Consultation response
Commission public consultation on the Impact Assessment Guidelines
29 September 2014

The Association for Financial Markets in Europe (AFME)\(^1\) welcomes the opportunity to comment in respect of the 2014 revision of the European Commission Impact Assessment Guidelines.

AFME and its Member firms greatly support the EU Better Regulation agenda and smart regulation. We appreciate and support the work invested in Impact Assessment (IAs) and the overall Commission’s focus on better regulation. IAs represent a key tool to ensure that policy-making, and ultimately legislation, are based on sound, well-informed, thorough evidence and analysis. Together with public consultations and other better regulation tools, IAs should inform policy-making to the ultimate benefit of the regulatory framework.

We believe that a genuine IA system should involve a strong cost-benefit analysis of a given legislation, incorporating a thorough analysis of the interaction with other pieces of legislation and with the overall regulatory landscape.

Currently, it is our view, that impact assessments are often perceived as being framed and carried out in a manner that provides support to the proposal that policymakers have already decided on. While we acknowledge that it is often difficult to put quantitative figures on the complete range of costs and benefits of a particular proposal, nonetheless it is important the any impact assessment is seen as strongly neutral in its methodology and approach and rigorous in its assessment of costs and benefits, even if there may be important qualitative components involved. Overall, more focus should be put to ensure a more IAs’ consistent quality and stronger governance process.

Our response to this consultation is not organised on a question-by-question basis but according to a small number of key themes.

Assessment of impacts
Commission’s IAs are in principle based on qualitative and quantitative analysis, covering costs and benefits. The draft guidelines mention that ‘all relevant impacts should be assessed quantitatively, if possible, as well as qualitatively.’\(^2\) Moreover, ‘when quantitative analysis is not possible or proportionate, you should assess impacts qualitatively’\(^3\).

\(^1\) AFME is the European member of the Global Financial Markets Association (GFMA) a global alliance with the Securities Industry and Financial Markets Association (SIFMA) in the US, and the Asia Securities Industry and Financial Markets Association (ASIFMA) in Asia. AFME is listed on the EU Register of Interest Representatives, registration number 651 10063986-76.

\(^2\) 2014 revision of the European Commission Impact Assessment guidelines, consultation document, page 18

\(^3\) Idem, page 19
AFME takes the view that while qualitative analysis is a necessary element, and while it will not always be possible to quantify the full range of impacts, nonetheless there should be a clear aim to strive to the fullest extent possible to conduct a thorough quantitative analysis of the full range of costs and benefits of the different policy options.

The Impact Assessment Board report for 2013 underlines that ‘efforts also need to be kept up as regards the analysis and – where possible – the quantification of impacts.’

We thus believe that the IA guidelines should more strongly affirm the need for thorough quantitative analysis – and when this is not possible the legislator should consider whether the qualitative analysis available is sufficient to support and justify a new legislative proposal.

We take the view that this should not only apply to the Commission IAs, but to any EU institution or body, including the European Supervisory Authorities (ESAs), that has an obligation to analyse the potential related costs and benefits of proposals, both at level 1 and Level 2.

We also take the view that IAs including cost benefit analysis should be conducted where appropriate during the drafting of Level 2 measures.

More specifically in relation to financial services legislation, we take the view that rigorous, comprehensive and independent data-based analysis of costs and benefits to market participants, end-users, and the wider economy is fundamental to ensuring coherence and an appropriate implementation of policy objectives.

It is important that the impact of a single possible proposal is not considered in isolation. It should be required practice for a number of alternative policy options to be identified and their different likely impacts compared.

From a presentational point of view, we take the view that IA documents could be simplified to the benefit of stakeholders’ understanding – the current structure can be repetitive and thus not conducive to the argumentation’s clarity and effectiveness.

**Coherence and cumulative costs of legislation**

The European Parliament in its report on ‘enhancing the coherence of financial services legislation’ noted that better consideration in impact assessments of the interactions between new proposals and existing legislation is essential if the single rulebook is to develop in a coherent form and called on the Commission to enhance its internal guidelines on impact assessments and their implementation to ensure that related legislation is clearly identified and interactions are fully considered in the assessments and by the Impact Assessment Board. Special emphasis is given to the need to consider coherence and coordination not only within the EU acquis, but also between the EU rules and those

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*IAB report 2013, page 8
European Parliament, 'Enhancing the coherence of financial services legislation', page 2*
adopted by other major jurisdictions, particularly where there is international coordination via G20, Basel and IOSCO.6

Also the European Court of Auditors (ECA) underlined in a recent report that 'since the start of the financial crisis the Commission has launched many legislative proposals concerning banking, securities markets, insurance and pensions and the Commission prepared impact assessments and the draft legislative proposals in parallel. However, the Commission has not so far carried out a cross-sectoral assessment of the cumulative impact on the financial markets of the full package of legislative proposals affecting financial institutions'.7

AFME would greatly welcome the development of a cumulative IA of financial services legislation as well as the preparation of cross-regulation IAs both per individual market segment, product and evaluating the cumulative effects of the main pieces of legislation on markets, economies, economic agents. The recent publication by the European Commission of the Economic Review of the Financial Regulation Agenda (ERFRA) is to be welcomed. But while it includes quantitative analysis related to individual measures, it does not provide for a quantitative assessment of the horizontal, cross-cutting, interactive and cumulative effects of legislation. This is something that should continue to be addressed on a priority basis. We have recently seen similar calls made by the Australian government, currently holding the G20 Presidency, endorsing the concept of impact assessments and supporting the idea of reassessing the costs of financial regulation.8

There have been a range of regulatory initiatives which we believe fall short of well articulated and integrated objectives and effective IAs. Amongst these, simply by way of example, have been the proposals for a Financial Transactions Tax and its effect on financial markets, and elements of MiFID 2 / MiFIR9.

