

Briefing note
May 2011

New EU decision-making landscape: Delegated acts & implementing acts

The Lisbon Treaty entered into force in December 2009 and introduced two new articles that allow the Member States and European Parliament to delegate power to the European Commission to adopt delegated acts and implementing acts. For the financial services and insurance sectors, these acts introduce an additional layer of complexity to the EU legislative landscape. A direct consequence is likely to be a mushrooming of different levels of EU legislation.

Delegating power: what has changed?

In the EU institutional framework, the Council of Ministers and European Parliament are responsible for adopting legislation. They can, however, delegate to the Commission the power to adopt non-legislative acts. These acts do not need to undergo the full legislative process. Giving the Commission these powers is a delicate matter; the Council and Parliament are essentially handing over power that is intrinsic to their roles as co-legislators. The procedures for adopting these acts are therefore a compromise between the need for more efficient decision-making on the one hand, and a desire by the Council and Parliament to preserve some influence over Commission decisions on the other.

In the past, the power to adopt measures was enshrined in Article 202 EC Treaty and subject to *comitology* procedures *i.e.* implementing powers were conferred on the Commission, but the Commission was required to consult a committee composed of Member State representatives before adopting new measures. In practice, however, the Commission drafted measures and presented them to the committee in question, essentially as a done deal. Other stakeholders were confined to a reactive role.

The Lisbon Treaty and, in particular, the Treaty on the Functioning of the European Union (TFEU) introduced new articles that allow the Council and Parliament to delegate power to the Commission in two ways:

- i. regulating a particular field only partially, leaving the Commission the responsibility for supplementing the regulations with quasi-legislative

measures ('delegated acts', Article 290 TFEU) and

- ii. entrusting the Commission with the responsibility for ensuring the harmonised implementation of EU Directives or Regulations (through 'implementing acts', Article 291 TFEU).

Articles 290 and 291 are mutually exclusive; an act is either a delegated or



an implementing act, but cannot be under the scope of both Articles. The two acts serve different purposes. An EU Directive or Regulation can, however, call for both delegated acts and implementing acts.

The Treaty provision on delegated acts (Article 290) is self-executing, entails no *comitology* procedures and has been in force since 1 December 2009, the date on which the Treaty of Lisbon came into force. The Treaty provision on implementing powers (Article 291) on the other hand required the adoption of secondary legislation (a Regulation) to establish the conditions for control by the Member States of how the Commission exercises implementing powers. This was agreed on 16 December 2010 and came into force on 1 March 2011. The [comitology decision \(1999/468/EC\)](#) (amended by [Decision 2006/512/EC](#)) has been repealed and all reference to it replaced with a reference to the new [Regulation \(EU\) No 182/2011](#).

Under Article 290 (delegated acts), the Commission has a degree of autonomy with a scrutiny role for the Council and Parliament. Under Article 291 (implementing acts), the Council in particular has lost out as compared to

old *comitology* procedures. Rather than the Council, as an EU institution, playing a formal role, Member State representatives participate in the process through expert committees, but the Commission is very much in the driving seat.

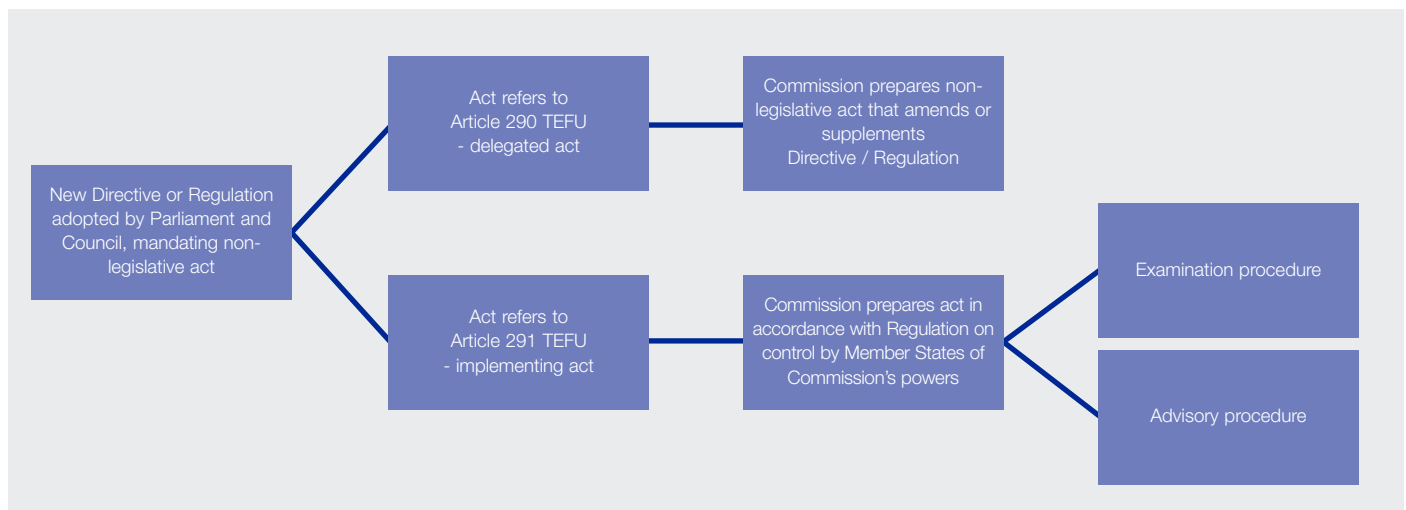
Whereas on average 40-50 EU Directives and Regulations are adopted by the Council and Parliament annually, 2,500 regulations are adopted by over 200 committees annually. With the new Treaty articles, expanding areas of responsibility for the EU and the increasingly technical nature of EU legislation, the number of these acts is set to increase. Rather than EU Directives or EU Regulations, they are referred to as Commission Directives and Commission Regulations.

