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STAKEHOLDER SUGGESTIONS

- FINANCIAL STABILITY, FINANCIAL SERVICES AND CAPITAL MARKET UNION -

DISCLAIMER

This document contains suggestions from stakeholders (for example citizens, NGOs, companies) or Member State authorities communicated to the Commission and submitted to the REFIT Platform in a particular policy area.

It is provided by the secretariat to the REFIT Platform members to support their deliberations on the relevant submissions by stakeholders and/or Member States authorities.

The Commission services have complemented relevant quotes from each suggestion with a short factual explanation of the state of play of any recent, relevant ongoing or planned work of relevance by the EU institutions.

The document does not contain any official positions of the European Commission unless expressly cited.

Table of Contents

1. SUMMARY

The briefing file covers suggestions received from the German Insurance Association (GDV), the Danish Business Forum (DBF), the Federation of Finnish Financial Services (FFI) and the German Chambers of Commerce and Industry (DIHK). The submissions consider a large number of legislative acts in different stages of adoption/ implementation including legislation that is currently in the legislative process and legislation that is currently being transposed and/or not fully in force. Most of the submissions consider more than one legislative act. One submission refers to the powers and activities of the European supervisory authorities, which are agencies of the EU.

Legislation considered in the submissions received includes:

- Financial Conglomerates Directive (GDV)
- Accounting Directive (DBF)
- European Market Infrastructure Regulation (FFI, GDV, DIHK)
- Undertakings for the collective investment in transferable securities directive - UCITS (FFI)
- Solvency II (GDV, FFI)
- The Regulation on key information documents for packaged retail and insurance-based investment products (FFI, GDV)
- Insurance Distribution Directive (FFI, GDV)
- Markets in Financial Instruments Directive (FFI, GDV)
- Delegated acts on the so called IMD 1.5 (FFI)
- Directives on distance marketing and on e-commerce (GDV)
- Regulation on reporting and transparency of securities financing transactions (GDV)
- Directive on disclosure of non-financial and diversity information by certain large companies and groups (DIHK, GDV)

In addition, we have received submissions from the Santander Bank on what hinders innovativeness of European banks and the UK Government suggestion to bring forward a legislative proposal to remove barriers to cross-border marketing of UCITS. These will be examined as part of Call for Evidence on the EU regulatory framework for financial services.[1]

Policy Background

Following the financial crisis, since 2009 the area of Financial Services has seen significant reforms and an increased harmonisation at European Level, including through the creation of the Banking Union and the ongoing work on the Capital Markets Union (CMU).

Work on the banking union has led to the creation of a Single Supervisory Mechanism and a Single Resolution Mechanism for banks, as well as the adoption of a single rulebook for all financial actors in the 28 Member States with stronger prudential requirements for banks, improved depositor protection and rules for managing failing

[1] http://ec.europa.eu/finance/consultations/2015/financial-regulatory-framework-review/docs/consultation-document_en.pdf

banks[2]. In November 2015, the Commission has also proposed a euro-area wide insurance scheme for bank deposits and has set out further measures to reduce remaining risks in the banking sector in parallel.

By building a stronger single market for capital, the objective of the CMU[3] is to ensure greater security and stability of financial institutions, to offer businesses more choices of funding at different stages of their development and to provide more options and better returns for savers and retail investors.

The EU financial system is now stronger as a result of the new regulatory framework and the actions taken by European and national authorities. This has put it in a better position to fund the European economy and support jobs and growth on a sound and sustainable basis.

While the bulk of the new regulatory framework has been adopted, some rules have not yet been fully implemented and there is much detail still to be finalised. The Commission will continue to work actively on these issues both at EU level, including with the European supervisory authorities and stakeholders, and at international level, within the G20 and the Financial Stability Board. There is still a need to act in the area of non-bank resolution and in making further progress on the Banking Union. It is essential to complete the job as well as making sure that rules are properly applied, enforced on the ground and working as intended.

In order to understand the combined impact on the financial sector of this important body of new regulations and whether it gives rise to any unnecessary burdens, inefficiencies or unintended consequences, the Commission has launched a Call for Evidence on the EU regulatory framework for financial services.[4] This call should allow any unnecessary regulatory burdens, interactions, inconsistencies and gaps in EU legislation as well as unintended consequences to be detected. Following this call for evidence, Commission services will report by mid-2016 on the main findings and next steps. As announced in the Commission Work Programme 2016, any follow-up actions will be conducted as part of the REFIT programme.

In addition, many legal texts in the area of financial services have review clauses. Over the next four years, many of the rules put in place are due for review at scheduled intervals. Some reviews, such as those for the Capital Requirements Regulation and the EMIR derivatives rules, have already started. Reviews, evaluations and fitness checks will help the Commission assess the impact of the new regulations on the longer term.

