Accountability in rule-making in the area of financial services: The EU in the context of global regulation

2nd Global Administrative Law Seminar, Viterbo, June 9-10, 2006

Joana Mendes*

[Draft paper]

[Introduction....1](#)
The existing institutional and procedural design of financial rulemaking in the EU....2
Background....2
The 4-level regulatory approach (Lamfalussy process) and its implications: the hierarchy of norms....3
Implications of the Lamfalussy procedure (continued): consultation....5
Implications of the Lamfalussy procedure (continued): an integrated administration in the financial sector....7
Accountability issues raised by the rulemaking procedure....9
Envisaged controls....10
Concrete issues raised by the functioning of the procedure....11
The global level....13
Conclusions....15
Bibliography....16

Introduction

The regulation of financial services involves an intricate net that embraces national and international, public and private actors. It is also an area where the intertwinement between the European and the global level is particularly strong. The challenge posed by ensuring the competitiveness of Europe's financial markets in the global context was one of the reasons behind the set up of a new regulatory approach in the EU financial sector. The so-called Lamfalussy Process (named after the chairman of the Committee that conceived it) embraces four different regulatory levels: legislation, implementation rules, coordination and enforcement.

This paper will focus on the analysis of that process, bearing in mind the global context in which it operates. Special attention will be given to the analysis of its Levels 2 and 3: these correspond to the regulation activity that stands between the enactment of European Directives according to the co-decision procedure established in the EC Treaty (Article 251) and the Commission's guardian role in ensuring respect for EU law (Article 211 EC). There lie the innovations of this regulatory approach and also the main problems it raises. The EU accountability mechanisms were designed to allow control over EU institutions and the powers they exercise as these were conceived in the Treaties. The practice, though, has revealed to be much richer, risking to circumvent those mechanism. The regulatory approach designed for the financial sector is one example.

The regulatory process defined by the Lamfalussy Committee is particularly interesting from a procedural point of view: by seeking flexibility it reinforces the hierarchy of norms, in the quest of inclusiveness it provides for a wide resort to consultation throughout the regulatory process and by emphasising implementation it produces an enhanced degree of administrative integration. These will be the lines of analysis followed in the first part of the paper.

* Researcher at the European University Institute (joana.mendes@iue.it). All comments are welcomed.
Note: the websites referred in the paper were last visited 15 May 2006.

The problems of accountability that the Lamfalussy Process raises will be approached through the lenses of the controls conceived by the authors of the Lamfalussy Process and subsequently adopted. A critical insight will be provided by illustrating concrete problems that the functioning of the procedure can raise.

A brief look at some international standard setting bodies in the financial sector will underline the fact that, despite internationalization, national regulators maintain a decisive role in the regulation of financial services. It will also illustrate the connections between EU and global regulation and the problems of accountability that may follow. Regarding this last point, however, this paper represents only a preliminary study: many questions will remain unanswered. It will hopefully contribute to shed some light on questions to be developed at a later stage of research.

The Lamfalussy approach was first conceived to be applied to the securities sector, but in 2004, both European Parliament and Council agreed to its extension to banking, insurance and occupational pensions (and asset management), where it has been applied with slight adaptations. Thus, while the paper focuses on the procedures of rulemaking in the securities sector, it should be borne in mind that the interest in the study of the Lamfalussy approach lies not only on its innovations, but also on its potentialities for expansion.

The existing institutional and procedural design of financial rulemaking in the EU

Background

The need to create a "legislative apparatus capable of responding to new regulatory changes" was a priority of the Commission when defining the framework for action in the field of financial services.[1] The aim was twofold: streamline the rules according to which financial services are regulated in Europe, eliminating legal and administrative barriers to cross-border activity of European firms, and create rules flexible enough to keep pace with market changes.

In 1999, the year of the single European currency, fragmented approaches to services regulation still hindered integration and remained as an obstacle to the envisaged benefits of an internal market in the financial sector. Moreover, political deadlock at the EU level impeded legislative proposals to be adopted or determined protracted delays.

In order to overcome these blockages, the Commission argued for a more inclusive and consensual approach in policy shaping and legislative drafting, extensive to all EU institutions, to representatives of market practitioners, consumers, users and employees. The length of the time needed for the adoption of EU legislation should be reduced and attention should be paid also to implementation, considered a key feature for the success of a new regulatory strategy.[2]

The Council set up a Committee to discuss the terms of Community rules' practical implementation in the areas identified in the Action Plan: the Committee of Wise Men on the Regulation of European Securities Market, presided by Alexandre Lamfalussy.[3] The challenge was to create a regulatory framework that would enable a prompt adaptation to changing circumstances as well as a quick and uniform implementation, while respecting the EU institutional existing framework and ensuring the democratic legitimacy of the EU decision-making process. The answer to this balance was to be found in an enhanced resort to comitology and in a regulatory process that entails wide consultation with the main interested parties (mainly, market participants and consumers). Here lie some key "innovations" of the so-called Lamfalussy process. The regulatory reform delineated in the Committee's Report[4] was endorsed by the Stockholm European Council of 23 March 2001 and by the European Parliament in its Resolutions of 15 March 2001 and of 5 February 2002 on the

[1] Communication of the Commission, "Financial Services: building a framework for action" (COM (1998) 625, of 28.10.98), complemented by the Financial Services Action Plan (Communication of the Commission, COM (1999) 232, of 11.05.99).

[2] Financial Services Action Plan, cited on note Errore: sorgente del riferimento non trovata, p. 16 and 17.

[3] Henceforth, the "Lamfalussy Committee". See The Committee of Wise Men Terms of Reference Given by the European Union's Economic and Finance Ministers on 17 July 2000 (p. 98 of the Final Report cited in note 4). The Committee's mandate was limited to the regulatory framework, excluding prudential supervision.

[4] "Final Report of the Committee of Wise Men on the Regulation of European Securities Market", Brussels, 15 February 2001 (available at http://ec.europa.eu/internal_market/securities/docs/lamfalussy/wisemen/final-report-wise-men_en.pdf). Hereafter, the "Lamfalussy Report".

implementation of financial services (an approval subject to the respect for the institutional balance and, namely, for the European Parliament role in this process). These resolutions constitute the “legal basis” of the regulatory approach defined by the Committee.

The 4-level regulatory approach (Lamfalussy process) and its implications: the hierarchy of norms

A decoupled rulemaking process was the main answer to celerity and flexibility. A strong emphasis is put on the need to distinguish political directions and orientations embodied in general principles and detailed technical measures; these had been mingled in the Directives that had been adopted in the financial sector before the creation of the Lamfalussy process.

The legislation adopted by the European Parliament and the Council following the co-decision procedure is intended to define only the framework principles of a given legislative regime (Level 1).[5] It embodies the basic political choices that will be complemented by detailed technical measures adopted through more flexible procedures (Level 2). The framework legislation shall specify the nature and extension of the implementing measures, as well as the limits within which those measures can be adapted and changed without modification of the framework legislation. The fact that those limits are set on a case by case basis is meant to avoid circumventing the institutional and procedural rules established by the Treaty.

