

The Harmonization of European Securities Law

MANNING GILBERT WARREN III*

I. Introduction

The creation of a comprehensive European securities code has been a lengthy exercise in overcoming improbabilities. The European Union's (EU) mission has been and continues to be the establishment of a single, internal market for financial services comprising the entire territory of its fifteen Member States. The achievement of a single market was historically dependent on provision of market access and the development of a comprehensive securities regulatory regime to displace or otherwise harmonize disparate national laws.¹ It was improbable that the EU Member States would relinquish considerable sovereign authority over their national markets. Excluding the United Kingdom, the Member States prior to the 1990s had no significant retail securities markets, virtually no comprehensive securities regulation, and, consequently, no national securities commissions. Their stock exchanges were self-regulated with minimal, if any, governmental oversight. Against this background, the EU's challenges have been to legislate access, to legislate virtually the entire field of securities law, and to legislate regulatory harmony. Of these three preconditions to a single market in financial services, harmonization proved the most difficult and the most improbable. Fortunately, the forces driving its achievement never yielded to the anti-harmonization view that a single, harmonized regulatory system would deny investors optimal choices among diverse national regimes and thus eliminate the supposed benefits of regulatory competition.² To the contrary, the EU has steadfastly pursued the ultimate

*Manning Gilbert Warren III holds the H. Edward Harter Chair of Commercial Law at the University of Louisville, Louisville, Kentucky. He is the most widely published scholar in the field of European Union financial services regulation and has published over twenty-five articles in the fields of corporate and securities law. Professor Warren currently serves as European Editor for the *International Securities Law Handbook*. He also serves on the Board of Directors of the American Judicature Society and is an active member of the American Law Institute.

1. See generally Manning Gilbert Warren III, *Global Harmonization of Securities Laws: The Achievements of the European Communities*, 31 HARV. INT'L L.J. 185 (1990).

2. See, e.g., Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359 (1998); Stephen J. Choi & Andrew T. Guzman, *Portable Reciprocity: Rethinking the International Reach of Securities Regulation*, 71 S. CAL. L. REV. 903 (1998). The assumptions underlying anti-harmonization theories are highly questionable. See, e.g., James D. Cox, *Regulatory Duopoly in U.S. Securities Markets*, 99 COLUM. L. REV. 1200 (1999).

goal of maximum harmonization, both to unify fifteen markets into one and to prevent refragmentation of the emergent single market as a result of diverse nationalistic regulatory philosophies. In a meaningful sense, commonality has triumphed over diversity.

II. The Evolution of Harmonization

When the common market was first established by the Treaty of Rome, the supranational authority reposed in the European Commission, the Council of Ministers, and, to a more limited extent, the European Parliament, proved insufficient to establish a comprehensive corporate and securities regulatory regime for the Member States. Despite the preemptive power of EU legislation and its concomitant supremacy over member state law, political consensus necessary for treaty reform and comprehensive regulation would require decades of development. It was recognized that achieving uniformity or pure commonality based on supranational regulation was not only improbable but impossible. Accordingly, the EU has not legislated directly binding regulations but, rather, has enacted more politically expedient directives that mandate only the general results to be achieved, providing each member state significant time and discretion in transposing the directives into national laws.

The EU's first complex of directives that should be considered an integral part of the common market securities code includes the company law directives, the company law accounting directives, the stock exchange directives, and the mutual funds directive. The company law directives, among other things, established a mandatory disclosure system,³ imposed minimum capital requirements and restrictions on capital distributions,⁴ promulgated rules for mergers,⁵ and set requirements for single-member limited liability companies.⁶ The company law accounting directives set forth minimum standards for financial statements and required audited financial statements to be filed in central registries,⁷ addressed the presentation of consolidated financial statements,⁸ and established minimum professional standards for auditors.⁹ The stock exchange directives included the Admission

3. First Council Directive 68/151/EEC of 9 March 1968 on Coordination of Safeguards Which, for the Protection of the Interests of Members and Others, are Required by Member States of Companies Within the Meaning of the Second Paragraph of Article 58 of the Treaty, With a View to Making Such Safeguards Equivalent Throughout the Community, 1968 O.J. (L 65).

4. Second Council Directive 77/91/EEC of 13 December 1976 on Coordination of Safeguards Which, for the Protection of the Interests of Members and Others, are Required by Member States of Companies Within the Meaning of the Second Paragraph of Article 58 of the Treaty, in Respect of the Formation of Public Limited Liability Companies and the Maintenance and Alteration of Their Capital, With a View to Making Such Safeguards Equivalent, 1991 O.J. (L 26), as amended by Council Directive 92/101/EEC, 1992 O.J. (L 347).

