The Association for Financial Markets in Europe (AFME)\(^1\) welcomes the opportunity to comment in respect of the European Commission's public consultation on the stakeholder consultation guidelines 2014.

AFME and its Member firms greatly support the EU Better Regulation agenda and smart regulation. We believe that the EU regulatory environment could be improved and simplified to the ultimate benefit of growth and jobs. And that the expertise of all stakeholders is a vital asset that policymakers should thoroughly and effectively use.

We believe that, in principle, an identified market failure should be the focus of any public consultation. In other words, new regulation should be focused on proportionate means to achieve a better market (e.g. fairer, more orderly, etc). This will help ensuring, together with the new better regulation role of the proposed First Commission Vice-President, that new regulation, and thus stakeholder consultations, are tabled and carried out only when necessary.

In this framework, we take the view that stakeholder consultations play a key role in achieving a well-informed, transparent and evidence-based approach to policy making. External input from stakeholders and interested parties is essential to ensure high-quality legislation.

AFME and its Members regularly take part in consultations launched by the Commission as well as by other EU bodies like the ESAs (ESMA and EBA in particular) and the ECB for example.

To make sure that consultations are of high standard, it is important that they are properly organised on the basis of clear and informative guidelines.

Our response to this consultation is organised not on a question-by-question basis but according to a small number of key themes. These refer in particular, but not exclusively, to step 3 (Selection of the most appropriate consultation methods and tools) and step 4 (defining the timing of consultation and its duration) of the consultation process.

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\(^1\) AFME is the European member of the Global Financial Markets Association (GFMA) a global alliance with the Securities Industry and Financial Markets Association (SIFMA) in the US, and the Asia Securities Industry and Financial Markets Association (ASIFMA) in Asia. AFME is listed on the EU Register of Interest Representatives, registration number 65110063986-76.
Maximise stakeholders’ responsiveness

As a general principle, we take the view that open public consultation should ideally be characterised by a broad and diversified stakeholder participation which allows for different views to be captured and reflected.

The draft Guidelines include five key principles governing relations with stakeholders: participation, openness, accountability, effectiveness and coherence.

These are complemented by five minimum standards A) Consultation documents are clear, concise, and include all necessary information; B) All relevant parties have an opportunity to express their opinion; C) Adequate awareness-raising publicity is ensured and communication channels are adapted to meet the needs of all target audiences; D) Participants are given sufficient time for responses; E) Acknowledgement and adequate feedback is provided.

We believe that minimum standards A, and D are particularly important to ensure that stakeholders are given the chance to participate and express their opinion in a meaningful, complete and thorough manner (see standard B).

Standard E is particularly important to ensure the establishment of an effective dialogue between officials and stakeholders. We would suggest that minimum standard B be amended to read "All relevant parties have an opportunity to express their opinion effectively". As stated below one of the difficulties that we have experienced in responding to some consultations is that the manner of response is so tightly constrained that it hinders the effective articulation of views.

Consultation documents and templates for responses: 'quantity' vs 'quality' and stakeholders' engagement

We take the view that in principle all consultations should be considered as important (see question 4 of this consultation). A priori, a stakeholder should not be confronted with the question whether a consultation is important or not. This depends on the relevant stakeholder's nature and interests. We thus believe there is not a risk of 'over-consultation' per se.

As regards consultation templates, while we understand that the use of closed templates, multiple choices and highly structured questionnaires can at times facilitate the somewhat mechanical work of officials when collecting and analysing responses, we take the view that a sufficient degree of flexibility should be given to respondents.

While minimum standard A rightly prescribes that consultation documents should be clear, concise, and include all necessary information, we believe that a combination of closed and open-ended questions often represents the best approach to drafting a questionnaire as it ensures that answers given can be properly substantiated with examples etc.

