Contribution

of the German Insurance Association (GDV)*

ID-Number 6437280268-55

on the

European Commission's call for evidence: EU regulatory framework for financial services

Gesamtverband der Deutschen Versicherungswirtschaft e. V.

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*) The German Insurance Association (GDV) represents the interests of the German private insurers. Its 460 member companies offer comprehensive insurance coverage to private and corporate customers through their 427 million insurance contracts. The German insurance industry is one of the biggest institutional investors and significantly contributes to the German economy by employing 533,000 people on a direct or indirect basis.

1. Introductory remarks

The German Insurance Industry appreciates the opportunity to contribute to the European Commission's (EC) call for evidence on the EU regulatory framework for financial services. We welcome and support the regulatory initiatives of the EU institutions to **improve security and resilience of the EU financial system**. The regulatory framework needs to be coherent and consistent. Administrative requirements should ensure an efficient regulatory environment. Additional bureaucratic burdens preventing soundness and sensibility of the system should be avoided. We therefore welcome the EC's explicit objective to better understand the financial legislation that has been recently put in place and the interactions between different measures.

We also share the European Parliament's recently expressed concern[1] about amount, detail and number of layers of regulation and supervision. It is essential to evaluate the impact and possible unintended consequences of regulatory measures with those affected[2]. A pan-institutional commitment to regular check-ups would be highly welcomed in this respect.

With regard to the call for evidence, we would like to raise the following key issues.

2. General comments

The EC's call for evidence focuses on legislation already enacted and implication already proven by respective evidence. We fully understand and acknowledge the intention of the EC in this respect. However, it is important that **negative impact and regulatory consequences are avoided when they become obvious**, even if they are not yet implemented or applied and evidence is not yet available. This particularly holds true for duplicating or conflicting regulatory requirements, bureaucratic burdens and delegated regulatory measures exceeding the mandate of empowerment. With regard to the latter, particular attention should be paid to the **enforcement of the principle of proportionality**. Adjustments foreseen by co-legislators which reflect the size of undertakings, or in case of insurers, the scale and complexity of an insurer's risk profile, should not be undermined by subordinated regulation.

[1] See European Parliament resolution of 19 January 2016 on stocktaking and challenges of the EU Financial Services Regulation: impact and the way forward towards a more efficient and effective EU framework for Financial Regulation and a Capital Markets Union http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0006+0+DOC+XML+V0//EN&language=EN

[2] See a. o. GDV Comments regarding better regulation at the EU level with a view to further discussions in the EU institutions on the EU Regulatory Fitness and Performance Programme (REFIT), July 2015: http://www.en.gdv.de/2015/07/european-commission-should-now-review-regulation-of-the-past-years/

In order to meet the requirements of this call for evidence, the GDV has **identified examples of legislation** which have been adopted by the co-legislators to date **as well as those European measures that have practical de-facto implications** for German insurers, e. g. guidelines issued by the European Supervisory Authorities (ESAs). More general statements on critical regulatory developments are always based on exemplary case studies.

We have included **regulatory measures taken by the ESAs** into our assessment due to the severe impact these measures have on coherence and consistency of financial services regulation in Europe. Due to the mandatory “comply-or-explain” process, national competent authorities usually enact the measures taken by the ESAs. Thus, the “level 3-legislation” by supervisory guidelines and recommendations has a de-facto binding nature. We would therefore like to raise awareness on the critical role these measures can play. We support the ESAs in their objective to coordinate supervision across member states, to foster a consistent application of the regulatory framework and to avoid arbitrage. We do not, however, believe that guidelines are always the best instrument and would urge the EC and the ESAs that such measures should be based on clearly identified shortcomings and proven experience.

Please see the annex to this document for the GDV’s response to this call for evidence.

Berlin/Brussels, 29 January 2016

Annex

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A. Rules affecting the ability of the economy to finance itself and grow

1. Unnecessary regulatory constraints on financing

1.1. Capital requirements for real estate and with respect to guarantees of regional governments and local authorities: Address risks properly

1.1.1. To which Directive(s) and/or Regulation(s) do you refer in your example?

- Directive 2009/138/EC of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)
- Commission Delegated Regulation (EU) 2015/35 of 10 October 2014 supplementing Directive 2009/138/EC of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)
- Regulation (EU) No 575/2013 of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012
- Commission Communication COM(2015) 468 final - Action Plan on Building a Capital Markets Union

1.1.2. Please provide us with an executive/succinct summary of your example:

This example addresses existing rules on real estate (Directive 2009/138/EC vs. COM(2015) 468) and guarantees (Directive 2009/138/EC vs. Regulation(EU) No 575/2013).

- First, the capital requirement for property risk does not reflect the inherent risks adequately

The European Commission (EC) aims at building a Capital Markets Union (CMU). We support the finding that stronger capital markets are needed in order to provide new sources of funding for the real economy and to help increase options for savers. All kinds of long-term investments should be facilitated. To that end, unnecessary regulatory obstacles for long-term investments of the insurance industry should be avoided.

The current amendments to the Delegated Regulation (EU) 2015/35 on infrastructure assets constitute a significant improvement in this respect. However, for property risk the capital requirement is still not reflecting the inherent risks adequately. Property markets are local markets. For many local or regional markets the uniform risk factor of 25% is too high and impedes investments by the insurance industry. This is contrary to the objectives of the CMU project.

- Second, the regulations for both the banking sector and the insurance sector privilege public debt

In Solvency II, exposures to many regional governments and local authorities as well as exposures which are guaranteed by Member States' central governments are granted the same zero risk factor as exposures to the central government itself.

However, guarantees given by regional governments and local authorities to other public sector entities are not recognised. These guarantees are treated like those granted by the private sector. This is not compatible with the privileged treatment of all public sector entities according to Regulation (EU) No 575/2013.

1.1.3. Please provide us with supporting relevant and verifiable empirical evidence for your example:

It is evident that the higher the risk factor for investments and the lower the recognition of guarantees, the higher the barrier to realise profitable infrastructure and property investments due to the increased costs of capital.

1.1.4. If you have suggestions to remedy the issue(s) raised in your example, please make them here:

The above concerns should be addressed quickly given the role of the insurers as the largest institutional investors:

- Under Solvency II, the risk factor for property risk should be reduced to adequately reflect the risk situation.
- Guarantees of regional governments and local authorities as well as guarantees given by national or regional development banks, which themselves benefit from comprehensive and explicit guarantees of territorial authorities, should be recognized and treated in the same way as guarantees of central governments.

1.2. <u>EFSI: Do not crowd out private investors</u>

1.2.1. To which Directive(s) and/or Regulation(s) do you refer in your example?

- Regulation (EU) 2015/1017 of 25 June 2015 on the European Fund for Strategic Investments, the European Investment Advisory Hub and the European Investment Project Portal and amending Regulations (EU) No 1291/2013 and (EU) No 1316/2013 — the European Fund for Strategic Investments

1.2.2. Please provide us with an executive/succinct summary of your example:

With the Investment Plan for Europe the EC intends to mobilise 315 billion EUR in private and public investments across the European Union. The European Fund for Strategic Investment (EFSI) provides potential to crowd in private investment. However, examples from the past show that the participation of the European Investment Bank leads to a decline in financing yields. Private investors might be crowded out from the respective project financing if the requirements of additionality is not enforced properly.

According to Recital 26 and Art. 5 of Regulation (EU) 2015/1017, the EFSI should among others help to avoid market failures or "sub-optimal investment" situations. At the same time, the scope of the EFSI in case of "sub-optimal investment situations" leads to a risk of crowding out private investors if the enforcement of this principle fails. The EFSI might only lead to reduced financing conditions for projects which would have been conducted anyways rather than raise funding for additional infrastructure projects.

1.2.3. If you have suggestions to remedy the issue(s) raised in your example, please make them here:

The EFSI should only be used for projects for which no alternative funding is available. A respective clarification and enforcement is necessary.

2. Market liquidity

N/A

3. Investor and consumer protection

N/A

4. Proportionality / preserving diversity in the EU financial sector

4.1. Solvency II: Do not put disproportionate burden on small insurers

4.1.1. To which Directive(s) and/or Regulation(s) do you refer in your example?

- Directive 2009/138/EC of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II): Art. 29, Art. 35, Art. 36, Art. 42, Art. 49, Art. 51, Art. 53, Art. 54 and Art. 254
- Commission Delegated Regulation (EU) 2015/35 of 10 October 2014 supplementing Directive 2009/138/EC of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II): Articles 275 and 314
- EIOPA-BoS-14/253 Final Report on Public Consultation No. 14/017 on Guidelines on system of governance

4.1.2. Please provide us with an executive/succinct summary of your example:

This example illustrates that there is an excessive and disproportionate burden on small and medium-sized insurers.

