Financial Conduct Authority

The Financial Conduct Authority's Response to the European Commission's Call for Evidence on the EU Regulatory Framework for Financial Services

Introduction

The Financial Conduct Authority (FCA) welcomes the Commission's Call for Evidence on the EU regulatory framework for financial services and is pleased to respond.

The FCA is the conduct regulator for financial services firms and financial markets in the UK and the prudential regulator for firms not prudentially regulated by the UK's Prudential Regulation Authority[1].

The FCA's overall strategic objective is to ensure markets work well. To advance our strategic objective we have three operational objectives. These are:

- to secure an appropriate degree of protection for consumers
- to protect and enhance the integrity of the UK financial system
- to promote effective competition in the interests of consumers

Given the FCA's regulatory remit, there are over 40 pieces of Level 1 European legislation, as well as the supporting body of Level 2 and Level 3 measures and standards, that fall within our statutory responsibility. We have drawn on this scope in providing examples and evidence for the Commission's individual questions where appropriate and available. It is pertinent to remember that much of the recently agreed EU legislative framework is yet to be fully implemented, and therefore it is too early to provide robust quantitative or qualitative evidence on the actual impact of this legislation.

The FCA hopes that the Commission will use the responses to this call for evidence to draw up a short-term action plan of specific measures to address identified problems. In particular, many of our examples suggest areas where a given regulatory policy objective could be achieved in a more efficient or more effective way. But we also look:

- for its conclusions to inform the future reviews of relevant existing legislation
- for the findings and lessons to be considered as the new EU Better Regulation arrangements are implemented (including more rigorous assessments of impacts)
- for lessons to be learned to inform future new legislative proposals – eg on proportionality; the need for requirements appropriately to accommodate technological developments; and the co-ordination of implementation dates for related measures.

The rest of this cover note summarises our examples and evidence using the structure of the categories identified by the Commission.

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

1. Unnecessary regulatory constraints on financing

There are already reviews in train of key elements of the regulatory regime which provide the opportunity to identify and address such constraints. We very much welcome the Commission's July consultation on the impact of the CRR on bank financing of the economy. We await the results of this exercise and how the findings will inform the ongoing Commission-led Reviews of the whole CRD IV/CRR regime – including the review of how the CRD IV regime applies to non-bank investment firms.

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[1] The PRA is the prudential regulator of banks, building societies, credit unions, insurers and designated investment firms, and is part of the Bank of England.

The July consultation covered not only direct lending but also investment in the real economy via funds and similar vehicles. So we also very much welcome the Commission's September 2015 proposals to review the Solvency II capital requirements for investment by insurance undertakings in qualifying infrastructure investments, European Long-Term Investment Funds, and a wider range of equities. This will help to address potential barriers to such investment.

More generally, we hope that the creation of new European investment vehicles such as European Long-Term Investment Funds, European Venture Capital Funds and European Social Entrepreneurship Funds, will serve to promote finance and investment in these sectors. To some extent they should help rebalance any unintended consequences of AIFMD regulation on European venture capital and private equity investment.

We also continue to believe that there are some particular elements of the new MiFID II/MiFIR regime that could have negative impacts on some specific aspects of real economy financing. We have included these in our list of specific examples.

2. Market liquidity

In practice it is difficult to provide quantitative evidence on the effects of EU legislation on market liquidity. But it is worth bearing in mind that, increased competition and the convergence of European financial markets around a single rulebook, ought to lead to an increase in the pool of resources and potential counterparties available to companies looking for growth capital. The opening up of trading venues to greater competition via the first Markets in Financial Instruments Directive (MiFID I) is a prime example of such a legislative change; falling trading costs and increased trading volumes seen following the introduction of MiFID I across the Union corroborate this. The introduction of greater transparency for non-equity financial instruments in MiFID II and MiFIR will be a further step-change for market liquidity, if calibrated correctly. Increased transparency has the potential to further improve the price formation process and foster greater competition and liquidity.

As noted elsewhere, we strongly support the current Commission reviews of the CRD IV regime. While CRD IV may have increased trust and improved the financial health in many of the key financial institutions that play a role in the market, there could also be effects on market activity that affect liquidity. The review should consider this.

We have identified in our response some specific elements of MiFID II/MiFIR, EMIR and the Short Selling Regulation, which we think warrant review because of their possible unintended consequences and potentially negative effects on market liquidity.

3. Investor and consumer protection

We recognise that most of the EU regulatory framework that has been created over past years, and individual measures within it, have – directly or indirectly – been intended to strengthen investor and consumer protection and confidence. Obvious measures include:

- MiFID II
- the IDD
- UCITS
- PRIIPs
- the Payment Services Directive
- the Investor Compensation and Deposit Guarantee Schemes Directives
- the Alternative Dispute Resolution Directive
- Payment Accounts Directive
- e-money Directive, together with the extensive work of the ESAs in this area

Alongside the current Call for Evidence, we welcome the investor protection theme within CMU, and the recent Green Paper on Retail Financial Services as contributions to the Commission's promise to ensure that the EU financial services regulatory framework takes into account the needs and interests of consumers and retail investors, and to identify any necessary measures to make financial services work better for citizens.

In this exercise, we have offered some examples of where original or agreed texts may not have fully delivered on their intended consumer protection aims. We also note some specific positive examples of measures we think are working well.

4. Proportionality/preserving diversity in the EU financial sector

The FCA strongly supports the principle of risk-based proportionality in financial services legislation. Such an approach will help ensure effective measures that target the particular risks and issues faced by the diverse range of market participants, and avoid imposing unnecessary burdens (for example, through casting the scope of measures too widely).

Our view is that all EU legislation should respect these principles. But the issues have been particularly central to recent negotiations on Solvency II, CRD IV, MiFID II/MiFIR, UCITS, AIFMD, and the Benchmarks Regulation. While the principle of proportionality is often embedded in the legislation, it has been done in ways which leaves it unclear as to what this should mean in practice.

In this context we also particularly welcome the various reviews that are underway to assess aspects of the CRD IV regime – in particular whether the way in which elements of the regime apply to non-bank investment firms should be reconsidered.

Generally, we think that most EU rules accommodate the emergence of new business models – though we believe that there will be an increasing need for all measures to be considered in the light of technological developments, to ensure that legislation is appropriately 'future proof' and 'technology neutral'. By this, we mean that legislation should be drafted, to the extent possible, in such a way as to retain applicability in the light of technological developments and innovations, for example, which may bring consumer benefits. Legislation should not constrain such developments unduly.

We also agree that EU measures must be considered for their effects on the participation of non-financial actors in the market place.

Unnecessary regulatory burdens

5. Excessive compliance costs and complexity

Since it will generally be the case that all new regulation incurs some cost to firms, and possibly to customers and other market participants, requirements for a specific policy outcome must be proportionate, as targeted as possible, and developed in ways that minimise costs and complexity.

This will be facilitated if the principles agreed under the EU Better Regulation agenda are effectively applied, in terms of:

- proper impact assessments and focus
- not going beyond what is necessary to achieve the objectives of the initiative
- avoiding complex and unclear drafting in the final legal texts of legislative proposals.

It can further be aided by having as much clarity as possible on any Level 2 mandates specified in Level 1 text.

Reporting and disclosure requirements are often a major source of regulatory and compliance costs, and these are dealt with separately below.

But another set of costs could be minimised by a new approach to implementation of EU legislation and supporting requirements. This is where more than one piece of EU law requires changes to the same or similar systems, documentation or processes, but the various changes must be implemented by different dates. This sequencing requires one set of changes to be made, and then later followed by a further set of changes to the same systems, documentation or processes. Such repeated but uncoordinated changes are expensive for firms and often confusing for customers. Where related changes can be foreseen and anticipated, we believe that serious consideration should be given to aligning implementation deadlines so that one omnibus set of changes can be made by firms and regulators.

One cross-dossier set of changes that could have benefited from such a co-ordinated implementation plan is MiFID II/MiFIR, the IDD, and the PRIIPs Regulation (a link that we believe was originally intended by the Commission). Notwithstanding the fact that the individual measures were agreed at different times, implementation deadlines could have been aligned to facilitate one set of changes by firms and regulators to systems, documentation and related processes. If MiFID II/MiFIR is delayed to coincide with IDD implementation, this could still actually be achieved.

Another linked set of changes arises under the Payment Accounts Directive, the revised Payment Services Directive and the Regulation on Interchange Fees, where obligations come into force within a year or so of each other. This imposes a significant cumulative implementation burden on firms, regulators and customers in terms of amending related systems, processes, customer documents, communications etc.

6. Reporting and disclosure obligations

We agree with the Commission's analysis that, as a result of the way in which EU legislation has developed, in some areas the same or similar information may be required to be reported or disclosed more than once; or requirements may result in information being reported in a way which does not provide effective oversight or added value for investors. We have provided some specific examples of where we believe this to be the case, particularly in relation to EMIR.

We would encourage a review of how both disclosure and reporting obligations might better be aligned across different EU measures.

7. Contractual documentation

Aligning the implementation deadlines for EU legislation (see section 5) will also bring benefits where changes in contractual documentation are required. As we suggested, better alignment could both save compliance costs and reduce confusion for consumers when documentation changes excessively frequently because of a series of regulatory implementations that could have be timed to coincide. We gave two sets of examples: MiFID II/MiFIR, the IDD, and the PRIIPs Regulation; and the Payment Accounts Directive, the revised Payment Services Directive and the Regulation on Interchange Fees.

We have also provided particular examples of impacts relating to contractual documentation required under the Mortgage Credit Directive, the AIFMD, and the interaction of the Prospectus Directive and PRIIPs Regulation.

8. Rules outdated due to technological change

We support the suggestion that rules should accommodate and not prevent the use of online services and channels, and should support the development of financial technology solutions.

The growth of mobile access to information through tablets and smartphones continues to shape the consumer experience. Digitalisation provides an opportunity to improve the engagement between investors and investment product providers, increase financial awareness, give consumers greater control over their investments, and drive down costs in capital markets. That said, it also provides a range of challenges for EU regulators and consumers: particularly around security, data protection, investor protection and maintaining fair competition, which need to be addressed.

The FCA has been undertaking considerable work in this area, to look at the way financial services firms communicate with consumers, particularly reflecting the changing way consumers are engaging with financial services. Our work has included the publication of a Discussion Paper on "Smarter Consumer Communications", which we have presented and discussed with various stakeholders in Brussels in September 2015.

Examples of innovative communication practices we have found include:

- the use of graphics to explain complex financial concepts to consumers
- the use of interactive apps to help consumers manager their money effectively
- communications tailored for the needs of a product's target market (eg young people)
- videos and infographics to present complex information, such as terms and conditions

In our view, the key point is that relevant future EU disclosure and communication rules are drafted in a "technology neutral" way which does not assume delivery and/or compliance through any particular format (eg paper-based) but accommodates all 'durable mediums' which consumers may wish to choose. We also think that existing requirements should be reviewed to ensure that they also satisfy this principle.

There may even be a case for policymakers to consider whether certain key disclosures can be adapted for consumption on mobile devices – with additional information then accessible to support this.

