



Ref: CESR/04-527b

**THE ROLE OF CESR AT “LEVEL 3”  
UNDER THE LAMFALUSSY PROCESS**

**ACTION PLAN FOR 2005**

October 2004



## Foreword

This paper aims at presenting the views of the Committee of European Securities Regulators (CESR) on how it will organise its role at level 3 under the Lamfalussy procedure. The paper is structured in two parts. The first section provides an introduction and description of the current general principles governing the way in which the Lamfalussy approach and in particular the level 3 should work. The second section sets out in a more detailed manner the organisation of CESR's role at level 3 which will be subdivided into the following three different categories: i) coordinated implementation of EU law, ii) regulatory convergence, and iii) supervisory convergence.

Now that the major pieces of securities law at EU level have been agreed, the day-to-day application of these texts by national competent authorities (which are the members of CESR) is of major importance. The single market for financial services can become reality only if the CESR members are able to provide common regulatory answers in each and every corner of Europe. The focus is now clearly on those who have the responsibility to apply these new provisions. The objective of CESR at level 3 is to ensure convergent application of EU securities law. In particular, the Inter-Institutional Monitoring Group ("Monitoring Group") mentioned in its Second Interim Report that "the differential transposition of EU Directives has become a serious impediment to the functioning of the internal market (...)" which could be prevented by consistent implementation at level 3. Therefore, the Monitoring Group encourages CESR to intensify its work on level 3 taking into account that the first set of level 1 and 2 measures have been recently adopted and need to be implemented consistently in the Member States. CESR acknowledges that a discussion on level 3 of the Lamfalussy procedure cannot be conducted in isolation from the other components of the overall Lamfalussy procedure. In this regard, the efforts of CESR at level 3 will be closely coordinated with the role of the Commission at level 4.

This paper clarifies the general principles covering level 3 in order to ensure real consistent implementation and application of EU securities market legislation, the maintenance of orderly markets and other relevant rules and analyses which activities CESR could further explore at level 3 and describes the arrangements and provisions that CESR has already made.

As competent authorities entrusted by Member States, the members of CESR extensively consulted practitioners, consumers and end-users on the best ways and means to achieve this goal. CESR sought the views from all market participants on the role of CESR at level 3 through the publication of a consultation paper on 6 April 2004 (Ref. CESR/04-104b), as market participants are natural counterparties to the implementation process of new rules and have therefore a direct interest in the way CESR intends to fulfil its role at level 3. Some 35 responses were received during the two-month consultation period, which provided most valuable input for this paper. (All public responses and a feedback statement are available on CESR's website.) In addition, CESR organised an open hearing on 11 May 2004 which was attended by about 50 interested parties. Finally, CESR presented the consultation paper at the European Securities Committee, where discussions took place at a number of meetings.

## 1. Background

### 1.1. Lamfalussy approach and the role of CESR

The Report of the Committee of Wise Men on the regulation of European securities markets (“Lamfalussy report”)<sup>1</sup> centred around a four-level approach for regulatory reform (see Annex 1).

With regard to **level 1** the Committee expressed the view that all European services and securities legislation should be based around a conceptual legislative framework of essential principles. The advantage of this approach is that the legislative process can speed up as the level 1 political co-decision negotiations between the European Commission, the Council of Ministers and the European Parliament only have to focus on the essential issues and not on technical implementing details. The level 1 principles are incorporated in new types of Directives or Regulations in the field of securities which are decided by normal EU legislative procedures (i.e. proposal by the Commission to the Council of Ministers/European Parliament for co-decision). The European Commission consults, beforehand, with market participants, end-users (issuers and consumers), Member States and their regulators on any level 1 legislative proposal. Furthermore, the European Commission informs the European Parliament, the Member States and their regulators on an informal basis of forthcoming proposals. The nature and the extent of the technical implementing measures that should be taken at level 2 have to be specified in the EU directives and regulations. This means that the European Commission has to seek understanding with the Council of Ministers and the European Parliament on the scope of level 2 implementing measures.

With respect to **level 2**, the Committee proposed a working method for CESR, the European Commission and the European Securities Committee (ESC) to define, propose and decide on the technical implementing measures of level 1 directives and regulations. Firstly, the European Commission, after consultation with the ESC, asks CESR to draw up a technical advice for the implementing measures on the basis of a clear mandate of the European Commission. Subsequently, CESR publishes any mandate received from the European Commission to provide interested parties to make submissions. In addition, CESR consults with the market participants, consumers and end-users on the basis of a draft advice at a sufficiently early stage to be able to take the responses into account. CESR may also establish consultative working groups where appropriate. After the consultation procedure, CESR draws up the final advice and sends it to the European Commission. Finally, the European Commission presents a proposal for technical implementing measures to the ESC taking into account the technical advice of CESR. The European Commission ensures that the European Parliament is fully informed on all these proposals in order to check whether the proposals are in conformity with the scope of the implementing powers defined by co-decision in level 1. After the ESC has approved of the proposal of the European Commission, the technical implementing measures are formally adopted by the European Commission.