2. FINANCIAL CONGLOMERATES DIRECTIVE (FICOD) - SUPERVISION OF FINANCIAL CONGLOMERATES

2.1. Submission by the German Insurance Association (GDV)

With Solvency II and CRD IV/CRR, the supervisory regimes for insurers and banks have been fundamentally revised. The far-reaching requirements raise the question of the

[2] COM/2012/0510 final

[3] COM(2015)468 final, 30.9.2015.

[4] http://ec.europa.eu/finance/consultations/2015/financial-regulatory-framework-review/docs/consultation-document_en.pdf

necessity of any additional supervision for financial conglomerates in Europe. Through the new sectoral supervisory system, cross-sector risks are already comprehensively covered. The additional regulation of the Financial Conglomerates Directive (FICOD) therefore leads to unnecessary and burdensome overlap in supervisory procedures. No added value for supervision and undertakings can be recognized here.

Notwithstanding the revision of FICOD in 2011, the European Commission should promptly review the Directive. Thereby the subordinate regulation must be examined. It is decisive that the altered framework conditions be considered.

2.1. Policy Context

The Financial Conglomerates Directive (FICOD) was adopted in 2002 to address cross-sectoral group risks arising in groups active in both the insurance and banking sector. The first revision of FICOD was adopted in 2011 as a quick fix Directive (FICOD1) to address immediate problems discovered during the crisis. FICOD1 also contained a provision for the Commission to deliver a report on the effectiveness of FICOD by December 2012, followed by a legislative proposal if necessary. The Report was published in 2012 and recommended a number of areas for review. However a legislative proposal was put on hold pending the conclusion of the sectoral legislation on which FICOD builds. Given that the sectoral legislation (CRDIV/CRR and Solvency II) has now stabilised, it is appropriate to consider the impact of these changes on the relevancy of FICOD and to assess whether concerns from the 2012 Report remain in spite of the sectoral legislation amendments.

3. European Rules on Storing Company Records Abroad

3.1. Submission by the Danish Business Forum (DBF)

Challenge

Rules on storing company records abroad vary across the EU, and there is no European-wide regulation in this area (apart from the VAT System Directive). This implies that a company from country A that wishes to set up a business in country B cannot automatically handle all accounting from country A and use their preferred accounting system.

Suggestion

Common EU-rules regarding storage of accounting records in another EU country should be introduced. This will allow businesses to make full use of internet-based accounting. The final report from "EU Multi Stakeholder Forum on e-Invoicing" could serve as inspiration. It concludes that the lack of access to storing accounting records in other countries is a hindrance for the use of electronic accounting.

3.2. Policy Context

The EU determines to a great extent the rules on information prepared and disclosed by EU companies, including the reporting framework for financial statements and non-financial information. The main legislative sources are the Accounting Directive

(2013/34/EU) for all limited liability companies, and the International Financial Reporting Standards adopted by the EU by means of regulations directly applicable to listed companies. These EU companies are required to publish their financial statements as laid down by the laws of each Member State in accordance with Chapter 2 of Directive 2009/101/EC (i.e. file them with the relevant national business register). The EU does not however provide for any rules regarding e.g. the accounting software to be used by companies.

Regarding the storage, for each company, a file shall be opened in a national register in which those documents and particulars are kept. Member States shall ensure that the filing of those documents and particulars which must be disclosed is possible by electronic means. A copy of the whole or any part of those documents or particulars must be obtainable on application. On this basis, the "BRIS" Directive (2012/17/EU) provides for a system of interconnection of registers which consists of the aforementioned registers of the Member States. A central European platform as well as the European e-Justice portal serving as European access point is planned to be operational by mid-2017. This interconnection will ensure that all EU business registers will be able to communicate to each other in a secure and safe way, and will also facilitate the access to information in the register for the public. Via the e-Justice portal citizens and businesses will be able to search for information on the limited liability companies registered in Member States, including information in accounting documents. The website of the e-Justice portal provides further information: https://e-justice.europa.eu/content_business_registers-104-en.do

As regards listed companies, the Transparency Directive (2004/109/EC) states that the European Securities and Markets Authority (ESMA) should set technical requirements regarding the access to regulated information at Union level and that, with effect from 1 January 2020, all annual financial reports of issuers shall be prepared in a single electronic reporting format.

4. European Market Infrastructure Regulation (EMIR)

4.1. Conflicts with Undertakings for the collective investment in transferable securities Directive (UCITS Directive) (1)

4.1.1. Submission by the Federation of Finnish Financial Services (FFI)

The European Markets Infrastructure Regulation EMIR was introduced after the financial crisis with the intention of increasing stability in derivatives markets. The regulation strongly recommends that derivatives are cleared through central counterparties and that the finalised trades are registered in trade repositories. This will mitigate the risk that other market participants present to the trade participants. At the same time, however, each trade participant's risks will focus on the central counterparties they use. This will cause problems to UCITS investment funds, because diversification of risks is an essential starting point in their regulation. The restrictions do not take into account the obligation to use CCP clearing set in EMIR. This obligation makes the use of CCPs compulsory for many typically used derivatives contracts. The restrictions set in UCITS practically prevent UCITS funds from using central counterparty clearing in the way it is set in EMIR. They will have to continue using bilateral clearing, which is not in line with the EMIR objectives. It is also not in the best interests of shareholders, as bilateral clearing is more expensive and carries more risks than CCP clearing. After EMIR's central counterparty obligation enters into force, UCITS funds will no longer be able to use the derivatives contracts that are in the scope of the obligation.