Aside from disclosure and communication channels, we believe that rules should also accommodate – with appropriate safeguards – other technology tools that some consumers may wish to use. In the UK, there is current interest in ideas such as 'account aggregation' and the idea of a 'digital passport' or portable electronic customer profile. These aim to speed up the process of opening investment accounts for consumers and establishing advisory relationships, and to help consumers to access and manage their finances in one place online. As long as such ideas are developed in a way that protects investors' interests and in full compliance with regulatory requirements, it should be possible for them to be accommodated within EU rules.

Interactions of individual rules, inconsistencies and gaps

13. Gaps

We support the Commission's overall assessment of the situation here, and the examples we have included in this response are points of detail.

However, in our response to the Commission's Capital Markets Union Green Paper, earlier in the year, we did suggest that "to support confident investing, the Commission should consider progressing its earlier ideas to create an EU Insurance Guarantee Scheme framework and consider reintroducing an updated Investor Compensation Scheme Directive". We are also aware that questions remain open about any regulatory gap at EU level around certain types of crowdfunding. While we support keeping this sector under review, our view remains much as set out by ESMA and the EBA in their reports to the Commission: that, as the sector is at an early stage in its development, it should be allowed to develop within the parameters of existing EU legislation and supported by rules introduced at national level.

Risks giving rise to possible other unintended consequences

14. Risk

The examples we have identified under this heading are fairly detailed instances of unintended consequences, rather than significant examples of such consequences or of risks shifting within the financial system.

For example, in the conduct area, we believe that the cumulative effect of MiFID II, the IDD, the PRIIPs Regulation and the recent funds initiatives serve to promote more of a level playing field across the securities and insurance-based investment sectors (including insurance-based funds) than has hitherto been the case; and should therefore discourage any incentive to favour one sector's products against another's on the basis of regulatory standards alone.

Conclusion

We hope that our response to the exercise will be helpful, and are keen to discuss these and other points further with the Commission as this welcome initiative progresses.

SPECIFIC EXAMPLES

Overview

1.	**Unnecessary regulatory constraints on financing**
1.1	*Solvency II + CRD IV/CRR – some capital weightings could unintentionally constrain investments in certain instruments/types of fund. These issues are already being explored by the Commission in current reviews.*
2.	**Market liquidity**
2.1	*MiFIR obligation for non-equity systematic internalisers to make quotes available to other clients could be clarified*
2.2	*MiFIR Double Volume Cap mechanism used to determine waivers from pre-trade transparency could be improved*
2.3	*EMIR "frontloading" obligation issues.*
2.4	*Short Selling Regulation – the requirements for ongoing market monitoring are disproportionately burdensome.*
2.5	*MiFID II – more flexibility could be considered in the pre-trade transparency regime for non-equity instruments.*
3.	**Investor and consumer protection**
3.1	*Requirements re disclosure to consumers across various investor protection Directives and Regulations could be better aligned and co-ordinated.*
3.2	*Alternative Dispute Resolution Directive – this should be the common EU framework in other pieces of legislation (which should not introduce inconsistent requirements)*
3.3	*Insurance Distribution Directive – an example of a measure which can valuably raise standards across Member States, but could provide even more of a level playing field with other relevant analogous standards (eg in MiFID 2).*
3.4	*PRIIPs – another example of raising investor protection standards across Member States – though underlines need to align disclosure requirements across legislation.*
3.5	*MiFID II – another example of a measure which includes elements that raise investor protection standards across Member States.*
4.	**Proportionality/preserving diversity in the EU financial sector**
4.1	*PSD II – co-operation obligations on home and host Member States may be disproportionate for smaller firms*
4.2	*PSD II and AMLD interaction – requirements for a central contact point for AML rules may be disproportionate for smaller firms*
5.	**Excessive compliance costs and complexity**
5.1	*Various pieces of legislation impose changes on firms undertaking retail services which come into force within a year or so of each other and could be better aligned and sequenced – also a lesson for future measures*
5.2	*EMIR - clearing requirements do not include an exemption for smaller firms and could be excessive; and a longer term solution to the temporary exemption for pension funds is needed*
5.3	*UCITS – elements of the regime for cross-border mergers of UCITS funds could usefully be reviewed*
5.4	*MiFID II – the regime for commodity derivative position limits and position reporting could be improved in specific respects*
5.5	*Short Selling Regulation – the SSR ban on naked short selling may no longer be*

	necessary, given its costs and potential burdens.
6.	**Reporting and disclosure obligations**
6.1	*MiFIR – transaction reporting requirements flagging short sales may be excessive*
6.2	*EMIR – the requirement for back loading expired trades should be reviewed*
6.3	*EMIR – the application of the EMIR 2-sided reporting obligations of derivatives trades could usefully be reviewed*
6.4	*EMIR – Exchange Traded Derivative reporting on a trade-by-trade basis should be reconsidered*
6.5	*Reporting requirements across various measures could be better aligned and made more consistent*
7.	**Contractual documentation**
7.1	*MCD – there is a specific issue in the interaction of transitional and review provisions around the European Standardised Information Sheet*
7.2	*AIFMD – the scope of the concept of cross border marketing for certain types of AIFs could usefully be reviewed*
8.	**Rules outdated due to technological change**
8.1	*UCITS – aspects of the cross-border notification requirements could be improved by accommodating online links/options*
8.2	*Distance Marketing Directive – some DMD language/provisions are outdated (eg references to faxes and floppy discs)*
9.	**Barriers to entry**
9.1	*CRD IV/CRR – we support the current CRD IV/CRR Reviews into the application of the regime to non-bank investment firms*
9.2	*AIFMD – the requirement to appoint an external valuer may have unintended consequences*
9.3	*AIFMD – the restriction on types of firms that may act as depositaries may have unintended consequences*
9.4	*UCITS – the restrictions on funds of funds acting as master UCITS should be reviewed*
10.	**Links between individual rules and overall cumulative impact**
10.1	*EMIR/CRR – the CRR leverage ratio may have unintended consequences on the offering of clearing services, inconsistent with the aims of EMIR*
10.2	*Passporting – there are some inconsistencies in the allocation of Home State and Host State responsibilities across passporting directives which should be considered, and avoided in future*
10.3	*The interaction of certain provisions across the AIFMD, MiFID and UCITS should be reviewed to address inconsistencies*
11.	**Definitions**
11.1	*The definitions and provisions around cross-selling across different EU legislation could usefully be reviewed for consistency*
11.2	*CRR – the definition of "asset management company" does not fit with the UCITS Directive*
11.3	*AIFMD, MiFID II – the interaction of the concepts of "professional investor" could usefully be clarified*
11.4	*Remuneration – the definition of "remuneration" across the various relevant measures is not always consistent*

12.	**Overlaps, duplications and inconsistencies**
12.1	*Various – provisions across a number of pieces of legislation relating to administrative sanctions are inconsistent*
12.2	*CSDR – the CSDR mandatory securities settlement regime could be clarified in the way in which it applies to Trade Date Netting models*
12.3	*Whistleblowing provisions differ across a number of measures and could usefully be reviewed for consistency*
12.4	*Various – provisions covering the publication of sanctions differ across a number of measures and should be reviewed for consistency*
12.5	*MiFID II and MAR - provisions about co-operation between NCAs across a number of measures should be reviewed for consistency*
13.	**Gaps**
13.1	*EMIR – elements of EMIR's territorial scope of application should be clarified*
13.2	*CSDR – the regime for mandatory buy-ins after failed transactions is unclear*
13.3	*UCITS – the UCITS reporting framework across Member Stats could be better aligned*
13.4	*MCD – an example of where transitional impacts could be better considered and provided for*
14.	**Risk**
14.1	*CSDR – the interaction of the CSDR and Financial Collateral Directive creates a specific unintended problem which should be addressed*
14.2	*Data Protection Regulation / MAR – the interaction of the measures may have unintended consequences for beneficial taping of calls*
14.3	*MCD – the MCD provisions on foreign currency lending could usefully be reviewed for effective focus and to avoid unintended consequences*
14.4	*IDD – unlike other Directives, the new IDD requires regulators to process authorisations in only 3 months, which may pose risks and challenges*
15.	**Procyclicality**
	No examples being provided.

1) Unnecessary regulatory constraints on financing

The Commission launched a consultation in July on the impact of the Capital Requirements Regulation on bank financing of the economy. In addition to the feedback provided to that consultation, please identify undue obstacles to the ability of the wider financial sector to finance the economy, with a particular focus on SME financing, long-term innovation and infrastructure projects and climate finance. Where possible, please provide quantitative estimates to support your assessment.

1.1 Solvency II and CRD IV Regimes

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

Solvency II (S II), Capital Requirements Directive IV (CRD IV) and Capital Requirements Regulation (CRR)

- **Please provide us with an executive/succinct summary of your example**

Prudential requirements can influence macroeconomic outcomes. When designing capital regulation, policymakers should consider the potential effects of capital requirements on both financial stability and lending activity and assess the consequences for economic output. A well designed capital requirement would balance the costs that it imposes with the benefits it intends to deliver.

Thus we welcome the Commission's September 2015 proposals to amend the Solvency II Delegated Regulation in order to promote investment by insurance undertakings in qualifying infrastructure investments, and in European Long-Term Investment Funds (to align the capital treatment with investments in European Venture Capital Funds and European Social Entrepreneurship Funds). We believe that such measures will promote real economy investment through these instruments.

We also welcome the Commission's July 2015 consultation on the impact of the CRR on bank financing of the economy, as an element of the wider Commission-led Reviews of the CRD IV regime. We believe that the review of how the CRD IV regime applies to non-bank investment firms could bring benefits to investment in the real economy, if it resulted in a better tailoring of the regime to the different risks posed by non-bank investment firms.
As part of the review of the CRD IV regime, and in response to the European Commission's call for advice on the suitability of certain aspects of the prudential regime for investment firms, the EBA and ESMA published an initial report in December 2015 which supports the need to amend the legislation. Again, we welcome this. The report recommended:

1. a new categorisation of investment firms which should distinguish between: systemic 'bank-like' investment firms to which the full CRD/CRR requirements should be applied; other investment firms ('non-systemic') with a more limited set of prudential requirements; and very small firms with 'non-interconnected' services;
2. the development of a specific prudential regime for 'non-systemic' investment firms; and
3. extending the waiver for commodity trading firms until 31 December 2020.

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

The FCA supports the proposed amendment of the Solvency II Delegated Regulation and the CRD IV Reviews, including the initial views of the EBA/ESMA Review of the appropriate prudential regime for investment firms.

2) Market liquidity

Please specify whether, and to what extent, the regulatory framework has had any major positive or negative impacts on market liquidity. Please elaborate on the relative significance of such impact in comparison with the impact caused by macroeconomic or other underlying factors.

2.1 Obligation for non-equity Systematic Internalisers to make quotes available to other clients when dealing in liquid non-equity instruments

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

Markets in Financial Instruments Regulation (MiFIR) - Article 18.