One of the key principles of the Directive 2009/138/EC is that its requirements should be applied in a way that is suitable and appropriate to cover the nature, scale and complexity of risks which arise from insurance business (Art. 29 (3). This proportionality principle is based on the respective risk profile of an insurance undertaking and extends to further regulatory levels and specification (Art. 29 (4)). Following the proportionality principle, requirements concerning the organization of an insurance undertaking under Solvency II depend on the size of the undertaking, the extent and volume of its business activities and hence, the respective risk profile.

Recital 19 of Directive 2009/138/EC acknowledges that the consistent application of the principle is particularly important for small and medium-sized insurers to prevent excessive and disproportionate regulatory burden on them. Moreover the European legislator confirms that the principle should apply both to the requirements imposed on the insurance and reinsurance undertakings and to the exercise of supervisory powers.

Experience shows that the application of the proportionality principle is impaired in practice (see below).

4.1.3. Please provide us with supporting relevant and verifiable empirical evidence for your example:

It is unclear how the proportionality criteria in Art. 35 (8) of Directive 2009/138/EC will be applied in practice. The true impact can only be judged once Solvency II is operational.

However, there are several specific examples to illustrate our concerns:

- Solvency II is a highly complex system consisting of numerous provisions which are specified and amended on several regulatory levels (see example 1/10). For instance, the set of Solvency II rules amounts to over 6,500 pages. As a consequence, it is very burdensome for SMEs to keep track of all requirements and their interdependencies. Duplication and repetition of provisions on different regulatory levels does not add value to insurance supervision.
- There are provisions that simply do not allow for differentiation between insurance undertakings of different sizes and risks. An example is the requirement on remuneration in Art. 275 of Commission Delegated Regulation (EU) 2015/35. There is no distinction between different types of insurers and, hence, applying proportional requirements is not possible.
- The new system foresees extensive reporting requirements: Insurers have to submit highly granular annual and quarterly information on their risk situation. The implementation of the required reporting templates, including technical and procedural issues, entails considerable efforts. However, there are no indications showing that the required level of detail is actually necessary for small companies with a simple risk profile or that it helps improving their solvency situation.
- There is a tendency that provisions that actually allow for proportionate flexibility on Level 1 are standardised to the very detail at subordinate levels, in particular through guidelines of the European Insurance and Occupational Pensions Authority (EIOPA) and interpretations by national supervisors. Striking examples for that trend are the reporting provisions under Directive 2009/138/EC such as Articles 35 and 36 as well as Articles 51, 53, 54. The flexibility granted by the Directive 2009/138/EC is undermined by further specifications and requirements on subordinate regulatory levels. The same applies to various governance provisions. For instance, undertakings are allowed to outsource key functions (Recital 31, Art. 49 of Directive 2009/138/EC). Guideline 14 in EIOPA-Bos-14/253 requires from the outsourcing undertakings to designate a special person within the undertaking that should be considered as the person responsible for the key function according to Art. 42 (2) of Directive 2009/138/EC and that needs to be notified to the supervisory authority. This contradicts the sense of an outsourcing and is not required by Art. Directive 2009/138/EC.
- There are several cases where the national supervisor extended reporting requirements although they are strictly limited to certain aspects on European level. An example is Art. 314 of the Commission Delegated Regulation (EU) 2015/35. This requires qualitative explanations of the main differences between the figures reported in the opening valuation as required in para. 1 point (a) of that article and those calculated according to the former solvency regime. The German national supervisor goes far beyond and requires additional qualitative explanations on capital manage-

ment. Smaller undertakings are particularly affected by these additional obstacles. Moreover, the current situation runs contrary to the objective of harmonizing reporting requirements in Europe and leads to divergence at technical level.
- For small companies, several provisions in the field of governance are inappropriate and highly impracticable. Small companies are not able to implement them without simplifications. For example, it is virtually impossible to introduce four independent key functions in a company with seven employees.

4.1.4. If you have suggestions to remedy the issue(s) raised in your example, please make them here:

- The principle of proportionality as a central legal premise of the Solvency II regime should be respected not only at single points, but in general.
- It should be assessed whether the current reporting requirements are too extensive and detailed, taking into account the experience gathered from the implementation of Solvency II.
- Supervisory authorities can apply Art. 254 of Directive 2009/138/EC to exempt insurance undertakings from certain reporting requirements as part of the quarterly reporting. If all individual insurance undertakings are exempted, an insurance group should receive an automatic exemption as well.
- It should also be critically verified whether the current governance requirements are sufficiently practice-oriented, especially for small companies. Requirements that turn out to be unfeasible without providing any added value to companies and supervisors should be adapted to better reflect the reality of business.
- To avoid excessive volume of regulation it should be ensured that provisions are not repeated on subordinated levels.
- If a requirement at European level is limited to certain aspects it should be ensured that this requirement has to be limited to those aspects on national level as well. National supervisors are not free to act in contradiction with decisions taken on the European level.
- Similar to the upcoming Europe-wide Solvency II review process of Pillar I, provisions on governance and reporting should be reviewed to analyse their sufficient implementation, i.e. reflecting the proportionality principle. Guidelines that are too extensive or detailed should be deleted. In general, provisions that do not provide room for differentiation between insurance undertaking according to their risk profile, size and importance should be revised.

4.2. Sector-specific regulation: Strengthen the insurance perspective in the context of cross-sectoral regulation in relation to other ESAs and to the ECB

4.2.1. To which Directive(s) and/or Regulation(s) do you refer in your example?

- Regulation (EU) No 1094/2010 of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC
- Regulation (EU) No 1093/2010 of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC
- Regulation (EU) No 1095/2010 of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC
- Regulation (EU) No 1286/2014 of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs)
- JC/2015/007 Joint Committee Report on risks and vulnerabilities in the EU Financial System
- JC/CP/2014/05 Joint Committee Consultation Paper on Guidelines for cross-selling practices
- EIOPA-BoS-14/150 Consultation Paper on the proposal for Guidelines on product oversight & governance arrangements by insurance undertakings

4.2.2. Please provide us with an executive/succinct summary of your example:

This example proves that, according to Regulations (EU) No 1093/2010, No 1094/2010 and No 1095/2010, each financial sector should be regulated specifically to their needs and requirements.

The following four examples demonstrate the developments and challenges relating to the practical application of the premise:

1. Joint Committee (JC) report on Loss databases
2. PRIIPs (Packaged retail and insurance-based investment products) Regulation
3. ESA Draft Guidelines on cross-selling
4. EIOPA draft Guidelines on product oversight and governance

In cross-sectoral discussions, EIOPA has the important task to provide insurance-specific expertise and to make sure that the characteristics of the

insurance industry are taken into account. The European System of Financial Supervision (ESFS) is based on a three-pillar structure, which provides for a sector-specific approach with regard to regulation. This also applies to financial conglomerates which are supervised by the European Central Bank (ECB).

In addition, the JC of the European Supervisory Authorities (ESAs) serves as a regulatory forum for cross-sectoral topics such as accounting, auditing and, to an increasing extent, consumer protection. Some topics are commonly regulated for the insurance, securities as well as the banking sector. There is a tendency that an increasing number of topics are being discussed in the JC. The main reason is to ensure a level playing field.

We have the impression that, unfortunately, the insurance perspective is not always sufficiently considered in cross-sectoral regulation.

4.2.3. Please provide us with supporting relevant and verifiable empirical evidence for your example:

Example 1: JC on loss databases

The JC called in a Joint report (JC 2015 007) for the implementation of additional measures to pre-vent risks in the entire financial industry. It proposed to require that loss databases are built up for the purpose of analysing and managing operational risks. Based on examples of the banking industry only, it was pointed out that the financial industry has incurred major reputational and financial damages caused by detrimental business practices in recent years.
Loss databases are, however, no appropriate means to manage operational risks in insurance undertakings. While banks focus on short-term speculative profits in the context of proprietary trading in particular, the business model of insurance undertakings is based on a long-term perspective and sustainability.

Accordingly, major operational risks which are based on inadequate incentive systems related to short-term speculation profits are not an issue for insurance undertakings. Consequently, EIOPA – during the preparatory phase – explicitly ruled out in its Final Report “System of Governance” that operational databases would be required. It is therefore incomprehensible that these insurance-specific assessments have not been addressed in the discussion of the Joint Committee.

Example 2: PRIIPs Regulation (Regulation (EU) No 1286/2014)

The legislator’s ambition to compare all retail investment products in a unique manner resulted in an unintended neglect of some important features of insurance-based investment products. Consequently, consumers will not be provided with optimum information. Methods that enable a comparison of short-term speculative products with a duration of several days with long-

term saving products with a duration of several decades automatically lead to low granularity of information. For further explanation see supporting evidence in example 2 of issue 5 (Question 3 therein).

