Comments

of the German Insurance Association (GDV)*

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regarding better regulation at the EU level

with a view to further discussions in the EU institutions on the EU Regulatory Fitness and Performance (REFIT) Programme

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* The Berlin-based German Insurance Association (GDV) is the federation of private insurers in Germany. Its about 460 member companies offer comprehensive coverage and retirement provisions to private households, trade, industry and public institutions, through 427 million insurance contracts. As a risk taker and major investor (with an investment portfolio of about 1,450 billion EUR), the insurance industry has outstanding significance in connection with investments, growth and employment in our economy. The insurance industry moreover provides gainful employment for 533,000 persons either as employees with insurers and in the intermediation business or as self-employed insurance intermediaries and advisers.

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Key points

With the REFIT Programme the European Commission has committed itself to reviewing all EU regulation in order to identify burdens, inconsistencies, gaps and ineffective measures. It must be warranted at all regulatory levels that the benefits of the administrative action are achieved at the lowest possible costs. **The goal of creating a clear, stable and predictable legal framework** is expressly welcome.

Past decisions and their effects are now to be critically re-examined with the stakeholders. At the same time, future regulation must be measured along REFIT criteria as well. **With a view also to the latest agenda of the European Commission for better regulation, the following objectives are crucial for the GDV:**

- **Conduct a strict review of policy options in terms of burdens:** Above all, ensure consistency with existing and planned initiatives. Overlaps, contradictions and redundancies must be corrected. This also applies to regulatory levels 1 and 2.
- **Structure impact assessments of the European Commission in a more comprehensive, sustainable and transparent fashion:** Impact assessments with compulsory consultations are welcome. The application of the standard cost model would also improve legislative proposals. Consultation analyses must be comprehensible. Expert groups should be open to all affected interest groups.
- **Establish a permanent inter-institutional culture of better regulation and corresponding mechanisms:** All EU institutions and agencies must commit to the same goals and processes. An independent and transparent regulatory review of the entire regulatory process must be established in all participating institutions.
- **Conduct ex-post analyses more frequently and draw consequences:** Consequent ex-post analyses are particularly important in light of the recent very high degree of regulation, particularly in the financial services sector. Unintended consequences must be corrected quickly.
- **Recognize limits of action: Always observe the principles of subsidiarity and proportionality.** Not everything that is good is also positive, necessary and appropriate at a European level. This also applies to Level 2.
- **Don't make regulation at subordinate levels the rule:** In principle, the clarification of technical details by experts is welcome. Yet even technical aspects can have far-reaching effects. Measures on a subordinate level should consistently be oriented on the basic legislative act. Political decisions should not be undermined at Level 2.
- **Improve impact assessment and involvement of stakeholders in subordinate regulation:** Better regulation also encompasses impact assessments and the involvement of stakeholders at Level 2.
- **Take better regulation into account regarding guidelines of the European supervisory authorities (ESAs):** Guidelines must always be based on a clear and specific authorization and a clear mandate. Conformity between the basis for authorization and the design must be produced. Guidelines should not contradict or anticipate legislation.
- **Consider all levels of regulation together**

1. Core considerations of German insurers for better regulation / REFIT

A closer Europe need not mean more common regulations. The German insurers are able and willing to support EU institutions in identifying bureaucracy and unnecessary regulatory burdens, thus contributing to improving the quality of legislation and mastering the urgent challenges of a common Europe.

With its Agenda for Better Regulation[1] published on 19 May 2015, the European Commission has stressed its intent to interact better with those affected by EU legislation and to take a fresh look across all policy areas to see where existing measures need to be improved. This is welcomed by German insurers.

The GDV's **general proposals for the improvement of regulation in the EU[2] are the following:**

1.1. Conduct a strict review of all policy options: keep burdens and incoherencies in focus

Consistent screening of coherency and the anticipated consequences of EU legislation is crucial and should be carried out systematically. Could the same goal possibly be achieved with another "horizontal" legislative proposal or through changes in a legislative proposal in a current legislative process? Did the topic already form the subject of earlier legislative acts and were similar considerations already put ad acta?

In principle, the following should apply: Measures to reduce bureaucracy and administrative burdens should not be eliminated through creating new bureaucracy. Publicly voiced demands to consider for each new legislative act the elimination of another ("one in, one out") are supported.

The GDV had already provided examples of incoherent and at least partially superfluous legislative initiatives in its comments for the public consultation of the ECON Committee of the European Parliament on enhancing the coherence of financial services legislation in June 2013.[3] Accordingly, any regulation on the distribution of insurance products should exclusively be contained in the revised Insurance Mediation Directive;[4] otherwise, citizens and enterprises could be faced with legal insecurity and unnecessary costs.

