



JOINT COMMITTEE OF THE EUROPEAN
SUPERVISORY AUTHORITIES

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Joint Consultation Paper

Draft Regulatory Technical Standards
on risk concentration and intra-group transactions under
Article 21a (1a) of the Financial Conglomerates Directive

Contents

1. Responding to this consultation	3
2. Executive summary	4
3. Background and rationale	5
4. Draft Regulatory Technical Standards on risk concentration and intra-group transactions within financial conglomerates	6
Article 1 - Subject matter	8
Article 2 - Significant risk concentration	8
Article 3 - Significant intra-group transactions	10
Article 4 - Supervisory measures	12
Article 5 - Final provisions and implementation	13
5. Draft cost-benefit analysis / impact assessment	14
5.1 - Introduction	14
5.2 - Problem Definition	15
5.3 - Objective pursued	17
5.4 - Policy Options	18
5.5 - Analysis of impacts	23
6. Overview of questions for consultation	31

1. Responding to this Consultation

The EBA, EIOPA and ESMA (hereafter 'the ESAs') invite comments on the proposal put forward in this consultation and in particular on the specific questions listed in 5.2.

Comments are most helpful if they:

- respond to the question stated;
- indicate the specific point to which a comment relates;
- contain a clear rationale;
- provide evidence to support the views expressed/ rationale proposed; and
- describe any alternative regulatory choices the ESAs should consider.

Submission of responses

To submit your comments, please refer to the consultation pages on the ESAs' websites. Please submit your comments by 24 October 2014. Please note that comments submitted after this deadline, or submitted via other means may not be processed.

Publication of responses

Please clearly indicate in the consultation form if you wish your comments to be disclosed or to be treated as confidential. A confidential response may be requested from us in accordance with the ESAs' rules on public access to documents. We may consult you if we receive such a request.

A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. Please note that the ESAs are subject to Regulation (EC) No 1049/2001 regarding public access to documents.

Contributions will be made available at the end of the public consultation period. Any decision we make not to disclose the response is reviewable by the ESAs' Board of Appeal and the European Ombudsman.

Data protection

The protection of individuals with regard to the processing of personal data by the ESAs is based on Regulation (EC) N° 45/2001 of the European Parliament and of the Council of 18 December 2000 as implemented by the ESAs in their implementing rules adopted by their Management Board. Further information on data protection can be found under the Legal notice sections of the ESAs websites.

2. Executive summary

1. In accordance with Article 21a(1a) of Directive 2002/87/EC (the ‘Financial Conglomerates Directive’, ‘FICOD’) and the procedure set out in Article 56 of Regulation (EU) No 1093/2010, Regulation (EU) No 1094/2010 and Regulation (EU) No 1095/2010 (together the ‘European Supervisory Authority (ESA) Regulations’), the ESAs shall, through the Joint Committee, develop draft regulatory technical standards to establish a more precise formulation of the definitions set out in Article 2 and to coordinate the provisions adopted pursuant to Articles 7 and 8 and Annex II of the FICOD.
2. The draft Regulatory Technical Standards (RTS) aim to ensure a consistent application of Articles 2, 7 and 8 and Annex II of the FICOD. The draft RTS provide clarification about which risk concentration and intra-group transactions at the level of the financial conglomerate should be considered “significant”, given that Articles 7 (2) and 8 (2) of the Directive require that significant risk concentration and intra-group transactions be reported to the coordinators.
3. The draft RTS also provide for coordination of factors which coordinators and other relevant competent authorities should take into account when identifying types of significant risk concentration, defining appropriate thresholds for the reporting of risk concentration and intra-group transactions, when setting periods for reporting and overseeing significant risk concentration and intra-group transactions as part of the supplementary supervision on the basis of the FICOD.
4. In order to ensure a consistent application of the FICOD’s rules on risk concentration and intra-group transactions, the draft RTS provide that coordinators and the other relevant competent authorities should require regulated entities or mixed financial holding companies to report certain minimum information. The coordinator and the other relevant competent authorities should agree on the form and content of the significant intra-group transactions report, including language, frequency, addressees, remittance dates and channels of communication.
5. Within the powers assigned by Union and national law, and without prejudice to other supervisory powers available, the draft RTS aim to provide a set of supervisory measures which should be taken into account by supervisors in their supplementary supervision according to the FICOD in order to foster a more harmonised approach with respect to supervisory measures.

3. Background and rationale

6. Financial conglomerates are subject to supplementary supervision in addition to that of sectoral supervision of the banking and insurance entities in the group. Supplementary supervision is designed to address two main concerns: (1) avoiding the double gearing or multiple use of capital, whilst ensuring it is appropriately allocated in the group according to sectoral rules; and (2) monitoring group risks, which are those risks arising from the group structure of a financial conglomerate, i.e. risks of contagion, structure complexity, risk of concentration, and conflicts of interest.
7. The FICOD was the first cross-sectoral legislative act in the field of prudential supervision. Cooperation between supervisors of different sectors was limited at that time and international cooperation in general was still in a developing stage. Since the enactment of the FICOD, cooperation in banking and insurance colleges has significantly intensified. Cross-sectoral college practices have evolved.
8. Different types of groups are captured under the scope of the FICOD regime. Conglomerate risks are therefore not the same for all groups.
9. Since the enactment of the FICOD, supplementary conglomerate supervision has evolved towards a more risk-based supervision, as evidenced by the changes implemented through Directive 2011/89/EU (hereinafter: “FICOD I”). The aim was to come to a better identification of groups that should be covered by the FICOD regime, also allowing for waivers with regard to both criteria.
10. Since the enactment of the FICOD, sectoral legislation both on the insurance and on the banking side has developed significantly, with a level of detail that is in sharp contrast to the provisions of the FICOD.
11. While Member States have implemented the FICOD and apply financial conglomerate supervision, the wide discretion given to Member States in the FICOD hampers supervisory consistency.
12. These RTS strive to enhance supervisory consistency with regard to risk concentration and intra-group transactions at the level of the financial conglomerate.

