EUROPEAN PARLIAMENT

COMMITTEE ON ECONOMIC AND MONETARY AFFAIRS

- PUBLIC CONSULTATION -

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

The European Parliament's Economic and Monetary Affairs Committee is launching a public consultation on ways to further enhance the coherence of EU financial services legislation. Given the transition to a single rule book in financial services across the EU and the EU legislator's willingness to have "all financial markets, products and actors covered by regulation" it is increasingly important to ensure that legislation fits together seamlessly. The consultation will feed into a programme of reflection to determine future priorities for the remainder of this mandate and to inform the priorities for the incoming Parliament in 2014. All interested stakeholders, including academics and informed individuals, are invited to complete the Committee's questionnaire by 12 noon CET **on Friday 14 June and send it by e-mail to: econ-secretariat@europarl.europa.eu.** All responses to the questionnaire will be published, so please do not send any confidential material with your response. Please make sure you indicate the identity of the contributor. Anonymous contributions will not be taken into account.

IDENTITY OF THE CONTRIBUTOR

Individuals

Name of respondent:

Position:

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Organisations

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QUESTIONS

1. Are there specific areas of EU financial services legislation which contain overlapping requirements? If so, please provide references to the relevant legislation and explain the nature of the overlap, who is affected and the impact.

   We would like to highlight the following areas of EU financial services legislation which contain overlapping requirements:

   - ***Remuneration:*** *There are currently multiple remuneration provisions contained within a number of EU financial services regulations (both finalised and still in draft) including in the Alternative Investment Fund Managers Directive (AIFMD - Directive 2011/61/EU), the Undertakings for Collective Investment in Transferable Securities (UCITS) V proposal*

(COM(2012) 350), the Capital Requirements Directive (CRD) IV proposals (COM(2011) 453 and 452) and the third iteration of this Directive (Directive 2010/76/EU) currently in place, as well as the Markets in Financial Instruments Directive (MiFID) II proposals (COM (2011) 652 and 656). All of these regulations potentially apply to or may have an impact on the same employees within asset management firms, in particular those that are part of a banking group, but also those asset management firms in Europe that simultaneously hold an AIFM and a UCITS and/or a MiFID license. This overlap creates unnecessary layers of regulatory requirements and impedes the development of clear, coherent and, most importantly, globally consistent remuneration policies.

- ***Reporting:*** *Both MiFID II and the European Markets and Infrastructure Regulation (EMIR - Regulation (EU) No 648/2012) foresee reporting requirements for the same type of transactions. Whilst it is envisaged that ESMA will ensure that these requirements are harmonised at Level 2 so as to avoid duplication, this process seems unnecessarily complex. In our view, overlap should be avoided in Level 1 legislation rather than having to rely upon subsequent regulator action and harmonisation at Level 2.*
- ***Restrictions on asset managers' activities:*** *A further area in which overlap as well as incoherence can be observed is with regards to legislative restrictions on the activities of asset managers. In particular, we would question why an asset manager can manage UCITS and alternative investment funds, but cannot perform the full range of MiFID activities. While this restriction has been in place for many years, we do not see a valid reason for it; asset managers manage "client mandates" rather than legal entities. Additional costs are therefore imposed if separate legal entities are required to manage different asset types.*

2. Are there specific areas of EU financial services legislation in which activities/products/services which have an equivalent use or effect but a different form are regulated differently or not regulated at all? If so, please provide references to the relevant legislation and explain the nature of the difference, who is affected and the impact.

   State Street has no comments.

3. Do you consider that the way EU financial services legislation has been transposed or implemented has given rise to overlaps or incoherence? If so, please explain the issue and where it has arisen, giving specific examples of EU financial services legislation where applicable.

   We have observed cases where implementation of European legislation has given rise to incoherence, for example the still on-going national implementation of the AIFMD. One source of such incoherences is the different language versions of EU official texts leading to inconsistencies in terminology, definitions and meaning between different translations of the same legislation.

   Still, efforts at ensuring full coherence should not lead to too overly prescriptive implementation as national competent authorities need to retain sufficient flexibility in order to be able to accommodate for the characteristics and specificities of their relevant national jurisdictions and markets.

   In our view, the question of coherence of national implementation of EU legislation is a trade-off between harmonisation and national flexibility which is best considered on a case-by-case basis.