The question of whether an act should be a delegated or implementing act is an important one. It is up to the legislators (Council and Parliament) to prescribe which of the two procedures is to be used by the Commission. A legal issue is bound to emerge as to the conditions of that choice (if supplementing or amending, an act should fall under Article 290; if it is merely implementing then it should fall under Article 291).

Article 290: Delegated acts

Article 290 has its roots in the old *comitology* procedure, 'regulatory procedure with scrutiny' but is no longer a *comitology* procedure *per se*. A Commission [Communication](#) from December 2009 sets out how the procedure should apply (the European Parliament's [response](#) of May 2010 proposed slightly different processes and reporting mechanisms).

Where reference is made in an EU Directive or Regulation to Article 290 TFEU, the Council and Parliament, as the legislators, choose to delegate to the Commission the power to adopt measures that they could have adopted themselves but in the interests of efficiency chose not to. This could be for a number of reasons; perhaps because the subject matter is particularly technical and better handled by sector experts, or because delegated acts are more easily amended than Directives that take an average of 14-18 months to be passed under the co-decision procedure. The framework within which the powers are to be exercised are defined by the Council and Parliament in the Directive / Regulation itself, which sets out the



scope, content and practical arrangements for delegating power. It is always the legislators who choose to delegate this power but the Commission enjoys a large measure of autonomy once it has been granted.

When the Commission receives the power to adopt delegated acts under Article 290, it is authorised to 'supplement or amend' the work of the legislator in a quasi-legislative role:

- 'Amending' might relate to the text of one or more articles in the Directive / Regulation or to the text of an annex that legally forms part of the Directive / Regulation.
- Determining what 'supplements' is more difficult. The Council and Parliament must assess whether the future measure specifically adds new non-essential rules which change the framework of the Directive / Regulation, leaving a margin of discretion to the Commission. If it does, the measure could be deemed to supplement the basic instrument.

The Commission's preparatory work includes consulting national authorities of the 27 Member States, through (new or existing) expert groups and other stakeholders, research, analysis and hearings.

Delegated acts are formally adopted by the College of 27 European Commissioners and take the form of Commission Regulations or Commission Directives as appropriate. As with traditional EU legislation, they must then be implemented by the national authorities of all the Member States.

Scrutinising the Commission's use of the delegated power

Because the European Parliament and Council delegate this power to the Commission, they also control its use

Examples

The Alternative Investment Fund Managers Directive (AIFMD) invokes Article 290. Delegated acts are required by a total of 25 articles of the AIFMD, and will cover everything from the calculation of thresholds and leverage, to the European passport regime and the risk management and conflict of interest policies applicable to alternative investment fund managers. The issues may be grouped together so that 25 separate acts are not required. Articles 47b, 47c and 47d of the AIFMD set out the limits of the delegated power, covering - respectively - the duration of the delegation, the procedure and implications of a revocation and the handling of objections from the Council and Parliament.

The amended Regulation on Credit Rating Agencies (CRA) also calls for delegated acts to be prepared in accordance with Article 290 in relation to fees, setting out the criteria for assessing the equivalence of the regulatory and supervisory framework of a third country, and laying out detailed rules on fines and penalty payments. The duration of the delegation, the procedure and implications of a revocation and the handling of objections from the Council and Parliament are set out in Articles 38a, 38b and 38c of the Regulation respectively.

through a right of revocation and / or by expressing objections (a right of objection) within agreed time limits. The time limits will be set out in the original Directive / Regulation. The Commission has proposed, however, that it would be useful to apply a standard formula where appropriate and suggested a period of two months (with an automatic one month extension if requested by either the Council and Parliament). The Alternative Investment Fund Managers Directive (AIFMD) sets a time period of three months for the Council and/or Parliament to object to a delegated act.

