THE LAMFALUSSY PROCESS AND EU BANK REGULATION: ANOTHER STEP ON THE ROAD TO PAN-EUROPEAN REGULATION?

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I. Introduction

In 1999, the European Commission issued the Financial Services Action Plan, a detailed plan to complete the integration of the financial services market within the European Union (sometimes "EU"). At the March 2000 European Council meeting in Lisbon, the leaders of the Member States approved this Plan and set an aggressive deadline for implementation in 2005.[1] To aid in meeting

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this deadline, the complicated, lengthy legislative process within the European Union needed to be modified to accelerate the passage of financial services legislation. The EU institutions agreed to such an accelerated process—the Lamfalussy process—and began applying it to securities legislation in 2002 and to banking legislation in 2004.

This article focuses on the Lamfalussy process's accelerated method of lawmaking in financial services within the European Union.[2] The first section of this article provides background information on the economic importance of the banking industry in a nation's economy, and the resulting hesitancy of nations to cooperate in international bank regulation. The second section describes and analyzes the Lamfalussy process. The third section analyzes recent assessments of this new legislative process and discusses implementation issues that have arisen during its short life. Finally, I argue that the Lamfalussy process is merely another step in the trend of greater financial integration and regulatory convergence within the European Union. The next step in the integration of financial services markets in the EU may be the creation of a dual banking system similar to that of the United States, where national banks and state-chartered banks operate under two separate, but related, bodies of law. While not an ideal solution, a Europeanized dual banking system is a likely next step in light of the failed ratification of the Constitutional Treaty and the resulting hesitancy and inability to create new European Union wide programs and institutions.

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[1] Presidency Conclusions, Lisbon European Council, ¶¶ 21-22 (March 23-24, 2000), *available at* http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/00100-r1.en0.htm.

[2] Eur. Comm'n, *Final Report of the Committee of Wise Men on the Regulation of European Securities Markets* 98 (Feb. 15, 2001), *available at* http://europa.eu.int/comm/internal_market/securities/docs/lamfalussy/wisemen/final-report-wise-men_en.pdf [hereinafter *Lamfalussy Report* (so named for Committee chairman Alexandre Lamfalussy)]. S*ee generally* Eur. Comm'n, *Lamfalussy Report*, *available at* http://europa.eu.int/comm/internal_market/securities/lamfalussy/index_en.htm [Assorted Documents].

II. Background

Banking is typically one of the most regulated industries within a nation's economy because it serves as the primary payment mechanism for economic activity.[3] The banking system gathers financial assets and then redeploys them for productive purposes via loans and other types of credit.[4] Because banking and its payment function are so central to the efficient operation of an economy, national governments tend to regulate this industry heavily[5] and at times, even own banks themselves.[6] As international trade has increased in size and importance, the banking system has become more international. For example, world merchandise trade increased from $579 billion in 1973 to $7,294 billion in 2003.[7] Also, international bank loans increased 669% from $2,713.7 billion in 1985 to $18,155.5 billion in 2003.[8]

Despite this growth in international banking, national governments have been very hesitant to enter into international agreements that would require them to cede regulatory control of banks incorporated or operating within their jurisdictions. It even appears that some policymakers analogize a transfer of regulatory control over the banking system to a transfer of sovereign power.

Additionally, bank executives[9] and scholars of European Union law have both recognized that national governments tend to follow protectionist policies with respect to ownership and regulation

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[3] Ed Stevens, *Evolution in Banking Supervision*, ECON. COMMENT., Mar. 1, 2002, at 1.

[4] Robert Krainer, *Banking in a Theory of the Business Cycle: A Model and Critique of the Basle Accord on Risk-Basel Capital Requirements for Banks*, 21 INT'L REV. L. & ECON. 413, 422 (2002).

[5] MICHIE ON BANKS AND BANKING ch. 1, § 3 (1999).

[6] Michael Blanden, *Can the Risks Be Seen?*, THE BANKER, May 1, 1997, at 34; *Survey—International Banking: A Blurred Euro-Vision*, ECONOMIST 12, May 21, 2005 [hereinafter *A Blurred Euro-Vision*].

[7] World Trade Organization, *International Trade Statistics 2004* at 30 tbl.II.2 (2004).

[8] *The International Banking Market*, BIS Q. REV., June 2004, at A52 tbl.8A (in Statistical Annex), *available at* http://www.bis.org/publ/qtrpdf/r_qa0406.pdf. *See* http://www.bis.org/statistics/qcsv/hanx8a.csv.

[9] HSBC Holdings PLC, 2005 Interim Results Presentation, Aug. 1, 2005, at 27, http://a248.e.akamai.net/7/248/3622/ff342c5c6baac5/www.img.ghq.hsbc.com/public/groupsite/assets/investor/hsbc2005irp_script.pdf;brochid=4M2N3I0XCQ44NQFIYN1CGWQ. A HSBC executive notes, "There is always a risk of political pressure leading to protectionism." *Id*.

of banks organized within their jurisdiction.[10] An indicator of nationalist, protectionist policies is the relative lack of cross-border merger activity among European financial institutions.[11] The most recent example of protectionism with respect to banks is the alleged favoritism of the Bank of Italy towards Italian buyers over non-Italian bidders for two Italian banks, Banca Nazionale del Lavoro and Banca Antonveneta.[12]

One reason national governments wish to retain control over their banking systems is the high cost of bank failures. National governments or related agencies, such as central banks, typically have lender-of-last-resort responsibility for banks operating within their borders. Thus, if a bank has insufficient liquid funds to meet payment demands from depositors, the national government, possibly through its central bank, may lend funds to the bank so it can meet its demands. Additionally, if a bank becomes insolvent, the national government generally provides funds to the depositors of the failed bank through a deposit insurance program.[13] This allows depositors of failed banks to recoup losses that resulted from their bank's insolvency. If a systemic financial crisis results from the bank failures, these costs to the lender of last resort can increase dramatically. Several scholars have documented the costs of resolving banking crises as a percentage of a nation's gross domestic product ("GDP").[14] For example, it cost Finland 11% of its GDP to remedy a banking crisis in the early 1990s.[15] Likewise, it cost Mexico 20% of its GDP to resolve a financial crisis occurring between 1994 and 1995, and Thailand 42% of its GDP to remedy a financial crisis in the late 1990s.[16]

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[10] *See* TOMMASO PADOA-SCHIOPPA, THE EURO AND ITS CENTRAL BANK: GETTING UNITED AFTER THE UNION 106 (2004).
[11] *A Blurred Euro-Vision*, *supra* note 6.
[12] Tony Barber et al., *A Cloud Over the Bank of Italy: A Proud Institution is Battered by Controversy*, FIN. TIMES, Aug. 3, 2005, at 9.
[13] Federal Deposit Insurance Act, Pub. L. No. 81-797, 64 Stat. 873 (1950) (codified as amended at 12 U.S.C. §§ 1811-1831 (2000)); Council Directive 94/19, 1994 O.J. (L 135) 5 (EC) (also referred to as the Deposit-Guarantee Directive).
[14] MORRIS GOLDSTEIN, THE CASE FOR AN INTERNATIONAL BANKING STANDARD 5-6 (1997); Richard Dale, *Going Global*, FIN. REG. REP., Oct. 1997, at 4; DAVID G. MAYES ET AL., IMPROVING BANKING SUPERVISION 259-60 (2001); Huw Evans, *International Financial Architecture: Learning the Lessons of History*, 2 J. INT'L FIN. MARKETS 70 (2000).
[15] Glenn Hoggarth et al., *Costs of Banking System Instability: Some Empirical Evidence* 15 tbl.A (Bank of England, Working Paper No. 144, 2001), *available at* http://www.bankofengland.co.uk/publications/workingpapers/wp144.pdf.
[16] *Id.*

Despite the reasons for governments not to cooperate, one reason for greater international cooperation in bank regulation is the increasing size of financial institutions with cross-border operations. Large financial institutions, such as HSBC and Citigroup, operate around the globe providing products, including insurance, securities, and traditional banking products, across the financial spectrum to many types of customers, like retail, small business, and corporate customers. Yet, even though financial institutions are increasing in size and complexity, bank regulators, for the most part, have maintained their national orientation. However, national governments have agreed to "soft law" measures intended to minimize systemic disruptions, such as the Core Principles for Effective Banking Supervision.[17]

Beginning in the early 1970s, national governments began to agree to international financial standards that set guidelines for best practice in regulating banks—in particular, internationally active banks.[18] These standards are not legally enforceable, but are soft law[19] or voluntary guidelines on regulatory and supervisory practices within the banking industry.

III. European Union and Bank Regulation

Among the nations of the world, the Member States of the European Union have progressed the furthest in harmonizing the regulation of their banks. One objective of the European Union is the creation of an internal market via the dismantling of internal trade restrictions.[20] The EU's conception of its internal market is based on

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[17] *See* BASEL COMMITTEE ON BANKING SUPERVISION, CORE PRINCIPLES FOR EFFECTIVE BANKING SUPERVISION (Sept. 1997), *available at* http://www.bis.org; *see also* Lawrence Lee, *The Basle Accords as Soft Law: Strengthening International Banking Supervision*, 39 VA. J. INT'L L. 1 (1998-99).

[18] BASEL COMMITTEE ON BANKING SUPERVISION, HISTORY OF THE BASEL COMMITTEE AND ITS MEMBERSHIP (Oct. 2004), *available at* http://www.bis.org/bcbs/history.pdf; *see* GEORGE A. WALKER, INTERNATIONAL BANKING REGULATION LAW, POLICY AND PRACTICE 35-59 (2001).

[19] Daniel E. Ho, *Compliance and International Soft Law: Why Do Countries Implement the Basle Accord*?, 5 J. INT'L ECON. L. 647, 650 (2002); Lee, *supra* note 17 at 4 (1990). Soft law is "an international rule created by a group of specific national authorities and adopted into their nations' laws or administrative codes." *Id.*

[20] Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community, 2002 O.J. (C 325) 33, 40 [hereinafter EC Treaty] (showing that the European Union currently consists of 25 Member States with most of its operations based in Brussels).

four principles, the freedoms of: movement of people, capital, goods and services.[21] Additionally, EU bank supervision is based on the legal principles of home country control, mutual recognition and minimum harmonization of laws.[22] To further integrate the internal market, the EU through the Maastricht Treaty began the process of creating a common currency, the euro.[23] Subsequently, EU leaders began to focus seriously on integrating the financial services market.

In December 1998, at the European Council meeting in Vienna, the leaders of the European Union called for the prompt integration of the financial services sector among member nations.[24] Subsequent to this Declaration, the European Commission proposed a Financial Services Action Plan ("FSAP") that outlined specific steps to be taken to create an internal market for financial services.[25] The heads of state of the EU approved the FSAP with a goal to integrate all EU financial markets by 2005.[26] According to a European Commission report, nearly all the required legislation at the European Union level had been enacted, by June 2004.[27]

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[21] JOHN F. MURPHY, THE CONSTITUTIONAL LAW OF THE EUROPEAN UNION 12 (1996); RALPH H. FOLSOM, PRINCIPLES OF EUROPEAN UNION LAW 107-08 (2005).

[22] Niamh Moloney, *New Frontiers in EC Capital Markets Law: From Market Construction to Market Regulation*, 40 COMMON MKT. L. REV. 809 (2003); Rosa Lastra, *Beyond the Lamfalussy Report*, 3 J. INT'L BANK. REG. 7 (2001); Howard Davies, Creating a Single Financial Market in Europe: What Do You Mean?, FMG Lecture at the London School of Economics 3-4 (Feb. 3, 2004), *available at* http://www.lse.ac.uk/collections/LSEPublicLecturesAndEvents/pdf/20040203Davies.pdf.

[23] Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 11, 1997, 1997 O.J. (C 340) 154. Table 1 is a chart providing a brief timeline of the development of banking regulation within the EU. Great Britain and Denmark opposed the creation of a common currency and opted out of those provisions of the Treaty on European Union. *See* Protocol on Certain Provisions Relating to the United Kingdom of Great Britain and Northern Ireland, July 27, 1992, 1992 O.J. (C 191) 87; Protocol on Certain Provisions Relating to Denmark, July 27, 1992, 1992 O.J. (C 191) 89.

[24] Presidency Conclusions, Vienna European Council, ¶ 51 (Dec. 11-12, 1998), *available at* http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/00300-R1.EN8.htm.

[25] Committee of the Eur. Comm'n, *Implementing the Framework for Financial Markets: Action Plan*, COM (1999) 232 final (May 11, 1999) (also referred to as the Financial Services Action Plan or FSAP).

[26] Presidency Conclusions, Lisbon European Council, *supra* note 1, at ¶¶ 20-21.

[27] Eur. Comm'n, *Turning the Corner: Preparing the Challenge of the Next Phase of European Capital Market Integration* (10th Report) (June 2, 2004), *available at* http://europa.eu.int/comm/internal_market/finances/docs/actionplan/index/progress10_en.pdf [hereinafter *Turning the Corner*]. Of the forty-two legislative measures

One principal purpose of the FSAP was to integrate *all* financial services markets within the EU, instead of merely one sector, such as banking or securities.[28] The EU issued a directive, as its main tool to accomplish the integration, requiring the Member States to transpose the EU law into their national legal systems.[29] To attain the legislative goals in the EU directive, Member States need to enact legislation at the national level to fully implement the provisions of various FSAP directives.[30]

While the economic benefits of an integrated market were clear and broadly agreed upon by Member States,[31] the pace of enacting EU legislation to create a single market for financial services was slow. The enactment of financial services legislation often took between three to five years—from the time the Commission proposed legislation to its publication in the *Official Journal*, and finally to its transposition by national legislatures. One financial services directive in particular—the Prospectus Directive—took over nine years to enact at the EU level.[32] Thus, the Council of Ministers was seriously concerned whether the existing legislative

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required by the FSAP, ninety-three percent had been enacted at the EU level by June 2004. *Id.*

[28] Council of the European Union, *Regulation of European Securities Markets – Terms of Reference for the Committee of Wise Men* (July 17, 2000), *available at* http://register.consilium.eu.int/pdf/en/00/st10/10491en0.pdf.