4. How has the sequence in which EU financial services legislation has been developed impacted your organisation? Please identify the relevant legislation and, where applicable, specific provisions and explain the nature of the impact.

Financial institutions are struggling with the sheer volume and speed of regulatory change currently taking place in the EU.

An additional challenge comes from increasingly shortened implementation periods. Regulatory initiatives often require fundamental system redesigns or process changes which take time to ensure that system/process are adequately adjusted and sufficiently robust in order to be compliant with the new requirements. Similarly, adapting established business processes necessitates sufficient lead-time. As a matter of best practice, we would urge the European institutions to ensure that a minimum implementation period of 18 months period starting from the date that all the necessary information for the application of the new rules has been made available.

Examples of significantly shortened implementation periods include:

- ***AIFMD:*** *Delays in the Level 2 implementation process have significantly reduced the implementation period for market participants despite the far-reaching and extensive requirements that the AIFMD introduces for both managers of in-scope funds and entities that offer depositary services.*
- ***Short Selling Regulation:*** *The new regulatory framework established by the EU Short Selling Regulation (Regulation (EU) No 236/2012) became effective on 1 November 2012 even though not all aspects of the regulation had been sufficiently clarified (e.g. market maker exemption). The short implementation period combined with the lack of clarity around many key details of the regulation has led to a significant level of uncertainty within the industry.*
- ***Derivatives:*** *Final Implementing Technical Standards (ITS) and Regulatory Technical Standards (RTS) implementing EMIR became effective only three months after the adoption by the European Commission. Without regulators taking a 'best efforts' approach, some financial institutions would have struggled to achieve compliance with the new requirements. This could have been avoided by providing adequate deadlines already in Level 1 taking into account the time firms need to implement the new requirements.*
- ***CRD IV:*** *The new capital and liquidity regime entails significant changes for credit institutions in the EU. It is therefore problematic that the framework is envisaged to enter into force only six months after its finalisation. While the European Banking Authority has attempted to mitigate this by undertaking early consultations on various implementing measures, the fact that there is still uncertainty around the final provisions at the time of consultation is unhelpful. Far-reaching proposals such as the CRD IV require a minimum implementation period of 18 months.*

Furthermore, European legislative initiatives that regulate similar or related products/activities should be more closely coordinated and their timing aligned. For example, while the European Markets and Infrastructure Regulation (EMIR) addresses most aspects of OTC derivatives reform, including clearing, reporting, risk mitigation, etc. However, it does not address the trading of such instruments which is covered by the review of MiFID (MiFID II). This creates broad uncertainties as EMIR has already entered into force and is being phased in whereas MiFID II is still going through the co-legislative process leaving an important element of OTC derivatives reform unaddressed for a significant period of time.

5. Are there 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 your activities?

State Street has no comments.

6. How do you think the coherence of EU financial services legislation could be further improved?

Please comment in particular on the extent to which the following would help to improve the coherence of future EU financial services legislation (please give examples to support your answer where possible):

a) a framework for legislative reviews or review clauses included in initial pieces of legislation which link to the reviews of other related legislation?

b) a unified, legally binding code of financial services law?

c) different arrangements within the EU institutions for the handling of legislative proposals (please specify)?

d) other suggestions?

Key to ensuring coherence of EU financial services legislation is extensive consultation and objective impact assessments ahead of any new legislative initiative. This should help identify at an early stage potential areas of overlap or incoherence. In addition, it is important that once legislation has been proposed, no wording is introduced during the legislative process that could lead to incoherence. A more open and transparent legislative process combined with adequate stakeholder involvement could help mitigate this concern. Furthermore, the same approach needs to be followed at Level 2 to ensure that no incoherence is introduced as part of the Level 2 rulemaking process. Lastly, any review of existing financial services legislation should as a matter of best practice consider whether incoherence had been created and needs to be removed.

Incoherence could also be avoided by strengthening the coordination and cooperation between different units within the European Commission. Initiatives that impact different areas/sectors of financial services should be co-drafted by the different responsible units within the European Commission. For example, in the case of the AIFMD, while most of the provisions could have been drafted by the asset management unit, provisions with respect to depositaries could have been authored by or co-drafted with the banking unit. Another example is the upcoming legislation on money market funds where cooperation between the asset management unit and the unit dealing with credit institutions and their prudential requirements is going to be essential.

