

**COMMITTEE OF EUROPEAN
BANKING SUPERVISORS****Response of the French Association of Investment firms
(AFEI)**

1. The French Association of Investment Firms (*Association Française des Entreprises d'Investissement* – AFEI) comprises nearly 130 investment service providers, mainly investment firms, but also credit institutions authorised to provide investment services. The majority of AFEI members operate in the fields of equities and derivatives. Approximately one-third are subsidiaries or branches of foreign institutions.

2. AFEI welcomes the public consultation initiated in May 2004 by the Committee of European Banking Supervisors (CEBS, or "the Committee") to seek the opinion of industry professionals on its future consultation methods.

Having studied the consultation paper in detail, AFEI wishes to submit the following observations.

I – GENERAL COMMENTS**◆ *Investment firms should be consulted***

3. First and foremost, AFEI advises CEBS to actively involve investment firms and their representatives in its deliberations and consultation processes. Given the field of action that the European Commission¹ has allotted to CEBS, the technical opinions the Committee will issue to the Commission will have a direct impact on the way investment firms operate.

Increasingly, experience has shown that standards drafted initially for application to credit institutions are transposed shortly afterwards to investment firms in an effort to level the playing field between companies with similar lines of business. This is particularly true as regards regulations governing corporate structure – witness Basel II / CAD III, which was originally discussed exclusively with representatives of the banking industry and which must now be tailored to the operating environment of investment firms.

Therefore, since many of the solutions identified by CEBS are bound to be adapted to investment firms, AFEI considers it absolutely vital that these firms should be involved in the Committee's work from the outset so that they can express their concerns.

¹ Decision 2004/5/EC, 1 January 2004.

It is particularly important that CEBS should agree to consult investment firms when preparing the opinions it submits to the Commission.

◆ ***CEBS and CESR must coordinate their activities***

4. CEBS and CESR need to coordinate their activities in order to avoid contradictions and overlaps. In this regard, AFEI notes that CEBS is conducting a project on outsourcing, while CESR will also make proposals in this area as part of its work on the Financial Instruments Markets Directive.

Closer coordination should also allow CEBS to benefit from CESR's experience with the Lamfalussy process. This would enable the Committee to avoid some of the pitfalls that CESR encountered in its early projects. The consultation process would thus be more effective and efficient.

◆ ***CEBS must define its future consultation process more precisely***

5. AFEI wishes to share with CEBS some of the same observations its has already submitted to CESR, the Committee's counterpart in the securities markets.

6. On the whole, the underlying principles of the future consultation process are satisfactory. All too often, however they are described in overly concise or general terms, making it impossible to get a clear idea of how the process will work. A thorough and precise definition is needed to ensure that the consultation process is genuinely open and transparent and that the industry is closely involved. In AFEI's view, it is unwise to give the standard-setting body, CEBS, too much leeway in implementing the fundamental principles.

The following points must be addressed or described in greater detail:

- timeframes
- the provisional mandates issued by the Commission (not mentioned in the CEBS paper)
- feedback mechanisms, which are dealt with in ambiguous terms
- the translation of documents and, in particular, legal concepts

II – DETAILED COMMENTS

A. Who is consulted

1. The Committee will generally:

- i) Target the full range of interested parties, including market participants, consumers and end-users;
- ii) Make consultation proposals widely known and available through appropriate means, in particular the Internet;
- iii) Consult at national, European and international levels.

7. **Point i)** AFEI naturally approves these measures. Consulting all interested parties (market participants, consumers, etc.) with regard to Level 2 will result in a satisfactory procedure and will take into account the concerns and opinions of all those involved in setting standards.

8. **Point ii)** AFEI supports this proposals, which calls for no particular comments. Using the Internet as a medium for disseminating draft measures, consultation papers and other materials will certainly facilitate access to information.

9. **Point iii)** Consultation at all levels – national, European and international – is vital in a context of globalised and increasingly integrated financial markets. CEBS' main purpose, as its name implies, is to draft European standards. In doing so, however, it must take account of the legislation in force in other countries – not just EU member states but also countries such as the USA – as well as the opinions of participants in other markets. This does not mean that CEBS must systematically adopt measures that are identical to existing regulations, particularly where industry professionals in EU member states have not been consulted. It must, however, familiarise itself with those regulations. Multi-level consultation is helpful and should provide the Committee with insights that it can use before taking decisions.

