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Secrétariat de la Commission des affaires économiques et monétaires
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BELGIQUE

Questionnaire for the public consultation on enhancing the coherence of EU financial services legislation

Sirs,

The Association Française de la Gestion financière (AFG)[1] is grateful for the opportunity to comment on the European Parliament's ECON Committee's questionnaire on enhancing the coherence of EU financial services legislation.

General comments

Before entering the details of the questions raised, we wish to stress the following comments.

[1] The Association Française de la Gestion financière (AFG) represents the France-based investment management industry, both for collective and discretionary individual portfolio managements. Our members include 426 management companies. They are entrepreneurial or belong to French or foreign banking or insurance groups. AFG members manage 2,900 billion euros in the field of investment management, making in particular the French industry the leader in Europe in terms of financial management location for collective investments (with over 1,500 billion euros managed from France, i.e. 19% of all EU assets managed in the form of investment funds), wherever the funds are domiciled in the EU, and second at worldwide level after the US. In the field of collective investment, our industry includes – beside UCITS – employee savings schemes and products such as regulated hedge funds/funds of hedge funds, private equity funds, real estate funds and socially responsible investment. AFG is of course an active member of the European Fund and Asset Management Association (EFAMA) and of PensionsEurope. AFG is also an active member of the International Investment Funds Association (IIFA).

1. Asset management companies, that we represent, are probably the most regulated financial service entities in the EU: asset management companies are regulated themselves (UCITS, AIFMD), in addition their products' design and products' distribution, as well as other services they may provide (UCITS, AIFs, MiFID services).

2. During the last decade, and in particular since the 2007 crisis, there was an acceleration in the changes of the EU legislatives texts. While some changes were justified by the crisis, such as the changes arising from the Madoff scandal - which revealed that the safety provided by UCITS depositaries was uncertain in Luxembourg as compared to UCITS depositaries in France and which justified the reinforcement of the safety provided by depositaries in the UCITS Directive - other initiatives were launched without a strong request from the politicians or the fund industry (e.g. European Venture Capital Funds or European Social Entrepreneurship Fund). The tricky point is that now the ball seems to roll more and more rapidly, e.g. the so-called UCITS VI revision while no assessment was carried out beforehand and while UCITS V has not been adopted yet. **Politicians have to be careful to keep a reasonable pace of legislation production, by ensuring first that the enforcement of existing rules is ensured – in a fair way from one regulator to another – across Europe before launching new and more precisely designed legislative initiatives.**

3. It is clear that many EU texts in the area of financial services are inconsistent in their substance, sometimes in a critical manner. For example, in texts currently under discussion inconsistencies may be found:

    - MiFID/IMD: on inducements;

    - MiFID/UCITS/AIFM: on the definitions of "markets", "portfolio management"; on the scope of passports for ancillary activities (between the UCITS Directive and AIFMD).

4. Inconsistencies may also be found across texts adopted by different bodies (e.g. provisions adopted by ESMA which are not in line with Level 1 provisions adopted by the Commission).

5. Such inconsistencies may be largely explained by the way texts are elaborated:

    - First, the various additions brought by the 3 European institutions (Commission, EP, Council) in charge of the proposals and adoption for each L1 textmay explain to some extent why finally the provisions of several L1 texts are not aligned while they should have been (e.g. for the scope of passports for ancillary activities, between the UCITS and the AIFM Directives);

    - Second, when ESAs bring their own views on Level 1 texts while not having necessarily followed the detailed provisions of Level 1;

    - Third, the sequence in which the texts are made might not always be completely logical. It seems obvious that level 2 measures should be

elaborated after level 1 measures have been finalized and level 3 measures after level 2 In other words, the preparation of rules should be organized and methodical.

6. The deadlines of implementation for market participants have also to be stressed, as often they are too short for a good implementation of the texts by professionals (e.g. too short deadlines proposed in the current draft text of the European Commission on Money Market Funds – a 6 month implementing period is definitely too short).