The measures adopted in each of these levels are different in nature. Beyond the distinction between political direction or framework principles and technical detail or implementing measures, lies a clear procedural and institutional difference between the two types of rules. Irrespective of the legal form under which Level 1 and Level 2 acts are adopted (either Directives or Regulations), these have a different “dignity” as well as different sources of legitimacy. Level 1 measures are legislative in nature: they establish the principles and rules that constitute the framework of a legal regime and reflect the political choices made by the legislative body of the EU (the European Parliament and the Council of Ministers) following the co-decision procedure defined in the Treaty.[6] Level 2 acts do not have a legislative nature: they are adopted by the Commission on the basis of the technical advice provided by the Committee of European Securities Regulators (CESR) and on the opinion of the European Securities Committee (ESC); that is, the implementing measures are adopted by an institution that does not have legislative power in the field of financial services,[7] following a procedure where representatives of national governments and representatives of national regulatory authorities play an important role as do market practitioners and end-users, whose contribution is channelled by the later.[8]

The Committees and the adoption of implementing measures

CESR was conceived as an independent advisory body outside the comitology process.[9] It is composed by “high level representatives from the national public authorities in the field of securities” designated by each

[5] The Lamfalussy Report and the Stockholm European Council Resolution referred that the legal acts at this level should be speedily adopted following a fast-track procedure, according to which the legislative measure would be approved by the Council on the basis of a single reading of the European Parliament. So far, this has only been followed once (Transparency Directive) and neither the Council nor the Parliament have shown willingness on making a more generalised use of this procedure (Third report monitoring the Lamfalussy Process, p. 16). On the problems raised by this fast-track procedure, see Inter-institutional Monitoring Group, “Third report monitoring the Lamfalussy Process”, Brussels, 17 November 2004, p. 15-17, available at http://ec.europa.eu/internal_market/securities/docs/monitoring/third-report/2004-11-monitoring_en.pdf (henceforth, the “Third report”).

[6] This has become the standard legislative procedure after the Amsterdam Treaty, and was established in the legal basis that served the adoption of the Directives that followed the Lamfalussy Report (Articles 44, 47 (2) and 95 EC).

[7] As it is know, the complexity in “labelling” the role that the Council and the Commission play in the regulatory process as legislative or non legislative depends largely on the different solutions adopted by different legal basis in the Treaties for different policy sectors. Even if the Commission is in charge of adopting framework rules in given sectors (a limited number, nonetheless), that is not the case in financial services.

[8] As mentioned bellow, CESR and ESC can also be consulted in the adoption of Level 1 measures. However, this does not thwart what is said: the procedural and institutional differences that were pointed out remain; moreover, there is no legal support for the intervention of CESR at that level.

[9] Article 1 of Commission Decision 2001/527/EC, of 6 June 2001, establishing the Committee of European Securities Regulators (OJ L 191, 13.7.2001, p. 43), amended by the Commission Decision 2004/7/EC of 5 November 2003 (OJ L 3, 13.7.2001, p. 32); in accordance with the Lamfalussy Report (cited in note Errore: sorgente del riferimento non trovata) p. 32.

Member State and by a "high-level representative" from the Commission. It has an advisory role to the Commission, "in particular" for the preparation of draft implementing measures in the field of securities, either on its own initiative or upon a Commission's request. In this case, it will act on the basis of a mandate given by the European Commission. Underlining its independence, the Commission's representative is not the chairperson: she or he is elected among the members of the committee.[10] This is also in accordance with the independency of its members towards their national governments: they are the heads of the competent authorities for securities regulation and supervision.[11] Moreover, the financial provisions contained in its Charter indicate that CESR's budget is made out of its members contributions, a very important sign of its independence vis-à-vis the Commission.[12] Although CESR was conceived to act mainly at Levels 2 and 3 of the regulatory process, nothing impedes that it will also act as advisory in the purely legislative process (Level 1).

ESC is composed by high level representatives of Member States (high level officials of the Ministries of Finance and chaired by a Commission's representative who participates at the meetings as an observer.[13] According to the Decision that created it, it was designed to advise the Commission on policy issues and on draft legislative proposals.[14] However, interpreting the role of ESC only on the basis of the text of its founding Decision may lead to a limited misperceived view. As it was conceived by the Lamfalussy Committee, ESC acts as an advisory body to the Commission in the elaboration of Level 1 legislation; however, its key role is to act as a regulatory committee in the adoption of implementing measures; besides, it also advises the Commission on the mandates that the latter issues to CESR. That key role is concretised by the provisions of the Level 1 Directives that have been so far adopted: the ESC assists the Commission in the adoption of implementing measures following the regulatory procedure, as defined in the Comitology Decision.[15] It is therefore a comitology (regulatory) committee, contrary to CESR.

According to the Lamfalussy report, the Level 2 measures should follow the following procedure:

- the **Commission** firstly consults the ESC and requests advice to the CESR on technical implementing measures;
- the **CESR** consults with market participants, consumers and end-users; on that basis, it formulates the advice that later forwards to the Commission;
- the **Commission** draws up its proposal and forwards it to the ESC;
- the **ESC** votes that proposal;
- the **EP** examines the final draft measures in order to control the respect of the limits to the implementing powers set in the framework legislation;
- the **Commission** adopts the proposal.

In short, the Commission gives the impulse to the Level 2 procedure and adopts the corresponding final act (implementing measure) on the basis of the opinion of the ESC and of the technical advice of the CESR. This procedure, as such, is not regulated in any binding legal text. The so called "Lamfalussy Directives" when regulating the procedures to follow in the adoption of the implementing measures only make reference to

[10] Articles 2 and 3 of the Commission Decision that established the CESR (Commission Decision 2001/527/EC); Article 4.2 of the CESR Charter (available at http://www.cesr-eu.org/index.php?page=document_details&id=348), where the condition of a mandate is made explicit. Although from the text of the Decision it is not clear whether the representative of the Commission can be elected as a chairperson, this possibility seems to be rejected both by the Stockholm Resolution (point 6), the founding Decision (Article 3, § 2) and the CESR Charter (Article 3.1).

[11] See list of the members in CESR website (above).

[12] Article 8 of the Charter.

[13] Article 3 of the Commission Decision 2001/528/EC, of 6 June 2001, establishing the Committee of European Securities Regulators (OJ L 191, 13.7.2001, p. 45) [this was amended by the Commission Decision 2004/8/EC of 5 November 2003 (OJ L 3, 13.7.2001, p. 33)].

[14] Article 2 of the Commission Decision cited in the previous footnote.

[15] Council Decision 1999/468/EC, of 28 of June 1999, laying down the procedure for the exercise of implementing powers conferred on the Commission (OJ L 184 p. 23) that is applied by force of Article 64 of the MiFid Directive (Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC); Article 17 of the Market Abuse Directive (Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation); Article 24 of the Prospectus Directive (Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC); and Article 27 of the Transparency Directive (Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC).

ESC.[16] The intervention of CESR in this regulatory level is mentioned in the Decision 2001/527/EC and in its Charter (Article 4.2.), but a reading of the legal texts is not helpful in determining how it is articulated with ESC intervention and at what stage in the procedure it occurs.

An innovation?

