only a very small number of referrals to the Council, suggesting that comitology committees (including the ESC) are not active watchdog committees of the Council. They are rather pools of experts cooperating with the Commission, while providing, if need be, the institutional possibility for Member States to express their national interests (Dehousse, R., 2003: 802). Therefore, the assumption of a sub-agency relationship between the Commission and the ESC is not invalidated insofar as there seems to be some control of the Commission through its chairmanship and monopoly on the initiative at L2. In other words, the ESC can be considered both an agent of the Council by constituting a safety net for vital national interests and of the Commission by approving its draft implementing measures and advising it regarding the L2 mandates of CESR.

tiny, the European Parliament may, in case there would not be predominant views within the Council (an unlikely case given that, to approve the L1 measures previously, the Council would have had to gather a qualified majority of votes, nay unanimity in some instances), oppose the draft measures, which would then not be adopted (Council Decision 2006/512/EC, article 1, § 7).

36 Police-patrol oversight can be defined as the examination by the principal of “a sample of the executive agency activities, with the aim of detecting and remedying any violations of legislative goals and, by its surveillance, discourage such violations” (McCubbins, M.D., Schwartz, T., 1987: 427).

37 Regarding the management procedure, from 1962 to 1978, less than 0.05% (eight out of 16,258) of the votes taken by the agricultural management committees led to a referral to the Council. The Commission reported that this trend was confirmed by later statistics, specifying that no negative opinion were delivered in 1987 and 1988. Subsequent data for the year 1995 showed no case of negative opinions out of 2231 draft implementing measures (Commission, 1989: 9; Commission, 1996: 6). Regarding the regulatory procedure, around 2% of the implementing measures drawn up in 1987 brought about referrals to the Council. The percentage was 1.25% for 1995 (Commission, 1989: 8-9; Commission, 1996: 6).

From 2000 (the beginning of annual reports on the working of comitology committees – Decision 1999/468/EC, article 7, § 4) up to and including 2005, there have been 51 referrals of implementing measures, to be adopted under both the management and regulatory procedures (data are not distinguished), to the Council. In percentage, the referrals have not exceeded 1% of all such measures, decreasing to 0% in 2003 (Commission, 2002: 3; Commission, 2003a: 3; Commission, 2003b: 18; Commission, 2005a: 3; Commission, 2005c: 6; Commission, 2006b: 6).

38 All implementing measures adopted by the Commission in the Lamfalussy process, up to and including 2005, have received a favorable opinion of the ESC (Commission, 2005a: 30; Commission, 2005d: 26; Commission, 2006c: 27; see also Commission, 2006a: 5).
Four, the agency pattern does not cover one of the main novelties of the Lamfalussy reform, namely the role of CESR at L3, which is supposed to “act alone as a fully independent committee of national regulators” (CWM, 2001: 31). This leads us to the second mode of fiduciary delegation.

III.2. Trust Relationship

The trust is a legal concept from equity (Hayton, D.J., 2005: 9); it is applied in common law regimes and some variations may be found in civil law. It can be defined as “the legal relationships created – inter vivos or on death – by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose”. The trust differs from agency on three aspects notably: scope of the fiduciary relationship, content of delegation and control over the fiduciary. First, while the agent acts for the benefit of the principal, i.e. the one who delegates, the trustee, who is the equivalent of the agent, acts for the benefit of a beneficiary, not of the settlor – unless the latter is also the beneficiary. This implies that the intent of the settlor is not to obtain a return for himself/herself as is the case for the principal (DeMott, D.A., 1998: 1039-1040; Gregory, W.A., 2001: 3; Pettit, P.H., 2006: 16, 486), but to transfer that return to other persons (the beneficiaries). Second, what is delegated in the trust is not empowerment in an area, but management of property rights. Third, whereas the control exercised over the agent by the principal/beneficiary is substantial (Gregory, W.A., 2001: 14), the control exercised over the trustee by the beneficiary, joint trustees and, in some specific cases, the settlor, is limited. Control in the trust is mainly a control of compliance with duties through suits, while control in agency is also a control through instructions from the principal.