The manner in which the Council and Parliament can revoke the delegated power will be set out in the basic act which initially referred to Article 290. Revocation is a general and absolute withdrawal of the delegated power from the Commission. Because of that, it is unlikely to be used except in exceptional circumstances. Where the Council and / or Parliament oppose(s) the delegated act, it cannot enter into force without either being amended to take account of

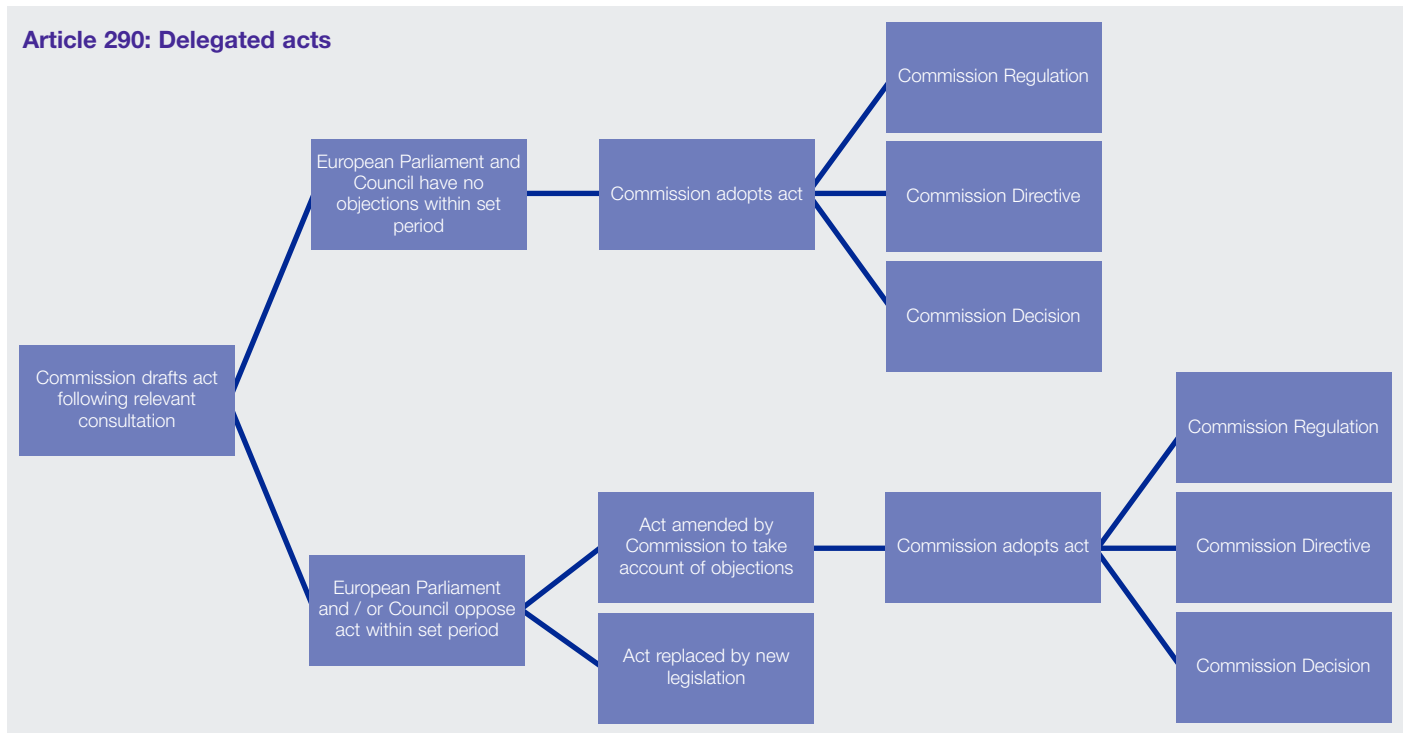
objections, or replaced by new legislation if the objections are based on the argument that the Commission has overstepped the powers delegated to it.

In order to exercise either of these powers of control, Council must act by qualified majority and Parliament by a majority of its members.

Additional limits are imposed on the delegation of power in the original Directive / Regulation: material limits (for example outlining whether the Commission may amend all or only part of an annex) and temporal limits (for example through the insertion of sunset clauses which would bring an automatic end to a delegation of power).

Fast tracking the process

An urgency procedure is foreseen for situations where legislation must be amended quickly, for example because of market conditions. The Commission has made a suggestion about how the urgency procedure might work: a delegated act would be adopted by the Commission and notified immediately to



the Parliament and Council. It would apply provided no objections are expressed by either institution during a period of, say, six weeks. If objections were expressed, the delegated act would cease to apply. Ultimately, however, it will be up to the legislators to provide for an urgency procedure in the basic act.