- **Please provide us with an executive/succinct summary of your example**

Where a systematic internaliser responds to a request to provide a quote to a client in a liquid bond or derivative in a size below the size specific to the instrument, that price has to be made available to other clients of the firm on the basis of their commercial policy and in an objective non-discriminatory way. Quotes are allowed to be updated at any time and price improvement can be offered in justified cases.

The scope of the obligation on firms to make prices available to clients other than the client who requested a quote is very unclear and open to different interpretations. For example, can the firm update its quote following execution and before providing access to the other clients? For how long does a firm have to make a quote available to other clients? What are the non-discriminatory criteria that a firm can use to distinguish between the clients to whom it gives access to a quote?

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

Liquidity provision is essential to resilient and well-functioning financial markets. Yet to maintain a workable market for systematic internalisers, the rules must work in a way which does not expose a systematic internaliser to unmanageable counterparty risk exposure as a result of potentially unmanageable obligations to publish executionable quotes.

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

In order to provide liquidity to the market, a systematic internaliser must be able to manage its risks well. In order to do that the systematic internaliser should never be exposed, when providing a quote to a client, to transactions which as a whole are above a size that would expose the systematic internaliser to undue risk.

MiFIR states that:

a) systematic internalisers are not subject to transparency obligations when dealing above the size specific to the instrument; and that

b) systematic internalisers may update their quote at any time.

So, we would therefore suggest that the following process should apply. When a quote is provided to a client on the request of that client, the quote should be executable by the client and made transparent to other clients and the wider public. This avoids exposing the systematic internaliser to the risk of multiple transactions at the same size for every quote it is requested to provide, which could give rise to unmanageable counterparty, market and credit risks.

This would provide a clear and straightforward obligation and one which is similar to that imposed on a market maker on a trading venue which operates a Request for Quote protocol, and in line with proper risk management practices and the intention of MiFIR. However, it is not clear that this approach is possible under the current drafting of MiFIR.

2.2 MiFID II Double Volume Cap

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

Markets in Financial Instruments Regulation (MiFIR) - Article 5, 'Volume Cap Mechanism'

- **Please provide us with an executive/succinct summary of your example**

MiFIR will introduce a double volume cap (DVC) mechanism for use of the reference price and negotiated trade waivers. This is aimed at limiting the extent of trading in equity and equity-like instruments that takes place under these two waivers from the obligation to provide pre-trade transparency.

We support the objective of the DVC, of protecting the effectiveness of the price formation process. However, we believe that the DVC is a poor way of achieving this, because it involves a significant cost in the collection and processing of the required data, and works against orderly trading by potentially flicking on and off certain methods of trading individual financial instruments, depending on whether the relevant cap thresholds are crossed.

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

ESMA will be able to provide the Commission with full details of the costs of establishing and running a mechanism to collect data for the purposes of measuring whether trading in individual equities and equity-like instruments exceeds the DVC.

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

We believe that the objective of the DVC can be achieved through significantly less costly and disruptive means. For example, a threshold could be set for the size of a transaction to benefit from the reference price waiver. The original intent behind this waiver was to enable financial institutions to cross orders in significant sizes. Additionally, negotiated transactions in liquid instruments could be restricted to transactions subject to conditions other than current market prices.

2.3 EMIR "frontloading" obligation

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

European Market Infrastructure Regulation (EMIR)

- **Please provide us with an executive/succinct summary of your example**

The “frontloading” obligation in EMIR (Level 1) gives rise to uncertainty in the derivatives market, potentially hampering the market’s ability to grow without an increase in systemic risk. EMIR (Art 4(1)(b)) requires counterparties to clear all OTC derivative contracts (pertaining to a class that has been declared subject to the clearing obligation) via a CCP, if the contracts were “entered into on or after a notification referred to in Art 5(1) EMIR (i.e. when a CCP notifies ESMA that it has been authorised to clear a class of OTC derivatives) but before the date from which the clearing obligation takes effect if the contracts have a remaining maturity higher than the minimum remaining maturity determined by the Commission in accordance with Art 5(2)(c).”

The industry has raised strong concerns about the uncertainty surrounding this “frontloading” obligation, and the inability for counterparties practically to fulfil such an obligation if they do not know – at the time a CCP is authorised to clear certain OTC derivative contracts – whether or not such class(es) of OTC derivatives will in fact be declared subject to the clearing obligation later on (in separate RTSs to be made by ESMA/the Commission).

The uncertainty surrounding Art 4(1)(b) has led to the publication of an open letter from ESMA to the Commission, indicating that a strict interpretation of the Art 4(1)(b) text might run counter to EMIR’s main purpose/objective of ensuring greater transparency and less systemic risk in the EU derivatives market.

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

We would encourage the Commission to remove the “frontloading” obligation.

2.4 Short Selling – Art 23

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

Short Selling Regulation (SSR) - Article 23

- **Please provide us with an executive/succinct summary of your example**

The prescriptive on-going monitoring process required to track the significant price movements of all financial instruments within the scope of Article 23 of the Regulation is costly, burdensome and disproportionate.

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

The Short Selling Regulation gives competent authorities discretion to impose a temporary ban on short selling on a particular financial instrument where its price has fallen significantly, in order to prevent a disorderly decline in the price of that instrument.

Although we acknowledge the purpose for a competent authority to have the power to ban short selling in certain circumstances, the prescriptive on-going monitoring required to monitor the significant price movement of every financial instrument within the scope of Article 23 requires significant resources for trading venues and competent authorities.

In addition, the steps that need to be taken by the competent authority to consider and then impose a ban once the price threshold has been met are lengthy and burdensome.

In light of the limited number of bans imposed since the SSR came into application, the monitoring requirement appears costly and disproportionate for trading venues and competent authorities.

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

To achieve the market impact that a temporary short selling ban seeks to address, competent authorities should have a more general ability to ban short selling within the scope of Article 23 which would limit the time taken to impose a ban. Temporary bans should also apply to a more limited type of financial instrument (e.g. financials).

This would alleviate the costs of the burdensome prescriptive ongoing monitoring for competent authorities and trading venues.

2.5 MiFID II – non equity transparency

Non-equity transparency regime

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

Markets in Financial Instruments Regulation (MiFIR) - Articles 8, 9, 10 and 11

- **Please provide us with an executive/succinct summary of your example**

MiFIR introduces a comprehensive transparency regime for bonds, structured finance products, emission allowances and derivatives. We welcome this regime, which is important for supporting more robust and efficient financial markets, including contributing to meeting the EU's international commitments to financial markets reform in the wake of the 2008 financial crisis. To give effect to this regime, ESMA was asked to draft RTS which calibrated the way it worked by developing criteria to identify liquid financial instruments and thresholds above which the transparency obligations are disapplied, modified or deferred. These calibrations are vital to striking an appropriate balance between transparency and the encouragement of liquidity. The regime will apply in full from the date of the application of MiFID II. Whilst ESMA has been careful to assess the data available to it, the legislation does not provide for the opportunity to roll out the regime over a period of time and to allow for it to be amended in the light of experience before it takes its full effect.

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

For the purposes of pre-trade transparency, the draft RTS on non-equity transparency set the threshold ('the size specific to the instrument'(SSTI)) at which a liquidity provider using a request for quote or voice trading system is exposed to undue risk at the 60th percentile of executed transactions for most non-equity instruments. But, to take one example: on average, looking at quotes on the multilateral trading facility i-SWAP Ltd between 4th June and 11 August 2015 for EUR single currency fixed float swaps, the average notional trade that liquidity providers were willing to undertake at various tenor points (2Y,3Y,4Y,5Y and 10Y) were all below the 60th percentile and, except the 5Y, at or below the 50th percentile. The average also hides intra-day and seasonal fluctuations in available liquidity. Using the 60th percentile for the SSTI might well be the right long-term solution to ensure that a significant proportion of trading activity is transparent, but given that it seems ambitious in the light of current trading patterns there is a case for moving towards it in a phased manner to give regulators and the market the opportunity to learn from experience and to ensure that the introduction of MiFID II/MiFIR does not immediately disrupt trading activity.

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

We believe that there is a case for caution, for example, by phasing in the regime. We believe the threshold should be introduced gradually; starting at a lower level and moving upwards over a period of three years.

3) Investor and consumer protection

Please specify whether, and to what extent, the regulatory framework has had any major positive or negative impacts on investor and consumer protection and confidence.

3.1 Consumer Disclosure

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

Packaged Retail and Insurance-based Investments Products Regulation (PRIIPS), Insurance Distribution Directive (IDD), Markets in Financial Instruments Directive II (MiFID II), Prospectus Directive (PD), Mortgage Credit Directive (MCD), Undertakings for Collective Investments in Transferable Securities Directive (UCITS), Alternative Investment Fund Managers Directive (AIFMD), Payment Services Directive II (PSD II), Payment Accounts Directive (PAD)

- **Please provide us with an executive/succinct summary of your example**

The significant majority of EU legislation in the retail space includes some requirement for firms to disclose information to consumers. As legislation is reviewed, revised and updated, disclosure is typically added rather than removed. From a consumer perspective, this means they receive numerous different disclosures throughout the purchasing process and lifecycle of their products; disclosures that are required by various pieces of EU legislation.

A key lesson from behavioural economics is that the more information given to consumers, the less able they are to engage and use the information to make effective decisions. Therefore, every time EU legislation requires more disclosure, the less effective this disclosure and pre-existing disclosure may be at empowering consumers to make effective decisions.

We also believe that maximum harmonised standardised EU disclosures (eg in the MCD and PSD) can, in some cases, unintentionally constrain the best content and format for disclosures required in local markets in respect of local products and issues.

Rather than a sectoral approach to requiring different disclosures, we see significant benefit in considering more holistically the customer decision-making process and the information consumers receive throughout this process. A review and rationalisation of the disclosures required across different pieces of legislation, and ensuring that these are provided to the customer when they are most likely to influence decision making, could ultimately benefit consumers.

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

The investment market is a good example of overlapping disclosure. For potentially substitutable products, consumers can receive quite different disclosures. MiFID II and PRIIPs are both adding to the list of information to be provided, with little attention apparently given to how the information included in the various disclosures interacts. If the information is not aligned, this risks confusing (and discouraging) consumers.

The FCA is carrying out a programme of consumer testing on a number of disclosure issues and will be happy to share the findings of this testing with the Commission. This may be particularly relevant in the context of the Commission's Retail Financial Services Green Paper work.

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

Rather than the sectoral approach to requiring different disclosures, we see significant benefit in considering the interaction of the different information consumers receive. A rationalisation of the disclosures, and ensuring that these are provided when they are most likely to influence consumers' decision making, could ultimately benefit consumers.

Therefore we would encourage a comprehensive review of the consumer purchasing process, including advised and non-advised channels, to consider consumers' information needs and the impact of current disclosures. The Commission could consider initiating a cross-cutting work stream (possibly led by the three ESAs) that considers disclosure across all substitutable products, as required by different sectorial legislation, to rationalise the information consumers receive.