5. Third Council Directive 78/855/EEC of 9 October 1978 Based on Article 54(3)(g) of the Treaty Concerning Mergers of Public Limited Liability Companies, 1978 O.J. (L 295).

6. Twelfth Council Company Law Directive 89/667/EEC of 21 December 1989 On Single-Member Private Limited-Liability Companies, 1989 O.J. (L 395).

7. Fourth Council Directive 78/660/EEC of 25 July 1978 Based on Article 54(3)(g) of the Treaty on the Annual Accounts of Certain Types of Companies, 1978 O.J. (L 222), as amended by Directive 84/569/EEC, 1984 O.J. (L 314), Directive 90/604/EEC, 1990 O.J. (L 317), Directive 90/605/EEC, 1990 O.J. (L 317), and Directive 94/8/EU, 1994 O.J. (L 82).

8. Seventh Council Directive 83/349/EEC of 13 June 1983 Based on Article 54(3)(g) of the Treaty on Consolidated Accounts, 1983 O.J. (L 193).

9. Eighth Council Directive 84/253/EEC of 10 April 1984 Based on Article 54(3)(g) of the Treaty on the Approval of Persons Responsible for Carrying out the Statutory Audits of Accounting Documents, 1984 O.J. (L 126).

Directive,¹⁰ which established common listing criteria for common market stock exchanges; the Listing Particulars Directive,¹¹ which mandated the filing and publication of a detailed information statement prior to exchange listing; and the Interim Reports Directive,¹² which imposed periodic reporting requirements on all listed companies. Finally, the Major Shareholdings Directive¹³ imposed public reporting requirements on acquisitions and dispositions of listed company securities. These four stock exchange directives were recently consolidated by a single directive in order to simplify the legislative framework for common market stock exchanges.¹⁴ In addition, the Mutual Funds Directive was adopted to establish common standards for open-ended funds and to provide a single license or passport based on home state authorization.¹⁵

The first complex of securities directives, while highly significant, was hardly comprehensive. Passage of the Single European Act in 1987¹⁶ and the 1992 goal for completing the internal market intensified efforts to develop greater harmonization and produced remarkable achievements. This second complex of directives included, among others: the Prospectus Directive, establishing a common market prospectus for listed and non-listed public offerings of securities;¹⁷ the Insider Trading Directive, providing the first common market prohibition on insider trading;¹⁸ and the Investment Services Directive, creating a single passport for investment firms and banks to access stock exchanges and conduct business in all Member States by requiring mutual recognition of home state authorization based on common minimum regulatory standards.¹⁹ The single passport established by the Investment Services Directive, as the new "constitution" of the EU's securities markets,²⁰

10. Council Directive 79/279/EEC of 5 March 1979 Coordinating the Conditions for the Admission of Securities to Official Stock Exchange Listing, 1979 O.J. (L 66).

11. Council Directive 80/390/EEC of 17 March 1980 Coordinating the Requirements for the Drawing Up, Scrutiny and Distribution of the Listing Particulars to be Published for the Admission of Securities to Official Stock Exchange Listing, 1980 O.J. (L 100).

12. Council Directive 82/121/EEC of 15 February 1982 on Information to Be Published on a Regular Basis by Companies the Shares of Which Have Been Admitted to Official Stock-Exchange Listing, 1982 O.J. (L 48).

13. Council Directive 88/627/EEC of 12 December 1988 on the Information to Be Published When a Major Holding in a Listed Company is Acquired or Disposed of, 1988 O.J. (L 348).

14. Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the Admission of Securities to Official Stock Exchange Listing and on Information to be Published on Those Securities, 2001 O.J. (L 184).

15. Council Directive 85/611/EEC of 20 December 1985 on the Coordination of Laws, Regulations and Administrative Provisions Relating to Undertakings for Collective Investment in Transferable Securities (UCITS), 1985 O.J. (L 375).

16. SINGLE EUROPEAN ACT, June 29, 1987, O.J. (L 169) (1987).

17. Council Directive 89/298/EEC of 17 April 1989 Coordinating the Requirements for the Drawing-Up, Scrutiny and Distribution of the Prospectus to be Published When Transferable Securities are Offered to the Public, 1989 O.J. (L 124) [hereinafter Prospectus Directive]. See generally Manning Gilbert Warren III, *The Common Market Prospectus*, 26 COMMON MKT. L. REV. 687 (1990).