4. Draft Regulatory Technical Standards on risk concentration and intra-group transactions within financial conglomerates

13. These draft regulatory technical standards pursuant to Article 10 of Regulation (EU) No 1093/2010, Regulation (EU) No 1094/2010 and Regulation (EU) No 1095/2010 (together the ‘European Supervisory Authority (ESA) Regulations’)¹ set out the ESAs’ view of how to ensure consistent application of the Articles prescribed by Article 21a (1a) of Directive 2002/87/EC of the European Parliament and of the Council.
14. Pursuant to the procedure set out in Articles 10 through 14 of the ESA Regulations, the draft technical standards still need to be adopted by the European Commission by means of regulation or decision before they will be published in the Official Journal of the European Union and enter into force on the date stated therein (Article 10 (4) ESA Regulations).

¹ Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC; Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC; and Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC.

COMMISSION DELEGATED REGULATION (EU) No .../..²

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[...]

supplementing Directive 2002/87/EC of the European Parliament and of the Council with regard to regulatory technical standards to establish a more precise formulation of the definitions and to coordinate the provisions with respect to the supplementary supervision of risk concentration and intra-group transactions

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate and amending Council Directives 73/239/EEC, 79/267/EEC, 92/49/EEC, 92/96/EEC, 93/6/EEC and 93/22/EEC, and Directives 98/78/EC and 2000/12/EC of the European Parliament and of the Council³, and in particular Article 21a (1a) thereof.

Whereas:

- (1) Coordinators are empowered to overview significant risk concentration and significant intra-group transactions and to identify the types of risks and transactions, which regulated entities in a financial conglomerate shall report. They are also empowered to define thresholds. In order to coordinate these provisions, this Regulation lays down a methodology to assist coordinators and other relevant competent authorities in their decision making.
- (2) Competent authorities are expected to take into account the particular situation of each specific financial conglomerate and the existing sector-specific requirements on risk concentration and intra-group transactions.
- (3) Regulated entities and mixed financial holding companies should report significant risk concentration and significant intra-group transactions in a coordinated manner. This will help coordinators and other relevant competent authorities to identify relevant issues and exchange information more efficiently. In order to achieve enhanced consistency in the reports on significant risk concentration and intra-group transactions, regulated entities

² The entire text of the RTS is still subject to in-depth legal review by the ESAs, which can require changes in wording and substance.

³ OJ L 35, 11.2.2003, p.1

and mixed financial holding companies should report at least certain standardised minimum information to the coordinators.

- (4) Supervisory measures with respect to supplementary supervision of risk concentration and intra-group transactions vary across the EU. While acknowledging existing EU and national legal frameworks, in order to foster a level playing field and to facilitate coordinated supervisory practices across the EU, competent authorities should at least take into account certain supervisory measures with respect to the supplementary supervision of risk concentration and intra-group transactions.
- (5) This Regulation is based on the draft regulatory technical standards submitted by the European Supervisory Authorities (European Banking Authority, European Insurance and Occupational Pensions Authority, European Securities and Markets Authority) to the Commission.
- (6) The European Supervisory Authorities have conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Banking Stakeholder Group, the Insurance and Reinsurance Stakeholder Group and the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1093/2010, Regulation (EU) No 1094/2010 and Regulation (EU) No 1095/2010 respectively.

HAS ADOPTED THIS REGULATION:

Article 1- Subject matter

This Regulation lays down rules regarding:

- (a) a more precise formulation of the definitions of intra-group transactions and risk concentration as referred to in Article 2 (18) and (19) of Directive 2002/87/EC;
- (b) a coordination of the provisions adopted pursuant to Articles 7 and 8 and Annex II of Directive 2002/87/EC on:
 - (i) the information to be provided by regulated entities or mixed financial holding companies to the coordinator and other relevant competent authorities for the purpose of overseeing risk concentration and intra-group transaction;
 - (ii) the methodology to be applied by these competent authorities to identify types of significant risk concentration and intra-group transactions;
 - (iii) the supervisory measures to be applied by competent authorities as referred to in Articles 7 (3) and 8(3) of Directive 2002/87/EC.

Article 2 - Significant risk concentration

1. Significant risk concentration shall be deemed to arise from risk exposures towards counterparties which are not part of the financial conglomerate. They may arise from direct and indirect exposures, on-balance and off-balance sheet items, regulated and unregulated entities,

the same or different financial sectors in a financial conglomerate, and from a combination or interaction of such exposures, including, without limitation, from liquidity risk and currency risk.

Counterparty risk or credit risk shall be deemed to include, in particular, risks related to groups of interconnected counterparties, including, without limitation, an accumulation of exposures towards counterparties in the same corporate or economic groups, the same geographical areas or industry sectors.

2. When identifying types of significant risk concentration, defining appropriate thresholds, periods for reporting and overviewing significant risk concentration, the coordinator and the other relevant competent authorities shall, in particular, take the following into account:

- (a) the solvency and liquidity position at the level of the financial conglomerate and of the individual entities within the financial conglomerate;
- (b) the size, complexity and specific structure of the financial conglomerate including the existence of special purpose vehicles, ancillary entities, third countries entities;
- (c) the specific risk management structure of the financial conglomerate and the features of the system of governance;
- (d) the diversification of the financial conglomerate's exposures and of its investment portfolio;
- (e) the diversification of the financial conglomerate's financial activities with respect to geographical areas and lines of business;
- (f) the relationship, correlation and interaction between risk factors across the entities in the financial conglomerate, i.e. inter-risk concentration;
- (g) the possibility of contagion effects within the financial conglomerate;
- (h) the possibility of a circumvention of sectoral rules;
- (i) the possibility of conflicts of interest;
- (j) the level or volume of risks;
- (k) a possible accumulation and interaction of exposures incurred by entities belonging to different financial sectors of the financial conglomerate, if not already reported at a sectoral level;
- (l) exposures within a financial sector of the financial conglomerate, which are not reported under the provisions of the sectoral rules.