[29] EC Treaty art. 249. In contrast, a regulation is directly applicable and requires no action by the Member State to be legally enforceable. James D. Dinnage & John F. Murphy, The Constitutional Law of the European Union 159 (1996).

[30] Commission Regulation 1606/2002, 2002 O.J. (L 243) 1 (EC) (stating that the FSAP directives related to the banking industry include the Regulation on the Application of International Accounting Standards); Council Directive 2002/87, 2003 O.J. (L 35) 1 (EC) (stating that the FSAP directives related to the banking industry also include the Directive on Supplementary Supervision of Credit Institutions and the Financial Conglomerates Directive).

[31] Different groups may disagree on the amount of economic benefit but all agreed that a more integrated market for financial services would have a broadly beneficial effect on the economy within the EU. *Lamfalussy Report*, *supra* note 2, at 9. The completion of the FSAP could increase EU GDP by 0.5% to 0.7% per year and save billions of euros on transaction costs of banking products. EUR. FIN. SERVS. ROUNDTABLE, THE SINGLE MARKET FOR FINANCIAL SERVICES: MESSAGE TO EUROPEAN COUNCIL: THE SINGLE MARKET FOR FINANCIAL SERVICES—BREAKING THE GRIDLOCK (2003) (also known as the Gyllenhammar Report), *available at* http://www.efr.be/members/upload/publications/41955singlemarket.pdf. Other estimates indicate that employment in the EU could increase by 0.5% because of the integration of financial markets. Niamh Moloney, *supra* note 22.

[32] Prospectus Directive of the European Parliament and of the Council, 2003/71, 2003 O.J. (L 345) 64 (EC).

process could meet the aggressive deadline set by the Heads of State to enact the FSAP by the end of 2005.[33]

Furthermore, ten new member states from Central and Eastern Europe would be joining the EU in May 2004. The resulting increase of the number of participants within the European Parliament and the Council of Ministers was seen as likely to slow the process even more,[34] requiring even more time to transpose the EU legislation into national law. Therefore, a streamlined approach was needed to accommodate an even greater number of players in the legislative process.

While financial markets are now becoming more unified within the European Union, supervisors of banks are not. The supervision of banks within the European Union is primarily the responsibility of Member States and is not conducted at the European Union level.[35] The European Central Bank ("ECB") along with the European System of Central Banks ("ESCB") controls monetary policy for the twelve Member States that are part of the European Monetary Union.[36] The ECB does not, however, have direct responsibility for the supervision of banks within the EU and, under the EC Treaty, it can only aid in the smooth operation of prudential supervision of banks.[37] Under the Treaty, the ECB would be allowed to take over prudential supervision of banks only after unanimous approval of the Member States and the assent of the European Parliament, which in practice would be nearly impossible to obtain.[38]

[33] ECOFIN/European Council Conclusions (Nov. 27, 2000), *reprinted in Lamfalussy Report*, *supra* note 2, at 43.

[34] EXPERT GROUP ON BANKING, FINANCIAL SERVICES ACTION PLAN: PROGRESS AND PROSPECTS, FINAL REPORT 12 (May 2004), *available at* http://europa.eu.int/comm/internal_market/finances/docs/actionplan/stocktaking/report-bank_en.pdf [hereinafter EXPERT GROUP BANKING REPORT].

[35] Tom Buerkle, *European Disunion*, INSTITUTIONAL INVESTOR—INT'L, July 2002; *European Monetary Union and Banking Supervision*, EUR. CENT. BANK MONTHLY BULL., April 2000, at 49-64; DAVID G. MAYES ET AL., *supra* note 14. See *infra* Table 2 for a brief outline of the institutions involved in bank supervision and monetary policy within the EU.

[36] EC Treaty art. 105. The Eurozone countries are Austria, Belgium, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, and Spain. The United Kingdom, Denmark and Sweden have not adopted the euro as their national currency.

[37] EC Treaty art. 105(5).

[38] *Id.* art. 105(6); Tom De Swaan, *The Changing Role of Banking Supervision*, 6 ECON. POL'Y REV. 75, 78 (2000); *see also* Rosa M. Lastra, *The Governance Structure for Financial Regulation and Supervision in Europe*, 10 COLUM. J. EUR. L. 49 (2003). The proposed constitutional treaty did not change this structure. Treaty

Thus, while the EU sets standards for bank regulation, implementation and interpretation of these standards are largely left to national bank supervisors who are guided by national laws.

Regardless, in an effort to further integrate the financial services sector and as part of the FSAP, the Council of Ministers asked a group of prominent policymakers involved in monetary and economic affairs to report on the prospects of improving the regulation of the securities market in the EU.[39] Led by Alexandre Lamfalussy, a Committee of Wise Men issued a report recommending changes in the process of enacting legislation governing the securities markets in Europe.[40] The Committee of Wise Men analogized the FSAP to the 1992 program intended to integrate the market of goods within the EU.[41] While the Lamfalussy Report developed a procedure originally focusing on the securities markets, the Commission has recommended that this Lamfalussy process be extended to the other parts of the financial services sector—namely, banking and insurance.[42] Consequently, in March, 2005, the Council and the European Parliament enacted a directive that applies the Lamfalussy process to those two sectors.[43]

IV. Lamfalussy Process

The Committee of Wise Men's task was to recommend changes in the legislative process to accelerate the passage of necessary legislation in order to further integrate the EU securities

Establishing a Constitution for Europe art. III-77, July 18, 2003, 2003 O.J. (C 169) 35 (currently unratified) [hereinafter Constitutional Treaty].

[39] *Lamfalussy Report*, *supra* note 2.

[40] *Id.*

[41] *Id.* at 71; *See Commission White Paper Completing the Internal Market*, COM (85) 310 final (June 14, 1985); *See also The Business of Europe*, ECONOMIST, Dec. 7, 1991, at 63.

[42] Comm'n for European Communities Proposal for a Directive to Establish a New Financial Services Committee Organizational Structure, COM (2003) 659 (2003), *available at* http://europa.eu.int/eur-lex/en/com/pdf/2003/com2003_0659en01.pdf.

[43] Council Directive to Establish a New Organisational Structure for Financial Services Committees 2005/1, March 4, 2005, 2005 O.J. (L 79) 9 (EC). The European Parliament was concerned about the institutional balance of power and wanted to retain its input into legislation. EUR. PARL. DOC. A5-0162/2004 (2004), *available at* http://www2.europarl.eu.int/oeil/index.jsp [hereinafter Randzio-Plath Report]; 5-2004 BULL. EUR. UNION § 1.3.23, *available at* http://europa.eu.int/abc/doc/off/bull/en/200405/p103023.htm. *See infra* Table 1 for a time line of the important events that occurred in the development of the Lamfalussy process.

market.[44] Baron Alexandre Lamfalussy, a well-respected central banker, former president of the European Monetary Institute (predecessor to the European Central Bank), and past director of the Bank for International Settlements, chaired the Committee.[45] Other members of the Committee included prominent central bankers from across Europe.[46]

France, during its presidency of the European Union from July through December, 2000, took the initiative in reforming the financial services lawmaking process.[47] Laurent Fabius, a former prime minister of France, led this effort.[48] The Council appointed the Lamfalussy Committee and urged them to focus on the "practical arrangements for implementation of the Community rules" of the legislative process.[49] The Council specifically prohibited the Committee of Wise Men from making recommendations on securities industry supervision, stating, "[the Committee] will not, however, deal with the prudential supervision."[50]

In its Final Report, the Committee identified the legislative process as the central impediment to integrating financial markets by 2005.[51] The report noted that the necessary EU-wide regulations of the securities markets were not present, and that this absence has hindered the growth of the EU capital markets.[52] The legislative process in the EU was too time-consuming and could not keep up with changes and developments in the fast-moving, global capital markets.[53] The codecision procedure for enacting laws (the typical procedure used to pass EU internal market legislation)[54] generally

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[44] *Lamfalussy Report*, *supra* note 2, at 7.
[45] EUROPA PUBL'NS, THE INTERNATIONAL WHO'S WHO 2004 952 (67th ed. 2003).
[46] *Lamfalussy Report*, *supra* note 2, at ii.
[47] Peter Norman, *Peter Norman on How Paris is Challenging London in Attempts to Unify the EU's Fragmented Market in Banking and Savings Products*, FIN. TIMES, Sept. 20, 2000, at 2. Each Member State holds the presidency for six months on a rotating basis. EC Treaty art. 203.
[48] Minutes of the 2283rd ECOFIN Council Meeting, July 17, 2000, 10328/00 (Presse 263).
[49] *Id.* at 12.
[50] *Id.* at 13.
[51] *Lamfalussy Report, supra* note 2, at 5, 26.
[52] *Id.* at 11.
[53] *Id.* at 13 (noting that the Committee suggested that politicians set reachable short term goals for integration, and make a concerted effort to reach those goals).
[54] A detailed description of the codecision procedure used to enact EU legislation is beyond the scope of this article. Generally, codecision requires agreement between the Council of the European Union and the European Parliament before legislation

spanned a minimum of two years, and the procedure was even more sluggish in enacting laws pertaining to financial services.[55] Within the EU, there were over 40 public bodies (in the then 15 Member States) that were responsible for regulating the securities industry.[56] Consequently, once the EU enacted a directive, the implementation of securities laws within the Member States was frequently inconsistent..

The Committee, after considerable consultation with interested participants, recommended a four-level approach to lawmaking related to financial services in the European Union.[57] Level 1 of the Lamfalussy procedure refers to the adoption of directives and regulations using the codecision procedure at the EU level.[58] Level 2 is the implementation of the law by "filling in the details."[59] U.S. attorneys would liken this level to the rulemaking by administrative agencies such as the Comptroller of the Currency or the Federal Deposit Insurance Corporation ("FDIC"). British attorneys may analogize this process to the enactment of statutory instruments in the United Kingdom.[60] The Report of the Wise Men recommended the creation of a special committee of national supervisory officials to draft these details.[61] Level 3 refers to greater cooperation among national supervisors to "ensure consistent implementation and enforcement."[62] Similar to Level 2, Level 3 of the Lamfalussy Report recommended the creation of a committee to coordinate supervisory practice among EU member states.[63] Level 4 refers to more effective enforcement of EU laws.[64] The European

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becomes law. *See generally* EUR-Lex, Process and Players, http://europa.eu.int/eur-lex/en/about/pap/index.html (last visited May. 3, 2006).

[55] *Lamfalussy Report*, *supra* note 2, at 14; Kees Van Dijkhuzen, *A Functional Approach to Fifty Years of Banking Supervision*, *in* BANKING SUPERVISION AT THE CROSSROADS 44 (Thea Kuppens ed., 2003).

[56] *Lamfalussy Report*, *supra* note 2, at 15.

[57] *Id.* at 19.

[58] *Id.* at 22. A directive is a type of EU legislation that sets out the objectives of the law but requires member states to enact national legislation to implement the law. *See* KLAUS DIETER BORCHARDT, THE ABC OF COMMUNITY LAW 63-71 (2000), http://europa.eu.int/eur-lex/en/about/abc/abc_20.html.

[59] *Lamfalussy Report*, *supra* note 2, at 28.

[60] House of Commons Information Office, Statutory Instruments, Factsheet L7 (June 2005), http://www.parliament.uk/documents/upload/L07.pdf.

[61] *Lamfalussy Report*, *supra* note 2, at 28.

[62] *Id.* at 37.

[63] *Id.* at 37-39.

[64] *Id.* at 40.

Council at its March 2001 Stockholm meeting endorsed the Final Report of the Lamfalussy Committee.[65]

Level 1 of the Lamfalussy process refers to the passage of directives and regulations (using the codecision procedure) to set forth the framework principles in a given area of securities law.[66] The framework principles reflect the "core political principles" and political choices made by the Council of Ministers, the European Commission and the European Parliament.[67] The principles should be specific to each directive or regulation and should reflect the political orientation of the legislation.[68] The Level 1 directive should also describe the "nature and extent of the technical implementing measures" [69] that should be taken at Level 2, the substantive content of the delegation to Level 2, as well as the limits of that delegation.[70] The European Commission has the sole right of legislative initiative under the treaties.[71] In order to accelerate the legislative process, the Committee recommended that the Commission consult widely with the financial industry, consumer advocacy groups and the general public prior to proposing a directive or regulation.[72] It concluded that the drafters of Level 1 legislation should focus on the essential issues to be decided and should leave the technical implementing details to the drafters of Level 2.