18. Council Directive 89/592/EEC of 13 November 1989 Coordinating Regulations on Insider Dealing, 1989 O.J. (L 334) [hereinafter Insider Trading Directive]. See generally Manning Gilbert Warren III, *The Regulation of Insider Trading in the European Community*, 48 WASH. & LEE L. REV. 1037 (1991).

19. Council Directive 93/22/EEC of 10 May 1993 on Investment Services in the Securities Field, 1993 O.J. (L 141) [hereinafter Investment Services Directive]. See generally Manning Gilbert Warren III, *The European Union's Investment Services Directive*, 15 U. PA. J. INT'L BUS. L. 181 (1994).

20. See Paul Arlman, Secretary General, Federation of European Securities Exchanges (FESE), *Assessing the Direction of (Stock) Exchanges in a Trading Climate of Competition and Consolidation: the Importance of EU Legislation* (Apr. 17, 2002); FESE, *Second Report and Recommendations on European Regulatory Structures* 12 (Jan. 2001) [hereinafter FESE Second Report].

proved most influential in reshaping market structure in the European Union.²¹ However, all three of these momentous directives would soon prove flawed, if not obsolete, by the time of their transposition into the national laws of the Member States. For example, the benefits of mutually recognized prospectuses were greatly reduced as a result of the directive's national tailoring by the individual Member States, the imposition of local language requirements, the absence of self-registration provisions, and the continuing industry preference for international-style offerings over pan-European offerings.²² The Insider Trading Directive's prohibition required tightening to overcome its "full knowledge" defense²³ and required expansion to cover market abuse. The Investment Services Directive, among other things, did not adequately classify investors for the application of contemplated conduct of business rules²⁴ and failed to address issues regarding electronic communications networks (ECNs) and alternative trading systems (ATS).²⁵ The continuous advance of alternative markets and structural redevelopment of traditional markets—plus the linkages among them—impaired the effectiveness of this round of financial services legislation.

In the years following 1992, the EU adopted a number of other directives that form an important part of the emergent European securities code. First among these was a directive that established minimum capital requirements applicable to both investment firms and the portfolios or trading books of banks.²⁶ This directive was closely related to and adopted at the same time as the Investment Services Directive. The Investor Compensation Schemes Directive further supplemented the Investment Services Directive, requiring each member state to establish at least one investor compensation scheme and prohibiting an investment firm from doing business in that member state unless it is a participant in that scheme.²⁷ In

21. The Investment Services Directive, by granting securities firms the ability to provide cross-border services without host state authorization, while permitting remote membership and access to EU stock exchanges, facilitated cross-border linkages that have enabled a firm operating in one member state to trade securities for its customers on all the EU's exchanges. The effect has been to obviate the need for listings by issuers on multiple exchanges, and, accordingly, has greatly reduced the advantages of mutually recognized listing particulars. See Howell E. Jackson & Eric J. Pan, *Regulatory Competition in International Securities Markets: Evidence from Europe in 1999—Part I*, 56 BUS. LAW. 653 (2001).

22. The vast majority of European securities offerings continue to involve an issuer's public offering to investors in its own domestic market, with complementary private offerings to institutional investors in other national markets under the Prospectus Directive's exemption for professionals. These accompanying private offerings, in turn, have resulted in substantial retail market leakage. *Id.* Neither the Prospectus Directive nor the respective laws of the Member States incorporate the statutory underwriter doctrine established under the United States' Securities Act of 1933 and, accordingly, no resale restrictions on privately placed securities have generally been imposed.

23. European regulators have been particularly critical of language in the directive that prohibits insiders from taking advantage of insider information "with full knowledge of the facts" by trading securities. See Insider Trading Directive, *supra* note 18, art. 2(1). This language may have provided an unintended loophole in the insider trading prohibition. Interview with Juan Fernando-Armesto, former president, Comision Nacional de Mercado de Valores (Oct. 24, 2000).

24. See Forum of European Securities Commissions (FESCO), *Implementation of Article 11 of the ISD: Categorisation of Investors for the Purpose of Conduct of Business Rules*, 00/FESCO/A (Mar. 2000).