3. The coordinator and the other relevant competent authorities shall agree on the form and content of the significant risk concentration report, including language, frequency, addressees, remittance dates and channels of communication.
4. Within the powers assigned by Union and national law, the coordinator and the other relevant competent authorities shall, in particular, require regulated entities or mixed financial holding companies to report on the following information:
 - (a) a description of the significant risk concentration according to the types of risks mentioned in paragraph 1;
 - (b) the break-down of the significant risk concentration by counterparties and group of interconnected counterparties, geographical areas, economic sectors, currencies, identifying the names, company register numbers or other identification numbers of the relevant group companies of the financial conglomerate and their respective counterparties, including legal entity identifier (LEI), where applicable;
 - (c) the total amount of each significant risk concentration at the end of a specific reporting period valued according to the applicable sectoral rules;
 - (d) if applicable, the amount of significant risk concentration taking risk mitigation techniques and risk weighting factors into account;
 - (e) how conflicts of interests and risks of contagion at the level of the financial conglomerate regarding significant risk concentration are managed, taking into consideration the financial conglomerate's strategy to combine activities in the banking, insurance and investment services sectors, or a sectoral own risks self-assessment amended with consideration on the management of conflicts of interests and risks of contagion regarding significant risk concentration.

Article 3 – Significant intra-group transactions

1. Significant intra-group transactions may include the following transactions within a financial conglomerate:
 - (a) investments and intercompany balances including real estate, bonds, equity, loans, hybrid and subordinated instruments, collateralised debt, arrangements to centralise the management of assets or cash or to share costs, pension arrangements, provision of management, back office or other services, dividends, interest payments and other receivables;
 - (b) guarantees, commitments, letters of credit and other off-balance sheet transactions;
 - (c) derivatives transactions;
 - (c) purchase, sale or lease of assets and liabilities;

- (d) intra-group fees related to distribution contracts;
- (e) transactions to shift risk exposures between entities within the financial conglomerate, including transactions with special purpose vehicles or ancillary entities;
- (f) insurance, reinsurance and retrocession operations;
- (g) transactions that consist of several connected transactions where assets or liabilities are transferred to entities outside of the financial conglomerate, but ultimately risk exposure is brought back within the financial conglomerate.

2. When identifying types of significant intra-group transactions, defining appropriate thresholds, periods for reporting and overviewing significant intra-group transactions, the coordinator and the other relevant competent authorities shall, in particular, take the following into account:

- (a) the specific structure of the financial conglomerate, the complexity of the intra-group transactions, the specific geographical location of the counterparty and whether or not the counterparty is a regulated entity;
- (b) the possibility of contagion effects within the financial conglomerate;
- (c) the possibility of a circumvention of sectoral rules;
- (d) the possibility of conflicts of interests;
- (e) the solvency and liquidity position of the counterparty;
- (f) transactions among entities belonging to different sectors of a financial conglomerate, if not already reported at sectoral level;
- (g) transactions within a financial sector, which are not already reported under the provisions of the sectoral rules.

3. The coordinator and the other relevant competent authorities shall agree on the form and content of the significant intra-group transactions report, including language, frequency, addressees, remittance dates and channels of communication.

4. Within the powers assigned by Union and national law, the coordinator and the other relevant competent authorities shall, in particular, require regulated entities or mixed financial holding companies to report on the following information:

- (a) dates and amounts of the significant transactions, names and company register numbers or other identification numbers of the relevant group entities and counterparties, including legal entity identifier (LEI), where applicable;
- (b) a brief description of the significant intra-group transactions according to the types of transactions listed in paragraph 1;
- (c) the total volume of all significant intra-group transactions of a specific financial conglomerate within a given reporting period;

- (d) how conflicts of interests and risks of contagion at the level of the financial conglomerate regarding significant intra-group transactions are managed, taking into consideration the financial conglomerate's strategy to combine activities in the banking, insurance and investment services sectors, or a sectoral own risks self-assessment amended with consideration on the management of conflicts of interests and risks of contagion regarding significant intra-group transactions.

5. Different transactions linked to each other in terms of time, function and planning shall be considered as one single transaction.

Article 4 – Supervisory measures

Within the powers assigned by Union and national law, and without prejudice to other supervisory powers available, competent authorities shall, in particular, take into account the following supervisory measures:

- (a) to require that certain intra-group transactions of the financial conglomerate shall be performed at arm's length or that intra-group transactions, which are not performed at arm's length, shall be notified;
- (b) to require that certain intra-group transactions of the financial conglomerate shall be approved through specified internal procedures with the involvement of the board of directors, independent directors or external experts of the financial conglomerate;
- (c) to require regulated entities or mixed financial holding companies to report more frequently than annually on risk concentration and intra-group transactions;
- (d) to define appropriate thresholds in order to identify and overview significant risk concentration and significant intra-group transactions;
- (e) to require additional reporting on risk concentration and intra-group transactions of the financial conglomerate;
- (f) to require a strengthening of the risk management processes and internal control mechanisms of the financial conglomerate;
- (g) to require regulated entities or mixed financial holding companies to present or improve a plan to restore compliance with supervisory requirements and set a deadline for its implementation.

Article 5

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Commission
The President

[For the Commission
On behalf of the President

[Position]

5. Draft cost-benefit analysis / impact assessment

5.1 Introduction

According to article 10 of the ESAs Regulations the ESAs conduct an analysis of costs and benefits in the policy development process. The analysis of costs and benefits is undertaken according to an Impact Assessment methodology.

This section evaluates the impact of the draft regulatory technical standards developed by the Joint Committee of the ESAs in accordance with Article 21a (1a) FICOD, which aims to ensure consistent application of Articles 2, 7 and 8 and Annex II FICOD.

5.2 Problem definition

The Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate and amending Council Directives 73/239/EEC, 79/267/EEC, 92/49/EEC, 92/96/EEC, 93/6/EEC and 93/22/EEC (hereinafter: “FICOD”) was published in the Official Journal of the European Union on 11 February 2003 and had to be implemented by 11 August 2004. The FICOD was the first cross-sectoral legislative act in the field of prudential supervision. It is a minimum harmonisation instrument. Cooperation between supervisors of different sectors was limited at that time and international cooperation in general was still in a developing stage. Since the enactment of FICOD, the banking and insurance college cooperation has intensified and cross-sectoral college practices have evolved.