On a first approach, there seems to be no substantial difference between this procedure and the "standard" comitology procedures. In fact, the basis of the Level 1/Level2 regulatory divide decided by the Lamfalussy Committee was not an innovation in European law: the use of delegated rulemaking on the basis of Article 202 of the EC Treaty has been a constant practice ratified by the ECJ jurisprudence.[17] To that extent, the assumed transfer of normative power from the triangle composed by the Commission, the European Parliament and the Council framed by the co-decision procedure to a lower regulatory level dominated by comitology committees, raises in the Lamfalussy approach the same criticisms of lack of accountability that have been identified in comitology.[18]

Still, some essential features evidence the difference. First, there is an agreement between the Commission, the Council and the Parliament expressly supporting the need to separate two clear levels of rulemaking. Second, an advisory independent body, composed of high representatives of national regulators (CESR), plays a key role in the adoption of Level 2 measures. The innovation, in this respect, lies particularly on its independent status and on its duty to carry out a broad consultation with market participants and end-users before providing technical advice.

These factors can determine a dispersion of normative power among the different actors involved in decision-making: the representatives of the national regulatory authorities that compose CESR are independent from their national governments; they resort largely to expert groups and are in principle responsive to consultation input.[19]

In this scenario, the mechanisms of accountability designed for the European institutional framework face a (not so) new challenge.

Implications of the Lamfalussy procedure (continued): consultation

Consultation is destined to ensure inclusiveness and acceptance by the parties affected by the rules enacted at the European level, as well as better rule-making. The Lamfalussy Report underlined the importance of carrying out wide consultation on the measures to be adopted both at Level 1 and at Level 2: involvement of market practitioners should be ensured in a continuous and open process.[20] Those consultation procedures have a different meaning in one case and the other, given the different nature of the measures to be adopted. In addition, CESR has a legal obligation to consult, whereas the same is not imposed on ESC; Article 5 of the Decision 2001/527/EC determines that "before transmitting its opinion to the Commission, the Committee shall consult *extensively* and *at the early stage* with market participants, consumers and end-users in an open and transparent manner".[21]

This constitutes a relevant difference with respect to the position the Commission assumed regarding consultation in the White Paper on Governance. Here, consultation practice is seen as destined to provide the Commission with guidance and information, as well as to bring citizens closer to its action. With the view that the effectiveness of the Commission's function of policy-making should not be hindered, the Commission rejects legal rules as an adequate means to ensure a culture of consultation: this "would create excessive

---

[16] See previous note.

[17] Case 25/70, *Einfuhr- und Vorratstelle für Getreide und Futtermittel v. Köster, Berodt & Co.*, [1970] ECR 1161; Case 23/75 Rey Soda v. Cassa Conguaglio Zuchero [1975] ECR 1279; Case C-240/90, *Germany v. Commission* [1992] ECR 1992 I-5383.

[18] See, among others, Christian Joerges (1999), "'Good Governance Through Comitology?" in Christian Joerges and Ellen Vos (eds), *EU Committees: Social Regulation, Law and Politics*, Oxford – Portland: Hart Publishing, p. 311-338 and Carol Harlow (2000) Accountability in the European Union, Oxford: Oxford University Press, p. 67-71.

[19] See also p. 11, below.

[20] Lamfalussy Report, p. 32-3. Still, the CESR's Public Statement of Consultation Practices (bellow note 26) is applicable also to the work it carries out at Level 3 (on this, see bellow, p. 14).

[21] Emphasis added. The difference is also perceived in the Stockholm Resolution (cfr. point 2, referring to consultation in general: the Commission "is invited" to consult; and point 6, second paragraph: CESR "should consult extensively" and "should have the confidence of market participants").

rigidity and risk slowing the adoption of particular policies".[22] The Commission, however committed to develop "a reinforced culture of consultation and dialogue", makes a strong claim in reserving to itself the choice on the *when*, the *who* and the *how* to consult. Accordingly, "the possibility of challenging a Commission proposal (sic) before the Court on the grounds of lack of consultation of interested parties should be avoided".[23]

It is certainly true that the norm that imposes on CESR a legal obligation to consult does not refer to the procedures that should guide consultation. However, it sets criteria that could serve as a basis for a Court review, should the opportunity arise and should the Court seize it.[24] The fact that this legal obligation was determined by the Commission in the Decision that established CESR could be surprising and indicate a different position assumed in the financial sector. However, the mandatory nature of the consultation procedures makes part of the recommendations contained in the Lamfalussy Report,[25] and this, as was mentioned before, was politically endorsed by the Council and by the European Parliament. Even if the Commission would have liked to maintain a non-legal approach to consultation, its margin to decide accordingly would have been considerably narrow if not inexistent.

Having regard to Article 5 of the Decision 2001/527/EC and according to its Charter (Article 5.10), CESR published a "Public Statement of Consultation Practices".[26] Emphasising the need of flexibility, it establishes the principles that shall guide CESR's consultation practices.

There, it is stated what already resulted from the precedent documents: consultation is destined to improve the information available to public decision-makers, with the aim of achieving better and more responsive legislation through "consensus where possible between all interested and affected parties".[27] Accordingly, "the full range of interested parties, including market participants, consumers and end-users (…) at national, european and international levels" should be involved.[28] The processes to consult include concept releases, consultative proposals, public hearings and roundtables, written and Internet consultations, public disclosure and summary of comments.[29]

In addition, CESR created a market participants consultative panel and established consultative working groups. The possibility of creating consultative working groups was envisaged in CESR's Charter, "for the purpose of facilitating the dialogue with market participants, consumers and other end users of financial services" (Article 5.11). As to the consultative panel, according to information found on CESR's website, it was established by CESR following a suggestion of the European Parliament and the Lamfalussy Committee; it assists CESR but it also has a sort of surveillance role in particular in what concerns the committee's consultation policy, its priorities and working methods.[30] Information on the processes and criteria to determine the composition of both of the consultative panel and of the working groups cannot be found nor in the legal texts nor in the documents available on CESR's website, although the list of members is public (as well as the reports of the consultative panel meetings).

Despite the openness of the procedure, there are still concerns regarding the involvement of all interested parties, in particular, lack of consumer representation (concerns manifested by CESR itself and by Member States). This seems to be due to the lack of resources of consumers representative associations, to the fact that the consultation documents have been produced only in English, which in conjunction with the highly technical nature of those documents, shuts consumers and small and medium enterprises out of the process.[31]

[22] White Paper on European Governance [COM (2001) 428 final], Brussels, 25.7.2001, p. 17. This position was reinforced by the Communication from the Commission, "Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission", COM(2002) 704 final, Brussels, 11.12.2002.

[23] Communication from the Commission on Consultation (quoted on the last footnote) p. 10.

[24] The requirements of standing defined in Article 230 (4) of the EC Treaty can be an obstacle.

[25] Lamfalussy Report (cited in note Errore: sorgente del riferimento non trovata), p. 32

[26] Ref. CESR/01-007c, of December 2001 (available at http://www.cesr-eu.org/index.php?docid=259).

[27] Point 1 of CESR's Public Statement on Consultation.

[28] Point 3.a) of the Public Statement on Consultation. The recommendations of the Lamfalussy Committee entailed a preference to be given to "those with knowledge and expertise in the subject in question", although it was added: "with end-users views being considered at the same time" (Lamfalussy Report, p. 33).