Below are concrete and current **examples** of foreseeable incoherencies and unnecessary bureaucratic burdens through EU legislation:

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[1] Communication Better Regulation for better results - An EU agenda

[2] Cf. Chapter 2 regarding subordinate regulatory levels and European supervisory authorities. Regarding previously formulated proposals of GDV on better regulation, also see:
- Reply of the German Insurance Association (GDV) to the public consultations of the European Commission on the revision of the Commission guidelines for impact assessments and on the Commission guidelines for consultations of stakeholders, September 2014 (in German language)
- Comments of the German Insurance Association on the consultation on the draft Commission Guidelines for Evaluation, February 2014

[3] Cf. GDV contribution to the ECON public consultation on enhancing the coherence of EU financial services legislation, June 2013

[4] The Insurance Distribution Directive (IDD) will replace the applicable Insurance Mediation Directive (IMD1, Directive 2002/92/EC). In the comments on the revised IMD1, the term "IMD2" was still used. The tripartite political agreement on the IDD was reached on 30 June 2015.

EXAMPLE Financial market regulation

- **EMIR and Solvency II: remedy redundant regulation of insurance derivatives**
  Irrespective of whether insurance derivatives can be considered financial instruments in the true sense, no contradictions should result through the simultaneous regulation in the Solvency II Directive[5] and the European Market Infrastructure Regulation (EMIR). In contrast to the specific insurance provisions from Solvency II, some provisions in EMIR[6] simply cannot be applied to insurance derivatives (e.g. weather derivatives). For example, Article 11 (3) EMIR mandatorily prescribes the exchange of collateral. According to Article 105 (6) Solvency II, however, there is no collateral requirement for the mentioned derivatives. Collateral to be held by or for the primary insurance company or reinsurance company and the related risks are to be taken into account in the calculation of the solvency capital, if collateral is provided. Because the two pieces of legislation, Solvency II and EMIR, address the risk of the loss of the counterparty, a contradiction exists here.

  Solvency II pursues the goal of stabilizing the financial system. No supplementary regulation from capital market law is necessary with a view to the insurance industry.

- **European Commission's proposal on SFTs as well as EMIR and UCITS guidelines: avoid additional expense**
  Currently, the Commission's proposal for a Regulation on reporting and transparency of securities financing transactions (SFT Regulation)[7] is under deliberation. The core of the proposal involves additional reporting and information requirements. In order to avoid additional bureaucratic obstacles, an effort should be made to use the existing systems. For example, in the case of securities financing transactions, it would be expedient to use the reporting system in accordance with the EMIR Regulation. Moreover, the Commission's proposal for a SFT Regulation contains additional information requirements for fund managers (Article 13). For the design of the UCITS V Directive,[8] the ESMA already presented guidelines for such reporting requirements.[9] As a result, a problematic situation arises with respect to the relation between the ESMA guidelines and the legal text inter alia (cf. Chapter 2 of this paper).

- **Guidelines of the European Commission on non-financial reporting: use best practices**
  Article 2 of the Directive on disclosure of non-financial information[10] provides for the European Commission to prepare non-binding guidelines to facilitate reporting of non-financial information by companies. These guidelines are currently being developed for publication prior to 6 December 2016. The purpose and benefit of these guidelines are very questionable, however. Though uniform reporting would be expedient, this goal does not justify the additional expense and time pressure. There are proven best practices for reporting non-financial information, which are already applied today. Based on these best practices, undertakings are thus preparing for the start of application of the Directive on 1 January 2017. The non-binding guidelines of the European Commission, to be published four weeks before the start of application and more than two years after the Directive came into force, consequently do not add any value.

[5] Directive 2009/138/EC
[6] Regulation (EU) No 648/2012
[7] Proposal COM(2014) 40 final
[8] Directive 2009/65/EC
[9] ESMA/2012/832
[10] Directive 2014/95/EU

– **Independent supervision of financial conglomerates: avoid unnecessary additional burdens**
With Solvency II and CRD IV/CRR, the supervisory regimes for insurers and banks have been fundamentally revised. The far-reaching requirements raise the question of the necessity of any additional supervision for financial conglomerates in Europe. Through the new sectoral supervisory system, cross-sector risks are already comprehensively covered. The additional regulation of the Financial Conglomerates Directive (FICOD)[11] therefore leads to unnecessary and burdensome overlap in supervisory procedures. No added value for supervision and undertakings can be recognized here.

Notwithstanding the revision of FICOD in 2011, the European Commission should promptly review the Directive. Thereby the subordinate regulation must be examined (see also Chapter 2 of this Paper). It is decisive that the altered framework conditions be considered.

EXAMPLE Consumer protection

– **PRIIPs: correct the doubling of information requirements**
The PRIIPs Regulation[12] provides for the information requirements pursuant to Solvency II and those in the Regulation to be taken into equal consideration (Recital 9, Article 3(2)). This regulatory approach has the consequence that identical information will have to be presented in different documents.

The PRIIPs Regulation moreover supplements the measures contained in the Insurance Mediation Directive (IMD1)[13] with respect to the distribution of insurance products (Recital 5). Here, too, information requirements might be doubled. This should be avoided during the further design.

