Getting to grips with Level 2

AFME Monthly Members Briefing Call

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Level 2: concept and evolution

System for delegating quasi-legislative and/or implementing powers to the European Commission

1961-2006: ‘OLD COMITOLOGY’
based on committees composed of representatives of each Member State, scrutinising the Commission’s proposals and adopting a formal (often binding) opinion before the Commission proceeded.

With comitology’s growing importance, the European Parliament fights for a stronger role.

2006: ‘OLD COMITOLOGY’ revised:
Introduction of the regulatory procedure with scrutiny (EP and Council on an equal footing)

2009 / Lisbon Treaty:
2001: With the Lamfalussy Report, comitology (identified as ‘Level 2’) becomes a key feature of financial services regulation.

**Level 1:** Framework principles to be decided by normal EU legislative procedures

**Level 2:** The Commission adopts technical implementing measures, after consulting a Level 2 Committee (regulatory committee with States representatives)

**Level 3:** Creation of committees of national supervisors/regulators for:  
- Providing the EC with technical advice for drafting L2 measures;  
- Cooperation / convergence among EU regulators in trasposition, interpretation, practices (e.g. guidelines).

**Level 4:** Strengthened enforcement by the EC (infringement procedures)

**2001: LAMFALUSSY APPROACH** (initially, only for securities markets)

**2004:** Lamfalussy approach extended to banking and insurance

**2009: De Larosiere Report**

**2009: Lisbon Treaty**

**2011:** New European System of Financial Supervision

**Emphasis on the ‘Single rulebook’ makes Level 2 even more important**
Focus on role of national auth. & EBA:

EBA Board of Supervisors

Standing Committee on Regulation and Policies (SCREPOL)

- Liquidity WG
- Capital WG
- (...) (...)
- Remuneration WG

EBA’s Secretariat steers the process
National authorities provide the resources and make the decisions

EC always involved

BSG
Delegated Acts and RTSs - Implementing Acts and ITSs

**Delegated acts** Article 290 TFEU

Supplement or amend *non-essential* elements of legislative acts

**Implementing acts** Article 291 TFEU

Implement legislative acts

**Regulatory technical standards**

Reference A290 Delegated acts

**Implementing technical standards**

Reference A291 Implementing acts
Key Takeaways...

• RTS/ITS (technical standards):
  - Can only be used in relation to technical issues
  - ESAs have drafting initiative

• Delegated Acts:
  - Supplement, amend or delete non-essential elements of legislative acts
  - Deal with sensitive policy issues
  - Objectives, content, scope, duration defined in Level 1 basic acts
  - EC has drafting initiative (based on ESA’s advice)
  - EC must informally consult MS experts (not bound by their opinion)

• Delegated Acts/RTS:
  - Parliament and Council on an equal footing
  - May object on any grounds
  - May revoke the delegation of powers to the Commission

• Implementing Acts:
  - Implementation of legislative acts
  - Deal with less controversial and purely technical issues
  - EC has drafting initiative (based on ESA’s advice)
  - EC must formally consult MS experts (bound by their opinion)
  - Parliament and Council limited influence
Questions and Answers
ANNEX 1: Procedures / flow charts
Delegated Acts – Preparation Phase

Commission call for Advisory Committee’s advice → ESA call for evidence

ESA call for evidence → Deadline ESA call for evidence (± 1 month)

Deadline ESA call for evidence (± 1 month) → ESA public consultation on advice

ESA public consultation on advice → ESA meetings with stakeholders

ESA meetings with stakeholders → ESA public hearing

ESA public hearing → ESA final advice

ESA final advice → Commission receives Advisory Committee’s advice

Commission receives Advisory Committee’s advice → Commission working docs Draft Measures + Impact Assessment

Commission working docs Draft Measures + Impact Assessment → Possible 2nd consultation

Possible 2nd consultation → Consultation with Examination Committee – after intense informal dialogue

Consultation with Examination Committee – after intense informal dialogue → Commission adopts measures

Commission adopts measures → Informal submission to the Parliament

Source: Fleishman Hillard, 2013
Delegated Acts – Adoption Phase

COMMISSION adopts Draft Delegated Act and notifies PARLIAMENT and COUNCIL WORKING GROUP

