International Swaps and Derivatives Association (ISDA)
International Capital Market Association (ICMA)
Asociación de Mercados Financieros (AMF)
Association of Private Client Investment Managers and Stockbrokers (APCIMS)
Associazione Italiana Intermediari Mobiliari (ASSOSIM)
Bundesverband der Wertpapierfirmen an den Deutschen Börsen e.V. (BWF)
Danish Securities Dealers Association (DSDA)
Euribor ACI European Commission Working Group
Finnish Association of Securities Dealers (FASD)
Futures and Options Association (FOA)
Icelandic Financial Services Association (IFSA)
Norwegian Securities Dealers Association (NSDA)
London Investment Banking Association (LIBA)
Securities Industry and Financial Markets Association (SIFMA)
Swedish Securities Dealers Association (SSDA)

JOINT ASSOCIATIONS' RESPONSE TO IIMG 2ND INTERIM REPORT

26th March 2007

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Introduction

This response sets out the views of the listed associations on the IIMG's second Interim Report. It focuses on IIMG's suggestions for further improvements to the implementation of the Lamfalussy process, and adds some further suggestions of our own.

However, it is essential to stress our continuing strong support for the Lamfalussy process and the Lamfalussy structure. The revised Lamfalussy architecture has significantly improved many aspects of the European legislative and regulatory process, including in particular the quality of cooperation between national supervisors, the ability of legislators and regulators to draw on the expertise of market participants through consultation and dialogue, and the alignment of legislative and regulatory proposals with the public policy needs of the users of financial markets.

We agree with the May 2006 ECOFIN conclusions, which affirmed that the Lamfalussy approach is the best means to achieve cooperation between national supervisors. We are also firmly of the view that continuing to improve the Lamfalussy arrangements is the most appropriate way to pursue the continuing improvements which IIMG identifies as necessary.

We suggest that the final IIMG report should stress the above points.

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

We welcome the 2nd Interim report of the IIMG and warmly support the preliminary recommendations made within it. We comment specifically on some of the observations and suggestions made within the report below.

Organisation of Lamfalussy process

We agree that the operation of the Lamfalussy process so far has improved consultation and transparency. In terms of speed and efficiency experiences have been more varied from directive to directive. Whereas the drafting processes of the Transparency Directive went smoothly, but the Level 2 implementing Directive, the Prospectus, the MAD and in particular the MiFID directives did not proceed as intended. In the case of MAD, CESR recently issued some guidance on how to interpret the concept of insider information and its application: issues that ought to have been resolved at Level 1 or 2. In the case of MiFID four contentious issues are subject to continuing discussion on interpretation not only after the Levels 1 and 2 have been adopted, even after the transposition deadline namely: passporting, best execution, inducements and transaction reporting. For MiFID even extensions of the timetable had to be adopted by the co-decision process. Despite these extensions, only a minority of the member states had transposed MiFID by the 31st January 2007 transposition deadline.

We would like to stress that it is essential not to lose sight of the original objective of efficient, rapid mechanisms to update legislation. In particular we share the view of the IIMG that too much detail at any and all levels of the Lamfalussy framework is detrimental to the overall objectives, and this is particularly the case at the higher levels. All participants in the process must be mindful of this risk. We strongly

endorse the IIMG's key message that Regulatory restraint is required at all levels of the process.

Transparency of process at all levels, cooperation between all bodies, and attention to timing/sequencing issues are essential if the full potential of the Lamfalussy process is to be achieved. More work remains to be done in each of these areas and we welcome the practical suggestion that work on Level 2 could begin while Level 1 is still under consideration. We share the view of the IIMG that it is appropriate to limit this pragmatically, to "sketching" of Level 2 rules to ensure that the political process is not pre-empted. We also share the Group's view that a parallel procedure could be beneficial to the legislative procedure and we hope would contribute considerably to efficiency and speed. First because it may surface issues that need to be addressed by Level 1 and which may not have been detected properly in the initial call for evidence, market failure analysis or impact assessments. Secondly, a parallel procedure may facilitate the drawing of a clear borderline between a principle based regulation on Level 1 and complementing implementing measures on Level 2 thereby trying to avoid excessive detail in Level 1. Nevertheless, it is essential to note that the more issues that are identified through this process, the greater the importance of discipline in the key objective of keeping the level of detail, at both Level 1 and Level 2, to a minimum.