2. Reflecting the need for flexibility, when technical aspects of prudential supervision are addressed, the Committee may choose to target its consultation at market participants only. Such targeted consultations will always be followed by the publication of the Committee's final decision on the same topic.

10. AFEI disagrees with this proposal. CEBS is using the need for flexibility as a pretext to restrict the constituencies with which it consults. In AFEI's opinion, the consultation process should extend to all interested parties, most notably professional associations, which hold a special place.

11. Generally speaking, consultations must be as open as possible. Only by taking into account the interests of all stakeholders will it be possible to improve the quality of the standards that are ultimately produced. Accordingly, AFEI's is critical of the idea of targeting consultations solely at "market participants".

Moreover, this view is shared by the Inter-Institutional Monitoring Group (IIMG). In its second interim report, the IIMG encouraged the Lamfalussy committees to make sure that "*consultation processes are as open as possible to all market participants and end-users*"². That recommendation applies to all the committees, including, naturally, the Committee of European Banking Supervisors.

² *Second Interim Report Monitoring the Lamfalussy Process*, Inter-Institutional Monitoring Group, 10 December 2003, p. 29.

3. The Committee will publish an annual work programme indicating which parties it intends to consult on each area of anticipated work. If a request to be consulted on a particular area is subsequently received from any other party, this request will be granted if it fits in with the time schedule foreseen in the work programme.

12. AFEI warmly welcomes the proposal to publish an annual work programme. We submitted several requests to that effect to CESR regarding work on implementing measures in the securities field. On the whole, those requests were taken into account. An annual work programme will allow professionals to make preparations in order to participate more effectively in the consultation process. Naturally, these annual programmes must include a draft schedule.

13. Regrettably, there was no mention of drawing up work programmes in collaboration with all interested parties – most notably professional associations – to ensure that realistic deadlines are set for the work that lies ahead. Time constraints must be reasonable. In other words, it must be possible to adhere to the schedule without compromising quality, which must always take precedence over speed.

14. AFEI wonders exactly what CEBS means when it refers to " *an annual work programme indicating which parties it intends to consult on each area of anticipated work*". Does the Committee plan to restrict the targets of its consultations? If so, we regret that position, which can be criticised on several levels, and we insist that all consultations be as broad-based as possible (see points 10 and 37).

B. Areas of consultation

4. The Committee will consult on all its work in the area of advising the Commission on draft implementing measures in the field of banking supervision.

15. This is precisely the role that CEBS should play. AFEI has no comments to make on this point.

5. Where relevant, the Committee will consult on its work in the areas of
i) the consistent application of Community directives;
ii) the convergence of Member States' supervisory practices.

16. CEBS is right to give priority to these two areas. The ongoing discussions on the enforcement of Community directives and the convergence of member states' existing practices will make it possible to implement harmonised standards and create a truly level playing field across the EU.

6. In principle, the Committee will not consult on its work in the area of enhancing supervisory cooperation, including the exchange of information on individual supervised institutions.

17. Cooperation among the banking supervisors of member states, in particular through the exchange of information, contributes to more effective enforcement of Community standards throughout the EU and to a fairer competitive arena. But it is not up to industry professionals to establish the arrangements for supervisory cooperation.

C. Modes of consultation

7. The Committee will:

- i) Provide an opportunity for interested parties to make submissions on receipt and publication by the Committee of a mandate from the European Commission;
- ii) Produce reasoned consultative proposals, reflecting all relevant aspects of the issues at stake;
- iii) Include in proposals preliminary information on their impact whenever possible;
- iv) When necessary, release its thinking at various stages, including via releases of draft papers;
- v) Establish consultative groups of experts where appropriate;
- vi) Use a variety of means, including Internet and written consultations, public hearings and roundtables, and, if necessary to deepen the Committee's understanding, bilateral meetings with affected parties.

18. **Point i)** AFEI naturally supports this proposal. It is vital that interested parties be given the opportunity to express their opinion on the Calls For Evidence issued by CEBS. This is already the case with the Calls For Evidence published by CESR, CEBS' counterpart in the banking field, and AFEI sees no reason why the two committees should be subject to different rules.