25. See generally Alexis L. Collins, *Regulation of Alternative Trading Systems: Evolving Regulatory Models and Prospects for Increased Regulatory Coordination and Convergence*, 33 LAW & POL'Y INT'L BUS. 481 (2002); Randolph James Amaro, Jr., *European Union Regulation of Electronic Communication Networks: Stifling Global Integration of Securities Markets*, 20 WIS. INT'L L.J. 397 (2002).

26. Council Directive 93/6/EEC of the European Parliament and of the Council of 15 March 1993 on the Capital Adequacy of Investments Firms and Credit Institutions, 1993 O.J. (L 141).

27. Council Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on Investor Compensation Schemes, 1997 O.J. (L 84).

addition, the Settlement Finality Directive was adopted and constituted the EU's first attempt to establish efficient, cost-effective operation of cross-border payment and securities arrangements.²⁸

Despite the largely successful achievement of the 1992 program, the resultant financial services directives produced insufficient harmonization of the Member States' regulatory schemes, and the single market remained fragmented and underdeveloped. These directives clearly had not produced a level playing field for market participants. Instead of prescribing the fundamental requirements to be achieved, they had evolved into highly detailed statements that went far beyond the framework legislation intended and often frustrated transposition. Moreover, the cumbersome legislative process, which required proposals by the European Commission (the "Commission") and co-decision by the Council of Ministers and an increasingly powerful European Parliament, continued to cause almost interminable delays and consequential obsolescence of proposals before their adoption and ultimate transposition by the Member States. In order to develop a truly integrated financial market, the Commission promulgated its 1999 Financial Services Action Plan,²⁹ which set an ambitious 2005 deadline for the adoption of more than forty separate regulatory measures, including a number of priority measures for adoption by 2003. The priority measures included an improved common market prospectus, an improved investment services directive, a common definition of professional investors, modernized exchange listing requirements, revised investment rules for mutual funds and pension funds, and the adoption of international accounting standards. The Commission recognized that adoption of a comprehensive regulatory scheme, as opposed to the piecemeal approach followed for roughly thirty years, was critical to the development of a competitive single market.

The Commission's implementation of the Financial Services Action Plan has thus far been largely successful. The achievements as of November 2002 include, among others, the following:

- Adoption of an EU Regulation requiring the application of international accounting standards to be adopted by all publicly-held companies in the EU;³⁰
- Adoption of the European Company Statute,³¹
- Adoption of the Distance Marketing Directive to protect consumers of financial services, including on-line services;³²

28. Council Directive 98/26/EC of 19 May 1998 on Settlement Finality in Payment and Securities Settlement Systems, 1998 O.J. (L 166).

29. See Eur. Comm'n, *Implementing the Framework for Financial Markets: Action Plan*, COM(99) 232 final [hereinafter Financial Services Action Plan].

30. Regulation (EC) No. 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the Application of International Accounting Standards, 2002 O.J. (L 243).

31. Council Directive 2001/86/EC and Council Regulation (EC) No. 2157/2001 of 8 October 2001 Supplementing the Statute for a European Company with Regard to the Involvement of Employees, 2001 O.J. (L 294). See generally *European Company Law Adopted Following 30 Years of Discussions*, WORLD SEC. L. REP., NOV. 2001, at 4.

32. Council Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 Concerning the Distance Marketing of Consumer Financial Services and Amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, 2002 O.J. (L 271). See generally Chris Reed, *Managing Regulatory Jurisdiction: Cross-Border Online Financial Services and the European Union Single Market for Information Society Services*, 38 HOUS. L. REV. 1003 (2001); Norbert Reich & Axel Halfmeier, *Consumer Protection in the Global Village: Recent Developments in German and European Union Law*, 106 DICK. L. REV. 111 (2001).

- Adoption of the Electronic Money Directive;³³
- Adoption of the Financial Conglomerates Directive, providing prudential rules to ensure capital adequacy of cross-sector conglomerates;³⁴
- Adoption of the Collateral Directive, supplementing the Settlement Finality Directive by providing a regime for the provision of securities and cash as collateral under pledges and title transfers, including repurchase agreements;³⁵
- Adoption of Amendments to the Fourth and Seventh Company Law Directives to allow fair value accounting;³⁶ and
- Adoption of amendments to the Mutual Funds Directive.³⁷

In addition, the Commission has adopted proposals for a new Prospectus Directive³⁸ and a new Market Abuse Directive addressing both insider trading and market manipula-

33. Council Directive 2000/46/EC of the European Parliament and of the Council of 18 September 2000 on the Taking up, Pursuit of and Prudential Supervision of the Business of Electronic Money Institutions, 2000 O.J. (L 275).