Furthermore, it is helpful that the IIMG has both identified and underlined the distinction between political and practical issues with respect to the working of the Lamfalussy process. Intractable political issues should not be passed to Level 2 or 3 Committees for resolution (not least as it is unacceptable for these same Level 3 Committees to be criticised for failing to achieve convergence and consistency in political areas where Member States could not agree). If a political issue is not resolved, it needs either to remain for national discretion, or be left outside of the legislation. On a practical front, legislators at all levels need to have a clear understanding of the process constraints and burdens on market participants when introducing new legislative measures. Efficiency is an important goal, but as we have commented repeatedly in the past, it is no compensation for poorly drafted legislation which is implemented in a hurried and confused manner.

We strongly recommend that a fixed deadline for transposition and implementation should not be set in the course of the Level 1 procedure as is the case at present. Our reasoning is that the time needed to finalise the Level 2 implementing measures is normally unclear and thus very often underestimated at the stage of Level 1. This was clearly demonstrated in the case of MiFID.

We have two alternatives to suggest for how the process could be amended, though we recognise that under either scenario there will need to be a change to the legal framework for determining deadlines:

1) We believe the best method would be to fix the deadline for transposition and implementation only once Level 2 is finalised. In this case the decision on timing would continue to be made under the co-decision process but Level 1 would provide that transposition and implementation take place a stated time after all Level 2 measures have been finalised.

2) Alternatively, we recommend that the timescale for Level 2 measures which is to be finalised, transposed and implemented by Member States should be agreed on a case by case basis, rather than according to a fixed 18 month timetable. In the case of MiFID, of course, the need for flexibility in the deadlines was clearly demonstrated and the deadline for the finalisation of the

Level 2 measures in fact was extended to 24 months, with a further 9 months for Member States to transpose into national legislation and an additional 9 months before the Directive came into force, and yet despite these extensions many Member States have not transposed on time, and some may not have done so even by the implementation deadline.

Another concern we have regarding the overall timetable is that the time available for the industry to make its preparations for implementation tends to be squeezed. The entire legislative process loses credibility if care is not taken to ensure that industry has appropriate time to implement national requirements.

Infringement procedures are of little purpose if insufficient time has been allocated to implementation processes. The experience of implementing the Transparency Directives, where Level 1 could not properly be implemented without Level 2, which was not published until nearly 2 months after the implementation deadline for Level 1, should have served to illustrate the significant burdens generated when legislation that requires major infrastructure investment is implemented hurriedly. Unfortunately this experience is being repeated with the MiFID where, as noted above, the Commission granted 9 months for the industry implementation but where failure to transpose on time by a majority of the Member States has reduced time available for to the industry. This is unacceptable as in a case like MiFID, some elements of which require extensive IT system development, the industry would normally need a minimum lead-time of 18 months for IT development alone in order to be compliant.

Industry cannot make major investments in developing new business models and the supporting IT systems until provisions at both Level 1 and 2, and in many cases Level 3 guidance as well as national implementing provisions, have been finalised. We note that bottlenecks with official translations of texts have further exacerbated the problem and these practical considerations must be examined by the EU institutions. We recommend that the process should deliver a commitment, in the case of each initiative, that there will be sufficient time built into the timetable to allow for the development of new system requirements or other changes that will be necessary in order to implement the new legislation. We note that in Sweden such protocols are already agreed between industry and the authorities and we believe this model has a lot to offer.

With respect to sunset clauses we support the Group in welcoming the joint statement of the European Parliament, the Council and the Commission recognising that the principles of good legislation require implementing powers to be conferred on the Commission without time limit. We believe this is a significant statement and is an important step forward in achieving the better regulation agenda where existing legislation should be regularly scrutinised by the Commission and where obsolete or flawed legislation should be withdrawn.