All disclosures should be underpinned by the need to ensure consumers receive information which truly empowers them to make effective decisions about their finances. Behavioural science (and consumer research and testing) therefore also plays an important role in informing this work; and it is necessary to consider, not only what information consumers should receive, but importantly *how and <u>when</u>* it should be provided.

In addition, any future changes should ensure disclosure requirements are sufficiently flexible to adapt to changes in consumer behaviour and technological advances. As an example, specifying that disclosure should be provided in paper-format and not exceed a number of pages can prevent firms from using video, interactive tools or other technological solutions to communicate this information more effectively to their consumers. Alternative media should still be capable of being regarded as "durable media" for these purposes.

3.2 The Alternative Dispute Resolution Directive (ADR Directive)

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

The Alternative Dispute Resolution Directive (ADR)

- **Please provide us with an executive/succinct summary of your example**

We support the rationale behind the EU Alternative Dispute Resolution Directive, in promoting the establishment of out-of-court redress mechanisms for consumers throughout the European Union. The UK is one of the Member States that has a long-standing ADR mechanism in place for complaints about most financial services.

Despite some issues with timeframes and deadlines in the final text, we see the EU cross-sectoral framework as a valuable promotion of high standards of investor/consumer protection across the Union – even if not mandatory in all respects.

However, one point we would make is that once such an EU ADR framework is agreed, subsequent sectoral measures should recognise this and not seek to introduce their own variations with slightly different requirements, particularly since a number of financial services firms operate in more than one sector. For example, MiFID II requires firms to explain in final response letters that the consumer can refer their complaint to an ADR entity and that they may also be able to go to court. Telling consumers they can also go to court could cause confusion – consumers may be better off using an ADR entity in the first instance because it is free for consumers. It could also create extra costs for firms carrying out MiFID business, because under the ADR Directive firms do not also have to tell consumers they can go to court if they are unhappy. This is an additional requirement that has been added to MiFID II but it does not appear in consumer awareness requirements in other Directives.

Other sectoral measures that provide for ADR mechanisms (eg the IDD, and the Mortgage Credit Directive) should also ensure that they respect the already agreed framework, and do not re-invent or vary requirements where this is not necessary.

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

The FCA would encourage the Commission to ensure that future financial services legislation does not introduce inconsistent individual variations to the ADR framework.

3.3 Insurance Distribution Directive

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

Insurance Distribution Directive (IDD), Markets in Financial Instruments Directive II (MiFID II)

- **Please provide us with an executive/succinct summary of your example**

The FCA sees the IDD as raising standards of consumer protection in the EU insurance sector when compared to the high-level Insurance Mediation Directive that it replaces. We believe that the IDD's more rigorous authorisation and notification requirements, together with stronger conduct of business standards, will, on the whole, promote greater confidence among both regulators and customers in this sector of the Single Market.

That said, we think that there is scope for even greater consistency between the IDD (Chapter VII) and MiFID II requirements, for insurance-based investment products, than has so far been achieved. Examples of this are the requirements for managing conflicts of interest and the rules around inducements. Greater consistency would aid compliance by firms undertaking both MiFID and IDD business, and help consumers who are considering competing products from advisers and other intermediaries.

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

In the coming development of Level 2 standards, and in future reviews of Level 1, we would encourage increased consistency between IDD and MiFID II requirements for insurance-based investment products.

3.4 PRIIPs

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

Packaged Retail and Insurance-based Investment Products Regulation (PRIIPs)

- **Please provide us with an executive/succinct summary of your example**

The PRIIPs Regulation will introduce requirements on firms that manufacture, advise on, or sell 'packaged retail and insurance-based investment products' (PRIIPs), to ensure that investors have access to a short, consumer-friendly Key Information Document (KID). The aim is to encourage efficient EU markets by helping retail investors to better understand and compare the key features, risks, rewards and costs of different retail products (where they fall within the PRIIPS definition).

Subject to the general points we have made earlier about the rationalisation of disclosures across different pieces of EU legislation, we continue to support the objectives behind the creation of consistent disclosures across the banking, investment and insurance sectors in respect of competing and 'substitutable' retail products. Despite the inherent limitations on how far disclosure alone can contribute to consumer protection, we believe that more consistent and comparable information, such as that which will be included in the KID, should help promote consumer choice and confidence. We hope that, from 2017 onwards, the introduction of the KID (it will replace some existing documents) will be seen as useful by consumers.

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

The FCA believes consistent and comparable information for consumers can be a tool to help them choose the best products for their needs. We would encourage consistent disclosure across substitutable products. However, we would also reiterate our earlier point about the value of a comprehensive review of current EU disclosure obligations across the various pieces of EU legislation to assess their interactions and cumulative effectiveness.

3.5 MiFID II

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

Markets in Financial Instruments Directive II (MiFID II)

- **Please provide us with an executive/succinct summary of your example**

The MiFID II/MiFIR package seeks to achieve the outcome of securing an appropriate degree of protection for consumers.

We particularly welcome many of the new and strengthened investor protection provisions of the MiFID II/MiFIR framework legislation – in particular, the limits on the use of third party inducements; the conditions for the provision of independent investment advice; stricter organisational requirements for product design and distribution; provisions aimed at ensuring that sales-staff are not inappropriately incentivised and that remuneration practices do not introduce conflicts of interest; product intervention powers; the disclosure of all costs and charges associated with an investment service and financial instrument; and the application of conduct of business standards to structured deposits.

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

The FCA welcomes such requirements and would encourage consistency in other areas of EU consumer protection legislation.

4) Proportionality/preserving diversity in the EU financial sector

Are EU rules adequately suited to the diversity of financial institutions in the EU? Are these rules adapted to the emergence of new business models and the participation of non-financial actors in the market place? Is further adaptation needed and justified from a risk perspective? If so, which, and how?

4.1 PSD II provision not necessarily appropriate for all firms

- **To which Directive(s) and/or Regulation(s) do you refer in your example**

Payment Services Directive II (PSD II)

- **Please provide us with an executive/succinct summary of your example**

Article 30 of PSD II (the 2nd paragraph) applies to passporting payment institutions (PIs) and provides for the competent authority in a host member state to take precautionary measures '*in emergency situations, where immediate action is necessary to address a serious threat to the collective interests of the payment service users in the host Member State*'.

We are not convinced that this provision would be easy to apply to payment institutions, especially smaller ones. It is also unclear about what circumstances could trigger this intervention. Within this specific area, this has implications for internal market policy as it alters the balance of power between the host and the home state in favour of the former without providing appropriate checks and balances.

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

We would encourage the Commission to consider the impact of this requirement (including on smaller firms) in future reviews.

4.2 Central Contact Point for AML rules

- **To which Directive(s) and/or Regulation(s) do you refer in your example**

Anti-Money Laundering Directive (AMLD) and Payment Services Directive II (PSD II)

- **Please provide us with an executive/succinct summary of your example**

The concept of a central contact point (a single point of contact for overseeing AML/CTF compliance of agents of payments institutions and e-money institutions based in another country) moving from the AMLD to PSD II could have a significant impact on the balance of responsibilities between home and host states.

The relevant article is Art 29 (4) and (5): '*Member States may require payment institutions operating on their territory through agents under the right of establishment, the head office of which is situated in another Member State, to appoint a central contact point in their territory to ensure adequate communication and information reporting'.*

While the EBA needs to draft a RTS '*specifying the criteria to be applied when determining, in accordance with the principle of proportionality, the circumstances when the appointment of a central contact point is appropriate…'* our concerns are that it creates issues with the home and host state responsibilities.

An additional problem is that article 29 only impacts payment institutions and not credit institutions, which potentially increases the burden on smaller firms. In certain circumstances, the requirement might translate into a burden that is unsustainable for a small payment institution.

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

We would encourage the Commission to consider the impact of this requirement on smaller firms in future reviews.

5 Excessive compliance costs and complexity

In response to some of the practices seen in the run-up to the crisis, EU rules have necessarily become more prescriptive. This will help to ensure that firms are held to account, but it can also increase costs and complexity, and weaken a sense of individual responsibility. Please identify and justify such burdens that, in your view, do not meet the objectives set out above efficiently and effectively. Please provide quantitative estimates to support your assessment and distinguish between direct and indirect impacts, and between one-off and recurring costs. Please identify areas where they could be simplified, to achieve more efficiently the intended regulatory objective.

5.1 Number of obligations for firms undertaking retail services which come into force within a year or so of each other.

- **To which Directive(s) and/or Regulation(s) do you refer in your example**

Payment Accounts Directive (PAD), Payment Services Directive II (PSD II), Regulation of Interchange fees, Single Euro Payments Area Regulation (SEPA), Bank Structural Reform (BSR), Insurance Distribution Directive (IDD), Wire Transfer Regulation, E-money Directive, Markets in Financial Instruments Directive II (MiFID II)

- **Please provide us with an executive/succinct summary of your example**

The number of obligations for firms undertaking retail services which come into force within a year or so of each other places a high cumulative implementation burden of firms in terms of amending customer documents, communications etc.

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

INITIATIVE	**REPAPERING REQUIREMENTS**	**TIMESCALES**
Payment Accounts Directive	Payment Service Providers to provide Fee Information Document and Statement of Fees; to use standardised terms in all material(s); comparison websites to be made available.	November 2017- January 2018
Payment Services Directive II	Updated information to consumers on rights and obligations for payment instruments; characteristics of payment services to be provided; timings; charges; unique identifiers.	January 2018
Regulation on Multi-lateral Interchange Fees	Updated information to consumers on payment transactions, including on charges.	TBC
Single Euro Payments Area Regulation	Updated information to consumers on transactions in Euro.	By 31st October 2016
Bank Structural Reform	Possible updated account information and details to consumers	TBC
Insurance Distribution Directive	Insurance intermediaries/undertakings to provide information to consumers on analysis; products; bundled products.	Likely by September 2017
Wire Transfer Regulation	Information on payer/payee to accompany transfer of funds.	Likely by June 2017
E-money Directive		TBC
MiFID II	Disclosure of all costs and charges in connection with investment services to client on an annual basis.	From January 2017

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

When the situation arises where more than one piece of EU law requires changes to the same or similar systems, documentation or processes, and the various changes must be implemented by different dates, the changes are made more complicated than necessary. This sequencing requires one set of changes to be made, and then later followed by a further set of changes to the same systems, documentation or processes. Such repeated but uncoordinated changes are expensive for firms and often confusing for customers. Where related/similar changes can be foreseen and anticipated, we believe that serious consideration should be given to aligning implementation deadlines so that one omnibus set of changes can be made by firms and regulators.

Therefore we would encourage the Commission to consider the timing of implementation dates to minimise the regulatory burden on firms and reduce the need for repeated communication of changes to consumers.