After 10 years of experience with the supplementary supervision of financial conglomerates, different types of groups are covered under the FICOD regime due to the relatively broad numerical identification criteria that are used to define “financial conglomerate” (10% threshold and 6 billion euro threshold). The typical conglomerate risks are not for all of these groups relevant to the same extent. Supplementary conglomerate supervision has therefore evolved to a risk-based supervision, as evidenced by the changes implemented through Directive 2011/89/EU (hereinafter: “FICOD I”) to come to a better identification of the groups that should be covered by the FICOD regime, allowing for waivers with regard to both types of threshold.

Since the original FICOD, sectoral legislation both at the insurance side and the banking side has developed significantly, with a level of detail that is in sharp contrast to the provisions of the FICOD.

These are the main reasons why the FICOD has been a rather succinct instrument, with different broadly formulated provisions. In the FICOD, the risk-based paradigm is mainly expressed through the broad flexibility, which is given to coordinators and relevant competent authorities. While all Member States have implemented FICOD and apply financial conglomerate supervision, the supervisory means through which this been done differ substantially. Different type of regimes exist throughout Member States ranging from an independent conglomerate regime to a regime based on the sectoral rules for the most important sector in the conglomerate (bank-led vs. insurance-led financial conglomerates).

While there were and still are good reasons for open, flexible provisions, this brings along the problem of divergent implementation and application of the provisions. An insufficient or uneven coverage of typical conglomerate risks may be the consequence. This gave rise to the mandate for this RTS.

Baseline

For the analysis of the potential related costs and benefits of the proposed Regulatory Technical Standards to ensure consistent application of Articles 2, 7, 8 and Annex II of Directive 2002/87/EC on the supplementary supervision of risk concentration and intra-group transactions, the ESAs have applied a baseline scenario defined as the prudential regulatory and supervisory situation for financial conglomerates and their supervisors and other involved stakeholders assuming that Articles 2, 7, 8, and Annex II of Directive 2002/87/EC and their implementing national legislation would exist without any further coordination through the draft RTS.

5.3 Objective pursued

The mandate to develop draft regulatory technical standards to ensure consistent application of Articles 2, 7, 8 and Annex II of FICOD on the supplementary supervision of risk concentration and intra-group transactions was introduced in the FICOD through Article 2, under point (20) (b) of FICOD I, which amended the FICOD mainly to introduce the so-called “top level supervision” for financial conglomerates. The mandate did not appear in the original proposal by the European Commission for the FICOD I and consequently was not mentioned in the impact assessment that accompanied the original proposal. It was only introduced at a late stage of the co-decision procedure by way of amendment no. 58 of the European Parliament (see Report on the proposal for a directive of the European Parliament and of the Council amending Directives 98/78/EC, 2002/87/EC and 2006/48/EC as regards the supplementary supervision of financial entities in a financial conglomerate. No specific justification appears in the report for this amendment.

As a consequence, besides the wording of Article 21a (1a) FICOD, there are no indications on the objectives pursued with the regulatory technical standards.

The text of Article 21a (1a) FICOD indicates that the objective of this RTS is twofold:

- a more precise formulation of the definitions set out in Article 2, and
- a coordination of the provisions adopted pursuant to Articles 7 and 8 and Annex II.

The overarching objective is to ensure consistent application of articles 2, 7, 8 and Annex II of FICOD.

5.4 Policy Options

With the intention to meet the objectives set out in the previous section, the ESAs have analysed different policy issues and corresponding policy options throughout the policy development process.

The section below reflects the most relevant policy issues and policy options that have been identified. Also listed are relevant options which have been discarded in the policy development process.

In total four policy issues and for each policy issue at least two policy options have been considered.

5.4.1 Policy issue 1 - Establish more precise formulation of the definitions set out in Article 2 FICOD:

The mandate prescribes as part of ensuring a consistent application of Articles 2, 7 and 8 and Annex II of FICOD, that the RTS shall establish a more precise formulation of the definitions set out in Article 2.

The wording in Article 21a (1a) FICOD does not clearly set out whether all 19 definitions of Article 2 FICOD should be encompassed and formulated more precisely or whether only the definitions in Article 2 (18) and (19) which relate to the supplementary supervision of risk concentration and intra-group transactions, should be covered.

The ESAs concluded that Article 21a (1a) FICOD does not intend to mandate the ESAs with the establishment of a more precise formulation of all 19 definitions contained in Article 2 FICOD but only covers the definitions of intra-group transactions (Article 2 (18)) and risk concentration (Article 2 (19)) for the following reasons:

Only the definitions of risk concentration and intra-group transactions in Articles 2 (18) and (19) have a specific connection to Articles 7, 8 and Annex II FICOD, as Articles 7, 8 and Annex II deal with risk concentration and intra-group transactions specifically. In addition, Article 21a (1a) FICOD speaks of “consistent application” of Articles 2, 7, 8 and Annex II, which implies a linkage between these Articles. Other definitions in Article 2, e.g. the definition of “regulated entity”, “financial sector”, “participation”, are neither mentioned in Articles 7, 8 nor in Annex II of FICOD. These other definitions in some instances also have broad impacts on other areas beyond the supplementary supervision of risk concentration and intra-group transactions, which are neither referenced to in Article 21a (1a) FICOD nor in Articles 7, 8 and Annex II of FICOD.

Articles 7 (2) and 8 (2) FICOD provide that Member States shall require regulated entities or mixed financial holding companies to report on a regular basis to the coordinator any “significant” risk concentration and all “significant” intra-group transactions in accordance with Articles 7, 8 and Annex II FICOD. It is therefore of particular importance whether risk concentration or intra-group transactions are considered “significant”, because only these significant risks and transactions are subject to supplementary supervision. Specific definitions of “significant” risk concentration and “significant” intra-group transactions are not contained in FICOD.

The ESAs have considered whether a further clarification of the meaning of “significant” risk concentration and “significant” intra-group transactions would be of value to ensure a consistent application of Articles 2, 7, 8 and Annex II FICOD. They concluded that it would be important to further elaborate on the meaning of “significant” risk concentration and intra-group transactions. In this context, two policy options emerged: (1) to establish a binding definition of “significant” risk and “significant” transactions, which would need to be reported under Article 7 (2) and 8 (2) FICOD (policy option 1) or (2), to describe risks and transactions, which would typically be understood to represent “significant” risk concentration and intra-group transactions through non-binding and non-exhaustive list of examples (policy option 2).

a. Policy option 1:

To establish a binding definition of “significant” risk concentration and “significant” intra-group transactions, which would need to be reported under Article 7 (2) and 8 (2) FICOD.

This policy option would entail a binding description of “significant” risk concentration and “significant” intra-group transactions, which would also prescribe which risks and transactions would need to be reported to coordinators pursuant to Articles 7 (2) and 8 (2) FICOD.

b. Policy option 2:

To describe the meaning of significant risk concentration and intra-group transactions to be reported to coordinators pursuant to Articles 7 (2) and 8 (2) FICOD in a non-binding and non-exhaustive manner.

This policy option would for example entail a list of risks and transactions, which typically constitute “significant” risk concentration and “significant” intra-group transactions to give steering to coordinators and other relevant competent authorities.

5.4.2 Policy issue 2 - Coordinate provisions adopted pursuant to Articles 7 and 8 and Annex 2 FICOD – methodology to identify types of significant risk concentration and intra-group transactions, define appropriate thresholds and set periods for reporting:

The mandate prescribes that as part of ensuring a consistent application of Articles 2, 7 and 8 and Annex II FICOD, the RTS shall “coordinate the provisions adopted pursuant to Articles 7 and 8 and Annex II”.

The starting point for this policy issue is that reference is made to the whole Articles 7 and 8 FICOD, and that these Articles contain further references. Consequently, the mandate for this policy issue is potentially very broad. The mandate could refer to the reporting of significant risk concentration or intra-group transactions (including for intra-group transactions a fall back significance threshold of 5 % of the total amount of capital adequacy requirements at the level of a financial conglomerate). It could also refer to the supervisory overview by the coordinator of these (significant) risk concentration or intra-group transactions and to the possibility, pending further coordination of Union legislation, either for the Member States, or for the competent authorities to set quantitative limits for risk concentration, and quantitative limits or qualitative requirements for intra-group transactions. It could also refer to the application of the sectoral

rules regarding risk concentration or intra-group transactions of the most important financial sector in the financial conglomerate, if any, to that sector as a whole in case the financial conglomerate is headed by a mixed financial holding company. Through paragraph 1 of Articles 7 and 8 FICOD, the mandate could indirectly also refer to the internal control and risk management procedures for, as well as to the measures to facilitate supplementary supervision of risk concentration and intra-group transactions. Internal control mechanisms and risk management processes are, however, addressed in Article 9 FICOD, including a separate mandate for the ESAs to develop common guidelines, Article 9 (6) FICOD.

Moreover, the mandate refers to Annex II FICOD, which is titled “Technical application of the provisions on intra-group transactions and risk concentration”. Here again, the different topics included in this annex lead to a broad range of possibilities to develop the RTS. Annex II outlines how the coordinator shall identify the type of transactions and risks regulated entities in a particular financial conglomerate shall report in accordance with the provisions of Article 7(2) and Article 8(2) FICOD on the reporting of intra-group transactions and risk concentration and how the coordinator shall define appropriate thresholds for this reporting based on regulatory own funds and technical provisions. Annex II also deals with the actual supervisory overview of intra-group transactions and risk concentration, and what kind of risks should be taken into account for this overview. Annex II repeats the option to apply at the level of the financial conglomerate the provisions of the sectoral rules on intra-group transactions and risk concentration, in particular to avoid circumvention of the sectoral rules.

FICOD also contains mandates for developing guidelines and technical standards in the field of risk concentration and intra-group transactions, namely Article 7 (5) and Article 8 (5), Article 21a (2) (b) and (c) FICOD. These other mandates have also been considered to further define and delimit the scope of the mandate in Article 21a (1a) FICOD. The ESAs understand that Article 21a (2) (b) and (c) FICOD refer to the format of the information to be provided. Thus, the RTS will not set up any criteria on the format of reporting requirements.

Based on this spectrum of possibilities, three policy options have been considered.

a. Policy option 1:

To provide technical standards addressed at financial conglomerates specifying thresholds, following which financial conglomerates need to report risk concentration to relevant competent authorities as a minimum standard.

Article 8 (2) FICOD, last sentence, determines that in so far as no threshold has been defined by the coordinator, an intra-group transaction shall be presumed to be significant if its amount exceeds at least 5 % of the total amount of capital adequacy requirements at the level of a financial conglomerate. Such a fall back threshold is not included in FICOD for risk concentration. Yet, some member states have implemented a threshold also for risk concentration in their national legislation, in some cases at 10% of the total amount of own funds / capital adequacy requirements at the level of a financial conglomerate, sometimes at lower percentages or with a different basis (e.g. banking regulatory capital for banking led conglomerates).

b. Policy option 2:

To provide technical standards addressed at financial conglomerates, specifying types of risk concentration and intra-group transactions, which financial conglomerates need to report to relevant competent authorities as a minimum standard.

c. Policy option 3:

To provide technical standards addressed at competent authorities, specifying aspects to consider when identifying types of risk concentration and intra-group transactions vis-à-vis financial conglomerates for reporting, setting thresholds and defining periods for reporting.

5.4.3 Policy issue 3 – Coordinate provisions adopted pursuant to Articles 7 and 8 and Annex 2 FICOD –Content of the report on significant risk concentration and intra-group transactions:

According to Articles 7 (2) and 8 (2) FICOD, Member States shall require regulated entities or mixed financial holding companies to report significant risk concentration and intra-group transactions on a regular basis and at least annually to the coordinator. The exact content of such report is not defined in FICOD. In order to coordinate provisions adopted with respect to such reporting of risk concentration and intra-group transactions and in order to achieve the delivery of appropriate types of data for different conglomerates throughout Member States, the ESAs have considered the following policy options:

a. Policy option 1:

To leave the content of the reporting to the discretion of the coordinator and other relevant competent authorities to allow for tailored requirements.

b. Policy option 2:

To list a set of items that the coordinator and the other relevant competent authorities shall – within the powers assigned to them by European and national law – in particular request from regulated entities or mixed financial holding companies to harmonise requirements.

