Association des Banques et Banquiers, Luxembourg
The Luxembourg Bankers' Association
Luxemburger Bankenvereinigung

Response from the ABBL to the ECON Questionnaire for the public consultation on enhancing the coherence of EU financial services legislation

Information about the ABBL:	
ABBL ID number in the COM Register of interest representatives:	
3505006282-58	
Identity	Organisation
Capacity	Industry trade body
MS of establishment	Luxembourg
Field of activity/ industry sector	Banking & other financial services
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Introduction and general remark

The ABBL[1] welcomes this initiative from the EU Parliament to improve regulatory proposals and streamline their application with the view to limit excessive burden so that more efforts are directed to the right direction namely sustaining and developing the EU economy, while a the same time making it sound and safe.

Although as a trade association the ABBL follows for its member all regulatory initiatives that may have an impact on its members, it is difficult to assess in an exhaustive way each and every issue, often across several regulations. As a general consideration, the Association thinks that the often used term of "regulatory avalanche" is not understated, as gathered over the course of interactions that the Association had with counterparts

[1] The Luxembourg Bankers' Association (ABBL) is the professional organisation representing the majority of banks and other financial intermediaries established in Luxembourg. Its purpose lies in defending and fostering the professional interests of its members. As such, it acts as the voice of the whole sector on various matters in both national and international organisations.

The ABBL counts amongst its members' universal banks, covered bonds issuing banks, public banks, other professionals of the financial sector (PSF), financial service providers and ancillary service providers to the financial industry.

from the regulatory side, its members, clients, advisors… Investment firms (IF) are confronted with an extreme pressure to comply with many projects at the same time while having limited resources at their disposal. Probably the most unfortunate aspect in that respect is that IFs are obliged to implement regulation where not only the paint is not dry but also which on occasion painting the entire regulation is not even finished. A prime example is EMIR, in force since 16th August 2012, but as of now impossible to apply as level 2 measures have only been released in the spring of 2013. In addition about 12 months will still have to pass before the first product can be officially cleared. The Association considers that this is neither acceptable nor that this helps to prepare a sound future where risks – systemic ones – are well understood and managed. This situation stems from the pressure exerted on the EU Institutions to release regulation with impossible-to-meet deadlines that are transferred to the likes of ESMA and to local authorities and firms. As a pragmatic reminder: applying and complying to a regulation means understanding the scope, implementing and defining procedures and then ensuring follow-up and reporting.

The ABBL is therefore happy that this initiative, which resembles a cross-regulation impact assessment, is initiated. Ideally it should have been organised at the time of producing the regulations. The Association hopes its views will contribute to the assessment and ideally a redesign of some measures.

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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 – See above

Individuals

Name of respondent:

Position:

Contact details:

Organisations

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Main activity of organisation: Banking and other financial services: trade association

Registration ID in the Transparency register (where applicable): 3505006282-58

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.

Incoherence MiFID / other legislative texts:

*In the articulation between **MIFID II and EMIR**, at least in the reporting area, there are improvements to be made. Indeed IFs will be confronted with a dual reporting: one for Trade Repositories for the purpose of EMIR and another one for MIFID II financial transactions that will cover the same types of instruments. At this stage there is no possibility to rely neither on a single reporting contact point nor agreement on the language to use. Entities affected are all financial institutions involved in dealings.*

A further overlapping between MiFID and EMIR regards the interoperability – or not – of clearing houses. MiFID imposes this interoperability while EMIR provides that there is none.

*Another area where there are overlaps although neither regulation is finished is the articulation between the **MIFID II/IMD II and UCITS on the one hand and the PRIPS** regulation on the other. In theory at least the service regulations (MIFID/IMD) and product regulation (UCITS) shall develop the necessary tools to ensure that IFs inform their clients, select appropriate products or respect diversification criteria… Then comes to play the PRIPS regulation as currently discussed in the EP. It seems to take over some rules that should be found in the service regulation like limiting some investments, imposing an additional obligation to hand over the document (which exist in the MIFID) and, regarding the UCITS, a complete framework designed at huge cost by CESR (at the time) which is completely scraped in favour of a new regime only 5 years after its first implementation. Firms will have to scrap what they have developed in the UCITS KIID only to build a similar file, when it would have been much simpler to extend the KIID to other products.*