To draft the technical implementing details set forth broadly in the Level 1 legislation, the Wise Men recommended the creation of two committees: the European Securities Committee ("ESC"), with a primarily regulatory function, and the Committee of European Securities Regulators ("CESR"), with an advisory function at Level 2.[73] The ESC would replace the High Level Securities Supervisors Committee[74] and act as a regulatory committee under Article 202 of

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[65] Presidency Conclusions, Resolution of the European Council on More Effective Securities Market Regulation in the European Union (March 23, 2001), http://ue.eu.int/ueDocs (recommending that the priorities set forth by the Wise Men be implemented).
[66] *Lamfalussy Report*, *supra* note 2, at 22.
[67] *Id.*
[68] *Id*. at 23.
[69] *Id.*
[70] *Id.*
[71] EC Treaty art. 251.
[72] *Lamfalussy Report*, *supra* note 2, at 25.
[73] *Id.* at 28.
[74] *Id.* at 29.

the EC Treaty.[75] The proposed legislative process at Level 2 begins with the European Commission asking the CESR to initiate work on the technical details related to the particular directive or regulation.[76] The CESR would consult with industry participants and report back to the Commission with its technical advice.[77] The Commission would then forward a proposal to the European Securities Committee for consideration as Level 2 legislation.[78] The ESC would consider the Level 2 legislation and then vote on the measure using qualified majority voting.[79] The ESC acting alone, but within the delegation limits set by the relevant Level 1 directive, would enact the directive or regulation at Level 2 without further approval from the Council of Ministers or the European Parliament. However, the European Parliament would be kept informed and consulted throughout this process.[80] The Wise Men believe that the ESC should consist of members nominated by the Member States who are at the ministerial or state secretary level, and should be chaired by a member of the European Commission (most likely the Internal Market Commissioner).[81] If the European Securities Committee fails to approve a Level 2 measure, then the European Commission can submit the proposed legislation to the Council of Ministers. The Council, using qualified majority voting, could then enact the Level 2 legislation.[82]

In addition to its operation at Level 2 as an advisory committee, the CESR would also operate at Level 3 to coordinate implementation of EU securities regulation. The Wise Men suggested that members of the CESR be made the heads of securities regulators of the Member States,[83] and that the Chair be both elected from the committee membership and made an observer on the ESC.[84]

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[75] EC Treaty art. 202. Level 2 committees fall under the comitology procedure. Council Decision 1999/468/EC of 28 June 1999 Laying Down The Procedures For The Exercise Of Implementing Powers Conferred On The Commission, 1999 O.J. (L 184) 23 [hereinafter Comitology Decision].
[76] *Lamfalussy Report*, *supra* note 2, at 28.
[77] *Id.*
[78] *Id.*
[79] *Id.* at 29; Comitology Decision, *supra* note 75. For a more detailed description of the qualified majority voting procedure, *see* EUR-Lex, Process and Players, *supra* note 54.
[80] *Lamfalussy Report*, *supra* note 2, at 30.
[81] *Id.*
[82] *Id.* at 29-30.
[83] *Id.* at 31.
[84] *Id.* at 32.

When the CESR functions at Level 2, the voting procedure should be by qualified majority voting, not consensus voting.[85] The CESR must have open, transparent and extensive consultation procedures.[86]

The Wise Men recognized the great concern of the European Parliament about the potential loss of their codecision powers with respect to Level 2 legislation.[87] As a result, the Wise Men stressed that the European Parliament should be kept informed throughout the process. In addition, they felt the Commission, the ESC and the CESR should be very cognizant of the limits placed on their Level 2 lawmaking power in the Level 1 framework legislation. For example, if these entities should overstep the limits set forth in the Level 1 legislation and agreed to by the European Parliament, the Parliament will probably be less amenable to the next piece of financial services legislation that is presented for enactment.[88]

Level 3 is intended to "greatly improve the consistency of day-to-day transposition and implementation of Levels 1 and 2 legislation."[89] The national supervisory authority of each Member State should designate an official to be a member of the CESR.[90] The members of the CESR should have expert knowledge of securities regulation and the power to deliver what they agree to in these meetings.[91] Voting on Level 3 measures should be agreed to by consensus in order to ensure consistent implementation.[92] The goal is to improve the uniform implementation of EU financial law. To do this, the CESR should issue consistent guidelines for implementation, produce joint interpretations and conduct peer reviews of regulatory practices.[93] The pronouncements of the CESR would be non-binding but would have significant persuasive authority.[94]

Level 4 focuses on enforcement of EU securities laws. The major responsibility of enforcement falls on the European Commission as the guardian of the treaties.[95] In the Wise Men's

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[85] *Id.*
[86] *Id.* at 32-33.
[87] *Id.* at 34-35.
[88] *Id.* at 35.
[89] *Id.* at 37.
[90] *Id.*
[91] *Id.* at 38.
[92] *Id.* at 37.
[93] *Id.*
[94] *Id.* at 38.
[95] *Id.* at 40. *See* EC Treaty arts. 226-228.

view, the Commission needs to be "bolder" in its enforcement, and industry participants must come forward to complain about inconsistent implementation of EU laws.[96]

The European Parliament raised significant objections to this procedure after the release of the Committee of the Wise Men's preliminary report.[97] The Wise Men addressed some of these concerns in their Final Report,[98] but the European Parliament obviously was not satisfied with the changes suggested. To gain approval for the creation of the ESC and the CESR, the European Commission President Romano Prodi had to make a solemn declaration before the European Parliament[99] and the Internal Market Commissioner had to send a letter to the European Parliament.[100] In these documents, the European Commission agreed to the following conditions: the insertion of a clause in FSAP legislation which limits the duration of the delegation of legislative powers at Level 2 to four years from the effective date of the legislation;[101] a delay in the effective date of the legislation of three months to allow the European Parliament to review the Level 2 legislation; wide consultation on any Level 2 legislation, including the simultaneous transmission of documents to the Economic and Monetary Affairs Committee ("EMAC") of the European Parliament and the Level 2 and 3 committees; regular meetings between EMAC and the Internal

96 *Id.*

97 *See* Lamfalussy Report, *supra* note 2, at 49 (pertaining to Annex 3: Analysis of the Comments on the Initial Report).

98 *See id.* at 33-35.

99 *See* Solemn Declaration of European Commission President Romano Prodi (Feb. 5, 2002), *available at* http://www.europarl.eu.int/comparl/econ/lamfalussy_process/ep_position/prodi_declaration.pdf [hereinafter Prodi Declaration].

100 Letter from Frits Bolkestein, European Commissioner, to Christa Randzio-Plath, Member of the European Parliament (Oct. 2, 2001), *available at* http://www.europarl.eu.int/comparl/econ/lamfalussy_process/ep_position/lt_bolkestein.pdf [hereinafter Bolkestein Letter].

101 This "sunset clause" in the Market Abuse Directive provides: "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 the period referred to above." Council Directive 2003/6/EC of 28 January 2003 On Insider Dealing and Market Manipulation (Market Abuse) art. 17(4), 2003 O.J. (L 96) 25.

Market Directorate General ("Internal Market DG"); the creation of a practitioner's panel in association with the CESR; and the Commission's support for an amendment of EC Treaty Article 202 to clarify the role of the EU institutions in the delegation of legislative power.[102]

When the European Commission proposed a directive to expand the Lamfalussy process to the banking and insurance sectors, the Economic and Monetary Affairs Committee issued a critical report on this expansion.[103] The Parliament questioned whether the expansion of the process was truly urgent and whether Parliament's reduced role in enacting Level 2 legislation contradicted the codecision procedure.[104] The Parliament and the Council agreed to the expansion upon the condition that each directive using the Lamfalussy process include a four year sunset clause and that the European Commission and the Council support and argue for a provision in the new Constitutional Treaty, recognizing the Parliament's codecision power with respect to delegated legislation and specifically giving the Parliament the right of call back with respect to FSAP legislation.[105] The Council and the Parliament finally reached a political agreement on the directive for a new committee structure in May 2004[106] and enacted the directive in March 2005.[107]

With respect to banking regulation, Level 2 and Level 3 of the Lamfalussy process are being implemented by the European Banking Committee and the Committee of European Banking Supervisors, respectively.[108] The Council has reconstituted the Banking Advisory Committee into a Level 2 committee known as the

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[102] Prodi Declaration, *supra* note 99; Bolkestein Letter, *supra* note 100.
[103] Randzio-Plath Report, *supra* note 43.
[104] *Id.*
[105] *Id.* The Constitutional Treaty does include such a provision. Constitutional Treaty, *supra* note 37, art. I-36. This provision gives the Parliament the right to "call back" or revoke delegated legislation within a time period set forth in the legislation. *Id.*
[106] *See* Eur. Council, Results of the Council of Economics and Finance Ministers, Brussels (May 10-11, 2004), *available at* http://www.uv.es/~roigjm/pdf/UE/2004/Memo-04-110.pdf.
[107] Council Directive to Establish a New Organisational Structure for Financial Services Committees, *supra* note 43.
[108] Table 2 *infra* is a chart showing the EU institutions involved at each level of the Lamfalussy process. The Lamfalussy process was also expanded to include insurance and pension funds, but discussion of that expansion is beyond the scope of this paper.

European Banking Committee.[109] In November 2003 the Council created the Committee of European Banking Supervisors ("CEBS") as a Level 3 committee with effect beginning January 1, 2004.[110] The purpose of CEBS, like CESR, is to coordinate bank supervisory practices so as to create a level playing field for banks within the EU.[111] These committees are so new that there is little basis for evaluation. The EU, led by the European Commission and the Council, is clearly attempting to centralize banking supervision as much as possible within the legal limits of the treaty structure.[112]

During its short life thus far, the CEBS has been relatively active in consulting with the financial industry and the public. The CEBS has issued ten consultation papers as of July 2005 on the following topics: validation and assessment of risk management and risk measurement systems; guidelines for greater supervisory cooperation; a review of the CEBS' own role and tasks; the recognition of external credit assessment institutions; consolidated financial reporting framework; common European framework for supervisory disclosure; a common framework for the reporting of the solvency ratio; implementation of pillar 2 of the Basel II Accord and the revised Capital Requirements Directive; a high level set of principles on outsourcing; and a public statement on its own consultation practices.[113] The CEBS has issued technical advice on the use of prudential filters in connection with the international financial reporting standards, which are required to be used by EU companies beginning January 1, 2005,[114] on cross-border mergers and acquisitions of financial institutions, deposit guarantee schemes,

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[109] *See* Commission Decision Establishing the European Banking Committee, 2004 O.J. (L 3) 36, 37, *available at* http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_003/l_00320040107en00360037.pdf.

[110] *See* Commission Decision Establishing the Committee of European Banking Supervisors, 2003 O.J. (L 3) 28, *available at* http://www.c-ebs.org/documents/CommissionDecision.pdf.

[111] *See* Jose Maria Roldan, Establishment of the Committee and Future Challenges, Address Before the Economic and Monetary Affairs Committee of the European Banking Federation (Apr. 26, 2004), *available at* http://www.c-ebs.org/pdfs/Speech%20to%20EMAC%2026%20April%202004.PDF.

[112] The European Central Bank would like to have clear bank supervisory authority. *See* Antonio Sainz De Vicuna, *The ESCB and its Role in Banking Supervision*, 34 INT'L LAW. 117 (2000).

[113] *See generally* Comm. of Eur. Banking Supervisors, *Consultation Papers*, *available at* http://www.c-ebs.org/Consultation_papers/consultationpapers.htm.

[114] Comm. of Eur. Banking Supervisors, *Guidelines on Prudential Filters for Regulatory Capital* (Dec. 21, 2004), *available at* http://www.c-ebs.org/prudential_filters.htm.

the definition of own funds and e-money.[115] The major activity of the CEBS for 2005 will be enactment and implementation of the Capital Requirements Directive.[116] A review of these activities reveals that the CEBS is focusing on converging supervisory practice as intended by the Lamfalussy Report and emphasizing common reporting and disclosure frameworks.

V. Assessment

The Lamfalussy process has been the subject of numerous assessments and reviews, both by European Union entities and independent commentators. Based on the assessments reviewed below, the Lamfalussy process has thus far worked reasonably well. However, nearly all observers also agree that because the Lamfalussy process is so new, it is too early to assess whether it is truly effective.[117] The Lamfalussy process as applied to securities regulation began in 2002. Its expansion to the banking, investment fund and insurance industries began even later, in early 2004. A few years is simply not enough time to evaluate the process as applied to securities, let alone banking and insurance.

Only four directives have been adopted under the Lamfalussy process through early May 2005 and all four of those directives deal with securities law, not banking law. The four directives passed using the Lamfalussy process thus far are the Market Abuse Directive (December 2002),[118] the Prospectus

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[115] *See generally* Comm. of Eur. Banking Supervisors, *Technical Advice to the European Commission on a Review of Article 16 of Directive 2000/12/EC* (May 31, 2005), *available at* http://www.c-ebs.org/pdfs/cebs0576.pdf.; Comm. of Eur. Banking Supervisors, *Advice to the European Commission*, *available at* http://www.c-ebs.org/advice/advice.htm.

[116] *See* Comm. of Eur. Banking Supervisors, *CEBS' Work on National Discretions*, *available at* http://www.c-ebs.org/Advice/national_discretions.htm. The Capital Requirements Directive is based upon the Revised Capital Accord or Basel II. *See also* Charlie McCreevy, Eur. Comm'r for Internal Mkt. and Services, Managing Financial Institutions: The Key Challenges, Address Before the 58th International Banking Summer School (June 21, 2005), *available at* http://europa.eu.int/comm/commission_barroso/mccreevy/docs/speeches/2005-06-21/fininstitutions_en.pdf.

[117] *See, e.g.*, Burcak Inel, *Assessing the First Two Years of the New Regulatory Framework for Financial Markets in Europe*, 18 J. INT'L BANK. L. 363 (2003).

[118] Council Directive 2003/6/EC of 28 January 2003 On Insider Dealing and Market Manipulation (Market Abuse), *supra* note 101, at 16.