Article 291: Implementing acts

Member States are responsible for implementing EU Directives and Regulations. When it is necessary to have uniform implementing conditions, the Commission intervenes in accordance with Article 291. Whereas with delegated acts, the Council and Parliament have a choice about what power they delegate to the Commission, if the conditions outlined in Article 291 TFEU are met, the Commission must be granted the implementing power (Article 291(2)). The Commission's intervention is compulsory not optional.

Article 291 was not of itself sufficient to outline how the Commission should exercise its implementing powers and a legal framework was established to set out the mechanisms for control. A new EU Regulation setting out the rules applicable to the Commission's exercise of implementing powers entered into force on 1 March 2011.

The new Regulation gives the Commission more flexibility and a greater political responsibility than was the case under the old *comitology* decision. As in the past, the mechanism of control foreseen by the Regulation is based on committees composed of representatives of Member States, to which the Commission submits draft implementing measures - but, contrary to the old system, there is no intervention from the Council as an appeal body. Instead, a new appeal committee – chaired by the Commission

- provides an opportunity for Member States to take a second look at draft decisions or to make changes if required.

Under the new Regulation, there are two procedures for the implementation of EU legislation:

- an advisory procedure where Member States give non-binding advice to the Commission and
- an examination procedure which involves an appeal committee.

Both lead to the adoption of implementing acts by the College of 27 Commissioners, which take the names 'Implementing Regulation', 'Implementing Directive' or 'Implementing Decision' as appropriate.

The examination procedure is the more elaborate of the two and applies to:

- implementing acts of general scope

- programmes with substantial financial implications
- the common agricultural and common fisheries policies
- the environment, security and safety or protection of the health or safety of humans, animals or plants
- the common trade policy and
- taxation.

The advisory procedure is a simpler process and applies to all areas other than those above (but may also apply to them in duly justified cases).

Competition policy is unaffected by these changes.

The Regulation includes provisions for the use of written procedures in order to obtain the committee's opinion and the possibility for draft measures to be amended in order to take into account discussions in the committee prior to it delivering its formal opinion.

Advisory procedure

Under the advisory procedure, the Commission drafts the implementing act and the relevant committee (made up of Member State representatives) adopts an opinion by a simple majority of its component members. The Commission, however, must only take 'utmost account' of the opinion delivered and has the final say on the content of the act. Interestingly, in EU speak, 'to take utmost account' is considered to be less binding than 'to take account.'

Examination procedure

Under the examination procedure, the Commission is still responsible for drafting the implementing act, but Member States control the Commission's powers with four simple rules:

- i. the Commission must find the widest possible support among Member States in order to adopt an implementing act, and has to take account of their comments
- ii. Member States can halt the Commission by a qualified majority (however, if the acts are deemed necessary, the chair of the committee may either submit them to the appeal committee or submit an amended version to the committee to reconsider)
- iii. when Member States are unable to agree an opinion, the Commission can adopt the measure (except in the areas of taxation, financial services, the protection of humans, animals or plant health, or definitive multilateral safeguard measures), or the committee chair (the Commission) can propose an amended version and
- iv. in sensitive cases (e.g. GMOs or trade defence measures – see more below) where Member States cannot reach an opinion, the matter is referred to the appeal committee, made up of more senior Member State representatives and chaired by the Commission. If the Appeal committee delivers a positive opinion, the

Commission will adopt the draft acts. If no opinion is delivered, the Commission may adopt the acts. If the appeal committee delivers a negative opinion, the act falls. The appeal committee's rules of procedure will be drafted by the Commission and adopted by a simple majority in the committee.

Trade defence

In the past, trade defence matters - such as anti-dumping and countervailing definitive measures - were outside the scope of the traditional *comitology* procedures and subject to a different process where the Council frequently had the last word. Just as the Lisbon Treaty brought agriculture and trade under co-decision for the first time, these policy areas are now also subject to the same regime as other implementing acts.

Anti-dumping duties are subject to the examination procedure outlined above, but with two changes: the Commission needs a positive opinion of the committee to adopt the draft implementing act. The second change is the voting rules: until September 2012, the appeal committee will adopt its opinion by a simple majority of its members. After that date, Member States will vote on the basis of qualified majority. The Commission argues that the transparency and effectiveness of policy implementation will be improved as a result, and the process made less political; EU government officials will be less vulnerable to lobbying because it will be more difficult for them to vote down measures, so the thinking goes.