EXAMPLE Distribution

– **Sharp growth in disclosure regulation: avoid unnecessary bureaucracy and redundancy**
It is questionable whether the growing number of disclosure regulations for insurers and insurance intermediaries still serve consumer protection or, insofar as this goal is not achieved, represent the buildup of unnecessary bureaucracy. For example, for broker distribution via the Internet there are currently 75 categories of disclosure requirements (based on IMD1, the Life Assurance Directive, Distance Selling Directive, E-Commerce Directive). In the future, there will be 147 (based on the Insurance Distribution Directive (IDD),[14] PRIIPS Regulation, Solvency II Directive, Distance Selling Directive, E-Commerce Directive).[15] Moreover, it is becoming apparent that many of these provisions are and will lead to redundancies that will make application even more difficult.

EXAMPLE Data protection

– **General Data Protection Regulation: clarify relationship to existing regulations**
To date, it remains unclear in what relation the planned EU General Data Protection Regulation[16] will stand to the existing e-Privacy Directive[17]. No

[11] Directive 2011/89/EU
[12] Regulation (EU) No 1286/2014
[13] Directive 2002/92/EC
[14] Insurance Distribution Directive (IDD)
[15] Cf. also Insurance Europe Press Release "Risk of information overload as EU disclosure requirements set to double", 14 April 2015
[16] Proposal COM(2012) 11
[17] Directive 2002/58/EC

arrangement has been found yet regarding data protection in the public sector and as to how overlap between the relevant content of the EU General Data Protection Regulation and the existing national regulations can be eliminated.

With respect to the EU General Data Protection Regulation, it must be expected that the information requirements for undertakings will sharply increase. Currently, the magnitude is still unclear, but it is also not foreseeable whether these increased information requirements will contribute real added value for consumers.

EXAMPLE Company law

- **Shareholder Rights Directive: safeguard proportionality and observe existing regulations**

  Opinions according to which the proposal to amend the Shareholders Right Directive[18] does not make any positive contribution to competitiveness or the internal market are shared by GDV. The proposed Directive and many considerations of the European Parliament contradict the declared objective of reducing bureaucracy and regulatory burdens.

  In particular, by overloading shareholders with decisions, such as regarding "related party transactions",[19] administrative expense will arise, jeopardizing the flexibility needed in business decisions. Likewise, the involvement of shareholders in general meetings on compensation policy is disproportionately bureaucratic and too far-reaching. No such regulation was incorporated into the final text of Level 2 Regulation 2015/35 on Solvency II for good reason. Besides, there are already supervisory regulations for the insurance industry concerning compensation, so that a conflict between regulations must be expected. The proposed obligation to disclose the investment strategies of all institutional investors and the inclusion of all shareholders in investment strategies are also questionable. Apart from the lack of objective necessity, these duties cannot be implemented in practical terms on factual and legal grounds. This would also undeniably lead to discrepancies with the provisions on safeguarding business secrets and the principles of European competition law.

  (Regarding the demands of the European Parliament for country-by-country reporting (CBCR), see the example below concerning accounting.)

EXAMPLE Financial reporting

- **Country-by-country reporting: wait for evaluation reports**

  The European Parliament has demanded that the revised Shareholder Rights Directive should require large undertakings to disclose country-specific data ("country-by-country reporting" / CBCR). This would anticipate the CBCR Evaluation Report foreseen for July 2018 pursuant to the applicable Accounting Directive.[20] The GDV deems it important to use this time to gather the necessary experience. In the ensuing review, an adequate solution for this state of affairs can be found. Anticipating the report could lead to regulation generating enormous additional expenses that would later have to be reduced.

[18] Proposal COM(2014) 213 final
[19] Cf. GDV Position Paper on the proposed revision of the Shareholders Right Directive, July 2014
[20] Directive 2013/34/EU

EXAMPLE Non-life insurance

- **Recognize costly consequences of new mandatory insurance**
  Mandatory insurance is regularly discussed at a European level, currently in relation to the proposals for regulations on medical devices[21] and in vitro diagnostic medical devices.[22] The introduction of mandatory insurance for medical device manufacturers as demanded by the European Parliament is unnecessary. The large number of insurance policies for claims triggered by medical devices and the lack of added value for patient safety make them unnecessary.

  In principle, the consequences of mandatory insurance can be significant and run contrary to consumer interests. When insurance solutions tailored to needs and risks are hindered the consequence is often inadequate over-insurance for low claims risk. Insurance costs rise through this "one size fits all" approach. Some businesses can be confronted with financial problems as a result. Moreover, mandatory insurance lowers the motivation to prevent risks and raises the danger of "moral hazard". Mandatory insurance also does not prevent or eliminate any bureaucracy. To the contrary, additional bureaucracy has to monitor compliance with requirements, thus costing taxpayers money. Through unnecessarily increased premiums, consumer prices can also increase, without consumers receiving a higher quality product.

  Voluntary insurance solutions are thus preferable in the spirit of European competitiveness. This also applies with respect to environmental liability. The Environmental Liability Directive[23] is currently being reviewed within the framework of REFIT in terms of its effectiveness and bureaucratic burdens.