Unintended consequences

We take the view that although the full impact of these reforms is yet to be felt, they are likely to have an important negative effect on market liquidity, funding costs and risk management. This relates directly to another important policy consideration, namely the risk that legislation has unintended consequences.

The draft IA guidelines mention this important issue10, which we believe should always be carefully considered by legislators. We believe the guidelines should be developed further as regards this point, particularly on how the Commission would deal with a situation where it appears that a proposed piece of legislation might cause unintended consequences. Review clauses embedded in legislation can play a fundamental role in this respect.

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6 Idem, page 3, point 14
7 ECA special report ‘European banking supervision taking shape - EBA and its changing context’, May 2014
8 G20 split over assessment of financial rules, Financial Times, 17 September http://www.ft.com/intl/cms/s/0/342c1a42-3e47-11e4-a620-00144feabdc0.html#axzz3DjzE4392
9 AFME response to the European Parliament Economic and Monetary Affairs Committee Questionnaire for the public consultation on enhancing the coherence of EU financial services legislation, June 2013
10 2014 revision of the European Commission Impact Assessment guidelines, consultation document, p. 16

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Increasing independence and credibility

In general, and if possible from a resource perspective, we take the view that IAs should draw to a greater extent on experienced research organisations independent from the Commission (or by the ESAs or whatever EU institution or body proposing the legislation). An increased use of external resources would help ensuring that the analysis conducted is thorough and fully independent and the overall robustness of the impact assessment is likely to be enhanced. As pointed out by the European Court of Auditors, the use of an external evaluator would be particularly important to carry out cross-sectoral analyses of a whole set of proposals. 11

The Impact Assessment Board (IAB) plays a very important role in the framework of the Commission’s IA system and we strongly support it. This key role should be adequately reflected in the IA guidelines.

As regards the IAB, there should be a regular and thorough review of its composition and working practices in order to ensure its independence and transparency. An idea could be for the IAB to also comprise a material number of fully independent, external members. This would help enhancing its role and the credibility of its opinions both internally and externally.

The IAB role could be enhanced by i) having the power to make policy recommendations based on IAs’ appraisals and analysis; and ii) as a follow-up to the IAB recommendation (point 1), specific policies should not be allowed to go ahead until suggested changes to the IA are made, thus considering fully and approving a specific policy and the IA together. This would also help linking more clearly an IA analysis and results with corresponding policies.

Ongoing review

Impact Assessments are in principle considered ex-ante exercises which are carried out, as a one-off, before the preparation of a legislative proposal.

However, given that the impact of legislation is likely to be somewhat different than predicted, both for exogenous and endogenous reasons, we believe that key legislation should undergo an ongoing process of regular review and re-assessment of its impact.

A periodic, ongoing review would ensure that the impact of legislation is regularly monitored and new or changing elements are properly, and timely, accounted for.

In the financial services sphere, this is also necessary to account for relevant developments in the economy and markets.

Impact Assessment and the other EU co-legislators

While this is not strictly related to the Commission IA guidelines, we take the view that all EU co-legislators should show commitment to considering IAs throughout the legislative process.

11 ECA special report ‘European banking supervision taking shape - EBA and its changing context’, May 2014, p. 37

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It should be ensured that the Council and the European Parliament regularly and consistently consider Commission IAs. Moreover, we would encourage them to regularly conduct their own IAs (commissioning independent analysis of costs and benefits) on relevant pieces of legislation and to carry out additional IAs on substantive amendments to Commission proposals throughout the legislative process. Substantial amendments to a legislative proposal should be accompanied by a supplementary IA so as to improve the balance between the IAs and the final legislative acts. In order to achieve this, dedicated resources should be established within the Council responsible for providing IA analysis and the role of the Parliament’s Directorate for Impact Assessment and European Added Value should be strengthened to provide strong IA analysis alongside the Parliament’s amendments.

For example, the proposals on remuneration adopted in the CRD IV legislation and proposals to remove or narrow the use of transparency waivers in equities in the MiFID 2 / MiFIR debate are clear examples of legislative elements which were not clearly set out in the Commission’s original proposals and therefore did not benefit from full impact assessment.\(^\text{12}\)

\(^{\text{12}}\)AFME response to the European Parliament Economic and Monetary Affairs Committee Questionnaire for the public consultation on enhancing the coherence of EU financial services legislation. June 2013