Directive (July 2003),[119] the Investment Services Directive (April 2004),[120] and the Transparency Directive (April 2004).[121]

Despite its relative newness, numerous groups, both official and private, have assessed and voiced their opinions on the process. The European Commission appointed four expert groups to give their assessment on the future of financial services regulation in the European Union.[122] An expert group for each of the securities, banking, insurance and investments sectors was appointed. The relevant report for this discussion is the Report of the Expert Group on Banking.[123] The report first states that it is difficult to measure the impact of the FSAP because the legislative portion at the EU level has just been completed and transposition of EU law into national law is ongoing.[124] The primary focus from this point forward should be on implementation and enforcement of the FSAP legislation.[125] In addition, the Expert Group recommended that supervisory standards and supervisory cooperation must improve. Now with twenty-five Member States and twenty-five national regulatory regimes, CEBS should focus on converging supervisory practices and creating a more consistent EU "rulebook."[126] Financial institutions complain about the divergence of supervisory practice among EU Member States.[127] In response, CEBS may provide a review mechanism and mediate complaints about inconsistent treatment of banks by national supervisors to ensure a level playing field.[128] The expert group made other recommendations: the EU should focus on a value-delivery approach for any future financial services legislation and adopt a lead supervisor model for the supervision of cross-border financial institutions.[129] In essence, the expert group wants cost-benefit analysis to play a greater role in EU lawmaking. By a "lead supervisor," the report means that a single

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[119] Prospectus Directive of the European Parliament and of the Council, *supra* note 32.
[120] Investment Services Directive, 2004 O.J. (L 145) 1.
[121] Transparency Directive, 2004 O.J. (L 390) 38.
[122] *See* Eur. Comm'n, *Expert Groups Report on Financial Integration*, SINGLE MARKET NEWS, July 2004, at 6, *available at* http://europa.eu.int/comm/internal_market/smn/smn34/p6_en.htm.
[123] Expert Banking Group Report, *supra* note 34, at 9.
[124] *Id.* at 8.
[125] *Id.*
[126] *Id.* at 14.
[127] *Id.* at 13-14.
[128] *Id.* at 15.
[129] *Id.* at 22-23.

regulator should be the primary contact and coordinator of all supervision of a particular bank within the EU.

The membership of the Expert Group on Banking was dominated by officers of large European financial institutions. At least eighteen of the twenty-three group members were employees of financial institutions or industry associations.[130] Given this make-up, it is not surprising that their recommendations largely coincided with the views and interests of cross-border institutions. For instance, the Report made no recommendations regarding consumer or investor protection, but rather stated that integration of retail banking "must maintain consumer confidence."[131]

In the same month that the Expert Group on Banking released its Report, the Internal Market DG issued a working document summarizing and commenting upon the reports of the four expert financial services groups.[132] While the primary purpose of the document was to seek comments from the public on the expert reports and to describe the procedure for submitting such comments, the working document also clarified the context of the Lamfalussy process within EU lawmaking. The DG report noted that the Lamfalussy process was intended to accelerate lawmaking in the financial services area in order to meet the deadlines set by the Financial Services Action Plan.[133] In addition, the DG report noted that the process has caused "a 'culture' change in EU financial rule-making."[134] More consultation has occurred on the new rules and there is renewed cooperation among the Council, the Commission and the European Parliament in the financial services area.[135]

The European Commission issued its own assessment of the Lamfalussy process later in 2004.[136] As explained in that

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[130] *Id.* at 24 (Annex: Members of Banking Expert Group.)
[131] *Id.* at 21.
[132] Eur. Comm'n, Internal Market Directorate-General, *Review of Financial Services Action Plan: Publication of Reports of Four Independent Expert Groups for Comment* (May 7, 2004), *available at* http://europa.eu.int/comm/internal_market/finances/docs/actionplan/stocktaking/report-coverdoc_en.pdf.
[133] *Id.* at 2.
[134] *Id.*
[135] *Id.*
[136] Eur. Comm'n, *The Application of the Lamfalussy Process to EU Securities Markets Legislation: A Preliminary Assessment by the Commission Services*, at 1459, SEC (2004) (Nov. 11, 2004), *available at* http://europa.eu.int/comm/internal_market/securities/docs/lamfalussy/sec-2004-1459_en.pdf [hereinafter *Application Report*].

assessment, the intent of the Lamfalussy process was to make European Community legislation more flexible to meet industry needs, to gather industry input, to use the expertise of market participants in drafting legislation and to focus on compliance and enforcement of EU legislation in the financial services area.[137] Although admitting in its report that the results thus far have not consistently met the objectives,[138] the Commission believed it had met its obligations to consult with the European Parliament on legislation, particularly Level 2 implementing measures.[139] Furthermore, the Lamfalussy process has in fact accelerated the passage of financial services legislation. The four directives dealing with securities law[140] were enacted on average in 20 months as compared to earlier securities directives whose time to enactment varied from 30 months to 9 years.[141] The Commission has made its own improvements to the process by extending its consultation with industry participants prior to issuing a legislative proposal and using working documents to solicit comments from both the European Parliament and industry participants prior to submitting Level 2 legislation to the European Securities Committee.[142] Both the CESR and the CEBS have provided access to many documents on their web sites, thus improving transparency.[143]

In its working document, the Commission made specific suggestions for improving the Lamfalussy process. First, the broad consultation has improved the quality of legislation but has at the same time delayed enactment, demonstrating a trade-off between consultation and speed of enactment.[144] The level of detail in Level 1 measures was still too great.[145] The Lamfalussy process intended for Level 1 directives to provide general principles, and Level 2 measures to fill in the detail. One cause of this problem is the ambiguity in the definition of Level 1 and Level 2 measures. The

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137 *Id.* at 3.
138 *Id.*
139 *Id.* at 5.
140 *See* Council Directive 2003/6/EC of 28 January 2003 On Insider Dealing and Market Manipulation (Market Abuse), *supra* note 101, at 16; Prospectus Directive of the European Parliament and of the Council, *supra* note 32; Investment Services Directive, *supra* note 120; Transparency Directive, *supra* note 121.
141 *Application Report*, *supra* note 136, at 6.
142 *Id.* at 7.
143 *Id.* at 8. The production of documents by both committees has been prodigious, especially given the Committees' small secretariats.
144 *Id.* at 9.
145 *Id.*

Commission recognized that there must be a clearer articulation of the differences.[146] As a result, at Level 2, the Commission could choose to use a regulation rather than a directive when consistency across the EU is required.[147]

The Commission's working document pointed out that Level 3 of the Lamfalussy process is largely untested.[148] The CESR and the CEBS are the responsible institutions at this level. The CESR has issued consultation papers, as has the CEBS, but it is too early to assess their effectiveness. The CESR has indicated it may serve as a mediator in order to resolve any differences between national supervisors and enhance supervisory convergence among national supervisors.[149] Level 4 enforcement will become more of a focus in the next several years. The Commission has organized transposition workshops to aid national officials in transposing directives into law in the 25 Member States using a total of 20 official languages.[150]

Later in November 2004, the Interinstitutional Monitoring Group issued its third report on the Lamfalussy Process.[151] The

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[146] *Id.*

[147] *Id.* at 10.

[148] *Id.*

[149] *Id.*; *see also* Comm. of Eur. Securities Regulators, *Preliminary Progress Report: Which Supervisory Tools for the EU Securities Markets?* (2004), *available at* http://www.cesr-eu.org/consultation_details.php?id=48 (considering whether mediation between national regulators should be one of its tools in securities regulation. This document is also known as the "Himalaya Report.").

[150] *Application Report*, *supra* note 136 at 11. The Commission noted that the Lamfalussy process has been extended to the banking and insurance sectors and that the proposed Constitutional Treaty contains provisions that recognize the Lamfalussy process. *Id.* at 13. The proposed Constitutional Treaty contains a declaration that recognizes the Lamfalussy process and its effect on financial services lawmaking. The short declaration states: "The Conference takes note of the Commission's intention to continue to consult experts appointed by the Member States in the preparation of draft delegated European regulations in the financial services area, in accordance with its established practice." Constitutional Treaty, Declaration on Article I-36, 2004 O.J. (C 310) 423, *available at* http://europa.eu.int/eur-lex/lex/en/treaties/index.htm. This declaration appears to contravene the call-back right granted to the European Parliament in the delegation of regulatory power by the Commission provide for in Article I-36. The two provisions do not neatly operate together.

[151] INTER-INSTITUTIONAL MONITORING GROUP, THIRD REPORT MONITORING THE LAMFALUSSY PROCESS (2004), *available at* http://europa.eu.int/comm/internal_market/securities/docs/monitoring/third-report/2004-11-monitoring_en.pdf [hereinafter MONITORING GROUP REPORT]. The Monitoring Group assesses "the progress made on implementing the Lamfalussy process to secure a more effective regulatory system for securities markets." INTER-INSTITUTIONAL MONITORING GROUP, FIRST INTERIM REPORT MONITORING THE NEW

Monitoring Group concluded that the process is "working well overall."[152] The Group noted that the four framework directives (the same four listed in the Commission document)[153] were adopted on average in 16.5 months as compared to from 2.5 years to 9 years for previous securities directives.[154] Level 2 implementing measures likewise are being enacted relatively quickly.[155]

However, transposition of directives into national law has not proceeded apace and may become the bottleneck in Level 2 implementing legislation.[156] The Internal Market DG has created the Lamfalussy League Table, a web-based tool showing the progress of the transposition of FSAP legislation into national law.[157] The table showed that, as of August 2005, the transposition of the Lamfalussy directives was very low.[158] Only Denmark, Slovenia and Ireland have transposed all the Lamfalussy directives thus far and only three other Member States had transposed more than 90% of the FSAP legislation.[159] In fact, nine Member States have not yet transposed any of the five securities directives.[160] The Interinstitutional

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PROCESS FOR REGULATING SECURITIES MARKETS IN EUROPE (THE LAMFALUSSY PROCESS) 4, *available at* http://europa.eu.int/comm/internal_market/securities/docs/monitoring/first-report/2003-05-monitoring_en.pdf. The Monitoring Group was set up by the European Parliament, the Council of Ministers (ECOFIN), and the European Commission. *Id.* Its Third Report was its final report according to its original authorization. In 2005 the Inter-Institutional Monitoring Group was reconstituted and held its first meeting in September 2005. European Commission, First Meeting of the Re-Established Inter-Institutional Monitoring Group for Financial Services, IP/05/1184 (Sept. 26, 2005). Its first report is expected in March 2006 with its final reported expected in December 2007. *Id.*

[152] MONITORING GROUP REPORT, *supra* note 151, at 6.

[153] *See supra* notes 118-121.

[154] MONITORING GROUP REPORT, *supra* note 151, at 7.

[155] *Id.* at 8.

[156] *Id.* at 9.

[157] Commission Launches "Lamfalussy League Table" on Member States' Implementation of Securities Directives, July 6, 2005, IP/05/857 at http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/05/857&format=HTML&aged=0&language=EN&guiLanguage=en. The Lamfalussy League Table is located at http://europa.eu.int/comm/internal_market/securities/transposition/index_en.htm.

[158] *Id.*

[159] Rate of Transposition of FSAP Directives, League Table by Member State (July 29, 2005), *available at* http://europa.eu.int/comm/internal_market/finances/docs/actionplan/index/memberstate_en.pdf.

[160] Agence Europe, *Nine Member States Have Not Yet Transposed Any of the Five Financial Securities Directives*, July 12, 2005. The nine Member States are

Monitoring Group's prediction that national transposition of FSAP directives would become the bottleneck appears to be coming true.

The Commission and the CESR have used "parallel working" to accelerate the speed of enactment.[161] Parallel working occurs when the CESR begins work on Level 2 implementing measures at the same time as the Commission is drafting Level 1 directives.[162] The European Parliament's views may be ignored under parallel working.[163] The Monitoring Group recommends its continued use but it "should be avoided when it threatens to pre-empt the views of Parliament."[164]

Like the Commission, the Monitoring Group agrees that Level 1 directives contain too much detail.[165] The purpose of the Lamfalussy process was to accelerate the enactment of legislation by agreeing on broad principles behind legislation in Level 1 directives using the codecision procedure and then setting forth technical details in Level 2 measures adopted in an accelerated manner.[166] Level 1 directives should state framework principles, not details. The Monitoring Group recommends the use of regulations at Level 2, rather than directives, to ensure consistent laws in the Member States and therefore a level playing field.[167]

The purpose of Level 3 committees such as CEBS and CESR is to ensure consistent interpretation and application of EU law.[168] National legislatures have the responsibility of transposing EU directives into national laws.[169] According to the Group, mediation between national supervisors managed by the CESR is a useful tool and should be encouraged.[170]

Assessments of the Lamfalussy process are ongoing. The Internal Market DG of the European Commission asked for

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Belgium, Cyprus, Hungary Ireland, Luxembourg, the Netherlands, Portugal, the United Kingdom and Sweden. *Id.*

[161] MONITORING GROUP REPORT, *supra* note 151, at 17-18.

[162] MONITORING GROUP REPORT, *supra* note 151, at 17. Parallel working occurred with both the Market Abuse Directive and the Investment Services Directive. *See infra* Table 4.

[163] *Id* at 17.

[164] *Id.* at 18.

[165] *Id*. at 18-19.

[166] *Id.* at 19.

[167] *Id.* at 22.

[168] *Id*. at 25.

[169] *Id.* at 26.

[170] *Id.* at 30.

comments on the FSAP in November 2005.[171] One aspect of this overall FSAP evaluation is an evaluation of the Lamfalussy process.[172] The Internal Market DG concluded in its initial report that the Lamfalussy process accelerated passage of Level 1 legislation, but also recognized that additional time was required for the passage of Level 2 legislation.[173] The report stated:

> [I]t is worth stressing that without the Lamfalussy procedures all necessary details would have had to be included in Level 1 directives. In such a case, *i.e.*, if all of the detailed rules had had to be adopted in co-decision, it is very likely we would not be in today's situation of having most of the legal framework adopted, but would have barely begun.[174]

The major justification for the Lamfalussy process was to accelerate the passage of financial services legislation. Some question whether the Lamfalussy process is in fact a faster method of enacting legislation. Pre-Lamfalussy, financial services laws were made in one step as directives. Post-Lamfalussy, two rounds of legislative activity are needed to enact financial legislation. Does this process merely shift the lawmaking to Level 2?