1.2. Structure the impact assessment process of the European Commission in a more comprehensive, sustainable and transparent fashion

Nobody knows the problems and potential solutions better than the stakeholders. Interested parties and affected groups have to be integrated early on and intensively in the legislative and evaluation process, also at the subordinate regulatory levels (see Chapter 2 of this paper). The corresponding recommendation of the High Level Group on Administrative Burdens on cutting red tape is still welcome.[24] A positive step has been taken by the European Commission with the proposed introduction to consult the public on roadmaps and inception impact assessments. Existing concerns include:

- **Conduct impact assessments for all initiatives with financial, social and ecological impacts**

  It is still worth discussing whether only foreseeable "significant" impacts of initiatives of the European Commission require impact assessments.[25] At the same time, it is not sufficiently defined as of when an impact is to be viewed as "significant". Precisely impact assessments are to ascertain the effects of projects and their magnitude. Only by eliminating the requirement for a presumed "significant impact" for the performance of an impact assessment can it be assured that impacts not presumed to be "significant" can be identified.

[21] Proposal COM(2012) 542 final
[22] Proposal COM(2012) 541 final
[23] Directive 2004/35/EC
[24] Final report of the High Level Group on Administrative Burdens, "Cutting Red Tape in Europe", July 2014
[25] Cf. inter alia p.17 of the Better Regulation Guidelines; "significant impact" in the original

– **Better communication of projects and application of standard cost model necessary**

The setup of a constantly updated central web portal for the entire impact assessment process of the European Commission (including ex-post evaluation) is desirable.

In addition to the review of coherency and subsidiarity, a key question of impact assessments should be the total compliance costs in light of the extended standard cost model.

– **Broadly address consultations of the European Commission and make input evaluation and influence comprehensible**

Even non-public consultations should always be aimed at the largest possible group of addressees. Stakeholders in a political initiative are not always evident at first glance. Insurers in particular are affected by an extremely large range of topics and should therefore be taken into special consideration when identifying the stakeholders to be consulted: Not only topics of "classical" financial market regulation are of great interest to insurers. Rather, any regulations of liability issues or traffic safety, for instance, are of immediate importance. In addition, insurers are naturally also affected by all regulations affecting them in their business activity.

Better regulation also encompasses clear and objective criteria for the inclusion of stakeholders. However, the transparency of the evaluation proceedings of consultations remains worthy of discussion even after the current Better Regulation Guidelines.[26] The evaluation and weighting of contributions from public consultations of the European Commission are not subject to any transparent methods. A clear specification as to how submissions from individuals are to be evaluated compared to replies from business speaking for numerous undertakings and their employees is still missing. Exactly what is important to the European Commission in specific cases, and what weighting it wants to undertake, should therefore be published.

– **Introduce more transparency in expert groups**

Potential for improvement also exists in connection with expert groups of the European Commission and other EU agencies, above all:[27]

- o to scrutinize the critical practice of personal mandates: Members should be allowed to exchange with the interests groups they represent. An appointment qua functionem instead of ad personam is therefore more appropriate.
- o to observe the relevancy of a topic for interest groups: Insurers above all are affected by a broad range of topics and should therefore be taken into special consideration.
- o to facilitate better transparency in public tenders: Analogous to the website "Your Voice in Europe", calls for participation in expert groups should be published so as to be publicly visible and not

[26] Better Regulation Guidelines
[27] GDV contributed to the Consultation of the European Ombudsman concerning the composition of European Commission expert groups in August 2014.

"hidden" in the newsletters of the services of the European Commission.

1.3. Establish a permanent inter-institutional culture of better regulation and transparent mechanisms

Better regulation should not only be understood as a project of the European Commission. Transparent impact assessments must also be established with co-legislators. The explicit determination of the responsibility of the European Parliament and the Council by the European Commission is therefore consequential. All institutions participating in the legislative process should accept their responsibility. The European Parliament has taken an important step in this direction by introducing its own assessments of legislative consequences. This path should be consistently pursued further.

Regulatory review for the entire regulatory cycle is also desirable. The German insurers propose establishing a permanent supra-institutional, independent board to accompany the changes in the future regulatory process. The GDV generally supports the demands for an independent regulatory review board and also the transformation of the Impact Assessment Board into a Regulatory Scrutiny Board. It is important, however, that members of the new groups are appointed and perform their work according to transparent, objective criteria. In addition, it would be desirable on the part of the European Parliament to entrust a member of the Conference of Presidents with the competence for Better Regulation.

1.4. Carry out ex-post analyses more frequently and draw consequences

All European regulatory institutions should moreover agree to ex-ante and prompt ex-post analyses of legal acts in transparent cooperation with the affected groups. In light of the recent high density of regulation, above all in the financial services sector, consistent ex-post analyses are a particularly important concern for the coming years.