5.2 Clearing requirements do not include an exemption for smaller firms

- **To which Directive(s) and/or Regulation(s) do you refer in your example**

European Market Infrastructure Regulation (EMIR)

- **Please provide us with an executive/succinct summary of your example**

Access to clearing within the EMIR framework may be problematic when the clearing obligation bites on non-clearing members - especially when smaller non-clearing members are brought into scope, but potentially also for the larger non-clearing members. Even where OTC Derivatives client clearing is available to non-prime clients, it typically comes with a high cost (e.g. £100k minimum annual fee), which is uneconomic for firms that trade infrequently and/or in small size. Pension funds will also have difficulties in accessing clearing; in addition to the reduction in the number of clearing members, CCPs currently require variation margin to be posted in cash form, while pension funds seek to maximise returns for pension-holders by being highly invested in shares, bonds and other securities. Even though pension scheme arrangements have been granted a 2 year extension to their current EMIR exemption from the clearing obligation, which will last until August 2017 (with the potential for a further year's extension), a longer term solution is required.

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

This could be alleviated by a permanent targeted small financials and pension funds exemption.

5.3 Chapter IV of UCITS (Art 37 to 48) looking at mergers with a cross border element

- **To which Directive(s) and/or Regulation(s) do you refer in your example**

Undertakings for Collective Investments in Transferable Securities Directive (UCITS) Art 37 to 48

- **Please provide us with an executive/succinct summary of your example**

Chapter VI of the UCITS Directive (Arts 37 to 48) concerns mergers between UCITS where there is a cross-border element. Several articles of the L1 text impose specific deadlines on the completion of certain actions, or specify the sequence in which actions are to be performed (e.g. Art 39(3) sub-paras 3 and 4; Art 39(5) sub-paras 1 and 2; Art 43(2); Art 43(3)(c); Art 45(1)). The interaction of these elements is highly complex and in some cases may be contradictory, which acts as a deterrent to firms from merging their funds.

Furthermore, one of the aims of the mergers regime in UCITS IV was to encourage funds to merge into larger vehicles that would enjoy economies of scale and pass on long-term cost savings for the benefit of their investors. UCITS Art 46 prevents the costs of a merger between UCITS from being charged to the funds or their investors (except for a self-managed investment company). While this measure has some merit in terms of ensuring investors are not subject to costs and charges that were not foreseen when they invested in the fund, it is arguably short-sighted because it acts as a deterrent to UCITS management companies from merging funds. Consequently, the expected long-term savings are foregone for the sake of achieving a short-term cost saving for investors.

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

UCITS Chapter VI, together with the related L2 Directive measures, should be reviewed for the purpose of analysing all the time-bound procedural requirements and determining a new, efficient and practical sequence that UCITS management companies could reasonably be expected to use. This should also extend to the provisions in Chapter VIII of the UCITS Directive concerning master-feeder structures where the master or feeder UCITS are involved in a merger, since the interactions and timescales become hugely complex in these situations (see CESR's technical advice to the Commission CESR 09/1186 of December 2009).

There should be a fresh impact assessment of UCITS Article 46 to determine whether a more flexible approach to merger cost charging might encourage uptake of the merger option by fund managers.

5.4 Commodity derivative position limits and position reporting

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

Markets in Financial Instruments Directive II (MiFID II) - Articles 57 and 58.

- **Please provide us with an executive/succinct summary of your example**

MiFID II will introduce a comprehensive regime of position limits and position reporting for commodity derivative contracts traded on EU trading venues and for equivalent OTC contracts. This is to prevent market abuse and support orderly pricing and settlement conditions. We support these objectives and the need to have appropriate controls in place around the trading of commodity derivatives to achieve them. There is much in the regime that MiFID II introduces (such as explicit requirements on position management) that will contribute to those objectives. However, there are aspects of the regime which present a number of challenges:

- within the scope of the definition of commodity derivatives are securitised derivatives that are essentially retail financial instruments;
- there is no proportionality to the regime, as it covers all commodity derivatives contracts traded on trading venues across Europe;
- the absence of an exemption from the limits for financial services firms hedging OTC contracts entered into with clients may force firms either to take increased risk or to reduce the amount of business they do for commercial clients, and is out of line with practice in other major jurisdictions;
- the aggregation of all positions held by entities within a group ignores whether such positions are subject to single control and is out of line with the approach taken in other major jurisdictions; and
- daily position reporting down to the level of the end client through the exchange poses very significant confidentiality issues, and ignores the fact that for exchange-traded derivatives information on positions is more readily available from CCPs than regulated markets.

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

Europe's commodity markets play a crucial role in allowing commercial companies to manage their risks and are a significant component of the attractiveness of the EU as a location for financial services.

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

We would suggest that the MiFID II policy goals could be achieved in a less costly way if:

- Instruments which are transferable securities are excluded from the definition of commodity derivatives.
- Limits are only imposed on economically-significant commodity derivatives contracts (for example, those with 10,000 lots of open interest or which have a foodstuff as an underlying).
- Financial services firms are allowed to apply for an exemption from a limit for transactions which hedge a position entered into with a client.
- Positions are only required to be aggregated across companies within a group where they are subject to common control.
- Position reporting is at the level of a member of a trading venue and the direct client of an investment firm entering into an equivalent OTC contract, rather than down to the end client.
- NCAs have the power to obtain information of positions down to the end client at their initiative.
- ESMA can determine how best to collect the information needed on positions, which for exchange-traded contracts is likely to be more easily available from CCPs than trading venues.

5.5 Naked Short Selling

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

Short Selling Regulation (SSR)- Chapter III

- **Please provide us with an executive/succinct summary of your example**

The introduction of a blanket prohibition on naked short selling contributes to excessive compliance costs and, to some extent, barriers to entry.

The Short Selling Regulation introduced a prohibition on naked short selling in order to address the risk of settlement failures brought about by a naked short seller's inability to source stock to fulfil his delivery obligations to the buyer. However, this type of prohibition limits the speed and extent to which a short selling strategy can be executed, since firms have to spend time and resources locating and borrowing stock before carrying out a short sale.

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

The Central Securities Depositories Regulation (CSDR) tightens the settlement discipline regime set out in the SSR, thus removing the need for the prohibition of naked short selling.

6 Reporting and disclosure obligations

The EU has put in place a range of rules designed to increase transparency and provide more information to regulators, investors and the public in general. The information contained in these requirements is necessary to improve oversight and confidence and will ultimately improve the functioning of markets. In some areas, however, the same or similar information may be required to be reported more than once, or requirements may result in information reported in a way which is not useful to provide effective oversight or added value for investors.
Please identify the reporting provisions, either publicly or to supervisory authorities, which in your view either do not meet sufficiently the objectives above or where streamlining/clarifying the obligations would improve quality, effectiveness and coherence. If applicable, please provide specific proposals.
Specifically for investors and competent authorities, please provide an assessment whether the

current reporting and disclosure obligations are fit for the purpose of public oversight and ensuring transparency. If applicable, please provide specific examples of missing reporting or disclosure obligations or existing obligations without clear added value.

6.1 Short Sales in transaction Reporting

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

Markets in Financial Instruments Regulation (MiFIR) - Article 26

- **Please provide us with an executive/succinct summary of your example**

MiFIR transaction reporting requirements require MiFID II investment firms to flag short sales in each transaction report, where applicable. This will be an additional administrative burden and firms will have to develop further their IT systems to gather this information. In addition, the information might not be reliable, given that the client may not disclose the correct information and/or it would be difficult for the firm to collect the information without this conflicting with other existing requirements.

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

Reporting short selling positions under the MiFIR transaction reporting requirements is not appropriate. It would be more coherent to collect information on short positions within the scope of the short selling regime.

6.2 Regulatory burden

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

European Market Infrastructure Regulation (EMIR)

- **Please provide us with an executive/succinct summary of your example**

In our view, the EMIR requirement for 'back-loading' expired trades (the requirement for the reporting of trades which have been live at some point since August 2012 but have now expired) is burdensome. We do not believe that competent authorities are likely to need access to expired trade data. We therefore question the purpose and utility of the requirement to report those expired trades.

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

We encourage the Commission to look at options to remove this unnecessary burden.

6.3 2 sided reporting under EMIR

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

European Market Infrastructure Regulation (EMIR)

- **Please provide us with an executive/succinct summary of your example**

In principle, there is a strong case for two-sided reporting, as having two independent sources of data should provide a valuable quality check and make it much easier for authorities to identify missing or inaccurate reports. However, EMIR's two-sided reporting obligations also impose additional burdens, particularly on small firms who would be unlikely to have to do much or any reporting under a one-sided system. As such, we believe that there is a case for an exemption from reporting for non-financial counterparties (i.e. those non-financial counterparties that have non-hedging derivatives positions below the relevant clearing thresholds set out in EMIR) when trading with either Financial Counterparties (FCs) or other non-financial counterparties. This would remove a significant number of SMEs from the obligation to report without significantly compromising overall data quality, since non-financial counterparty reports are only a small part of the total and we understand that most of them currently delegate reporting to their FC counterparty. In addition, the reporting of intragroup trades within non-financial groups is overly burdensome compared to the questionable utility for national competent authorities to map systemic risk. We support the view that there should be an exemption from reporting for non-financial counterparty intragroup trades where no FC is included within the group.

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

We would encourage certain exemptions to be adopted (at least for non-financial counterparties when trading with either FCs or other non-financial counterparties). Furthermore, there should also be an exemption from reporting for non-financial counterparty intragroup trades when there is no FC included within the group.

6.4 Exchange Traded Derivative reporting

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

European Market Infrastructure Regulation (EMIR)

- **Please provide us with an executive/succinct summary of your example**

Exchange-traded derivative (ETD) reporting on trade-by-trade basis: under EMIR, ETDs currently need to be reported on a trade-by-trade basis, as opposed to the end-of-day position, creating a reporting burden on ETD market participants.

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

Requiring ETD reporting at position level only would dramatically cut the number of trade reports and therefore the reporting burden on firms. While this would imply some reduction in the information available to authorities, given that the primary purpose of EMIR trade repository data is to monitor systemic risk, position data is likely to be suitable in the majority of cases. In the remaining instances where authorities do need transaction level data, it should be possible to obtain the data from the CCPs and/or trading venues. Furthermore, from 2017 MiFID II/MiFIR will increase the scope of its own transaction reporting regime to cover a broader range of contracts, thus further reducing the risk that position-level-only reporting under EMIR would result in overall data gaps for authorities.

6.5 Data Reporting

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

European Market Infrastructure Regulation (EMIR); Markets in Financial Instruments Regulation (MiFIR); Markets in Financial Instruments Directive (MiFID) II; Securities Financing Transaction Regulation (SFTR); Short Selling Regulation (SSR); Alternative Investment Fund Managers Directive (AIFMD)

- **Please provide us with an executive/succinct summary of your example**

Multiple and varying reporting requirements across different pieces of EU legislation cause an unnecessary burden for firms. For example, under EMIR all firms entering into derivatives contracts have to report certain counterparty and trade information to an EMIR-authorised Trade Repository. Under MiFID, investment firms (some of which also have to report under EMIR) trading in certain financial instruments (some of which are the same as under EMIR) have to report details of the transaction, including the identification of the entities involved, to their NCA.