*A future articulation for the legislators to watch will be the one between **MiFID and the yet to be adopted Securities Law regulation**. Indeed MiFID includes a regime for the activity of custody which risks overlapping with the future Securities Law regulation.*

Incoherence data protection proposal for a regulation / other legislative texts:

Banks are necessarily holding information on their customers and the amount of information held has been increasing steadily in particular due to legislative requirements. The current proposal for a regulation on data protection (COM(2012/11) provides for the necessary explicit consent of the data subject or a demonstrated legitimate interest. The first is not always possible to obtain while the second leaves up an amount of legal uncertainty as to whether there is a legitimate interest or not.

***MiFID** for example imposes on financial professionals to evaluate the situation of each customer in order to be able to suggest the most appropriate products and services. This implies the storing and handling of data on these persons.*

*Similarly, the **consumer credit directive** 2008/48/EC provides that the bank has to investigate the financial capacity of the customer and "*assesses the consumer's creditworthiness on the basis of sufficient information, where appropriate obtained from the consumer" (article 8).

*The proposal for a **mortgage credit directive** (COM 2011(48)) equally provides for a number of obligations on the bank and in particular the requirement that "a thorough assessment of the consumer's creditworthiness is conducted by the creditor, based on criteria including the consumer's income, savings, debts and other financial commitments" (article 14).*

*In the context of the **fight against money-laundering**, banks are obliged to identify not only their own customers but also other persons with whom the first have occasional transactions as soon as there is a suspicion of money-laundering or when the amount is higher than 15 000 euros. Banks need to keep this information for five years following the transaction. In this case it can be counterproductive to alert the relevant persons that there is a suspicion of money-laundering and therefore their data is stored.*

A similar logic is applied to the fight against corruption and related money-laundering. Indeed

the AML directive 2005/60/EC provides that banks need "appropriate risk-based procedures to determine whether the customer is a politically exposed person" (article 13(4)). Credit institutions need to identify "natural persons who are or have been entrusted with prominent public functions and immediate family members, or persons known to be close associates, of such persons" (article 3(8)). By law banks need therefore to keep databases on persons falling into that category of politically exposed persons (PEP). These files can contain the names of persons that the bank counts among their customers or has done business with or the names of persons that it has no, does not have or is prohibited to have relations with (list of persons that are subject to sanctions in the context of the EU's external and security policy or that are suspected terrorists).

The very existence of these files and processing of personal data by the banks, essential to their proper functioning, should not be jeopardized through new requirements under the data protection regulation.

Incoherence AML directive / bank account proposal for a directive

There risks also to be overlapping and contradictory requirements between the ***anti money-laundering directive and the basic bank account proposal***. The obligation to provide access to a payment account with basic features to a costumer seems contrary to the Know Your Costumer Due diligence. Moreover, a bank should remain free to refuse to open a new relationship with a client when there is strong suspicion of fraud, dishonesty against the bank or criminal activities.

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.

A primary point of focus is in the competition ***between banking services/investments and insurances*** *(life/pensions). The ABBL feels that probably due to tax incentives there is a distortion where insurance products benefit from a much more favourable treatment than*

banking / financial products. References may be the MIFID and IMD.

*In the **MIFID II** debate the ABBL wonders why the new article 3 excludes firms that provide investment services. The view of the ABBL is that all professional actors in the investment universe should be subject to the MIFID, namely have a licence, requirements for internal organisation and basic principles regarding interactions with clients.*

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.

Considering the huge amount of regulation the principle of the single rulebook seems now to be working. Member States had to transpose directives quickly and sometimes with no adaptation at all. Unfortunately it seems as if nobody or only a limited number of experts have been able to understand the great number of interactions between the different texts. In fact the process to pass these regulations and simply comply is taking so much effort that the time for analysis has not really come yet.