Not least through the affirmation of increased ex-post evaluations, the European Commission recognizes the overriding importance of reviewing the inventory of regulations. The voluntary commitment of the European Commission to conduct public consultations for evaluations and fitness checks[28] is expressly welcome. Unintended consequences for stakeholders as a result of accelerated legislative proceedings must be corrected quickly.

1.5. Establish a firm schedule for REFIT and formal consultations on measures

A firm schedule of REFIT activities, communicated in advance, would be desirable. REFIT communications, including proposals for measures, have to date not be publicized according to any recognizable scheme. Formal consultations on proposals of REFIT measures before their publication would motivate interested and affected parties to reply. The ambitions of the European Commission would thus be better anchored in the consciousness of stakeholders and placed on a legitimized base.

[28] Cf. p.66 of the Guidelines for better regulation

1.6. Respect the limits of the need for action: always take the principle of proportionality into account

In accordance with Article 5(4) of the Treaty on the European Union, measures of the EU must be proportionate and may not exceed the degree necessary to achieve the goal. Yet proportionality must be more than a general affirmation and legal catchword. For example, the diversity within the industries affected by the regulation must be considered, among other things. Within the insurance industry, there are small and medium-sized undertakings, specialized insurers, regional undertakings and insurers whose product portfolio conceals relatively low risks.

1.7. Respect the limits of the capacity to act: safeguard the principle of subsidiarity at all times

Pursuant to Article 5(3) of the Treaty on the European Union, the principle of subsidiarity applies as the basic principle for action of the EU. It implies that regulation must basically be made at the level of authority which is the most appropriate for a given question. Accordingly, the EU is only competent if a harmonized Europe-wide regulation is better suited to solve the problem. Harmonization and jurisdiction of the Member States are in tension with one another. It must always be weighed in each specific case in which way the political objectives will be better served. It is positive that the European Commission wants to better declare in the future how an initiative is in harmony with the principle of subsidiarity.

Analyses show that the principle of subsidiarity in the EU has not been observed enough to date.[29] The following aspects could therefore contribute to improving the control of compliance with the subsidiarity principle:

- the right of the national parliaments to control subsidiarity for the entire EU legislative process, even at the secondary regulatory level,
- consultation of national lawmakers by the European Commission even before the presentation of legislative proposals,
- establishment of a court for competency and subsidiarity issues,
- definition of legally secure and justiciable subsidiarity criteria,
- voluntary commitment of the national parliaments to carry out consistent subsidiarity controls,
- obligation of the European supervisory authorities (ESAs) to perform subsidiarity tests (see also 2.6.).

1.8. Address "gold plating" by the Member States

Excessive interpretation of European legal provisions and any complementing of EU legal provisions by national regulations harm the competitiveness of the relevant Member State and run contrary to the notion of fair competition within the EU internal market.

EU institutions, above all the European Commission and the supervisory authorities, should therefore review corresponding indications by stakeholders and, as feasible, brief national legislators on the actual goals and the implementation in other Member States. To warrant the most balanced legal situation possible throughout Europe, REFIT should also take

[29] Centre for European Policy (cep): Bring subsidiarity principle to life; April 2015 (in German language)

on the issue of "gold plating". The GDV supports the European Commission's request to Member States to avert gold plating[30].

From the current implementation of the Solvency II Directive alone, the following **examples** result which jeopardize a level playing field:

- **EXAMPLE Attestation of solvency requirements pursuant to the German Insurance Supervision Act**

  § 35(2) of the German Act on the Supervision of Insurance Undertakings[31] provides for an obligatory affirmation of the solvency requirements by the independent auditor. This strictly national provision goes beyond the Solvency II requirements. Article 129(4) of the Solvency II Directive only requires a quarterly calculation and communication of the minimum capital requirement (MCR) to the supervisory authorities.

- **EXAMPLE Requirements for the qualifications of key functions pursuant to the German Insurance Supervision Act**

  § 24(1), Sentences 3 and 4 of the Insurance Supervision Act require theoretical and practical knowledge in "insurance transactions" and three years of experience in an insurance undertaking of comparable size and of a comparable business type as necessary qualifications. In accordance with Article 273(2) of the draft delegated legislative acts, in contrast, knowledge in "insurance sector, other financial sectors or other businesses" is expressly to be taken into account. The foreseen tightening in national law narrows the group of qualified persons unnecessarily. Even a move from the banking or securities industry would thus only be possible in rare cases after much effort.

- **EXAMPLE Prohibition on borrowing pursuant to the German Insurance Supervision Act**
  In § 15(1), Sentence 3 of the Insurance Supervision Act, there is still a prohibition on borrowing for which there is no basis in the European regulations and which does not exist in other Member States of the EU. The prohibition on borrowing places the German insurance industry at a disadvantage.