Instruments: Directive vs Regulation

We welcome the IIMG discussion on the choice of legislative instrument that might be used and we support the conclusion that the decision needs to be taken on a case by case basis. The proposed guiding principles for deciding between regulations and directives are soundly based, although we offer some observations below, and we also note that the IIMG offers important reflections on the potential for regulations to lead to increased legal uncertainty in certain circumstances as well as the utility of directives where national subsidiarity is appropriate.

The IIMG recognises that "regulations could be used when an action requires immediate effect." This is true, but we would qualify this observation by stating that speed of transposition alone should never be the guiding principle on which to opt for a regulation rather than a directive, not least because of the complex issues that can be created by the use of a regulation that the IIMG itself points to. We share the IIMG's perspective that issues that clearly do not conflict with present national civil law or other legislation, or that need to be fully harmonised in order to deliver the objective of the single market objective, are more suitable for regulations. Indeed we think that the ability to be self contained, in itself, is a good criterion for opting between regulations and directives. However, we find the statement that regulations are necessarily more appropriate for measures that target a specific area of the Internal Market rather than a whole sector, to be a little confusing and we note that the IIMG does not provide a rationale for its position on this point. We think that the important issue is for the content of the regulation to be self contained, not the area of the market.

We note that the IIMG's general discussion is consistent with submissions that we have made in the past and also with the analysis prepared by ISDA in October 2004. We continue to support the ISDA analysis very strongly and attach it as an annex to our report. We encourage the use of both Directives and Regulations to be used carefully in order to support the overall process of convergence.

Consultation

We entirely support the recommendation of the IIMG that consultation should be conducted at all levels but that overlaps should be avoided. Hence, the IIMG asks the Commission to cooperate closely with the Level 3 Committees with respect to the drafting of Level 2 measures. We agree that the Commission should provide an explanatory statement in all cases where it deviates from the Level 3 Committees' advice. The Level 3 Committees represent the Community bodies which implement EU legislation, and are closer to the practicalities of the market than the Commission. There will, however, clearly be occasions when it is entirely appropriate for the Commission not to follow the advice from the Level 3 Committees, for example if advice is not consistent with the needs of market users or with the EU legislation.

Consultation processes are an essential component in the effective operation of the Lamfalussy process. Hence, consultative programmes must be planned with care and sufficient time allowed for them. This stricture applies at all levels of the Lamfalussy process. Compressed time scales and high volumes of consultations which we have seen uncomfortably often (sometimes driven by poorly conceived legislative timetables) are, naturally, counterproductive in terms of quality of industry input and fail the test of genuine industry-regulatory dialogue. It is also important to ensure that the content matter of the consultation is also appropriate. It is, for example, incorrect for a consultation on a Level 3 measure to exceed the boundaries set out by Level 1 and Level 2 measures.

We also underline the need for coordination of consultation efforts whether between different parts of the Lamfalussy process or even different sections of the European Commission. It is more time-efficient for a respondent to respond to a single consultation, wherever possible, rather than a sequence of overlapping consultations, where duplication of consultative effort can actually damage the quality of the industry input, not least for reasons of time pressure.

Both within the context of consultation but also more generally, we note that it is necessary for the regulators themselves to continue the process of gaining ever

greater understanding and expertise of markets and of firms' practices so that regulatory proposals and recommendations take appropriate account of market realities and create proportionate risk sensitive responses. We therefore encourage an ever closer dialogue with the industry, including both firms and associations, in order best to understand the range of needs and particularities of the industry.

Better Regulation: Impact assessment

The IIMG offers fruitful proposals concerning impact assessment. There are several important observations by the Group: namely that Impact Assessments should be carried out at all levels where significant proposals are made; that there should be an ex-post impact assessment – both for individual measures but also for the whole financial services regulatory portfolio; and that an independent assessment body is needed.

We support the proposals for an Impact Assessment Board, though we feel that it is important that steps be taken to ensure that this board is sufficiently impartial and objective. One solution might be to give the European Parliament a role in oversight of this Impact Assessment Board (to verify impartiality).