[29] Article 5.10 of CESR's Charter and Point 3.c) and d) of the Public Statement.

[30] For more information, see www.cesr-org.eu.

[31] Third Report of the Inter-institutional Monitoring Group, p. 22-25. One of the findings of the Third Report of the Inter-Institutional Monitoring Group was precisely the need to improve consultation procedures.

Implications of the Lamfalussy procedure (continued): an integrated administration in the financial sector

The regulatory reform proposed by the Lamfalussy Committee was not confined to the procedures of rulemaking (regulation *stricto sensu*). As mentioned before, reform was also considered needed at the level of implementation.

Accordingly, the Lamfalussy Process entails two other regulatory levels: a third level where networks are established between regulators in order to improve implementation through cooperation; a fourth, where the Commission has a key role in strengthening the enforcement of Community rules (desirably with the cooperation of Member States, regulators, private actors, and European Parliament). In these last "regulatory" level, the Commission performs its traditional role of "guardian of the Treaties".[32] The regulatory action undertook at Level 3 is more interesting for the analysis of the Lamfalussy regulatory structure.

Its aim is to ensure consistent transposition into national law and national implementation of Community law, as well as consistent interpretation and application of Community and national rules. The first aspect covers the work of the Member States authorities competent for transposition (parliaments, governments) and those competent to apply EC law (administration); the second is mainly directed at national regulators (CESR members).

CESR operates here in a different role. Its face changes from an advisory body in the making of mandatory implementing measures, usually under a mandate by the Commission,[33] to a network coordinator that, acting on its own initiative, issues non-binding acts to conduct peer review and to stimulate best practices. Despite the fact that decisions are taken by consensus, coordination implies more than an "horizontal" action: bringing the national regulators to convergence puts CESR in an position of authority even if the instruments it uses are to be non-binding. Its authoritative role can be as strong here as at level 2, even if that depends on different factors: at level 2, its authority depends in particular on how its advice influences the measures adopted by the Commission; at Level 3, it depends on how the soft law instruments it issues will be received and on the political commitment of Member States in taking CESR's action and consistent implementation seriously. Its institutional weigh vis-à-vis other institutional actors is determinant in one case and the other. The fact that the instruments so far adopted at Level 1 and 2 were mainly directives strengthens the importance of CESR's action in ensuring convergence in implementation.

The intensity of the administrative action carried out by CESR will depend on how it will assume and interpret its role in fostering and reviewing the implementation practice developed by Member States, on how stringent will be the content of guidelines destined to regulate the administrative regulations adopted at national level, and on how these and the interpretative recommendations that it issues will be received by the national administrations. In addition to these functions, CESR sets common standards where they do not exist (acting in non-harmonised sectors and, eventually, filling in lacunas of the Community legislation), conducts peer reviews of administrative regulation and regulatory practices in Member States, produces reports of the respective results to the Commission and to the ESC.[34]

Some of these activities where already carried out by FESCO (Forum of European Securities Commissions); however, the kind of institutionalization and the degree of formality that CESR represents cause a qualitative difference regarding the previous regulatory context. Now, there is an overarching body, created by a European decision, on the basis of a regulatory approach conceived by the European institutions, whose aim is to ensure convergence of regulatory practices. This represents an added, formalised administrative regulatory level that stands between the actions carried out by Member States and the regulation undertook in the EC institutional framework as defined in the Treaty, while also overlapping with them. The structure that

[32] Lamfalussy Report, p. 40.

[33] Apparently, the institutional practice is that only at Level 2 CESR acts upon a mandate by the Commission, issued after advice of the ESC (see "The Role of CESR at 'Level 3' under the Lamfalussy Process – Action Plan for 2005, Ref: CESR/04-527b, October 2004, p. 3, available , available at http://www.cesr-eu.org/index.php?docid=2550; henceforth, "The Role..."). Acting under a mandate by the Commission would not be coherent with the independence that CESR should enjoy at Level 3.

[34] On the tasks performed at Level 3, see Articles 4.3. and 4.4 of the Charter and Lamfalussy Report (cited in note Errore: sorgente del riferimento non trovata), p. 37-9.

FESCO represented – a forum for cooperation among national regulators that stood formally outside the EC rulemaking structures – was upgraded and absorbed by those formal structures. This produced an enhanced degree of administrative integration.

Moreover, there are strong indicators of the possibility of a stringent administrative action. These are found in the Charter and in the terms of reference of CESR's action determined in the document in which it explains how it conceives its role at Level 3.[35] The following examples also show how its action tends to change and expand.

CESR created a Review Panel that controls the transposition by all CESR Members of EC legislation and CESR standards and guidelines into national rules, through a system of correspondence tables; these tables are built on the basis of self-assessments made by the different regulators, scrutinised by the Review Panel and made public.[36] According to information available on CESR's website, the Review Panel "conducted a comprehensive mapping exercise of the powers of CESR members in the securities sector, which was also a contribution to the so-called "Himalaya Report" (...), where the results of the mapping exercise can be found (as part of the exercise, CESR members were also asked to provide information as to other issues, such as their political, administrative, financial and judicial accountability)".[37]

Another example is given by the suggestion of an endorsement mechanism: CESR considers that the Commission "where and when appropriate" could "give more authority to common approaches by CESR members as a proper manner of applying EU law".[38] This would be a way of giving more authority to Level 3 standards issued by CESR. It was, however, rejected by the Commission that saw there a hurdle to its right of initiative. Heard by the monitoring Group, Council and EP considered it to be premature to express an opinion and market participants manifested different views. The Monitoring Group, on its hand, considered that endorsement should be limited to the cases when "soft law rules risk remaining ineffective, for whatever reason".[39]

CESR perceives its role also as a mediator destined to solve conflicts among regulators, extending the scope of a mechanism established in the Market Abuse Directive (Article 16 (2)). This would be a previous step to an eventual infringement procedure, but "should not overlap with the Commission's enforcement competences".[40] The Monitoring Group encouraged this possibility as "a promising way forward" not only to strengthen CESR role in ensuring convergence, but also "to avoid time-consuming cases before the ECJ".[41]

Acting with two different faces, CESR has an ambiguous status.[42] It does not have legal personality, but it is more than an informal network of regulators; its members possess legal competences at the national level, but perform European functions, and are independent regarding their national governments.

In addition, as conceived in the Lamfalussy Report, CESR represents an intermediate step to a reformation of national regulatory structures, an intermediate stage to a stronger convergence.[43] Convergence of national regulatory structures is seen as a central factor for the success of the CESR and ESC.[44] This view is assumed by CESR who sees the differences in the legal powers of national regulators as a factor that can hinder efficient networking; accordingly, it is working to create a path that can lead to a level degree of rulemaking powers among European securities regulators.[45]

The present state of administrative integration in the securities field raises questions of accountability different than those pointed out before. CESR is an independent body, even more independent when acting under its Level 3 hat.[46] To whom is it accountable for its administrative action?

---

[35] "The Role ...", quoted in note Errore: sorgente del riferimento non trovata.