19. **Point ii)** AFEI wishes to stress the importance of giving all due care to the wording of draft implementing measures. As evidenced in the Lamfalussy process and the work of CESR, any ambiguities or grey areas in a technical opinion can have a substantial impact on the final measures prepared by the Commission, which finds itself unable to replicate accurately the position expressed by the relevant committee. This was the case, for example, when CESR failed to clarify the concept of "safe harbour", which was extensively discussed in connection with the Market Abuse Directive (2003/6/EC) and which proved to be ambiguous.

20. AFEI would therefore like CEBS to be permitted to draft Level 2 measures in a legally binding form. While working on the details of future rules, industry professionals would be able to ensure at the same time that the wording is suited to the content, thereby ironing out any difficulties. We have made several similar requests as regards CESR³.

21. **Point iii)** We approve of the reference to preliminary information, which would help clarify the issues that lie behind the proposed measures. It is not always easy – even for professionals – to gauge the full impact of measures that are often highly detailed and technical.

22. **Point iv)** The wording is not entirely clear. In particular, AFEI has two questions:

- Will CEBS documents simply explain the Committee's position or will they also contain proposals? Are they merely explanatory, or can readers comment on them?
- Will the documents be published before or after the first consultation round?

While we do not have enough information at present to form a precise opinion on this point, we feel that the publication of documents setting out the Committee's point of view at different stages could be interesting. Crucially, it would help make the procedure more transparent.

³ AFEI posts its memos on its website at www.afei.com. They include: "Lamfalussy Process – Second Interim Report of the Inter-Institutional Monitoring Group – Response of AFEI", (*AFEI / 03-32*), Point 15, p. 6. "Lamfalussy Process – Second Interim Report of the Inter-Institutional Monitoring Group – Response of AFEI", (*AFEI / 04-04*), Point 12, p. 40.

23. However, AFEI has two concerns.

First, these documents should not go over the same ground as the feedback documents published after a consultation (see point 39). Any such situations should be avoided because the Committee has only limited time and resources.

Second, and for the reasons mentioned earlier, consultation with interested parties is the focal point of the process and must therefore take precedence over everything else. Accordingly, these proposed publications are not high on the agenda because they might tie up resources which, in the current state of affairs, could be better used for other purposes, such as organising a second consultation round at the level of CEBS.

24. **Point v)** We wholeheartedly endorse this proposal. Consultative groups of experts could use their skills to help CEBS elucidate certain technical issues that might prove complex to handle. Expert advice and opinion will certainly help improve the quality of the Committee's work.

These groups have already proved their worth in connection with the preparation of standards in the securities field. And CESR, in its last consultation paper, quite rightly proposed keeping them in place⁴.

25. However, AFEI wishes to point out that, despite their obvious qualities, these expert groups cannot under any circumstances replace industry professionals and their representative organisations. While experts may help to advance a project by drawing on their specialist knowledge in a particular area, their input is no substitute for the opinions, observations and proposals of professional associations, which are directly concerned by the legalisation that will be put in place. Moreover, they alone can express the industry consensus.

26. **Point vi)** The proposal to use a variety of information media, especially the Internet, is gratifying. This will make it easier for interested parties to access consultation papers in particular and documentation in general.

Moreover, CEBS intends to organise meetings with "affected parties". These contacts may be a useful adjunct to conventional consultation processes. They will provide an opportunity to hold direct discussions, compare and contrast points of view, provide additional explanations on particular topics, and give special attention to delicate issues. Although written responses to draft measures are obviously indispensable, they do not have the same advantages as face-to-face contact.

D. Timing of consultation

8. The Committee will:

- i) Publish any mandate received from the European Commission as soon as practical after receipt;
- ii) Organise upon request informal discussions at an early stage with those most likely to be directly affected;
- iii) Consult at a sufficiently early stage to enable the Committee to take the responses into account;
- iv) Allow those consulted adequate time to respond, given the complexity of the issue and the time available. For significant issues, the Committee will aim to allow a three-month consultation period.

⁴ See "The role of CESR at "level 3" under the Lamfalussy process", consultation paper, April 2004, p. 7: "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."

27. **Point i)** Like the Committee, AFEI recognises the need to publish mandates as soon as possible after they have been received.

28. We regret, however, that CEBS does not make explicit reference to the system of provisional mandates. This is significant insofar as the Commission is likely to proceed in the same manner as with CESR, issuing a provisional mandate to allow CEBS to start work on implementing measures before Level 1 legislation has been finally adopted.