While the IIMG talks more about impact assessment than cost/benefit analysis, there can also be real merit in obtaining cost and benefit information where this is available. We note that there was no cost benefit analysis for the MiFID and in retrospect this was a missed opportunity. Of course, which tool it is appropriate to use will vary depending on the specific circumstances. We see impact analysis as a more general assessment of how a proposed piece of legislation might work and what consequences it might have for market structures etc. Cost/benefit analysis can be a more practical gathering of specific information on how much a new requirement will cost for firms to implement and therefore whether the costs outweigh the benefits or can be easily absorbed, or which particular method of implementing an agreed policy objective is most cost-efficient.

Moreover if the cost/benefit analysis and/or impact assessment identifies one or two areas of critical cost or great sensitivity then there can be benefits yielded in implementation and enforcement priorities as themed questionnaires about implementation in that area could be used.

In any case, it is important to bear in mind the realistic limitations of either impact assessment needs or cost/benefit analysis. In particular markets are capable of evolving more quickly than regulation, hence forward looking assessments can be overtaken and rendered void. Also, if new regulations create obstacles to markets' ability to cater for the legitimate needs of investors and issuers, they will inevitably seek out new ways to meet those needs, a process whose costs and impacts may not be predictable. Furthermore, new rules can have quite unintended consequences that no impact assessment could have envisaged.

However, while cost/benefit analysis and impact assessment alone is not enough to ensure quality legislation, it can contribute to a process that identifies issues that will make demands on industry. The legislative language should then be drafted in a way that makes clear what the implications will be for firms.

Another important aspect of evidence based regulation which the IIMG could usefully focus upon is market failure analysis. Conducting such analysis in the first instance will help establish whether any legislative action needs to be taken at all.

Level 3 issues

We support the IIMG analysis that cooperation and convergence are litmus tests of progress at Level 3, but that it is hard to find clear indicators of progress. An alternative approach might be to evaluate the Level 3 Guidance after a period of time to assess whether it has helped to deliver convergence. We recognise that without continuing and wholehearted political support, the Level 3 process of convergence is likely to be frustrated and we reiterate the fact that if there is a political desire to achieve convergence it is necessary to create the foundations at Level 1.

We look forward to the IIMG's future suggestions for concrete proposals for fostering cooperation and support as much dialogue as possible between supervisors at Level 3 and in interaction with the industry. In this regard we support the collegiate approach that CEBS has adopted. We also welcome some innovative practices that the Level 3 Committees have pioneered including the Frequently Asked Questions approach launched by CESR. However, Level 3 Guidance must not move beyond its legitimate boundary into areas that were closed by Levels 1 and 2 nor seek to impose additional obligations beyond Levels 1 and 2.

Nevertheless, we would also note that the IIMG's proposal for creating a specific requirement for national regulators to foster convergence risks opening up potentially complex wider discussions about the role of the regulators concerned. In general terms we can agree with a statement that would support convergence in regulatory results and outcomes but not one that suggests a structural convergence is necessary.

Please see our further comments on this general issue in response to question 4.

Level 4: Transposition and Enforcement

In discussing transposition and enforcement, we share the IIMG's view that implementation has not yet lived up to expectations. There are multiple strands to this, which the IIMG documents clearly. We strongly support the IIMG recommendation that EU institutions should make a proper assessment before deadlines are set.

Transparency and disclosure are two important themes, which we are glad that the IIMG has noted. We have welcomed the first steps in Supervisory Disclosure made by CEBS and echo the IIMG's request that over time CEBS should volunteer to look beyond CRD disclosures (which are mandatory under the directive). Other Level 3 Committees should follow suit. Additionally, we suggest that CEBS and other Committees seek feedback on the manner and utility of their disclosures so that maximum benefit can be obtained.

One important feature of the CEBS Supervisory Disclosure is the link to national law and implementing regulations as well as regulatory rule books. So far as we are aware, this provision and access to information is unique. It is notable that information provided by the Commission does not extend to all legislation in the financial services sphere (e.g. whilst there is some information on the extent of transposition of FSAP directives, the CRD itself is no longer categorised as an FSAP measure).