2. Subordinate regulation: require European supervisory authorities (ESAs) to adhere to REFIT

Because of their expertise, the three European supervisory authorities (ESAs), EIOPA, ESMA, EBA[32], play a key role in the consistent formulation and application of European financial supervision rules. The legislative acts enacted by the ESAs and the limits of their powers should also be part of the REFIT agenda. Key aspects include the conformance of decision-making processes with the rule of law (including the principles of subsidiarity and proportionality) and democratic accountability of the agencies. The following aspects stand in focus:

[30] Cf. Communication: Better regulation for better results – An EU agenda
[31] German Act on the Supervision of Insurance Undertakings of 1 April 2015 (in German language)
[32] The European Insurance and Occupational Pensions Authority (EIOPA), the European Securities and Markets Authority (ESMA), the European Banking Authority (EBA)

2.1. Regulation at subordinate levels should not be the standard case

The ESAs formulate the draft technical standards which are formally issued by the European Commission with legally binding effect on Level 2.[33] In principle, the delegation of matters to experts for the clarification of technical details is welcome. After all, the goal is to streamline the legislative process. In accordance with clear specifications in the primary law (Article 290 and Article 291(2)2 of the Treaty on the Functioning of the European Union), however, strategic political decisions are to be made by the lawmakers themselves. Even supposedly technical aspects may have far-reaching political effects. Co-lawmakers only have a veto for delegated acts. Accordingly, regulatory powers should be delegated with care, and only in the presence of a specific need and following prior clarification of the principles of subsidiarity and proportionality (also see 2.6.).

2.2. Measures at subordinate regulatory levels must adhere closely to the basic legislative act

Lawmakers must ensure that actions taken by supervisory authorities at subordinate regulatory levels adhere closely to the basic legislative act. This begins with the definition of terms. In the event of deviations from the basic legislative act, the danger exists that political decisions will be undermined, that additional expenses will be created for the addressees and that the flexibility which was often deliberately afforded will be lost.

– **EXAMPLE: Divergent definitions at different regulatory levels:**
In the Technical Advice for delegated acts for the implementation of "IMD 1.5" (Article 91 MiFID2) on the handling of conflicts of interest in the sale of insurance-based investment products,[34] EIOPA proposes a new definition of "inducements" as opposed to "remuneration" which conflicts with the definition in the Directive.[35]

It should also be kept in mind that regulation at Level 2 could diminish the reliability of impact assessments for the legislative proposal.

In addition, the limits of the authorization must be observed at all times. With regard to the EIOPA guidelines, Article 16(1) of the EIOPA Regulation should be formulated in a more specific manner (see 2.6.).

2.3. Improve impact assessment and integration of stakeholders in subordinate regulation as well

Transparency, stakeholder integration and impact assessment need to apply on the subordinate regulatory level as well.[36] The GDV supports the European Commission's determination to require impact assessments for delegated and implementing acts.[37] This includes hearing from stakeholders and interested parties.

The questionable rule under which impact assessments need only be performed with regard to the presumed "significant" effects of an initiative (al-

[33] Regulatory Technical Standards are issued as delegated acts pursuant to Article 290 of the Treaty on the Functioning of the European Union (TFEU), Implementing Technical Standards are issued as implementing acts pursuant to Article 291 Par. 2 of the TFEU.
[34] EIOPA-15/135
[35] See Art. 2(1) of the General Approach to the IDD, as adopted in the trilogue.
[36] Cf. Comments of the German Insurance Association on the consultation on the draft Commission Guidelines for Evaluation, February 2014
[37] Better Regulation Guidelines

so see 1.2.) applies for delegated and implementing acts as well. In a possible revision of the ESA regulations binding requirements should be defined for impact assessments by the ESAs.

Better regulation includes the adequate inclusion of all stakeholders based on clear and objective criteria, which should be expressly established in the EIOPA Regulation. This requires transparent processes. These principles must be applied even in cases where EIOPA acts not as a supervisor, but rather as part of the regulatory process. Explicit secrecy requirements for stakeholder groups raise questions concerning accountability and the ability to involve other experts.

2.4. Take better regulation into account in the issuance of ESA guidelines

A clear commitment to smart and transparent regulation is necessary especially with respect to the issuance of guidelines by European supervisory authorities. It is problematic in this regard that secondary legislation requires national authorities and undertakings to make every effort to comply with ESA guidelines and recommendations ("comply or explain", cf. Article 16(3) EIOPA Regulation[38]), even though such guidelines and recommendations shall have no binding force in accordance with the primary legislation.

Especially the fact that the power to issue guidelines is being increasingly used in order to anticipate ongoing EU legislative projects and, in some cases, to actually define dissenting standards is problematic. From this situation, necessary REFIT conditions for supervisory guidelines can be derived:

- **Clearly specified authorization and a clear mandate necessary**

  Legally certain authorization of the ESAs by the lawmakers is the only way to prevent shadow regulation and the anticipation of legislative projects. Article 16(1) of the EIOPA Regulation is not enough as an unspecified basis for the issuance of guidelines.

