

Opinion of the European Economic and Social Committee on the 'proposal for a Directive of the European Parliament and of the Council amending Council Directives 73/239/EEC, 85/611/EEC, 91/675/EEC, 93/6/EEC and 94/19/EC and Directives 2000/12/EC, 2002/83/EC and 2002/87/EC of the European Parliament and of the Council, in order to establish a new financial services committee organisational structure'

(COM(2003) 659 final – 2003/0263 (COD))

(2004/C 112/06)

On 18 November 2003, the Council decided to consult the European Economic and Social Committee, under Article 95 of the Treaty establishing the European Community, on the above-mentioned proposal.

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 10 March 2004. The rapporteur was Mrs Fusco.

At its 407th plenary session of 31 March and 1 April 2004 (meeting of 31 March), the European Economic and Social Committee adopted the present opinion by 95 votes with two abstentions.

1. Gist of the Commission proposal

1.1 Context and objectives

1.1.1 In 1999, the Commission adopted an Action Plan for Financial Services ⁽¹⁾ that identified a series of actions required to construct a single European financial market. At its meeting in Lisbon in March 2000, the European Council called for the implementation of this Action Plan by 2005.

1.1.2 On 17 July 2000, the Council set up a Committee of Wise Men on the Regulation of European Securities Markets. The Committee's final report published in February 2001 recommended regulating these markets on four levels in order to make Community legislation more flexible, effective and transparent.

1.1.3 In the light of these developments, the Commission adopted Decisions 2001/527/EC ⁽²⁾ and 2001/528/EC ⁽³⁾ setting up, respectively, the Committee of European Securities Regulators (CESR) and the European Securities Committee (ESC).

1.1.4 On 3 December 2002, the Council called on the Commission to implement arrangements for the remaining financial services sectors based upon the Final Report of the Committee of Wise Men.

1.1.5 The proposal therefore extends the 'comitology' approach of the aforementioned decisions to the banking, insurance and occupational pensions, and investment fund sectors.

⁽¹⁾ COM(1999) 232 final.

⁽²⁾ OJ L 191, 13.7.2001.

⁽³⁾ OJ L 19, 13.7.2001.

1.2 Essential elements

1.2.1 The proposal establishes a new 'comitology' system by both setting up new committees and abolishing existing ones, thereby shaping a new regulatory framework for financial services in the European Union.

1.2.2 As regards credit institutions, the European Banking Committee – established under the Commission Decision of 5 November 2003 ⁽⁴⁾ – will therefore take over most of the functions of the Banking Advisory Committee, which will cease to exist ⁽⁵⁾. That is to say, essentially it will play an advisory role at the request of the Commission concerning legislative acts adopted in co-decision by the Council and the Parliament, and a regulatory 'comitology' role.

1.2.3 Meanwhile, the Committee of European Banking Supervisors (CEBS), established under the Commission Decision of 5 November 2003 ⁽⁶⁾, will enhance supervisory cooperation and contribute to the convergence of Member States' supervisory practices and the consistent application of Community legislation. It will also advise the Commission, at the latter's request, on issues relating to banking legislation.

⁽⁴⁾ OJ L 3, 7.1.2004. Regarding its composition, the Committee will be chaired by the Commission with each Member State sending a high-level representative. The Chairperson of the Committee of European Banking Supervisors and a European Central Bank representative will participate as observers.

⁽⁵⁾ Articles 57-59 of Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000, OJ L 126, 26.5.2000.

⁽⁶⁾ OJ L 3, 7.1.2004. The Committee will be composed of high-level representatives from the national public authorities competent for the supervision of credit institutions, national central banks, the European Central Bank and the Commission. The Committee will elect a chairperson from among the representatives of the competent supervisory authorities.

1.2.4 As regards insurance and occupational pensions, the Insurance Committee established under Council Directive 91/675/EEC of 19 December 1991 ⁽¹⁾ will become the European Insurance and Occupational Pensions Committee ⁽²⁾, essentially playing an advisory role at the request of the Commission and a regulatory 'comitology' role.