Example 3: ESA draft Guidelines on cross-selling (JC/CP/2014/05)

There are specific provisions on cross-selling in the banking, securities as well as in the insurance industry (MiFiD, PAD, MCD, IDD in the future). Some of these provisions vary significantly in terms of content and scope. Nonetheless, overall guidelines were consulted in the Joint Committee. This was even done prior to the trilogue agreement of the EU legislators on the Insurance Distribution Directive (IDD). The legislative provisions regarding the insurance sector were not finalized at the time of the consultation.

Example 4: EIOPA draft Guidelines on product oversight and governance (EIOPA-BoS-14/150)

The role models of the provisions consulted for the insurance sector are found in the banking and securities sector. Just applying the assessments to the insurance sector, however, is not appropriate given the broad range of products. For instance, a simple motor insurance does not require a complex definition of the target market, since such a definition does not provide any added value but instead causes additional efforts that might have to be born by customers. Adequate solutions for companies and customers can only be found within the scope of an insurance-specific approach.

4.2.4. If you have suggestions to remedy the issue(s) raised in your example, please make them here:

- It is necessary to strengthen the autonomous representation of insurance issues by EIOPA in the JC and ensure a qualified approach towards the specificities of the insurance business model.
- While information exchange between the ESAs is indispensable, it is of utmost importance for the insurance sector that there is no application of banking standards to the insurance sector without closer scrutiny, in particular no one-size-fits-all approach.
- A general reference to the requirement of a level playing field does not justify that requirements in the different sectors are equated.

B. Unnecessary regulatory burdens

5. Excessive compliance costs and complexity

5.1. Solvency II and EIOPA Guidelines: Reduce excessive documentation requirements

5.1.1. To which Directive(s) and/or Regulation(s) do you refer in your example?

- Directive 2009/138/EC of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II): Art. 41 (3); Art. 44 (2); Art. 55 (1); Art. 35 (5)
- Commission Delegated Regulation (EU) 2015/35 of 10 October 2014 supplementing Directive 2009/138/EC of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II): Art. 258 (2); 259 (1) lit. c; Art 260 (1); Art. 308 (6) lit. b; Art. 270 (19); Art. 308 (5) lit. c; Art 274 (1); Art. 294 (8); Art. 258 (3); Art. 275 (19, Art. 294 (1) lit. c; Art. 324 (2) lit. a; Art. 261 (19); Art. 267 (2)
- EIOPA-BoS-14/259 Final Report on Public Consultation No. 14/017 on Guidelines on own risk and solvency assessment

5.1.2. Please provide us with an executive/succinct summary of your example:

This example illustrates that documentation requirements for insurers are excessive:
As set out in Art. 41 of Directive 2009/138/EC and EIOPA-BoS-14/259 (Guidelines 3-10)", the Administrative Management and Supervisory Body (AMSB) of an insurance undertaking has to approve all policies of the system of governance. Accordingly, all policies shall be reviewed on an annually bases. Therefore, undertakings are forced to permanently review policies – even if obviously no changes are needed. As a consequence, a lot of resources are tied up and unnecessary costs and administrative burden are accumulated.

Documentation requirements on Level 1 are in some cases even unlawfully expanded further by EIOPA Guidelines. For example, Art. 41 (3) of Directive 2009/138/EC stipulates a yearly assessment of specific internal guidelines. However, EIOPA-BoS-14/259 (Guideline 9) requires all written internal guidelines to be evaluated. Also EIOPA-BoS-14/259 (Guideline 31) asks for rules on asset management which are not included in the abovementioned provision of the Directive 2009/138/EC.

5.1.3. Please provide us with supporting relevant and verifiable empirical evidence for your example:

Directive 2009/138/EC requires that insurance undertakings create more than 20 policies concerning their governance.

Another problem is that one single guideline can have several hundred pages. In consequence, the average company has to elaborate, implement and review (annually) policies which often amount of several thousand pages. In particular Small and Medium-sized Enterprises ()are hardly able to meet these expectations.

Examples for such policies are:

- EIOPA-BoS-14/259 (Guideline 13) in conjunction with its Technical Annex provides for excessive formal obligations to proof the “fit&proper”-criteria
- According to EIOPA-BoS-14/259 (Guideline 4) all decisions of the AMSB and the inclusion of Risk Management in their decisions are to be documented
- Art. 244 Delegated Regulation (EU) 2015/35 requests documentation of the internal model which in its extent are overly excessive
- According to Art. 258 (1) lit. l and Art. 275 Delegated Regulation (EU) 2015/35 insurers need to set out in writing their remuneration policy in high detail

5.1.4. If you have suggestions to remedy the issue(s) raised in your example, please make them here:

- The number of mandatory policies should be reduced. The EC should review the necessity of legally binding internal guidelines and should urge EIOPA to act accordingly.
- The companies should have the sole responsibility for the content-related design of the guidelines (content and scope). There is no need for detailed guidelines regarding mandatory policy content. Each insurer has specific characteristics in terms of organization and risk profile and, thus, requires different content in its policies.
- The obligatory annual policy review should be deleted. Instead, a review should be mandatory if there have been significant changes in the field of the policy.
- Policies with purely operational content should not be subject to a prior approval by the AMSB. In such cases the respective division manager (e.g. the owner of a key function) should be responsible.

5.2. PRIIPs: Avoid short implementation periods and contradicting goals

5.2.1. To which Directive(s) and/or Regulation(s) do you refer in your example?

- Regulation (EU) No 1286/2014 of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs) - Levels 1 and 2

5.2.2. Please provide us with an executive/succinct summary of your example:

Regulation (EU) No 1286/2014 provides that consumers will receive a short concise information document about the key features of the product. We welcome enhanced transparency and comparability of different PRIIPs. Two main concerns remain, however:

First, the period provided for the industry to implement the Key Information Document (KID) for PRIIPs is extremely tight. According to the timetable pursuant the Regulation and taking into account the expected date for the EC's adoption of the draft regulatory technical standards (RTS), as well as the European Parliament's (EP) and the Council's period for objection, there will only be maximum six months for the industry to implement several sophisticated risk indicators for different classes of products, cost indicators and performance scenarios. Such a short implementation timeframe is unrealistic. Manufacturers will definitely need more time to develop and implement methods which will result in trustworthy, meaningful, comparable, and stable information for consumers.

Second, the legislators' ambition to compare all retail investment products in a unique manner resulted in neglect of some important features of insurance-based investment products, meaning that consumers will not be provided with optimum information. Methods that enable a comparison of short-term speculative products with a duration of several days with long-term saving products with a duration of several decades automatically lead to low granularity of information.

One aim of the Regulation (EU) No 1286/2014 – to compare all investment products available to retail investor in a unique manner – is not compatible with the other aim of the PRIIPs Regulation – to enable consumers to understand the key features of investment products (see Art. 1).

5.2.3. Please provide us with supporting relevant and verifiable empirical evidence for your example.

Providers will only have few months (not more than six) to implement several sophisticated methods for representation of risk, performance and costs for various products.

The legislators' ambition to compare as many products as possible will lead to consumers not receiving optimum information:

- risk indicators are not able to differentiate between different products with guarantees,
- explanatory power of performance scenarios for short-term and long-term products is presumed to be the same
- the presentation of important features is not balanced:
  There is not sufficient space foreseen for the crucial information on biometric risk cover due to length limitation. The provisions on costs disclosure do not make it sufficiently clear (e.g. in Art. 8(3)(f)) that
  - ° premiums for protection against biometric risks are not costs, since retail investors receive insurance benefits for these payments,
  - ° annualised costs instead of total costs for the whole investment period should be compared as it is the only meaningful way to compare, for example, a product with a few months investment period and one characterised by a 30 years investment period.

5.2.4. If you have suggestions to remedy the issue(s) raised in your example, please make them here.

- The industry should have been provided with a much more adequate implementation period for such an important and complex document that will require comprehensive IT system developments with the providers.
- European regulators and supervisory authorities musto ensure that they provide for sufficient time for Level 2 consultations and for implementation in future legislation.
- The objectives of the future legislation should be assessed thoroughly and impact assessment should be updated to take into account on-going developments in order to avoid contradicting goals.

5.3. <u>IDD: A Product Information Document (PID) for all customers creates disproportionate burden</u>

5.3.1. To which Directive(s) and/or Regulation(s) do you refer in your example?

- PE-CONS 49/15: Directive on insurance distribution and repealing Directive 2002/92/EC (recast): Art. 20 (4, 5) - Adopted text yet to be officially published

5.3.2. Please provide us with an executive/succinct summary of your example:

In commercial insurance there is a vast variety of insurance products which cover the different risks of commercial customers. The covers may also be individualised and negotiated by the commercial customer and the insurer.