7. **IN ANY CASE, THE SEARCH FOR A BETTER CONSISTENCY ACROSS TEXTS MUST NOT LEAD TO A NEW PRODUCTION OF TEXTS: THE EP SHOULD NOT USE THIS QUESTIONNAIRE TO JUSTIFY THE LAUNCH OF NEW INITIATIVES, WHICH MIGHT JUST RESULT IN THE PRODUCTION OF NEW TEXTS ADDING TO THE EXISTING ONES, INSTEAD OF ACTUALLY SIMPLIFYING AND IMPROVING CONSISTENCY ACROSS THE TEXTS. A LEGISLATIVE BREAK WOULD BE VERY WELCOME, THAT WOULD ALLOW EXISTING TEXTS TO BE FULLY, PROPERLY AND FAIRLY IMPLEMENTED AND ENFORCED ACROSS EUROPE.**

   It is important that users have a good understanding of the texts – too many texts are harmful. Texts need to be properly implemented, which entails modifying systems that cannot be updated continuously and costs that are eventually borne by end-consumers.

8. In addition, the search for consistency across texts **should not lead to a "one size fits all" approach in the provisions across texts**, as it might be inappropriate to replicate the same rules for different financial sectors. E.g. on remunerations: remunerations must be tackled in a different way for bankers and asset managers, as asset managers do not embed the same level of systemic risk and are not allowed to do proprietary trading.

9. **Before launching new regulatory initiatives, the European institutions have to work first on the existing texts, in order to make sure that in practice:**

   - The texts are implemented in all Member States and in the same manner;
   - They are enforced in all Member States and with the same stringency.

10. The lack of consultation on some draft legal texts, such as the AIFM Level 2 Regulation or the draft proposal on MMFs, generates uncertainties and leaks leading to an uneven level playing field among market participants and difficulties to exchange views with the European Commission on these texts : as referred to in the Lamfalussy Report in 2002, consultation should occur at all stages of the legislative process – especially when Level 2 texts diverge from ESMA's proposals (as for AIFM L2 Regulation), and when L1 texts are not mere revisions of previous texts but fully new ones (as for MMFs).

11. Last point: there is no systematic consultation of national authorities on the different language versions of the EU official texts to be published, ending with frequent different meanings of the provisions across Europe. And even at national level, if from

one EU text to another a single word is translated by two different words in the national language, it will end with inconsistency as well.

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Detailed comments on European Parliament's Questionnaire

Q1: Yes, there are specific areas of EU financial services legislation which contain overlapping requirements.

For instance:

- The three Directives MiF, UCITS and AIFM are not always consistent:
    - They provide different definitions or wordings for the same activity (e.g. portfolio management in MiFID as compared to portfolio management in AIFMD; or the definition of regulated markets in UCITS as compared to MiFID);
    - The scope of passporting for ancillary activities for UCITS management companies and for AIF management companies is not the same, just because the final drafting of the two directives was not aligned, unintentionally;

      Such overlap leads to practical difficulties, both for industry players and for national regulators. For instance, the non-UCITS asset management companies which used the MiFID passports will not be allowed to use them anymore, because an unintended drafting in the adopted AIFM Directive repealed the ancillary activities from the scope of "passportable" activities. For instance, if a private equity management company still wishes to passport an individual mandate, it would be required to manage a UCITS fund in order to benefit from a UCITS passport – which includes a passport for mandates, contrary to the AIFM passport – while by nature a private equity management company has usually no UCITS in its natural scope of activities.
    - Overlapping requirements in the UCITS and AIFM Directives applying to depositaries should be avoided as far as possible. Under the AIFMD, AIF depositaries are required to register relevant financial instruments in their books "within segregated accounts opened in the name of the AIF or the AIFM acting on behalf of the AIF". If this requirement was simply copy-pasted in UCITS V, it would entail a multiplication of segregated accounts – and in turn costs – in case the depositary holds in custody both AIF and UCITS assets. The obligation set out in the AIFMD should be taken into account while drafting UCITS V. In other words, the obligation of segregation should apply to funds in general – not specifically to AIFs or UCITS.
- MiFID and EMIR set out reporting requirements which cover the same type of transactions but which are not always fully consistent. ESMA's work will hopefully

help in harmonising them. However, such overlaps should be avoided already at level 1.