Moreover, the Commission's disclosure of information is periodic and does not contain links to national legislation/rule books. Ideally there would be a more integrated approach adopted by EU bodies. The Commission website could provide specific links to Level 3 Committees where more detailed implementation information

(measure by measure, Member State by Member State) could be obtained. Up to date information on whether a Member State has transposed a directive or other measure should be available on the Commission website in a timely manner. The suggestion that it should be possible to make comparisons by use of one of the Commission's working languages is also welcome. The willingness to provide such transparency would be an important testament to the EU institutions' commitment to an effective single market.

The IIMG recommends use of transposition workshops. We support this suggestion and would welcome suggestions from the IIMG on how industry could become more involved in the discussions prior to implementation decisions are made. As much transparency of process as possible is important.

The IIMG also highlights the importance of the Commission ensuring that sufficient resources are devoted to assessing accurate transposition and infringement procedures. This is a valid and long standing observation which we very strongly support and we think the IIMG should ask what plans the Commission has to address resource constraints We would also note that we have experienced a gap between the stated transposition of measures within Member States and the date on which real transposition occurs and it would be helpful if the Commission were to provide concrete information on the state of transposition and implementation.

The Commission and other parties agree that we are in a period of implementation at present and resources should thus be devoted to implementation and assessment processes and transparency therein. Re-deployment of resources in this way, would, we feel, be entirely in keeping with the priority (over conception of new legislation) afforded to transposition and implementation of FSAP legislation in the White Paper on Financial Services Policymaking 2005-2010, and the principles of better regulation. As a general principle, new legislative initiatives are not welcome at this time and if any should be proposed, they must meet all the principles of better regulation and be in response to a clearly identified and significant need. Moreover, where new legislative initiatives are initiated this should be in areas where further market integration offers significant economic benefits or where market failures have been demonstrated.

The Group also asks the Commission to consider ways in which to address industry concerns which might inhibit firms from lodging complaints in respect of legislation that has been wrongly applied. We echo this request. We recognise that mis-application of legislation can occur despite the most assiduous efforts on the part of the Member States so the essential point is to ensure a process that can be evoked effectively.

We also note that infringement procedures themselves are sometimes too lengthy to deliver a useful outcome. MiFID implementation, for example, cannot be hastened by the threat of infringement as the infringement procedures themselves would run beyond the implementation date. Hence any salutary, persuasive force that the threat of infringement might have is weakened and any damage to firms' interests through delayed implementation will already have been sustained.

Other issues: outside of scope of IIMG mandate

The IIMG draws attention to the fact that the Lamfalussy process is complex and highly structured and it asks whether this process could have weaknesses in terms of creating an overall effective regulatory framework for financial services. The IIMG specifies, by way of example, the potential impact of hedge funds and the

procyclicality of the financial system in light of recent risk-based regulatory changes, as issues which might be otherwise overlooked or dealt with only on a partial basis. The IIMG suggests that there could be a forum or fora with participants drawn from different bodies in order to create a more holistic assessment of an issue. This proposal could, in theory, address deficiencies arising from the existing sectoral approach. It is true that there is an increasing blurring between the financial sectors (banking, securities and insurance) which is widely commented upon but which does not fit well with the Lamfalussy structure as it has evolved so far.

Creating a true cross sectoral grouping, however, has proved to be one of the most challenging aspects of the Lamfalussy process so far. The "3 Level 3 Committee" (3L3), as a solution, is essentially an additive approach, with the drawback that the Committee is unwieldy in size and may not be effective in assessment or output. However, although the IIMG presumably has in mind a different structure to that of the 3L3, we do not support the creation of a new body. Recent experience suggests that now the various Level 3 Committees are more established they are now working much more fluidly and in closer cooperation with each other where necessary (for example the recent joint work between CEIOPS and CEBS on the cross sectoral comparison of capital instruments). This development should be encouraged and moreover the Committees should be encouraged in forging deeper relationships with international peers. We believe that continuing to support these naturally developing relationships is more likely to foster convergence than new formal structures.