CCP risk is not similar to other counterparty risks, and UCITS regulation should therefore be amended so that otherwise justified diversification requirements do not apply to counterparty risks that target CCPs.

4.1.2. Policy Context

The European Markets infrastructure Regulation (EMIR) requires the use of central clearing parties (CCPs) for most over-the-counter (OTC) derivative contracts.

The UCITS Directive contains qualitative and quantitative limits for UCITS engaging in OTC derivative transactions. More specifically, the risk exposure to a counterparty in an OTC financial derivative transaction shall not exceed 5% of the assets of a UCITS, or 10% if the counterparty is a credit institution.

Furthermore, UCITS may only invest in OTC derivatives that are subject to a reliable and verifiable valuation on a daily basis and can be sold, liquidated or closed by an offsetting transaction at any time at their fair value at the initiative of the UCITS (i.e. the unilateral termination clause). In practice, management companies included such unilateral termination clause within the standard ISDA documentation, which governs the fund's use of OTC derivative transactions.

Pursuant to Article 5(4) of EMIR, the new clearing obligation will be subject (amongst other things) to a certain level of standardisation of the OTC contract.

Both provisions in the UCITS Directive go back to 2002, when risks in OTC derivatives were mostly managed bilaterally. At the time, OTC derivatives were far less liquid and were often not centrally cleared.

Indeed, regarding the unilateral termination clause as currently included in the ISDA agreements, it seems likely that most CCPs will not agree to include it within the standard documentation foreseen by EMIR. In the past this clause acted as a safety net for UCITS obliging counterparties to provide liquidity to the UCITS when necessary.

4.2. Conflicts with Solvency II

4.2.1. Submission by the German Insurance Association (GDV)

Irrespective of whether insurance derivatives can be considered financial instruments in the true sense, no contradictions should result through the simultaneous regulation in the Solvency II Directive and the European Market Infrastructure Regulation (EMIR). In contrast to the specific insurance provisions from Solvency II, some provisions in EMIR simply cannot be applied to insurance derivatives (e.g. weather derivatives). For example, Article 11 (3) EMIR mandatorily prescribes the exchange of collateral. According to Article 105 (6) Solvency II, however, there is no collateral requirement for the mentioned derivatives. Collateral to be held by or for the primary insurance company or reinsurance company and the related risks are to be taken into account in the calculation of the solvency capital, if collateral is provided. Because the two pieces of legislation, Solvency II and EMIR, address the risk of the loss of the counterparty, a contradiction exists here.

4.2.2. Policy Context

The provisions on the exchange of collateral under EMIR aim at mitigating counterparty risk of the derivative transaction, whereas in the context of Solvency II collateral is important in relation to capital requirements that are meant to ensure the liquidity of the insurance undertakings.

Under EMIR, a reporting obligation on derivative transactions is laid down aiming at increasing transparency so that relevant authorities, according to their mandates, can access the information they need to assess risk and adopt the necessary measures to reduce systemic risk. The reporting obligation requires counterparties to derivative transactions to report to trade repositories the information to be sent to the relevant authorities.

Moreover, EMIR sets out an obligation to clear certain OTC derivative transactions through central counterparties (CCPs) (the clearing obligation) in order to increase safety and mitigate systemic risk. Over-the-counter (OTC) contracts that are not suitable to be cleared by a CCP also entail risk. In order to mitigate that risk, market participants that are not subject to the clearing obligation should have risk-management procedures in place that require (the timely, accurate and appropriately segregated) exchange of collateral. This obligation to exchange collateral includes all OTC derivatives not subject to the clearing obligation.

Currently, the Commission is conducting a review of EMIR. Particular consideration is given to the impact of EMIR on smaller firms. The results of the review are expected around March 2016.

4.3. Reports for OTC derivative trading

4.3.1. Submission by the German Chambers of Commerce and Industry (DIHK)

The DIHK has repeatedly received complaints from traditional industrial companies (not only financial companies) implementing EMIR obligations. When SMEs use financial intermediates to fulfil their reporting obligations, they have to contractually arrange this delegation and to register and administer their Legal Entity Identifier (LEI).

Even if by now, most companies have implemented their reporting duties, so this considerable one-time effort is largely behind them, an examination should be carried out as to whether simplifications can be made to the clearing and reporting obligations.