5.4.4 Policy issue 4 - Coordinate provisions adopted pursuant to Articles 7 and 8 and Annex 2 FICOD – Supervisory measures:

As part of the mandate to coordinate provisions adopted pursuant to Articles 7 and 8 and Annex 2 FICOD, the ESAs understand that the technical standards shall address not only the reporting of significant risk concentration and intra-group transactions but also the supervisory overview of significant risk concentration or intra-group transactions by the coordinator and/or the possibility, pending further coordination of Union legislation, for either the member states or the competent authorities to set quantitative limits for risk concentration and quantitative limits or qualitative requirements for intra-group transactions, as foreseen in paragraph 3 of Article 7 and in paragraph 3 of Article 8 FICOD.

Based on that, a fourth and final set of policy choices was identified, for which two policy options were considered.

a. Policy option 1:

To establish a list of supervisory measures that competent authorities, within the powers assigned to them and without prejudice to other supervisory power available to them under European and national law, shall take into account when overseeing financial conglomerates including in particular measures which are available to authorities of both, the banking and the insurance sectors.

b. Policy option 2:

To establish a more exhaustive list of supervisory measures that competent authorities shall take into account when overseeing risk concentration and intra-group transactions, including not only the measures mentioned in option 1 but also measures that are available to one or the other sectoral competent authority under its sectoral regulatory framework.

5.5 - Analysis of impacts

5.5.1 Policy issue 1 - Establish more precise formulation of the definitions set out in Article 2 FICOD

a. Policy option 1:

Positive impacts of option 1

A binding definition or list of “significant” risk concentration and “significant” intra-group transactions might have as a benefit that identical information would be reported to coordinators and other relevant competent authorities.

Negative impacts of option 1

This policy option would require financial conglomerates to adapt their internal reporting procedures with the respective resources, training, staff, etc. It would require supervisors to adapt their supervisory processes and internal guidelines.

In addition, certain risks concentration and intra-group transactions might already have been reported at sectoral level. They might not contribute to the supervision of significant risk concentration or intra-group transactions for an individual financial conglomerate because the financial conglomerate might have a specific corporate set-up, specific business activities, or specific inter-connectedness with other entities, which would not be mirrored by the pre-defined information, but would require that different risks and transactions would be reported. Also, adding further factors to the list in the future would be difficult.

A binding definition or list of “significant” risk concentration and “significant” intra-group transactions as a minimum standard would leave coordinators the possibility to require additional information and capture all necessary data for a specific financial conglomerate. However, the information requests would not be tailored to the individual financial conglomerate and would contain information, which might not be relevant or redundant. This would entail an inefficient use of resources for the industry and for supervisors.

b. Policy option 2:

Positive impacts of option 2

A non-binding list of risk concentration and transactions, that generally constitute significant risk concentration and significant intra-group transactions, would foster harmonisation, since it will provide supervisors with a toolbox, which they can use to identify significant risks and intra-group transactions for a specific financial conglomerate.

It will, give coordinators the possibility to adjust reporting requirements and focus their supplementary supervision on significant risk concentration and intra-group transactions, which are relevant for a specific financial conglomerate. This should reduce administrative burden and allow coordinators and relevant competent authorities to focus their supplementary supervision

over financial conglomerates since only relevant risks and transactions for a specific conglomerate will be considered.

Negative impacts of option 2

A negative aspect as compared to policy option 1 could be the non-binding character of the list, which might not generate the same degree of acceptance and enforceability. Option 2 would entail certain costs for supervisors, since they will need to check the completeness of their internal processes and that all relevant risks and transactions are being considered. However, these costs are relatively low, as coordinators and relevant competent authorities are expected to re-consider relevant types of significant risks and transactions on an ongoing-basis for a specific financial conglomerate in any case.

For conglomerates, no additional costs are to be expected since only significant risks and transactions for a specific conglomerate need to be reported.

5.5.2 Policy issue 2 - Coordinate provisions adopted pursuant to Articles 7 and 8 and Annex 2 FICOD - Methodology to identify types of significant risk concentration and intra-group transactions, define appropriate thresholds and set periods for reporting

a. Policy option 1:

Positive impacts of option 1

Policy option 1 achieves harmonisation to a greater extent compared to other options. It is a clear rule directly applicable to financial conglomerates, thus minimising the risks of diverging implementation and market distortion. In principle, costs and administrative burdens are expected to be evenly distributed both for financial conglomerates and authorities.

The Review Report of the European Commission⁴ also included this option as a preferred way to develop further the conglomerate framework.

Negative impacts of option 1

This option may create disproportionate burdens and might not achieve effective harmonisation, due to the following reasons:

First, the FICOD does not envisage a single threshold for the reporting of risk concentration across all financial conglomerates but instead leaves discretion to the coordinator in consultation with the other relevant competent authorities to set thresholds for the reporting of “significant” risk concentration on a conglomerate level. In doing so, the authorities are required to take the specific group and risk management structure of the financial conglomerate into account (Article 7(2) and Annex 2 of FICOD).

Moreover, the FICOD allows Member States to apply the sectoral rules on risk concentration at the level of the financial conglomerates, in particular to avoid circumvention of the sectoral rules. The framework of supplementary supervision adopted by the European legislator was clearly in

⁴ Report from the Commission to the European Parliament and the Council of 20 December 2012, COM (2012) 785 final

favour of a tailored and flexible approach rather than the “one size fits all” approach. In this regard, it is worth remembering that a complete harmonisation of thresholds for the reporting of risk concentration was not proposed in the 2012 Commission Report for the review of the directive, where a milder approach based on ESAs’ guidelines fostering convergence was suggested.