[36] "The Role ...", p. 7 and 8. The terms of Reference of the Panel can be consulted as an annex to that document (p. 15)

[37] The "Himalaya Report" (Ref. CESR/04-333f) can be found on CESR's website, as well as more information on the Review Panel activity.

[38] "The Role...", p. 9.

[39] Third Report, p. 32.

[40] "The Role...", p. 11.

[41] Third Report, p. 30.

[42] See below, p. 12.

[43] This aim is stated as such: the "horizontal" regulatory structures should converge, the degree of autonomy of regulators and the involvement of market participants should be levelled (Lamfalussy Report, cited in note Errore: sorgente del riferimento non trovata, p. 38).

[44] Lamfalussy Report (cited in note Errore: sorgente del riferimento non trovata), p. 42.

[45] On this see, "The Role...", p. 7 and 9 and Third Report, p. 32.

[46] The representative of the Commission cannot participate in the meetings when the Committee, acting at level 3, discusses confidential matters relating to individuals and firms. This not only allows to preserve the secrecy of some issues

Accountability issues raised by the rulemaking procedure

The perception that the new regulatory approach could raise problems in terms of accountability, especially in what regards the role of the EP, was present since the beginning in the minds of its authors.

When defending the procedure to be followed in the adoption of Level 2 measures, the Lamfalussy Committee put emphasis on two aspects: the procedure should not impair the Commission's right of initiative and the European Parliament must be fully informed of the proposals and measures adopted throughout the procedure. There is an obvious reason for this insistence: the means to guarantee the institutional balance as defined in the EC Treaty (developed by the customary practice of the institutions, and solidified by the case-law of the ECJ) is to ensure both the integrity of the Commission's right of initiative and the possibility of overview by the European Parliament.[47] At the same time, these guarantees ensure that the general mechanisms of legal and political accountability (with their intrinsic limitations) function adequately also in the context of this new regulatory approach. Whether that corresponds to the reality or not depends on how the regulatory process actually functions.

On a first approach, it is possible to make two observations regarding the Commission's right of initiative. First, comparing the Lamfalussy procedure with the "standard" implementing procedures where regulatory committees intervene,[48] the political weight of the ESC (and of CESR) is likely to constitute a stronger curb to the Commission's margin of manoeuvre; second, if CESR gives its technical advice on the basis of a wide consultation with market participants, consumers and end-users, as a result of a legal obligation, it is unlikely that the Commission's final decision will deviate much from that advice. This is particularly true given that CESR's advice represents an agreed solution among national regulators. Moreover, CESR's technical advice can be supported by the ESC's vote.

It can be argued that, even if the constraint of the Commission's power remains a possibility, still the Commission's control over the regulatory process is ensured, in what concerns CESR's intervention, by the fact that CESR acts at Level 2 upon a mandate issued by the Commission, whereby the latter formalises its request for advice. At the end, the content of CESR's intervention depends on the Commission's will. However, a concrete example shows clearly that this is merely an argument of formal nature. In the mandate that formalised the Commission's request for technical advice regarding the implementing measures of the MiFID Directive, the Commission asked CESR to be "detailed and precise in order to allow for a harmonised and uniform definition of the financial instruments that fall under the scope of this Directive" and charged CESR with "providing comprehensive advice on all subject matters covered by the delegated powers".[49] The terms of the mandate give considerable leeway to CESR.

In this context, the claim that the Commission's right of initiative is not affected and that an articulated proposal by CESR does not hinder the Commission from disagreeing with the proposal becomes merely a formal argument. Furthermore, from this perspective, CESR intervention appears to be the determinant element of the regulatory activity carried out at Level 2.

On the issue of whether this regulatory approach implies or not a diffusion of the EU's normative power, different scenarios that can be sketched:

- the Lamfalussy procedure functions basically as the "standard" comitology procedures and both the Council and the Commission have full control over the content of the implementing measures adopted;
- the Lamfalussy procedure functions as the "standard" comitology procedures, but the final outcome is determined by national regulators and national representatives that sit in the

but it also ensures the independence of the committee.

[47] The guarantee of the institutional balance was a stated concern of the Lamfalussy Committee ("The Committee [Lamfalussy] is acutely aware of the importance of maintaining institutional balance between the European Commission, European Parliament and the Council of Ministers", Lamfalussy Report, p. 33-4).

[48] Regulatory committees in the sense of the Decision 1999/468/EC, i.e., those committees that act according to the regulatory procedure there established.

[49] Third Report (cited above in note Errore: sorgente del riferimento non trovata), p. 20. The degree of detail requested by the Commission in its mandates to CESR was the result of a recommendation contained in the Second Report of the Inter-institutional Monitoring Group and of the criticism manifested by market participants in their reactions to that second report: they considered that CESR's advice should be more concrete and purpose-oriented.

committees (in which case the Commission or the Council merely rubberstamps the measure adopted);

— the weight that the two committees have is such that the power of the Commission is more limited than in other cases (where comitology procedures apply), as more limited is the role of the Council given the independence of the CESR and its members;
— the regulatory outcome of the procedure is determined not only by the role of the two committees, but also by the private actors that participate in the procedure through the CESR.

The first and second scenarios are nor different than many situations that occur in other sectors dominated by comitology committees. Given the precedent considerations, it is unlikely that the procedure will function in the terms sketched in the first scenario. Between the second and the third, there is mostly a difference of degree. What separates the last two situations envisaged is the weight given to the comments presented by private actors. According to the analysis made before, it is likely that one of the two will occur, being that the diffusion of normative power is stronger in the last case.[50] This conclusion, however, would have to be confirmed by an empirical analysis and with the practitioners in the field.

There are not specific mechanisms of accountability designed to face these two scenarios.

Envisaged controls

The mechanisms of ensuring control over the action carried out by the institutional actors playing in the securities field pertain mainly to the guarantees accorded to the European Parliament, on the one hand, and to the operational links that shall be established between those actors, on the other.

Considerable care was given to the guarantees of the European Parliament. Its role is sought to be ensured by four means: the establishment of a sunset clause in each Level 1 act (the Commission's power to adopt implementing measures expires four years after the entry into force of the basic legislative act and can be renewed only through the co-decision procedure);[51] the definition of a three-month period for the EP to react to draft implementing measures (this, however, is only established in the recitals of the Directives);[52] and the need to keep the EP fully informed of the measures adopted at Levels 1 and 2, which is underlined by the acts that endorsed the Lamfalussy Report; finally, the European Parliament can pass a Resolution if it considers that the draft measures submitted by the Commission exceed the implementing powers provided for in the framework legislation.[53]

These controls were set up having in mind the implementing powers of the Commission, enhancing (and going beyond) the mechanisms of control that were established by the institutional agreements on the application of the Comitology Decision. However, CESR, a determinant player both at Level 2 and Level 3, is not a comitology committee.

The Decision that created CESR determined only one mechanism of control: CESR presents an annual report to the Commission (Article 6) which, by force of the CESR's Charter, is also sent to the Parliament and to the Council (Article 6.1). The Charter also determines that the Chair of CESR will report periodically to the European Parliament. It is the independence of CESR that justifies that precision (no such duty is imposed on the ECS); however, precisely due to that independence, it is not clear which consequences would derive from that duty to report. It also mentions the need to maintain close operational links with the Commission and the ESC, which are concretised by the CESR Charter (Article 3); these, however do not constitute a mechanism of control, but a guarantee of the functionality of the procedure.