In addition, once implementing measures are being developed, the cooperation between securities and banking regulators is important. One example is the AIFMD Level 2 measures (Commission Delegated Regulation (EU) No 231/2013) where we would have welcomed a closer cooperation and coordination between the European Securities and Markets Authority and the European Banking Authority given the significant implications that the AIFMD provisions on the depositary function have for custody banks.

Lastly, coherence of EU financial legislation can be further improved through a more refined Level 2 process. This means more alignment between the principles of Level 1 and the Level 2 provisions, and also better defined periods for the publication of Level 2 provisions and their national implementation.

7. What practical steps could be taken to better ensure coherence between delegated acts and technical standards and the underlying "Level 1" text?

State Street has no comments.

8. Which area or specific change would you identify as the highest priority for the 2014-2019 mandate in terms of improving the coherence of EU legislation?

Increased and improved regulatory cooperation should be the main priority. Cooperation in this context includes two elements; on the one side, cooperation with non-EU regulators and policymakers to ensure coordination and cooperation leading to international consistency in financial regulation and on the other, the above-mentioned cooperation between securities and prudential regulators. Examples such as the AIFMD depositary provisions have shown that securities and prudential regulators do not sufficiently communicate with each other leading to suboptimal legislative outcomes with unintended consequences that could have been avoided.

Also of importance going forward is that thorough, comprehensive and objective impact assessments are undertaken. Unfortunately, we have seen instances of new legislation that lack sufficiently robust and objective impact assessments, for example the EU11 Financial Transaction Tax proposal. Impact assessments need to be undertaken on a more rigorous basis, both with regards to Level 1 and Level 2 measures to ensure that suboptimal policy choices and unintended consequences are avoided.

9. Do you consider that the EU legislative process allows the active participation of all stakeholders in relation to financial services legislation? What, if any, suggestions do you have for how stakeholder participation could be enhanced?

The model process that should be followed with all EU financial services legislation should include public consultations and impact assessments ahead of any new legislation, followed by open hearings once new legislation has been published and the inclusion of relevant feedback in draft proposals before they are being finalised.

There are however examples of new EU financial services legislation where this has not been followed. The upcoming draft proposal on Money Market Funds has not been preceded by an in depth consultation of the stakeholders. Instead, uncertainties as to the European Commission's legislative intentions are not only impeding market participants in expressing a clear and defined view.

10. Do you consider that EU legislators give the same degree of consideration to all business models in the EU financial sector? Please explain your answer and state any suggestions you have for ensuring appropriate consideration of different business models in the development of EU financial services legislation.

One of the challenges in financial services regulation is that often a 'one size fits all' approach is chosen, not recognising different types of financial institutions and business models as well as their differing risk profiles. For example, banking regulation does not sufficiently consider the varying business models of institutions that fall within the definition of a bank. In particular, custodian banks, while regulated as banks, have very different business models, financial activities and risk profiles than universal or more specialised retail or investment banks. One example of regulation where further calibration is needed is in respect of the new capital and liquidity framework for credit institutions in the EU (CRD IV).

Another sector that suffers from a 'one size fits all' approach is asset management: Not only do asset managers differ significantly from other sectors in the financial services industry due to

their particular business model, i.e. acting as an agent on behalf of the end-investor and not taking principal risk, and their fiduciary responsibilities, but there are also important differences in the business models between asset managers, e.g. independent managers vs. managers that are part of a wider financial services group. It therefore has to be ensured that EU financial services legislation is sufficiently calibrated to accommodate the different aspects of the asset management industry.

In our view, this calibration is important to avoid unintended consequences. At the same time, we recognize that this is more difficult to achieve in Level 1 legislation which often is rather principles-based. However, going forward, it should be ensured already on Level 1 and in particular on Level that regulation is calibrated and tailored as much as possible to accommodate the various sectors and types of business models.

Note on answering the questions

Please clarify in your answers whether your example relates to financial services legislation in force, or to proposals still under consideration. For example, if you refer to MiFID as an example, please specify whether your point relates to Directive 2004/39/EC ("MiFID 1") and accompanying implementing measures, or to the MiFID 2 negotiations based on Commission proposals COM (2011) 652 and 656.