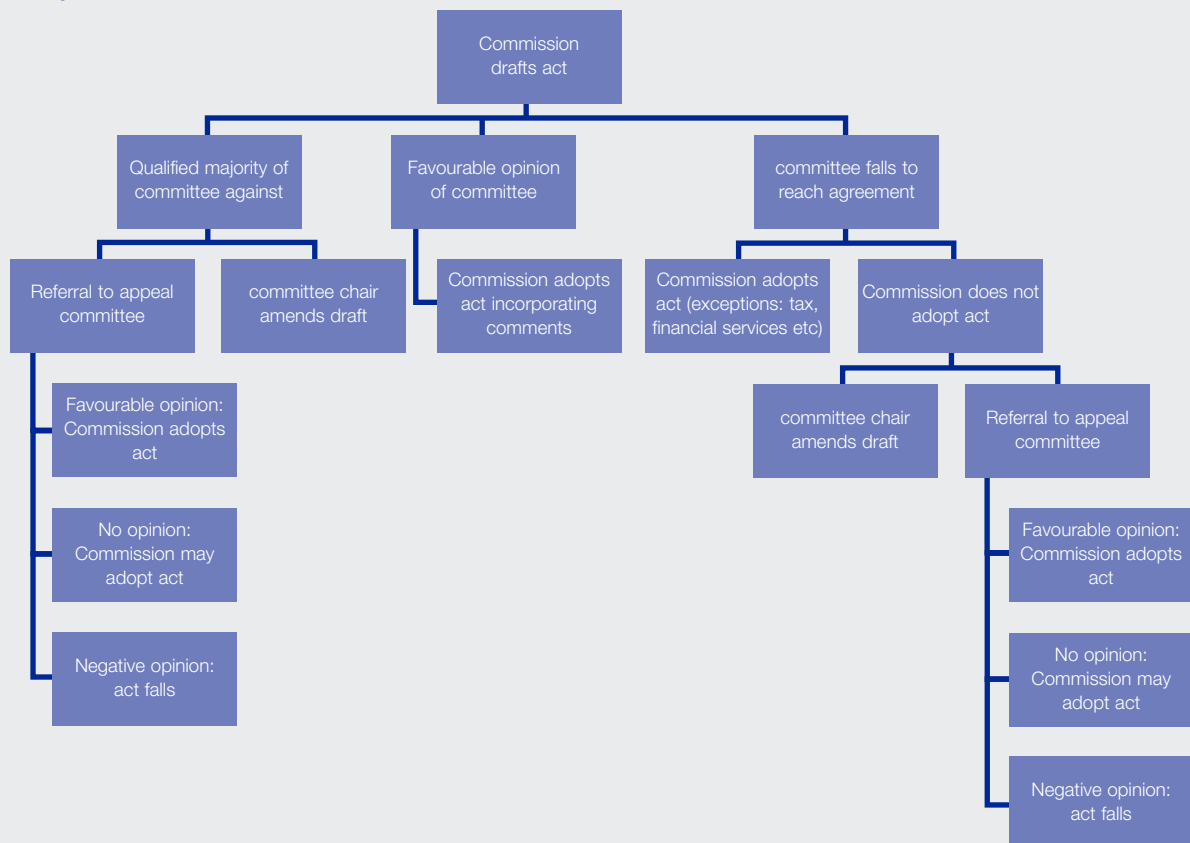
Fast tracking the process

There is a provision for an urgency procedure where the Commission may adopt draft acts under the examination procedure in order to avoid creating a significant disruption of the markets in the area of agriculture or risk for the financial

Advisory procedure under Article 291



Examination procedure under Article 291



interests of the Union. The measures apply immediately but are submitted to the appeal committee which must sign off for the acts to remain in force. If the committee disagrees with the measures, the Commission must repeal them. If the committee delivers a favourable opinion or does not deliver an opinion at all, the acts remain in force.

Scrutinising the Commission's use of implementing acts

There is no role for the European Council and Parliament to control the Commission's exercise of implementing powers once Article 291 is invoked. The two institutions will receive copies of the documents submitted to the committees and may indicate at any time that they

consider the draft implementing act to exceed the powers conferred by the relevant legal basis to the Commission. However, the Commission must only review the draft implementing act taking account of the legislator's position and explaining to the Council and the Parliament whether it intends to maintain, amend or withdraw it. It is not obliged to take any further action.