1.2.5 The establishment of the Committee of European Insurance and Occupational Pensions Supervisors ⁽³⁾, meanwhile, will contribute to the convergence of the supervisory practices of the competent national authorities, improve the exchange of confidential information on specific supervised institutions, and facilitate the provision of technical advice to the Commission, in particular on draft implementing measures that the Commission may wish to propose.

1.2.6 Finally, as regards the securities market - and to ensure compliance with, among other relevant legislation, Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 ⁽⁴⁾ - the functions of the Contact Committee on undertakings for collective investment in transferable securities (UCITS) ⁽⁵⁾ are transferred as follows: its 'comitology' role and role of advising the European Commission, at the latter's request, on legislation being drafted are transferred to the European Securities Committee ⁽⁶⁾, while its role of advising the Commission on the preparation of draft implementing measures for relevant legislation in this area and promoting enhanced co-operation and networking among EU securities regulators are transferred to the Committee of European Securities Regulators ⁽⁷⁾.

2. General comments

2.1 The urgent need to respond quickly and effectively to technological change and financial market developments in the global economy calls for the reform of the European Union's legislative and 'comitology' structure currently regulating this area.

⁽¹⁾ OJ L 374, 31.12.1991.

⁽²⁾ Commission Decision of 5 November 2003. OJ L 3, 7.1.2004. The Committee will be composed of high-level representatives from the Member States and chaired by a Commission representative.

⁽³⁾ Commission Decision of 5 November 2003. OJ L 3, 7.1.2004. The Committee will be composed of high-level representatives from the national public authorities competent in the field of supervision of insurance, reinsurance and occupational pensions. The Commission will have one high-level representative, but the Committee will be chaired by a representative from the Member States.

⁽⁴⁾ OJ L 96, 12.4.2003.

⁽⁵⁾ Established under Council Directive 85/611/EEC of 20 December 1985. OJ L 375, 31.12.1985. This Committee initially played an advisory role, assisting the Commission in the implementation of the Directive, facilitating consultation between the Member States and advising the Commission on amendments that should be made to the aforementioned Directive. In the event of technical amendments, the Committee acted as a 'comitology' committee. Directive 2001/108/EC (OJ L 41, 13.2.2002) strengthened this 'comitology' role with regard to the technical regulation of investments of UCITS.

⁽⁶⁾ Established under Commission Decision 2001/528/EC (OJ L 191, 13.7.2001) amended by Commission Decision of 5 November 2003 (OJ L 3, 7.12.2004).

⁽⁷⁾ Established under Commission Decision 2001/527/EC (OJ L 191, 13.7.2001) amended by Commission Decision of 5 November 2003 (OJ L 3, 7.1.2004).

2.2 The EESC therefore welcomes the proposed directive, which aims to harmonise the European financial regulatory framework by adapting the current regulatory approach in accordance with the principles of subsidiarity, proportionality and adequate resources.

3. Specific comments

3.1 The proposed directive extends the structure and role of advisory and regulatory committees, already applied in the securities sector, to the sectors of banking, insurance and occupational pensions and UCITS.

3.2 In accordance with the aforementioned objectives and content of the proposal, four main elements can be identified: (i) the establishment and composition of new committees; (ii) the different consultative role assigned to them; (iii) the regulatory or 'comitology' role given to each of the new committees; and (iv) the supervisory and follow-up role vis-à-vis implementation of relevant Community legislation in this area.

3.3 According to the Commission, the establishment of four new committees - i.e. the European Banking Committee, the Committee of European Banking Supervisors, the European Insurance and Occupational Pensions Committee and the Committee of European Insurance and Occupational Pensions Supervisors - to replace the three existing committees - i.e. the Banking Advisory Committee, the Insurance Committee and the UCITS Contact Committee - avoids the risk of complexity and duplication due to overlap between existing committees.

3.4 In quantitative terms alone, the number of new committees is nonetheless twice the number of existing committees, giving rise to a long list of committees which becomes even longer if we include the Financial Services Committee, established a few months before the committees listed above and the role of which would seem to overlap a priori with theirs ⁽⁸⁾. Unless this situation is justified by the reasons of legislative techniques outlined above, it would in principle seem to run counter to the demands for transparency and simplification via a drastic reduction in the huge number of existing EU committees ⁽⁹⁾.