PARLIAMENT and COUNCIL WORKING GROUP exercise right of objection (by qualified majority, time limit specified in legislation)

PARLIAMENT or COUNCIL WORKING GROUP opposes

Delegated Act DOES NOT ENTER INTO FORCE

COMMISSION may

Make legislative proposal (co-decision)

Submit amended Draft Delegated Act

PARLIAMENT and COUNCIL WORKING GROUP do not oppose

COMMISSION formally adopts Delegated Act

Source: Fleishman Hillard, 2013
Implementing Acts - Preparation Phase

- Commission call for Advisory Committee's advice
  - ESA call for evidence
    - Deadline ESA call for evidence (± 1 month)
    - ESA public consultation on advice
    - ESA meetings with stakeholders
    - ESA public hearing
    - ESA final advice

- Commission receives Advisory Committee's advice
  - Commission working docs Draft Measures + Impact Assessment
    - Possible 2nd consultation
      - Consultation with Examination Committee
        - advisory or examination procedure (see next page)
  - Commission adopts measures

Source: Fleishman Hillard, 2013
Implementing Acts – Adoption Phase

COMMISSION prepares Draft Implementing Act and consults with the L2 Committee

COMMITTEE considers

COMMITTEE agrees

COMMISSION adopts UNLESS

Exceptional circumstances or new elements arose justifying non-adoption

COMMISSION may

Submit a new Draft of the Implementing Act

COMMITTEE disagrees

Measure required within imperative deadline and non-adoption will create significant disruption to agric markets or to the EU financial interests

COMMISSION may

Submit immediately to the appeal committee. Act must be repealed if appeal committee disagrees

Appeal committee disagrees

Not adopted

Appeal committee agrees

Commission adopts

COMMITTEE does not deliver opinion

COMMISSION may

COMMISSION adopts EXCEPT for some areas, including taxation and financial services

COMMISSION does not adopt

Submit an amended version of the draft to the committee

Appeal committee disagrees

Not adopted

Appeal committee agrees

Commission adopts

Commission may adopt

Submit amended version of the Draft Implementing Act

Source: Fleishman Hillard, 2013
RTS – Preparation Phase

COMMISSION consults experts appointed by the Member States and informs them of its preliminary position. (INFORMAL – practice will show how)

ESAs prepares Draft Regulatory Technical Standard

ESAs STAKEHOLDERS GROUP opinion and public consultation organized by ESA

COMMISSION receives Draft Regulatory Technical Standard from ESA and forwards to PARLIAMENT and COUNCIL WORKING GROUP for information

COMMISSION opposes or amends or endorses partly

COMMISSION adopts Draft Regulatory Technical Standard and notifies PARLIAMENT and COUNCIL WORKING GROUP

ESAs prepares a new Draft Regulatory Technical Standard

COMMISSION receives a Draft Regulatory Technical Standard from ESA and forwards to PARLIAMENT and COUNCIL WORKING GROUP for information

COMMISSION rejects

COMMISSION adopts Draft Regulatory Technical Standard and notifies PARLIAMENT and COUNCIL WORKING GROUP

COMMISSION does not receive in time or Draft not consistent with COMMISSIONs amendments

COMMISSION rejects

COMMISSION proposes a new time limit

COMMISSION does not receive in time

COMMISSION adopts with amendments it considers relevant

COMMISSION adopts without draft

COMMISSION does not receive in time

ESAs proposes a new draft

COMMISSION does not receive in time

Procedure Article 290 – Control by PARLIAMENT and COUNCIL WORKING GROUP (cf. next slide)

Source: Fleishman Hillard, 2013
COMMISSION adopts Draft Regulatory Technical Standard and notifies PARLIAMENT and COUNCIL WORKING GROUP

PARLIAMENT and COUNCIL WORKING GROUP exercise right of objection (by qualified majority, time limit specified in legislation)

PARLIAMENT or COUNCIL WORKING GROUP opposes

Regulatory Technical Standard DOES NOT ENTER INTO FORCE

COMMISSION may

Make legislative proposal

Submit amended Draft Regulatory Technical Standard

PARLIAMENT and COUNCIL WORKING GROUP do not oppose

COMMISSION formally adopts Regulatory Technical Standard

Scrutiny Period Suspends entry into force of the Regulatory Technical Standard

Source: Fleishman Hillard, 2013
ITS – Preparatory and Adoption Phases

Source: Fleishman Hillard, 2013
ANNEX 2: Examples
Examples (1): Short selling

SHORT SELLING DELEGATED REGULATION

On 6 July 2012 the Commission adopted the delegated act (regulation) on short selling and submitted it to the Council and the EP for their scrutiny.

During the scrutiny period several member States expressed reservations about the procedure for the adoption of the delegated act. In particular they criticised the fact that the Commission’s draft Delegated Act for the Short Selling Regulation departed from ESMA's advice in a number of areas, without explanation.

The Commission replied that the impact assessment accompanying the delegated act in question provided for the explanation of instances where the Commission proposed to depart from the ESMA advice. The Commission also stressed that the delegated acts need to fully comply with the objectives, content and scope of the delegation of power laid down in the basic legal act.

Germany and the UK even proposed that the Council raised a formal objection which would have stopped the adoption. However the States did not support this line and the combined DE and UK votes (58) were far from the qualified majority (255 votes) required for objecting to a delegated act. The delegated act as proposed was therefore finally adopted, but the council invited the EC to adopt a more open and consultative approach in future, when drawing up level two proposals, in particular explaining the reasons for any deviations from ESA’s advice.

A very similar situation emerged during the preparation of the Delegated Act supplementing the AIFM Directive.
EMIR

The adoption of the technical standards under EMIR raised some tensions with the European Parliament. ESMA submitted the draft regulatory technical standards to the Commission on 27 September 2012 which the Commission immediately forwarded to the Council and the European Parliament. The Commission adopted the regulatory technical standards, without modification, on 19 December 2012.

On 4 February 2013, the Committee on Economic and Monetary Affairs (ECON) of the European Parliament consulted on adopting a resolution rejecting two of the delegated acts adopted by the Commission relating to technical standards supplementing the EMIR Regulation (the EP reservations were both substantive – e.g. the calibration of some thresholds for the clearing obligation – and procedural, i.e. insufficient involvement in the drafting phase). The Commission reacted on 7 February 2013 with a declaration addressed to the Parliament. In this declaration the Commission promised an open dialogue and transparency about its planning for forthcoming technical standards and enough time for the Parliament to assess them. Furthermore, the Commission made a commitment to promote, for instance, meetings, planning and the regular exchange of views between the Commission and ECON on regulatory standards. In view of this declaration ECON withdrew the resolution and the Parliament adopted the delegated acts.
**Examples (2) – CRD4/CRR: LCR**

### Commission Delegated Act on the LCR

The Capital Requirement Regulation (CRR) mandated the Commission to adopt a delegated act to specify in detail the Liquidity coverage requirement (LCR). In particular the delegated act will specify the following “non-essential” elements:

- Definition of Extremely High Quality and High Quality Liquid Assets (HQLA): reactions to EBA report and suggestions for an HQLA List;
- Liquidity outflows/inflows.

The EC will have to adopt the delegated act by June 2014. After the adoption, the scrutiny period for the EP and Council will be 3 months (which can be extended by further 3 months).

As required by the CRR, the EBA published in December two Reports on liquidity, namely (i) on the impact assessment for liquidity coverage requirements and (ii) on appropriate uniform definitions of extremely high quality liquid assets (extremely HQLA) and high quality liquid assets (HQLA) and on operational requirements for liquid assets. These two reports provide the European Commission with some data and evidence and specific recommendations for the purpose of the above mentioned delegated act.

During March 2014 the EC has organised a public hearing and consultation with all stakeholders. In parallel it has held meetings with Member States and has kept the EP informed.

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- **What**, from a legal point of view is “non essential” (and can therefore be pushed to Level 2, in a delegated act) might actually be fundamental in terms of impact (e.g. calibration of the LCR; inclusion of securitisation in the liquid buffer).

- The L2 committees (gathering member states’ representatives) are involved in the drafting phase; consultation with the broader range of stakeholders is also required.

- A difference from the usual procedure: instead of an advice required to the ESA’s the CRR requires EBA to draft a number of reports. Their function is similar however.