34. Council Directive 2002/87/EC, Dec. 16, 2002, on the Supplementary Supervision of Credit Institutions, Insurance Undertakings and Investment Firms in a Financial Conglomerate and Amending Council Directives 73/239/EEC, 79/267/EEC, 92/49/EEC, 92/96/EEC, 93/6/EEC and 93/22/EEC, and Directives 98/78/EC and 2000/12/EC of the European Parliament and of the Council, 2003 O.J. (L35). See generally Michael Gruson, *Supervision of Financial Holding Companies in Europe: The EU Directive on Supplementary Supervision of Financial Conglomerates*, 36 INT'L LAW. 1229 (2002). See *Commission Gains Final Approval of Financial Conglomerates Directive*, 8 World Sec. L. Rep. (BNA) No. 12, Dec. 2002, at 5.

35. Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on Financial Collateral Arrangements, 2002 O.J. (L 168).

36. Directive 2001/65/EC of the European Parliament and of the Council of 27 September 2001 amending Directives 78/660/EEC, 83/349/EEC and 86/635/EEC as Regards the Valuation Rules for the Annual and Consolidated Accounts of Certain Types of Companies as Well as of Banks and Other Financial Institutions, 2001 O.J. (L 283).

37. Directive 2001/107/EC of the European Parliament and of the Council of 21 January 2002 amending Council Directive 85/611/EEC on the Coordination of Laws, Regulations and Administrative Provisions Relating to Undertakings for Collective Investment in Transferable Securities (UCITS), With a View to Regulating Management Companies and Simplified Prospectuses, 2002 O.J. (L 41); Directive 2001/108/EC of the European Parliament and of the Council of 21 January 2002 amending Council Directive 85/611/EEC on the Coordination of Laws, Regulations and Administrative Provisions Relating to Undertakings for Collective Investment in Transferable Securities (UCITS), with Regard to Investments of UCITS, 2002 O.J. (L 41). See Eur. Comm'n, *Financial Services: Commission Welcomes Adoption of the New Directives on Investment Funds* (Dec. 4, 2001); *Parliament Drops Oversight Demands, Raising Hopes for UCITS Amendments*, World Sec. L. Rep. (BNA), Nov. 2001, at 3.

38. Proposal for a Directive of the European Parliament and of the Council on the Prospectus to be Published When Securities are Offered to the Public or Admitted to Trading, COM(01) 280 final, and an Amended Proposal, COM(02) 460 final. The Prospectus Directive establishes common standards for a European passport, permitting a prospectus approved in an issuer's home state to be used in all other Member States without further review. It generally permits a prospectus used in more than one member state to be distributed in English or another language customary in the sphere of finance. The directive incorporates IOSCO's international disclosure standards. Significantly, it applies the principle of *maximum harmonization*, requiring transposition of the full content of the directive, which should serve to preclude differing sets of disclosure requirements among the Member States. It also provides a self-registration scheme, permitting fast track approval procedures for issuers with previously approved prospectuses, requiring submission only of information relating to the securities to be issued. The directive also provides unusually broad private placement exemptions for offers of unlisted securities, including sales to qualified investors, sales to fewer than one hundred investors in each member state or in tranches of roughly \$50,000 per investor, sales in denominations of roughly \$50,000, and sales of less than roughly \$2,500,000 in any twelve-month period. See generally Katherine Ashton et al., *European Commission's Revised Directive on European Passport for Prospectuses*, 8 World Sec. L. Rep. (BNA) No. 12, Dec. 2002, at 68.

tion.³⁹ Both are now close to enactment by the Council of Ministers. The Commission recently proposed its long-awaited revised directive on investment services and regulated markets⁴⁰ to address many of the weaknesses in the Investment Services Directive. The Committee of European Securities Regulators has taken related action⁴¹ to provide consultative advice to the Commission on harmonized conduct of business rules,⁴² standards for alternative trading systems,⁴³ and stabilization and allotment.⁴⁴ The Commission adopted proposals for a takeover directive⁴⁵ and a directive on the prudential supervision of pension funds.⁴⁶ The Commission also established a consultation process to address the critical issue of coordinated clearance and settlement of securities in the single market.⁴⁷ In addition, the Commission has developed FIN-NET as a network of alternative dispute resolution bodies to provide redress for aggrieved investors.⁴⁸ The EU's continued implementation of the comprehensive regulatory scheme proposed in its Financial Services Action Plan will have a profound influence in achieving deeper integration and greater protection of its single market in financial services.