**Level 3** concerns a strengthened co-operation between national regulators to ensure consistent and equivalent transposition and implementation of level 1 and level 2 legislation. This requires an active role of CESR in the field of common and uniform implementation of EU legislation. CESR should fulfil this role by producing administrative guidelines, interpretation recommendations, common standards, peer reviews and comparisons of regulatory practice to improve enforcement of the legislation concerned.

In particular, the Lamfalussy Report defines the role of CESR under level 3 as follows:

- To produce consistent guidelines for the administrative regulations to be adopted on the national level;

---

<sup>1</sup> Lamfalussy Report of 15 February 2001.



- To issue joint interpretative recommendations and set common standards regarding matters not covered by EU legislation – where necessary, these could be adopted into Community law through a level 2 procedure;
- To compare and review regulatory practices to ensure effective enforcement throughout the Union and define best practice;
- To periodically conduct peer reviews of administrative regulation and regulatory practices in Member States.

The national securities regulators of Europe started working together on a voluntary basis in 1997 with the creation of the Forum of European Securities Commissions (“FESCO”). At that time the work was fundamentally focused on common approaches to day-to-day implementation of EU law and closer cooperation between national competent authorities. This work is reflected in the Lamfalussy approach at level 3 and is now exercised by an independent committee (“CESR”). While forming part of a four level approach, the independence of CESR members, working together at level 3, is the guarantee that all the decisions taken in application of the EU Directives and Regulations will be exclusively governed by the interest of investors and the proper functions of the markets.

Strengthened enforcement of the Community rules is identified by the Lamfalussy Committee as **level 4**. Article 226 of the Treaty stipulates that *“If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice”*. Level 4 is the responsibility of the European Commission but Member States, regulators and the market participants have an important role in supplying information to the European Commission about any potential infringement of Community rules.

## 1.2. General principles

Level 3 is essential for improving the consistency of the day-to-day implementation and application of level 1 and 2 legislation by CESR members. It is the responsibility of the national regulators to set up a framework of strengthened cooperation and networking with a view to ensuring consistent implementation.

Consequently, CESR must put in place the necessary policies and procedures in order to fully play its role on all aspects of level 3. In order to reach a common understanding of all the basic principles underpinning level 3 and the possible role which CESR could fulfil at level 3, in accordance with the respective roles of the EU Institutions, and in particular the role of the EU Commission as “Guardian of the Treaty”, it is important to set out the general principles of level 3 as laid down in several texts adopted at EU level to implement the Lamfalussy Report.

First of all, it is stated in the European Council’s Stockholm Resolution<sup>2</sup> that *“national regulators and CESR should also play an important role in the transposition process by securing more effective cooperation between supervisory authorities carrying out peer reviews and promoting best practices, so as to ensure more consistent and timely implementation of community legislation in member states”*.

The Commission Decision establishing CESR<sup>3</sup> states that CESR should *“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”*.

Finally, in CESR’s Charter (Ref. CESR/01-002) it is stated that its role is to: i) improve coordination among European Securities regulators; ii) act as an advisory group to assist the

---

<sup>2</sup> Resolution of the European Council on more effective securities market regulation in the European Union, Stockholm, 23 March 2001.

<sup>3</sup> Commission Decision of 6 June 2001, OJ L 191/43 of 13 July 2001 (2001/527/EC).



Commission, in particular in its preparation of draft implementing measures in the field of securities; and iii) work to ensure more consistent and timely day to day implementation of community legislation in the Member States. More specifically the level 3 role of CESR is defined in Article 4.3: *“The Committee will foster and review common and uniform day to day implementation and application of Community legislation. It will issue guidelines, recommendations and standards that the members will introduce in their regulatory practices on a voluntary basis. It will also undertake reviews of regulatory practices within the single market”*; and Article 4.4: *“The Committee will develop effective operational network mechanisms to enhance day-to-day consistent supervision and enforcement of the Single Market for financial services”*.

As regards the consultation process, CESR follows the same consultation practices at level 2 and level 3. Therefore, the CESR Charter and CESR’s Public Statement of Consultation Practices (Ref. CESR/01-007c) do not distinguish between level 2 and level 3 in CESR’s approach to consultation (e.g. publication of consultation papers, setting-up of Consultative Working Groups). CESR also encourages consultation at national level by CESR members in order to get the best possible input in all Member States.

In the report of the Economic and Financial Committee to the informal ECOFIN of 8 September 2004<sup>4</sup>, it was requested that CESR and the other level 3 committees should systematically report to the Financial Services Committee on convergence of supervisory practices.

Based on the principles mentioned above and the experience gained by CESR with respect to level 1 and 2 of the Lamfalussy process, as well as its experience as a network of national securities regulators since 1997, three different categories of issues can be distinguished at level 3. These three areas cover: i) coordinated implementation of EU law and rules; ii) day-to-day regulatory convergence, and, finally, iii) supervisory convergence.

## 2. Analysis of level 3 in the Lamfalussy process

### 2.1. Introduction

Consistent implementation of level 1 and level 2 legislation in Member States is a key element in achieving a single EU securities market. Recently, the first examples of decision-making at level 1 and 2 have been successfully completed. This means that these measures (where in the form of Directives) should be transposed in the domestic laws or regulations and be applied in a consistent manner. This implies that level 3 is of immediate and increasing priority.

As regards the overall functioning of the Lamfalussy approach, it should be stressed that the boundary between level 2 and 3 has been progressively clarified through the work carried out for the Market Abuse Directive and the Prospectus Directive. A more specific definition of the content and role of CESR members at level 3 also provides a better understanding of the interaction with level 4 which is the exclusive prerogative of the Commission (see also paragraph 1.1).

The purpose of this paper is to establish what level 3 means for CESR and its members, taking into account the crucial role of the EU Commission and the Member States.

The role of CESR under level 3 may be subdivided into three categories of issues.

1. *Coordinated implementation of EU law:* For the purpose of this paper coordinated implementation covers the work by Member States and their competent authorities respectively in transposing Directives into national laws and/or rules and in applying EU law on a daily basis.
2. *Regulatory convergence:* Regulatory convergence is for CESR members to establish common approaches and standards in order to facilitate harmonised implementation of EU law.

---

<sup>4</sup> Document ECFIN/CEFCPE (2004), REP/502444 rev. 1.



3. *Supervisory convergence:* Supervisory convergence relates to the co-operation of regulators in the performances of their supervisory tasks and obligations under the Directives/Regulations.

In the following, the three categories of issues will be further analysed and illustrated with concrete examples. An overall description on how the Level 3 framework fits into the Lamfalussy process is provided in Annex 2.

### Current activities of CESR at level 3:

- The Review Panel ensures more consistent and timely implementation of EU legislation by carrying out collective (peer) review through a system of correspondence tables, which are scrutinised and made public (the assessment started with the CESR Standards on Investor Protection and Standards for Alternative Trading Systems which were adopted to facilitate further harmonisation and consistent implementation of the Investment Services Directive (ISD), and will continue with C Standard No. 1 on Financial Information);
- The Permanent Group of CESR-Pol establishes guidance and information on the common operation of the Market Abuse Directive;
- The Expert Group on Prospectus delivers the recommendations to complete prospectus under the Prospectus Directive;
- The Permanent Group of CESR-Fin delivered a common approach to the enforcement of IFRS by its Standards No.1 and No. 2 on Financial Information;
- The joint CESR-ESCB Group will issue Standards on Clearing and Settlement;
- CESR-Pol currently updates the CESR Multilateral MoU and conducted research in the field of Internet surveillance and a risk-based approach to supervision.

## 2.2. Coordinated implementation of EU law by CESR members

The coordinated implementation of EU law covers the legal transposition process into national laws and/or rules and the day-to-day application of the EU legislation.

Responsibility for transposing EU Directives (whether of level 1 or level 2 nature) lies with the Member States, which can be brought before the European Court of Justice (ECJ) in case of infringement.<sup>5</sup> This action might be taken by the Commission, under the powers conferred by Article 226 of the Treaty<sup>6</sup>. However, in case of EU Directives, the national competent authorities (CESR members) may, where permissible at national level, intervene in the transposition process, being delegated by national legislators to transpose certain technical measures. Furthermore, the national competent authorities (CESR members), either formally or informally, are often involved in the transposition process as advisors to their respective governments and parliaments. The coordinated implementation process also covers the day-to-day application of the EU legislation which is largely the responsibility of the national competent authorities (CESR members). This aspect is of particular relevance when no transposition into national laws or rules (Regulations) is required.

The overall objective that securities regulators in Member States should have equivalent rulemaking powers for the implementation of level 2 measures (and also CESR level 3 standards), would enhance the flexibility, which is called for in the Lamfalussy Report, to adapt any subsequent changes to level 2 and facilitate further coordinated work at level 3 with respect to regulatory convergence. Although, any extension of rule-making powers of securities regulators can only take place in compliance with the constitutional requirements applicable in the Member States. (The results of the first mapping exercise of powers of CESR Members in the securities sector are published in CESR's Preliminary Progress Report "Which Supervisory Tools for the EU Securities Markets?" [Ref. CESR/04-333f].) In this respect, it is also of interest that, in its Second Interim Report, the Inter-Institutional Monitoring Group encouraged to consider

<sup>5</sup> Regulations are directly applicable in the Member States.

<sup>6</sup> Under level 4, the Commission has an institutional role, as a "guardian of the Treaty", in controlling transposition of level 1 and level 2 Directives by Member States after the transposition date has elapsed. Art. 227 of the EC Treaty provides for the right of a Member State to bring infringement proceedings against another Member State before the ECJ.



the benefits of Regulations at level 2 which would specifically overcome existing differences in the regulatory competences of national securities regulators.

It is necessary to coordinate efforts to avoid divergent implementation of EU law at a time when Member States and national regulators are transposing level 1 Directives and the accompanying level 2 implementing measures into national law or rules.

Acting as “Guardian of the Treaty”, the EU Commission, as part of its exclusive enforcement duties at level 4, facilitates coordination between Member States as a preventative measure ahead of any infringement procedure. The Commission sets out in its Communication on “Better monitoring of application of Community law”<sup>7</sup> that it intends to make more generalised use of “package meetings” where Member States and national regulators can discuss any problems with the transposition and to examine preliminary draft transposition measures. Furthermore, the Commission may draw up “transposition guidelines” in cooperation with the Member States and the national regulators. Finally, the Commission might encourage the creation of single coordination points responsible for the application of Community law within the Member States. The Commission has already organised informal transposition meetings with Member States with respect to the Market Abuse Directive (“MAD”) and the Prospectus Directive.

To complement this at regulators level, in full coordination with the efforts of the Commission CESR may coordinate ad-hoc sessions concerning, in particular, practical measures that will largely be in the hands of the national regulators.

With respect to the implementation of EU law and CESR rules, CESR has established the Review Panel to carry out collective (peer) reviews through correspondence tables that are scrutinised and made public. As provided in the Terms of Reference of the Review Panel (see Annex 3: Ref. CESR/03-061), its role is to assist CESR in its task of ensuring more consistent and timely implementation of Community legislation in Member States, as foreseen in the Lamfalussy Report and provided for in the Commission Decision establishing CESR. In this respect, it is crucial that not only formal transposition, but also day-to-day application of EU law is consistent across Member States (in particular, regarding Regulations which are directly effective in Member States). Following a self-assessment by CESR members on the implementation of a specific set of rules, the Review Panel gives its opinion on this assessment and discusses common approaches for implementation. Finally, pressure by all market participants and overall stakeholders is to be expected through the publication of reports of the Review Panel and correspondence tables.<sup>8</sup>

Finally, it is considered useful to keep alive the network of CESR experts which were involved in drafting the level 2 advice. This network could fulfil a permanent advisory role for any problems arising in the application of the legislation concerned.

---

<sup>7</sup> Communication on “Better monitoring of application of Community law” (COM (2002) 725 final/4 of 16.5.2003).

<sup>8</sup> The CESR Standards on Investor Protection (Ref. CESR/01-14d and CESR/02-098b) and the CESR Standards for Alternative Trading Systems (Ref. CESR/02-86b) are a clear example of the overall exercise to achieve harmonised application of common standards. These Standards were adopted to facilitate further harmonisation and consistent implementation of the ISD. The Review Panel has been assessing whether these Standards are fully implemented in the jurisdictions of the members of CESR. It is envisaged that a similar exercise with respect to CESR’s First Standard on Financial Information (CESR/03-073) will be conducted in 2004.



## Coordinated implementation of EU law

### *Current activities:*

- Assessment by the Review Panel of the implementation of the CESR Standards on Investor Protection and ATS under the current ISD. First report made public on 4 March 2004;
- An Ad-hoc meeting at regulators level on transposition of Market Abuse Directive co-ordinated with package meetings on transposition issues held by the Commission, Member States and national regulators;
- CESR has recommended in its initial contribution to the post-FSAP phase to the Commission that CESR Members should be given similar rulemaking powers.

### *Proposed new activities:*

- Network of CESR experts advising on the application of EU law;
- Developing the capacity to receive information about concrete implementation problems;
- Following the mapping exercise on powers of CESR Members, developing proposals for equivalent powers of CESR Members and necessary safeguards (in particular transparency and accountability), in line with the constitutional requirements.

## 2.3. Regulatory convergence

Regulatory convergence can be best defined as the process of creating common approaches. The legitimacy of the role of CESR in achieving this convergence at level 3 comes from the fact that CESR members take individual decisions on a daily basis that create jurisprudence. This “bottom-up approach” relates to the normative nature of concrete decision-making activities of the supervisors. The impact of precedents on decisions is determined by the law and cannot be fully controlled by legislators. In addition, in an integrated European securities market, the jurisprudence created by supervisors produces effects that cannot be limited to national jurisdictions and therefore must be faced at EU level.

Accordingly, in an attempt to take converging decisions, as recommended by the Stockholm Resolution, the members of CESR may decide to enter these common approaches simply into minutes of meetings or, if felt necessary, to transform into indicative guidance, or into regulatory recommendations providing a benchmark or, more strongly, into standards that carry their commitment. The members of CESR will introduce and implement these guidances, recommendations and standards, which do not have the status of Community law (thus are not legally binding at EU level), in their regulatory practices on a voluntary basis. They create obligations on national regulators vis-à-vis each other in order to respect their commitment under the CESR Charter on the one hand and to promote mutual confidence and to create “peer” pressure on the other hand.

The main purpose of the standard-setting activity of CESR is to enhance the transparency and predictability of decisions by CESR members when acting at national level. The adoption of standards by CESR is an effort to specify in advance how the national authorities will apply the Directives on a daily basis in order for market participants to anticipate the behaviour of regulators in the Single Market. The fact that these standards are widely consulted before adoption favours market participants’ adherence to the approaches developed. These standards might be considered as a proper manner of applying EU law in a consistent way across Europe and should, therefore, be fully compatible with level 1 and 2 measures.

At the initiative of the Commission, CESR standards could be “upgraded” at a later stage and form part of level 2 (or even level 1) legislation and become binding through the intervention of the Commission at level 2 where comitology is envisaged, complying with the EU legal and institutional framework, in particular respecting the Commission’s right of initiative. The Commission could also take the initiative, where and when appropriate, to give more authority to common approaches by CESR members as a proper manner of applying EU law.

CESR has already started working on “guidance” for level 3 issues which consist of practical measures or common implementations of legal texts: a) under the MAD for the process of assessing the co-ordination of accepted market practices by competent authorities; b) under the



Prospectus Directive in delivering the recommendations to issuers on how best to complete a prospectus; c) under the UCITS Directive on a number of important issues.

Finally, at level 3 CESR may intervene in areas not covered by EU law or in areas where Commission proposals for level 1 or level 2 measures have not been made. In such non-harmonised sectors, CESR members may agree on the need for a coordinated and transparent approach to cope with a specific market reality that requires a more common behaviour by regulators, and, therefore, may adopt autonomous standards as a common EU-wide regulatory approach to securities business which might feed the regulatory process at EU level. This activity will enhance mutual confidence and persuasion among CESR Members. The CESR-ESBC Standards on Clearing and Settlement are an example of this activity. The joint Working Group, composed of representatives of CESR and the ESCB, the 15 national central banks and CESR members published the consultation paper “Standards for securities clearing and settlement systems in the EU” along with the note “Scope of application of the CESR-ESCB Standards”. Adoption of these standards is envisaged during the course of 2004. Another related aspect could be a role of CESR in providing coordinated opinion on new services or products with pan-European scope, which – without stifling competition or innovation – could reduce costs and delays and provide greater legal certainty.

Finally, CESR considers it an important part of its mandate from the EU Institutions to point out to the Commission possible areas of concern as to the transposition and application of EU law or as to the need to review or update level 1 or level 2 measures. CESR becomes aware of such shortcomings not only through its own members, but also through its contacts with market participants (either in the more institutionalised form of the CESR Market Participants Consultative Panel or other regular contacts with market practitioners, consumers and end-users).

#### **Regulatory convergence**

##### *Current activities:*

- Guidelines to assess accepted market practices under MAD (CESR-Pol);
- Recommendations to complete a prospectus (CESR Group on Prospectus);
- Standards on Clearing and Settlement (CESR-ESCB);
- Establishment of Expert Group on Investment Management;
- CESR’s initial contribution to the post-FSAP phase to the Commission;

##### *Proposed new activities:*

- Support the initiatives of the EU Commission to give, when and where appropriate, more authority to CESR common approaches;
- Alert the EU Commission as to needs to update Level 2 measures (and possibly Level 1 texts);
- Develop accountability links with the Financial Services Committee, as suggested by the Economic and Financial Committee, in addition to the existing accountability links with the EU Commission, the European Securities Committee and the European Parliament.

#### **2.4. Supervisory convergence**

Supervisory convergence relates to how regulators approach the practical operation of rules and legislation. Convergence of both supervisory objectives and techniques will be achieved by sharing these objectives and techniques to secure a common approach across Europe. This requires strengthened cooperation through CESR’s network, as called for in the Second Interim Report of the Monitoring Group.

Examples of this activity are given by Standard no. 1 and Standard no. 2 on Financial Information, representing a common approach to the enforcement of International Financial Reporting Standards (IFRS) in Europe. CESR-Fin, through its Sub-Committee on Enforcement (SCE), established the two standards, in order to contribute to the development and implementation of a common approach to the supervision and enforcement of financial



reporting in Europe. Building on this work, SCE developed a second standard to establish appropriate coordination of enforcement practices.

Furthermore, supervisory convergence implies cooperation and efficient exchange of information. In an integrated financial market, efficient cooperation between regulators is essential to allow proper performance of the respective supervisory tasks. Efficient administrative procedures should be in place to ensure that day-to-day flow of information takes place without encountering any obstacle. An example of this activity is supplied by the current work undertaken by CESR-Pol. CESR-Pol's objective is to enhance the sharing of information, co-operation and coordination of surveillance and enforcement activities between CESR members. CESR members cooperate in the field of exchange of information and enforcement pursuant to the CESR Multilateral Memorandum of Understanding on the Exchange of Information and Surveillance of Securities Markets ("MoU"). In 2003, CESR-Pol adopted a "Service Level Agreement", which sets out a common approach on how the members wish to see their requests for assistance directed to fellow members are treated under this MoU. In addition, best-practice guidelines are being developed in the field of joint investigations. Furthermore, current work is undertaken in CESR-Pol to exchange experiences in conducting investigations on market abuse (both at national level and cross-border level) and the risk-based approach to supervision. Finally, CESR-Pol undertook a survey of current Internet surveillance activities and automated tools for detecting illegal securities activities. This survey facilitates the development of new methods of surveillance and the possible setting-up of common approaches.

Supervisory convergence can also be found in responses to supervision and enforcement actions. Sharing common experiences in the field of enforcement actions is crucial to ensure that similar cases are treated consistently and in an equivalent manner across Europe. The various Directives in the securities field impose extensive obligations for close cooperation on national regulators (CESR members). A catalogue of all mutual recognition and cooperation obligations under the Directives, where CESR is active, was enclosed to the consultative paper (Ref. CESR/04-104b).. CESR will keep the catalogue under review and might undertake an analysis of the provisions as to their consistency. CESR also believes that these provisions should be consolidated into one single text which should apply to all circumstances where cooperation between competent authorities takes place. The catalogue gives a global picture of the various practical working links that will need to be established in the near future. Within these obligations, one can distinguish those resulting from the mutual recognition of decisions from another competent authority and, those asking competent regulators to cooperate in the performance of their supervisory tasks. If there is a lack of cooperation by one competent authority, the MAD (Article 16 par. 4) explicitly envisages this situation and gives a legal "mediation" role to CESR. CESR-Pol will be exploring this further, possibly in a broader context, in order to have an operational mechanism in place if necessary.

The Monitoring Group encouraged CESR to set up an internal mediator system under its Charter in order to solve conflicts between national securities regulators. For example, as regards the mutual recognition of decisions from the home competent regulator by the host competent regulator(s) (e.g. licenses of intermediaries and regulated markets, approval of prospectuses or UCITS), the Directives are drafted in a manner that mutual recognition is an increasingly automatic procedure. It might happen, however, and most likely in very limited cases, that the home and the host competent regulators (or two host competent regulators) disagree. Normal procedure would be to refer the case to the European Commission or even to the ECJ, if the matter requires an official interpretation of the relevant directive. But in order to have more rapid and less costly solutions, CESR will start putting in place a "mediation" mechanism by peers (other members of CESR) so as to provide an acceptable solution for specific cases. This will need of course to be in accordance with the speed of markets and, therefore in most cases, intervene *ex post*. In addition, the existence of a "mediation" system should not be regarded as an incentive to systematically question the increased automaticity of mutual recognition. Any mediation system would have to respect, in particular, confidentiality and business secrecy obligations. Finally, any CESR mediation activity should not overlap with the Commission's enforcement competences.

Other practical examples of methods by which supervisory convergence might be obtained, include members undertaking joint supervisory visits to cross-jurisdictional market players and



joint investigations. CESR will develop common standards on these areas in order to facilitate this work and to allow for an efficient functioning of such arrangements, and has already started to work on this issue in more concrete terms, not the least in order to overcome any legal impediments.

Convergence is also achieved through the sharing of national decisions or cases that progressively establishes “EU Jurisprudence”. As a first experiment, CESR-Fin will introduce, for the use of accounting enforcements authorities, a database of application examples of International Financial Reporting Standards, so as to facilitate the sharing of practical cases and ensure convergence over time. Such a type of database could also be extended to other regulatory interpretations and judicial cases so as to facilitate consistent implementation and application of EU legislation, taking fully into account confidentiality requirements applicable. More operationally, ahead of a decision by a competent national regulator, if rapid coordination is necessary, such a regulator could feel the need to collect the views of its fellow CESR members. In order to provide rapid answers, specific “urgent issues groups” could be called under the auspices of CESR.

As a more long term objective, several ways of empowering the understanding by the staff of the CESR members of the EU dimension of the performance of their tasks can be envisaged. They cover specific training sessions to operational staff on the application of the new EU legislation, but also a more ambitious exchange of personnel between CESR members or even the advertising of positions on a EU scale, for which CESR could play the role of clearing house.

#### **Supervisory convergence**

##### *Current activities:*

- Standards on enforcement of financial information (CESR-Fin);
- Database on enforcement case of IFRS (CESR-Fin);
- Practical improvements of the MoU on exchange of information and surveillance/survey on Internet surveillance (CESR-Pol);
- Coordination and cooperation with CEBS and CEIOPS in areas of common interest.

##### *Proposed new activities:*

- Guidelines for CESR members to undertake joint investigations of cross-jurisdictional market-players (CESR-Pol);
- Joint supervisory visits by relevant CESR Members to cross-jurisdictional institutions;
- Urgent issues group/specific cases devoted Task Force;
- Exchange and training of staff;
- Develop additional information databases in particular in the area of regulatory interpretations and judicial cases;
- “Mediation mechanism” by peers to find acceptable solutions when two competent authorities disagree on a mutual recognition or in case of a lack of cooperation.

**Annex 1 : THE FOUR-LEVEL APPROACH RECOMMENDED BY THE COMMITTEE (p.6 of the Lamfalussy Report)**

**LEVEL 1**

**Commission** adopts formal proposal for Directive/Regulation after a full consultation process

**European Parliament**

**Council**

Reach agreement on framework principles and definition of implementing powers in Directive/Regulation

**LEVEL 2**

**Commission**, after consulting the **European Securities Committee**, requests advice from the **European Securities Regulators Committee** on technical implementing measures

**European Securities Regulators Committee** prepares measures in consultation with market participants, end-users and consumers, and submits them to **Commission**

**Commission** examines the measures and makes a proposal to **European Securities Committee**

**European Securities Committee** votes on proposal within a maximum of 3 months

**Commission** adopts measure

**European Parliament** kept fully informed and can adopt a Resolution if measures exceed implementing powers

**LEVEL 3**

**European Securities Regulators Committee** works on joint interpretation recommendations, consistent guidelines and common standards (in areas not covered by EU legislation), peer review, and compares regulatory practice to ensure consistent implementation and application

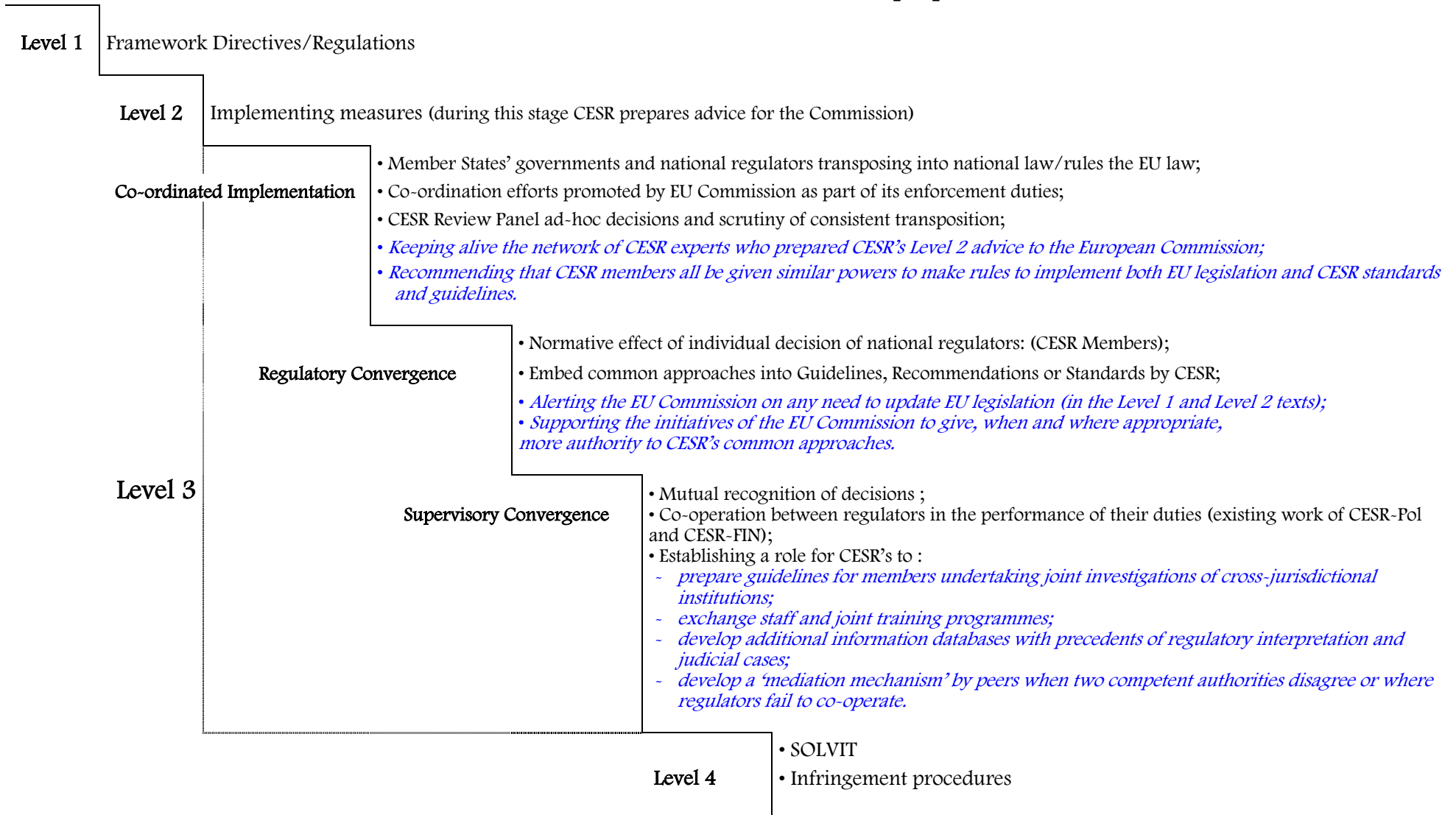
**LEVEL 4**

**Commission** checks Member State compliance with EU legislation

**Commission** may take legal action against Member State suspected of breach of Community Law



## Annex 2: Level 3 Framework in context and new proposals (in italics)





### Annex 3: Terms of Reference of the Review Panel (Ref. CESR/03-061)

<u>Chair</u>	The Vice-Chairman of CESR.
<u>Membership</u>	Internal Coordinators of each CESR member.
<u>Observers</u>	The EU Commission can attend the meetings of the Panel.
<u>Secretariat</u>	The Secretariat of CESR facilitates the work of the Panel.
<u>Role</u>	The role of the Panel is to assist CESR in its task of ensuring more consistent and timely implementation of Community legislation in Member States.
<u>Mandate</u>	The Panel is the middle-step in the implementation process; it intervenes after the self-assessment conducted by members and before the final approval by the CESR. It gives its opinion on the overall process of implementation, discusses common approaches for the implementation, provides common understanding and expresses views on specific problems encountered by individual members. In case of particular circumstances, the Panel may propose to establish a special group to address issues of technical nature. Clarifications of CESR Standards will be collected by the Secretariat and shared with the Panel.
<u>Monitoring of the implementation process</u>	<p>The organisation of monitoring the implementation the adoption will be based on the following steps:</p> <ul style="list-style-type: none"><li>- <b>self-assessment by members:</b> the Secretariat of CESR will send to the members a correspondence table, after the agreed deadline for implementation of EU rules and CESR standards; the table should be filled in by each member with the precise indication of measures of implementation adopted for each standard;</li><li>- <b>review by CESR:</b> the correspondence table will be reviewed by the Secretariat and the Panel. The Panel submits periodically to CESR, together with correspondence tables, a report for final approval. The panel can collect the opinion of the Market Participants Consultative Panel before final submission;</li><li>- <b>publication of the self-assessment:</b> the report of the panel and the correspondence table, once approved by CESR, are posted on its web-site. This table will be regularly updated, to take into consideration changes.</li></ul>