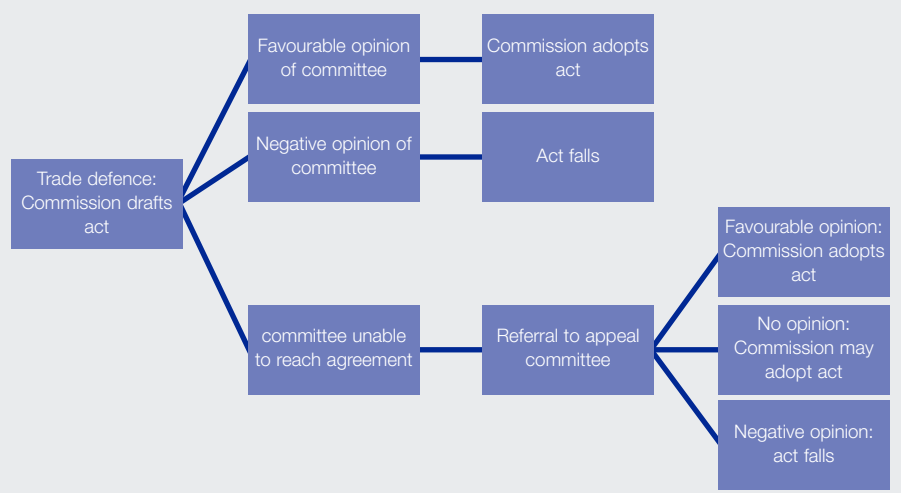
In response to demands from the Council and Parliament, the Commission has committed to keeping both institutions 'properly and continuously informed' of proceedings through the [comitology Register](#) which will from now on include:

- a list of committees

- agendas of committee meetings
- summary records and list of the authorities from which the members come
- draft acts on which the committee is asked to deliver an opinion
- the results of voting
- final draft acts following the opinion of the committees
- information concerning the final adoption of the measures by the Commission and
- statistical data on the work of the committees.

The Commission will also publish an

Trade defence under Article 291



annual report on the work of the various committees.

In terms of transparency, the principles and conditions on public access to documents and on data protection applicable to the Commission will apply to all committees.

The role of the new European supervisory authorities

On 1 January 2011, three new European supervisory authorities (ESAs) came into being: EBA (European Banking Authority, based in London), ESMA (European Securities and Markets Authority, based

in Paris) and EIOPA (European Insurance and Occupational Pensions Authority, based in Frankfurt) by [Regulation \(EC\) No 1093/2010](#) (EBA), [Regulation \(EC\) No 1094/2010](#) (EIOPA) and [Regulation \(EC\) No 1095/2010](#) (ESMA) respectively. The function of the predecessor organisations to the ESAs under the Lamfalussy procedure (the *comitology* procedure as implemented in the financial sector), was limited to advising the Commission on drafting delegated acts and co-ordinating how countries implemented the EU's high-level legislation and secondary regulations and directives. They had no mandate to write or enforce rules. The new authorities have a range of tasks and responsibilities including developing technical standards, i.e., non-legislative measures that do not involve strategic decisions or policy choices. There will be regulatory technical standards that are enacted as delegated acts (Article 290) and implementing technical standards that are enacted as implementing acts (Article 291). All technical standards will be formally adopted by the Commission, because the EU Treaty indicates that the European Parliament or Council can delegate certain legislative powers to the

Commission, but not to other bodies such as the ESAs.

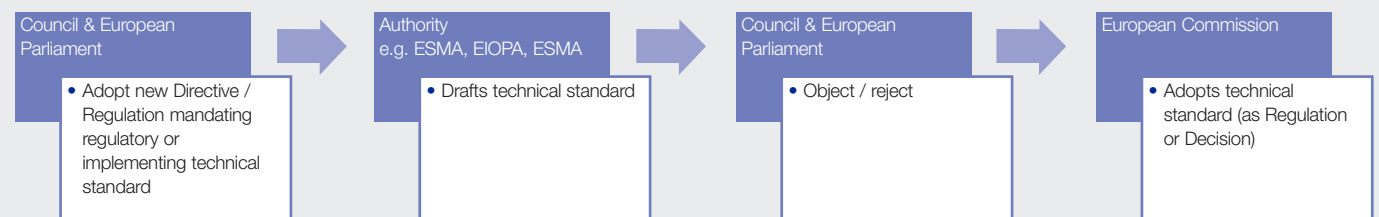
Both types of technical standard will be created by a somewhat similar process:

- the ESAs will hold public consultations and seek opinions from relevant stakeholder groups (e.g. ESMA will seek opinions from the ESMA Securities and Markets Stakeholder Group)
- the ESAs will draft the technical standards and submit them to the European Commission
- the Commission will either endorse, amend, or reject the technical standards. As the ESAs are considered to be in close contact with, and have the best understanding of financial markets, the Commission may amend the draft technical standards only in very restricted circumstances and following prior coordination with the relevant ESA (Recital 22 of the ESA Regulations)
- in the case of regulatory technical standards, the Council and the Parliament may revoke the delegation or object to the technical standard and it will not come into force
- once the process is complete, the standards will be adopted as 'Regulations' (which are binding in their entirety and directly applicable in all Member States) or as 'Decisions' (which also have direct effect and are binding in their entirety on the persons, entities or Member States to which they are specifically addressed).
- a **delegated act** (based on Article 290 TFEU) is a non-legislative act of general application, prepared by the European Commission. It supplements or amends certain non-essential elements of the legislative act.