III. The Delegation of Securities Regulatory Authority

The Commission, in addition to identifying specific and urgent legislative measures in its Financial Services Action Plan, was also very much concerned with the EU's complex,

39. Proposal for a Directive of the European Parliament and of the Council on Insider Dealing and Market Manipulation (Market Abuse), COM(01) 281 final. See generally Jesper Lau Hansen, *The New Proposal for a European Union Directive on Market Abuse*, 23 U. PA. J. INT'L ECON. L. 241 (2002). The Market Abuse Directive addresses both insider trading and market manipulation, and requires a designated competent authority in each member state to investigate violations of common rules. The directive is the first framework directive and thus contemplates implementing rules to be adopted by the European Securities Committee. See also FESCO, *Market Abuse: FESCO's Response to the Call for Views from the Securities Regulators under the EU's Action Plan for Financial Services*, FESCO/00-0961 (Jun. 29, 2000), and FESCO, *Measures to Promote Market Integrity: A Follow-up Paper to FESCO's First Paper on Market Abuse*, FESCO/01-052f (Aug. 1, 2001).

40. Proposal for a Directive of the European Parliament and of the Council on Investment Services and Regulated Markets, and Amending Council Directives 85/611/EEC, Council Directive 93/6/EEC and European Parliament and Council Directive 2000/12/EC, COM(02) 625 final. The proposed Investment Services Directive would substantially revise the existing directive. Among other things, it permits internalization of client orders, imposes conduct of business rules, improves transparency, and sets requirements for authorizing operation of regulated markets. See *New Rules for Investment Firms, Markets Proposed in Draft New ISD*, 8 World Sec. L. Rep. (BNA) No. 12, Dec. 2002, at 3.

41. See *infra* note 65 and accompanying text.

42. Committee of European Securities Regulators (CESR), *A European Regime of Investor Protection: The Harmonization of Conduct of Business Rules*, CESR/01-014d (Apr. 2002).

43. CESR, *Proposed Standards for Alternative Trading Systems*, CESR/02-001 (Jan. 14, 2002).

44. CESR, *Stabilisation and Allotment: A European Supervisory Approach*, CESR/02-020b (Apr. 2002).

45. Proposal for a Directive of the European Parliament and of the Council on Takeover Bids, COM(02) 534 final. See generally Meredith M. Brown et al., *The European Commission's Revised Takeover Directive*, 8 World Sec. L. Rep. (BNA) No. 11, Nov. 2002, at 26.

46. Proposal for a Directive of the European Parliament and of the Council on the Activities of Institutions for Occupational Retirement Provision, COM(00) 507 final.

47. Communication from the Commission to the Council and the European Parliament: Clearing and Settlement in the European Union, COM(02) 257 final. See generally The Giovannini Group, *Cross-Border Clearing and Settlement Arrangements in the European Union*, European Commission Economic Papers, No. 163 (Feb. 2002) ECFIN/112/02-EN, available at http://europa.eu.int/comm/economy_finance/giovannini/clearing_settlement_en.htm.

48. See Commission Recommendation on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes, 98/257/CE.

painstakingly slow legislative process, which often required four or more years to complete, and the EU's inability to adapt its financial services legislation to future market challenges by aligning that legislation with state-of-the-art regulatory and supervisory practices. It stated that "a more wide-ranging rethink of the way in which policy for financial markets is processed is required" and that "greater flexibility in regulatory policy [must be] introduced so that where necessary it can be more promptly adapted (subject to political oversight) to changing circumstances."⁴⁹

To initiate the necessary regulatory reform, the EU's Council of Economic and Finance Ministers (ECOFIN) established an independent forum in 2000, referred to as the Committee of Wise Men, chaired by Baron Alexandre Lamfalussy. Its object was to develop a better approach to the legislative process in order to achieve comprehensive regulatory harmonization more expeditiously.⁵⁰ The Committee of Wise Men recognized the proven inability of the EU's legislative process to respond promptly to the accelerating, evolutionary changes in European financial markets. The more important of these in recent years have been the demutualization of most of the European stock exchanges into for-profit businesses,⁵¹ wider access to those markets under the Investment Services Directive,⁵² and the advent of the Euro as the EU's common currency.⁵³ In addition, other increasingly active and authoritative organizations had developed into powerfully influential actors in the promotion of increased harmonization. The International Organization of Securities Commissions (IOSCO),⁵⁴ comprising most of the world's national securities regulators, worked progressively in the development and acceptance of international disclosure standards,⁵⁵ resulting in their adoption by the U.S. Securities and Exchange Commission (SEC) in its registration forms for foreign issuers,⁵⁶ and, ultimately, their inclusion in the EU's revised common market prospectus.⁵⁷ The International Accounting Standards Committee (IASC),⁵⁸ working cooperatively with IOSCO, developed a fairly comprehensive set of principles-based international accounting standards⁵⁹ that the EU has now adopted for implementation by all EU-listed companies by 2005.⁶⁰ Finally, the Forum of European

