

The role of CESR at “Level 3” under the Lamfalussy process

UNICE POSITION

UNICE welcomes the opportunity to comment on the role of CESR at level 3 of the Lamfalussy process. CESR's mandate at level 3, as foreseen by the Lamfalussy Report, to promote consistent implementation of EU securities market legislation in the member states is vital for the further integration of Europe's financial markets. For companies as users of financial services and as issuers, inconsistent transposition of EU directives into national law and/or divergent regulatory practices and supervisory approaches can substantially raise the cost of cross-border business operations while in many cases there are no overriding reasons for such divergences that could be justified on economic grounds.

General remarks:

- CESR action at level 3 must focus on the implementation of existing rules and on the coordination of regulatory and supervisory practice and not establish new regulatory requirements for market participants. It must not be used to insert unnecessary discretionary leeway for national regulators in matters where EU legislation is too prescriptive, nor must it provide for harmonisation in matters on which no agreement was reached at level 1 or 2. CESR action should build on the existing regulatory and economic approaches established in level 1 framework legislation and elaborated in level 2 implementing legislation and not seek to fill in the void where no such approaches were determined.
- Level 3 action should be used to facilitate flexible and speedy adjustments of level 2 legislation in line with evolving market structures.
- Implementation problems may arise for a number of different reasons. Only when the implementation process of level 1 and level 2 measures has begun will concrete need for clarification and sources of regulatory inconsistencies become evident. Until then, CESR level 3 action should restrict itself to issues where the need for guidance is apparent due to unclear or ambiguous wording of the relevant legal texts. Otherwise, for lack of experience, CESR would run the risk of choosing the wrong approaches to be transformed into guidance and standards for national regulators.
- Market participants should therefore be consulted on an ongoing basis about CESR's role at level 3. CESR should indeed ensure a transparent process for its level 3 work, including information about the results of meetings and development of new initiatives.

Specific remarks:

A. Coordinated implementation of EU law

1. UNICE agrees with the mandate CESR was given with regard to promoting consistent implementation of EU securities law. Measures to promote convergence should relate to both implementation of EU directives by member-state governments into national law and to implementation via delegated powers by regulators through changes to regulatory rules. CESR must, however, limit its activities to the application of existing EU law and not create additional legal requirements for market participants.

2. In our view, the coordinated implementation of EU law could be further facilitated through the following measures:

- alignment of certain rule-making powers and other supervisory competences of CESR members;
- “intelligence gathering” by CESR on national legal rules and regulatory practices;
- the development of communication and information retrieval means between CESR members and between CESR members and market participants regarding national transposition of EU law;
- easy access to national regulatory rules for regulators from other member countries and for market participants;
- the coordination of national impact analyses with regard to the required changes to national rules and with regard to the economic effects involved.

B. Regulatory convergence

3. Market participants must be consulted about CESR’s proposals for guidance that addresses CESR members and/or market participants directly. If guidance or standards are based on a specific practice or a decision by a national regulator, CESR must, in order to avoid negative effects for a majority of market participants, ensure that this practice or decision would be the most beneficial one in those countries where the bulk of the respective financial transaction is taking place.

In order to facilitate the convergence of regulatory decisions among CESR members, national regulators should provide CESR with annual reports on the administrative rules and practices they have adopted on the basis of EU legislation, accompanied by their reasoning as to why a specific practice or approach has been adopted. This would provide CESR with important information before it creates common approaches in the form of guidance or standards.

In no way must guidance on level 3 issues impose new rules on market participants or integrate requirements that for important purposes have been left out of EU legislation. For example, it could be argued that CESR’s *Standards on Investor Protection* which de facto establish minimum harmonisation of conduct of business rules for investment firms are not required to secure convergent application of EU law. Guidance that provides, in CESR’s words, “a higher level of detail” than the corresponding legislative measures runs the risk of needlessly adding to the requirements market participants have to comply with without fulfilling its original aim of promoting convergence of regulatory practices.

UNICE welcomes CESR’s intention to alert the Commission to necessary adjustments to level 2 and level 1 measures. This must, however, not lead to an increase in the legislative burden. It should aim at simplifying or, where indispensable, at complementing existing

legislation. This procedure should also be used by CESR, where appropriate, to recommend that certain level 1 or level 2 provisions, which during the implementation phase prove to be counterproductive, be eliminated.

4. A coordinated opinion by CESR on new services or products with a pan-European scope might be envisaged if requested by market participants. It must be secured beforehand, however, that such a measure truly provides incentives for innovation regarding products and business methods and that it does not stifle progress. This can only be achieved if this coordinated opinion is not too prescriptive and detailed so as to leave national regulators – and subsequently market participants – the necessary room for trial and error processes.

In no way must there be a requirement for financial services firms to obtain approval from CESR for a new service or product. If prior regulatory approval for a new product or service is required, this competence should remain with the home regulator who has the best available market knowledge. A CESR opinion only makes sense if that service or product will be introduced in a significant number of member-state markets.

In the context of new products being launched or new business methods being introduced which might or might not require a regulatory framework, UNICE sees a role for CESR primarily in gathering information and experience – and putting this at the disposal of its members - with regard to the use of that product or method in different countries and to the regulatory issues involved.

5. As a matter of principle, CESR standards and guidance are developed by national regulators to promote convergent application of EU law and supervisory practices and as such should not be turned into EU law. Moreover, they must remain easily adaptable and not add to the legislative body surrounding the underlying matter.

However, there might be a need to give greater political authority to these measures by means of Commission endorsement where there is either

- genuine lack of clarity that could lead to divergent implementation in the EU which would prove counterproductive;
- need for implementation of level 3 instruments in member states where national regulators do not have the powers to do so;
- need for enforcement of level 3 instruments in national courts.

An endorsement procedure must be subject to rigorous procedural principles, and should not be done in a systematic way:

- where CESR asks the Commission for endorsement of a measure, it should put forward detailed reasoning why in its view there is a need for greater authority with regard to this measure;
- the Commission should undertake an evaluation of the CESR measure after consultation with market participants and come to a conclusion as to whether it merits endorsement or not;
- market participants should have the right to demand endorsement by the Commission.

C. Supervisory convergence

6. CESR can considerably contribute to achieving convergence in the application of laws and regulations by, firstly, promoting the exchange of information between supervisors. In this

context, UNICE welcomes CESR's intention to introduce databases containing examples of applications of regulatory interpretations, such as CESR plans for the use of accounting enforcement authorities with regard to IFRS.

CESR should only move into new areas of supervisory convergence once there is more experience with the results of current measures. In this context, UNICE supports CESR's approach with regard to convergence in the enforcement of IFRS.

7. CESR can furthermore promote supervisory convergence by providing effective means to solve conflicts between national regulators arising from non-compliance with EU legislation and CESR standards. UNICE supports the creation of a mediation system within CESR. Finding solutions to contentious issues between national regulators could considerably shorten the time to settlement compared with action before the European Court of Justice involving member state governments.

The mediation system should deal with cases where national regulators have not implemented level 1 and level 2 measures in line with CESR standards and guidelines, and where they do not comply with the provisions for mutual recognition of national regulatory decisions and for cooperation between national regulators as foreseen in level 1 and 2 legislation. It should also apply to the compliance with CESR's autonomous standards.

The right to referral of a member state's practices to CESR should not only reside with the regulators, but also with the regulated market participants and their professional associations.