Consultation of

ESA's Joint Consultation Paper on Draft Regulatory Technical Standards on the uniform conditions of application of the calculation methods under Article 6.2 of the Financial Conglomerates Directive (JC/CP/2012/02)

Comments of the German Insurance Association

Reference	Comments
I. Questions for Consultation	
What are the cost implications of a requirement for conglomerates to follow the clarifications for calculating own funds and solvency requirements described in this paper? If possible, please provide estimates of incremental compliance cost that may arise from the requirements, relative to following the Directive in the absence of the Regulatory Technical Standards.	
How, in your opinion would the proposed clarifications impact on conglomerates' business models?	We do not believe that conglomerates' business models are directly influenced by clarifications on calculation methods as provided by the ESAs. These methods just provide the technical means to measure the group-wide regulatory capital. The FCD provides for a supplementary group-wide capital framework for financial conglomerates which is applied in addition to the sectoral capital requirements. Therefore, differences in the treatment of regulatory capital between the sectoral frameworks which are not justified by the unique features of the corresponding business models are more likely to affect the business strategy and give rise for regulatory arbitrage. Given this background, it seems advisable to wait for the full implementation of Solvency II and CRD IV before the FICOD is substantially reviewed.
How far would the suggested clarifications change current market practices?	The enforcement of Solvency II and CRD IV will mark a paradigm shift in the supervision of insurers and banks which indeed will have a massive impact on current market practices rather than the clarifications subject to this consultation. There is, and will be, a fair amount of interaction between the sectoral frameworks which is a particular issue for financial conglomerates. The reciprocal effects between the different frameworks need to be carefully investigated in order to determine whether further alignment is necessary.
Are the Technical Principles in Title II sufficiently clear? If not, what areas require further clarification?	The technical principles widely provide additional clarity to those set out in Annex I of Directive 2002/87/EG. We particularly welcome that Method 1 of Directive 2009/138/EC is deemed to be equivalent for insurance-led financial conglomerates under Article 7 of the draft RTS. However, it needs to be clarified that equivalence applies not only to insurance-led conglomerates and irrespective of whether the scope of the group is similar with the

	scope according to FICOD.
Are there any areas of ambiguity in the way that the Technical Principles in Title II apply to the three consolidation methods?	Article 10 of the draft RTS excludes sector specific own funds from covering losses occurred in other sectors. Only cross-sector own funds elements as defined in Article 5 of the draft RTS should be eligible for the remedy of deficits. There is an immanent ambiguity between Articles 5 and 12 as regards ancillary own funds classified as Tier2. Apart from that, we question that both Article 5 and Article 10 are consistent with the technical principles set out in Annex I of Directive 2002/87/EG (see also our detailed comments on the respective Articles below). Furthermore, we believe that the further stressing of the concept of availability of own funds (Article 4) will lead to ambiguity and legal uncertainty. The Joint Forum should consider that the concept is not even clear at sectoral level. Please see our comment to Article 4.
Are there any areas of ambiguity in the way that Method 1 needs to be carried out?	
How much of an operational burden is the use of consolidated accounts of the conglomerate as a starting point for Method 1? Is there an alternative more straightforward method/way to eliminate the intra-group creation of own funds?	
Do you foresee any problems in applying sectoral rules to own funds under Method 1? If so, what refinements to the method would you propose?	We agree that against the background of diverging valuation principles under CRD IV and Solvency II, a true consolidation is not possible. However, we share the ESA's view that a one line item consolidation is possible and should be regarded as method 1.
Are there any areas of ambiguity in the way that Method 2 needs to be carried out?	
For the purpose of assessing the transferability of "funds" to entities subject to CRR, under Article 4, is "three calendar days" a sufficient timeframe in a period of stress?	As indicated in our response to the fifth question, we consider the whole approach pursued in Article 4 as counterproductive since the entire concept of transferability and availability lacks consistency. The timeframes chosen to proof the transferability in a stress scenario seem to be arbitrary and hardly to verify. It is worth to mention that the determination of cross-sector own funds elements set out in Article 5 of the draft RTS refers to the classification of own funds according to Article 93 of Directive 2009/138/EC which already includes aspects of availability.
II. Executive Summary	
III. Background and Rationale	
IV. Draft Regulatory Technical Standards	
General Comment	The German Insurance Association (GDV) is pleased to contribute to the ESAs consultation on Regulatory Technical Standards concerning the application of calculation methods under Article 6 (2) of FICOD. We fully support the aim to provide for convergence in applying the calculation methods set out in Annex I of Directive 2002/87/EG. Particularly, we appreciate

	that insurers can calculate their capital under Solvency II equivalent to the consolidation calculation method under FICOD. This is a very important clarification which ensures that there is no further burden for insurers to comply with the FICOD as regards the consolidation method. However, it is essential that equivalence is granted independent from the scope of the group and won't be restricted to insurance-led conglomerates as currently drafted in Article 7 of the Draft RTS. On the other hand, we believe that the discussion of Regulatory Technical Standards is premature at this particular time. We are aware that pursuant to Article 139 of the Draft CRD IV-Directive the ESAs are committed to present their proposals to the Commission until 1st of January 2013. However, we would like to note that the drafting of RTS makes very limited sense in anticipation of the finalized legislative texts for CRD IV, CRR and Solvency II. Given the current drafts of the proposals, there are still some inconsistencies between the sectoral regulatory approaches which need further alignment. This is especially true with the different definition and treatment of cross-sector capital. Apart from that, we have severe concerns with the requirements on transferability and availability of own funds. These requirements are excessive and disregard the treatment of the conglomerate as one economic unit. Hurdles are imposed which are in no way justified and which significantly limit a flexible capital allocation within the conglomerate.
Recitals	Recital 9 does not differentiate between own funds eligible to cover sectoral capital requirements and excess own funds. Neither sectoral regimes nor FICOD require that any own fund item is fungible and transferable in order to be included in the calculation. This only applies to excess own funds. This is e.g. confirmed by Article 4 (1) of the Draft RTS. Please see our comments to Article 4 with regard to further issues. *"(9) It is important to ensure that **excess** own funds are only included at conglomerate level if there are no impediments to the transfer of assets or repayment of liabilities across different conglomerate entities, including across sectors."*
Article 1	
Article 2	In our view, it does not make sense to provide for a definition of an ultimate responsible entity at the level of the RTS. Furthermore, it would exceed the mandate of the present RTS to determine a responsible entity. To our understanding, the FICOD exclusively determines the entity responsible for the calculation.
Article 3	
Article 4	Although we acknowledge that the concept of transferability and availability of own funds is included in Annex I of the FICOD, we have concerns with Article 4. So far, the concept is applied in practice only to very limited number of own funds items. This is also due to the

	fact that it doesn't seem to be a consistent concept, neither in Solvency II nor in FICOD. The terms availability, fungibility and transferability are often confused in the absence of a suitable definition. Moreover, it is still unclear which criteria have to be taken into account, e.g. as to whether an economic approach as required under Solvency II is applied or any possible impediments (e.g., statutory accounting) are to be considered. This situation even deteriorates with Article 4 which mentions a bulk of aspects to be considered. The ambiguity of the concept is a significant impediment to legal certainty and manageable processes in determining own funds. Against this background, we request the Joint Forum not to further complicate the legal situation and await clearance in the respective sectoral regimes. Finally, we believe that the issue is already sufficiently covered by Article 10 which pursues a similar goal. Therefore, Article 4 should be deleted or at least limited to qualitative requirements, e.g. adequate risk management as regards the availability of own funds.
Article 5	In accordance with Annex I of the FICOD, only cross-sector own funds elements should qualify for the compensation of own funds deficits at conglomerate level. For the insurance sector, Tier1 and Tier2 own funds according to Directive 2009/138/EC are accepted as cross-sectoral funds elements. This is inconsistent with Article 10 of the draft RTS which excludes Tier2 ancillary own funds as sector specific from covering cross-sector risks. Apart from that, FICOD states that if sectoral rules provide for limits on the eligibility of certain own funds instruments these limits should apply mutatis mutandis when calculating own funds at the level of the financial conglomerate. Therefore, it is not justified to exclude Tier2 ancillary- and Tier3 own funds items entirely.
Article 6	
Article 7	We strongly appreciate the clarification that the Solvency II consolidation method as outlined by Level 2 Art. 323bis is to be considered as an equivalent consolidation method for the purpose of the FICOD. However, it is important that equal treatment must apply in general, and not only, as outlined in the explanatory text, if the scope of the group under Solvency II is similar to the one under FICOD. This is because the scope is not subject to the group's discretion. If the scope under Solvency II is limited compared to FICOD (which, however, is unlikely since Solvency II even covers IORPs, which FICOD doesn't), it should not affect the adequacy of the calculation method for the insurance group. Furthermore, there is no comprehensible reason for restricting equivalence to insurance-led conglomerates. The application of method 1 of Directive 2009/138/EC is solely based on sectoral preconditions which may also be complied with if the banking sector is deemed to be the most important one from the conglomerate perspective. The questionable distinction between bank-led and insurance led-conglomerates may lead to a different treatment of equal structures without a justification. There is likewise need for the application of method 1 of Directive 2009/138/EC if in a bank-led conglomerate insurers hold participations in banks. After all, Article 7 should be drafted as follows:

	Method 1 of the Directive 2009/138/EC shall be considered as equivalent to the consolidation as defined under Method 1 of the Directive
Article 8	
Article 9	
Article 10	See comments on Article 5.
Article 11	
Article 12	Though Annex I of the FICOD requires the calculation of a notional capital requirement for non-regulated entities, we note that the application of the Directive to non-regulated entities is still subject to the fundamental review by the Commission. Therefore, it would make sense not to address this issue in the RTS until the review is finalized.
Article 13	
Article 14	We suggest to clarify Article 14 (8) as follows: *The valuation of assets and liabilities calculated for the purposes of Directive 2009/138/EC shall **also** be used at the level of the financial conglomerate."* With respect to Article 14 (13), we request the Joint Forum to consider discretional adjustments for intra-group transactions, similar to Article 14 (2) for the calculation of own funds.
Article 15	We welcome that the definition of a participation according to Solvency II applies for the purpose of calculating the capital requirements and own funds of financial conglomerates. However, this should be the guiding principle not only for the Pillar I-requirements but for the entire scope of the FICOD. We would like to see the Joint Forum to include such a proposal in its final recommendations to the Commission concerning the fundamental review of the FICOD.
Article 16	
Article 17	
Annex I	
Annex II	