⁽⁸⁾ See point 2 of the Council Decision of 18 February 2003, OJ L 67, 12.3.2003.

⁽⁹⁾ See the answer given by Commissioner Schreyer on behalf of the Commission to written question E-1070/01 by M. Ferber (OJ C 318 E, 13.11.2001) and the Poos report on reform of the Council (A5-0308/2001 final) adopted by European Parliament Resolution of 25.10.2001, in particular recital M and point 13 of the Resolution.

3.5 On the other hand, as regards the composition of the four new committees, the EESC welcomes the fact that the European Banking Committee will be composed of only one high-level representative per Member State – as opposed to the national delegations to the Banking Advisory Committee which are currently allowed up to three members – and that it will be chaired by the Commission - as opposed to the latter which is chaired by a representative from a Member State. Though the proposed Directive does not explicitly refer to this, it can be deduced from the executive summary.

3.6 However, no provision is made for representatives from the securities markets to participate in the committees responsible for regulating them. Given that all European stock exchanges are private entities operating under the supervision of public regulators, at least one national representative from the securities market should be allowed to participate as an observer.

3.7 As regards the advisory role of the new committees, the proposal suggests simultaneously reassigning and splitting the tasks currently carried out by the existing committees in the sectors of banking, insurance and collective investment in transferable securities.

3.8 According to point 1.2 above, the European Banking Committee, the European Insurance and Occupational Pensions Committee and the European Securities Committee will together play a key advisory role during the drafting and implementation of relevant legislation in this area.

3.9 In other words, they will play an advisory role at Level 1 of the EU's current four-level regulatory approach to securities legislation.

3.10 The Committee of European Banking Supervisors, the Committee of European Insurance and Occupational Pensions Supervisors and the Committee of European Securities Regulators, meanwhile, will play an advisory role with regard to the consistent and timely implementation of relevant legislation in this area – including implementing technical measures – and enhanced cooperation among regulators in the Member States. In other words, they will play an advisory role at Level 3 of the aforementioned regulatory approach.

3.11 No new advisory roles are therefore created in addition to those that already exist. Whatever the likely impact of the entry into force of the new advisory system, the initial assessment is positive, providing that it improves the technical quality of the legislation in question and that doubling the number of committees does not adversely affect the flexibility and transparency of any advisory procedures initiated by the Commission.

3.12 Thirdly, the European Banking Committee, the European Insurance and Occupational Pensions Committee and the European Securities Committee will each play an exclusive regulatory or 'comitology' role in their respective areas of competence. No new committee procedures are created here, nor are the committees assigned any new roles in addition to those already played by the existing committees.

3.13 However, we wish to make a number of comments on this subject given that a 'comitology' system has until now been almost non-existent in the finance sector⁽¹⁾. On the one hand, with regard to the decision-making procedure, financial 'comitology' is governed by the provisions of Article 5 of Council Decision 1999/468/EC of 28 June 1999⁽²⁾, i.e. in accordance with the regulatory procedure. This procedure establishes a right of revision which can be exercised only by the Council⁽³⁾ and a right of examination which can be exercised by the European Parliament⁽⁴⁾, which gives the two institutions similar but not equal weight in cases where they consider that their prerogatives have been infringed through a regulatory procedure based on a Community legal act adopted under the co-decision procedure⁽⁵⁾.

3.14 This situation needs to be treated with a degree of caution with regard to the proposal which concerns us here, as in effect the European Parliament, in its Resolution of 5 February 2002 on the implementation of financial services legislation⁽⁶⁾, accepted the four-level regulation recommended in the report of the Committee of Wise Men, referred to above, provided that the Parliament received equal treatment in Level 2 ('comitology' procedures), as guaranteed to the Council in accordance with the Resolution of the Stockholm European Council⁽⁷⁾. The European Economic and Social Committee urges the competent institutions to resolve the conflict over supervision of implementing powers as a matter of urgency.