Possible starting points for this are, for example:

- Raising the limits beyond which companies are subject to a clearing obligation (currently > 100 derivatives or a nominal value of more than €100 million) or at least an increase in the limits for the requirement for confirmation by the auditor,

- Possibility of reporting aggregated data.

Finally, it should be noted that an important part of the burden in Germany comes from the need to have compliance with EMIR duties certified by the auditor, which is an additional obligation created by the German legislator and not within the responsibility of the European Commission.

4.3.2. Policy Context

The reporting obligation under EMIR was designed to improve transparency in derivatives markets and to enable authorities to have a comprehensive view of derivatives market activity and to monitor risks to the stability of the derivatives markets. It is also aimed at protecting against market abuse. To achieve these objectives, it was decided that all derivatives contracts should be reported to trade repositories (and not just the aggregated positions of market participants). Public authorities can access subsets of this data depending on their legal mandate, so the data reported must be sufficiently far-reaching and granular to satisfy all users.

The clearing obligation under EMIR applies only to financial counterparties and to non-financial counterparties that enter into derivatives contracts above a threshold. Its objective is to reduce systemic risk in financial markets.

The threshold above which non-financial counterparties are subject to the clearing obligation has been designed to capture only companies that "make an extensive use of OTC derivatives". Moreover, derivatives used for hedging purposes do not count for the clearing threshold, which only captures derivatives concluded for speculative activities. SMEs are therefore subject to the clearing obligation under EMIR only if their speculative activity is of a size that could pose a threat to the stability of the financial system.

DIHK highlights that the EMIR reporting obligation is a "burden for SMEs". However, EMIR also allows counterparties to delegate the reporting of derivatives contracts into trade repositories to another entity (which can be the other counterparty to their contract). SMEs can take advantage of this possibility, though they cannot delegate their legal obligation to report. Financial counterparties, service providers and trade repositories are developing new services in this area.

The requirement to have compliance with EMIR duties certified by an auditor is one which is imposed by national law; it is not an EMIR requirement.

5. SOLVENCY II

5.1. Submission by the German Insurance Association (GDV)

Attestation of solvency requirements pursuant to the German Insurance Supervision Act

§ 35(2) of the German Act on the Supervision of Insurance Undertakings provides for an obligatory affirmation of the solvency requirements by the independent auditor. This strictly national provision goes beyond the Solvency II requirements. Article 129(4) of the Solvency II Directive only requires a quarterly calculation and communication of the minimum capital requirement (MCR) to the supervisory authorities.

Requirements for the qualifications of key functions pursuant to the German Insurance Supervision Act

§ 24(1), Sentences 3 and 4 of the Insurance Supervision Act require theoretical and practical knowledge in "insurance transactions" and three years of experience in an insurance undertaking of comparable size and of a comparable business type as necessary qualifications. In accordance with Article 273(2) of the draft delegated legislative acts, in contrast, knowledge in "insurance sector, other financial sectors or other businesses" is expressly to be taken into account. The foreseen tightening in national law narrows the group of qualified persons unnecessarily. Even a move from the banking or securities industry would thus only be possible in rare cases after much effort.

Prohibition on borrowing pursuant to the German Insurance Supervision Act

In § 15(1), Sentence 3 of the Insurance Supervision Act, there is still a prohibition on borrowing for which there is no basis in the European regulations and which does not exist in other Member States of the EU. The prohibition on borrowing places the German insurance industry at a disadvantage.

5.2. Policy Context

The comments relate to the German Act on the Supervision of Insurance Undertakings (Versicherungsaufsichtsgesetz, VAG) which is the main national legislation on the operation and supervision of insurance undertakings implementing the EU Directives on the subject (Solvency I and, as from 1 January 2016 Solvency II). It is not clear whether the issues raised are linked to the German act currently in force (Solvency I), or to the amended act implementing Solvency II which will enter into force on 1 January 2016. As part of its regular monitoring of the application of EU law, the Commission is currently examining the measures national authorities have taken to incorporate the Solvency II Directive into national law. If the Commission detects a possible infringement, it may start a formal infringement procedure.

6. Issues related to Level 2 legislation and European Supervisory Authorities

6.1. Submission by the German Insurance Association (GDV)

General suggestions:

- Article 16 of the EIOPA regulation is not enough as an unspecified basis for issuance of guidelines
- In the possible revision of the ESA regulation binding requirements should be defined for impact assessments by ESAs
- Explicit secrecy requirements for stakeholder groups raise questions concerning accountability and the ability to involve other experts

Specific issues raised:

Divergent definitions at different regulatory levels

In the Technical Advice for delegated acts for the implementation of "IMD 1.5" (Article 91 MiFID2) on the handling of conflicts of interest in the sale of insurance-based investment products, EIOPA proposes a new definition of "inducements" as opposed to "remuneration" which conflicts with the definition in the Directive.