The approach of the current EU legislation is largely justified by the following circumstances:

- a. financial conglomerates are very different in size, complexity of businesses, level of integration across the EU financial market and even within Member States’ markets;
- b. sectoral legislations on risk concentration both from the banking and insurance sides are still divergent due to the different nature of the underlying businesses and different methodological approaches to regulation and supervision.

Considering the above, setting a single threshold for the reporting of risk concentration applicable to each and every financial conglomerate appears to be a policy choice not in line with the legal text of the directive. Based on the legal text of FICOD and the EU Regulations setting up the ESAs, European authorities are not entitled to make such a policy choice, nor can they overcome level 1 text by means of RTS, the scope and subject of which should be limited within the technical remit in any case.

From a cost-benefit analysis point of view this option would result in a rather inflexible approach and ineffective outcome. In particular:

- a. a unique threshold would impact the different financial conglomerates with a different magnitude, considering that conglomerate-specific characteristics such as size, combination of businesses, group structures may result in different significance of the phenomenon of risk concentration. A threshold based on the characteristics of a certain exemplary conglomerate (e.g. 10% of own funds/technical provisions) may prove too high for certain groups and too low for others;
- b. the single threshold, given the different nature of risks in the banking and insurance sectors and therefore different methodologies for measuring them in sectoral regulations, raises an issue of aggregating risks from different sectors in a financial conglomerate according to a single metric. However, a common cross-sectoral approach to measuring and aggregating risks has not been agreed at the international level so far and is clearly out of the mandate of the RTS;
- c. a single threshold set directly in a binding rule would leave no possibility for competent authorities, particularly within colleges, to adapt supervision to the characteristics of each financial conglomerate, thus undermining the principles of risk-based supervision and proportionality that are essential to supervision at the sectoral and supplementary level.

Lastly, to find sufficient common ground for inserting a numerical threshold in the RTS, the threshold would need to be set at a quite high percentage. Member States that wish to retain stricter thresholds would be able to do so. Consequently, the level of harmonisation obtained may be less meaningful than expected.

Another negative impact is that this option is limited to reporting; it is not concerned with the actual assessment of the risk concentration by the involved competent authorities and with the potential limits that apply on risk concentration.

b. Policy option 2:

Positive impacts of option 2

The main merit of this option is that it would be directly applicable to financial conglomerates whilst at the same time avoiding the rigidity of setting a fixed threshold. It may also imply limited burdens for supervisors, for the identification of what is a “significant” risk concentration and intra-group transactions would be ultimately left to the supervised groups/entities. This option would result in a “principle based” regulation whose concrete implementation is left to the discretion of the supervised entities/groups.

Some European and international policy documents around financial conglomerate supervision contain examples of the types of risk concentration and intra-group transaction that could be a potential threat to the regulated entities within the conglomerate or to the conglomerate as a whole (e.g. the Joint Forum risk concentration principles and intra-group transaction principles). This option would mean an “upgrade” of such soft law to directly applicable rules.

Negative impacts of option 2

This option might not effectively solve the problem and may pose some of the shortcomings highlighted with regard to option 1, due to the following:

Leaving to financial conglomerates the ability to decide what is a “significant” risk concentration and “significant” intra-group transaction according to types of risks/transactions set in general terms by the RTS may create uncertainties on what is expected by the supervisors, as well as allow arbitrage and lax implementation from some supervised groups/entities. As a result, financial conglomerates would be exposed to a high risk that they will not comply with supervisors’ expectations. This might require additional efforts for ex-post verifications and clarifications. It might also require enforcement procedures to verify an appropriate application of the standards.

Moreover, even with that principle-based approach, it still seems likely that types of risks and transactions identified in the technical standards might not be relevant for a particular financial conglomerate. This would result in supervision that is ineffective (i.e. not covering relevant risks) and overburdening (i.e. requiring reporting which is not or only marginally useful to assess the risk situation of a group).

Another negative impact is that this option is limited to reporting; it is not concerned with the actual assessment of risk concentration by competent authorities and the setting of limits that apply on risk concentration.

c. Policy option 3:

Positive impacts of option 3

In all, this option achieves harmonisation to the extent needed to ensure the effective implementation of the tools envisaged in FICOD to supervise RCs and IGTs, whilst at the same time avoiding requirements that are likely to be either disproportionate or inadequate for a number of financial conglomerates. Moreover, the option is fully in line with the legal text of FICOD.

More specifically:

- a. the option allows the flexibility needed in respect of financial conglomerates that are different in size, group structures, business combinations, level of internal integration, and is therefore sufficiently risk-based and proportional;
- b. Member States/competent authorities remain able to apply stricter or additional measures if they deem appropriate;
- c. for those Member States where the supervision of risk concentration and intra-group transactions at the conglomerate level is based on extending sectoral regulation to the conglomerate as a whole, the option allows Member States/competent authorities, in line with FICOD, to keep following this approach and at the same time incentivises them to develop an approach based on supplementary tools, in addition to the sectoral ones;
- d. the option easily adapts to supplement sectoral rules and reporting requirements that still are not completely harmonised in certain areas, such as monitoring of intra-group transactions in banking groups;
- e. given that an internationally agreed framework for measuring and aggregating cross-sectoral risks is not well established at the time, the option allows authorities to develop and further refine methodologies that, once sufficiently established, can at a later stage be put down in a more binding regulation;
- f. builds on the guidelines for conglomerate colleges.

Negative impacts of option 3

On the other hand, this option may entail more coordination costs for the relevant competent authorities that shall consult each other to specify risks and transactions to be reported for a specific financial conglomerate. However, these costs are deemed manageable, considering that:

- a. the JC is developing specific guidelines aimed at assisting authorities in the definition of coordination agreements (Joint Committee consultation on *Guidelines on the convergence of supervisory practices relating to the consistency of supervisory coordination arrangements for financial conglomerates*);

- b. most of the costs of coordination will emerge at the first application of the new standards, when coordination agreements will be amended to include oversight of risk concentration and intra-group transactions for financial conglomerates, but cost should be limited after that time.