  Smart regulation can only be developed in an orderly process, step by step. Otherwise, there would be a risk of overregulation on the level of guidelines. For this reason, Article 16(1) of the EIOPA Regulation states that guidelines must ensure consistent application of existing Union law. There is no option to issue guidelines in lieu of failed political compromises.

  Moreover, since the new supervisory system will not take effect until 2016, no reliable findings exist at the present time as to whether and in which areas there is actually a need for such detailed explanations by EIOPA. Accordingly, the need for each and every guideline must be examined especially carefully.

  – **EXAMPLE: POG within the context of IMD 2**
  In accordance with Article 21a of the future Insurance Distribution Directive (IDD), in a provision borrowed from Article 16(3) of MiFID 2, Product Oversight and Governance arrangements by insurance undertakings[39] (POG)

[38] Regulation (EU) 1094/2010
[39] EIOPA-BoS-14/150

are to be introduced not just for insurance-based investment products, but for all insurance products. The entire approach was first raised in the current legislative process by EIOPA, which made preparations for this process without any authorization. In substantive terms, the POG rule leads to an unnecessary expansion of bureaucratic requirements which does not by any means benefit such review processes for the overwhelming majority of simple (non-life) products.

– **EXAMPLE: EIOPA guidelines for complex debt instruments**
Article 25(10) of MiFID 2 provides for a clear authorization for ESMA to issue guidelines for complex debt instruments and structured deposits. By contrast, EIOPA has acted largely without specific authorization in issuing guidelines for Solvency II. The result has been that this already complex supervisory system has grown to more than 6,700 pages because of these guidelines and the associated explanatory text. It is evident even from the sheer quantity of pages that such copious rules can hardly be mastered.

– **EXAMPLE: Expediting Omnibus II**
Also worrisome was the initiative to "expedite" the flagging negotiations for the Omnibus II Directive by implementing certain components of the proposal immediately as "guidelines" (cf. EIOPA "Preparatory Guidelines on Solvency II – System of Governance"[40]).

o **Ensure consistency between authorization and formulation (including monitoring and accountability requirements)**

The substance of the guidelines must adhere to the binding Level 1 and Level 2 rules and may not exceed the bounds of those rules. However, guidelines may not conflict with the legislation itself. In the case of EIOPA, the very quantity and granularity of the guidelines make the rules highly problematic. Moreover, EIOPA should not be able to issue guidelines in cases where the basic legislative act already provides for specifications on Level 2 (cf. Recital 25 of the EIOPA Regulation).

– **EXAMPLE: Solvency II guidelines overextend rules**
A large number of Solvency II guidelines go beyond the rules of the Directive and the delegated Regulation. As a result, rules in areas where the lawmakers have created flexible solutions and eased requirements are hollowed or counteracted.
  - **Fit & proper requirements:** While the Solvency II Directive, in Article 42, imposes fit and proper requirements only for persons who have a "key function" and effectively run the undertaking, the System of Governance guidelines (Explanatory Text 1.22) speak of persons who "implement key functions", thus extending the scope of the rules to all employees in key functions. Scopes of application which are deliberately limited must not be extended through guidelines.
  - **"System of Governance" guidelines:** Although Article 41(3) of the Solvency II Directive requires an annual review of documentation requirements only for certain internal company guidelines, the "System of Governance" guidelines (Guideline 9) includes all written guidelines in the mandatory annual review.

– **EXAMPLE: ESA guidelines on cross-selling**
The MiFID 2 Directive authorizes ESMA to issue guidelines on cross-selling, in conjunction with EBA and EIOPA. However, cross-selling is defined in Article 4 of the MiFID 2 Directive as "investment service together with another service or product as part of a package or as a condition for the same agreement or package." Nevertheless, the ESAs are currently

[40] EIOPA-CP-13/08

conducting consultations in preparation for such guidelines which have a far broader scope (namely, packages of all financial products).

In view of the de facto binding nature of the guidelines (the "comply or explain" mechanism), discussion is necessary as to whether the existing checks are adequate for the issuance of guidelines.

Before guidelines are published, it is at least necessary to ascertain whether the formal criteria (adequate basis, no conflict with Level 1 or Level 2 rules, etc.) are met. This task should be assumed by the European Commission, although expanding the sphere of competence of the Regulatory Scrutiny Board is also worthy of discussion. In addition, the national supervisory authorities and financial institutions must have the ability to initiate an ex-post review as to the lawfulness of the rules in the guidelines. The existing options for appeal are inadequate. In any case, it is necessary to expressly extend the scope of appeals in accordance with Article 60 of the EIOPA Regulation to include guidelines. Clarification is also necessary as to who can file an action in accordance with Article 61 of the EIOPA Regulation seeking to nullify EIOPA guidelines and under which circumstances.

2.5. Consideration of all regulatory levels necessary

The guidelines pursue the same goal as the Level 2 technical standards: harmonizing and ensuring consistent implementation of EU law. The key difference, however, despite the strong pressure for de facto implementation, is that the guidelines are not legally binding. In accordance with Recital No. 25 of the EIOPA Regulation, EIOPA is only to issue guidelines in areas which are not covered by technical standards.

