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## **General methodology for implementation reviews undertaken by CESR**

The document is split into two parts: the first part sets out the reasoning and objectives of the general methodology for implementation reviews undertaken by CESR and the second part provides the procedural framework for the conduct of CESR implementation reviews and the general review criteria for these.

### **Overall Approach**

#### **A. Introduction**

1. This document aims to introduce a Methodology<sup>1</sup> which will be guidance for assessing the implementation of CESR Standards and other Level 3 measures and will also be used as a tool to illustrate CESR's interpretation of CESR Measures. Furthermore, the scope of the Methodology will, when articulated, cover the day-to-day application of the technical aspects of EU Directives and Regulations and of the European Commission's Recommendations by the Members of CESR.<sup>2</sup>
2. The following Methodology has to be read in accordance with the relevant CESR measures, in particular the CESR Charter (Ref. CESR/01-002) and the Terms of Reference of the Review Panel (Ref. CESR/03-061). The following Methodology is informed by the experience gained in the review process undertaken by the CESR Review Panel as to the Standards on Investor Protection and Alternative Trading Systems (Ref. CESR/03-414b) and the Review Panel mapping exercise on powers of CESR Members in the securities sector (Ref. CESR/04-445)<sup>3</sup>.
3. Reference is also made to the Stockholm Resolution of the European Council of 23 March 2001 endorsing the Lamfalussy Report, the Commission Decision establishing CESR (Doc. 2001/527/EC as amended), the FSC Report on Financial Integration as endorsed by the Council on 2 June 2004, and the Council Resolution of 16 November 2004, where the

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<sup>1</sup> This Methodology does not cover the review of the transposition of Level 1 or Level 2 measures which is the European Commission's responsibility.

<sup>2</sup> For simplification reasons any reference hereinafter to "CESR Measures" concerns both CESR Standards and/or other CESR Level 3 measures, except where indicated otherwise and to "Measures" concerns CESR Measures, the day-to-day application of the technical aspects of EU Directives and Regulations and of the European Commission's Recommendations, except where indicated otherwise.

<sup>3</sup> The work undertaken by IOSCO on the "Methodology for Assessing Implementation of the IOSCO Objectives and Principles of Securities Regulation" published in October 2003 was also taken into account while developing the CESR Methodology.



need for full and consistent implementation and effective enforcement of Community legislation and the role that CESR has to play in this area at Level 3 are emphasised.

4. CESR Members are committed to the implementation of CESR Measures. In Article 4.3 the CESR Charter provides:” *[CESR] will issue guidelines, recommendations and standards that the members will introduce in their regulatory practices on a voluntary basis.*” As to the concrete timeframe for implementation, either CESR Measures themselves set it out, or CESR agrees on it on a case-by-case basis. One of the main objectives of CESR under the Lamfalussy Process is to ensure more consistent and timely day-to-day implementation of Community legislation in the Member States.
5. CESR intends to introduce this Methodology as general guidance for implementation reviews undertaken by CESR. In addition, this Methodology would serve CESR Members in the self-assessment that usually precedes an implementation review. Even though the first step in the review process is a self-assessment by each CESR Member, the final results published will be considered as the results of a common implementation review by CESR.

#### B. Assessment Criteria

6. The CESR Methodology is based on criteria which should allow an objective assessment of the level of implementation of Measures in Member States and on the development of general principles, which would be applied in the different CESR implementation reviews.
7. As to CESR Measures, these are drafted at a sufficiently broad conceptual level to accommodate the legislative, regulatory and market differences among jurisdictions and to avoid being overly prescriptive while still providing sufficient guidance as to the core elements of an essential regulatory framework, depending on the nature of the document and its specific content. Experience with assessments to date indicates that the quality of assessments would be enhanced through written guidance from CESR and a set of criteria (benchmarks) by which to assess a jurisdiction’s implementation of each Measure. Finally, previously approved CESR Measures and relevant CESR reports would also provide input to the implementation review process and foster consistency in interpretation of the CESR Measures.
8. The assessment criteria establishing the benchmarks must be as objective as reasonably possible and should permit one of the following categories to be assigned:
  - a. *Fully Implemented:* A Measure under review is to be considered “*fully implemented*” when all assessment criteria are met without any significant deficiencies.
  - b. *Partially Implemented:* A Measure under review is to be considered “*partially implemented*” when some, but not all assessment criteria are met with some deficiencies that may, substantially in some cases but less so in others, affect the overall adequacy of implementation. A common format will be used for footnotes explaining any specific reasons why a Member State falls into this category.
  - c. *Not Implemented:* A Measure under review is to be considered “*not implemented*” where substantial deficiencies exist in meeting the assessment criteria. A common format will be used for footnotes explaining any specific reasons why a Member

State falls into this category or why a CESR Member considers that the Measure is irrelevant or non applicable in its market.