Example

The Alternative Investment Fund Managers Directive (AIFMD) invokes Article 291. Under Article 49 of the AIFMD, implementing measures will be adopted by the Commission with the assistance of the European Securities committee, which is made up of Member State representatives and chaired by the Commission.

Role of new European Supervisory Authorities (ESAs)



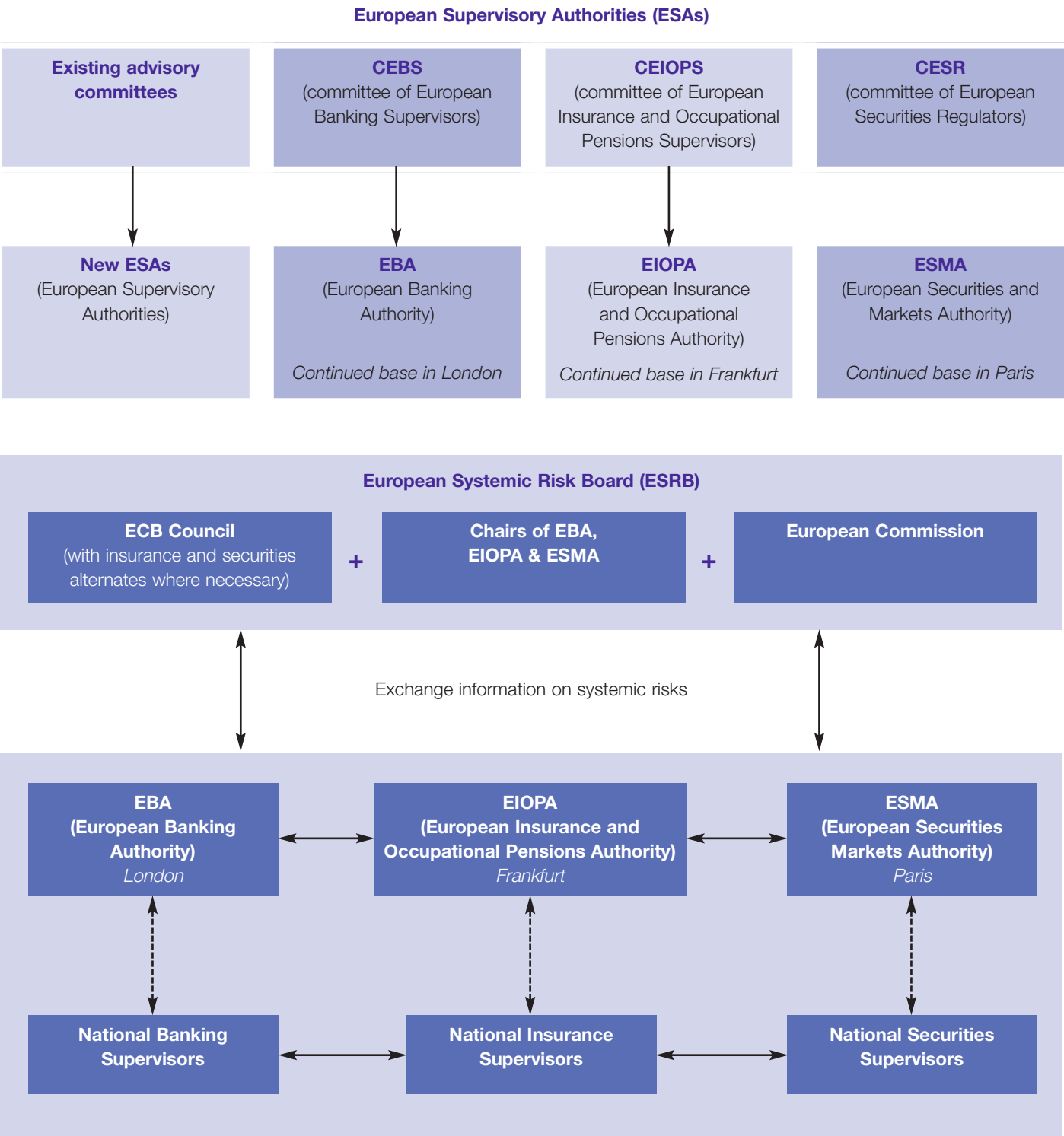
- a **regulatory technical standard** (based on Article 10-14 ESA Regulation) is a delegated act, technical, prepared by a European Supervisory Authority. It should further develop, specify and determine the conditions for consistent harmonisation of the rules included in the basic legislative act, and should not involve strategic decisions or policy choices.
- an **implementing act** (based on Article 291 TFEU) is prepared by the Commission and used where uniform conditions for implementation are necessary.
- an **implementing technical standard** (based on Article 15 ESA Regulation) is an implementing act, technical, prepared by the European Supervisory Authority. It provides for the uniform application of certain provisions in the basic legislative act, and should not involve strategic decisions or policy choices.