29. **Point ii)** Although the advantages of this measure are undeniable, AFEI has reservations. Organising informal meetings with some of the interested parties – those "most likely to be directly affected" – is at odds with the need for transparency at every stage of the standard-setting process. During such meetings, CEBS might proffer information that other parties would not be privy to. This is problematic, because all the parties called upon to give their opinions on a proposal must have exactly the same information. Moreover, there are no absolutely reliable criteria for determining which parties are most likely to be affected. That is left solely to CEBS' discretion, a situation that is open to criticism.

30. **Point iii)** CEBS is too vague about the work schedule. Saying that the consultation will take place "at a sufficiently early stage" for the Committee to consider the responses is not enough. The entire schedule must be determined precisely (timeframes for preparing the draft measures, consultation with interested parties, analysis of responses, etc.). Most importantly, sufficient time must be allowed for professionals to express their opinions. This is the only criterion that should be taken into consideration when setting deadlines – it seems obvious to AFEI that the Committee will take responses into consideration, even where time constraints are tight.

31. **Point iv)** The wording is ambiguous. After affirming that consultation periods should take account of complexity and time, CEBS goes on to say that the consultation period for "*significant issues*" will be three months. Therein lies the ambiguity. Does the Committee intend to allocate shorter periods for issues it does not consider to be significant? If so, AFEI disapproves of this proposal. In our view, professionals should be allowed three months, whatever the circumstances. This is the minimum period needed for a proper and effective consultation process.

32. Much of the criticism levelled at the Lamfalussy process has centred on the issue of deadlines. It is important to learn from this experience and to avoid the situation, which has arisen all too often in connection with CESR's work, where professionals have insufficient time to express their opinions on draft implementing measures. This undermines the efficacy of the consultation process and, in consequence, detracts from the quality of the ensuing rules. Close cooperation with professionals is vital to the production of satisfactory standards and, hence, demands sufficient time for consultation.

33. It may be necessary to extend the standard three-month period if an issue is particularly complex or politically sensitive.

34. The consultation paper could have specified that, if a consultation is scheduled during the holiday season, the month of August would not be included, in order to ensure that the three-month period does indeed last three months.

35. Furthermore, a significant period of time should be set aside to discuss translation issues with the industry (see points 43 and 44).

36. In sum, AFEI would like CEBS to have at least nine months, and possibly twelve, in which to complete its work. To ensure the quality of the consultation process, the following timeframes are necessary:

- 3 - 4 months for CEBS to draft a consultation paper
- 3 months for professionals to submit their observations on the paper
- 2 for CEBS to analyse those observations
- 2 months for CEBS to prepare an opinion and submit it to the Commission (the need may then arise for another consultation round, which would require a further 2 - 4 months)

This is the request submitted to the ECON Commission of the Parliament European by Arthur Docters van Leeuwen, Chair of CESR, on 17 March 2003⁵.

E. Follow-up to consultations

9. The Committee will:

- i) Give due consideration to responses received;
- ii) Make public all responses to any of its consultations, unless the respondent requests otherwise, or make public a summary of the responses received;
- iii) Publish a reasoned explanation addressing all major points raised;
- iv) Consult for a second time if the response to the first consultation reveals significant problems, or if revised proposals are radically different from the original proposals on which consultation was based;
- v) Publish all formal proposals and all advice given to the European Commission.

37. ***Point i)*** AFEI notes that there is no mention of the representativeness of the person(s) commenting on the responses, a factor that really should be taken into account. Representative professional organisations play a special role in that, when submitting observations to CEBS (or institutions such as CESR), they are voicing the consensus view of their members. AFEI expressed the same view in a response to CESR⁶ in connection with work on the implementing measures for the Market Abuse Directive.

38. ***Point ii)*** This measure already applies to responses to CESR consultations, and AFEI sees no reason why the same rule should not apply to CEBS, CESR's counterpart in the banking sector.

39. ***Point iii)*** AFEI has concerns about this proposal because we find the phrase "*reasoned explanation addressing all major points*" to be ambiguous. The question is whether "reasoned explanation" means the publication of proper feedback, in which case we fully endorse the proposal. In any event, and whatever the nature of the publication envisaged by CEBS, AFEI acknowledges the need for an explanatory document. This would enhance the ex-post transparency of the consultation process and clarify the proposed measures, making it easier to understand why a particular position has been accepted or rejected. Accordingly, the proposed rule will be more readily accepted and adopted by those who are subject to it.