In these cases, the provision in Art. 20 (4) IDD creates disproportionate financial and organizational burden for insurance undertakings by demanding a Product Information Document (PID) for each customer instead of each consumer. Only large risks within the scope of the Directive 2009/138/EC are excluded from the scope.

Insurance products for professional customers are usually tailor made-products, sometimes even customized according to the individual needs of professionals with their unique interest in insurance coverage. Offering a PID for each and every of these complex products requires a disproportionate effort and creates tremendous compliance costs. A clear need of professional customers for additional information cannot be observed and has to our knowledge not been uttered by the various organizations representing these undertakings.

5.3.3. Please provide us with supporting relevant and verifiable empirical evidence for your example:

The variety of relevant covers in commercial insurance requires the development of a huge amount of PIDs. The relevance differs from undertaking to undertaking. However, an idea as to the amount of documents that needs to be generated can be derived from the variety of liability insurances. Such insurances address the liability risk of the various customers. The risks are fundamentally different and thus are covered by different products. Such products take into account the respective risk situation (e.g. pharmacies, architects, medical profession, lawyers, car workshops, agriculture and forestry industry with production plants with individuals insurance risks) and often offer customized insurance protection. The costs to draft and constantly update the respective PIDs for commercial customers will be enormous.

5.3.4. If you have suggestions to remedy the issue(s) raised in your example, please make them here:

The obligation to provide a PID under the IDD should be limited to cases of distribution to consumers only.

6. Reporting and disclosure obligations

6.1. <u>Financial stability reporting: Align reporting deadlines with Solvency II</u>

6.1.1. To which Directive(s) and/or Regulation(s) do you refer in your example?

- Directive 2009/138/EC of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)

- EIOPA-BoS-15/107 Final Report on public consultation No. 14/045 on Guidelines on reporting for financial stability purposes

6.1.2. Please provide us with an executive/succinct summary of your example:

Please note that this example also qualifies for Issues 12.

This example illustrates that the current system of financial stability reporting duplicates data requirements under Solvency II.

It constitutes a big challenge for insurers to be able to fulfil all future reporting requirements – annual financial statements, Solvency II, ECB statistics, financial stability reporting, tax statements - in a consistent and efficient way. Insurers have to deal with different deadlines which will cause enormous extra costs due to multiple reporting processes and different data basis (estimates and accurate data). We do not see the benefit to report almost identical information as for regular Solvency II reporting but in a shorter timeframe. One example:

According to the EIOPA-BoS-15/107 groups under the scope of financial stability reporting have to provide e.g. balance sheet information within seven weeks after the year-end reference date. The same information has to be reported again four weeks later for 4th quarter Solvency II reporting and 19 weeks later for annual Solvency II reporting.

Thus, insurers have to either run threefold calculation for three different reporting requirements or they have to shorten all processes up to seven weeks. The latter is almost impossible if one considers that groups have to consolidate data from their solo entities first. In addition, insurance undertakings are likely to run into HR-related bottle necks at year end when not only financial stability reporting and Solvency II reporting is due, but also the annual financial statements.

It is not understandable how a shorter deadline of four weeks will have an impact of financial stability analysis or on the stability of the financial system. But it has a huge effect on insurers' reporting processes, resources and costs which at the end have to be born by the policyholder. Moreover, not only big insurers are affected by EIOPA-BoS-15/107 but also SMEs of tgroups are subject to financial stability reporting.

6.1.3. Please provide us with supporting relevant and verifiable empirical evidence for your example:

The following identical quarterly information have to be submitted again for regular Solvency II reporting 4 weeks after financial stability reporting is due (i.e. 11 weeks after end of quarter):

- Solvency II balance sheet
- Information on own funds
- Premiums, claims and expenses by country
- Asset-by-asset list

Additionally, there is one annual information which is also part of annual Solvency II reporting which is regularly due 19 weeks later (i.e. 26 weeks after end of year):

- Information on life obligations analysis

6.1.4. If you have suggestions to remedy the issue(s) raised in your example, please make them here:

Align reporting deadlines with the Solvency II reporting deadlines.

6.2. EMIR: Current reporting requirements are burdensome

6.2.1. To which Directive(s) and/or Regulation(s) do you refer in your example?

- Regulation (EU) No 648/2012 of 4 July 2012 on OTC derivatives, central counterparties and trade repositories: Art. 9
- Commission Delegated Regulation (EU) No 148/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories with regard to regulatory technical standards on the minimum details of the data to be reported to trade repositories
- Commission Implementing Regulation (EU) No 1247/2012 of 19 December 2012 laying down implementing technical standards with regard to the format and frequency of trade reports to trade repositories according to Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories

6.2.2. Please provide us with an executive/succinct summary of your example:

For exchange-traded derivatives (ETD), double-sided reporting (DSR) seems unnecessary in context of European Market Infrastructure Regulation (EMIR) reporting obligations. The parties acquire and sell derivative products under the respective market places conditions, so that all details are agreed and no dispute can arise. In case of exchange traded derivatives the mandatory DSR does not improve data quality and can therefore be changed into one-side reporting.

6.2.3. Please provide us with supporting relevant and verifiable empirical evidence for your example:

Any time a buying-side acquires an ETDs at a futures exchange, all conditions of the respective derivative contract are precisely fixed and agreed upon in advance. Contractual partner of the buying-side is always a clearinghouse, which guarantees the contracts duties.

6.2.4. If you have suggestions to remedy the issue(s) raised in your example, please make them here:

ETDs as non-OTC-derivatives should explicitly be exempted from EMIR's DSR obligation. If clearinghouses would report single-sided in future, data quality would remain the same but reduce market participants reporting burdens remarkably.

6.3. EMIR, MiFID and Solvency II: Do standardise reporting formats

6.3.1. To which Directive(s) and/or Regulation(s) do you refer in your example?

- Regulation (EU) No 648/2012 of 4 July 2012 on OTC derivatives, central counterparties and trade repositories
- Directive 2004/39/EC of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC
- Directive 2009/138/EC of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)

6.3.2. Please provide us with an executive/succinct summary of your example:

Many pieces of legislation – most prominently Regulation (EU) No 648/2012(EMIR), Directive 2004/39/EC (MiFID) and Directive 2009/138/EC of 25 (Solvency II) - provide different reporting formats. The reporting formats should be standardised and reported to one competent authority or trade repository (single entree point). Key data should be clearly defined.

6.3.3. If you have suggestions to remedy the issue(s) raised in your example, please make them here:

A new architecture of reporting requirements in the European financial supervisory law would require careful consideration.

7. Contractual documentation

N/A

8. Rules outdated due to technological change

8.1. IDD: Paper-based communication should not be default option

8.1.1. To which Directive(s) and/or Regulation(s) do you refer in your example?

- PE-CONS 49/15: Directive on insurance distribution and repealing Directive 2002/92/EC (recast): Art. 23 – Adopted text yet to be officially published

8.1.2. Please provide us with an executive/succinct summary of your example:

Default paper requirements for information provision as stipulated in Art. 23 of the IDD are not appropriate in the light of changes and possibilities offered by digitalization. The default paper-based communication does not keep up with the consumers' wishes for information being available prompt, easy and by means of electronic communication on mobile devices.

8.1.3. Please provide us with supporting relevant and verifiable empirical evidence for your example:

If a customer wants to conclude an insurance contract exclusively by means of distance communication, the first step of communication should not be the mandatory choice between information on paper and information on a durable medium or by means of a website. The format of information should already be adapted to the means of distance communication used for contracting.

8.1.4. If you have suggestions to remedy the issue(s) raised in your example, please make them here:

- Art. 23 of the IDD according to which paper should be the default setting for costumer communication should be amended and be made fit for digitalization.
- Do not require insurance distributors to ask costumers using distance communication to actively decide against paper communication.

9. Barriers to entry

9.1. Solvency II: Do allow all IORPs to use reinsurance directly

9.1.1. To which Directive(s) and/or Regulation(s) do you refer in your example?

- Directive 2005/68/EC of 16 November 2005 on reinsurance and amending Council Directives 73/239/EEC, 92/49/EEC as well as Directives 98/78/EC and 2002/83/EC: Art. 2(2)
- Directive 2009/138/EC of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II): Art. 13(7)(a)

9.1.2. Please provide us with an executive/succinct summary of your example:

Under 'Reinsurance' Directive 2005/68/EC Member States could allow reinsurers to provide cover to Institutionsinstitutions for Occupational Retirement Provisionoccupational retirement provision (IORPs) directly (Art. 2(2)). Directive 2009/138/EC, which is applied since 1 January 2016, changes the definition of reinsurance in such a way that it will suppress the ability for reinsurers to provide cover to IORPs directly (Art. 13(7)(a)).