This is also true with regard to technical consultations run by the ESAs. An example of this was the recent ESMA Consultation on the Clearing Obligation under EMIR (no. 1). Due to the consultation's
format, AFME members found it difficult and very time consuming to respond in an organised and consistent manner.

**Time limits for consultation responses**

There is another important aspect that AFME and its Members would like to underline. This relates to the duration of consultations (minimum standard D). This is an absolutely critical point for stakeholders, as it can greatly impact the quality of the responses. Too short a consultation can hamper the respondents’ ability to provide officials with the full range of expertise they have available and that they could otherwise provide if more time was allowed.

As a general rule, since January 2012 the *minimum* time limit for replies to open public consultations is 12 weeks.² This is clearly mentioned in Annex 1 of the draft guidelines. However, it should be noted that the European Court of Auditors (ECA) concluded in a recent report³ that ‘the Commission and EBA have not observed their own stated best practice as regards the time allowed for stakeholders to provide their opinions, resulting in the risk of a limited number of responses or responses that are unable to go into sufficient depth, in particular for banking associations, thus leading to legislative proposal of poorer quality’.

We would suggest amending the language on page 13 of the draft guidelines (Step 4) to ensure full consistency - the word ‘minimum’ should be added on page 13.

The guidelines also specify that derogations to the 12-week period could be envisaged *exceptionally* if a consultation is linked to a fixed annual cycle and is carried out on a regular basis. It is also highlighted that derogations must be justified and provided in the consultation document and on the consultation webpage.

We take the view that the exceptional circumstances to allow for a consultation period shorter than 12 weeks should be reasonably justified in detail. Length of consultation periods is a key factor impacting on the stakeholders’ ability to respond to public consultations, particularly as regards international or European associations whose consultation response is drafted on the basis of a variety of views gathered from members.

AFME and its Members strongly believe that the above arguments are valid not only for Commission’s consultations, but should also apply to the ESAs’ consultations: we take the view that the 12-weeks’ minimum standard as regards time limits for consultations should apply to all consultations issued by any EU institution, agency or authority and exceptions should be strictly limited and explained in detail.

This includes all consultations issued by the European Supervisory Authorities (ESAs) and by the European Central Bank (ECB), which are often of a very technical nature and thus require thorough technical and specific input from stakeholders, which takes time for stakeholders to gather and present consistently. If consultations are conducted over too short period of time, this negatively affects the overall quality of answers provided.

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² Draft stakeholder consultation guidelines, Annex 1, p. 25
³ ECA special report ‘European banking supervision taking shape - EBA and its changing context’, p. 24
A recent example of failure to maintain the best practice described above is again ESMA's Consultation on the Clearing Obligation under EMIR (no. 1). The consultation raised complex issues for the industry, yet it ran for just over five weeks, and that over the summer period.

Feedback on consultations' responses

As regards acknowledgement of the receipt of contributions, the draft Guidelines (Step 9) mention that it is best practice to send an acknowledgment of receipt and indicate timing of publication. Collective acknowledgment of receipts could be automatically generated at entry point. We take the view that acknowledgement of receipt should be done in all cases, for all contributions.

On the fact of providing feedback to respondents explaining how the contributions have been taken into account, the draft Guidelines highlight the need to highlight in the IA report why certain options were discarded (especially when those were widely supported by the respondents).

We believe this is a key point regarding feedback practices but also with regard to the available policy options and the actual proposal: we take the view that the language in the draft guidelines could be strengthened to ensure that the Commission always reports feedback in detail.

Post-consultation changes to legislation

It happens very often that during the policymaking process legislation changes considerably in nature, purpose and objectives. We have seen this happening in financial services legislation over the past years.

At times such legislative changes during the process might impose considerable additional burden on market participants.

We would thus take the view that it would be helpful to include in the policymaking process the practice of consulting again when material and significant policy changes are made, during the legislative process, to proposed legislation post-consultation where those changes impose additional burdens on market participants.

We would thus suggest adding a section to the consultation guidelines to this effect.