The UCITS Directive includes strict and detailed product requirements. However, similar requirements may also be found in regulations dealing with distribution and disclosure requirements such as MiFID and PRIPs. In our view, MiFID and PRIPs should focus on distribution and disclosure.
In some cases requirements may be not only overlapping but also clearly contradicting. For example, some MiFID proposals allow Member States to prevent the provision on their territory of some products or services. This is clearly in contradiction to the UCITS and AIFM Directives which provide for a passport regime applying throughout the EU. A provision should be introduced in the revised MiFID that takes into account the texts specifically applying to investment funds i.e. MiFID should include an exemption in case a pan European product passport is granted by another directive, at least for European products.

However, inconsistencies should be analysed very carefully, as very often a 'one size fits all' approach is not the appropriate solution – i.e. different situations and cases may fully justify a differentiated legislative treatment. For instance, as banks have a completely different activity as compared to management companies, a mere copy-paste of banking legislative provisions on asset management companies would not make any sense – as for instance management companies are not allowed to perform proprietary trading and are not allowed to hold client assets.

In addition, the attempt to reduce inconsistencies across different pieces of legislation should not lead to an additional layer of legislation, on the ground of so-called "simplification".

And if new, better consistent, legislation is adopted, it should repeal previous legislative provisions in a smooth manner, in order to avoid sudden and potentially heavy changes in the businesses related to such provisions.

Q2: Yes, there are specific areas of EU financial services legislation in which activities which have an equivalent use or effect but a different form are regulated differently or not regulated at all.

- Areas which are regulated differently by different texts

For instance, regarding the PRIPs file, many products which are substitutes to UCITS and available to retail investors at the point of sale are not in the scope of the European Commission's proposal: banking saving products, banking capital market products, securities (equities, bonds) are not required to comply to the same level of information and requirements vis-à-vis retail investors, as compared to UCITS which have to disclose more detailed information, in particular about their risk/return profile.

There also are inconsistencies between the proposed MiFID and IMD. Both drafts aim at increasing investor protection. However, it seems that the standards set out in the two texts are different. We believe that the same disclosure rules should apply within both IMD and MiFID in order to ensure consistent information for consumers and a level playing field and fair competition.

- Areas which are regulated differently at different levels

In addition there may be inconsistency across provisions related to a same topic but treated at different European regulatory Levels. For instance, regarding the UCITS Directive, the requirements of ESMA on the 20% ratio for collateral spreading are not in line with Level 1 provisions. The ultimate outcome is that professionals are lost and cannot ascertain which provisions should be complied with, as they are inconsistent from one Level to another.

More generally, the creation of the ESAs, which have increased regulatory powers as compared to the three previous bodies, may lead to some sort of competition in the production of rules between those ESAs and the European Commission – which may explain sometimes inconsistencies among the different Levels. **While giving more powers to ESAs is fully legitimate and should facilitate the fair enforcement of European legislation across Europe, such a regulatory competition - or at least lack of regulatory coordination - between ESAs' rules and European legislation should be avoided as far as possible.**

- Areas which are not regulated at all

The ESMA Guidelines on ETFs and other UCITS issues, published on 18th December 2012, set out conditions for the use of financial indices as benchmarks by UCITS. The lack of similar guidelines for other benchmark users may cause UCITS managers significant disadvantages compared to other market participants.

Q3: Yes, the way EU financial services legislation has been transposed or implemented may have given rise to overlaps or incoherence.

For instance, just from a national languages' perspective, the different national language versions of the same Directive have led to many inconsistencies. In this case, Member States which make use of several language versions are in a position to choose the most favourable language version to optimise their regulatory arbitrage.