9.1.3. Please provide us with supporting relevant and verifiable empirical evidence for your example:

IORPs play a major economic and social role in the European Union. Also, IORPs carry a significant amount of market and biometric risks. For instance, IORPs offering annuities may be exposed to sizeable longevity risks, for which it is essential that they get adequate coverage. Reinsurance, as a security mechanism for carriers of occupational pension schemes, has the capacity to add stability to the pension system by offering such coverage.

Under Directive 2005/68/EC Member States could allow reinsurers to provide cover to IORPs directly (Art. 2(2)): This is unquestionable since from a risk perspective the reinsurance of occupational pension schemes is very similar to the reinsurance of group life portfolios. While IORPs and insurance companies can have different characteristics, both can provide a cover against similar risks (e.g. mortality, morbidity, invalidity). This is why a number of Member States such as Germany, France, Belgium and Portugal, along with others, have made use of this option.
Directive 2009/138/EC, which is applied since 1 January 2016, changed the definition of reinsurance in a way that it suppressed the ability for reinsurers to provide cover to IORPs directly (Art.13(7)(a)).

For the reasons mentioned above, we believe that this new development is unfortunate for reinsurers, IORPs, pensioners and employers. It is also our understanding that this modification was not the result of a clear intention.

Moreover, the core competency of reinsurers is protection against some specific risks such as peak risks and protection of very large portfolios. Therefore, reinsurers can offer particularly efficient protection against these risks to IORPs. We strongly supports that all IORPs should be able to use reinsurance directly.

9.1.4. If you have suggestions to remedy the issue(s) raised in your example, please make them here:

The issue can be remedied through an amendment in Art. 76(1)(c) of the proposed Directive (COM(2014) 167 final), which is currently discussed. The definition of reinsurance should allow all IORPs to use reinsurance directly.

C. Interactions of individual rules, inconsistencies and gaps

10. Links between individual rules and overall cumulative impact

10.1. Too many layers of regulation: Reduce the quantity and increase coherence

10.1.1. To which Directive(s) and/or Regulation(s) do you refer in your example?

- Regulation (EU) No 1094/2010 of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC (European Insurance and Occupational Pensions Authority): Art. 16
- Directive 2009/138/EC of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II): Art. 42
- EIOPA-BoS-14/150 Consultation Paper on the proposal for Guidelines on product oversight & governance arrangements by insurance undertakings
- JC/CP/2014/05 Joint Committee Consultation Paper on guidelines for cross-selling practices
- ESMA/2014/SMSC/1189 Consultation paper on Guidelines on the application of C6 and C7 of Annex I of MiFID

10.1.2. Please provide us with an executive/succinct summary of your example:

This example illustrates that there are too many layers of regulation and an excessive number of provisions which have to be considered by insurers. These lead to disproportionate compliance costs and unnecessary complexity.

If solved, high-quality and consistent regulation reduces the necessary efforts and in consequence the cost of undertakings and supervisors (development, consultation, and implementation).

The quality of regulation in the insurance sector is currently impaired by the excessive number of provisions and the level of detail at up to seven regulatory levels. For example under the Solvency II regime, German insurers have to comply with the following provisions:

1. Directive 2009/138/EC (Solvency II)
2. Delegated Regulation (EU) 2015/35 and Regulatory Technical Standards (RTS)
3. Implementing Technical Standards (ITS)
4. EIOPA Guidelines
5. EIOPA Opinions
6. German Insurance Supervision Act (VAG)
7. Announcements of the national supervisory authorities

Add to this the announced international provisions (International Association of Insurance Supervisors (IAIS) capital standards, for instance).

For instance, it can be observed that EIOPA extends the Solvency II rules by tightening provisions of the Solvency II Directive 2009/138/EC and creating unnecessary redundancies and specifying already existing provisions. The set of rules now comprises more than 6,700 pages. Contrary to the principle-based approach, many of the provisions are characterised by a high level of detail. Moreover, the individual regulatory levels are not sufficiently aligned to each other. The large number of regulations results in a reduction of legal clarity and transparency as well as a significant increase in bureaucratisation.

Fewer regulatory levels will not only result in less consultation and implementation efforts but also in fewer issues causing conflicting provisions and uncertainties. It is therefore reasonable to clarify the limits of the application of guidelines. According to Art. 16 of Regulation (EU) No 1094/2010 guidelines serve the purpose of harmonising supervision and application of Union law. Guidelines, however, are not a general instrument to enforce independent regulatory aspects defined by the ESAs.

In addition, the credibility of guidelines to harmonise provisions is severely restricted as compared to binding Level 2 measures: National competent au-

thorities (NCAs) decide on “whether” and “how” they are being implemented in Member States. Divergences in the transposition pose the risk that the legal requirements will be fragmented further.

According to recital 25 of Regulation (EU) No 1094/2010, the authority does not have the power to issue guidelines in areas covered by technical standards. Guidelines should only be allowed for where there is sufficient evidence that they are required for a coherent application of EU law. There are several examples in the current regulatory practice where these requirements have not been fulfilled.

10.1.3. Please provide us with supporting relevant and verifiable empirical evidence for your example:

To support the above mentioned, we refer to the following examples:

- EIOPA has consulted guidelines on product governance and oversight (POGs), without waiting for the parallel discussion of the European legislator within the scope of the trilogue on the IDD. So no regulatory law existed at that time. It is yet unclear whether EIOPA will now stick to its intention to issue guidelines despite the empowerment with regard to Level 2 measures in the IDD. In practice, this would result in double implementation efforts for the undertakings.
- Guidelines going beyond binding EU law are equally critical. For instance, the scope of application of Art. 42 of Directive 2009/138/EC with regard to personnel, which has been restricted deliberately, is explicitly extended by the proposals of EIOPA on the interpretation of the fit and proper requirements.
- The JC of the ESAs also drafted Guidelines on cross-selling even though a respective basic decision by the legislator had been missing.
- A parallel discussion also takes place at ESMA. Despite the existing empowerment of the EC to develop delegated acts and already started work on this issue, ESMA has published guidelines on MiFID I Annex C6 and C7 (definition of derivatives). With the publication of these guidelines, ESMA anticipates the politically legitimate procedure on the delegated acts.

10.1.4. If you have suggestions to remedy the issue(s) raised in your example, please make them here:

- Specify the legal framework (Art. 16 of Regulation (EU) No 1094/2010) with regard to the adoption of guidelines:
  - º Guidelines must not anticipate basic political decisions and current EU legislative procedures and must not be used in lieu of missing political compromises.
  - º Guidelines must not go beyond binding regulations or extend these arbitrarily by means of general provisions.

- Guidelines should only be applied on a subsidiary basis:
  - º In terms of regulation, Level 2 standards are always to be preferred to

guidelines. They establish directly binding uniform implementation standards and prevent “gold plating” when respective provisions are being implemented at national level.
  - The application of guidelines should depend on the necessity and appropriateness of these guidelines to ensure a consistent application of the law.

- EIOPA should not issue guidelines in areas in which the EC has been empowered to develop delegated acts and Implementing Technical Standards.

10.2. EIOPA Guidelines: Refrain from introducing quasi-binding legislation through explanatory text

10.2.1. To which Directive(s) and/or Regulation(s) do you refer in your example?

- Regulation (EU) No 1094/2010 of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC
- EIOPA-CP-14/017 2 June 2014 Consultation Paper on the proposal for Guidelines on system of governance and own risks and solvency assessment
- EIOPA-CP-14-020 Cover note for the Consultation on Guidelines for Solvency II (set 1)
- EIOPA-BoS-14-253 Final Report on Public Consultation No. 14/017 on Guidelines on system of governance

10.2.2. Please provide us with an executive/succinct summary of your example:

This example will show that explanatory texts to EIOPA guidelines are quasi-binding in practice.

Most of the EIOPA guidelines are coming along with extensive explanatory text. According to EIOPA, the explanatory text “may be to indicate how the guidelines could be applied in particular cases or circumstances, but where it is not appropriate to prescribe an approach which should be complied with. In other areas, for example where complex calculations are necessary, the explanatory text may be used to explain or illustrate the approach and sometimes contains detailed examples.”

During the consultation phase concerning EIOPA Set 1 (see page 13 of EIOPA-CP-14-020) EIOPA emphasized that “the guidelines are intended to be self-standing” and “that the consultation focuses on the guidelines and not on the explanatory text.”

Against this, EIOPA states in the Final Reports for the EIOPA Set 1 (see page 7 of EIOPA-BoS-14-253) that the explanatory text "is not purely illustrative. It ensures that the aim and purpose of the guidelines is well understood. As such, it is not a problem if supervisory authorities follow the explanatory text in their day-to-day supervisory tasks". Unfortunately, explanatory texts are not subject of a public consultation and thus not discussed publicly.