9. The assessment criteria establishing the benchmarks have to be specified for each Measure in advance of the review and have to focus on the key issue(s) addressed by each element. If necessary for an objective and comprehensive assessment, the assessment criteria should be supplemented by questions that serve as a guidance, which would also take into account any explanatory text set out in a Measure being of relevance to that element.
10. In order to be considered sufficient for the purposes of CESR implementation reviews, implementing measures would, in particular, cover laws (i.e. acts of Parliament) and regulations (i.e. decrees of ministries or rule books of regulators), guidelines and circulars of regulators (provided that non-compliance with these guidelines and circulars triggers enforcement action by the regulator concerned), rules of self-regulatory organisations, such as regulated markets or industry associations (where applied by a significant part of the industry in a specific Member State and provided that non-compliance with those rules triggers enforcement action by the self-regulatory organisation concerned or by the regulator), and relevant case law.
11. The level of detail of the implementing measure should be equivalent to the level of detail of a Measure under review; i.e. an implementing measure of general scope is only considered as implementing a detailed Measure if there is clear indication that other provisions (e.g. case law, the regulator's manuals for licensing or supervision, etc.) add the same level of detail to that implementing measure..
12. If an implementing measure is considered as going beyond the requirements of the Measure, this fact would be indicated in an appropriate form in the comments. As regards the assignment of one of the categories of implementation in such cases, this has to follow a case-by-case approach taking into account considerations, such as the level of harmonisation intended by the Measure in question, its regulatory objective, or compliance with relevant EU law.
13. The principle for completing the correspondence tables is that every single column has to be completed, so that no column is empty, even if a Measure has not been implemented ("comply or explain" approach).
14. Any derogation from the full application of an implementing measure or any possibility for issuing a waiver from the requirement should be stated explicitly, together with the rationale for any such exemption, and has to be taken into account in the assessment.
15. If a Measure has not been fully implemented, in the comments section of the correspondence table, in particular, the following has to be stated: the reason for non-implementation, the action taken so far for implementation, and the proposed timing of implementation, if any.
16. If an implementing measure is not in force but has already been formally adopted, and a concrete date of its coming into force is stated in the correspondence table, it will be assessed as if it had been in force at the time of the review, provided that implementing measure comes into force within a reasonable period of time after the review process has started.

17. If an implementing measure as to a Measure is in the process of being drawn up, this has to be stated in the correspondence table, provided that the implementing measure is already in a concrete stage (e.g. a proposal to Parliament or publication of a consultation paper).

### C. Review Process

18. The Methodology's aim is to determine whether the objective of each measure assessed is sufficiently met from two perspectives: (i) from a legal perspective (by testing whether the implementation of Measures in the legal framework of Member States is consistent with the relevant Measures), and (ii) from the perspective of the practical implementation of the above mentioned legal framework, considering also whether enforcement of the relevant framework is effective.
19. CESR does not want implementation reviews to be unnecessarily resource-intensive, which has been taken into consideration in the development of the Methodology. It is therefore recognised that it is the responsibility of each CESR Member to provide all relevant information and to confirm the accuracy of its responses. Hence, the review is based on a 'check and trust' approach.
20. The Methodology is used as a tool for providing an accurate and up-to-date picture of the status of implementation of Measures in Member States. Wherever the regulatory framework in a Member State is assessed to be partially implemented or not implemented with respect to a particular Measure, the Review Panel should express views on specific problems encountered by individual CESR Members and, where necessary, suggest ways for achieving full implementation.
21. The Methodology is going to be used primarily to verify the actual implementation of the CESR Measures in Members' jurisdictions, the day-to-day application of the technical aspects of EU Directives and Regulations and - in cooperation with the European Commission - of the European Commission's Recommendations in the Members' jurisdictions. The Methodology does not aim to extend or change the scope or nature of Measures, but, where relevant, to lead to their consistent application after adoption and implementation in each Member's jurisdiction. Where the findings of an implementation review suggest that the implementation of one or more particular Measures poses a problem in most Members' jurisdictions, the Review Panel should identify the reasons (e.g. markets have changed since the adoption of Measures or following the adoption of relevant EU law a CESR Standard could not be considered as fully appropriate any more) and report them to CESR, including recommendations for consideration as to the need for possible amendments. However, it should also be noted that solely the unwillingness of a majority of CESR Members to implement a particular Measure should not necessarily be a valid reason for reconsideration.
22. At the beginning of the review process, the Review Panel will - if deemed necessary - develop a questionnaire and detailed assessment criteria for a Measure to be reviewed, where necessary with the input from relevant CESR groups.

#### Step one – self-assessment

23. Each CESR Member will undertake a self-assessment according to the Methodology, the questionnaire and the detailed assessment criteria, if any, within a timeframe agreed on beforehand, and provide the information via the CESR internet tool. (This includes the text



of implementing measures, in English version if available.) Where necessary, the CESR Secretariat will question individual CESR Members as to the correctness and completeness of their responses in order to achieve an acceptable level of consistency in the self-assessments. Once completed, the self-assessments (including “tick boxes”) will be made public on the CESR Website.

#### Step two - common implementation review

24. A common implementation review of the Measure, either as a whole or of parts thereof, will be undertaken by the Review Panel, assisted by the CESR Secretariat. When deciding on what to review at this stage, the Review Panel will, in particular, consider any responses received following the publication of the self-assessments and focus its efforts on those areas that raise significant problems in relation to the operation of the Single Market. The Review Panel (or any ad-hoc group of the Review Panel deemed necessary) assesses all jurisdictions jointly and simultaneously according to the same criteria, in order to minimise the risk of uneven or biased results. (Depending on the size of an exercise, more than one ad-hoc group could be established.) Any ad-hoc group(s) submits its findings to the Review Panel for further discussion.

#### Step three – Review Panel report to CESR

25. When reporting the findings of an implementation review to CESR, the Review Panel may comment on the state of implementation of the relevant Measure under review, including its views on specific problems encountered by individual CESR Members and, where necessary, its suggestions for ways of achieving full implementation. The Report will include an assessment of the level of convergence (generally and provision by provision) achieved. The Review Panel may also comment on the Measure itself, including proposals with recommendations for consideration as to the need for possible amendments.

#### Step four – publication of the final report

26. The publication of the final results of the common implementation review on CESR’s Website is to be made in the form of correspondence tables, which set out the complete response from each CESR Member, and in summary form providing the level of implementation and the comments (“tick box”). In addition, CESR will publish the Review Panel’s report to CESR, once it has been agreed. Should any suggestions for ways of achieving full implementation be published, comments of the CESR Member, to which suggestions relate, are included, if so requested by that CESR Member.

#### D. Follow-up

27. All publications of the Review Panel, as approved by CESR and under the final responsibility of CESR, will be open to comments. CESR will consider comments received from any interested parties, as well as reactions thereto by CESR Members concerned.
28. The information provided by CESR Members will be updated on a regular basis at points in time agreed on by CESR. The assessment of any changes will follow the same procedure set out above.
29. Attached there is a procedural framework and a set of general review criteria.

### **Procedural framework**

1. CESR decides to begin an implementation review process of a specific Measure and gives the mandate to the Chairman of the Review Panel to begin the review process of the Measure at issue.
2. The Review Panel (or any ad-hoc group(s) of the Review Panel deemed necessary) drafts a questionnaire and more detailed assessment criteria, if necessary.
3. The questionnaire and the review criteria, after the approval by the Review Panel, are distributed to CESR Members to begin their self-assessment.
4. The CESR Secretariat receives these self-assessments and any supplementary material, and, where necessary, will question individual CESR Members as to the correctness and completeness of their responses in order to achieve an acceptable level of consistency in the self-assessments.
5. The results of the self-assessment (including “tick boxes”) will be published before a common implementation review is undertaken.
6. The Review Panel (or any ad-hoc group(s) of the Review Panel), assisted by the CESR Secretariat, reviews the Measure, either as a whole or parts thereof, and makes provisional assessments against the Methodology, any questionnaire and detailed assessment criteria. Bilateral contact (conference call/video conference) between CESR Members and sub-group(s) can be made, if necessary. The member of the sub-group(s), while the implementation review of its own jurisdiction is in progress, should not participate in this review. Any sub-group(s) submits its report, including views on specific problems encountered by individual CESR Members and, where necessary, suggestions for ways for achieving full implementation, to the assessed CESR Members for consideration. The sub-group(s) receives any comments by the assessed Members and submits the report with the recommendations and comments received by the assessed Members to the Review Panel for consideration.
7. The Review Panel prepares a report to CESR. The report will set out its views on specific problems encountered by individual CESR Members and, where necessary, its suggestions for ways for achieving full implementation. It will include an assessment of the level of convergence (generally and provision by provision) achieved. Each CESR Member may comment on the assessment relating to its own jurisdiction, which comments, if so requested, may be included in the report.
8. When reporting the findings of an implementation review to CESR, the Review Panel may also comment on the Measure itself, making recommendations for consideration as to the need for possible amendments.
9. The final results of the implementation review are submitted for approval to CESR. Documents to be published on the CESR Website, after approval by CESR, include the correspondence tables, tick boxes and the Review Panel’s report to CESR, once it has been agreed. Should any suggestions for ways of achieving full implementation be published, comments of the CESR Member, to which suggestions relate, are included, if so requested by that CESR Member.



## General review criteria

### IMPLEMENTING MEASURES

1. Is the self-assessment up-to-date and complete?
  - a. Is there a response in each of the columns?*
  - b. Are there any obvious mistakes?*
  - c. Is the response in line with the format required for the Review Panel Website tool?*
  - d. Have the implementing measures been provided as a link or in hardcopy?*
  - e. In case of up-dating, is there any evidence contradicting the self-assessment of the CESR Member?*
  
2. Have the implementing measures been fully and accurately described?
  - a. Is the derogation or any waiver from the full application of an implementing measure clearly indicated and described?*
  - b. If a Measure is not implemented in a Member State, is, in particular, the reason for non-implementation, the actions so far taken for implementation, and the timing of implementation appropriately indicated in the comments' section?*
  - c. Is the level of detail of the implementing measure equivalent to the level of detail of the Measure?*
  - d. Is the implementing measure a law, regulation, guideline, circular or rule, to be considered sufficient for the purposes of CESR implementation reviews?*
  
3. Has the implementing measure exceeded the Measure under review?
  - a. Does the implementing measure meet the regulatory objective of the Measure?*
  - b. Does the Measure provide for minimum/maximum harmonisation?*
  
4. What is the implementing authority?
  - a. When more than one domestic authority is responsible, which implementing authority has responsibility for which implementing measure?*
  - b. Do the responsibilities cover the whole Measure?*
  
5. Are there any planned changes to relevant provisions of national law/implementing provisions?



- a. *What stage in the legislative process have the changes reached?*
- b. *When are the changes to be effective?*

#### MONITORING AND ENFORCEMENT

6. Is compliance with the implementing measures monitored and enforced?
  - a. *Is there case law of the implementing measures, in particular where the implementing measure has the status of soft law?*
  - b. *Are there any impediments to efficient monitoring or enforcement of the implementing measures?*
  - c. *What are the sanctions for failure to comply with the implementing measures and who is responsible for imposing the sanctions?*
  - d. *When more than one domestic authority is responsible, which enforcement body has responsibility for which implementing measure?*
  - e. *Do the responsibilities cover the whole Measure?*
7. Are the implementing measures achieving the aims set out in the Measure ('are things working the way they were designed to')?
  - a. *Is there evidence (e.g. case law) that would suggest that the implementing measures do not achieve the aims set down in the Measure?*
  - b. *What is the reason for this?*
8. Is there any action CESR might need to take with respect to a Measure?
  - a. *Are there elements of a CESR Measure which do not comply with EU law?*
  - b. *Are there several Member States which have legal problems in implementing the Measure?*