More generally, to avoid regulatory arbitrage by national regulators, ESAs such as ESMA should be given some direct enforcement powers, going beyond the current peer reviews and comply or explain procedures. For instance, regarding the existing so-called 'trash ratio' in the UCITS Directive, applied in various ways by national regulators, ESMA should play a stronger role in ensuring the fair enforcement in practice of such a ratio in Europe.

Q4: The sequence in which EU financial services legislation has been developed impacted asset management companies in many ways.

- A source of uncertainty

First of all, as already mentioned above, the inconsistencies across the different Levels on the same topics have led to a dual uncertainty, both legal and operational.

- Implementing deadlines are often too short

Very often, the deadlines for implementing EU provisions are too short. For instance, regarding AIFMD Level 2, the provision for a minimum substance for management companies will require significant reflections within European asset management groups, which may run short of time to adjust their business models and meet the July 2014 deadline.

- Inconsistent timelines

In the case of AIFMD, the legislative time-line has been remarkably inconsistent. Indeed, only one month before the deadline for national transposition (i.e. July 2013), ESMA released its Guidelines the "key concepts" of the Directive! Another example of timing inconsistency arose with the late publication of the Commission's Q&A, which took place after transposition by some Member States had started.

Another aspect is the use of ESMA's Guidelines. Regarding "efficient portfolio management techniques", ESMA's Guidelines were so unclear that ESMA had to provide for a "Q&A", after the deadline for implementing the Guidelines, to explain ex post how to implement them!

- The status of ESMA's Guidelines is unclear

Last, the status given to ESMA's Guidelines is not always the same from one national regulator to another. In the case of those related to efficient portfolio management techniques, the German Bafin decided to postpone their implementation, while the French AMF decided to implement them by the deadline set out in the Guidelines. Obviously, such national discrepancies among national regulators impact the fair competition among asset management companies across Europe.

Q5: Yes, there are areas of EU financial services where the difference between forms of regulation (non-binding Code of Conduct or Recommendation to Member States vs. legislative proposals) has affected the activities of French asset management companies.

It is particularly so due to the unclear status of ESMA's Guidelines (please see above): the principle of "comply or explain" leads very often in practice to various national implementations, which goes against the principle of regulatory harmonisation across Europe (that we support, as far as possible).

In addition, as already mentioned, it occurred that some ESMA's Guidelines infringed the Level 1 provisions of the UCITS Directive (e.g. on ratios): we have the impression that ESMA exceeded its powers in clarifying Level 1 provisions, by contradicting them.

Regulation in the area of costs should become more precise and binding. Indeed, we are still waiting for a harmonised Total Expense Ratio (TER) for UCITS across Europe.

Q6: Regarding the further improvement of the coherence of EU financial services legislation, we think that:

- A framework for legislative reviews or review clauses may be legitimate in certain circumstances, but only with a strict procedure.

Even though revisions cannot be avoided (because new needs arise), too frequent revisions could destabilise the legislative framework and therefore market participants in their internal organisation and potentially their business model as well, which means respectively at least costs of compliance and adaptation and at worst financial difficulties to adapt to the new business model. Any change in EU legislation generates significantly high costs (compliance costs, IT costs) for professionals.

In principle, impact assessments are very important, and potentially very helpful. However, the way they are carried out today is not satisfactory: usually, they are drafted once the legislative proposals are already on track, following a purely political decision – in these cases, impact assessments are just used to give a justification to legislative actions which have already been decided at political level. In addition, any impact assessment should be carried out only after a significant period of time has been given to national implementations and enforcements, in order to judge really about the outcomes (while currently many reviews are launched before any significant and tangible results can be assessed at pan-European level). Moreover, in top of considering the need for any new regulation, impact assessments should look at the articulation of the new text and other existing pieces of legislation.

- A unified and legally binding code of financial services law appears as very dangerous and illusory

Indeed, national laws are currently based on different grounds and therefore any pan-European Code might become a nightmare and hardly possible both to draft and to implement and enforce.