Finally the IIMG ask whether the Level 3 Committees should be able to take initiative and provide advice without a mandate form the Commission, and whether they should be able to propose amendments to legal texts. This is an ambitious but very constructive suggestion. Technical expertise and detailed understanding of issues is more likely to reside in the Level 3 Committees than it is in the Commission. Therefore it is logical that if a Level 3 Committee had a particular concern on which it wished to present advice to the Commission that it should be able to do so. On some occasions the Level 3 Committees might consider that new legislation or amendments to or deletions from legislation are not needed; on others they might take the opposite view. The core principle should be that where concerns exist they should be surfaced and that arguments and evidence are properly presented and made available to all interested parties. Consistent with the principle of transparency the Commission can then make its own determination on whether or not further legislation needs to be proposed. If the Commission were to opt to act against the advice of the Level 3 Committee, then it should respond fully to the concerns presented by the Level 3 Committee and not merely rest on its powers.

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

The classic distinction between Level 1 and Level 2 was that Level 1 contained the political direction and core enduring principles of what was to be achieved, and the Level 2 measures contained the technical details necessary to carry out the Level 1 objectives.

As the IIMG observes, of course, some technical details have the capacity to create such an impact on one or other sector/Member State that they can become a political issue in their own right.

In essence, the Level 1 legislation needs to make clear what the intent and also the public policy purpose of legislation is – in this way it will be easier to gauge the difference between core enduring principles and technical details, and harder for Level 2 or Level 3 measures to exceed their appropriate scope. Given that individual market sectors and/or Member States could be dramatically affected by a specific technical provision (or by the calibration of a technical provision) then legislators need to be very clear on a case by case basis where the political decisions arise and ensure that they are taken cleanly and clearly at the Level 1 stage.

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

The question of how to improve consumer and end user participation in the consultation process has been discussed for several years now, and to date no easy answers have been forthcoming. Clearly there are, of course, also associations who represent consumer interests specifically, and who should be engaged with, although we encourage the IIMG to consider the definition of "end-user" carefully. For example, shareholder associations perform a significant function in many countries and represent the views and interests of small shareholders (including their relationships with investment firms and banks) in societies where shareholding can extend to up to 80% of the population. We would encourage the IIMG to share its experiences with the Internal Market and Consumer Protection Committee of the European Parliament.

Additionally some financial organisations are nearer to different groups of consumers than others, and it should be possible to identify these organisations and to target them specifically when consumer input is needed. For example, retail banks and independent financial advisers deal extensively with large numbers of consumers on a daily basis, and such organisations will have a large amount of information on consumer behaviour and views. Several of the associations subscribing to this response, and other associations representing participants in retail securities, banking, and insurance business have members who deal with consumers/retail clients and will have extensive knowledge about consumer views. A lot of work is already done at Member State level and it may also be worth specifically targeting those regulators which have consumer protection objectives in their statutory requirements and which may also have conducted financial education programmes with consumers thus building up knowledge of consumer issues.

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

Progress: It is not clear what benchmarks are suitable to be used in assessing progress. We look forward to seeing the suggestions that the IIMG will bring forward.

Suitable extent of supervisory convergence: This is a significant question to which there is no easy answer. Convergence is a process that supervisors are embarking on at present and they are doing so within a political climate that wishes to encourage them to learn from each others' experience and to influence each others' practices – ideally on a consensus driven basis, because that ensures that the new practices will be "owned" by the supervisors.

In assessing the appropriate extent of convergence, there are at least two aspects that must be addressed: (a) the relationship between convergence and national subsidiarity; and (b) the extent to which convergence is relevant to the benefits that the legislation is intended to deliver.

With respect to (a), convergence by definition removes the scope for national discretion and national approaches to supervision. This does not necessarily vitiate the subsidiarity principle, provided that it is the result of pragmatic action and that its benefits are clear.

But there are plainly links to the concern, already identified by the IIMG, that the scope of political questions that cannot be resolved at Level 1 should not be delegated to Level 3. To take an example: if the political process inserts national discretions into the legislation, it is not appropriate for the Level 3 process to be expected to "resolve" the differences by way of swift convergence. There is a more positive approach that can be taken, however. For example, the process of convergence offers the possibility that over time Member States will choose to align their national discretions. It is a more evolutionary approach and allows Member States to gain practical experience of the options available and move to alignment with greater confidence and insight. Creating a climate that fosters convergence of approaches to supervision and facilitates the ultimate deletion of the discretions can thus be helpful.