Another negative impact is that this option is limited to reporting; it is not concerned with the actual assessment of the risk concentration by the involved competent authorities and the potential limits that apply on risk concentration.

5.5.3. Policy issue 3 – Coordinate provisions adopted pursuant to Articles 7 and 8 and Annex 2 FICOD – Content of the report on significant risk concentration and intra-group transactions

a. Policy option 1:

This option does not trigger direct costs for competent authorities and financial conglomerates because no specific reporting obligations are added to the general FICOD rule that significant intra-group transactions and significant risk concentration need to be reported. Form and content of the reporting are left completely to the agreement of the competent authorities. This has the advantage that competent authorities can set up reporting arrangements that are as close as possible to the actual features and functioning of the financial conglomerates.

However, this option has some considerable indirect negative impacts. Besides stating explicitly that competent authorities have to agree on the form and content of the reporting, this option does not bring along much coordination of the provisions adopted pursuant to Articles 7 and 8 FICOD. Moreover, if the RTS intends to provide a methodology for competent authorities to establish supervisory arrangements for a particular financial conglomerate, competent authorities still lack guidance for setting up reporting requirements. This produces uncertainty for competent authorities and financial conglomerates and will require time and resources to negotiate the appropriate content of the reports on a case-by-case basis. The reports that result from this case-by-case process would not be easily comparable and would not enhance a level playing field for the financial conglomerates throughout the EU.

b. Policy option 2:

Since the adoption of the FICOD, the Member States have developed different reporting practices with respect to Articles 7 and 8 FICOD. The differences range from qualitative to quantitative reporting, or a mix of both, from sector-based reporting that has been widened to the conglomerate context to specific cross-sector reporting. Since the level 1 text of the FICOD is very on the requested reporting, the different reporting contents cannot per se be judged as negative.

This option has the advantage of putting existing practices into a common methodology and labelling them as common / good practices in the conglomerate supervision systems of the Member states. This will diminish the “negotiating time” between competent authorities and financial conglomerates when new supervisory arrangements need to be set up or when there is a

wish to enhance existing supervisory arrangements. This option will also enhance the level playing field for conglomerates in the EU.

This option comes with certain direct costs. Conglomerates that were not used to report one or more of the contents listed in the relevant articles of the technical standards will need to introduce additional reporting requirement in their governance systems. This requires of course the necessary resources. Also, competent authorities will incur additional costs for analysing and following up on the reports.

As mentioned above, this option does not go as far as prescribing a detailed format (by way of templates) for the information that must be delivered to the competent authorities. The FICOD includes a specific mandate to develop template-like technical standards. This option could also be considered a good intermediate step to gather experience with conglomerate reporting, which could later on, if considered appropriate, be developed into more detailed templates.

5.5.4 Policy issue 4 - Coordinate provisions adopted pursuant to Articles 7 and 8 and Annex 2 FICOD – Supervisory measures

a. Policy option 1:

This policy option is deemed to produce benefits whilst also being respectful of the current EU legislation for financial conglomerates.

By listing a range of supervisory measures deemed appropriate for the purpose of supervising risk concentration and intra-group transactions, and without affecting the ability of competent authorities to apply other, and possibly more stringent measures provided for by the national and EU legislative framework, the technical standards aims to increase the clarity and transparency of this regulatory framework. Besides general references to quantitative limits and qualitative requirements in Articles 7 and 8 and in Annex II FICOD, the FICOD does not mention any particular supervisory measure that the competent authorities should be empowered to adopt. Further detailing such measures would foster a level playing field with respect to supervisory measures towards financial conglomerates throughout the EU, and guide competent authorities regarding their use of supervisory measures.

At the same time, this option is not expected to produce additional costs compared to the current situation. As stated in Article 4 of the draft RTS, the supervisory measures shall be considered within the powers assigned to competent authorities by EU and national law. As such the RTS cannot create new supervisory powers or overrule existing national legislations. At the same time, the listed supervisory measures are expected to set a reference and a minimum standard to consider for changes to national legislative frameworks and supervisory practices and with that foster convergence of national legislation and supervisory practices of competent authorities.

b. Policy option 2:

This option is a varies from option 1 because not only those measures that are shared across financial sectors are listed but also measures that usually are in the remit of just one financial

sector. As in option 1, also option 2 does not affect the national and European law concerning supervisory measures and the ability of the competent authorities to apply other measures, different from those listed in the technical standards, if provided for by the national or EU legislative framework.

However, the implementation of this option might face practical and legal obstacles because level 1 legislation with regard to supervisory measures is only little harmonised. Throughout the EU, supervisory measures are likely to divert, following different supervisory and regulatory approaches in Member States. The issue is in particular relevant, because supervisory measures largely divert across sectors, due to different developments of sectoral EU legislations in this respect, in particular in the banking and insurance sector.

Option 2 is not feasible, and in general, further significant progress towards a harmonisation of supervisory measures throughout the EU can only be achieved by level 1 legislative requirements, because technical standards may not implement “new” powers and may not include policy choices. Therefore, option 2 can in practice not provide more benefits than option 1. Given the legal and practical obstacles, it might prove less effective in eliminating uncertainties for conglomerates and authorities in respect of supervisory measures available.

6. Overview of questions for consultation

1. Is the suggested scope of the draft regulatory technical standards and the definition of significant risk concentration and significant intra-group transactions appropriate with respect to the mandate given in Article 21a (1a) of the Directive 2002/87/EC (FICOD)?
2. Are the criteria, which coordinators and other relevant competent authorities shall take into account when identifying types of significant risk concentration and significant intra-group transactions, defining appropriate thresholds and periods for reporting and overseeing significant risk concentration and intra-group transactions, appropriate and comprehensive?
3. Is the proposed information to be contained in a report on significant risk concentration and significant intra-group transactions appropriate? If not, which other information should be included?
4. Do you agree with the proposed set of supervisory measures to be taken into account by competent authorities? If not, which other measures should be included?
5. Do you agree with the analysis of the impact of the proposals in this Consultation Paper? If not, can you provide any evidence or data that would further inform the analysis of the likely cost and benefit impacts of the proposals?