A review of the first four directives enacted under the Lamfalussy process indicates that the directives were enacted in a shorter amount of time than their predecessors pre-Lamfalussy, at least with respect to Level 1 directives. Table 3 compares the length of time required to enact these four directives to the time needed to enact their predecessors. Each directive under the Lamfalussy process was enacted in a shorter period of time than its predecessor directive. However, a data set of four is obviously not large enough on which to base firm conclusions.

The Lamfalussy process is a four-step process with the first two levels involving legislation. To analyze fully whether the process has accelerated the enactment of financial services legislation, we must consider the time needed to enact related Level 2

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[171] *European Commission, FSAP Evaluation, Part I: Process and Implementation* (Nov. 2005), *available at* http://europa.eu.int/comm/internal_market/finances/docs/actionplan/index/051028_fsap_evaluation_part_i_en.pdf.
[172] MONITORING GROUP REPORT, *supra* note 151, section 2.1, at 10-13.
[173] FSAP EVALUATION, *supra* note 171, at 12.
[174] *Id.*

legislation. Table 4 shows the length of time required to enact Level 2 legislation as well as Level 1 directives. Of the four Lamfalussy directives, only the Market Abuse Directive and the Prospectus Directives have Level 2 legislation associated with them as of August 2005. When including Level 2 legislation in the calculation of the length of time to enact financial services law, the legislative process takes somewhat longer than only including Level 1. The Level 2 legislation for the Prospectus Directive and the Market Abuse Directive were all drafted using "parallel working," where the CESR drafts Level 2 legislation concurrently with the consideration of Level 1 legislation under the typical codecision procedure. The Market Abuse Directive has four pieces of Level 2 legislation related to it.[175] Two directives and one regulation were enacted eleven months after the Market Abuse Directive was agreed upon on January 28, 2003.[176] A later directive dealing with accepted market practices was enacted on April 29, 2004 – fourteen months after the Market Abuse Directive was enacted. Including the time to enact Level 2 legislation, the length of time to enact the Market Abuse Directive under the Lamfalussy process is nearly the same as its predecessor directive – approximately thirty months.[177] The Level 2 legislation related to the Market Abuse Directive was drafted using parallel working, which supposedly accelerates the lawmaking process and may not always be used.[178] While the Market Abuse Directive is just one example, the lawmaking process at Level 2 should continue to be examined to confirm whether the Lamfalussy process in reality has not accelerated the financial services lawmaking process and has not instead shifted some of the legislative

[175] Directive 2003/124 on Insider Dealing, 2003 O.J. (L 339) 70; Directive on Disclosure Requirements, 2003 O.J. (L 339) 73; Regulation 2273/2003 on Exemptions from Buyback, 2003 O.J. (L 336) 33; Directive 2004/72 as regards Accepted Market Practices, the Definition of Inside Information Among Other Objectives, 2004 O.J. (L 162) 70.

[176] Council Directive 2003/6/EC of 28 January 2003 On Insider Dealing and Market Manipulation (Market Abuse), *supra* note 101, at 16. The Commission had sought advice on this Level 2 directive beginning on January 31, 2003. Comm. Eur. Securities Regulators, CESR 03-037 at 1, *available at* http://www.cesr-eu.org/. *See infra* Table 4.

[177] *See infra* Table 4.

[178] The Inter-Institutional Monitoring Group was cautious in recommending whether to use a regulation at Level 2. Generally, the Monitoring Group favored using a regulation over a directive, but cautioned against using a regulation as a means to override the European Parliament's intentions. MONITORING GROUP REPORT, *supra* note 151, at 18.

activity to Level 2 with no decrease in the total amount of time required to enact legislation.

One reason the Lamfalussy process has not clearly accelerated enactment of FSAP legislation may be the excessive detail in the Level 1 legislation. The distinction between Level 1 directives and Level 2 implementing measures is not clear, even after reading the Lamfalussy Report. The experience thus far with the process has not yielded a clear delineation between Level 1 and Level 2 legislation. The European Commission has the sole initiative for legislation. Because the European Commission prepares the first draft of legislation prior to submitting it to the Council or the Parliament, the Commission could readily delineate the difference between framework principles and technical implementing details in its drafts. The Commission thus far has not been clear in distinguishing between Level 1 and Level 2 legislation in its proposals for Lamfalussy directives.[179]

The Investment Services Directive[180] is an illustrative example. The amount of detail in the directive is extensive. The directive deals with the definitions of several concepts such as best execution, prior consent for internalization, and pre-trade transparency.[181] Applying the Lamfalussy process, these technical issues and definitions should be dealt with at Level 2 and not in a Level 1 directive. The Commission states in its proposal for the directive that it only intends to include "a high level statement of the principal obligations" of the Member States in the directive.[182] I am not sure the Lamfalussy Committee would agree that this stated objective was met in this particular case. By adding this complexity to a directive, the Commission, the Council and/or the Parliament

[179] *Commission Proposal for a Directive on the European Parliament and of the Council on the Harmonisation of Transprancy Requirements,* COM (2003) 138, final (March 26, 2003); *Amended Commission Proposal for a Directive of the European Parliament and of the Council on the Prospectus to be Published*, COM (2002) 460, final (Aug. 9, 2002); *Commission Proposal for a Directive of the European Parliament and of the Council on Insider Dealing and Market Manipulation*, COM (2001) 281 final (May 30, 2001); *Commission Proposal for a Directive of the European Parliament and of the Council on Investment Services and Regulated Markets*, COM (2002) 625 (Nov. 19, 2002).

[180] Directive 2004/39/EC on Markets in Financial Instruments, 2004 O.J. (L 145) 1.

[181] Karel Lannoo, *The New ISD: A Sympton of Excessive Harmonisation in the Implementation of the Lamfalussy Approach?*, Centre for European Policy Studies, June 2005, *available at* http://www.ceps.be.

[182] *Commission Proposal for a Directive of the European Parliament and of the Council on Investment Services and Regulated Markets*, *supra* note 179, at 33.

can slow down the legislative process.[183] The European Parliament has an incentive to add detail to Level 1 directives because it has little involvement in the drafting and enactment of Level 2 legislation.

The EU institutions may want to retain this ambiguity between Level 1 and Level 2 in order to leave open possible arguments for enhancing their legislative and regulatory power. When the responsibility at each level is not clear, an opportunity exists for the European Parliament at Level 1 or the EBC or CEBS at Level 2 to expand their influence.

Level 3 of the Lamfalussy process is largely untested. Both the CESR and the CEBS have been active in providing advice to the European Commission and in consulting with the financial industry and the public,[184] but their influence is unclear. The test for Level 3 in the banking sector will be the implementation of the Capital Requirements Directive.[185] The EU has decided to apply the directive to all financial institutions, unlike the United States where the Revised Capital Accord will only apply to twenty or so of the largest international banks.[186] The effect of the Capital Requirements Directive in Europe will be widespread and consistent implementation across the EU is important.

VI. Impediments and Issues

Even though there has been limited experience using the Lamfalussy process in securities lawmaking and even more limited experience with the process in enacting banking law, several issues regarding the process have emerged and will need to be monitored over the next several years.

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[183] *Id.*

[184] See *supra* note 149 and accompanying text.

[185] *Proposal for a Directive of the European Parliament and of the Council on the Capital Adequacy of Investment Firms and Credit Institutions*, COMM (2004) 486 final (July 14, 2004).

[186] Risk-Based Capital Guidelines; Implementation of New Basel Capital Accord, 68 Fed. Reg. 45,900 (Aug. 4, 2003); *see also* Risk-Based Capital Guidelines; Capital Adequacy Guidelines; Capital Maintenance; Domestic Capital Modificiations, 70 Fed Reg. 61,068 (Oct. 20, 2005) (seeking comments on the implementation of the Basel II Capital Accord in the United States); Roger W. Ferguson, Jr., *The Role of Central Banks in Fostering Efficiency and Stability in an Evolving Financial System*, May 17, 2004, *available at* http://www.federalreserve.gov/boarddocs/speeches/2004/20040517/default.htm.

A. Capital Requirements Directive

In June 2004 the Basel Committee on Banking Supervision issued its final standard on capital requirements after several years of consultation and debate.[187] The Revised Basel Accord sets forth several methods by which international banks can calculate required minimum capital levels. The standard takes a three-pillar approach, focusing on: (1) minimum capital levels using one of several acceptable calculation methods, (2) prudential supervision of the method chosen and (3) market discipline.[188] The recent standard is a lengthy document of over 250 pages and describes in technical detail the different methods banks may use to calculate minimum capital levels. In order to reach an agreement among the members of the Basel Committee, the document includes over 100 national discretions – provisions allowing national regulators to vary from the text of the standard.[189] The CEBS has identified 143 national discretions in the Revised Basel Accord.[190] The Chair of the CEBS has stated that this number is too great for consistent implementation within the EU and that allowing this number of discretions would contradict the goal of creating a "level playing field."[191] The CEBS has recommended deleting 23 of these national discretions from the proposed directive on capital requirements.[192] Two major tasks of

[187] Basel Comm. on Banking Supervision, *International Convergence of Capital Measurement and Capital Standards: A Revised Framework* (2004), *available at* http://www.bis.org/publ/bcbs107a.pdf (sometimes referred to as the "Revised Basel Accord" or "Basel II").
[188] *Id.* at 18. This report builds on an earlier minimum capital standard promulgated in 1988, called *Basle Committee on Banking Supervision: International Convergence of Capital Measurement and Capital Standards* (1988), *available at* http://www.bis.org/publ/bcbs04a.pdf. The 1988 Basel Capital Accord was implemented in the EU through Council Directive 93/6, 1993 O.J. (L 141) 1 (EC), as amended by 98/31, 1998 O.J. (L 204) 13 (EC).
[189] Jose Maria Roldan, Assessing the Implementation Challenges of Capital Requirements Directive and the Convergence of Supervisory Practices Across Europe, Address Before the Annual Risk Management Forum (Dec. 7, 2004), *available at* http://www.c-ebs.org/Speeches/SP10.pdf. See Comm. of Eur. Banking Supervisors, *National Discretion Exercise*, *available at* http://www.c-ebs.org/Advice/ND_CoverNote.doc.
[190] Comm. of Eur. Banking Supervisors, *Full List of National Discretions*, *available at* http://www.c-ebs.org/Advice/national_discretions.htm.
[191] *See* Roldan, Address Before the Annual Risk Management Forum, *supra* note 189; Jose Maria Roldan, *Faster, Higher, Stronger*, FIN. WORLD, July 2004, at 24, 25.
[192] Comm. of Eur. Banking Supervisors, *CEBS Deletions of National Discretions*, *available at* http://www.c-ebs.org/Advice/national_discretions.htm.

the CEBS will be advising the Commission on the text of the Level 2 directives in order to implement the Capital Requirements Directive consistently among the Member States, and reaching a consensus on decreasing the number of national discretions that will be applied to banks within the EU.[193] One benchmark of the success of the Lamfalussy process in banking regulation will be the CEBS' ability to decrease the number of national discretions in the new capital requirements directive and in its related Level 2 legislation. This process will likely not be completed until 2006.[194]

The Council and the European Parliament reached an agreement on the Capital Requirements Directive in early October 2005.[195] The European Commission has not issued any requests for Level 2 legislation from the CEBS related to the Capital Requirements Directive or any other EU banking law.[196] The Capital Requirements Directive is very detailed and the opportunity for Level 2 advice by the CEBS will be limited, at least initially. However, as amendments to the directive are needed, the CEBS will have a greater opportunity to influence Level 2 technical legislation related to the Capital Requirements Directive.

B. European Central Bank as Supervisor

One inter-institutional concern relates to the European Central Bank. As mentioned above, the ECB and ESCB control monetary policy for members of the Eurozone.[197] Like most central

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193 Roldan, Address Before the Annual Risk Management Forum, *supra* note 189. The Capital Requirements Directive, when enacted, will implement the Revised Basel Capital Accord in the EU. The Directive is currently before the European Parliament.

194 Comm. of Eur. Banking Supervisors, *CRD Transposition Group*, *available at* http://www.c-ebs.org/crdtg.htm.

195 Press Release, European Commission, Charlie McCreevey, Commissioner for Internal Market and Services, Welcomes the Agreement Reached in Council on the 8th Company Law Directive on Statutory Audit, IP/05/1250 (Oct. 11, 2005), *available at* http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/05/1249&format=HTML&aged=0&language=EN&guiLanguage=en.

196 Comm. of Eur. Banking Supervisors, *The Role and Tasks of CEBS*, Consultation Paper CP08 (July 2005), at 11, *available at* http://www.c-ebs.org/pdfs/CP08.pdf [hereinafter CEBS Role Paper].