With respect to (b) it is important to consider if differences in the way in which supervision is conducted in different Member States reduce the effectiveness of the EU legislation or weaken its outcome, or cause unnecessary costs and friction in the creation of the single market.

The issues that need to be considered under both (a) and (b) are highly important, but this means there is no straightforward answer to the appropriate extent of convergence. A better approach, therefore, might be to conclude that at this stage in the process it is wiser to devote resources to making practical progress in convergence rather than trying to determine a priori what the suitable extent of convergence should be. Moreover, the more the regulators gain experience of convergence and supervisors and industry alike begin to see the practical effects and benefits of convergence, then the more the process of convergence might gain momentum. If we take our starting point as one where all parties agree that at present greater convergence is desirable, then we can for the time being put the political questions to one side and concentrate on identifying practical concerns and obstacles on a case by case basis.

There is one final issue to be considered with respect to convergence and cooperation: the third country dimension when discussing prudential regulation (as opposed to conduct of business or market issues). The IIMG refer to supervisory convergence rather than regulatory convergence which is a stated objective of many industry representatives in the context, for example, of the US-EU regulatory dialogue and where progress is continuing. However, it is important to bear in mind for the prudential dimension that although supervisory cooperation is seen as desirable globally (in particular the Basel Committee supports cooperation among banking supervisors in the G10 and beyond, and IOSCO is showing some interest in this sphere), the same may not be true for supervisory convergence. Supervisory convergence is common terminology for EU banking regulators (it is one of CEBS' objectives). Beyond the EU, the concept of finding "commonality" rather than achieving convergence may be more likely to find support in the prudential

supervisory field. Hence, efforts that encourage effective cooperation between supervisors will also support international cooperation and global standards of supervision. Efforts towards convergence should also, over the longer term, assist understanding of how the EU thinks about and conducts supervision – but it is not a concept that is likely to be adopted internationally and efforts towards convergence should not be allowed to get in the way of continued efforts at fruitful international supervisory dialogue and cooperation among regulators.

How to enhance cooperation: We support the comments of the IIMG to the effect that political will is essential to ensure effective cooperation between authorities. Cooperation agreements, memoranda of understanding, staff exchanges, delegation of tasks, establishment of a mediation mechanism and peer group assessments all facilitate expectations and practical efforts. Trust and skill builds over time. It is not clear that there are obvious gaps in cooperation between supervisors within the EU in terms of willingness to cooperate or the legal ability to do so.

Obstacles to cooperation: The chief obstacles to cooperation are likely to be lack of time and resource. Supervisors typically understand that their task in supervising either a branch/subsidiary or overall group can only be made easier by establishing open, trusting and communicative relationships with their peer regulators. New mechanisms to create greater incentives for cooperation have been encoded within the CRD (Article 129 provisions which allow for the consolidated supervisor to take decisions in the event of lack of consensus being obtained among the relevant supervisors) but it is too early to see if this mechanism be effective or whether it needs amendment before being replicated in other areas.

However, a very clear test of failure of cooperation would be if a cross border group were to be subjected to duplicative and expensive supervisory demands because supervisors were not willing to take account of each others' work or assessment processes. If this situation were to arise, then it would be an obvious candidate for a mediation mechanism or other means of alternative dispute resolution.

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

At this time, information on the state of transposition itself – let alone incorrect transposition – is somewhat limited. As we commented above in the context of question 1, the table for transposition of FSAP Directives does not include all relevant financial services directives. Hence information is scattered and inconsistent in terms of content.

As a starting point, we suggest that the overall level of transparency and accessibility to information should be considerably enhanced. MiFID implementation will be a key test of this. We note that to achieve this, cooperation will be needed between various EU institutions and agencies, including notably the Commission, Member States and their competent authorities (who will work through the aegis of the Level 3 Committees).

We suggest that the Commission should provide an accessible single point of access on its website that clarifies the date of actual transposition of a directive/regulation. Further, the Commission should supply a link to the correct part of the relevant Level

3 Committee's website which provides further links to national measures (ie using a supervisory disclosure process).

Moving to the issue of transparency of incorrect transposition, then the correct body to disclose information is the Commission, acting in its capacity as Guardian of the Treaty.