POG within the context of IMD 2 In accordance with Article 25 of the future Insurance Distribution Directive (IDD), in a provision borrowed from Article 16(3) of MiFID 2, Product Over-sight and Governance arrangements by insurance undertakings (POG) are to be introduced not just for insurance-based investment products, but for all insurance products. The entire approach was first raised in the current legislative process by EIOPA, which made preparations for this process without any authorization. In substantive terms, the POG rule leads to an unnecessary expansion of bureaucratic requirements which does not by any means benefit such review processes for the overwhelming majority of simple (non-life) products.

EIOPA guidelines for complex debt instruments

Article 25(10) of MiFID 2 provides for a clear authorization for ESMA to issue guidelines for complex debt instruments and structured deposits. By contrast, EIOPA has acted largely without specific authorization in issuing guidelines for Solvency II. The result has been that this already complex supervisory system has grown to more than 6,700 pages because of these guidelines and the associated explanatory text. It is evident even from the sheer quantity of pages that such copious rules can hardly be mastered.

Expediting Omnibus II

Also worrisome was the initiative to "expedite" the flagging negotiations for the Omnibus II Directive by implementing certain components of the proposal immediately as "guidelines" (cf. EIOPA "Preparatory Guidelines on Solvency II – System of Governance").

S**olvency II guidelines overextend rules**

A large number of Solvency II guidelines go beyond the rules of the Directive and the delegated Regulation. As a result, rules in areas where the lawmakers have created flexible solutions and eased requirements are hollowed or counteracted.

- **Fit & proper requirements:** While the Solvency II Directive, in Article 42, imposes fit and proper requirements only for persons who have a "key function" and effectively run the undertaking, the System of Governance guidelines (Explanatory Text 1.22) speak of persons who "implement key functions", thus extending the scope of the rules to all employees in key functions. Scopes of application which are deliberately limited must not be extended through guidelines.
- **"System of Governance" guidelines:** Although Article 41(3) of the Solvency II Directive requires an annual review of documentation requirements only for certain internal company guidelines, the "System of Governance" guidelines (Guideline 9) includes all written guidelines in the mandatory annual review.

ESA guidelines on cross-selling

The MiFID 2 Directive authorizes ESMA to issue guidelines on cross-selling, in conjunction with EBA and EIOPA. However, cross-selling is defined in Article 4 of the MiFID 2 Directive as "investment service together with another service or product as part of a package or as a condition for the same agreement or package." Nevertheless, the ESAs are currently conducting consultations in preparation for such guidelines which have a far broader scope (namely, packages of all financial products).

Level 2 acts under the Solvency II Framework Directive

The EIOPA's proposed implementing acts for capital add-ons (CP-14/053)41 call for comprehensive cooperation and disclosure requirements which have no basis in Article 37 of the Solvency II Framework Directive. Furthermore, Article 35 of the Framework Directive authorizes the member states to adopt such requirements. The technical standards should do no more than regulate the processes for communicating information.

6.2. Policy Context

The suggestion is focused on EIOPA guidelines on insurance distribution and system of governance for insurance undertakings. It also relates to draft implementing technical standards (ITS) developed by EIOPA on capital add-ons.

The European Insurance and Occupational Pensions Authority (EIOPA), the European Banking Authority (EBA), and the European Securities and Markets Authority (ESMA) are responsible for the coordination of micro-prudential supervision at European level. EIOPA, EBA and ESMA have been established as of January 2011 and are Union bodies with their own legal personality.

The powers assigned to the Authorities include developing draft technical standards as well as guidelines and recommendations, while respecting better regulation principles. The Authorities may, in areas specified in the relevant sectorial legislation, develop draft technical standards in accordance with the procedures set out in Articles 10-15 of the founding Regulations. In order to give the draft technical standards legal effect, the Commission needs to subsequently adopt them by means of delegated acts pursuant to Article 290 TFEU (regulatory technical standards) or by means of implementing acts pursuant to Article 291 TFEU (implementing technical standards). Technical standards are of technical nature and must not imply strategic decisions or policy choices; their content should be delimited by the legislative act on which they are based. Technical standards are ultimately adopted by the Commission.

Guidelines and recommendations adopted by the ESAs pursuant to Article 16 of the ESAs Regulations are of non-binding nature, but have specific characteristics ('comply or explain' effect).

In 2014, the Commission conducted the Review of ESAs (http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014SC0261&from=EN). The review of ESAs concluded that: "Overall, the new instrument of technical standards and the central role of the ESAs in their development are considered by stakeholders as a success. It allows the EU to equip itself with a significant amount of high quality rules within a very short timeframe. Guidelines and recommendations developed under Art. 16 of the ESAs Regulation proved to be a flexible instrument for convergence, although uncertainties remain with regard to their nature and scope.

Finally, for stakeholder groups, the ESAs are to publish on their websites the names of members of the Group, the opinions and advice of the Stakeholder Group, the summaries of conclusions of its meetings and short biographies of its Members.

7. Regulation on key information documents for packaged retail and insurance-based investment products (PRIIPs)

7.1. Coherence of information and investor protection rules in the PRIIPs regulation, the IDD (former IMD2) and Solvency II

7.1.1. Submission by the Federation of Finnish Financial Services (FFI)

Proposals for investor protection in the financial sector contain conflicting and partially overlapping regulations that apply to the same investment products and customer service**.** In revising the regulation of investor protection, the Commission's original goal was to harmonise the regulation of different types of investment products and service providers**.** This would mean that the same set of rules would govern securities, funds etc. and life insurance policies, or banks and insurance companies, for example. FFI supports this idea, but the Commission hasn't reached this goal. The differences between different proposals have only grown during Parliament discussions and negotiations with member states.

For example, at the moment there are overlapping and inconsistent rules and proposals on disclosure requirements regarding costs and risks of investment products in the PRIIPs Regulation, IMD2 proposal and MiFID2 rules. Requirements in the PRIIPs Regulation overlap in certain parts with the disclosure requirements in the Solvency II directive.

Certain rules in the PRIIPs Regulation go beyond the disclosure requirements and, in fact, deal with conduct of business rules, which are tackled with in MiFID2 and IMD2 for different investment products, as they should.

The Commission is now drafting delegated acts on the so-called IMD 1.5 which is included in MiFID2. IMD 1.5 contains similar but not identical conduct of business rules for insurance-based investment products. Same products will be regulated by the IMD2 as well. IMD2 will enter into force only later, after MiFID2 and IMD1.5. We are concerned that two different set of rules need to be applied in a short period of time when these two regimes enter into force.

The cross selling rules, which are included in MiFID2, IMD2 and the Mortgage Credit directive, are another example of inconsistent rules, applied to the same financial services products.

The ESAs have and will produce level 2 and 3 measures on all these fields. Part of level 3 measures are such that the ESAs either do not have a mandate or they are pre-empting the level 1 still under negotiation. All these different measures create a complex network of rules for investor protection. We think it is of central importance to create a clear, comparable and easily applicable set of rules in the area of investor protection. This is in the interest of both customers and the service providers.

7.1.2. Policy Context

The legislative acts referred to in the suggestion differ from each other in essential points.

The <u>PRIIPs Regulation</u> introduces a Key Information Document for the distribution of packaged retail and insurance-based investment products (PRIIPs) to retail investor. Its standardised, very brief format and plain language is to aid investors to understand and compare the main features of investment products offered to them.

The Solvency II Directive lays down the rules for the pursuit of the business and reinsurance in the European Union. It contains requirements on information to be provided to policy holders before the conclusion of an insurance contract.

The Insurance Distribution Directive (IDD, formerly known as IMD2) was adopted by the European Parliament on 24 November and the Council on 14 December 2015. It is expected to enter into force in February/March 2016, i.e. 20 days after the publication in the Official Journal. The new Directive sets the legislative framework for the distribution of insurance in the EU. It will replace the current Insurance Mediation Directive (IMD) which regulates the distribution of insurance products by intermediaries such as agents and brokers.

The rules on information and investor protection set by these instruments vary in accordance with the different objectives, scope and addressees of the legislative acts in question. IDD, for instance, imposes specific information requirements that are adapted to the distribution stage and concern all operators involved in the distribution of insurance products. Solvency II provides obligations for insurance companies to make specific elements of information available to policy holders.

The system of investor protection and information requirements under the different legislative instruments is intended as a consistent set of rules with only very limited areas of intentional overlap. For example, the PRIIPs Regulation states explicitly that it does not replace Solvency II. This is due to the different objectives of the two instruments: While the PRIIPs regulation provides for a standardised document with generic information about the product, Solvency II requires the transmission of customised data on the insurance contract offered to the individual consumer.

IMD 1.5

IMD has been modified in 2014 by the new Directive on markets in financial instruments (MiFID II) which introduced a new chapter with specific customer protection requirements for the sale of insurance-based investment products. This was done as an interim measure to ensure that the investor protection rules introduced in MiFID II are also applied to investment products packaged as insurance contracts. The IDD contains more sophisticated rules and repeals IMD 1.5.

7.2. Overlapping information requirements

7.2.1. Submission by the German Insurance Association (GDV)

The PRIIPs Regulation provides for the information requirements pursuant to Solvency II and those in the Regulation to be taken into equal consideration (Recital 9, Article 3(2)). This regulatory approach has the consequence that identical information will have to be presented in different documents.

The PRIIPs Regulation moreover supplements the measures contained in the Insurance Mediation Directive (IMD1) with respect to the distribution of insurance products (Recital 5). Here, too, information requirements might be doubled. This should be avoided during the further design.

7.2.2. Policy Context

The PRIIPS Regulation introduces a Key Information Document (KID), the purpose of which is to provide retail investors with easy to understand descriptions of the main features of various investment products. Its standardized, very brief format and plain language is to aid comparison of investment products not just within an investment product category but also across a wide range of different product categories on a cross-sectorial basis.

Certain overlaps between KID and disclosure under Solvency II and IMD1 or in the Insurance Distribution Directive (IDD) were intended as the latter have a broader scope and are designed for a different public (information to professional investors and supervisors). The scope of these disclosures will be larger and the information will be more detailed.

Furthermore, according to IMD1/IDD, the distributor will provide the retail investor with additional information on its services which are not in the PRIIPs scope whose focus is on characteristics and comparison of products.

8. DISCLOSURE OBLIGATION FOR INSURANCE COMPANIES

8.1. Submission by the German Insurance Association (GDV)

It is questionable whether the growing number of disclosure regulations for insurers and insurance intermediaries still serve consumer protection or, insofar as this goal is not achieved, represent the build-up of unnecessary bureaucracy. For example, for broker distribution via the Internet there are currently 75 categories of disclosure requirements (based on IMD1, the Life Assurance Directive, Distance Selling Directive, E-Commerce Directive). In the future, there will be 147 (based on the Insurance Distribution Directive (IDD), PRIIPS Regulation, Solvency II Directive, Distance Selling Di-reactive, E-Commerce Directive). Moreover, it is becoming apparent that many of these provisions are and will lead to redundancies that will make application even more difficult.

8.2. Policy Context

The suggestion refers to a number of legislative acts with substantially different objectives, scopes and addressees as summarised below.

The PRIIPs Regulation introduces a Key Information Document for the distribution of packaged retail and insurance-based investment products (PRIIPs) to retail investor.

The Solvency II Directive lays down the rules for the pursuit of the business and reinsurance in the European Union. It contains requirements on information to be provided to policy holders before the conclusion of an insurance contract.

The Directives on distance marketing and on e-commerce provide targeted rules for very specific and well-defined distribution channels, namely distance marketing of consumer financial services and information society services, including all forms of e-commerce.

The IDD sets the legislative framework for the distribution of insurances in the EU. It replaces the current Insurance Mediation Directive (IMD) which regulates the distribution of insurance products by intermediaries such as agents and brokers.

These instruments contain information and disclosure rules which vary in accordance with the different objectives and scopes of the legislative acts in question. IDD, for instance, imposes specific information requirements that are adapted to the distribution stage and concern only the operators involved in the distribution of insurance products. Solvency II provides obligations for insurance companies to make specific elements of information available to policy holders. The directives on distance marketing and e-commerce contain additional information and disclosure requirements that are tailored to the particular needs of the distribution techniques covered by them.

The system of information and disclosure requirements under the different legislative instruments is intended as a consistent set of rules with only very limited areas of intentional overlap. For example, the PRIIPs Regulation states explicitly that it does not replace Solvency II. This is due to the different objectives of the two instruments. While the PRIIPs regulation provides for a standardised document with generic information about the product, Solvency II requires the transmission of customised data on the insurance contract offered to the individual consumer.

9. Regulation on reporting and transparency of securities financing transactions (SFT Regulation)

9.1. Submission by the German Insurance Association (GDV)

The core of the SFT Regulation involves reporting and information requirements. In order to avoid additional bureaucratic obstacles, an effort should be made to use the existing systems. For example, in the case of securities financing transactions, it would be expedient to use the reporting system in accordance with the EMIR Regulation. Moreover, the SFT Regulation contains additional information requirements for fund managers (Article 13). For the design of the UCITS V Directive, the ESMA already presented guidelines for such re-porting requirements. As a result, a problematic situation arises with respect to the relation between the ESMA guidelines and the legal text inter alia

9.2. Policy Context

The proposal sets an EU framework on securities financing transactions (SFTs). It contains three measures to improve the transparency of SFTs. First, all SFTs, except those concluded with central banks, will be reported to central databases known as trade repositories. Second, information on the use of SFTs by investment funds will be disclosed to investors in the regular reports and pre-investment documents of funds. Finally, minimum transparency conditions will need to be met on reuse of collateral, such as disclosure of the risks and the need to grant prior consent.

On 17 June 2015, the co-legislators reached a political agreement on the proposed

Regulation. The agreed text has been subject to legal revision and translation prior to its publication in the EU Official Journal.

- **alignment with reporting under EMIR**

The SFT Regulation was based on the reporting mechanism for derivative contract established under EMIR, namely the reporting obligation, registration, supervision and access to data. As under EMIR, the European Securities and Markets Authority (ESMA) will develop specific technical standards on reporting procedures and formats, access to data procedures and registration procedures for TRs. In developing the technical standards, ESMA shall ensure consistency, to the extent possible, with the existing standards in EMIR, in order to minimise the reporting burden and IT changes. In addition, the co-legislators introduced the possibility for trade repositories already registered under EMIR to follow simplified registration for extension of their services to SFTs.

- **relationship between the ESMA guidelines and the legal text**

The annex to the SFT Regulation lists information on the use of SFTs and TRSs to be disclosed to investors in AIFs and UCITS in the pre-contractual and periodical disclosure documents. This information is not contradictory, however it is more detailed and targeted, in comparison to the ESMA guidelines. ESMA guidelines are not applicable to AIFMs. Thus the SFT Regulation will provide for uniform and legally binding transparency requirements applicable to all fund managers.

10. DIRECTIVE 2014/95/EU ON DISCLOSURE OF NON-FINANCIAL AND DIVERSITY INFORMATION BY CERTAIN LARGE COMPANIES AND GROUPS

10.1. Disclosure requirements

10.1.1. Submission by the German Chambers of Commerce and Industry (DIHK)

Almost all companies with more than 20 employees assume social responsibility in Germany. Their commitment goes beyond the legal regulations on a voluntary basis; accordingly, such information on these matters should also be voluntary. Every fifth company can well imagine that if the reporting requirements become mandatory, they will cut back on their levels of commitment (IHK-Unternehmensbarometer 2012).

The directive does not require a fully-fledged and detailed sustainability report. But the directive requires an additional report which will be a burden for the companies. Furthermore different studies (Eurochambres, CSES) state much higher direct and indirect cost than the EU Commission mentioned (less than € 5.000 per year/ company, i.e. less than €30 million euro on an EU basis).

The proposed directive should therefore be withdrawn or at least implemented with as few burdens as possible.

10.1.2. Policy Context

The Directive 2014/95/EU on disclosure of non-financial and diversity information by certain large companies and groups was adopted by the Council on 29 September 2014.

The text entered into force on 6 December 2014. Member States will have a two-year period to transpose it into national legislation ending in December 2016.

The disclosure requirement applies to large public-interest entities with more than 500 employees. This includes companies listed in EU markets, as well as some unlisted companies, such as credit institutions, insurance companies, and other companies that are so designated by Member States because of their activities, size or number of employees. It is estimated that the number of companies included in the scope of the Directive is approximately 6000.

The new rules will only apply to some large companies with more than 500 employees, as the costs for requiring small and medium-sized enterprises to apply them could outweigh the benefits. For larger companies, costs associated with the required disclosures are commensurate with the value and usefulness of the information, and with the size and complexity of the business.

Companies concerned are required to disclose material information including environmental, social and employee matters, respect of human rights, corruption and bribery matters, and diversity in the boards of directors.

Companies with fewer than 500 employees will not be subject to any new obligations. For larger companies, the required disclosures may be provided at group level, rather than by each individual subsidiary within a group. Auditing will be kept to a minimum.

This measure is expected to improve the transparency of certain large EU companies as regards non-financial information. This legislation aims at relevant, useful information. Companies, investors and society at large will benefit from increased transparency. This is important for Europe's long-term competitiveness and the creation of jobs.

Companies benefit too. Those that already publish information on their non-financial performance are more competitive and successful in the long term. Investors are more and more interested in non-financial information in order to have a comprehensive understanding of a company's position and development, and to analyse and factor this information in their investment-decision process.

The Directive leaves significant flexibility for companies to disclose relevant information in the way that they consider most useful. Companies may use EU-based, international or national guidelines that they consider appropriate (for instance, the UN Global Com-pact, ISO 26000, or the German Sustainability Code).

The cost of the proposed disclosure was estimated in the impact assessment to be between €600 and €4300 per year per company, thus generating a total cost between 10.5 and 75.25 million euros. The cost of disclosure of the diversity policy is estimated to be between €600 and 1000 generating a total cost between 3.6 and 6 million euros.

10.2. Guidelines under development

10.2.1. Submission by the German Insurance Association (GDV)

Article 2 of the Directive on disclosure of non-financial information provides for the European Commission to prepare non-binding guidelines to facilitate reporting of non-financial information by companies. These guide-lines are currently being developed for publication prior to 6 December 2016. The purpose and benefit of these guidelines are very questionable, however. Though uniform reporting would be expedient, this goal does not justify the additional expense and time pressure. There are proven best practices for reporting non-financial information, which are already applied today. Based on these best practices, undertakings are thus preparing for the start of application of the Directive on 1 January 2017. The non-binding guidelines of the European Commission, to be published four weeks before the start of application and more than two years after the Directive came in-to force, consequently do not add any value

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Article 2 of Directive 2014/95/EU requires that the Commission publish non-binding guidelines by 6 December 2016. Concretely, Article 2 sets out: "The Commission shall prepare non-binding guidelines on methodology for reporting non-financial information, including non-financial key performance indicators, general and sectoral, with a view to facilitating relevant, useful and comparable disclosure of non-financial information by undertakings. In doing so, the Commission shall consult relevant stakeholders. The Commission shall publish the guidelines by 6 December 2016."