While information might be structured differently across the reporting regimes in order to meet the needs of the specific regimes, in some instances the information required is the same, such as for example the identification of the financial instrument. In other instances, similar reporting requirements may apply to those regimes notwithstanding the different uses of the information. For example, a commodity derivative transaction could be subject to overlapping or duplicative reporting requirements under EMIR, MiFID and the Regulation on wholesale energy market integrity and transparency (REMIT) legislation. One example of an area where reporting requirements could, depending on the particular circumstances, be duplicative concerns exchange-traded derivatives (ETD) transactions, which must be reported to trade repositories under EMIR but are also, to some extent, covered under the MiFID transaction reporting regime. The position resulting from the transaction will also need to be reported under the position reporting regime in MiFID II.

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

The Commission should encourage consistent reporting requirements across dossiers and identify where the data reported under requirements across separate financial services files overlap (creating needless compliance burden for firms, while providing little additional benefit to EU authorities). Furthermore, we would encourage an improved dialogue between those who set the general requirements and those who are expected to use the information collected.

Of course, in simplifying and/or removing any reporting requirements, the Commission should consider (i) the operational costs to firms of adapting to any changes, and strike an appropriate balance between adjusting reporting regimes to reduce duplicative requirements and recognising the investments firms have already made to comply with current rules; and (ii) the respective purposes of the specific reporting regimes.

7 Contractual documentation

Standardised documentation is often necessary to ensure that market participants are subject to the same set of rules throughout the EU in order to facilitate the cross-border provision of services and ensure free movement of capital. When rules change, clients and counterparties are often faced with new contractual documentation. This may add costs and might not always provide greater customer/ investor protection. Please identify specific situations where contractual or regulatory documents need to be updated with unnecessary frequency or are required to contain information that does not adequately meet the objectives above. Please *indicate where digitalisation and digital standards could help to simplify and make contractual documentation less costly, and, if applicable, identify any obstacles to this happening.*

7.1 Interaction between articles 44 and 14 (5) of the MCD

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

Mortgage Credit Directive (MCD), Articles 44 and 14(5)

- **Please provide us with an executive/succinct summary of your example**

There is a particular problem with the interaction of articles 14(5) and 44 of the Mortgage Credit Directive. Article 14(5) allows MSs that had implemented equivalent national disclosure requirements/formats before 20/3/14 to continue to use these instead of a European Standardised Information Sheet (ESIS) until 21/3/19. But Article 44 requires the Commission to review the MCD, including the ESIS, by 21/3/19. This means that MSs that have used the Article 14(5) transitional could be forced to implement an ESIS shortly before the ESIS is amended following the review. These MSs would need then to implement an amended ESIS shortly afterwards. This could be confusing for consumers and costly for businesses.

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

In order to reduce the potential for confusion, cost and market disruption, we would encourage the Commission to consider aligning the ending of the Article 14(5) transitional provision with the outcome of the ESIS review.

7.2 Art 32 AIFMD on cross border marketing of AIFs

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

Alternative Investment Fund Managers Directive (AIFMD)

- **Please provide us with an executive/succinct summary of your example**

Art 32 of AIFMD envisages cross-border marketing of AIFs in terms of a notification of finalised marketing documents, on transmission of which marketing and capital-raising can begin. This does not recognise that for many professional funds, 'marketing' is a negotiation process under which draft documents are provided to prospective investors who then decide whether the terms are acceptable to them. Only when the terms have been mutually agreed are documents such as the "fund rules" finalised with a view to accepting commitments to subscribe. However, some Member States regard such activities as marketing within the scope of Art 32, which can create practical challenges that do not match accepted market practices.

Furthermore, under Art 32(7) of AIFMD, where there is a material change to the cross-border marketing arrangements for an AIFM, the AIFM has to notify its Home State authority which then has to inform the Host State authority. This is inconsistent with, and more cumbersome than, the equivalent procedure for UCITS.

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

The efficiency of Art 32 could be improved if negotiations of the kind described above were either entirely excluded from the concept of 'marketing', or subject to a specification that some or all of the documents listed in Annex IV can be in draft form, if the AIFM first certifies that investors are not being invited to commit themselves at that stage of the process and no contract will be entered into on the strength of these particular versions of the documents.

We would also suggest an amendment to Art 32 (7). The AIFM should be able to notify the Host State authority directly of cross-border marketing arrangement changes, informing its Home State authority of them at the same time.

8 Rules outdated due to technological change

Please specify where the effectiveness of rules could be enhanced to respond to increasingly online-based services and the development of financial technology solutions for the financial services sector.

8.1 UCITS Art 93 - Cross Border Notification

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

Undertakings in Collective Investments in Transferable Securities (UCITS) - Art 93 (2) – cross border notification

- **Please provide us with an executive/succinct summary of your example:**

Although the UCITS cross-border notification regime functions quite well in broad terms, there are some aspects that could be improved, especially to reflect a more web-based approach. In Art 93 (2) and (3) of the UCITS Directive the references to documents to be transmitted as part of the notification process imply that these should be electronic attachments, which is cumbersome and can greatly increase file sizes. It may also involve some authorities encrypting documents which are already in the public domain, such as fund prospectuses. Art 93(7) & (8) say that the notifications of updates to changes to funds and changes to marketing arrangements can go directly from the UCITS to the Host State authority – however there is no actual requirement for the UCITS to inform its Home State authority of such changes.

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

The Commission should consider clarifying that all relevant public documents can be published on a secure area of a suitable website with links provided to them, which can then be sent from the Home State authority to the Host State authority. This appears in fact to be the intention of UCITS Art 93(7) - particularly the first sentence ("…ensure that the competent authorities…have access by electronic means to the documents…") and the final sentence ("The UCITS…shall indicate where those documents can be obtained electronically."). An explicit amendment to Art 93 to this effect would improve efficiency at no extra cost.

8.2 Distance Marketing Directive

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

Distance Marketing Directive (DMD), Mortgage Credit Directive (MCD)

- **Please provide us with an executive/succinct summary of your example:**

The Distance Marketing Directive (DMD) is quite an old Directive now (dating from 2002) and, as a result, does appear out-of-date in places; not reflecting technological developments over the last 10 years.

Furthermore, the DMD now overlaps with other subsequent EU legislation, including UCITS, IMD/IDD, PRIIPs and MiFID II disclosure requirements. Different rules apply to sales by a product provider or intermediary, and vary for providers and intermediaries according to different sales channels. It should be clear how all these requirements interface, particularly where the territorial application of the pieces of legislation is different.

Two specific points: DMD Article 10 on unsolicited communications is out of date as it refers to fax machines but not current electronic communications. And Recital 20 is out of date as it refers to floppy disks as a durable medium.

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

Given consumer's increased use of technology a review to ensure that all relevant EU legislation (including the DMD) is fit for purpose should be encouraged. Such revisions (including, for example, updated definitions of "durable medium") must also be consistent across other pieces of EU legislation.

9 Barriers to entry

Please document barriers to market entry arising from regulation that the EU should help address. Have the new rules given rise to any new barriers to entry for new market players to challenge incumbents or address hitherto unmet customer needs?

9.1 CRR scope

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

Markets in Financial Instruments Directive II (MiFID II) and Capital Requirements Regulation (CRR)

- **Please provide us with an executive/succinct summary of your example:**

The changing of exemptions in MiFID 2 will bring High Frequency Trading (HFT) firms dealing on their own account into scope of MiFID 2. Due to them falling under the definition of an investment firm, they will then be subject to the Capital Requirements Regime as well (as the definition of "investment firm" for CRR is taken from MiFID). This may be a barrier to entry and remaining in business for HFT market makers.

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

We would support a more appropriate prudential regime for all investment firms - as a result of the reviews of the CRD IV regime that are currently taking place, which will hopefully lead to legislative proposals.

9.2 AIFMD – External Valuer

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

Alternative Investment Fund Managers Directive (AIFMD)

- **Please provide us with an executive/succinct summary of your example:**

Under AIFMD Article 19, an AIFM is able to appoint an external valuer to value the assets of an AIF it manages. The external valuer is liable to the AIFM for any losses suffered by the AIFM as a result of the external valuer's negligence or intentional failure. This liability threshold is not subject to any exemptions and has meant that in practice this external valuer route is commercially unattractive.

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

We understand that the liability regime was introduced to address concerns about the independence of valuation. However, it might be useful to consider whether this is the proportionate tool to achieve this goal.

9.3 AIFMD - Depositary

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

Alternative Investment Fund Managers Directive (AIFMD)

- **Please provide us with an executive/succinct summary of your example:**

The types of firm that may act as a depositary under AIFMD Article 21 are limited to credit institutions, a €730k MiFID investment firms with permission to carry on safekeeping and administrating of financial instruments, and firms which on 21 July 2011 were able to provide depositary services to UCITS. Member States may allow other types of firm to act as a depositary, but only for certain types of fund. This limits the types of firm that are able to provide depositary services and means that new market entrants must gain authorisation and provide services under other EU legislation to be able to provide depositary services to the full range of AIFs.

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

We would suggest a review of how competition in the market for depositary services for AIFs work and whether there are excessive barriers to entry.

9.4 UCITS funds of funds

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

Undertakings in Collective Investments in Transferable Securities Directive (UCITS)

- **Please provide us with an executive/succinct summary of your example:**

UCITS Art 58 effectively (though not expressly) prevents a fund of funds (i.e. a UCITS employing the investment powers under Art 55) from acting as the master UCITS in a master-feeder structure. As funds of funds are a popular vehicle, this is hindering the take-up of master-feeder structures; and we do not recall that it was the intention to prevent funds of funds from acting in this way.

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

Art 58 should be reviewed to allow UCITS funds of funds to operate as master funds.

10 Links between individual rules and overall cumulative impact

Given the interconnections within the financial sector, it is important to understand whether the rules on banking, insurance, asset management and other areas are interacting as intended. Please identify and explain why interactions may give rise to unintended consequences that should be taken into account in the review process. Please provide an assessment of their cumulative impact. Please consider whether changes in the sectoral rules have affected the relevancy or effectiveness of the cross-sectoral rules (for example with regard to financial conglomerates). Please explain in what way and provide concrete examples.

10.1 EMIR Art 4/CRR – conflicting requirements

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

European Markets Infrastructure Regulation (EMIR) and Capital Requirements Regulation (CRR), specifically in reference to Art 4 EMIR

- **Please provide us with an executive/succinct summary of your example:**

There are potential conflicting unintended consequences for clearing resulting from EMIR and the CRR. Whilst EMIR imposes a clearing obligation (Art 4), provisions in CRR related to the leverage ratio arguably disincentivise clearing members from offering clearing services to clients. This in turn poses a real issue in terms of firms subject to the EMIR obligation being able to access the clearing infrastructure, through a decreasing number of clearing members (thereby also causing competition issues and potential concentration risk).

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

We would encourage a review of the CRR leverage ratio regime to ensure there are appropriate incentives to provide client clearing services, as well as a targeted exemption from the clearing obligation for some smaller firms in order to reduce the number of firms that will be subject to mandatory clearing (see also Question 5 Example 2 on clearing requirements for smaller firms).