Applying the concept of trust to EU governance, G. Majone (2001: 113-116) argues that political property rights (policy-making rights), which include elements of national sovereignty, are transferred from the Member States to the Community institutions for the benefit of the former. This is the case for example with the European Central Bank, whose role consists in preserving the property rights of the Member States in the area of monetary policy. Similarly, some provisions of the EC Treaty provide the Commission with property rights, such as the right of initiative, in order to safeguard the acquis communautaire. G. Majone adds that the main difference between the situation of the agent and the trustee is their level of independence with regard to the principal or settlor respectively. Contrary to the agency relationship, where the agent’s preferences must be in line with those of the principal in order to avoid or minimize agency losses, in the case of a trust relationship, these preferences have to be relatively different from those of the settlor, to ensure the credibility of the policy proposals put forward by the trustee.

Based on this analysis, the trust approach can help understand the three unsolved problems mentioned above. Firstly, the apparent paradox of the Commission – being on the one hand controlled by the Council and the European Parliament when being delegated implementing powers at L2 and, on the other hand, independent at L1 and controlling the Member States at

39 For instance, the Bewind in Dutch law and the Treuhand in German law (Witz, C., 1991: 11-14).
40 Convention on the Law Applicable to Trusts and on their Recognition, article 2.
42 In that sense, D.J. Hayton describes the borderline between trust and agency as “when the settlor's influence or control is so excessive that the trustees must in substance be treated merely as agents administering and distributing his property as he wants” (Hayton, D.J., 2003: 136).
L4 –, can be explained by the assertion of double mandate. The Commission fulfils two functions: one of agent of the Council (and thus the Member States acting through that Community institution) and the European Parliament in a dual agency relationship at L2, and one of trustee (T) of the Member States (its settlors, S₁) at L1 and L4, acting for the benefit of the EU citizens and organizations (the beneficiaries, B) in a trust relationship (i)⁴³. This is illustrated in the graph below.

**Graph 3: A Second Approach of the Lamfalussy Reform (L1, L2 and L4) – Trust Relationship and Revised Agency Relationship**⁴⁴

![Graph 3: A Second Approach of the Lamfalussy Reform (L1, L2 and L4) – Trust Relationship and Revised Agency Relationship](image)

Next, the role of CESR does not currently fit into the agency model on account of its independence from the Commission. This issue might be explained when looking at the role of CESR at L3; in that way, the third problem regarding the interpretation of L3 could also be answered. First, CESR is made up of representatives of the national authorities for the regulation of securities, who are designated by the Member States. Next, those representatives exercise at L3 competences they have at the national level, i.e. setting up guidelines and regulatory practices for nation-wide actors. As a result, it could be argued that the Committee plays a role of trustee (T₂) of the Member States (its settlors, S₁), managing the assets that national regulatory competences constitute, for the benefit of market participants (practitioners, end-users and consumers – the beneficiaries, B₂). The graph is as follows.

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⁴³“The Commission is an agent when it exercises implementing powers delegated to it by the Council”; it is a “trustee of the member states when it exercises certain powers expressly granted to it by the treaties, such as agenda-setting, ensuring compliance with EC law, or issuing directives and decisions without the Council’s approval under Article 86(3) (ex Article 90(3)) of the EC Treaty” (Majone, G., 2001: 114)

⁴⁴No arrow is included in the relationship between the Commission and CESR due to the conclusion in point 1 that CESR is not an agent of the Commission.
**Graph 4: A Third Approach of the Lamfalussy Reform (All Levels) – Revised Trust and Agency Relationships**

<table>
<thead>
<tr>
<th>Member States/Council</th>
<th>European Parliament</th>
</tr>
</thead>
<tbody>
<tr>
<td>Implementing powers</td>
<td></td>
</tr>
<tr>
<td>L1/L4*</td>
<td>Commission (A^d, T^1, P^s)</td>
</tr>
<tr>
<td></td>
<td>Approval</td>
</tr>
<tr>
<td></td>
<td>CESR (T^2)</td>
</tr>
<tr>
<td></td>
<td>EU citizens and organizations (B^1)</td>
</tr>
<tr>
<td></td>
<td>ESC (A^ds)</td>
</tr>
<tr>
<td></td>
<td>EU securities market participants (B^2)</td>
</tr>
</tbody>
</table>

*L1: right of initiative  
L3: national regulatory competences  
L4: monitoring of the implementation*

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**IV. Working Hypotheses for the Empirical Analysis**

It becomes clear from the preceding theoretical discussion that several hypotheses have to be taken into account, when evaluating the potential benefits of the Lamfalussy reform. Our research has allowed us to further investigate these hypotheses regarding the benefits of the Lamfalussy reform (section III) and to test them through an empirical analysis (section IV). By benefits, we mean the potential contribution of the reform to the policy effectiveness in the securities sector as well as its consequences on the balance of power between the Community institutions.

**IV.1. Status Quo: Member States Predominance**

This first hypothesis could be referred to as the *status quo* option: some observers (Grossman, E., 2004; Hertig, G., Lee, R., 2003) are sceptical about the alleged benefits of the new framework. In their opinion, the Council and the European Parliament will continue to disagree on

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*CESR is considered a trustee of the Member States, rather than an agent of the Commission. Hence, the absence of arrow in its relationship with the latter.*
the principles and the scope of delegation to the Commission, because financial regulation remains a very sensitive issue in many national contexts. As a result, the comitology system will not function more rapidly or smoothly. On the contrary, with the aerosol clause, a greater veto power is given to the Council in order to block the implementing measures of the Commission. Overall, the new process will not succeed in improving the policy effectiveness – notably reducing excessive delays in the implementation of Community law – and the balance of power between the three main Community institutions will not change significantly since each of them will stick to its prerogatives.

The following arguments support this hypothesis. First, it follows from the main objective of the new system in terms of speed and flexibility that excessive details should be avoided at L1. The legislator (the Council and the European Parliament) should adopt general principles at L1, leaving it to the Commission, after consulting the ESC and CESR and informing the European Parliament, to decide on the technical details. However, despite the fact that market actors have a greater access to information through the consultation process organized by the Commission at L1 and through CESR at L2, interest groups will probably continue lobbying at L1 in order to have the technical details already regulated at that level. Second, although the global reaction to the new Lamfalussy process has been positive, it remains an open question how far the Member States are really enthusiastic about it. Third, opening up the consultation process does not prevent Member States from agreeing upon policy decisions before that process is closed as in the case of the Market Abuse Directive (Grossman, E., 2004: 649). The IIMG (2004: 23) also reports that market participants “want more transparency with regard to the Council and the European Securities Committee; two rounds of consultation; and more extensive and convincing feedback statements so that consultation is demonstrably a genuine dialogue”.

IV.2. Agency Relationship: Commission as Agent, ESC as Sub-Agent

A second hypothesis – called the Lamfalussy hypothesis because it was the one the Group of Wise Men had mind – consists in interpreting the Lamfalussy scheme purely and simply as a method of delegation in line with the agency theory. The new four-level approach is expected to enhance the overall policy effectiveness in the securities sector, provided that the risk of agency loss is well under control. The argument of the Committee of Wise Men (CWM, 2001: 24-25) is summed up as follows:

46 In the explanatory memorandum of its proposal, the Commission indicated that, “in view of the urgency of action in the area of market abuse, and in view of the extensive consultations on the issue already carried out with Member State governments, regulators and supervisors, financial industry (Forum Group meetings) and other interested parties, the Commission has decided to come forward with the proposal now rather than to delay it through recourse to a more formal consultative process. In line with the report of the Wise Men, the Commission will engage in consultations, as foreseen in the Stockholm European Council resolution, when it prepares the implementing measures in accordance with the relevant provisions of the proposed Directive” (Proposal for a Directive of the European Parliament and of the Council on insider dealing and market manipulation (market abuse), presented by the Commission on 30 May 2001, COM(2001) 281 final - 2001/0118 (COD) (Luxembourg: Office for Official Publications of the European Communities, http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0281en01.pdf), p. 5). The Economic and Social Committee reacted by saying that “the Directive itself fails to meet one of the most important elements of the Lamfalussy Recommendations. This is that consultation with market practitioners and other interested parties should be open and continuous throughout the legislative process. This was not done in the case of this Directive” (Opinion of the Economic and Social Committee on ‘Insider dealing and market manipulation (market abuse)’ (2002/C 80/14), Official Journal of the European Communities C 80/61, April 3, 2002, point 3.2.).
“(i) The legislative **process would speed up** – because the key Level 1 political co-decision negotiations between the Commission, the Council of Ministers and the European Parliament would focus solely on the essential issues and not on technical implementing details. As the section on Level 2 shows, the process of updating technical details would also be speeded up.

(ii) **The process would be democratic and flexible** – with the range and scope of implementing powers being defined by the Council of Ministers and the European Parliament by co-decision on a case by case basis for each Level 1 proposal.

(iii) **The EU institutions** would be able to benefit from the technical and regulatory expertise of European regulators, with the European Commission fully retaining its right of initiative”.

As regards the balance of power, the new process is likely to strengthen the position of the European Parliament to some extent. As mentioned in point I, some safeguards have been built into the process at L2, in order to provide the European Parliament with control on the implementing measures (three-month period to react to these measures and sunset clauses). The new reform of comitology, leading to the creation of a call-back right, seems to reinforce this shift of power towards the European Parliament.

**IV.3. Trust Relationship: Commission and CESR as Trustees**

A third hypothesis assumes that the Commission and CESR, or CESR alone, by increasing their autonomy, will in the long run move to a position of trustee of the Member States. Two basic arguments are advanced to support that hypothesis.

One could reasonably expect that, in highly technical matters such as the securities markets, the experts of the Commission (DG Internal Market) will progressively form an “epistemic community” with the national regulators and the market actors (Wilks, S., 2005: 447), which will be on an equal footing with the Member States and the European Parliament. The Lamfalussy process even reinforces this “deliberative autonomy” since the Commission and CESR control the chain of command in the tasks of initiating, implementing and monitoring legislation. More generally, for S. Wilks (2005: 439), the Commission as a guardian of the EC Treaty has gained considerable power so that it has become less vulnerable than before to the sanctions of its principals. Revising the agent’s mandate could thus be very costly for them.

But one could take this approach a step further by putting forward that some political property rights have already been transferred from the Member States to the Commission and CESR. Substantial powers have indeed been assigned to the Commission by the EC Treaty (right of initiative at L1, control of compliance with Community legislation at L4) in order to protect the interests of the EU citizens and organizations. We may also infer from the Lamfalussy structure that CESR has inherited some political property rights from the Member States at the implementation level since CESR is supposed to play a significant role at L3 instead of the national regulatory authorities. Moreover, as mentioned in point II, CESR does not actively behave as if it was a guardian of national interests, but takes its decisions by consensus for the benefit of market participants.

In terms of policy effectiveness, a trustee relationship would probably produce effects similar to the second hypothesis (more transparency through extensive consultation, increased speed of the decision-making process, etc.). But the balance of power in this case would probably be, as above-mentioned, in favor of the Commission.

As a synthesis of this theoretical discussion, table 1 below indicates the impact of the Lamfalussy reform, which could be expected from alternative theoretical approaches.
### Table 1: Hypotheses on the Implications of the Lamfalussy Reform

<table>
<thead>
<tr>
<th>Hypothesis/Dependent Variable</th>
<th>Policy Effectiveness</th>
<th>Balance of Power between EC Institutions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Status Quo: Member States Predominance</td>
<td>Unchanged</td>
<td>Unchanged</td>
</tr>
<tr>
<td>Agency: Commission as Agent, ESC as Sub-Agent</td>
<td>Increased</td>
<td>In favour of the European Parliament</td>
</tr>
<tr>
<td>Trust: Commission and CESR as Trustees</td>
<td>Increased</td>
<td>In favour of the Commission</td>
</tr>
</tbody>
</table>

### V. Empirical Test of the Hypotheses

In order to empirically test the plausibility of the three research hypotheses presented above, about fifteen interviews were conducted with representatives of CESR, the Commission (DG Internal Market), the Council, the ESC, the European Parliament and the Inter-Institutional Monitoring Group, and with members of the permanent representations of four Member States, selected according to the main schools of regulation. The topics discussed with these actors focused mainly on the actual relationships between the Community institutions, the ESC and CESR, and on the first tangible impacts of the Lamfalussy reform on the regulation of the securities markets (for instance, assessment of the decision-making process and outputs of the directives adopted after the Lamfalussy reform). In addition, a roundtable took place in Brussels with some of these representatives to confront their points of view. Evidence from the 2006 and 2007 reports of the IIMG and the first part of the Commission FSAP evaluation (2005b) was also added to those sources.

In the first place, contrary to the expectations of the intergovernmentalist school of thought which predicted a failure in the implementation of the process (Hertig, G., Lee, R., 2003: 364-370), there is now widespread agreement among the interested parties to consider that the Lamfalussy approach has fulfilled its general purpose, namely that of providing an appropriate process for passing primary and secondary legislation in the securities field. The Lamfalussy process has created a political momentum that has speeded up the adoption of the FSAP, even if there are still several unresolved issues or criticism surrounding the new procedure. Similarly, the ongoing process has not strengthened the influence of the Member States. For these reasons, the status quo hypothesis should be ruled out.

At this point, we suggest making a distinction between the policy outcome at L1 and L2 on the one hand, and at L3 on the other hand.

In the second place, evidence based on the four Lamfalussy directives seems to validate the second hypothesis. Thanks to extensive and frequent consultation of experts, the Lamfalussy process has indeed reduced the average time taken to negotiate and adopt the first framework directives at L1, compared to the normal co-decision procedure (Commission, 2005b: 11). In this sense, we may conclude that delegation has enhanced the policy effectiveness in the securities sector.

According to Council and Commission officials, the adoption of the Market Abuse, Prospectus and MIFID directives at L1 went relatively swiftly. The positive aspect of the Lamfalussy reform thus is deep, technical, enlarged consultation that belongs to the structure of the decision process itself. If consultations make the decision-making process more transparent (prac-
tically anybody can voice his/her opinion when consultations are carried out), the downside is that there is much information to be sorted out. A second problem in the new process is how to distinguish between framework legislation, which should be adopted at L1, and technical measures, which should be adopted at L2 (IIMG, 2006: 9-10; Avgerinos, Y.V., 2002: 273-287). A third one is that, with the creation of the new regulatory procedure with scrutiny (see point I), the issue of distinction between framework legislation and technical measures has been added, at L1, regarding L2 measures themselves. Indeed, the Council and the European Parliament, when co-deciding on a directive or regulation in the field, will have, following the adoption of alignment proposals, to determine whether or not measures implementing that L1 instrument are to be considered of quasi-legislative nature or not. The rationale underlying this approach is to ensure that the European Parliament, as a co-legislator, is on a par with the Council, when the nature of the implementing measures legitimates its involvement in view of the institutional balance (Christiansen, T., Vaccari, B., 2006: 13-14).

Things went equally smoothly at L2, even in the case of the MIFID given that projects of such magnitude usually either take 10 years to be adopted or are never approved. It is worth noting that the Commission does not always follow closely the advice of CESR (IIMG, 2006: 12, 26). For instance, in the case of the MIFID, the Commission decided to substantially change the advice because it was too long and too detailed to be incorporated in the directive.

Regarding the balance of power, the Lamfalussy reform did not seem, at first, to have changed it dramatically at L1 and L2. The European Parliament increased its control on the ESC through a three-month period to react to draft implementing measures and sunset clauses, but could not veto implementing measures. However, the institutional changes brought by the reform might have reinforced the determination of the European Parliament to request a greater involvement in comitology. The result was a call-back right for the implementing measures adopted under the regulatory procedure with scrutiny, which is meant to be applied not only to the Lamfalussy directives, but also to other areas (environment, health, movement of persons across borders and other financial matters). This provides the European Parliament with a substantial potential of influence at L2. Nevertheless, it remains that the European Parliament is not directly involved in the working of the ESC and that it can be quite difficult for its members to scrutinize all the technical details of the securities legislation. Most interviewees think that it is in fact the Commission that has gained a great deal of power. At L1, it has the right of initiative; at L2, it has a preponderant role because it drafts the proposals, controls the consultation process and chairs the meetings of the ESC. Nevertheless, notwithstanding this gain in power, there can be no doubt that the Commission remains accountable to a large extent to its principals, namely the Council and the European Parliament, and that it should be considered an agent, not a trustee, of the latter.

In the third place, it is far more difficult to assess the validity of the trustee hypothesis, i.e. whether the Commission and CESR, or CESR alone, in fact, act as trustees of the Member States at L3. The problem here is that the process is completely new and that, in future, CESR’s autonomy vis-à-vis the Member States will depend on several factors such as external events (competition between financial centers), CESR’s internal organisation and dynam-

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47 The 2006 decision holds that measures to be adopted under the regulatory procedure with scrutiny are “measures of general scope designed to amend non-essential elements of a basic instrument adopted in accordance with the procedure referred to in Article 251 of the Treaty [co-decision procedure], including by deleting some of those elements or by supplementing the instrument by the addition of new non-essential elements” (Council Decision 2006/512/EC, recital 3). Measures seeking to amend essential elements of the legislative act can only be adopted by the legislator on the basis of the Treaty (article 1, § 2).
ics as well as its funding. CESR indeed reported to the IIMG “difficulties related to a lack of means to finance cooperation tools foreseen in Level 1 legislation” (IIMG, 2007: 12). In addition, even if the common approaches defined by the members of CESR already have an influence on the day-to-day supervision, their effect is still not binding (CESR, 2004: 10). Similarly, if CESR has started using majority rules\textsuperscript{48}, development of its competences requires a proposal from the Commission to be adopted by the Council and the European Parliament (CESR, 2004: 3, 16-17). It is however uncertain whether Member States are inclined to grant it additional competences and funding, and see it evolving into a European regulatory agency.

In addition to the will of the Member States, the increased autonomy of CESR is also subject to the balance of power between the Community institutions. In that way, the European Parliament expressed concerns about the lack of transparency stemming from the “discretionary” powers of CESR at L3 and requested a strengthening of its oversight on the activities of the Committee. As a result, CESR accepted in September 2005 to regularly inform the Committee on Economic and Monetary Affairs (ECON) of the European Parliament on its activities at L3\textsuperscript{49}. The DG Internal Market took account of that balance when mentioning in a working document on the application of the Lamfalussy process that “Level 3 must evolve in a carefully modulated, open and transparent environment that fully respects Institutional boundaries and the importance of democratic accountability. CESR standards adopted at Level 3 must be fully compatible with – and cannot substitute for – binding EU legislation at Levels 1 and 2. They should not prejudice the political process, nor the Institutional prerogatives of the Parliament, the Council or the Commission” (Commission, 2004: 10, point 31).

VI. Conclusion

The three main novelties of the Lamfalussy reform are, first, the distinction between framework principles (L1) and implementing measures (L2), second, the creation of CESR and its systematic consultation of market actors at L2 and, third, the introduction of a third level to ensure the consistent and equivalent implementation of securities legislation. Regarding the decision-making framework already present before the reform, our argument is that it matches an agency relationship between the Commission on the one hand, and the Council and the European Parliament on the other hand. However, the Commission has another mandate towards the Member States, that of trustee, consisting in exercising attributes of sovereignty (right of legislative initiative and implementation monitoring) for the benefit of EU citizens and organizations. Regarding the new elements of the process, the Commission sub-delegates to the ESC the right of advice on L2 mandates and approval of L2 draft measures; contrary to what has been contended, the ESC has not only features of an agent of the Council, but also of an agent of the Commission. As regards the role of CESR, it turns out to be impossible to integrate into an agency model with the Commission as a principal. It has therefore been suggested to consider CESR as a trustee of the Member States, delegating to the Committee the management of “regulatory assets” for the benefit of the market actors.

\textsuperscript{48} The charter of CESR holds that “when delivering advice to the European Commission, the Committee may vote according to the qualifying majority vote in the Council if the Chair considers that there is a split of views or if one or more members ask for a vote”, and that, “for Level 3 work explicitly requested from CESR by Community legislation or directly related to Community legislation, unanimity is required if one or more members so wishes” (CESR, 2006: articles 5, § 6 and 5, § 7 respectively).

By introducing a new mode of governance, the Community institutions have succeeded in reducing to a large extent the backlog in the securities markets regulation. Cooperation with market actors and national supervisors has increased the overall policy effectiveness. Empirical studies provided by the Commission (Commission, 2005b) and the IIMG (IIMG, 2003, 2004, 2006, 2007) suggest that the speed of the process has increased overall and that there are less bottlenecks than before in the different steps leading to the adoption of legislation. There is also more consistency in the proposals submitted by the Commission to the Council and the European Parliament, thanks to extensive consultation. In sum, the Lamfalussy process has brought about more transparency and more expertise in the policy process and might also contribute to the emergence of a common culture of supervision in the securities sector.

As far as benefits for the markets are concerned, the policy effectiveness and political momentum created by the institutional reform should be considered in parallel with the increased efficiency of EU securities markets – measured by their innovation capacity\(^{50}\) –, which was generated by the deregulatory content of the Community policy itself (Gkantinis, S., 2006: 3-5, 19, 22-27, 48, 52), developed following the White Paper on the Internal Market (Commission, 1985: 29).

The Lamfalussy reform proposed a new process and is recent. We are aware that our assertions on policy effectiveness and balance of power thus remain debatable. The system is still in flux, as indicated by the blurring of the boundary between L1 and L2 in the activities of CEIOPS, in the framework of the Solvency II project; the IIMG wondering whether L3 committees should from now on be empowered to propose amendments to legal texts (IIMG, 2007: 3, 15). This observation also emerges from the various questions that are still unsolved at all four levels (IIMG, 2007: 1, 4-15). Among these questions, two can be singled out. First, resourcing has arisen as an important issue in the functioning of CESR, the IIMG emphasizing that “the budget constraint appears to be real and a prerequisite for further development is that it is solved” (IIMG, 2007: 12)\(^{51}\). Additional financial means for CESR, and more generally for L3 committees, could indeed contribute to overcoming distrust between Member States, and ensuring a cooperative relationship between the Commission and these committees.

Second, the new call-back right raises the question of whether it will have an impact on the functioning of the Lamfalussy structure and, more largely, the Community process, either through its effective use or through disputes on its choice in legislative instruments. That impact depends on whether the European Parliament will from now onwards act as with its right of co-decision or as with its previous right of scrutiny. Indeed, in the first case, the European Parliament fully used its new right of co-decision to gain new powers in comitology, namely its right of scrutiny (Bergström, C.F., 2005: 219-271). In the second case however, the use the European Parliament has so far made of its right of scrutiny was limited\(^{52}\). As contemplated

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\(^{50}\) “Trading has become automated in all major European exchanges, which have converged in a common, and arguably efficient, trading model. To finance their investment in trading technology, European exchanges have become for-profit corporations and have often sought a listing in their markets. They have expanded their reach beyond their local jurisdiction by engaging in mergers and alliances, and they have diversified their businesses by establishing derivative trading facilities” (Gkantinis, S., 2006: 48).

\(^{51}\) “The other Level 3 Committees indicated that similar financing issues have not arisen in their sectors” (IIMG, 2007: 12).

\(^{52}\) Since its creation in 1999 (Council Decision 1999/468/EC, article 8), the right of scrutiny has only been used twice: once in 2000 (Commission, 2002: 3) and once in 2005 (Commission, 2006b: 4-5). Even when taking into account the three other cases where the European Parliament considered the Commission had exceeded its implementing powers without referring to article 8 of the above decision (one case in 2004 and two in 2005 – see Commission, 2005c: 5-6 and Commission, 2006b: 5-6 respectively), the total number of cases
in a GAIN report of the United States Department of Agriculture (USDA, 2006: 5), the European Parliament could threaten to use its new comitology right if the Commission does not change its plans to draft implementing measures giving food companies two years to adapt their nutrition and health claims aimed at children to the new rules of Regulation 1924/2006/EC of December 20, 2006 (article 14, § 1) (Taylor, S., 2007: 1)\(^5^3\). The Commission alignment proposal required to grant the European Parliament a call-back right in that regulation has however not yet been adopted\(^5^4\). The next steps of this dispute will indicate towards which case the European Parliament is heading.

\(^5^3\) The European Parliament favors a 6-month period.

\(^5^4\) As of July 19, 2007, the common position of the Council is pending (Website of the European Commission – Prelex, [http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=194788](http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=194788)).
VII. Bibliography