- The main improvement for ensuring a better consistency of EU legislation would be to ensure in practice the so-called Level 4 of the Lamfalussy approach

We believe that the fair and even enforcement of EU legislation by ESAs such as ESMA is crucial. It implies to give stronger pan-European enforcement powers to ESAs, in particular to ESMA, in order to avoid regulatory arbitrage and to give a better legal certainty to market participants at pan-European level.

Q7: In order to ensure a better coherence between delegated acts and technical regulatory standards (RTS) and the underlying "Level 1" texts, a series of tools should be used more systematically:

- Consultations:

On some major topics such as AIFMD Level 2 Regulation or Money Market Funds (MMFs), the European Commission has not officially consulted which such topics are crucial for a significant part of the European asset management industry. We wish to recall that in the Lamfalussy approach, endorsed by European institutions more than ten years ago, consultation must occur at all Levels of legislation and regulation.

- Reasonable timelines:

- Very often, very short political timelines are given to the European Commission or ESAs to draft texts – and they often officially use this reason for not consulting on some draft texts, although crucial;

- Also, reasonable timelines must be given to respond to public consultations: if time is too short, the quality of market participants' responses will not be fully satisfactory;

- Last, reasonable timelines for legal transposition but also for compliance by market participants: businesses need time to adapt to new rules, as their often have to adapt their organisation and IT accordingly, with associated costs.

- Clear scope of application and core definitions in Level 1

While we agree that implementing measures may be used to clarify or to give more precisions to Level 1 provisions, it does not make sense that for instance AIFMD was drafted without any positive scope of application, due to the lack of time given by politicians, ending with a "negative" scope of application (i.e. all investment funds but UCITS). And it does not make sense either that only one month before the deadline for national transpositions, ESMA delivers a Report on "key concepts"… at last!

- Better treatment of national language versions

Very often, not enough time is given to the different language versions of the same EU piece of legislation, leading to different national implementations or even regulatory arbitrage sometimes;

- EP's powers of rejection

Regarding Level 2 and RTS, until now the EP has not often made use of its powers of rejection, while it might be helpful in particular when such measures have diverged from the previous texts submitted to consultation.

Q8: The highest priority for the 2014-2019 mandate, in terms of improving the coherence of EU legislation, would not be to draft new and additional legislation, but to ensure a real pan-European and fair enforcement of legislation across Europe

It is not enough to adopt common legislation, what is crucial is to enforce it in a fair way across Europe. One way to better ensure it would be to go beyond the existing peer reviews carried out by ESAs, by giving ESAs pan-European enforcement powers in all their fields of competence.

Q9: No, we think that the current EU legislative process does not allow for the active participation of all stakeholders in relation to financial services legislation.

Two areas of important improvements should be targeted.

First, almost all – if not, all - consultations from EU institutions are carried out only in English nowadays, contrary to the past. It generates a double bias:

- It favours English-speaking countries among the respondents to EU consultations;

- It favours market professionals, to the detriment of investors, and in particular retail investors.

Second, more generally, investors – and in particular retail investors – are not targeted by public consultations (and it is reinforced even more if the consultations are only carried out in English).

Q10: No, we do not consider that EU legislators give the same degree of consideration to all business models in the EU financial sector.

First, in particular due to consultations only provided in English, it generates a bias among Member States, to the benefit of English-speaking countries. For example, the consultation on securities law was not translated in languages other than English, which introduces a bias in favour of common law concepts to the detriment of civil law concepts.

Second, very often the banking and insurance industries are more heard than the asset management industry. It is maybe because the power of influence of banks and insurance companies is higher than the one of asset management companies, but also maybe because the staff of European institutions are not always so aware of the specificities of asset management companies as compared to banks and insurance companies (while both investment funds and asset management companies are probably the most directly and indirectly regulated types of market products and market participants).

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Sincerely Yours,

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