10.2 Passporting

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

Prospectus Directive (PD), Transparency Directive (TD), Undertakings in Collective Investments in Transferable Securities Directive (UCITS), Alternative Investment Fund Managers Directive (AIFMD), Markets in Financial Instruments Directive (MiFID), Insurance Distribution Directive (IDD), Payment Services Directive II (PSD II), Mortgage Credit Directive (MCD) and E-money Directive II (EMD II)

- **Please provide us with an executive/succinct summary of your example:**

In some cases the rules under individual directives apply to the same firms but put in place different regimes and differing responsibilities for home and host state competent authorities, depending on the market sector. Some definitions are also inconsistent across legislation on key terms such as home state, host state, freedom of establishment (branches) and freedom to provide services.

For example, there are some inconsistencies on whether the home or host state is responsible for conduct supervision. For alternative investment fund managers under AIFMD conduct of business supervision is the responsibility of the home state. Under UCITS it is unclear whether the host or home state is responsible for branch conduct supervision.

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

We consider that the regime would benefit from more consistency across directives. Currently, some different directives put in place different regimes with differing responsibilities for either the home or host state competent authorities, depending on the market sector. Clarity and consistency on this aspect of EU legislation should also extend to consistent definitions of such concepts as home state, host state, the freedom of establishment (branches) and requirements related to the location of firms' head and registered offices.

As a general rule, we support the model that is perhaps most common: whereby authorisation and prudential supervision is the responsibility of the Home State; but conduct of business responsibilities are related to practical considerations of where the relevant activity is taking place – which generally means Home State responsibility for services activity being provided from the Home State, but Host State responsibility for oversight of the conduct of business done by passporting branches in Host member states.

10.3 Interaction with other EU legislation

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

Alternative Investment Fund Managers Directive (AIFMD), Markets in Financial Instruments Directive II (MiFID II) and Undertakings in Collective Investments in Transferable Securities Directive (UCITS)

- **Please provide us with an executive/succinct summary of your example:**

AIFMD Article 6(6) requires AIFMs to comply with certain provisions of MiFID when providing the services covered by article 6(4) AIFMD. However, article 6(4) (unlike the equivalent UCITS provision) is not limited to financial instruments. This means that AIFMs may provide services that are not covered by MiFID. However, according to AIFMD, the provision of these non-MiFID services is subject to the MiFID requirements in article 6(6).

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

Better alignment with the scope of MiFID – a technical adjustment in AIFMD would be useful to clarify that the references to specific Articles in MiFID only apply to activities related to MiFID scope financial instruments.

11 Definitions

11.1 Cross-selling

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

Markets in Financial Instruments Directive II (MiFID II), Insurance Distribution Directive (IDD), Payment Accounts Directive (PAD), Mortgage Credit Directive (MCD)

- **Please provide us with an executive/succinct summary of your example:**

Provisions on 'cross-selling' (tying and bundling) have been included in several pieces of legislation – notably MiFID II, IDD, PAD and the MCD – but the focus and formulation of the requirements is different in each piece of legislation. MiFID II and the IDD are close in approach, but even here are not identical. The reasons for fundamental differences are not clear, and the differences have recently created problems for the three ESAs in trying to produce a common set of Level 3 Guidelines on the topic to support all the relevant Level 1 texts.

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

There would seem advantages in much closer alignment of the Level 1 provisions on the same topic across sectoral pieces of legislation (subject to any essential specificities), in order to deliver consistent standards of consumer protection that address the relevant risks.

11.2 CRR - Asset management company

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

Capital Requirements Regulation (CRR)

- **Please provide us with an executive/succinct summary of your example:**

The definition of 'asset management company' means a UCITS management company or an AIFM, and the definition of 'financial institution' includes an 'asset management company' (Article 4). However, in the obligations for consolidated supervision which must include financial institutions in article 18(1), there appears to be inconsistency with article 18(8) where only "asset management companies as defined in the [UCITS Directive]" are included in consolidated supervision.

Article 19 (2) (b): The provision contains a reference to 'credit institution' only in the condition, but the condition should apply equally to investment firms (as was the case under the predecessor directives). Our suggested change would be:

> "(b) where the undertaking concerned if of negligible interest only with respect to the objectives of monitoring ~~credit~~ institutions"

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

Our suggested change Article 19 (2) b would be:
"(b) where the undertaking concerned is of negligible interest only with respect to the objectives of monitoring ~~credit~~ institutions"

11.3 Professional Investor

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

Alternative Investment Fund Managers Directive (AIFMD) and Markets in Financial Instruments Directive II (MiFID II)

- **Please provide us with an executive/succinct summary of your example:**

AIFMD uses the MiFID definition of a "professional investor". This works well in relation to the categories of client who are considered to be professional under Part I of Annex II of MiFID. However, it is not clear how the requirements in relation to clients who may be treated as professionals on request (Part II of MiFID Annex II) are intended to work in an AIFMD context. Part II requires an assessment by an "investment firm" and it is not clear whether an AIFM is able to undertake this assessment or whether it needs to engage a MiFID investment firm to carry out the assessment.

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

A clarification that AIFMs can carry out the assessment themselves without engaging a MiFID firm would be useful.

11.4 Remuneration

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

Alternative Investment Fund Managers Directive (AIFMD), Capital Requirements Directive IV (CRD IV), Undertakings in Collective Investments in Transferable Securities Directive (UCITS), Solvency II (SII)

- **Please provide us with an executive/succinct summary of your example**

There are two related issues on remuneration. One is on consistency of requirements between different pieces of legislation and the other is on proportionality.

Remuneration is an area that cuts across multiple Directives and institutions will often be subject to more than one Directive. Wherever possible, consistent definitions and approaches are needed to enable institutions to understand and comply with the provisions. Furthermore, a number of firms have provided us with feedback that the volume and prescriptiveness of these remuneration rules are often overly burdensome and that the rules sometimes fail to recognise the diversity of firms subject to different European Directives. Proportionality is an important safeguard for national regulators to apply these rules in a meaningful and consistent manner that achieves the underlying objective of aligning risk with reward, whilst taking into account the complexity and diversity of domestic financial markets.

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

The FCA would encourage consistent wording and definitions where similar concepts are used across multiple directives.

12 Overlaps, duplications and inconsistencies

12.1 Powers and sanctions

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

Packaged Retail and Insurance-Based Investment Products Regulation (PRIIPS), Insurance Distribution Directive (IDD), Insurance Mediation Directive (IMD), draft Securitisation Regulation (STS)

- **Please provide us with an executive/succinct summary of your example:**

Provisions across a number of pieces of EU legislation relating to administrative sanctions are inconsistent, which means that an opportunity is lost to deliver coherence on cross-cutting enforcement issues. One of the varying provisions establishes the amount of fine expressed as a percentage of the total annual turnover of a legal person. In the three pieces of legislation which relate to insurance issues – PRIIPS, IDD and IMD - the percentage varies from 3%, 5% and 10% respectively. Furthermore, the fine for a natural person is the same in PRIIPS and IDD but the fine for the legal person is different. The fine for a natural person in IMD (€5m) is considerably higher than under PRIIPS and IDD (€700k). The STS Securitisation Regulation (still under negotiation) is also unusual in terms that it proposes the same fine for legal and natural persons - both to be EURO 5m. This is not in line with other EU legislation where the fine for a legal person is usually twice the amount for a natural person. Furthermore Art. 61 IDD notes that in order to avoid the risk of regulatory arbitrage and to deliver consistent investor protection, administrative sanctions should align with those set out in the PRIIPS. This should mean that the relevant circumstances to be taken into account ought to mirror. Article 34 of the IDD and Article 25 of the PRIIPS Regulation note the relevant circumstances where appropriate. It is unclear why the relevant circumstances do not mirror in substance and form. For example: the financial strength of the person appears in Article 34 of the IDD but not in Article 25 of PRIIPS.

- **Please provide us with supporting relevant and verifiable empirical evidence for your example:**

  See the relevant text in the following articles:

  - PRIIPS – Articles 24(2)(e)(i) and (ii) and Article 25
  - IDD – Articles 33(2)(e) and (f) and Article 34

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

The FCA would encourage greater consistency in drafting at least dossiers relating to similar issues.

12.2 CSDR

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

Central Securities Depositories Regulation (CSDR)

- **Please provide us with an executive/succinct summary of your example:**

CSDR introduces a mandatory securities settlement discipline regime that could have an adverse impact on the UK clearing model. The UK operates under a Trade Date Netting (TDN) system and most of continental Europe operates under the Continuous Net Settlement (CNS) system.

In CSDR there is no distinction between CNS systems and TDN systems. The CNS methodology extinguishes all failed transactions at the end of the processing day and nets them against the next day's settlement, thus ostensibly avoiding the securities settlement discipline regime. However, TDN (utilised by the UK market) does not extinguish failed settlements at the end of the processing day and does not net against the next day's settlement. Thus each day's settlement fails remain discrete. Whilst we can accept that CNS systems can report end of day fails to the CSD prior to them being extinguished, it is not clear that any monitoring or reporting beyond one day is possible. When monitoring settlement fails that are submitted to ESMA, many member states show little or no fails, whereas the UK reports an accurate record of all fails.

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

The new regime will need to be monitored once in operation, but the CSDR obligations could result in a misleading picture being created as a result of reporting inconsistencies arising from the different clearing models.

12.3 Whistleblowing

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

Markets in Financial Instruments Directive II (MiFID II), Fourth Money Laundering Directive (AML), Capital Requirements Directive IV (CRD IV), Market Abuse Regulation (MAR), Regulation on Energy Markets Integrity and Transparency (REMIT)

- **Please provide us with an executive/succinct summary of your example:**

A range of recent directives and regulations (e.g. MIFID2, Fourth Money Laundering Directive, Capital Requirements Directive IV, Market Abuse Regulation, and the Regulation on Wholesale Energy Market Integrity) contain clauses requiring firms to put whistleblowing arrangements in place so staff can report breaches of the directive. These clauses are specific to those directives; there is no overarching requirement relating to all breaches of any requirement, which would be more consistent with how whistleblowing services work inside firms (i.e. firms take disclosures on any topic of concern to the whistleblower). Furthermore, because the wording is not consistent in each directive, there is a risk that future directives with whistleblowing provisions may use further slightly different wording - which could make the operation of firms' internal whistleblowing arrangements even more difficult. Furthermore, none of the clauses exempt (or provide special treatment for) small businesses (e.g. sole traders), for which formal internal whistleblowing arrangements are irrelevant or unlikely to be effective because a whistleblowers' confidentiality cannot credibly be protected.

12.4 Publication of Sanctions

- **To which Directive(s) and/or Regulation(s) do you refer in your example:**

Capital Requirements Directive 4 (CRD IV), Markets in Financial Instruments Directive II (MiFID II), Market Abuse Regulation (MAR), Transparency Directive Amending Directive (TDAD)

- **Please provide us with an executive/succinct summary of your example:**

Provisions relating to the publication of an enforcement decision or sanction, in the legislation cited above, are all drafted differently. This includes wording of the exemptions to the duty to publish a decision. Such inconsistencies create practical difficulties and challenges for regulators if they are faithfully transposed and implemented in national legislation since they will result in similar but not identical obligations on regulators.