On the evaluation of the FSAP as a whole, both as a package of measures and in its individual components we would encourage the EU institutions to step back and take a coordinated approach, having first allowed the measures to take effect. Time is necessary not merely for implementation but for industry to assimilate the revised framework and to make the most of its new opportunities. We would welcome coordination between the EU Institutions in their evaluation to avoid duplication, overlap and to ensure a comprehensive assessment.

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

Some thoughts/ideas:

- European Parliament. The Parliament's role in the field of enforcement has largely rested on the periodic reports that are supplied to the Parliament on the implementation of existing legislation. Most directives contain a provision stating that a report must be made to Parliament, usually between 2 and 5 years after original transposition - could there be a useful role for interim reports being made to Parliament? Or might this, counterproductively, encourage further legislative creep – ie if some part of a directive were not seen to be operating as originally envisaged, the Commission might propose additional legislation (more details, more implementation burden etc). Would there be a way of seeking Parliamentary reports/enhancing effective Parliamentary scrutiny without de facto spurring further legislation?

- Member States. Arguably Member States could take a more active role in "peer assessing" other Member States' transposition. This role might be possible either through a Level 2 or Level 3 mechanism (NB Peer Review is already very much part of a Level 3 cooperative ethos). However, the Commission might feel that such activity by the Level 2 and 3 Committees represented an infringement of its own powers and responsibilities.

- Private Sector. In practice it is probably the private sector who will be most aware of and affected by incorrect transposition – in particular when trying to take advantage of passporting of activities. However, it is inevitable that firms (even when making their views known via Associations or other bodies) are anxious not to jeopardise relationships with national competent authorities. This can lead to hesitation in wishing to bring forward complaints. In other words, the sector with the greatest knowledge and awareness of real and potential transposition problems is the sector that is least well placed to act. It may be possible for firms (anonymously if necessary) to put issues before the Level 3 Committees so that there is a possibility of identifying whether the issue can be resolved in a low key practical manner before raising the stakes and bringing a formal infringement case to the Commission. It may even be

possible to harness future mediation mechanisms within the Level 3 Committees.

- Commission: The IIMG does not ask how the Commission's role might be enhanced, but in reality it is not clear how to discuss enforcement and transposition without discussing the role of the Commission.

- Possible suggestion.

  Where an instance of possible incorrect transposition is identified, whether by industry or another Member State or Competent Authority, the issue/question is submitted (anonymously if necessary): to the Level 3 Committee, but copied to the Level 2 Committee, Commission and relevant Parliamentary Committee (probably ECON).

  (a) In the first instance the relevant Level 3 Committee conducts a swift peer review to establish national practices and identify whether there were any outlying behaviours or apparent misunderstanding/ mis- implementation of EU legislation. Aberrations could thus, potentially, be cleared up in a low key manner, maybe even utilising mediation mechanisms. Level 3 is possibly the best level at which to assess the practical effects of implementation.

  (b) If resolution at Level 3 is not possible, then the matter is referred to the Level 2 Committee at which point the Commission Legal Services can offer an opinion on whether there has been incorrect interpretation/transposition of the relevant provision.

  (c) If necessary, the Commission moves ultimately to full infringement mechanism, as provided for under the Treaties.

  (d) Regardless of the outcome, a periodic report (e.g. six monthly) should be provided to the Parliament on the operation of this process and the outcome of individual cases (anonymised where necessary). This would give the Parliament the requisite information to consider whether the underlying legislation itself was deficient in any significant respect.

  The intention of this process is to [allow/ harness] the Lamfalussy process to the maximum extent whilst creating a bottom-up process that provides as much flexibility as possible for Member States/Competent Authorities to identify instances of incorrect transposition or mis-interpretation of the directive during implementation. It allows for a convergence process to provide peer pressure and ensures that, should the issue become difficult to resolve, that Member States as well as the Commission are fully aware of the debate at all stages. In particular, this process takes account of the fact that although some issues arise via late/incorrect transposition, many more issues are likely to arise due to the differing implementation/interpretation decisions that Member States and their Competent Authorities must take when implementing EU legislation.