*What is however clear is that it has been a long time since we have seen such a difficult transposition as for example the **EMIR**. This regulation is live, enforceable but cannot be applied. This is all the more problematic for the non-cleared instruments side of it. Indeed today IFs still do not know which capital treatment or margins to apply to these products and at the current pace it is likely that they will not be the wiser for the near future.*

*In the **AIFMD,** which is applicable from 22/7/2013, a form of tacit grandfathering period has been introduced for 12 months so that AIFM managers may comply. But in practice it will depend on the speed at which Member States will consider to end that period and how clients of these AIFM will view this (possibility to get protection sooner or not). This has a specific impact on the rules for the depositary institutions that now act as asset insurers of last resort. During the transition phase what would happen if there were a problem in a fund? Shall the old law apply or the new AIFMD rules? This might be on the Courts to decide, but there are costs*

to this process.

*Another area characterised by an incoherent approach is the use or availability of instruments for **collateral** purposes. With the arrival of CRDIV /CRR and the EMIR regulation all IF know that they will have to have access to prime quality collateral. Collateral does exist, but not always where it should be. One way to solve the issue is to – in a transparent and clear way - reuse or transform some collateral. This is a message that both the ECB and IMF (besides the industry) are passing with alarming intensity. What is happening however is that anywhere where there is a possibility to reuse it is scrapped by a regulatory initiative. Examples can be found in UCITS V and probably in the future MMF (money market fund) proposal.*

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.

*Together, **UCITS V and AIFMD** provide a noteworthy example, where the supposedly more flexible regime for the AIFMD depositaries was so strict that when UCITS V was addressed, although it was considered that more needed to be done in terms of investor protection, in practice the only options available were neither satisfactory nor economically justified, since they shut many markets and add costs to the investment process without really increasing protection for retail clients.*

*In the view of the association, it might have been more coherent to first adopt **the Securities Law Regulation and then only the EMIR and CSD-R**. The reason is that the SLR shall define the legal framework for holding securities across the EU, notably defining the property rights (or how to manage conflicts of law across MS). Now it seems that this regulation will also target the traceability of assets. These 2 features have an impact on the CSD for issuing instruments as well as on settlement, viewed from a cross-border perspective. Moreover, in the case of EMIR, if full traceability and segregation are applied, then this will hugely impact the cost of collateral for IF members of the Clearing House. In other words, both the CSD-R and EMIR fed on legal concepts of securities law and had to introduce basic features that could have been avoided with a single regulation.*

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?

There is always a need for a basis of regulation that is topped up by administrative rules/guidelines that are supplemented by industry wide best practices. However given the process to update regulation, ABBL's feeling is that it shall to the maximum extent be relying on regulatory principles that are further defined by lighter regulatory approach (in terms of regulatory scale).

Although the idea of a single rulebook defined by regulations instead of directives may present some appeal, the Association considers that on the other hand this has the potential to bring the financial ecosystem to a standstill. Flexibility and adaptation are key values, but many regulations simply favour large global institutions, a case evidenced again by the interaction of EMIR and MIFID II. To go into the details, MIFIR opens the trading platforms regime to 4 types of entities (Regulated Markets, Multilateral Trading Facilities, Organised Trading Facilities and Systematic Internalisers). This is valid for all markets from equity shares to derivatives including bonds and any other tradable instrument. The problem is that for a SME IF to connect to all relevant markets is already a challenge, if not outright impossible. With the interaction with EMIR, which by the way MIFIR contradicts, clearing is compulsory for on exchange (platform) trading including derivatives and multiple clearing houses may be linked to such platform. The issue is that to clear one needs collateral, proportionate to its trading, which will exclude medium sized institutions from the market by lack of available collateral. Thus the EU markets will be run by a small number of global players that are able to connect or offer services (being MTF/SI/clearer…) and all other institutions will fall in the agency business fully dependent from these big houses. A simple solution would have been to limit clearing houses per platform vetting their access to members' approval.

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?***

There may be one single principle to apply in the first hand, which is to try to ensure better cohesion within the initiator of the regulatory proposals. Today it is as if each project is lead in total independence from others. A better calibration of the regulatory agenda will help deal with bottlenecks. Spreading regulatory wind all over the place is easy but when secondary level regulations (RTS or ITS) have to be produced, the necessary resources are often lacking. The staff of ESMA for example is completely insufficient compared to its objectives, which, when they are met, are scrapped by the EU Commission. The AIFMD L2 measures are a prime example.

Furthermore, regarding level 2 measures (delegated acts or RTS), the ESAs are tasked with drafting advice as well as technical standards on very detailed and often complex issues. It is therefore essential that they are given sufficient time to be able to produce the texts of the necessary quality. L1 texts should therefore avoid imposing unrealistically short deadlines and give preference to a set period (e.g. 1 year) after the adoption of the L1 text, rather than referring to concrete dates, which, with any delay in final adoption, shorten the timeframe for the ESAs' work.

Another element that is missing is metrics. Next to the always supportive impact assessment, no rule is created in the various regulations to measure its benefits. This discussion was held 2 years after the finalization of the FSAP and realisation that benchmarking was impossible because of lack of prior inventory. In the same vein impact assessments are complex processes subject to many biases among which trade-off between costs and benefit and benefits at individual level compared to the costs incurred, as well as imbalances at a more granular level than a misleading EU average.

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

An improved definition of powers and more confidence in the expert role played by the ESAs (European Supervisory Authorities) would be an improvement. The case of the AIFMD was a poor example of management of the process. Indeed the EU Commission for its reasons ignored part of the ESMA advice regarding depositaries and according to some lawyers even went further than what level 1 was requiring (the case of cash monitoring).

The EMIR experience was similar. The EU Commission copy-pasted the proposal from ESMA, but released a FAQ to complete the ITS. Regulating via FAQs is not an optimal way of proceeding.

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?

A close eye shall be drawn at the interactions between EMIR, MIFID II (& MIFIR) and CRD/CRR. Regarding upcoming regulations, the Securities Law Legislation may be a game changer for CSD-R, MIFID, EMIR, T2S, UCITS and AIFM. The idea to switch off omnibus accounts in favour of direct holding models will be a challenge for all firms.

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 ABBL generally considers that in most cases participation of all stakeholders is the norm at nearly every level. The main issue is that naturally people seem to be more attracted to what is an argument comforting one's own views. Without mentioning the debate on the FTT, there were many instances when although strong and coherent the voice of industry representatives has been mostly ignored. Discussions in the EMIR vis-à-vis the impact on non financial counterparties, the MIFIR debate on pre-trade transparency for non-equity instruments or the AIFM discussions on the cash monitoring as well as the UCITS debate on remuneration or reuse of assets are all cases in point. To reflect a comment heard several

times in the press or from some legislators saying a project is good because banks (or IF) say it hurts is not a justification for going ahead and logically faulty. Sometimes there are legal and pure operational issue to solve, be it only timing of the process.

The ABBL wishes to highlight 2 cases:
The first example is the AIFM level 2 measures, where ESMA conducted numerous bi-lateral and open market review, published advice, which subsequently has been changed by the EU Commission that simply rebuffed views from the regulators, the industry or lawyers on some key elements.

The other example is the EMIR level 2 measures as well where ESMA conducted several consultations but seemed to have been less open to bi-lateral meetings. This said ESMA was under an unrealistic pressure to deliver its texts. By default a minimum 12 months should be given to ESMA from the date of publication in the OJ.
In the end the ABBL concludes that communication with ESMA or the authorities is the point to improve.

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.

The ABBL believes that because the perspective of the internal market is to ensure harmonised regulation across the space and standardised or harmonised procedures, the regulation is twisting the biodiversity of the ecosystem in favour of the biggest players. They are the first to benefit from economies of scale and the ones able to diversify their activities relying on large cash pockets. The issue is that the SME sector in finance is suffering from this standardisation that makes some businesses unattractive. An example again is the case of the MIFIR requiring pre-trade transparency for bonds which may not necessarily help investors (specifically retail ones) but will certainly be prohibitive to develop for an IF that seldom trades for its clients. What is interesting is that one of the aims often mentioned is to promote competition and diversity but examples from financial market regulations point quite clearly in

the opposite direction.

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.