Regarding its impact on the application of future guidelines, this practice is at least questionable. In particular, the EIOPA does not comply with the Regulation (EU) No 1094/2010 establishing EIOPA, the "General principles and minimum standards for consultation of interested parties by the Commission" and the EIOPA "Public Statement of Consultation Practices".

10.2.3. Please provide us with supporting relevant and verifiable empirical evidence for your example:

The Consultation Paper EIOPA-CP-14/017 2 provides 76 single guidelines and 325 corresponding explanatory texts.

It is only possible to make reference to specific examples when the text is part of consultation processes. This is due to the fact that even though EIOPA refers to explanatory texts, they are not published with the final versions of guidelines on EIOPA's website. This means there is not only an issue of legal certainty but also of transparency and openness.

10.2.4. If you have suggestions to remedy the issue(s) raised in your example, please make them here:

Explanatory texts for guidelines should only be illustrative and address communication issues to understand the direction and the meaning of the provisions during the consultation phases.

Explanatory texts should either be abandoned in final reports and final guidelines or should explicitly be labelled as non-regulatory.

10.3. <u>EMIR: Treat small companies like non-financial counterparties</u>

10.3.1. To which Directive(s) and/or Regulation(s) do you refer in your example?

- Regulation (EU) No 648/2012 of 4 July 2012 on OTC derivatives, central counterparties and trade repositories: Art. 2 (8, 9) in connection with Directive 73/239, Directive 2002/83 and Directive 2005/68.

10.3.2. Please provide us with an executive/succinct summary of your example:

In order to conform with the comprehensive principle of proportionality, small insurance companies should be treated like non-financial counterparties.

Insurance companies predominately use financial derivatives to carefully hedge parts of their restricted assets, which cover the insurance companies' liabilities against their insurance clients. These hedging strategies - and the corresponding acquisition of financial derivatives on the buy side - are important instruments of the insurers' asset liability management.

Since the gradual introduction of EMIR, small insurance companies have been forced to reduce the use of such important hedging tools because they cannot cope with the administrative, operational and financial burdens of EMIR compliance. Small insurance companies sustain competitive disadvantage if they cannot hedge their portfolios at reasonable costs against future risks.

10.3.3. Please provide us with supporting relevant and verifiable empirical evidence for your example:

Small companies also have hedging needs and, where the size of the risk exposure is limited, the company may decide to engage in hedging via derivatives but only perform one transaction per quarter or per year. A single transaction would in fact trigger significant EMIR obligations, including collateral management on a daily basis. Such an entity would be faced with a decision of whether it is efficient from a risk and cost perspective to be hedged and could in the end be incentivised to not hedge because of overly-burdensome EMIR requirements.

10.3.4. If you have suggestions to remedy the issue(s) raised in your example, please make them here:

In its report on the review of Regulation (EU) No 648/2012 the EC should assess the burden for small institutional investors and reflect on unintended consequences where small institutional investors reduce their risk-mitigation via derivatives. The report should reflect on how the requirements of EMIR can better take into account the situation of small companies.

Small and smallest insurance companies should be treated like non-financial counterparties. They should be able to conclude their few hedging agreements without the burden of mandatory clearing (see Art.4 (1) and Art. 10 of Regulation (EU) No 648/2012) and with lighter burdens as regards risk-management techniques (see Art. 11 Regulation (EU) No 648/2012).

11. Definitions

11.1. Definition of SME: Respect specificities of insurance industry

11.1.1. To which Directive(s) and/or Regulation(s) do you refer in your example?

- Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises
- Directive 2009/138/EC of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)

11.1.2. Please provide us with an executive/succinct summary of your example:

The EC's definition of SME focuses on number of employees, turnover and balance sheet total. The definition includes three company categories:

- Medium-sized: Employees < 250 AND either turnover < 50mn EUR or balance sheet total < 43mn EUR
- Small: Employees < 50 AND either turnover < 10mn EUR or balance sheet total < 10mn EUR
- Micro: Employees < 10 AND either turnover < 2mn EUR or balance sheet total < 2mn EUR

We believe that these parameters are not suitable for insurance undertakings as its turnover and balance sheet total of insurance undertakings are inevitably large due to the nature of the insurance business:

- Insurance undertakings need to hold technical provisions to secure payouts for claims
- They collect premium income from insurance takers
- They allocate large investments to account for / hedge claims

As a consequence, almost none of the insurance undertakings fall under the above SME definition. This prevents them from benefiting from regulatory requirements that are in fact aimed at fitting SME's specific needs and limitations.

11.1.3. Please provide us with supporting relevant and verifiable empirical evidence for your example:

Following Art. 4 of Directive 2009/138/EC it is possible that an insurer is exempted from the application of Solvency II, but such an insurer does not meet the definition of a small company as included in the EC recommendation. The identification of small and medium sized undertakings is left open and can definitely not be supported by the EC recommendation on the SME definition.

The following examples based on statistics by the German Federal Financial Supervisory Authority (BaFin) illustrate the ineffectiveness and unsuitability of the EC's definition of SME concerning the insurance industry (see http://www.bafin.de/SharedDocs/Standardartikel/DE/st_va_erstvu.html):

Example 1: a small German life insurer collects annual written gross premiums of approx. 40 million EUR and has a balance sheet total of approx. 400 million EUR, but accounts for only 0.04% of the German life insurance market

Example 2: a small German P&C insurer collects annual written gross premiums of approx. 30million EUR and has a balance sheet total of approx. 40 million EUR, but accounts for only 0.03% of the German P&C insurance market

Example 3: a medium-sized German life insurer collects 1.1 billion EUR and has a balance sheet total of approx. 14 billion EUR, but accounts for only 1.8% of the German life insurance market

Example 4: a medium-sized German P&C insurer collects 1.5 billion EUR and has a balance sheet total of approx. 3.2 billion EUR, but accounts for only 2.4% of the German P&C insurance market

(The above mentioned market shares refer to the following total market size in 2014: life insurers collect 90 billion EUR written gross premiums, P&C insurers collect 63 billion EUR written gross premiums)

11.1.4. If you have suggestions to remedy the issue(s) raised in your example, please make them here:

- The definition of SME should be amended to suit for non-industrial specificities of the insurance business, both in structure and in size.
- Different parameters to measure size, such as written gross premiums or technical provisions, should be introduced.

11.2. Example MiFID: Make European legislation better understandable

11.2.1. To which Directive(s) and/or Regulation(s) do you refer in your example?

- Directive 2014/65/EU of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast)
- Regulation 600/2014/EU of 15 May 2014 on markets in financial instruments and amending Regulation 648/2012/EU

11.2.2. Please provide us with an executive/succinct summary of your example:

The examples of Directive 2014/65/EU (MiFID 2) and Regulation 600/2014/EU (MiFIR) exemplify that the drafting of EU legislation needs to be improved.

In comparison to national law, EU legislation is long and complicated. This can constitute a serious burden on the side of those that are directly addressed by the respective EU legislation. A clear structure and table of contents could remedy this problem. Laws are made for legal practitioners.

Without a clear structure and contents the application of the law is very difficult. Legislative documents often refer to definitions and provisions contained in other laws. One example of non-user-friendly design is the neither systematic nor alphabetically arranged definitions in the above mentioned pieces of legislation. These constitute only an unsystematic list of definitions over several pages.

11.2.3. If you have suggestions to remedy the issue(s) raised in your example, please make them here:

A clear structure and table of contents could remedy this problem. A positive example is the German Civil Code BGB. It has a clear structure is systematic and has an informative contents

12. Overlaps, duplications and inconsistencies

12.1. EIOPA Guidelines: Clearly define and obey limits of the mandate

12.1.1. To which Directive(s) and/or Regulation(s) do you refer in your example?

- Directive 2009/138/EC of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II): Art 227, Art. 87-99
- Regulation (EU) No 1094/2010 of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC: Art. 16
- EIOPA BoS 15/201 Opinion of the European Insurance and Occupational Pensions Authority on the group solvency calculation in the context of equivalence

- EIOPA-CP-15/008 Consultation Paper on the proposal for preparatory Guidelines on product oversight & governance arrangements by insurance undertakings and insurance distributors
- ESMA/2014/SMSC/1189 Consultation paper on Guidelines on the application of C6 and C7 of Annex I of MiFID
- PE-CONS 49/15 DIRECTIVE on insurance distribution and repealing Directive 2002/92/EC - Adopted text yet to be officially published

12.1.2. Please provide us with an executive/succinct summary of your example:

This example shows that EIOPA regulations or opinions overlap in areas which are sufficiently covered by binding Level 2 regulation.