In practice, the relationship of the various rules with each other is frequently unclear and there is often no examination of the interactions between the various levels. The side-by-side existence of various overlapping and sometimes contradictory rules substantially complicates implementation in the affected undertakings.

- **EXAMPLE: Solvency II and subordinate regulatory levels**
  For example, the outsourcing of key functions is addressed in the Solvency II Framework Directive (Article 49 in conjunction with Recitals 31 and 33) and the delegated acts (Article 274), as well as in the EIOPA Guidelines on "System of Governance" (Guideline 14) and in the corresponding BaFin announcement (Marginal No. 38). The requirements become stricter and broader with each additional regulatory level. As a result of these and other supplementary rules, the option of outsourcing key functions, as originally provided for in the Directive, an option which is of particular importance for insurance groups, is completely bureaucratized, in effect, and therefore cannot be implemented in an expedient fashion.

In order to ensure that complex multi-level regulatory schemes such as the new Solvency II insurance supervisory regime and the entire consumer protection legislation (e.g. IDD, PRIIPs, MiFID 2, the Distance Selling Directive, the E-Commerce Directive; see examples for consumer protection and sales in 1.1.) are effective and functional in all areas, it is necessary to examine the entire scheme for redundancies and to adjust overlapping and excessive requirements. This is a task which only European lawmakers can assume. These aspects should also find their way into the review of the European system of financial supervision ("ESA Review").

2.6. Observe limits to authorization and need for action at subordinate regulatory level as well

o Stay within the boundaries of the authorization

Hierarchies of norms and bases for authorization must be observed. ESAs should act only within the boundaries of the relevant basic legislative act at all times. Only through legally certain authorization of ESAs by the lawmakers it will be possible to prevent shadow regulation. This applies not just for draft delegated and implementing acts, but also for the issuance of guidelines, for the basis of which Article 16(1) of the EIOPA Regulation (in the case of EIOPA) should be formulated in more specific fashion (see 2.4.).

– **EXAMPLE: Level 2 acts under the Solvency II Framework Directive**
The EIOPA's proposed implementing acts for capital add-ons (CP-14/053)[41] call for comprehensive cooperation and disclosure requirements which have no basis in Article 37 of the Solvency II Framework Directive. Furthermore, Article 35 of the Framework Directive authorizes the member states to adopt such requirements. The technical standards should do no more than regulate the processes for communicating information.

o Maintain proportionality

The GDV supports the European Parliament's call[42] to step up the review of the application of the principle of proportionality, especially with regard to delegated and implementing acts.[43]

o Take into account principle of subsidiarity

The European Court of Justice, in its judgment on the short selling prohibition (Judgment of 22 January 2014 in Case No. C-270/12, United Kingdom vs. EP and the Council[44]), came to the following conclusion: Based on the division of labor between the national supervisory authorities and the ESAs, the ESAs may only take action in individual cases under exceptional circumstances, where the national authorities have unlawfully failed to act. This requirement is a realization of the subsidiarity principle, which is of fundamental importance on the EU level. Accordingly, EU organs can only take action if the measures undertaken by the member states are inadequate and if political objectives can better be accomplished on the Community level (Article 5(3) of the Treaty on European Union).

3. REFIT proposals in the Work Programme of the European Commission for 2015: impact on German insurers

Of particular relevance from the viewpoint of the German insurers is the withdrawal of the proposal to amend the Directive on investor compensation schemes (COM(2010) 371), which has already been published in the

[41] EIOPA-CP-14/053
[42] Cf. No. 9 of Resolution P7_TA(2014)0061
[43] Cf. Comments of the German Insurance Association on the consultation on the draft Commission Guidelines for Evaluation, February 2014
[44] Decision in Case C-270/12

Official Journal. Insurers have been following this matter, e.g. due to the possible liability questions which may result.

The GDV has also given input on relevant ongoing REFIT fitness checks and **stands available with its expertise at any time in connection with current and planned REFIT measures,** not least for:

- Evaluation of the standardization system in the EU: standardization should take place only in areas falling within the regulatory competence of the EU, not e.g. in the health care services sector.[45]
- Evaluation of Directive 2004/35/EG on environmental liability: retention of voluntary solutions is necessary.
- Evaluation of Regulation 1606/2002 on the application of international accounting standards: accounting rules must be adapted to the nature of the insurance business.
- Codification of company law Directives: consolidating existing Directives on company law would improve the transparency and clarity of the rules.
- In transportation: traffic safety must be promoted.

Consistent ex-post analyses are especially important (see e.g. 1.4. above). Further examinations of existing initiatives in conjunction with stakeholders remain necessary. If regulation has unintended consequences which restrain competition, those consequences must be quickly eliminated.

The German insurers will continue to make their expertise and experience available to European institutions for evaluation measures.

Berlin/Brussels, July 2015

[45] GDV Position Paper "on standardisation of medical treatments and other healthcare services at EU level." December 2014