49. Financial Services Action Plan, *supra* note 29, at 17.

50. ECOFIN Council 213 of 17 July 2002 Regulation of European Securities Markets—Terms of Reference for the Committee of Wise Men, 10491/00.

51. See Norman S. Poser, *The Stock Exchanges of the United States and Europe: Automation, Globalization, and Consolidation*, 22 U. PA. J. INT'L ECON. L. 497, 12–13 (2001).

52. See Jackson & Pan, *supra* note 21.

53. See Fabrice Demarigny, *One Year After the Euro: What Type of Regulation for the European Financial Market?* 19 FUTURES & DERIVATIVES L. REP. (No. 10) 11 (Jan. 2000).

54. See generally A. A. Sommer, Jr., *IOSCO: Its Mission and Achievement*, 17 NW. J. INT'L L. & BUS. 15 (1996).

55. IOSCO, Report of the Technical Committee, International Disclosure Standards for Cross-Border Offerings and Initial Listings by Foreign Issuers (1998). See generally Felicia H. Kung, *The Rationalization of Regulatory Internationalization*, 33 LAW & POL'Y INT'L BUS. 443 (2002); Douglas W. Arner, *Globalisation of Financial Markets: An International Passport for Securities Offerings?* 35 INT'L LAW. 1543 (2001).

56. See SEC Securities Act Release No. 7745 (Sept. 28, 1999). See generally Sandra Folsom Kinsey, *New Rules for Foreign Private Issuers*, 14 INSIGHTS 9 (Sept. 2000).

57. See *supra* note 38.

58. The International Accounting Standards Committee has been reorganized as the International Accounting Standards Board (IASB). The IASB has been entrusted with the further development and interpretation of its international accounting standards. See *EC Proposes Mandatory Use of IAS by All EU Listed Companies by 2005*, World Sec. L. Rep. (BNA), Mar. 2001, at 4.

59. See generally Marc I. Steinberg et al., *The Development of Internationally Acceptable Accounting Standards: A Universal Language for Finance in the 21st Century?* 27 SEC. REG. L.J. 324 (1999).

60. See *supra* note 30.

Securities Commissions (FESCO),⁶¹ comprising representatives of most European securities regulatory authorities, had become even more important than the Commission itself in promoting common regulatory, enforcement, and information sharing systems among the Member States. In a largely unheralded manner, FESCO significantly contributed to harmonizing financial regulation from the *bottom up* rather than from the Commission's less effective *top-down* approach to harmonization.

The Committee of Wise Men, carefully regarding these additional forces of harmonization and respecting the EU's comitology decision,⁶² proposed a radically different approach to EU securities regulation.⁶³ The Committee's proposed regulatory process, adopted by the Council of Ministers in 2001,⁶⁴ provides for the delegation of rule-making authority implementing financial services directives to a newly-created European Securities Committee,⁶⁵ comprising representatives of the Member States' finance ministries. The new rule-making process requires the Commission first to consult another recently-established committee, the Committee of European Securities Regulators (CESR),⁶⁶ basically the successor to FESCO, which, in turn, must consult with investors, issuers, and market professionals. After concluding its consultative process the CESR then submits technical advice, presumably in the form of draft implementing rules, to the Commission for its consideration and transmission to the European Securities Committee for approval. The European Securities Committee's securities regulations, to be essentially developed from the bottom up by the Member States themselves, should ultimately produce far greater harmonization of common market financial regulation, the absence of which has for so long frustrated true integration of Europe's securities markets.⁶⁷ The European Securities Committee could constitute an embryonic European Securities Commission. However, its rule-making authority, at present, is not accompanied by general administrative or enforcement authority. Moreover, the Committee of Wise Men specifically considered and determined not to recommend the creation of a European regulatory agency for the securities markets. Recognizing the political obstacles that would face such a proposal, the Committee determined that under present circumstances it would be impracticable to establish a central European securities regulatory authority. However, the Committee stated that if the full review mandated in 2004 indicated insufficient progress, "it might be appropriate to con-

61. The Forum of European Securities Commissions (FESCO) has been succeeded by the Committee of European Securities Regulators. See *infra* note 66 and accompanying text.