For the financial sector the three ESAs have a particular responsibility for the quality of regulation. At Level 2, this is done through drafts for Regulatory Technical Standards (RTS) which are being prepared by the ESAs. At Level 3, EIOPA, EBA and ESMA decide autonomously on where harmonising guidelines are required. Fewer regulatory levels will not only result in less consultation and implementation efforts but also in fewer issues causing conflicting provisions and uncertainties. It is therefore reasonable to clarify the limits of the application of guidelines or recommendations as well as the relation towards directly binding Level 2 measures.

Guidelines serve the purpose of harmonising supervision and application of Union law. This has been stipulated in Art. 16 of Regulation (EU) No 1094/2010. They should therefore only be applied where they are required to fulfil this purpose and where they ensure consistent implementation and application of the provisions stipulated by EU law. Guidelines, however, are not a general instrument to enforce independent regulatory aspects defined by the ESAs. Given the strong engagement of EIOPA, ESMA and EBA, in particular on guidelines, this issue should not be underestimated with respect to the discussion on costs and funding. As a result of the current practice, critical resources which are necessary for carrying out other important tasks are being tied up.

According to Recital 25 of the EIOPA Regulation, the authority does not have the power to issue guidelines in areas covered by technical standards. The EP has also noted that guidelines are only allowed for where there is sufficient evidence and that they are required for a coherent application of EU law (see 2014/2121(DEC) and also stressed (Ibid.) that “EIOPA should check the necessity of drafting guidelines and recommendations”.

12.1.3. Please provide us with supporting relevant and verifiable empirical evidence for your example:

There are several examples in the current regulatory practice in which the criteria of the EIOPA regulation to issue guidelines have not been respected:

- According to Art. 227 of Directive 2009/138/EC insurance undertakings from third countries, whose insurance supervisory regimes are deemed equivalent to Solvency II, can be taken into account according to national requirements for the calculation of the Solvency Capital Requirement (SCR) in groups. The EC is mandated to adopt delegated acts specifying the criteria for assessing whether the solvency regime of a third country is equivalent (Art. 227 (3)). For instance, on 5 June 2015 the EC declared to consider the supervisory system in Switzerland as fully equivalent with Solvency II. Other supervisory systems (e.g. Australia, Brazil, USA) are considered as temporarily equivalent to Solvency II.
  In the EIOPA Opinion on the group solvency calculation, EIOPA, however, induces higher standards. It is required that Solvency II standards shall be applied irrespective of the decision of equivalence of the supervisory system of that third country. For instance, national authorities are urged to apply the highest SCR level for third country undertakings in the Solvency II group SCR calculations and to allow the possibility to restrict the transfer of own funds under Solvency II. Also the allocation of own funds to specific tiers is to follow the Art 87 to 99 of the Directive 2009/138/EC if the categorization of own funds differs significantly under the national supervisory regime from Solvency II.

- EIOPA has consulted POGs, without waiting for the parallel discussion of the European legislator within the scope of the trilogue on the IDD. So no regulatory basis existed at that time.

  The IDD provides for POG requirements in Art. 25. The EC is empowered to adopt delegated acts in accordance with Art. 39 to further specify the principles set out in this Article. Even though the EU legislator gave this clear mandate to the EC, EIOPA intends to issue guidelines on POG specifications. This is not only in conflict with the clear provision in Recital 25 EIOPA regulation, but also, will result in double implementation efforts for the undertakings.

- A parallel discussion also takes place at ESMA. Despite the existing empowerment of the EC to develop delegated acts and already started work on this issue, ESMA has published guidelines on MiFiD I Annex C6 and C7 (definition of derivatives). With the publication of these guidelines, ESMA anticipates the politically legitimate procedure on the delegated acts.

12.1.4. If you have suggestions to remedy the issue(s) raised in your example, please make them here:

- Less regulatory levels reduce compliance costs and the risk of inconsistencies and contradiction.

- ESA Guidelines should only be applied on a subsidiary basis:
  - In terms of regulation, Level 2 standards are always to be preferred to guidelines. They establish directly binding uniform implementation stan-

dards and prevent “gold plating” when respective provisions are being implemented in national.
  - º The application of guidelines should depend on the necessity and appropriateness of these guidelines to ensure a consistent application of the law.

- Moreover, the legal framework with regard to the adoption of guidelines should be specified:
  - º Guidelines must not anticipate basic political decisions and current EU legislative procedures and must not be used in lieu of missing political compromises.
  - º Guidelines must not go beyond binding regulations or extend these arbitrarily by means of general provisions.
  - º EIOPA should not issue guidelines in areas in which the EC has been empowered to develop technical standards.

12.2. EIOPA Guidelines: Reduce quantity and volume

12.2.1. To which Directive(s) and/or Regulation(s) do you refer in your example?

- Directive 2009/138/EC of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)
- Commission Delegated Regulation (EU) 2015/35 of 10 October 2014 supplementing Directive 2009/138/EC of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)
- Regulation (EU) No 1094/2010 of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC

12.2.2. Please provide us with an executive/succinct summary of your example:

As already stated, ESA guidelines have a decisive impact on financial services regulation. The following example illustrates the need to reduce quantity and volume of EIOPA guidelines.

First, the volume of EIOPA Guidelines and Implementing Technical Standards is increasingly excessive (over 2,800 pages) and contains several specifications which exceed, repeat or contradict the Directive 2009/138/EC. The granularity with which EIOPA establishes additional requirements for insurance supervision is critical. EIOPA has so far produced more than 700 guidelines on Solvency II. Exact requirements, different specifications and additional technical provisions are practically almost impossible to fully comply with.

Second, many requirements leave room for different interpretation. There is no clear and reliable indication for the need to establish technical specifications on Solvency II. Hence, the necessity of additional provisions must be evaluated before they are implemented. Many of the EIOPA guidelines precede other regulatory processes.

12.2.3. Please provide us with supporting relevant and verifiable empirical evidence for your example:

The volume of regulation concerning the Solvency II regime amounts to 6700 pages that includes approx. 700 EIOPA guidelines as well as approx. 120 ITS Articles

Two examples for excessive provision concerning governance:

- Fit & Proper: While Art. 42 of Directive 2009/138/EC identifies fit & proper requirements for “persons who effectively run the undertaking or have other key functions”, the EIOPA guidelines on System of Governance extend the requirement to “persons [who] perform functions of specific importance for the undertaking in view of its business and organization”. This overloads insurance undertakings in that “fit & proper” criteria would apply to everybody working in key functions. Art. 16 of Regulation (EU) No 1094/2010 does not provide a mandate for EIOPA to extent the scope of Solvency II provisions.
- Documentation: Art 41 (3) of Directive 2009/138/EC introduces “written policies in relation to at least risk management, internal control, internal audit and, where relevant, outsourcing”. These policies “shall be reviewed at least annually”. However, the EIOPA Guidelines on System of Governance extends this requirement to apply to “all written policies undertakings have to implement in order to comply with Solvency II, i.e. it not only covers the policies explicitly referred to in Art. 41(3) but also e.g. the “sub-policies” according to Art. 44(2), the Own Risk and Solvency Assessment (ORSA) policy, the Solvency and Financial Condition Report (SFCR) policy and the model change policy”.

12.2.4. If you have suggestions to remedy the issue(s) raised in your example, please make them here:

- Substantial supervisory provisions must be provided by institutions which are part of the legislative process and not by an executive agency. The authority to publish guidelines shall not replace regulatory provisions intended to be set up by e.g. the EC.
- Guidelines should only be applied on a subsidiary basis. In terms of regulation, Level 2 standards are always to be preferred to guidelines. They establish directly binding uniform implementation standards and prevent “gold plating” when respective provisions are being implemented in national. The application of guidelines should depend on the necessity and appropriateness of these guidelines to ensure a consistent application of the law.

- It is reasonable and advisable to first wait for the final implementation of Solvency and evaluate the practical experiences. Only then will it be possible to draw reliable conclusions and to assess further measures or modifications with regard to their quantitative impacts.

12.3. Solvency II: Avoid inconsistencies across regulatory levels

12.3.1. To which Directive(s) and/or Regulation(s) do you refer in your example?

- Directive 2009/138/EC of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II): Art. 41, 104 (7), 111 (1)j, 246
- Commission Delegated Regulation (EU) 2015/35 of 10 October 2014 supplementing Directive 2009/138/EC of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II): Art. 218 (1), 338

12.3.2. Please provide us with an executive/succinct summary of your example:

This example is to show that for a smooth implementation and to avoid unnecessary costs, it is of utmost importance that the different levels of regulation are consistent and do not contradict each other.