- **Please provide us with supporting relevant and verifiable empirical evidence for your example:**
    - See the relevant text in the following articles:
        - CRD IV – Article 68
        - MiFID II – Article 71
        - MAR – Article 34
        - TDAD – Article 29

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

The FCA would encourage consistency in drafting throughout dossiers relating to similar issues/sectors. Furthermore we would encourage standardised language and forms.

12.5 Cooperation between NCAs

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

Markets in Financial Instruments Directive II (MiFID II), Market Abuse Regulation (MAR)

- **Please provide us with an executive/succinct summary of your example:**

Both MiFID II and MAR ITSs provide a standard form for making and responding to requests to/from other NCAs. These forms and wording of ITSs are different even though the intent is the same. This creates process difficulties for any NCA to enforce these requirements set by both MiFID and MAR requests.

- **Please provide us with supporting relevant and verifiable empirical evidence for your example:**

MiFID II - Articles 80/81

MAR - Articles 24/25

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

In future reviews we would encourage increased consistency and standardisation in drafting.

13 Gaps

While the recently adopted financial legislation has addressed the most pressing issues identified following the financial crisis, it is also important to consider whether they are any significant regulatory gaps. Please indicate to what extent the existing rules have met their objectives and identify any remaining gaps that should be addressed.

13.1 EMIR - No clear territorial scope written into Level 1

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

European Market Infrastructure Regulation (EMIR) - Article 39,

- **Please provide us with an executive/succinct summary of your example:**

There is no clear territorial scope written into Level 1 EMIR.

In EMIR, the lack of territorial scope definition in the Level 1 text has caused much uncertainty in the market as to whether the clearing members' obligations in Article 39 applies to all EU as well as non-EU clearing members of an EU CCP, to EU clearing members of non-EU CCPs, and/or in each case whether they applied in respect of contracts cleared for EU and non-EU clients. This caused some firms to question whether they would have to cease offering clearing to clients where they were structurally unable to comply with Article 39 provisions, and eventually led to some clarification being provided via ESMA EMIR Q&As (CCP Question 8(i) and (j)). Although this clarification was helpful, the Q&A process did not provide for the consultative process associated with Level 1 or Level 2 legislation, and the Q&As also do not provide the same level of legal certainty which Level 1 or Level 2 text provides as Q&As are not binding.

Similarly, it is not clear whether the indirect clearing obligations set out in Article 4 apply to clearing arrangements where the derivative is cleared in EU CCPs by EU indirect clients (i.e. excluding derivatives traded by EU indirect clients but cleared in a non-EU CCP), in EU CCPs by non-EU indirect clients, or to arrangements involving EU entities only (i.e. EU CCPs, EU clearing member, EU clients and EU indirect clients). The same uncertainty has also been raised by industry in the context of the MiFIR indirect clearing provisions in Article 30.

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

We would suggest clarifying the territorial scope of obligations in the legislation as part of the EMIR review.

13.2 CSDR regime for mandatory buy-ins

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

Central Securities Depositories Regulation (CSDR)

- **Please provide us with an executive/succinct summary of your example:**

In the CSD Regulation, the structure and legal framework relating to the mandatory regime for how buy-ins will function when a transaction fails to settle was insufficiently captured by the level 1 text.

ESMA published a consultation paper to which consultation responses raised some strong and serious misgivings from the market about the buy-in operation for OTC transactions (the consensus was that CSDs should not be involved in the buy-in phase and that, rather, OTC buy-ins should be executed at the trade level). As a result, ESMA published a second consultation paper, which has given rise to delays in the relevant obligations starting to apply. Although it is understandably difficult for the legislative bodies to discern the intricacies of many points at the level 1 stage, it is imperative that if the legislators choose to delegate the responsibility for elaboration of the detail to level 2, the level 1 text must at least provide for the elaboration with sufficient legal certainty, to avoid delays and uncertainties when preparing level 2 material.

- **Please provide us with supporting relevant and verifiable empirical evidence for your example:**

The rules of the trading platform apply where a settlement fail occurs following a transaction undertaken on a trading platform. Where a transaction is cleared then the rules of the CCP apply in terms of a potential buy-in. The matter causing issues is where the failed transaction is the result of an OTC transaction, thus the trading platform or CCP rules do not apply. A significant proportion of the market suggests that OTC transaction buy-ins should be the responsibility of the trading party, through contractual obligations. This could be difficult to enforce and difficult for the competent authority to enforce against a trading party someway down a chain of links with the ultimate trading party residing outside of the EU. CSDR Level 1 casts doubt on the trading party being responsible, as it states: "CSD rules place an obligation on their participants". This matter is still being debated.

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

CSDR Level 1 could be changed to point to the trading party rather than to 'their participants'.

RTS now proposes that the trading party should be responsible for the payment of penalties and cash compensation. It is noted however, that there could be circumstances where the CSD participant may still become liable for the payment of price differences and buy-in costs. ESMA feel this liability will only occur in limited circumstances, such as the insolvency of the trading party.

13.3 EU reporting for UCITS funds

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

Undertakings for Collective Investments in Transferable Securities Directive (UCITS)

- **Please provide us with an executive/succinct summary of your example:**

The AIFMD has introduced a comprehensive reporting mechanism for funds marketed to professional investors, but there is no EU-wide equivalent for UCITS.

It does not follow that UCITS should be treated like AIFs in this regard, since UCITS by their nature do not all have the same scope to generate risk exposure, but there are certain areas such as portfolio liquidity, and use of leverage (especially when based on VaR measures), where there are potential systemic concerns.

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

Although the UK (like other Member States) has processes at national level to monitor these issues, we would welcome more streamlined and developed reporting in order to identify the possible build-up of systemic risk in the UCITS sector.

13.4 Transitional impacts

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

Mortgage Credit Directive (MCD)

- **Please provide us with an executive/succinct summary of your example:**

Some EU legislation could be better designed to manage transitional impacts. In particular, where the application of measures is determined by whether an agreement exists on a particular date the legislation should consider the impact on agreements already under discussion but not yet finalised. The MCD is an example of this. Mortgage sales typically take time to complete (roughly three months in the UK). With the MCD containing numerous pre-sale obligations that apply to agreements coming into existence on or after 21 March 2016, this means firms either having to re-start those sales discussions that have not yet reached an agreement or firms implementing the MCD obligations several months ahead of the formal date of adoption. Both options are disruptive and introduce additional cost, and the latter course reduces the time available for transposition, and also requires Member States to take action to ensure that firms can apply the MCD changes ahead of time.

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

It would be better if the legislation specifically provided transitional arrangements covering sales that are underway at the date of national implementation.

14 Risk

EU rules have been put in place to reduce risk in the financial system and to discourage excessive risk-taking, without unduly dampening sustainable growth. However, this may have led to risk being shifted elsewhere within the financial system to avoid regulation or indeed the rules unintentionally may have led to less resilient financial institutions. Please indicate whether, how and why in your view such unintended consequences have emerged.

14.1 Scope of Article 3 (2) CSDR

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

Central Securities Depositories Regulation (CSDR)

- **Please provide us with an executive/succinct summary of your example:**

Article 3 (2) of the CSD Regulation draws on a definition in the EU Financial Collateral Directive (FCD), which potentially increases the scope of the CSDR requirement significantly more than it is likely was intended, and has caused confusion in the market as to the scope of the requirement. The CSDR requires that securities that are transferred following a financial collateral arrangement (as defined in the FCD) be recorded in a CSD in dematerialised / book entry form on or before the intended settlement date, unless they have already been recorded. The definition in the FCD would bring within scope instruments and transactions that we do not consider were intended by the EU co-legislators, but additionally, causes a particular problem in English law because of the distinction between legal and equitable mortgages.

However, the instance of a problem that provokes more problems in one Member State than others may not be unusual. For example, the FCD does not require Member States to appoint a competent authority for its enforcement, but the related CSDR provision requires enforcement by such an authority. The rationale for this inconsistency is not clear to us.

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

We still believe that clarification from the Commission on the point we have explained would be helpful.

14.2 Conflict Data Protection Regulation / MAR

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

Data Protection Regulation & Market Abuse Regulation (MAR)

- **Please provide us with an executive/succinct summary of your example:**

There an interesting point to consider with the interaction between the Data Protection Regulation and MAR. A client now needs to give consent for a recorded line to be used in a call. If the client does not provide consent then written minutes may be taken. The outcome is that there may be a less reliable record of the discussion which is more open to challenge.

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

We would encourage the Commission to include an exemption in future reviews of MAR to the Data Protection Regulation, especially for the purpose of record keeping requirements under MAR. Having adequate records of the conversations is crucial for investigatory purposes to detect and evidence market abuse. This also assists individuals to evidence against an allegation of market abuse.

14.3 Foreign currency lending

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

Mortgage Credit Directive (MCD)

- **Please provide us with an executive/succinct summary of your example:**

By adopting a very broad definition of foreign currency lending, the MCD imposes significant new burdens even where there is no currency mismatch between the denomination of the loan and the income or assets from which it is being repaid. An example would be a UK pensioner who has bought a property in Spain using a loan secured on their existing property in the UK. Despite this being a sterling loan repaid using sterling pension income it is classified as a foreign currency loan. Rather than introducing the additional disclosure systems the MCD requires for foreign currency lending, many lenders are choosing to no longer accept customers who want a foreign currency loan. So a measure intended to promote single market activity is inadvertently causing some lenders to withdraw from dealing with customers residing in another EEA state.

- **Please provide us with supporting relevant and verifiable empirical evidence for your example:**

The risks with such lending have been exposed by the recent situation with the Swiss franc and the effects on a number of EU consumers (including those in Hungary and Poland).

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

The MCD definition of 'foreign currency loan' could be improved to better align with the exchange rate risk the directive is seeking to address. This would promote greater market interest in servicing the needs of consumers who, while they may be living in a second Member State, are protected from exchange rate risk because their mortgage and their income is in the same currency.

14.4 Time to process IDD authorisations

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

Insurance Distribution Directive (IDD)

- **Please provide us with an executive/succinct summary of your example:**

The reduction of the time limit for NCAs to process applications for permission to offer insurance distribution services (from 6 months to only 3 months for a complete application) may cause practical issues if regulators are to meet the short deadline. This is mainly because a lot of applications for other permissions have a 6/12 month application period. So if any firm is applying for a bundle of authorisations/permissions e.g. insurance intermediation and investment services, or consumer credit, the timescales are out of alignment. Although simple insurance intermediation is arguably lower risk, scrutiny of applications for higher risk activities by the same entities may come under pressure. The reduction in the timeframe for the authorisation of insurance intermediaries has also been agreed alongside an increase in the factors that must now be considered at the authorisation stage under the IDD.

15 Procyclicality

EU rules have been put in place to make the financial system less procyclical and more stable through the business and credit cycle. Please indicate whether some rules have unintentionally increased the procyclicality of the financial system and how.

The FCA has no comment on this question.