62. Council Decision 99/468/EC of 28 June 1999 Laying Down the Procedures for the Exercise of Implementing Powers Conferred on the Commission, 1999 O.J. (L 184). The EU's comitology decision requires implementation of EU legislation by the Commission through coordination with regulatory committees comprising member state representatives. See generally Koen Lenaerts & Amaryllis Verhoeven, *Towards a Legal Framework for Executive Rule-Making in the EU? The Contribution of the New Comitology Decision*, 37 COMMON MKT. L. REV. 645 (2000).

63. Committee of Wise Men, *Final Report on the Regulation of European Securities Markets* (2001).

64. Results of the Council of Economics and Finance Ministers, 22 March 2001, Stockholm—Securities Legislation (Mar. 23, 2001), available at <http://www.europa.eu.int> (last visited Feb. 2, 2003).

65. Commission Decision 2001/528/EC of 6 June 2001 Establishing the European Securities Committee, 2001 O.J. (L 191).

66. Commission Decision 2001/527/EC of 6 June 2001 Establishing the Committee of European Securities Regulators, 2001 O.J. (L 191).

67. See generally John F. Mogg, *Regulating Financial Services in Europe: A New Approach*, 26 FORDHAM INT'L L.J. 58 (2002).

sider a Treaty change, including the creation of a single EU regulatory authority for financial services generally in the Community."⁶⁸

IV. Conclusion

The EU has developed an increasingly comprehensive, supranational securities code for corporate issuers, securities professionals, stock exchanges, and investors. Despite the remarkable achievements thus far, many areas still demand legislative and regulatory attention. In addition to the adoption of the pending measures previously noted, the EU should develop an efficient centralized or cross-linked clearance and settlement system; revise the Interim Reports Directive to mandate prompt filing of uniform annual, quarterly, and current reports by publicly-held companies;⁶⁹ develop a mandatory, internet-accessible electronic filing system for all prospectuses and periodic reports; incorporate restrictions on resales of securities exempted from the Prospectus Directive; and intensify efforts to develop greater access for its securities professionals and its investors to U.S. markets.⁷⁰ Most importantly, the EU should engage its Committee of Wise Men in the development of a proposal to reestablish the European Securities Committee as an independent administrative agency that would, in addition to its rule-making authority, help develop and monitor the proposed centralized clearance and settlement system, maintain the proposed centralized filing system, collect and disseminate compliance and enforcement data, coordinate member state enforcement of EU securities laws and regulations, monitor the administration of alternative dispute resolution proceedings, and provide consumer education to retail investors to further develop and protect its unified retail securities market. Although the European Securities Committee should continuously promote harmonization of regulatory and enforcement policy among the Member States, the proposed agency should serve primarily to supplement and not supplant the competent securities authorities of the Member States.

The absence of EU legislation addressing the concerns reflected in the foregoing recommendations does not detract from the EU's remarkable ongoing success in the regulation and integration of its financial markets. Its achievements in the development of market access, regulatory standards, and harmonization continue to accelerate at an unprecedented rate. The EU financial markets now enjoy a common currency, common accounting standards, and, in coming months, common disclosure standards. Moreover, the EU's co-optation of member state regulators and representatives, through the CESR and the European Securities Committee, respectively, should accomplish critical improvements in the legislative process and provide a significant opportunity for cooperation at the national and supranational levels in the development of regulatory harmonization and the now well-established field of European securities law.

68. Committee of Wise Men, *supra* note 63, at 41.

69. See *Towards an EU Regime on Transparency Obligations for Issuers Whose Securities Are Admitted to Trading on a Regulated Market*, Consultation Document by the Services of the Internal Market Directorate-General (July 11, 2002). See also Centre for European Policy Studies, *Updating EU Securities Market Regulation* 36-37 (Feb. 5, 2001).

70. Regulatory authorities in the United States have been continually criticized for taking unduly restrictive, if not protectionist, positions to deny the same access to EU firms that the EU provides to firms based in the United States. See FESE Second Report, *supra* note 20; George Möller, President, Federation of European Securities Exchanges, European Union Legislation for a European Capital Market, Speech at the Sixth European Financial Markets Convention, Brussels, Belgium (May 30, 2002).