One recurrent problem is that the very number of provisions in the financial market entails the risk that provisions do not match content-wise. While this indicates that the quantity of provisions needs to be reduced in favour of the quality, existing inconsistencies need to be addressed. Moreover, it can be observed that in some cases the interdependencies of different legal provisions are not adequately taken into account by the EU legislator.

First example: Undertaking-specific Parameters (USPs)

According to Art 104 (7) of Directive2009/138/EC USPs may be applied to all underwriting risk modules. However, this is unjustifiably restricted by Art 218 (1) of the Delegated Regulation (EU) 2015/35. Moreover, the possibility to develop and use group specific parameters (GSPs) is further reduced, if not even entirely excluded by Art. 338 of Delegated Regulation (EU) 2015/35.

Second example: The governance provisions in Art. 41 ff Directive 2009/138/EC

Solvency II also applies on the level of a group of undertakings (Art. 246). Implementation and enforcement of standards throughout a group prove to be very difficult in practice. This is due to the fact that EU supervisory law

(Solvency II) and national corporate law contradict. As Solvency II doesn't refer to the relation between the different provisions is it unclear how to deal with it, particularly in cases in which Solvency II requests group-wide standards that according to corporate law cannot be enforced in legal terms. The conflict is even aggravated when the subsidiary undertaking is subject to additional stricter provisions, e.g. if it is listed.

12.3.3. Please provide us with supporting relevant and verifiable empirical evidence for your example:

As to the first example (USPs):

Undertakings should be able to replace parameters in all sub-modules of the underwriting risk by USPs. For GSP two options exist. The use of a weighted average of USPs should be permitted or, in the case that sufficient consolidated data are available, standardised methods (e.g. Merz-Wüthrich within the reserve risk module) should be permitted to use the sum of solo data. Group specific modifications of the methods or alternative group specific methods to calculate GSPs should be allowed for. We suggest to limit the outline of Delegated Regulation (EU) 2015/35 on USPs in a way which sets requirements for the methods used when calculating USP without prescribing defined methods in an exhaustive list.

As to the second example (Governance provisions in Art. 41 ff of Directive 2009/138/EC):

Existing conflicts between supervisory law and corporate law need to be solved. One way is to legally oblige subordinate companies to co-operate with the parent company. Alternatively, it could be provided for that generally supervisory obligations can only go as far as there is the respective influence on the subordinated company in terms of corporate law.

12.3.4. If you have suggestions to remedy the issue(s) raised in your example, please make them here:

- Undertakings should be able to replace parameters in all sub-modules of the underwriting risk by USPs.
- For GSP two options exist:
  - the use of a weighted average of USPs should be permitted or
  - in the case that sufficient consolidated data are available, standardised methods (e.g. Merz-Wüthrich within the reserve risk module) should be permitted to use the sum of solo data. Group specific modifications of the methods or alternative group specific methods to calculate GSPs should be permitted.
- We suggest to limit the outline of Delegated Regulation (EU) 2015/35 on USPs in a way which sets requirements for the methods used when calculating USP without prescribing defined methods in an exhaustive list.

12.4. PRIIPs: Avoid information overload and duplication of information requirements

12.4.1. To which Directive(s) and/or Regulation(s) do you refer in your example?

- Directive 2009/138/EC of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II): particularly Art. 185 (information for policy holders) under subsection 2 (life insurance)
- Regulation (EU) No 1286/2014 of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs): Articles 3, 8 and 14
- PE-CONS 49/15 Directive on insurance distribution and repealing Directive 2002/92/EC (recast) – Adopted text yet to be officially published
- Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce): particularly Articles 5 and 10
- Directive 2002/65/EC of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC: particularly Art. 3
- Directive 2002/92/EC of 9 December 2002 on insurance mediation

12.4.2. Please provide us with an executive/succinct summary of your example:

Well-informed consumers are better equipped to compare products and make informed decisions. In order to empower and protect consumers effectively, the information provided must respond to consumers' needs.

The provision of highly qualitative rather than highly excessive information is a basic principle of consumer protection. Indeed, consumer behavioural theories widely recognise that it is essential that information overload must be avoided to create value for consumers. Regrettably, several EU regulations applicable to insurance will dramatically increase the amount of pre-contractual information that insurers will be required to provide to consumers.

In addition, not enough attention has been paid to the combined effects and potential unintended consequences of these regulations. This resulted in numerous duplicative requirements in the EU legislation regarding the information that needs to be disclosed to insurance consumers. In practice, it means that consumers risk receiving the same type of information twice, but in a different wording and a different format. This would have a negative impact on consumers' ability to shop around and understand products' features, and it risks to ultimately undermine their confidence in the concerned products.

12.4.3. Please provide us with supporting relevant and verifiable empirical evidence for your example:

The rules that will be applicable to the sale of insurance-based investment products give the impression that the cumulative effect of the legislation on the disclosure of pre-contractual information and the interaction between all disclosures (including potential duplications) have never been properly assessed by policymakers.

As far as the cumulative effect is concerned, currently 75 different pieces of pre-contractual information are applicable under existing EU legislation to the case of a consumer purchasing an insurance-based investment product online from an intermediary. With the new PRIIPs Regulation, Directive 2009/138/EC and the IDD, this number will raise to 148 different pieces of pre-contractual information. When broken down into its component parts, the number of pre-contractual product disclosures will increase from 20 under the Life Directive, to 66 under Directive 2009/138/EC and Regulation (EU) No1286/2014, representing a 330% increase, while the disclosure requirements for sales rules would rise from nine under the Insurance Mediation Directive (IMD) to 36 under IDD, representing an increase of 400%.

As far as duplication is concerned, Directive 2009/138/EC and Regulation (EU) No 1286/2014 require the cumulative disclosure of fully or partially equivalent information to consumers, as per Art. 3 of Regulation (EU) No 1286/2014. Fully equivalent information that needs to be provided under Directive 2009/138/EC and Regulation (EU) No 1286/2014 includes the insurer's identity, the duration of the contract, the description of the underlying instruments, the description of the surrender/cooling-off periods, the risks and the existence/ procedures for complaints. In addition, partially equivalent information also needs to be provided including the products benefits, the costs/payment and the tax arrangements.

Another example illustrating such duplication of equivalent requirements under different pieces of legislation is related to the disclosure of the product's costs under the IDD, as well as Regulation (EU) No 1286/2014.

12.4.4. If you have suggestions to remedy the issue(s) raised in your example, please make them here:

Excessively burdensome and prescriptive rules on product disclosure, information overload and duplicative disclosures must be avoided.

For instance, as regards the overlap between Directive 2009/138/EC and Regulation (EU) No 1286/2014, we suggest that the KID should also satisfy the duplicative disclosure requirements under Directive 2009/138/EC. Consumers would benefit from receiving equivalent information only once through the KID, instead of disclosing it a second time to consumers, in a different format, under Directive 2009/138/EC, which would confuse consumers.

12.5. Supervision of insurer-led financial conglomerates: Solvency II provides for an adequate supervision of cross-sectoral risks

12.5.1. To which Directive(s) and/or Regulation(s) do you refer in your example?

- Directive 2002/87/EC of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate and amending Council Directives 73/239/EEC, 79/267/EEC, 92/49/EEC, 92/96/EEC, 93/6/EEC and 93/22/EEC, and Directives 98/78/EC and 2000/12/EC of the European Parliament and of the Council
- Directive 2009/138/EC of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)

12.5.2. Please provide us with an executive/succinct summary of your example:

The forthcoming implementation of Solvency II and Basel III requirements gives rise to seriously challenge the benefits or need of maintaining an additional layer of supervision for financial conglomerates in Europe. From the perspective of insurance-led financial conglomerates, Solvency II ensures that

- governance requirements apply group-wide, also to significant (from a risk perspective) unregulated entities;
- cross-sectoral capital requirements are reflected in the insurance group solvency calculation;
- supervision of intra-group transactions as well as risk concentrations occur group-wide, i.e. also with regard to cross-sectoral entities and significant non-regulated entities;
- supervision of holdings is already covered and even extended to include sub-holdings without a separate management function on national level.

In addition, remaining gaps in terms of scope have been closed by Directive 2011/89/EU, as mixed financial holding companies were included in the Solvency II group supervision. At the same time, waivers were amended to Art. 213 of Directive 2009/138/EC due to the conclusion that certain provisions of Directives 2002/87/EG and 2009/138/EC are equivalent and create unnecessary overlap.

12.5.3. If you have suggestions to remedy the issue(s) raised in your example, please make them here:

After all, supplementary supervision of financial conglomerates according to Directive 2002/87/EC should be entirely abandoned since the evolving sectoral regulation for insurers and banks extensively address cross-sectoral risks.

13. Gaps

N/A

D. Rules giving rise to possible other unintended consequences

14. Risk

N/A

15. Procyclicality

N/A