Despite those duties to report, it seems to be have been assumed that CESR, being composed by independent national regulators, is accountable mainly to the Council and to national governments and

[50] See below, p. 14.

[51] Article 64 (3) of MiFID, Article 17 (4) of the Market Abuse Directive, Article 24 (4) of the Prospectus Directive, and Article 27 (4) of the Transparency Directive.

[52] Recital 69 of MiFID, 9 of the Market Abuse Directive, 42 of the Prospectuses Directive, and 34 of the Transparency Directive.

[53] References to this possibility are made in the Stockholm Resolution, point 5 and in the Commission Staff Working Document, "The Application of the Lamfalussy Process to EU Securities Market Legislation. A preliminary assessment by the Commission services, SEC(2004) 1459, Brussels, 15.11.2004, p. 5

parliaments. In fact, according to CESR's Charter (Article 5.7), the standards of legality that limit CESR discretion are provided by the "overarching principles identified in the Stockholm European Council Resolution". No reference is made to the Treaty or to the legal framework created by the European Parliament and the Council and developed by the Commission. Again, the independence of CESR seems to justify this solution. The issue then shifts to the national level: are the national mechanisms of accountability adequate to ensure the control over the activity that CESR plays at the European level? The answer to this question would obviously imply an insight to the domestic legal orders.

An additional problem lies in the scarce legal definition of CESR's role at level 3. The Decision 2001/527/EC only mentions its advisory role to the Commission in the preparation of legislation. Apart from a reference in the 9th recital of that Decision, no other indication is given in that decision or in any other document published in the Official Journal to CESR's role at level 3.[54] This gave broad room for CESR to define its tasks itself in the Charter (Articles 4.3. and 4.4) and in a document where it explained the way it conceived its own powers.[55]

CESR's claim for the Commission's endorsement of some of its standards as a way to strengthen their authority is an example of CESR's ambiguity in terms of accountability, which emerges from its "intermediate" position between the national and the EU regulatory levels. Without endorsement, CESR members are in principle responsible for the standards they adopt before their national governments and parliaments; in case the Commission endorses those standards, the political accountability shifts to the European level.[56] Still, the substance of the decisions remains the same. Nevertheless, endorsement, even if problematic from the point of view of accountability (in particular, it would impact in the Commission's right of initiative) would paradoxically help overcome the problems that the use of soft law poses in terms of accountability, namely political and legal accountability (legal certainty, doubts on possibility of judicial review).

The Inter-institutional Monitoring Group manifested its concerns regarding the legal status of CESR. However, this assessment is limited by the Group's role: it was set up to monitor the effectiveness of the Lamfalussy regulatory approach, evaluating the progress made and "identifying the bottlenecks", not to assess its accountability.[57]

Concrete issues raised by the functioning of the procedure

Concrete challenges to accountability and to the institutional balance lie in the difficulties in delimiting clearly the sequence and the scope of the measures adopted at each level. The continuum between the different stages may, at the end, develop into an intertwinement of the different regulatory steps.

Firstly, there are risks involved in parallel working between Levels 1 and 2, with the Commission drafting mandates to CESR in a moment in which Level 1 measures are still being prepared. This parallel working has been considered necessary by the Commission, due to the need to allow sufficient time for CESR to consult. Moreover, it was considered inevitable by the Inter-institutional Monitoring Group in cases where Member States transpose both Level 1 Directives and the technical "details"; the Group considered it even desirable to allow for broad consultation and better insight into the practical implications of Level 1 principles.[58] The main risk is that the Commission (the committees?) will end up leading the whole regulatory process at Levels 1 and 2, if the content of Level 1 measures is determined by the work already developed at Level 2. There seem to be some guarantees to prevent that possibility: an attempt of the Commission in that direction could provoke a reaction from the European Parliament and the Council that would impair future work in the sector, something that all actors wish to avoid. However, the risk exists, also for practical difficulties in finding an adequate level of detail of Level 2 mandates: it cannot be so low to hinder consultation, it cannot be so high to harm Level 1 negotiations.[59]

---

[54] The 9th recital reads as follows: "The Committee of European Securities Regulators should also contribute to the consistent and timely implementation of Community legislation in the Member States by securing more effective cooperation between national supervisory authorities, carrying out peer reviews and promoting best practice".

[55] "The Role…", quoted in note Errore: sorgente del riferimento non trovata. See p. 9, above.

[56] Third Report, p. 31.

[57] Third Report, p. 28. On the Groups mandate, see Stockholm Resolution, point 7 and Third Report, p. 3.

[58] Third Report, p. 17-8.

[59] Third Report, p. 18.

Secondly, CESR is characterised as acting in a double hat.[60] The role it performs at Level 2 (and Level 1) is different than the tasks it fulfils at Level 3, the degree of independence is also different in one case and the other, and so are the accountability problems raised by the functions performed. But to what extent is it possible to separate clearly the two functions? One sign of the continuum existent between the two phases is the desire manifested by CESR in maintaining the network of experts that were involved in the drafting of the Level 2 advice in order to fulfil a permanent advisory role for problems arising in law application.[61] Another example on how the different levels intertwine is the CESR's proposal to make CESR members intervene, "where permissible at national level", on the technical measures entailed in the transposition of Directives, for which they would receive a delegation by national legislators.[62]

Thirdly, the duty to consult interested parties would, in principle, be limited to Level 2. In fact, Article 5 of the Commission's Decision determines that CESR should consult "before transmitting its opinion to the Commission". The tasks performed at Level 3 are of a different nature: they do not imply issuing an opinion that should be transmitted to the Commission, but the adoption of acts and measures that have the national regulators and authorities has addressees. Yet, the Public Statement on Consultation Practices states that it is also applicable to Level 3 action, and, if any doubt would remain, the document where CESR defines its role at Level 3 asserts that CESR follows the same consultation process at Level 2 and Level 3.[63] Depending on the scope of consultation at this level and on how it will be carried out, it is possible that national regulators who are coordinated by CESR can be limited in their action by the comments produced by market participants (and consumers). In fact, the aim of carrying out consultation before the adoption of standards is to "favour market's participants adherence to the approaches developed".[64] In addition, it is envisaged the possibility of upgrading those standards, by their introduction in Level 1 and Level 2, through the Commission's initiative.[65] Again, this can consubstantiate an important constraint to the Commissions regulatory power (these standards would, at that point, represent not only a consensus among regulators but also a practice accepted and expected by the market participants). To whom is CESR accountable for this activity is a question that remains unanswered.

One last point: Level 4 is an exclusive prerogative of the Commission: it enters its core function of "guardian" of the Treaties. Despite the insistence on this point, it can be questioned whether in practice the distinction between Level 3 and Level 4 will be a clear-cut one, whether CESR's action will not pre-empt some of the Commission's field, even if certain powers remain exclusive to the Commission (the power to initiate an infringement procedure, according to Articles 226 and 227 EC).

In conclusion, full transparency of the system through the publication of information and participation in decision-making, as well as caution in the inter-institutional commitment to carry the process through, were greater concerns than accountability.[66] If transparency seems to have been ensured throughout the process,[67] despite the problems still faced in terms of inclusiveness, the same cannot be said regarding political and legal controls that could grasp the complexity of the procedure that was created. The several duties to report and to keep (the public, the European Parliament) informed lack the structural and substantive elements of accountability (in particular if we consider CESR independence and the soft law rules that it produces): the "ex post calling by one person of another actor to account for its prior conduct" and a convincing answer to the "substantive questions of who is accountable to whom for what, with what sanctions, and under what standards and procedures".[68]

---

[60] Lamfalussy Report, p. 31.

[61] "The Role of CESR at 'Level 3' under the Lamfalussy Process", quoted in note Errore: sorgente del riferimento non trovata,", p. 8.

[62] "The Role…", p. 7.

[63] "The Role…", p. 5.

[64] "The Role…", p. 9.

[65] "The Role…", p. 9. Confirmed by the Commission: see Commission Staff Working Document, "The Application of the Lamfalussy Process…", quoted in note Errore: sorgente del riferimento non trovata, p. 10-11.

[66] Distinguishing accountability from mechanisms of ensuring responsiveness, see Richard Stewart (2006) "Mars or Venus? US and European Models for Regulatory Governance and the Discontents of Globalization", paper presented at the European University Institute in the framework of the Transatlantic Programme jointly with the Law Department, in 27 April 2006 (see in particular, p. 15-19).

[67] Mention should be made to the large publication of documents in the CESR website, including annual report and meetings reports.

[68] Richard Stewart, cited before (note 66), p. 8.

The global level

National regulators continue to play a key normative role in the integration of EU securities market. That is also the case at the international level, despite the cross-border trade of financial services. This is confirmed by a brief look into some international standard bodies in the financial sector. National regulators are not only members of European regulatory and independent committees, but also of organizations such as the Basel Committee, the International Organization of Securities Commissioners (IOSCO) and the International Association of Insurance Supervisors (IAIS), whose principles and standards are later incorporated into national legal systems.

So far, the answer to the globalisation of financial markets relied in the creation of international financial networks where national regulators cooperate and coordinate themselves to reduce the risk of financial crisis. They try to fill the gap existent between the emergence of a market-led global financial system and a coherent corresponding institutional or regulatory framework. In 1997, a major step was made with the conclusion of the Financial Services Agreement which seized the financial services sector into the WTO system and, inherently, made it subject to its Dispute Settlement System.[69] Its scope and aim were to liberalise cross-border trade. Regulation and supervision, however, were to remain in the national realm: this was made clear by national regulators from the outset of the negotiations.[70] Accordingly, standards for prudential purposes are determined by national regulators in more or less informal fora: international networks of which the Basel Committee[71] (Banking), IOSCO[72] (Securities) and IAIS[73] (Insurance) are only the more visible ones.[74] These agreements and arrangements are recognised by the Annex to the above-mentioned Agreement, upon fulfilment of two alternative or cumulative conditions: they shall be open for accession by other states or the conveners have to concede the same substantive treatment to third states (Annex para. 3 (b)).

An attempt of carrying out an analysis of the decision-making processes of the international financial standard setting bodies with the same detail used in the analysis of the Lamfalussy process is hampered by the low level of formalisation of decision making processes in these fora. This, however, varies from organization to organization.

None of the international standard setting bodies mentioned has legal personality, all are composed by representatives of national regulators and issue non-binding measures through non-formalised procedures. They play a decisive role in ensuring convergence of international supervision, since those measures have become the regulatory standard in their respective fields of action. In every case, the technicality of the measures they adopt hampers the scrutiny of their activity by the national overseeing bodies.

The Basel Committee, probably the most influential, has adopted the practice of publishing consultative papers open to comments by interested parties (among them, governments and banks) before defining standards. This represents a move away from the usual secretive way in which it operated. Its membership, though, is still exclusive (the Basel Committee has refused the accession of any other state after Spain in 2001), a feature that contrasts with the growing membership of IOSCO and IAIS. The consultative practices and publicity of the Basel Committee's work represents a slow move in the direction of a path already partially made by IOSCO and IAIS. Both have sought to overcome accountability and legitimacy problems by expanding and diversifying its membership (to include developing countries' regulators) and giving to the possible

[69] On the significance of this Agreement see Hahn, Michael J. (2006), "WTO rules on trade in financial services: a victory of greed over reason?", in Grote, Rainer and Marauhn, Thilo (eds), *The Regulation of Financial Markets. Perspectives for Reform*, p. 176-205, in particular, p. 192-201.

[70] Idem, p. 199

[71] Basel Committee on Banking Regulations and Supervisory Practices, established in 1974 by the bank governors of the G10. It is attached to the Bank of International Settlements (Basel) that provides the Secretariat.

[72] Set in 1983. Its secretariat was moved from Montreal to Madrid in 2001

[73] Founded in 1994. It assumed standard setting functions in 1999. Its sectretariat is provided by the Bank of International Settlements (Basel). The European Commission (sic) appears has one of IAIS members in the list provided in IAIS website.

[74] See www.fsforum.org/compendium/who_are_the_standard_setting_bodies.html, for a list of the international standard setting bodies.

affected countries the opportunity to comment on the adoption of the standards. IAIS concedes the status of observers to actors from the insurance and professional sectors.

These bodies have created a Joint Forum on Financial Conglomerates, that sets standards to regulate the activity of financial conglomerates operating in different jurisdictions and different financial sectors. They have also worked jointly in the International Accounting Standards Board (IASB) to establish international accounting standards (IAS).

Although limited or extended membership does not affect the reach of the rules defined by these bodies – they spread to countries and jurisdictions that have not participated in the decision-making process, mainly through the IMF and World Bank conditionality and surveillance programs – it does affect the perceived legitimacy of these organisations.[75]

The fable definition of their legal status, when it exists, and the persuasive character of their soft law measures are common features that they share with CESR and expose them to similar problems of accountability. Their work also relies mostly on working groups of experts; these determine the content of the standards, which often remains unchanged after the consultative process and after passing through the filters of other bodies within the organizations (that is the case of Technical Committee of IOSCO, mostly composed of regulators from G10 countries).[76]

A structural difference between regulation in financial services at the global and EU level lies in the "added" institutional framework that exists at the EU level and that "channels" and filtrates private standards (i.e. those that were defined by a public or private actor), with all the institutional guarantees that that represents (namely, the possibility of judicial review). This, however, has the limits that were underlined above in this paper.

Still, both regulatory levels are increasingly linked: the rules produced in relatively informal international fora impact in the EU rulemaking without necessarily passing through the formal mechanisms of reception of international rules. This poses a problem related to the accountability of the rulemaking processes in the EU: to what extent can the claimed lack of accountability at the international level impact on the mechanisms existent at the EU level? The acuity of this problem is enhanced by the open texture of the Lamfalussy procedure, since this can facilitate that process of incorporation of international rules.