197 Currently, the United Kingdom, Denmark and Sweden have not adopted the euro as their currency. The ten new Member States that joined the EU in May 2004 have not yet adopted the euro as their currency but are required to do so under the Accession Treaty upon the fulfillment of certain conditions.

banks, the ECB's independence from direct political influence is important to instill confidence in the financial markets.[198] In some nations, central banks not only set monetary policy but also have some degree of regulatory power over the banking industry. For instance, the Federal Reserve System in the United States sets monetary policy and regulates certain financial institutions in the United States, particularly member banks of the Federal Reserve, foreign banks and financial holding companies.[199] In contrast, the European Central Bank currently has no prudential supervisory power over financial institutions in the EU. Some commentators question the wisdom of this lack of power and argue that this separation of monetary policymaking from financial regulatory policymaking creates an inherent systemic risk.[200] The Treaty on European Community acknowledges the ECB's role in aiding the "smooth conduct of policies . . . relating to the prudential supervision of credit institutions" but contains no explicit grant of supervisory power.[201] Article 105 of the EC Treaty allows the Council to grant the ECB supervisory power, but any such grant would require unanimity of the members of the Council of Ministers and the assent of the European Parliament, which would be very difficult to obtain.[202] The ECB has indicated that it welcomes greater cooperation between bank regulators and central banks, implying that the ECB is more suitable for macro-prudential supervision of the banking sector.[203] In its official opinion on the directive creating the European Banking Committee and the Committee of European Banking Supervisors, the ECB stated, "[c]lose and effective cooperation between central banks and supervisory authorities is crucial for the promotion of financial stability. Banking activities entail a systemic risk that affects the heart of central banks'

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[198] *But see* Kathleen McNamara, *Rational Fictions: Central Bank Independence and the Social Logic of Delegation*, 25 WEST EUR. POLITICS 47 (2002).

[199] Foreign Bank Supervision Enhancement Act, 12 U.S.C. §§ 3101–3111 (2000); Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999).

[200] Karel Lanoo, *Supervising The European Financial System* (Ctr. for Eur. Policy Studies, Policy Brief No. 21, 2002); PADOA-SCHIOPPA, *supra* note 10, at 115-116.

[201] EC Treaty art. 105(5).

[202] EC Treaty art. 105(6); Protocol on the Statute of European System of Central Banks and the European Central Bank, 1992 O.J. (C 191) 73, art. 25.

[203] Jean-Claude Trichet, Integration of the European Financial Sector, Address at the International Banking Event (June 29, 2004), *available at* http://www.bis.org/review/r040714f.pdf. Senior staff within the ECB are divided over whether the ECB should have supervisory power over financial institutions.

interests."[204] The expansionary tendency of the ECB thus adds a complicating variable to the financial services lawmaking process and the issue of inter-institutional balance.

C. Failure of the Constitutional Treaty

The failure of the Constitutional Treaty could potentially halt Level 2 of the Lamfalussy process. In negotiating the directive on the Lamfalussy committees, the European Parliament, the Council of Ministers and the European Commission agreed that the Commission would advocate for a right of call back in the Constitutional Treaty at the Convention on the Future of Europe in exchange for the European Parliament's acceptance of the Lamfalussy process.[205] In order to ensure the Commission's compliance, the European Parliament inserted a four year sunset clause in each of the directives enacted under the Lamfalussy process.[206] Once the Constitutional Treaty was ratified and the European Parliament had a right of call back, the sunset clauses would no longer be necessary. The powers delegated to CESR under the Market Abuse Directive will be the first to lapse on April 12, 2007.[207]

The inter-institutional concerns of the European Parliament with the Lamfalussy process have not yet dissipated – one reason being that the proposed Constitutional Treaty has not been ratified. Since the electorate from France and the Netherlands voted against the Constitutional Treaty in late May and early June 2005, the

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[204] European Central Bank, Opinion of the European Central Bank, 2004 O.J. (C 58) 23, 25. One commentator has noted that article 105(4) of the EU Treaty requires ECB consultation on any legislation related to financial services and argued that the ECB should only be consulted on Level 1 legislation, particularly since consulting the ECB on Level 2 legislation could significantly slow the Lamfalussy process. Atilla Arda, *Consulting the European Central Bank: Legal Aspects of the Community and National Authorities' Obligation to Consult the ECB Pursuant to Article 105(4) EC*, 1 EUREDIA 111, 131 (2004).

[205] *See* generally The European Convention, http://european-convention.eu.int/bienvenue.asp?lang=EN (last visited May 3, 2006). The Convention included two members who were appointed by the European Commission and fifteen members who were appointed by the Member States.

[206] *See*, *e.g.*, Prospectus Directive, 2003 O.J. (L 345) 64, 81; Market Abuse Directive, 2003 O.J. (L 96) 16, 25 (offering examples of the four-year sunset clause).

[207] *See* Market Abuse Directive, *supra* note 206, at 25; MONITORING GROUP REPORT, *supra* note 151, at 39.

likelihood of ratification is nil.[208] The United Kingdom, Denmark and the Czech Republic have also suspended their planned referendums on the Constitutional Treaty.[209] The European Parliament, though, wishes to protect its legislative power in the codecision procedure and has reminded other EU policymakers that it is the only truly democratic EU institution.[210] As such, its influence on the EU lawmaking process reflects the popular will, and any loss of influence only exacerbates the public's concern about the accountability of the EU and its institutions.

Unless another inter-institutional resolution is agreed upon, Level 2 of the Lamfalussy process will cease as each sunset clause is triggered. Upon the triggering of these clauses, changes to financial services laws will only be possible through the typical codecision procedure, and the accelerated procedure enacting Level 2 technical measures will cease. Therefore, the financial services lawmaking process will revert to the slower procedures that were in place prior to the Lamfalussy Report. The European Parliament appears to have the stronger position in any inter-institutional negotiations over these sunset clauses, and the reversion to the codecision procedure as the primary method for all financial services lawmaking will give the European Parliament a greater role in the process. In order to continue using the Lamfalussy process after the sunset clauses are triggered, the institutions will have to enter into an agreement on the sharing of power similar to the solemn statement by Romano Prodi and the letter to the European Parliament from the Internal Market Commissioner.[211] The European Commission is well aware of this dilemma and has called on the Council and Parliament to reach an inter-institutional agreement to resolve this issue.[212]

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[208] Richard Bernstein, *Two No Votes in Europe: the Anger Spreads*, N.Y. TIMES, June 2, 2005, at A1; *The European Union Constitution: Dead, but Not Yet Buried*, ECONOMIST, June 4, 2005.
[209] Elaine Sciolino, *European Leaders Give Up on Ratifying Charter by 2006*, N.Y. TIMES, June 17, 2005, at A3.
[210] Randzio-Plath Report, *supra* note 43.
[211] *See* Prodi Declaration, *supra* note 99; Bolkestein Letter, *supra* note 100.
[212] Charlie McCreevy, Eur. Comm'r for Internal Mkt. and Services, Regulatory and Supervisory Challenges of Financial Integration, Address at the Lamfalussy London Summer Dinner 4 (June 27, 2005) (transcript on file with the Annual Review of Banking & Financial Law).

D. Transposition of Directives by Member States Becoming a Bottleneck

Regardless of the ratification process or the likelihood of inter-institutional agreements, Member States must enact national laws in compliance with a particular directive.[213] Some Member States, however, have delayed enacting the relevant laws.[214] The European Commission has the right to initiate infringement proceedings against Member States if they fail to act,[215] but the Commission has been hesitant to do so in the past because of a concern about harming its working relationship with a Member State. Nonetheless, in August 2005, the Commission announced that it was pursuing infringement procedures against sixteen Member States for failing to implement the Market Abuse Directive and its three related Level 2 directives.[216] The Commission is thus becoming stricter in enforcing compliance with FSAP directives and in overcoming its past hesitancy. This enforcement also reflects the Internal Market DG's emphasis on implementing existing FSAP legislation, rather than enacting new legislation.[217] In addition, the Commission, through its Internal Market DG, has taken a step towards improving the enforcement of directives by creating the Lamfalussy League Table.[218] The Lamfalussy League Table is updated nearly every month.[219] This "name and shame" policy began in July 2005 and its

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[213] EC Treaty art. 249; *see* T.C. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW 103 (2003).
[214] *See* Charlie McCreevy, Eur. Comm'r for Internal Mkt. and Services, The Wind Has Changed, Address at EUROFI – Banking and Finance in Europe Conference (Mar. 10, 2005) (transcript on file with the Annual Review of Banking & Financial Law); European Commission, Transposition of FSAP Directives – State of Play as at 11/05/2005, *available at* http://europa.eu.int/comm/internal_market/finances/docs/actionplan/index/050511-transposition_en.pdf.
[215] EC Treaty art. 226.
[216] Press Release, Internal Market: Commission Moves Against 16 Member States for Failure to Implement EU Legislation on Financial Services, IP/05/1035 (Aug. 3, 2005) (on file with the Annual Review of Banking & Financial Law).
[217] *Commission Green Paper on Financial Services Policy*, COM (2005) 177 final (May 3, 2005).
[218] *See* MONITORING GROUP REPORT, *supra* note 151, at 9; Commission Launches "Lamfalussy League Table" on Member States' Implementation of Securities Derivatives *supra* note 157; Rate of Transposition of FSAP Directives, League Table by Member State, *supra* note 159; Agence Europe, *supra* note 160.
[219] The original table was published on July 11, 2005. An updated table was published on October 1, 2005., *available at*

effects are as yet not apparent. In the financial services sector, experience is beginning to show that while the EU lawmaking process is improving and possibly accelerating, at least in the short term, the different national lawmaking processes are becoming the bottleneck.

The Inter-Institutional Monitoring Group recognized this problem of delayed transposition and has recommended the use of regulations in financial services lawmaking, particularly for Level 2 measures.[220] Unlike directives, regulations are directly applicable to Member States and have the force of law in Member States without any further legislative action by a Member State.[221] Other commentators do not agree with an increased use of regulations and believe that regulations should only be used in the uncommon circumstance where variations in national law do not need to be considered.[222] The European Commission itself is taking a case-by-case approach when deciding whether to use a directive or regulation at Level 2.[223] CESR and CEBS are making an effort to improve the transposition of EU directives into national law by training national officials on how this can be best affected.[224]

E. Translation Delays

A more unusual issue has become apparent, particularly after the enlargement and admission of ten new Member States to the EU in May 2004. Prior to expansion, the EU recognized ten official languages and translated all of its legislation and many of its official documents into those ten languages. Delays in translation were common but somewhat manageable. With the ten new Member States, though, the EU now recognizes twenty official languages.[225] Translation bottlenecks are thus becoming a problem. EU laws do not become effective until they are published in the *Official Journal*

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http://europa.eu.int/comm/internal_market/securities/docs/transposition/table_en.pdf.

[220] MONITORING GROUP REPORT, *supra* note 151, at 22.
[221] EC Treaty art. 249; *see* HARTLEY, *supra* note 213, at 103-04.
[222] MONITORING GROUP REPORT, *supra* note 151, at 22.
[223] *Id.*
[224] *See generally* Committee of European Banking Supervisors, http://www.c-ebs.org (last accessed May 3, 2006).
[225] The candidate countries of Romania and Bulgaria will also increase the number of official languages upon their admission into the EU in 2007. Irish Gaelic, though, may become the twenty-first official language even before then. *See* Welcome to the European Lanauges Portal, http://europa.eu.int/languages/en/home.

of the European Union, and laws are not published in the *Official Journal* until they have been translated into all twenty official languages of the EU.

This translation bottleneck is already causing serious delays. The new capital requirements directive (Basel II), already agreed upon by the Council, has not been endorsed by the European Parliament because it has not yet been translated into all of the EU's offical languages.[226] Further, a directive on a new financial services committee structure was agreed upon in May 2004, but was not published in the *Official Journal* until March 2005.[227] The delay was partly due to the translation of the directive into the twenty official languages. Some commentators have recommended that the working documents for financial services law be drafted only in English since English is by far the predominant language of financial markets.[228] National governments, rather than the EU, would then be responsible for translating working documents into their respective official languages. Final legislation for Level 2 would continue to be translated into all official EU languages in order to comply with official legislation.[229]

VII. Next Steps

What is the future of the Lamfalussy process as it applies to banking law in the European Union? The evaluations described above are generally positive, but nearly all agree it is too early to assess its effectiveness. Some commentators boldly predict the failure of the Lamfalussy process. Hertig and Lee, for example, predict that the Lamfalussy process will not work because of national

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[226] *Translations May Hold Up Basel II – EU's McCreevy*, REUTERS NEWS, Dec. 6, 2004. This directive is long and technical – the Revised Basel Accord itself is over 400 pages. Juliane Von Reppert-Bismarck, *EU Unanimous on Banks' Capital Requirement Bill*, DOW JONES INT'L NEWS, Dec. 7, 2004. Furthermore, concerns about the quality of the translations have arisen. Apparently the Polish version of the Treaty Establishing a Constitution for Europe has serious errors. *Flaws in the Constitution*, WARSAW VOICE, Jan. 30, 2005.

[227] Directive 2005/1/EC of the European Parliament and of the Council to Establish a New Organisational Structure for Financial Services Committees, 2005 O.J. (L 79) 9 (Mar. 4, 2005).

[228] *See* MONITORING GROUP REPORT, *supra* note 151, at 42. The European Central Bank currently uses English as its working language. *See also* Patrick Blum, *Report Calls for Use of English in EU Legislation*, EFINANCIAL NEWS, Nov. 20, 2004.

[229] MONITORING GROUP REPORT, *supra* note 151, at 42.

protectionism and bureaucratic inertia.[230] In their opinion, the European Securities Committee is merely a version of the Council of Ministers on a smaller scale and, therefore, will be susceptible to the same political pressures as the Council.[231] The European Commission, the Council and the European Parliament are in a power struggle as demonstrated by the agreement on the committee structure directive and the sunset clauses in the directives enacted using the Lamfalussy process. This inter-institutional competition, critics argue, will contribute to the failure of the Lamfalussy process.[232]

Hertig and Lee predict the creation of a centralized regulator as one possible scenario for the future of securities regulation in the EU.[233] While admitting that the creation of a pan-European securities regulator is not a new idea, they believe that such an agency would have greater powers than those currently granted to the European Securities Committee or to the Committee of European Securities Regulators.[234]

The Lamfalussy Report also hinted at the possibility of the creation of a centralized securities regulator. The report stated, "[if] the approach did not have any prospect of success, it might be appropriate to consider a Treaty change, including the creation of a single EU regulatory authority for financial services generally in the Community."[235] The Committee of Wise Men clearly understood that a recommendation on a centralized regulator was beyond their mandate and that there was not sufficient political will at that time to even pursue discussion of such a possibility.[236] In fact, the Council

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[230] GÉRARD HERTIG & RUBEN LEE, FOUR PREDICTIONS ABOUT THE FUTURE OF EU SECURITIES REGULATION 7 (2003), http://www.ecmi.es/files/hertig_lee.pdf. Dr. Lee also testified to this effect before the House of Lords. HOUSE OF LORDS SELECT COMM. ON THE EUR. UNION, TOWARDS A SINGLE MARKET FOR FINANCE: THE FINANCIAL SERVICES ACTION PLAN, 2002-3, REP. NO. 45 [HL Paper 192], at 23, *available at* http://www.publications.parliament.uk/pa/ld200203/ldselect/ldeucom/192/192.pdf.

[231] HERTIG & LEE, *supra* note 230, at 7.

[232] *Id.* at 8-9.

[233] *Id.* at 14.

[234] *Id.* at 14-15.

[235] *Lamfalussy Report*, *supra* note 2, at 41. Baron Lamfalussy later clarified his remarks stating that if a pan-European regulator were created, he would prefer a regulator of all financial services, not just a bank regulator or a securities regulator. Lastra, *supra* note 22.

[236] *Id.*

had stated that recommendations on "prudential supervision" were outside the Lamfalussy Committee's consideration.[237]

Discussion of the possibility of a pan-European financial services regulator has been muted. The United Kingdom's House of Lords Select Committee on European Union Affairs opposes the idea of a pan-European regulator.[238] In a 2003 report, the Committee stated, "[w]e agree with witnesses: there is no case for a European Regulator for as far forward as we can realistically see."[239] While the idea of a pan-European regulator has been discussed and the Treaty of the European Community provides for the possibility of the European Central Bank to become a bank supervisory agency,[240] there is no immediate, credible call for the creation of a pan-European regulator in any of the financial services sectors (banking, insurance, investments or securities). Given the current political climate following the failure of the Constitutional Treaty, any discussion of a new pan-European agency, such as an EU-wide Financial Services Authority or BaFin, has little chance of success.

In the short term, the institutions of the European Union must deal promptly with the failure of the Constitutional Treaty and the existence of sunset clauses in the existing Lamfalussy directives. The European Parliament will not obtain a right of call back within the treaty structure in the foreseeable future.[241] In light of past experience, the European Parliament is unlikely to yield on this right of call back.[242] Unless some accommodation is made for the European Parliament's concerns, the sunset clauses will be triggered.

An inter-institutional agreement is necessary to prevent the stagnation of the Lamfalussy process. Two forms of inter-institutional agreement are possible. First, the institutions could agree to a process recognizing the Parliament's right to callback. This agreement would allow the Lamfalussy process to continue as it exists now, rather than requiring treaty provisions. Second, the Parliament could agree to renew the sunset clauses at regular intervals. Under this arrangement, the Commission and Lamfalussy committees will have to act within the parameters set by Parliament in the Level 1 directives or Parliament will not renew their authority to act for the next renewal period. The worst case would be that the

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[237] *See supra* note 50 and accompanying text.
[238] HOUSE OF LORDS SELECT COMM. ON THE EUR. UNION, *supra* note 230, at 23.
[239] *Id.* at 23.
[240] EC Treaty art. 105(6).
[241] *See supra* notes 208-210 and accompanying text.
[242] *See supra* notes 197-198, 210-212 and accompanying text.

institutions cannot reach any agreement and the Lamfalussy process halts. The Lamfalussy committees would lose their legislative authority at Level 2 as each sunset clause is triggered. All future financial services legislation would then be enacted using the codecision procedure.

However, under any of these scenarios (including the worst case), the CEBS and CESR can continue to operate at Level 3 to improve the convergence of supervisory practice. The CEBS and CESR at Level 3 make decisions by consensus and can operate similarly to the Basel Committee on Banking Supervision which also reaches decisions by consensus.[243]

Over the longer term, the Lamfalussy process is not a stable decision-making system. The 25 Member States are represented on the Council of Ministers. These same Member States with their same national interests are also represented on the Lamfalussy committees. The additional layers of regulatory structure may complicate decision-making on bank regulation rather than simplify it.

The creation of the European Monetary Union and the introduction of the euro as the common currency have in some ways overtaken the Lamfalussy process and become the key drivers of European financial market integration. The introduction of the euro has accelerated the integration of wholesale financial markets. For example, an increasing amount of debt securities are issued in euros.[244] In 2000, debt securities in the principal amount of 6,481 billion euros were outstanding; in 2004 the amount outstanding had increased to 8,572 billion euros – a 32% increase.[245] Retail markets, on the other hand, have not integrated to any great extent. Few cross-border mergers have occurred and national regulators are very protective of their local markets.[246] EU banking regulation, even under the Lamfalussy process, has proven too slow to keep up with financial markets. The financial sector has become impatient with the slow progress of integration and has started its own process in

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[243] International Monetary Fund, *Managing Risks to the International Banking System*, 33 FINANCE & DEV. 26 (1996).

[244] EUROPEAN CENTRAL BANK, STATISTICS POCKET BOOK 29-33 (2005).

[245] *Id.* at 30 tbl.9.3; EUROPEAN CENTRAL BANK, STATISTICS POCKET BOOK 29 tbl.9.3 (2003). The euro became available at the wholesale level in 1999 and at the retail level in 2002. HANSPETER K. SCHELLER, THE EUROPEAN CENTRAL BANK: HISTORY, ROLE AND FUNCTIONS 16-17 (June 2004), http://www.ecb.int/pub/pdf/other/ecbhistoryrolefunctions2004en.pdf.

[246] *A Blurred Euro-Vision*, *supra* note 6.

parallel with the EU. A group of major European banks proposed creating a so-called "26th regime," which would permit them to offer uniform retail financial products to investors across the EU.[247] Retirement savings products would be the first products offered under the 26th regime.[248] The rules of the 26th regime would be industry standards, not enforceable law. Private sector discussions such as these are just beginning, but they reflect the financial institutions' frustrations with the EU legislative process. If the EU fails to integrate the retail markets, then the financial institutions may create a competing, yet less effective, regulatory regime. One solution to the slow integration of financial markets would be to create a regulatory system for EU-wide financial institutions that incorporates the Lamfalussy process.

VIII. Europeanized Dual Banking System

In the longer term, the creation of a federal system of bank regulation within the EU is a more likely scenario than the creation of a pan-European bank regulator.[249] This would follow the United States model, in which a bank may be licensed by a state[250] or by the federal government as a national bank.[251] This dual banking system is a hallmark of U.S. banking law and was created during the Civil War as part of the effort to create a true national currency.[252] While

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[247] Peter Norman, *Call for Pan-European Finance Products*, IRISH TIMES, March 25, 2005, at Finance 6; EUROFI, ACCELERATING THE CREATION OF A SINGLE MARKET IN RETAIL FINANCIAL SERVICES THROUGH A 26TH REGIME FOR PAN-EUROPEAN PRODUCTS (March 10, 2005), http://www.forum-europe.com/PDFdoc/note_26_-me_r-gime_Lux_EN_VFF.pdf; Jacques de Larosiere, Co-Chairman, Eurofi, Opening Remarks at Eurofi Conference (March 10, 2005), http://www.forum-europe.com/PDFdoc/JdLEurofiluxembourg.pdf.

[248] EUROFI, *supra* note 247.

[249] William Wright, *A Breath of Fresh Air in European Regulation*, EFINANCIAL NEWS, May 29, 2005; *cf.* Ruben Lee, Politics and the Creation of a European SEC: The Optimal UK Strategy – Constructive Inconsistency (London School of Economics Financial Markets Group, Policy Discussion Paper No. sp161, 2005), *available at* http://ideas.repec.org/p/fmg/fmgsps/sp161.html (questioning the need for a central regulator while recognizing the growing political support for a unified securities regulator in Europe). *Contra* Rosa M. Lastra, *The Governance Structure for Financial Regulation and Supervision in Europe*, 10 COLUM. J. EUR. L. 49 (2003).

[250] *See* National Bank Act, 12 U.S.C. § 35 (2000); *see also* MILTON R. SCHROEDER, THE LAW AND REGULATION OF FINANCIAL INSTITUTIONS ¶ 1.02[3] (2005).

[251] National Bank Act, 12 U.S.C. § 21 (2000).

[252] MICHAEL P. MALLOY, BANKING LAW AND REGULATION § 2.1.1 (2005).

not necessarily a model of regulatory efficiency and more a historical accident than a premeditated, well-designed bank regulatory system, the dual banking system has allowed for regional differences in the U.S. banking system.[253]

Over the past 100 years in the United States, there has been an increasing concentration of regulatory power over banks at the Federal level and an ongoing minimization of differences among state banking regulations. The FDIC, an independent federal agency, provides deposit insurance for accounts at member banks, whether national banks or state-chartered banks.[254] In order to obtain deposit insurance, state banks must comply with FDIC regulations.[255] Both national and state-chartered banks may join the Federal Reserve System, which provides both liquidity protection for banks and a check-clearing service.[256] Federal Reserve member banks are subject to Federal Reserve regulations.[257] Prior to 1991, foreign banks that operated in the United States usually incorporated as state-chartered banks and were subject to little federal bank regulation.[258] After several large foreign bank failures, Congress granted the Federal Reserve Board greater supervisory powers over foreign banks operating in the United States.[259] Furthermore, the recent Gramm-Leach-Bliley Act granted the Federal Reserve the lead regulatory role in the supervision of financial holding companies, a particular type of financial conglomerate that combines commercial banking, investment banking, insurance and other financial services within the same corporate ownership structure.[260]

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[253] *Don't Start From Here*, ECONOMIST, May 21, 2005, at 76.
[254] Federal Deposit Insurance Act, 12 U.S.C. §§ 1811, 1813-1815 (2000).
[255] *See* 12 C.F.R. pt. 362 (2006).
[256] Federal Reserve Act, 12 U.S.C. §§ 222, 321, 341-361 (2000).
[257] 12 U.S.C. § 222 (2000); *see* 12 C.F.R. pts. 208, 210 (2005).
[258] *See* Duncan E. Alford, *Basle Committee Minimum Standards: International Regulatory Response to the Failure of BCCI*, 26 GEO. WASH. J. INT'L L. & ECON. 241 (1992).
[259] Foreign Bank Supervision Enhancement Act of 1991, Pub. L. No. 102-242, 105 Stat. 2236 (1991) (codified at 12 U.S.C. §§ 3101–3111 (2000)). *See generally* Alford, *supra* note 258.
[260] Financial Services Modernization Act of 1999 (Gramm-Leach-Bliley Act), Pub. L. No. 106-102, 113 Stat. 1338, (1999) (codified in scattered sections of 12 U.S.C.). For the definition of "financial holding company," see 12 U.S.C. § 1841(p) (2000). An example of a financial holding company is Citigroup, the combination of Citibank and the Travelers Insurance Group. *Big Umbrella: Travelers and Citicorp Agree to Join Forces in $83 Billion Merger*, WALL ST. J., Apr. 7, 1998, at A1. *See also* Donato Masciandaro, *Financial Supervision Unification and Central Bank Fragmentation Effect* (University of Lecce Economics Working Paper No. 74/35,

Another reason to create a Europeanized dual banking system is the potential reduction in compliance costs for international banks. Financial conglomerates, such as HSBC,[261] have complained forcefully about the costs of multiple jurisdiction regulatory compliance. With a dual banking system, pan-European financial institutions could choose to organize as a European bank and be subject to pan-European bank regulation. The European bank would operate much like a national bank in the United States, which is subject to federal bank regulation that largely preempts contradictory state regulation.[262] Large financial institutions operating in multiple countries within the EU may wish to organize as such an institution and be subject to only one set of EU regulations, rather than the 25 sets of national laws and regulations of the Member States. The European Company Statute and the "societas europaea"[263] vehicle provide a method of creating a pan-European corporate entity. Nordea Bank, a large Scandinavian financial institution, is planning to convert to European company status and change its bank subsidiaries in various Member States to branches in order to take advantage of home regulator rules.[264]

Financial institutions that remain focused on national markets could continue to operate under the current regime of mutual

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2005), *available at* http://ssrn.com/abstract=808966 (noting the trend of centralization of bank supervisory authority around the world).

[261] John Bond, Chairman, HSBC Holdings, Speech to Goldman Sachs Conference (May 7, 2004), *available at* http://www.hsbc.com/public/groupsite/assets/newsroom/speech_07may.pdf. HSBC spent approximately $400 million on regulatory compliance around the globe in 2003.

[262] For instance, national banks in the United States are subject to usury laws of the state in which they are headquartered, not where the borrower is located. ROBERT M. TAYLOR, III, BANKING LAW § 30.03 (2005). National banks can "export" interest rates and avoid application of state usury laws. Marquette National Bank v. First of Omaha Serv. Corp., 439 U.S. 299 (1978).

[263] European Company Statute, 2001 O.J. (L 294) 1.

[264] EXPERT GROUP BANKING REPORT, *supra* note 34, at 10. The Nordea conversion has been delayed in order to resolve issues regarding the deposit insurance of bank customers and the tax implications of the conversion. Andrew Bibby, *Trials of a European Trailblazer*, FIN. TIMES, March 31, 2005, at 14; Lawrence Goldberg et al., *Nordea Points the Way to Better Bank Regulation*, 10 FIN. REGULATOR 69 (2005). *See also* Paul Meller, *For Firms in Europe, It Could Be Age of "SE,"* INT'L HERALD TRIBUNE, Oct. 9, 2004, at 17 (explaining that Fortis, a Belgian financial conglomerate, and Swedish bank SEB are two other financial institutions considering converting to European Company status).

recognition and minimum harmonization of laws.[265] Cross-border financial institutions could choose to operate under EU level directives and regulations. A Europeanized dual banking system would provide pan-European consistency for those banks that choose it and local regulatory diversity for those banks that wish to focus on a particular local or national market.

An important question is what governmental agency would conduct prudential supervision of these European banks. Three options are: (1) a new EU-wide supervisory agency, (2) the European Central Bank, or (3) selected national prudential supervisors. Any agency selected would need visitorial rights among its other supervisory powers.[266] In the current political climate, a new agency is unlikely to be created for this purpose. The European Central Bank is a plausible option because the EU Founding Treaties already provide a procedure for the Bank to obtain prudential supervisory powers.[267] A designated national agency for each Member State is possible given that EU financial law is becoming more specific about the necessary coordination among Member States' bank and securities supervisors. The provisions in the Financial Conglomerates Directive dealing with a "single coordinator,"[268] the provisions in the proposed Capital Requirements dealing with a consolidated supervisor,[269] and the definition of "competent authority" in the Market Abuse Directive[270] all detail how to decide which national supervisor will take a leading role in supervising a complex financial institution. Prior to enactment of the Market Abuse Directive, financial services legislation typically did not define competent authority.[271] The next logical step would be to

[265] Prior to the Lamfalussy process, EU financial regulation was based on the three principles of home country rule, minimal harmonization and mutual recognition. Davies, *supra* note 22; Moloney, *supra* note 22, at 810.

[266] Visitatorial rights refer to the supervisor's right to enter the premises of the financial institution, examine its books and records, and question its officers regarding activity subject to supervision. *See*, *e.g.*, 12 C.F.R. § 7.4000 (2006). In the U.S., only the Office of the Comptroller of the Currency or its representative have visitatorial rights over national banks. *Id.*

[267] *See supra* notes 36-38 and accompanying text.

[268] Council Directive 2002/87 art. 10, 2003 O.J. (L 35) 1, 9 (EC).

[269] Capital Adequacy Proposal, *supra* note 185, at 127-128.

[270] Council Directive 2003/6 arts. 11, 12, 2003 O.J. (L 96) 16, 23 (EC).

[271] Moloney, *supra* note 22, at 809.

expand this concept of a coordinating supervisor or consolidating supervisor to include visitorial and other supervisory rights.[272]

Furthermore, the first option is unlikely while the other two options are more plausible given existing Treaty structures and financial services directives. The EU legislative process would focus on the regulation and supervision of EU banks with cross-border operations and continue to use the Lamfalussy process to accelerate financial services lawmaking. However, serious legal obstacles in the European Union will hinder this proposal of a dual banking system. The legal principle of subsidiarity[273] raises the issue of the need for a European bank created under EU law. The existence of the European Company Statute mitigates this issue to some degree, as the EU institutions have already agreed on the need for a limited liability entity created under EU law.[274]

The creation of the Lamfalussy process caused serious debate among the EU institutions over their power within the legislative process.[275] Agreement on substantive bank regulation applicable across the 25 nations of the EU and preempting Member States' laws will likely be at least as difficult. Given that banking provides the means of payment within an economy, any discussion of bank regulation raises national sovereignty issues by countries protective of their national banking institutions.[276] However, this is

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[272] *See generally* EUROPEAN FINANCIAL SERVICES ROUND TABLE, ON THE LEAD SUPERVISOR MODEL AND THE FUTURE OF FINANCIAL SUPERVISION IN THE EU (2005), *available at* http://www.efr.be/members/upload/publications/22676EFRlsvfinal-June2005.pdf; Expert Banking Group Report, *supra* note 34, at 13-14; Government Accountability Office, Financial Regulation: Industry Changes Prompt Need to Reconsider U.S. Regulatory Structure 131-32 (GAO-05-61 October 2004) (reflecting a similar discussion among US policymakers about the structure of financial institution supervision).

[273] BORCHARDT, *supra* note 58 at 25-29.

[274] Eur. Comm'n, *Modernising Company Law and Enhancing Corporate Governance in the European Union: A Plan to Move Forward*, at 22, COM (2003) 284 final (May 21, 2003); Council Regulation 2157/2001, On the Statute for a European Company, 2001 O.J. (L 294) 1; Council Directive 2001/86, Supplementing the Statute for a European Company with regard to the Involvement of Employees, 2001 O.J. (L 294) 22 (EC).

[275] *See* Randzio-Plath Report, *supra* note 43.

[276] See *supra* notes 1-16 and accompanying text for a discussion of the role of banking in the economy. The recent controversy between the European Commission's Internal Market Directorate and the Bank of Italy over the proposed acquisition of Bank Antonveneta by ABN AMRO illustrates that these concerns are very real. *Fazio Responds To European Commission Letter On Antonveneta*, ANSA ENGLISH MEDIA SERVICE, May 25, 2005.

not to suggest the creation of an exclusive EU bank regulatory regime. Rather, banks would have the option of choosing to organize themselves as a European bank. Some banks whose markets are primarily local in nature will wish to continue to operate under the *status quo*, which should remain available to them.

The current European Commission is not seeking to introduce major initiatives in EU financial regulation. Financial institutions have loudly complained of regulatory fatigue and of the need to digest the large number of laws resulting from the completion of the Financial Services Action Plan.[277] The new Internal Market Commissioner Charles McCreevy has stated that he will be focusing on the implementation of the FSAP over the next five years and does not plan on proposing any new major legislative initiatives in the financial services area.[278] Although the financial industry broadly supports consolidating existing financial services legislation and coordinating supervisory practice among the twenty-five Member States, the current political climate does not appear to be supportive of any major change.

The CEBS is unlikely to support a more active role for itself as a bank regulator within the EU. According to a recent consultation paper, CEBS is not focusing on enforcement as a key policy objective as is CESR.[279] Rather, the CEBS is focusing on the convergence of supervisory practice at Level 3 as one of its primary objectives.[280] In the consultation paper, the CEBS states, "CEBS considers that its work is more about building a common supervisory culture and approach, mainly around the proposed CRD, and a practical, co-operative framework within an existing and firmly established legislative framework."[281] The CEBS does not view itself as a regulator and is focusing on consensus building as its primary tool. It has rejected for the time being the creation of a peer review panel or a mediation mechanism to hear complaints regarding national regulators.[282] Given its limited view of its role in EU

[277] Charlie McCreevy, Eur. Comm'r for Internal Mkt and Services, Governance and Accountability in Financial Services, Speech before the Economic and Monetary Affairs Committee of the European Parliament 2 (Feb. 1, 2005), *available at* http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/05/64&format=PDF&aged=0&language=EN&guiLanguage=en.
[278] *Id.* at 3.
[279] CEBS Role Paper, *supra* note 196, at 15-16.
[280] *Id.* at 16.
[281] *Id.*
[282] *Id.* at 15-16.

banking regulation and supervision, the CEBS is probably unwilling to assume the role of an EU-wide bank supervisor.

However, notwithstanding its potential benefits, the dual banking system, like the current Lamfalussy process itself, may not be a stable regulatory system. A Europeanized dual banking system would likely cause a shift in power and influence to the central regulator over time, much like the federal regulators have experienced under the U.S. system. The current political climate in the aftermath of the failure of the Constitutional Treaty does not lend itself to the creation of a new EU-wide institution, especially one that regulates a fundamental sector of the economy such as the financial system. Just like the Lamfalussy process, a Europeanized dual banking system would be a further, but not final, step towards pan-European financial regulation.

IX. Conclusion

The Lamfalussy process appears to have accelerated the lawmaking process at the EU level and enabled the passage of the last portion of the EU legislation proposed by the Financial Services Action Plan by the 2005 deadline. This acceleration may in reality only apply to the Level 1 legislation. Including Level 2 legislation in the calculation, the extent of the acceleration becomes more questionable. The bottlenecks in the financial services lawmaking process now appear to be the fault of national parliaments that are slow in transposing EU law.

An immediate concern is a prompt response to the failure of the Constitutional Treaty and the future triggering of the sunset clauses in the Lamfalussy directives. The EU institutions must reach an inter-institutional agreement or else the stagnation of the Lamfalussy process is a very real possibility. Over the next few years, the Lamfalussy process will focus on the implementation of EU law at Level 3. The performance of the CESR and the CEBS will also be scrutinized during this period as a test of the effectiveness of the Lamfalussy process. The Level 2 measures and advice related to the Capital Requirements Directive (Basel II) will be of particular interest and a test of the Lamfalussy process.

A possible next step in integrating the banking industry within the EU is the creation of a Europeanized dual banking system. This system would require a new entity called a European bank, which would be similar to a national bank under U.S. banking law. The pan-European bank would be subject to uniform EU bank regulations, presumably lowering the bank's compliance costs. The European bank option would be most attractive to large, complex financial institutions with operations in multiple Member States. In the short term, however, the EU likely will make few changes to the financial services lawmaking process. EU institutions and banks are recovering from regulatory fatigue and the EU institutions continue to make adjustments to the Lamfalussy process in light of the failure of the Constitutional Treaty.

X. Appendices

A. Table 1 – Timeline

Event	Common currency agreed upon – Treaty of Maastricht	Financial Services Action Plan	Lisbon Council - March French Presidency of the EU - July – December Preliminary Lamfalussy Report November	Report of the Wise Men – Final Lamfalussy Report – February Stockholm Council approved the Final Report - March	European Securities Committee and Committee of European Securities Regulators formed	Euro introduced at the retail level	ECOFIN Council extends Lamfalussy process to banking and insurance	Bank (EBC and CEBS) and insurance Lamfalussy committees formed	Revised Basel Accord (Basel II) issued
Date	1992	1999	2000	2001	June 2001	Jan. 1, 2002	December 2002	November 2003	June 2004

B. Table 2 – Institutions Involved in EU Bank Regulation

Lamfalussy Process	**Institutions - Legislative Process**	**Monetary Policy Institutions**	
Level 1	Council of Ministers (Ecofin) European Parliament, Economic and Monetary Affairs Committee European Commission, DG Internal Market	European Central Bank	European System of Central Banks
Level 2	European Banking Committee (regulatory) Committee of European Banking Supervisors (advisory)	*12 Member States in the eurozone currently*	*25 members*
Level 3	Committee of European Banking Supervisors	*All of the ten new Member states are required to join the eurozone upon meeting certain criteria*	Banking Supervision Committee
Level 4	European Commission		

C. Table 3 – Securities Directives – Length of Time for Enactment

Name of Directive	Length of Time for Enactment (Months)	
	Under Lamfalussy Process – Level 1 Only	Pre-Lamfalussy
Market Abuse Directive	20	30
Prospectus Directive	15	108
Market in Financial Instruments (Investment Services) Directive	18	54
Transparency Directive	14	36
Average	**16.75**	**57**

D. Table 4 – Comparison of Securities Directives

Pre-Lamfalussy and Post-Lamfalussy

Directive – Name	**Pre-Lamfalussy**	**Post-Lamfalussy**
Level 1 *Level 2*		Level 1 *Level 2*
Markets in Financial Instruments (Investment Services) Directive (April 2004)		
Citation	85/61/EEC, 93/6/EEC, 2000/12/EC, 93/22/EEC	2004/39/EC, 2004 O.J. (L 145) 1-44, April 30, 2004.
Time to pass legislation (months)	54	18
Length (pages)	25	44
Number of articles	32	73
Transparency Directive (April 2004)		
Citation	2001/34/EC	2004/109/EC, 2004 O.J. (L 390) 38, Dec. 31, 2004
Time to pass legislation (months)	36	14
Length (pages)	51	20
Number of articles	113	35
Prospectus Directive (July 2003)		
Citation	2001/34/EC	2003/71/EC,

		2003 O.J. (L 345) 64, Dec. 31, 2003.
Time to pass legislation (months)	108	15
Length (pages)	51	25
Number of articles	113	33
Regulation on Disclosure Standards		
Citation		*809/2004,* *2004 O.J. (L 149) 1, April 30, 2004*
Number of months Level 2 legislation enacted after Level 1 legislation		4
Market Abuse Directive		
Citation	89/592/EEC,	2003/6/EC, 2003 O.J. (L 96) 16, April 12, 2003 (adopted Jan. 28, 2003)
Time to pass legislation (months)	30	20
Length (pages)	3	9
Number of articles	15	22
Directive on Insider Dealing		
Citation		*2003/124,* *2003 O.J. (L 339) 70, Dec. 23, 2003*
Number of months Level 2 legislation enacted after Level 1 legislation		*11*
Directive on Disclosure		

Requirements		
Citation		*2003/25, 2003 O.J. (L 337) 73, Dec. 23, 2003*
Number of months Level 2 legislation enacted after Level 1 legislation		*11*
Regulation on exemptions from buy back		
Citation		*2273/2003, 2003 O.J. (L 336) 33, Dec. 23, 2003*
Number of months legislation enacted after Level 1 legislation		*11*
Directive as regards accepted market practices, the definition of inside information among other objectives		
Citation		*2004/72/EC 2004 O.J. (L 162) 70, April 30, 2004*
Number of months Level 2 legislation enacted after Level 1 legislation		*14*

Note: The directives and regulations in italics are Level 2 legislation providing the technical implementing details as outline in the Lamfalussy Report.