

**MEMO# 17398**

April 19, 2004

# **CONSULTATION PAPER ON ENSURING CONSISTENT APPLICATION OF EU LEGISLATION**

ACTION REQUESTED [17398] April 19, 2004 TO: INTERNATIONAL COMMITTEE No. 20-04 RE: CONSULTATION PAPER ON ENSURING CONSISTENT APPLICATION OF EU LEGISLATION The Committee of European Securities Regulators (CESR) recently published a consultation paper exploring how CESR members might exercise their responsibilities within the four-level framework of the Lamfalussy process.<sup>1</sup> A copy of the consultation paper is attached. The Institute is considering whether to comment on the consultation paper. Comments on CESR's paper are due on June 1, 2004. Please provide any issues or concerns with CESR's consultation paper or any areas that the Institute specifically should address in a comment letter to me at (202) 326-5810 or at [jchoi@ici.org](mailto:jchoi@ici.org) by May 3, 2004. The Final Report of the Lamfalussy Committee defined the role of CESR under Level 3 as: (1) producing consistent guidelines for administrative regulations to be adopted at the national level; (2) issuing joint interpretative recommendations and setting common standards regarding matters not covered by EU legislation that could be adopted into legislation under Level 2, if necessary; (3) comparing and reviewing regulatory practices to ensure effective enforcement throughout the European Union and defining best practice; and (4) conducting periodically peer reviews of administrative regulation and regulatory practices in Member States. In the consultation paper, CESR reviews how it could develop its role in Level 3 of the Lamfalussy process to ensure consistent application of EU legislation. The consultation paper sets forth CESR's recommendations and seeks comments on the Level 3 functions, which CESR divides into three categories – coordinated implementation of EU law, regulatory convergence, and supervisory convergence. 1 Under Level 1 of the Lamfalussy process, directives and regulations would contain framework principles, and implementing measures would be adopted by the Commission and the European Securities Committee with the assistance of CESR at Level 2. Level 3 concerns cooperation among national regulators to ensure consistent and equivalent transposition and implementation of Level 1 and Level 2 legislation. Level 4 involves the responsibility of the EU Commission (with the assistance from Member States, regulators, and the private sector) to strengthen enforcement of the Community rules. 2 Coordinated Implementation of EU Law The coordinated implementation of EU law covers both the process by which EU legislative directives are transposed into national law and rules and the day-to-day application of EU legislation. In this role, CESR currently coordinates ad hoc sessions of national regulators to discuss implementation issues. In addition, CESR has established a Review Panel to conduct peer reviews of Member State transposition of EU legislation. The Review Panel gives its opinion on self-assessments conducted by CESR members on the implementation of a specific set of rules, and both the reports of the Review Panel and the self-assessments are made

public. Moreover, the Review Panel provides its opinion on the overall process of implementation, discusses common approaches for implementation, provides common understanding, and expresses views on specific problems encountered by individual CESR members. In the consultation paper, CESR recommends that CESR members all be given rulemaking powers to implement EU legislation and CESR standards, which would facilitate further coordinated work at Level 3 with respect to regulatory convergence. In CESR's view, permitting national regulators to have rulemaking authority and to transpose certain EU legislation into rules of national regulators by delegation (rather than in national laws) would facilitate flexibility to adapt to any subsequent changes. In addition, CESR proposes to retain the network of CESR experts who prepared CESR's Level 2 advice to the European Commission to act in an advisory role for issues arising in the application of the legislation.

**Regulatory Convergence** Regulatory convergence is the process of creating common rules. To make converging regulatory decisions, members of CESR may agree on common approaches, produce guidance, make recommendations, or produce standards. The members of CESR introduce the guidance, recommendations, and standards into their regulatory practice on a voluntary basis but are "binding" on national regulators to the extent the regulators respect their commitment under the CESR Charter, hope to promote mutual confidence, and create peer pressure. CESR standards may at a later time form part of Level 2 (or Level 1) legislation and becoming binding through the intervention of the Commission. At Level 3, CESR also may intervene in areas not covered by EU law (non-harmonized sectors) and adopt autonomous standards as a common EU-wide regulatory approach to a particular securities business (e.g., clearance and settlement). In the future, CESR proposes that it conceive of ways to give more authority to its guidelines, recommendations, and standards and to alert the EU Commission as needed to update EU legislation.

**Supervisory Convergence** Supervisory convergence relates to how regulators approach the practical operation of rules and legislation. CESR believes that convergence of both supervisory objectives and techniques will be achieved by sharing these objectives and techniques to secure a common approach across Europe, which will require strengthened cooperation through the CESR network. CESR is of the view that supervisory convergence implies cooperation and efficient exchanges of information and similar responses to supervision and enforcement actions. In this regard, CESR has instituted procedures to enhance the sharing of information, cooperation, and coordination of surveillance and enforcement activities among CESR members. In the consultation paper, CESR proposes to prepare guidelines for, and undertake, joint investigations of cross-jurisdictional institutions, exchange and train staff, create additional information databases of regulatory interpretations and judicial cases, and develop a mediation mechanism by peers when two competent authorities disagree or where regulators fail to cooperate.

Jennifer S. Choi Associate Counsel Attachment (in .pdf format)