One possible channel lies in the fact that CESR can perform in non-harmonised sectors, defining autonomous standards (autonomous in the sense that they are not integrated in the Lamfalussy regulatory building) with the view that these might at a later stage "feed the regulatory process at EU level").[77] A concrete example are the "Standards for securities clearing and settlement in the European Union", adopted by a Working Group created by CESR and the ECB, composed of representatives of the ECB, 15 national central banks and the CESR (the European Commission participated as an observer). The standards adopted by the Working Group are based on the CPSS-IOSCO[78] recommendations and are likely to have an impact on the content of future Level 1 and Level 2 directives or regulations.[79]

This example shows a parallelism between structural forms of regulation at the European and at the international level, that exists side to side to their comparative institutional and procedural differences. EU rules adopted in this manner are close to being a mere product of a network of regulators, that, however, have behind them a regulatory structure that can absorb and give a different form to the regulatory standards issued in this manner.

Another example on how global rule-making processes (practices) impact on the regulatory processes carried out at the European level: one of the suggestions of FIN-USE,[80] heard by the Inter-institutional

[75] On the secretive character of the Basel Committee, its evolution and the reasons for the impact of its decisions, Susan Emmenegger (2006), "The Basle Committee on Banking Supervision – a secretive club of giants", in Grote, Rainer and Marauhn, Thilo (eds), *The Regulation of Financial Markets. Perspectives for Reform*, p. 224-236. Among other aspects, the author shows how financial crisis occurred in 1974 (Bankhaus Herstatt), in 1982 (Banco Ambrosiano) and 1991 (BCCI) have spurred the creation and evolution of the Basel Committee. All the banks mentioned operated in the EU internal market.

[76] See Alexander (et al.), (2006), *Global Governance of Financial Systems. The International Regulation of Systemic Risks*, p. 58-60 and 62-63

[77] "The Role…", p. 10.

[78] Task Force on Securities Settlement Systems set up by the Committee on Payment and Settlement Systems and the Technical Committee of IOSCO to issue recommendations for securities settlement systems.

[79] Third Report, p. 42.

[80] A forum of independent experts created by the Commission to give input in policy definition in the financial sector from the perspective of users (see http://ec.europa.eu/internal_market/fin-use_forum/charter/index_en.htm).

Monitoring Group on the Lamfalussy Process on how to improve CESR consultative procedures, was that explanation should be provided on the differences between CESR and other bodies that may be consulting on similar topics, as IOSCO.[81] Possibility of confusion seems to be one of the problems for smaller organizations involved in consultation procedures.

A different example of the regulatory relations established between the European and the international bodies is given by the function of CESR's Subcommittee on International Standards Endorsement (SISE): it assesses the existing IAS and provides comments to the IASB on the view of European securities regulators before the adoption of new standards. It also maintains direct contacts with "the staff of the IASB Board, inviting them to participate in part of its meetings".[82] Its activity can also feed the formal regulatory process: according to information available on CESR's website, SISE identified "specific topics not dealt with by the Regulation 1606/2002 [on the application of IAS] which needed further consideration by European Securities Regulators if a proper implementation of IAS/IFRS is to be ensured".

These links can enhance the political strength of CESR in the context of EU rulemaking.

Conclusions

The procedures of rulemaking entail ed in the Lamfalussy Process can cause a diffusion of normative power among the actors involved, implying a significant restraint to the Commission's regulatory power in ensuring an integrated market in the securities field. Two factors can determine that diffusion of power: CESR, composed by representatives of independent national regulatory authorities, plays a key role throughout the different phases of the regulatory procedure, mainly at Levels 2 and 3; consultation is at the core of a regulatory approach destined to ensure inclusiveness and acceptance by the parties affected.

The paper has shown that the Commission's right of initiative and delegated power to adopt implementing measures can be considerably limited by the intervention of the committees in the procedure, in particular of CESR. This impacts on the institutional balance and on the European Parliament's political control. Despite the intended increased role of the EP, the consequences of the control it can exert over CESR (given its duty to report) are not clear.

Moreover, CESR plays a determinant role in the adoption of implementing measures and, through the coordination of national regulators, in the way the EU law is implemented in Member States. However, the role it performs at this level lacks sufficient legal delimitation. Particularly here, it is not clear to whom CESR is accountable for its regulatory activity, namely which controls national authorities can exert. This problem is enhanced by the difficulties in delimiting clearly the borders of the different regulatory levels.

In what concerns consultation, problems of inclusiveness remain. In addition, the criteria to select members of CESR consultative workings groups and consultative panel is unclear. The fact that the latter, created by CESR's initiative, has also a surveillance role regarding CESR consultation practice, priorities and working methods pushes the possibility of control into a spiral.

Accountability mechanisms that can grasp the complexity of the process were not envisaged, only guarantees of transparency and mechanisms of participation that, in themselves do not allow for effective control, lacking the structural and substantive elements of accountability. More than that, the same mechanisms that were build to enhance inclusiveness can spread normative power among the actors involved in the rulemaking procedures, whose action stays beyond the controls effectively created.

Another important aspect is the impact that international rules produced in relatively informal fora have in EU rulemaking. These are incorporated into national laws without passing through the formal mechanisms of reception of international rules. Similar incorporation occurs also at the European level, acquiring there a degree a formal strength that in principle would not be entailed in their soft law nature (in particular, this can happen if Level standards are upgraded to Levels 1 and 2).

Between the EU and the global level, there is a minimum common denominator: despite the EU being situated in a institutional and regulatory framework with a degree of coherence and formality hardly envisaged

[81] Third Report, p. 24.

[82] See CESR's website.

at the global level, a good part of the regulatory tasks remain in the hands of the national regulators acting in networks.

Bibliography

Alexander, K., Dhumale, R., Eatwell, J. (2006) *Global Governance of Financial Systems. The International Regulation of Systemic Risks*, Oxford: Oxford University Press, Ch. 2

Corcoran, Andrea M. and Hart, Terry L. (2002), The Regulation of Cross-Border Financial Services in the EU Internal Market, in *Columbia Journal of European Law* 8, p. 221-

Communication of the Commission, "Financial Services: building a framework for action" (COM (1998) 625, of 28.10.98

Communication of the Commission, "Financial Services Action Plan" (COM (1999) 232, of 11.05.99

Emmenegger, Susan (2006), The Basle Committee on Banking Supervision – a secretive club of giants", in Grote, Rainer and Marauhn, Thilo (eds), *The Regulation of Financial Markets. Perspectives for Reform*, Cambridge: Cambridge University Press, p. 224-236

"Final Report of the Committee of Wise Men on the Regulation of European Securities Market", Brussels, 15 February 2001 (http://ec.europa.eu/internal_market/securities/docs/lamfalussy/wisemen/final-report-wise-men_en.pdf)

Hahn, Michael J. (2006), "WTO rules on trade in financial services: a victory of greed over reason?", in Grote, Rainer and Marauhn, Thilo (eds), *The Regulation of Financial Markets. Perspectives for Reform*, Cambridge: Cambridge University Press, p. 176-205

Inter-institutional Monitoring Group, "Third report monitoring the Lamfalussy Process", Brussels, 17 November 2004 (http://ec.europa.eu/internal_market/securities/docs/monitoring/third-report/2004-11-monitoring_en.pdf)

Wymeersch, Eddy (2005), "The future of financial regulation and supervision in Europe", *Common Market Law Review* 42, p. 987-1010