⁽¹⁾ Thus, since 'comitology' functions were assigned to them in 1989 (Article 9 of Council Directive 89/647/EEC on the solvency ratio), the Banking Advisory Committee has acted in this capacity on only four occasions, and the Insurance Committee and the UCITS Contact Committee have never done so.

⁽²⁾ OJ L 184, 17.7.1999.

⁽³⁾ To date less than 0.25 % of legal acts following this procedure have been referred by the Commission to the Council. See point 1.4 of Report COM(2003) 530 final, OJ C 223 E, 19.9.2003.

⁽⁴⁾ To date the European Parliament has never exercised this prerogative. See Report COM(2003) 530 final, *ibid.*

⁽⁵⁾ A discrepancy to be corrected by a joint Parliament-Council scrutiny procedure, as provided for in proposal COM(2002) 719 final of 11.12.2002. For the scope of this proposal see C.J. Moreira González, *Änderungen des normativen Rahmens der Komitologie*, *Zeitschrift für Europarechtliche Studien* 4, 2003, pp. 561-588, and 584 et seq.

⁽⁶⁾ Resolution A5-0011/2002.

⁽⁷⁾ Equally, in its Resolution B5-0578/2002, the European Parliament questioned the urgency of restructuring the architecture of the committees in the financial area, making its approval of the proposal conditional on an unequivocal commitment by the Council to correct the legislative discrepancy with regard to the supervision of the exercise by the Commission of its implementing powers.

3.15 On the other hand, echoing the previous comment, there is a worrying inconsistency in the proposal, in that the proposal is difficult to reconcile with some of the provisions of the proposed amendment to the Treaties establishing the European Community currently under negotiation. Thus, Article I-35 of the draft Treaty establishing a Constitution for Europe ⁽¹⁾ would require revision of the regulatory procedure, assigning to the European Parliament and the Council of Ministers equally the power to reject the power delegated to the Commission.

3.16 In its turn, Annex 8 to the document of the Naples ministerial conclave on the 2003 IGC ⁽²⁾, amends point 6 of Article III-77 of the draft Treaty, creating a twofold conflict with the proposal under consideration. First because, by providing that a European law could grant the European Central Bank the power of prudential supervision of credit institutions and other financial institutions, with the exception of insurance undertakings, it would undermine the consultative and 'comitology' functions of the European Banking

Committee, as well as the consultative functions of the Committee of European Banking Supervisors ⁽³⁾.

3.17 Secondly because it would spark off a new conflict with the European Parliament, by providing that the Council would effect such a transfer of powers by unanimity, after consulting the Parliament, whereas Article 105(6) of the EC Treaty, as currently in force, allows the Council to do this only after receiving the assent of the Parliament. Although Commission proposals do not have to take account of draft legislation which has not entered into force, the above comments stem from the fact that the Committee is bound to look ahead when exercising its consultative functions.

3.18 Finally, the power to supervise and monitor the application of Community law in this area would enable the committees to reinforce the current mechanism under which the Commission detects obstacles and deploys the appropriate means for eliminating them in the legal systems of the Member States ⁽⁴⁾.

Brussels, 31 March 2004.

*The President
of the European Economic and Social Committee*
Roger BRIESCH

⁽¹⁾ Brussels, 18 July 2003, CONV 850/03.

⁽²⁾ Brussels, 25 November 2003, CIG 52/03 ADD1, p. 12.

⁽³⁾ Although majority opinion in the Member States is in favour (see M. G. Dassel, D. Isaac: 'Financial services in the Era of the Euro and E-Commerce: Does home country control work?' - General Report, in F.I.D.E., XX Congress, BIICL, London, 2003, pp 433-446, esp. points 38-56. ECOFIN, meeting in Oviedo on 12-13.4.2002, expressed reservations with regard to this possibility, particularly in the light of the manifest opposition of the German and British delegations.

⁽⁴⁾ See, respectively, the 18th Report on monitoring the application of Community law, COM(2003) 309 final, and the 19th Report, COM(2002) 324 final.