



Anlage 3 zur Stellungnahme des Verbandes der Auslandsbanken zum
Entwurf des CRD-UmsG vom 22. Mai 2006:

CEBS-Konsultationspapier CP02rev vom 6. April 2006



6 April 2006

Consultation Paper

STANDARDS ON OUTSOURCING

CEBS presents a revised version of its Standards on Outsourcing. The proposed standards are based on current practices and also take into account international, such as the Joint Forum, and European initiatives in the field of outsourcing.

Taking account of the comments received during the first public consultation, and subsequent legislative developments, these Standards are open for three further months of consultation in accordance to CEBS' public statement on consultation practices. CEBS invites comments on this revised consultation paper by **6 July 2006** (CP02rev@c-eps.org). Comments received will be published on the CEBS website unless the respondents request otherwise.

Alignment with securities regulation

Following comments received during the first round of consultation, CEBS and the Committee of European Securities Regulators (CESR) have ensured that the proposed standards are consistent with the Markets in Financial Instruments Directive (MiFID) and its application to credit institutions. CEBS strived to align the Standards to the highest degree possible with regulation under MiFID, taking into account the "Draft Commission Directive implementing Directive 2004/39/EC" as published on the Commission homepage on 6 February 2006.¹ A mapping of the present version of CEBS Standards and the latest draft of MiFID Level 2 measures will be published by the end of April. Examples of alignment worth highlighting are:

- a. consistent use of "senior management" in the sense of Dir 2000/12/EC which is in essence identical to MiFID;
- b. the approach taken towards the outsourcing of senior management responsibilities and functions; and
- c. limitations on outsourcing only of activities at the core of credit institutions, which is comparable to the approach taken by MiFID Level 2.

¹ Draft Commission Directive implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms, and defined terms for the purposes of that Directive (6.2.2006).

In spite of CEBS' attempts at alignment there remain areas in which CEBS Standards diverge from MiFID Level 2 regulations. The main reason for this is that MiFID Level 2 and CEBS Standards do not have the same scope of application and do not regulate the same area. Whereas CEBS Standards are directed towards credit institutions generally possessing a universal licence to conduct all kinds of banking business, including investment services, MiFID is directed towards investment service providers (which may also be credit institutions). Secondly, CEBS Standards are aimed at prudential supervision, while MiFID has more of a conduct of business focus. This explains why CEBS Standards explicitly refer to risk management which is a core focus for prudential supervision. The areas of divergence were identified in the cross-sectoral talks and they were accepted by the other Level 3 committees.

It is for all these reasons that in several places CEBS Standards diverge from MiFID Level 2 regulation, while taking into account as far as possible industry requests for alignment. The following paragraphs explain why a different approach has been taken in several instances:

- a. Definition: CEBS Standards are using the same definition as the Joint Forum's Outsourcing Standards, which put an emphasis on "continuity". MiFID also asks for continuity but refers to it in different articles.
- b. Materiality: CEBS Standards use the concept of "materiality". This is a term which is not used in MiFID, though MiFID – Level 2 regulation does regard operational functions as "critical or important". Material activities as defined in CEBS Standards embrace not only critical or important activities, but also the risk management of such activities, other licensed activities and activities with a significant impact on risk management. The deviation from MiFID terminology is thus justified.
- c. Risk management: risk management is considered of such importance for prudential reasons and in the context of banking supervision that CEBS Standards mention it explicitly.
- d. Activities which must not be outsourced: CEBS Standards now mention explicitly "services and activities concerning the acceptance of deposit or to lending" as activities which must not be outsourced to an unauthorised entity. MiFID Level 2 contains comparable rules only in relation to "portfolio management provided to retail clients" if the service provider is located in a third country. This difference in approach is explained by the CEBS Standards' focus on prudential supervision.
- e. Adequate information/prior notification: following strong requests from supervisory authorities to refrain from the requirement of prior notification, this criterion has been changed. Now an outsourcing institution is requested to "adequately inform" its supervisory authority in certain cases. MiFID Level 2 requests in one specific case prior notification. CEBS believes that the expression "adequately inform" leaves sufficient room for its interpretation by national authorities in line with MiFID Level 2 requirements.

Standard 4

4.1 An authorised entity may not outsource services and activities concerning the acceptance of deposits or to lending requiring a licence from the supervisory authority according to the applicable national banking law unless the outsourcing service provider either (i) has an authorisation that is equivalent to the authorisation of the outsourcing institution; or (ii) otherwise allowed to carry out those activities in accordance with the relevant national legal framework.

4.2 Any area of activity of an outsourcing institution other than those identified in Standards 2 and 3 may be outsourced provided that such outsourcing does not impair:

- a. the orderliness of the conduct of the outsourcing institution's business or of the financial services provided;**
- b. the senior management's ability to manage and monitor the authorised entity's business and its authorised activities;**
- c. the ability of other internal governance bodies, such as the board of directors or the audit committee, to fulfil their oversight tasks in relation to the senior management; and**
- d. the supervisory authority's ability to fulfil its supervisory tasks.**

4.3 An outsourcing institution should take particular care when outsourcing material activities. The outsourcing institution should adequately inform its supervisory authority about this type of outsourcing.

1. These requirements do not affect the principle of managers' sole responsibility (Standard 2) for all authorised activities. The managers of the outsourcing institution shall be fully responsible to the supervisory authority for any outsourced activity. The managers should therefore take suitable measures to ensure that the outsourced activities continue to meet the performance and quality standards that would apply if their own institution were to perform the relevant activities in-house.
2. An outsourcing institution should adequately inform its supervisory authority on any material activity to be outsourced. Such information should be made available in a timely manner in order for the supervisor to evaluate the proposal or to allow him to consider whether the proposal raises prudential concerns and to take appropriate action if required. Outsourcing institutions should be aware that for the outsourcing of material activities the supervisory authority may impose specific conditions. In doing so, the supervisory authority will consider factors such as the size of the institution, the nature of the outsourced activity, the characteristics and market position of the service provider, the duration of the contract and the potential of the outsourcing to generate conflicts of interest (e.g. the supervisory authority may wish to prohibit the outsourcing of the financial accounting and the preparation of the