⁵ See the memo published by AFEI in 2003 : " Lamfalussy Process – Second Interim Report of the Inter-Institutional Monitoring Group – Response of AFEI " (*AFEI / 03-32*), Point 23, p. 9.

⁶ See AFEI's 2002 memo: "CESR consultation on implementing measures for the Market Abuse Directive. Response " (*AFEI / 02-26*), paragraphs 5 and 6 p. 2.

40. **Point iv)** AFEI does not entirely agree with this proposed measure. In our view, it would be preferable to arrange systematically for a second consultation round. The dialogue that develops as a result of successive consultations between rule-makers and market participants is important to enhancing regulatory quality. On several occasions, CESR's work on implementing measures for the Market Abuse Directive demonstrated the need for a second round. Accordingly, all consultations should consist of two rounds.

AFEI is well aware of the substantial costs involved in introducing a systematic second round, not just money but also time and human resources. But although these costs are real, they must not be considered as a sticking point if they ultimately improve the quality of regulations.

41. **Point v)** Transparency is a constant requirement at all stages of the process. Making public the formal proposals and technical opinions submitted to the Commission will contribute to greater ex-post transparency. AFEI therefore endorses this measure.

42. AFEI regrets that CEBS has omitted to address the important issue of translating its documents from English – presumably the drafting language – into other languages. The quality of Community legislation depends *inter alia* on the quality of its translation. At first sight, skipping the translation process might be seen as a way of saving time; in practice, however, a non-translated document takes longer to examine than a translated one. The congruence of legal concepts has a direct bearing on the harmonised enforcement of legislation in member states.

The work carried out in connection with CESR has highlighted these translation issues, a fact that AFEI has mentioned on several occasions⁷. The problems become particularly acute when the same term covers different concepts (e.g. *share buyback programme*) or when a concept has no direct legal equivalent in one or more member states. For example, the concept of "*safe harbour*", used in the draft regulation to refer to exemptions in buyback and stabilisation programmes, does not exist in French law.

43. For this reason, AFEI hopes that CEBS will not go down the same route as CESR and decline to translate any of its work. We are naturally aware that translation is a resource-hungry process. If, for that reason, it is not feasible to systematically translate every working document, then CEBS should at least translate legal concepts if requested to do so by the industry. Such a request would mean that professionals have encountered a problem with certain concepts which might prove to be fundamentally important when assessing a proposed regulation or standard.

44. Accordingly, as we did with CESR⁸, AFEI recommends that CEBS should work in collaboration with *juristes-linguistes* (legal/linguistic experts) on these issues.

⁷ see the following AFEI memos: "Market Abuse Directive– implementing measures – first mandate – response of AFEI" (*AFEI / 03-27*), n° 2 p. 2 ; "Implementing measures for the Market Abuse Directive – second CESR mandate – Response of AFEI", (*AFEI / 03-30*), p. 2; " Lamfalussy Process – Second Interim Report of the Inter-Institutional Monitoring Group – Response of AFEI" (*AFEI / 03-32*), n° 29, p. 11 ; et "Implementing measures for the Market Abuse Directive – second CESR mandate – Response of AFEI to the European Commission ", (*AFEI / 03-50*), p. 3.

⁸ see AFEI's 2003 memo: " Implementing measures for the Market Abuse Directive – second CESR mandate– initial response of AFEI" (*AFEI / 03-13*), Point 6 p. 2.

F. Final provisions

10. If it is not possible for the Committee to follow the principles described above, the Committee will publicly explain its reasons.

45. AFEI obviously endorses this proposal, with a view to ensuring the highest possible level of transparency in the framework set up by CEBS. However, the Committee should make it a rule to avoid departing from those principles, which underpin the smooth functioning of the standard-setting process.

11. When necessary, the Committee will review this statement of consultation practices.

46. AFEI shares the Committee's view. The document setting out the principles of the consultation process must be updated and, where necessary, overhauled. Once the process has been put into practice, it may be necessary to establish additional principles or improve existing ones. The CEBS document must take account of these additions or amendments.