Example

The 'Omnibus Directives' amend banking and insurance legislation to bring it into line with the Treaty of Lisbon and the new supervisory structure. The Directives replace the general authorisations of the European Commission to enact delegated acts by specific authorisations to enact one of the four types of acts that are now available: delegated acts, regulatory technical standards, implementing acts or implementing technical standards. It is difficult to distinguish between these different options and indeed the choice of act is a source of controversy between the European institutions and the Member States.

Omnibus I amends ten pieces of financial services legislation (Capital Requirements Directive, Financial Conglomerates Directive, Institutions for Occupational Retirement Provisions Directive, Market Abuse Directive, Markets in Financial Instruments Directive, Prospectus Directive, Settlement Finality Directive, Transparency Directive, Anti Money-Laundering Directive, Undertakings for Collective Investments in Transferable Securities). Omnibus I was proposed by the Commission in 2009 and adopted by the Council and Parliament in November 2010. It contains a mixture of delegated acts, regulatory technical standards and implementing technical standards.

Omnibus II relates to the insurance sector. It was proposed by the Commission in early 2011 and is being debated in the Council and Parliament. Delegated acts are required by 34 separate Articles in the Commission's proposal. Article 301 sets out how the delegated power will be exercised (Article 301(b) sets out how power may be revoked and 301(c) sets out how Parliament and Council may object to a delegated act). The Commission proposal contains only delegated acts and implementing technical standards. It does not include any regulatory technical standards or implementing acts. It remains to be seen whether this will change as the draft is discussed by the legislators.



Relevant extracts from The Treaty on the Functioning of the European Union

Article 290

1. A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act.

The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power.

2. Legislative acts shall explicitly lay down the conditions to which the delegation is subject; these conditions may be as follows:

- (a) the European Parliament or the Council may decide to revoke the delegation;
- (b) the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act.

For the purposes of (a) and (b), the European Parliament shall act by a majority of its component members, and the Council by a qualified majority.

3. The adjective 'delegated' shall be inserted in the title of delegated acts.

Article 291

1. Member States shall adopt all measures of national law necessary to implement legally binding Union acts.
2. Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council.
3. For the purposes of paragraph 2, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.
4. The word 'implementing' shall be inserted in the title of implementing acts.

Declaration 39 on Article 290

The Conference takes note of the Commission's intention to continue to consult experts appointed by the Member States in the preparation of draft delegated acts in the financial services area, in accordance with its established practice.

Clifford Chance contacts

If you would like to know more about the subjects covered in this publication or our services, please contact:

London



Chris Bates

T: +44 20 7006 1041

E: chris.bates@cliffordchance.com



Simon Crown

T: +44 20 7006 2944

E: simon.crown@cliffordchance.com



Dermot Turing

T: +44 20 7006 1630

E: dermot.turing@cliffordchance.com



Michel Petite

T: +33 1 4405 5244

E: michel.petite@cliffordchance.com



Gail Orton

T: +33 1 4405 5140

E: gail.orton@cliffordchance.com



Frederick Lacroix

T: +33 1 4405 5241

E: frederick.lacroix@cliffordchance.com

Frankfurt



Daniela Weber-Rey

T: + 49 69 7199 1551

E: daniela.weber-rey@cliffordchance.com



Marc Benzler

T: +49 69 7199 3304

E: marc.benzler@cliffordchance.com

Milan



Lucio Bonavitacola

T: +39 028063 4238

E: lucio.bonavitacola@cliffordchance.com



Jose Manuel Cuenca

T: +34 91590 7535

E: josemanuel.cuenca@cliffordchance.com

Amsterdam



Frank Graaf

T: +31 20 711 9150

E: frank.graaf@cliffordchance.com

Brussels



Yves Herinckx

T: +32 25 33 5901

E: yves.herinckx@cliffordchance.com

Luxembourg



Christian Kremer

T: +352 48 5050 201

E: christian.kremer@cliffordchance.com

Warsaw



Grzegorz Namiotkiewicz

T: +48 22 429 9408

E: grzegorz.namiotkiewicz@cliffordchance.com

Prague



Vlad Petrus

T: +420 22 255 5207

E: vlad.petrus@cliffordchance.com

© Clifford Chance LLP, May 2011

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571.

Registered office: 10 Upper Bank Street, London, E14 5JJ.

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications.

This publication does not necessarily deal with every important topic nor cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to nomorecontact@cliffordchance.com or contact our database administrator by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ.