

C L I F F O R D  
C H A N C E



**THE EU LEGISLATIVE PROCESS EXPLAINED**  
FEBRUARY 2020

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# THE EU LEGISLATIVE PROCESS EXPLAINED

This briefing paper provides an overview of the key institutions of the European Union (EU), the EU legislative process and the roles of the European Commission and the European Supervisory Authorities in the creation of the technical rules that are central to the implementation of the EU single rulebook for financial services.

## What is the European Union?

The European Union (EU) is the name given to the formal association of 27 European countries, or Member States, and is used to describe the geographical area covered by those countries as well as the abstract concept of the association. The establishment and operation of the EU is based on intergovernmental treaties by means of which the Member States have granted certain powers and functions to centralised EU institutions, of which the most important are the European Commission, the Council, the European Parliament and the European Court of Justice. The distribution of power both between EU institutions and Member State governments and amongst the institutions themselves is still shifting and is the subject of continuing debate.

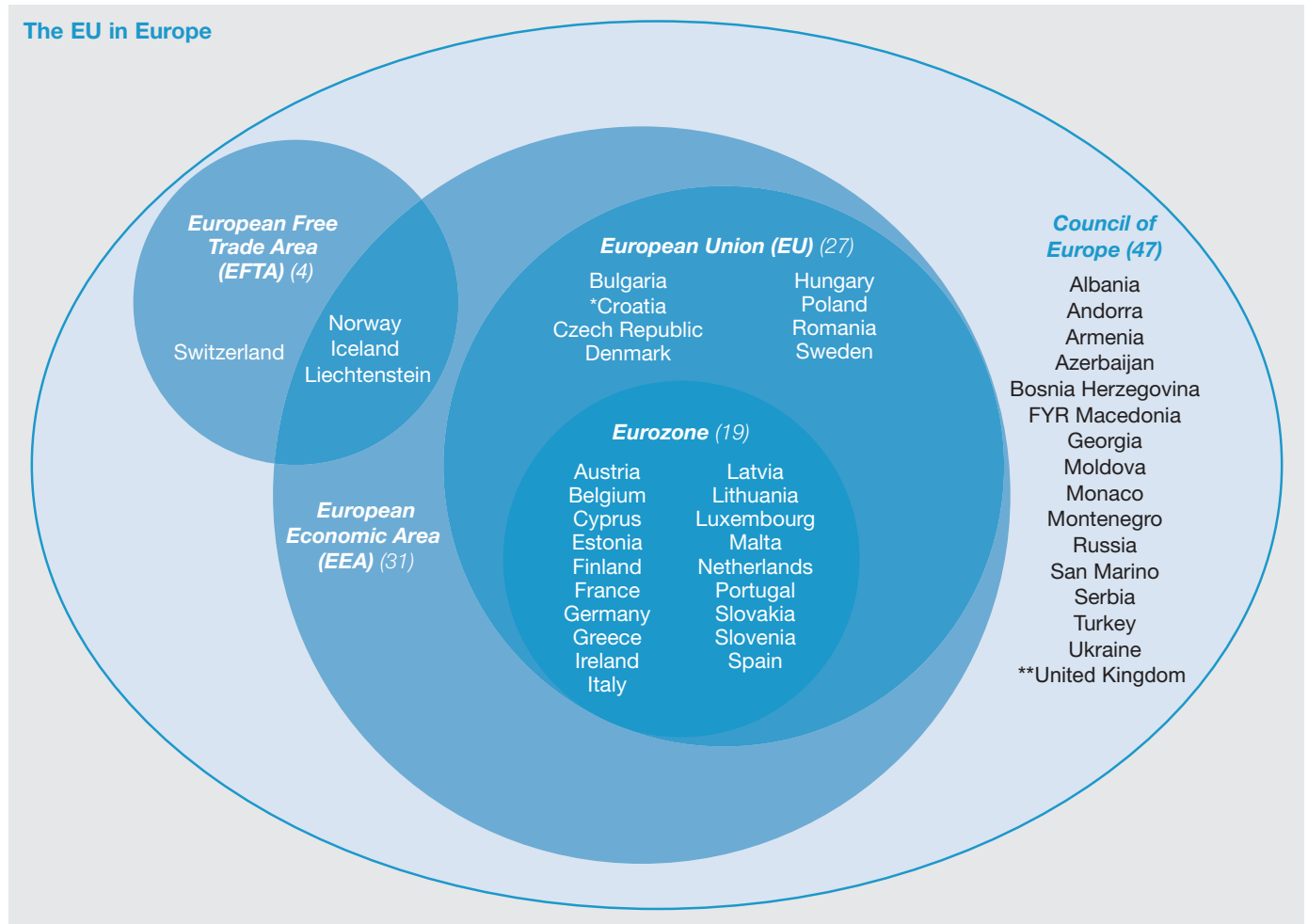
For more information and resources on the EU legislative process, visit the Topic Guide on the Clifford Chance Financial Markets Toolkit at

<https://financialmarketstoolkit.cliffordchance.com/euexplained>

## Status and objectives of the EU

- A series of multilateral treaties between sovereign states that:
  - constitute the source of EU constitutional law; and
  - set out the objectives of the EU, create its institutions and regulate its functioning
- EU institutions can make laws directly affecting businesses and people in Member States (MS) within the EU's defined objectives and competencies
- Fundamental task is to establish an internal market, Economic and Monetary Union, and an “ever closer Union among the peoples of Europe”
- Internal market is to be achieved through the establishment of:
  - Free movement of goods;
  - Free movement of persons;
  - Free movement of services; and
  - Free movement of capital

# THE EU LEGISLATIVE PROCESS EXPLAINED CONTINUED



\* Croatia has provisionally been admitted to the EEA pending full ratification of its accession treaty.

\*\* The UK ceased to be an EU Member State on 31 January 2020 and no longer participates in the EU institutions and EU legislative process. However, under the terms of the Withdrawal Agreement, the UK continues to be treated as if it were an EU Member State for the purposes of most EU and EU-derived law during the transition period which is due to end on 31 December 2020.

# KEY INSTITUTIONS OF THE EUROPEAN UNION

## The European Commission

The European Commission is the central administrative and policy-making body of the EU. It is made up of 27 Commissioners (nominated by the Member States and approved by the European Parliament), one of whom acts as President. The Commission formulates legislative proposals, implements Council decisions, negotiates international agreements on behalf of the EU and supervises compliance with, and implementation of, EU law by the Member States.

## The Council of the European Union

The Council of the European Union (or Council of Ministers) is the EU's principal decision-making body. At the top level it comprises government ministers or state secretaries of all the Member States with responsibility for a particular sector, e.g. finance ministers will convene to discuss proposed legislation on financial services in the configuration of the Council known as the Economic and Financial Affairs Council (Ecofin). The details of legislation are usually worked out at lower levels by other official representatives of the Member States, the most important of these being the Committee of Permanent Representatives (Coreper). The European Council, a twice-yearly meeting of the Heads of State or Government of the Member States, reviews and decides on the overall policy of the EU.

## The European Parliament

The European Parliament is a democratically elected body with members (MEPs) elected directly from each of the Member States and grouped according to political, rather than national, affiliation. The number of MEPs from each Member State is roughly proportionate to the Member State's population. It shares with the Council the power to legislate and it exercises democratic supervision over the Commission. Other EU bodies such as the Economic and Social Committee, the Committee of the Regions and the European Central Bank (ECB) may also play an advisory role in the legislative process.

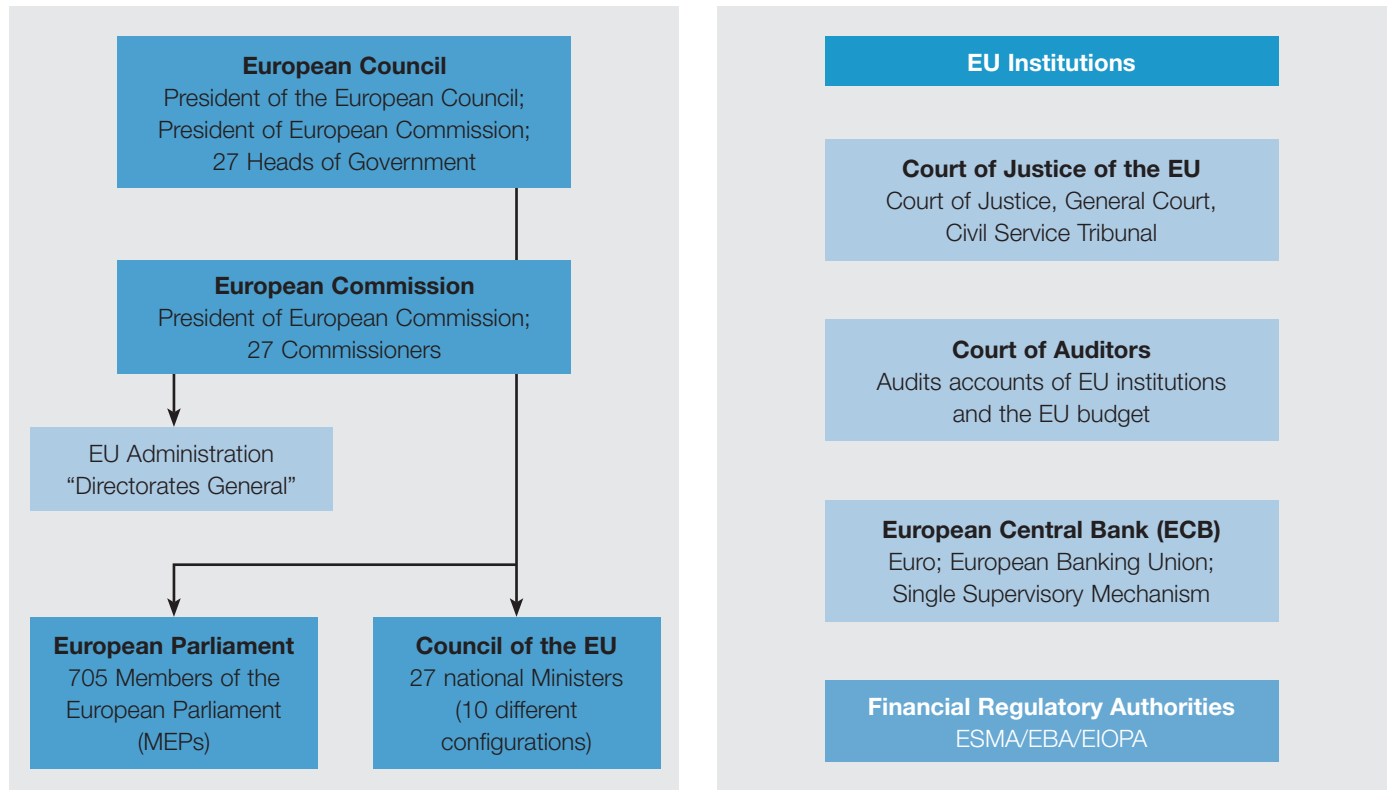
## The European Court of Justice

The European Court of Justice is a supranational court, which is responsible for interpreting and enforcing EU law.

The EU Treaties provide for the euro to be the common currency of the Member States participating in monetary union. Currently, 19 Member States are members of the eurozone. The ECB sets the monetary policy for the eurozone and an informal body of ministers of the euro area Member States (the Eurogroup) coordinates economic policies among those states, supported by the European Commission.

# KEY INSTITUTIONS OF THE EUROPEAN UNION CONTINUED

## The EU's key players

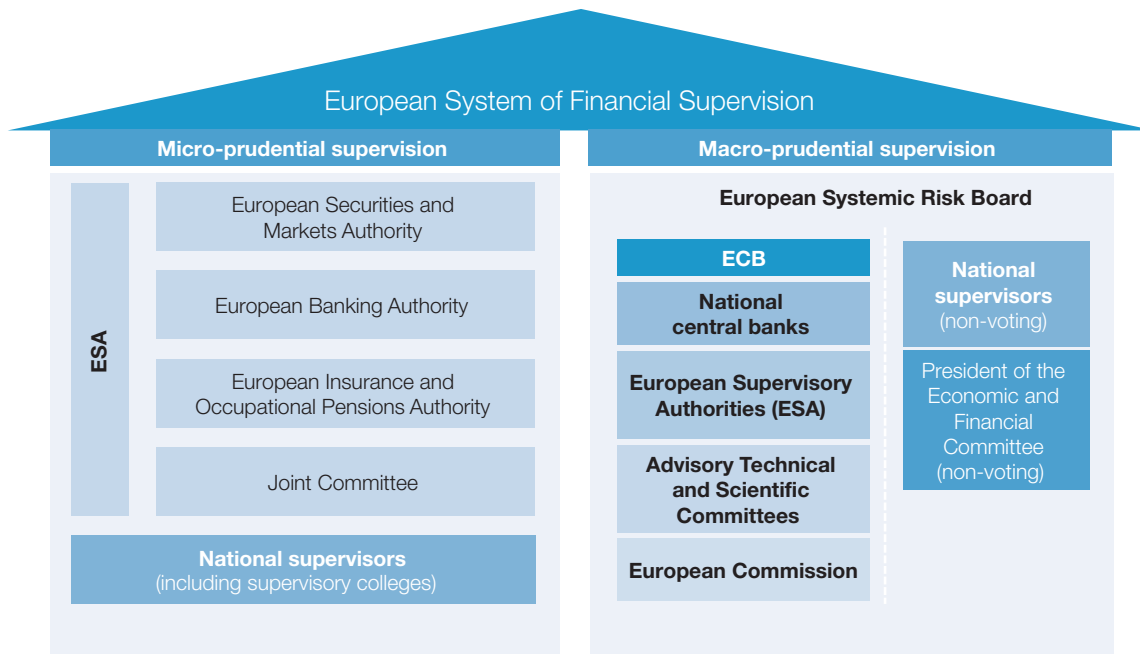


## Financial regulatory authorities

In the context of financial services, the EU has created three specialised European Supervisory Authorities (ESAs): the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA). The ESAs have a limited quasi-rule making authority, have some direct supervisory responsibilities (e.g. ESMA directly supervises credit rating agencies) and are responsible for coordinating the consistent application of EU law by the competent authorities and mediating between them.

The European Systemic Risk Board (ESRB) is the macro-prudential supervisor created as part of the creation of the European System of Financial Supervision.

The Member States play a role, through the Council, in developing EU legislation and are responsible for ensuring that EU legislation is implemented and applied in their territories. EU legislation may require Member States to designate “competent authorities” (e.g. national regulators) to implement or supervise the implementation of provisions of EU legislation. Under the Banking Union, the ECB and the Single Resolution Board (SRB) perform the functions of the competent authorities in the area of banking supervision and bank resolution.



# EU LEGISLATION

The EU can only legislate in areas in which there is specific authority to do so in one of the EU Treaties. In the area of financial services, legislation will normally be based on the provisions of the Treaties giving the EU power to legislate to develop the single market. The Treaties and legislation made under the Treaties take precedence over any inconsistent national law.

Legislation may take the form of Regulations or Directives. Regulations are directly applicable (i.e. they have a binding legal effect) in all Member States. By contrast, Directives are not directly applicable and they need to be implemented into national law by the law-making bodies of each Member State. In addition, the EU Treaties or legislation made under them may give the Commission or other bodies powers to adopt decisions or recommendations on particular issues.

## Legislative process

The Commission initiates most EU legislation although it does not enjoy a monopoly on the “right of initiative”. In certain circumstances the ECB, the European Investment Bank or the European Parliament can play a role in the initiation or adoption of EU legislation. Also, in forming its legislative programme the Commission needs to take into account the political wishes of the Member States (expressed through the Council) and the European Parliament.

Once the Commission issues a legislative proposal it is considered by the Parliament and the Council and will follow

one of a number of procedures as dictated by the Treaties. The most commonly used of these is the ordinary legislative procedure (formerly known as codecision). Under the ordinary legislative procedure, the Parliament and the Council are the co-legislators and both need to agree on the legislation. See the “EU Legislative Process – Level 1” section of this briefing paper.

EU legislation may confer on the Commission the power to adopt delegated or implementing acts on the conditions that are set out in the legislation. Delegated acts supplement or amend non-essential elements of the legislation. Implementing acts are used to ensure the uniform conditions for implementing Regulations or Directives. Delegated and implementing acts may take the form of Regulations, Directives or, in some cases, decisions adopted by the Commission. The legislation conferring the powers on the Commission to adopt delegated and implementing acts will specify the conditions under which that power can be used. See the “EU legislative process – Level 2” section of this briefing paper.



## Lamfalussy process for financial services regulation

In the financial services sector, new laws and rules are developed according to the “Lamfalussy Process” (named after the chair of the EU advisory committee that originally outlined the process in its final report in 2001). This process has evolved following the establishment of the European System of Financial Supervision and the creation of the ESAs, in particular after the de Larosière report in 2009, with the aim of creating a harmonised core set of standards (a “single rulebook”) for the financial sector.

Under this four level process, “Level 1” framework legislation establishes the broad base of new rules. This legislation is usually adopted by the Parliament and the Council under the ordinary legislative procedure. There is a political preference for new Level 1 legislation to take the form of Regulations to enhance the uniformity of the single rulebook for financial services, but legislation may take the form of Directives (or, in some cases, a companion Directive and Regulation). The ESAs then work in conjunction with the Commission to develop the “Level 2” measures through which framework legislation is implemented. The Level 1 legislation will specify the powers of the Commission to adopt Level 2 measures which may take the form of:

- Delegated or implementing acts adopted by the Commission, usually after taking the advice of one or more of the ESAs. These may take the form of Regulations, Directives or decisions.
- Regulatory Technical Standards (RTS) or Implementing Technical Standards (ITS) which are delegated or implementing acts where the Level 1 legislation confers on one or more ESAs the power (or the duty) to draft the relevant act and to submit it to the Commission for adoption according to the procedure set out in the Regulations establishing the ESAs. RTS and ITS must take the form of Regulations and are used to address technical points of implementation. They must not involve strategic decisions or policy choices.

See the “EU legislative process – Level 2” section of this briefing paper for more information on the differences between delegated and implementing acts, as well as binding technical standards and the process by which Level 2 legislation is made.

The ESAs are also responsible for the production of non-binding “Level 3” guidelines and other measures to ensure consistent implementation and application of the single rulebook.

“Level 4” of the Lamfalussy Process denotes the Commission’s process for checking that Member States and the competent authorities have correctly implemented and applied EU legislation. The Commission may take infringement proceedings in the Court of Justice against Member States which have not complied with their obligations under EU law. The ESAs also have a role in monitoring and advising the Commission on whether national competent authorities are correctly implementing EU law.

# EU LEGISLATION CONTINUED

## Lamfalussy Process

### Level 1

#### Directive

- Not directly applicable
- Requires Member State transposition

#### Regulation

- Directly applicable
- Limited Member State transposition

### Level 2

#### Delegated/implementing acts (regulations or directives):

- Drafted and adopted by Commission following advice from ESA

#### Regulatory/implementing technical standards (regulations):

- Drafted by ESA and adopted by the Commission

### Level 3

#### ESA guidelines and ESA/Commission FAQs to achieve consistent implementation in Member States

#### National implementation (not strictly Level 3):

- Primary or secondary legislation, regulatory rules
- Penalty regimes

### Level 4

#### Enforcement

- Commission verifies Member State compliance with EU law
- Commission legal action against Member States suspected of breaches of EU law
- National competent authorities monitoring compliance with rules by regulated firms

## Publication and implementation of EU legislation

When it is adopted, all EU legislation, including delegated and implementing acts and technical standards, is published in the Official Journal of the EU in the 24 official languages of the EU. All official language versions of EU legislation are equally authentic.

Directives and Regulations enter into force on the date specified in the legislation. This is normally 20 days after publication of the legislation in the Official Journal. However:

- Regulations may contain provisions delaying the date of application of some or all of the provisions of the Regulation, in order to give affected parties time to prepare to comply with the requirements of the Regulation. The date of application may also be delayed in order to allow time for the Commission to adopt any Level 2 measures needed in order to give effect to the requirements of the Regulation or to allow the adoption of any related national rules. Although Regulations are directly applicable (and so do not require the adoption of national legislation or regulations to give effect to their provisions), Regulations will often require Member States to adopt national rules to enable national competent authorities to supervise the implementation of the Regulation and to enforce its provisions by imposing penalties or other sanctions.
- Directives will contain a “transposition deadline” which is the date by which Member States must pass national legislation or adopt national regulations to give effect to the requirements of the Directive. Directives will also specify the date (which may be the same as – or some months after – the transposition deadline) from which Member States will be required to apply those new laws or regulations. The date of application of the new laws may also be delayed to allow time for the Commission to adopt any Level 2 measures needed in order to give effect to the requirements of the Directive, in addition to the implementing national laws.

Council presidencies up to 2030	
<b>Croatia</b>	January – June 2020
<b>Germany</b>	July – December 2020
<b>Portugal</b>	January – June 2021
<b>Slovenia</b>	July – December 2021
<b>France</b>	January – June 2022
<b>Czech Republic</b>	July – December 2022
<b>Sweden</b>	January – June 2023
<b>Spain</b>	July – December 2023
<b>Belgium</b>	January – June 2024
<b>Hungary</b>	July – December 2024
<b>Poland</b>	January – June 2025
<b>Denmark</b>	July – December 2025
<b>Cyprus</b>	January – June 2026
<b>Ireland</b>	July – December 2026
<b>Lithuania</b>	January – June 2027
<b>Greece</b>	July – December 2027
<b>Italy</b>	January – June 2028
<b>Latvia</b>	July – December 2028
<b>Luxembourg</b>	January – June 2029
<b>Netherlands</b>	July – December 2029
<b>Slovakia</b>	January – June 2030
<b>Malta</b>	July – December 2030

# EU LEGISLATION CONTINUED

## Better Regulation Agenda

On 15 March 2016, the Council adopted an agreement on improving EU law making. The agreement was signed on 13 April 2016 and entered into force the same day. The inter-institutional agreement is the product of a 2015 Commission Proposal to cut red tape and improve transparency, accountability and stakeholder participation in the EU legislative process. The agreement aims to improve the EU legislative process by providing that:

- each year, the Council, the Parliament and the Commission will discuss the EU's legislative priorities and agree common top priorities for the upcoming year
- impact assessments of new initiatives will become more comprehensive by taking account a wider range of aspects, including the impact on competitiveness, in particular for SMEs, administrative burden and the cost of not taking action at EU level
- the Council, Parliament and Commission will evaluate existing EU laws with a view to simplifying them and avoid overregulation and administrative burdens, including through an annual burden survey. This is to make sure that EU laws are fit for purpose and do not put an unnecessary burden on citizens, companies and public administrations
- a joint database on the progress of legislative files will be set up to facilitate tracking of the legislative procedure

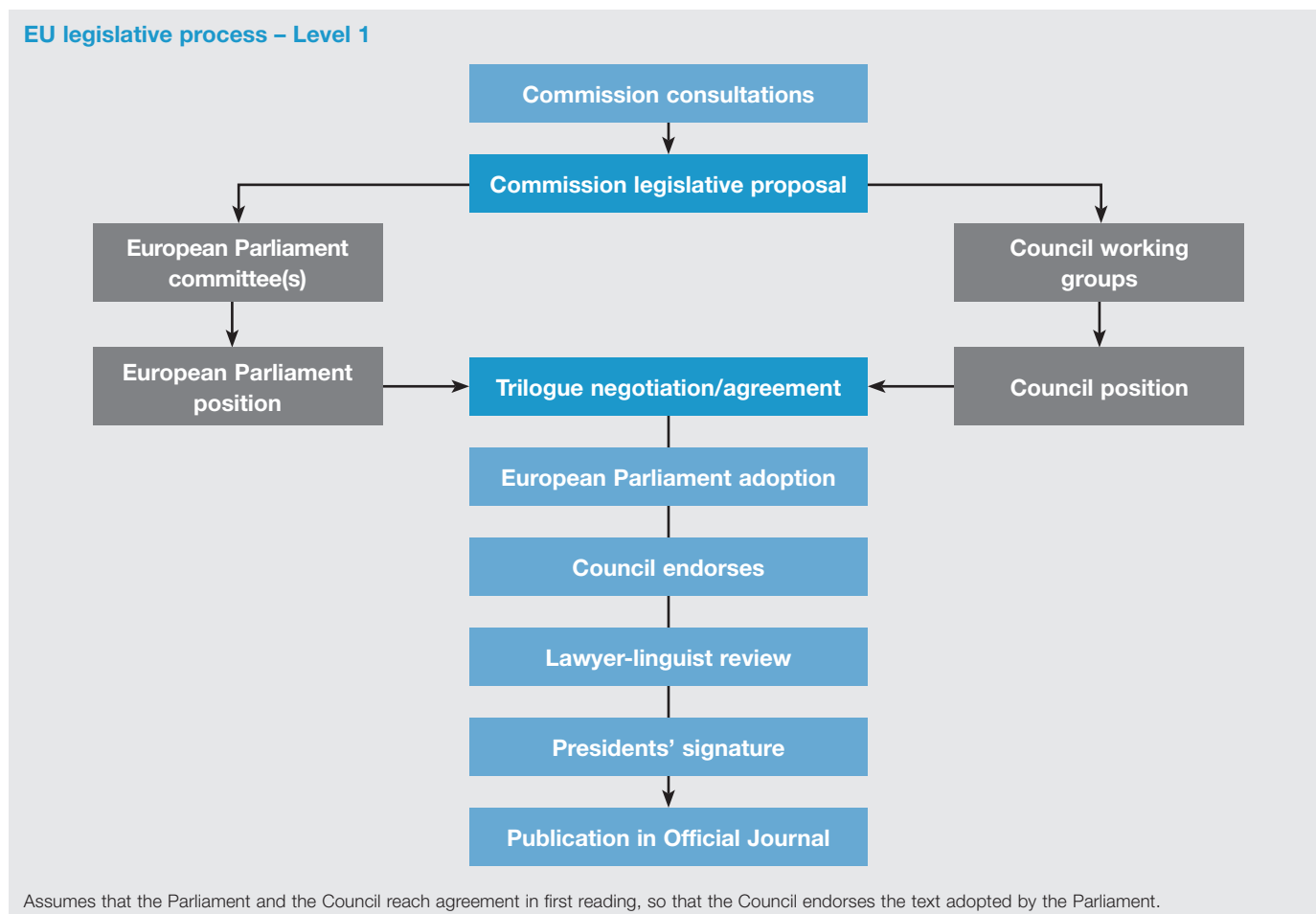
The agreement will provide stakeholders with additional opportunities to input in all phases of the EU legislative process. Other elements of the EU's better regulation agenda comprise:

- a Communication on the creation of a New Regulatory Scrutiny Board which will replace the current Impact Assessment Board; and
- a Communication on the Regulatory Fitness and Performance (REFIT) platform bringing together high-level experts from Member States and business/civil society to discuss how to reduce regulatory and administrative burden. REFIT-driven amendments have been made to various pieces of EU legislation since inception of this initiative.

The Better Regulation Initiative also provides that after the Commission has adopted a legislative proposal there will be an eight week period after the text is submitted to Parliament and Council in all EU languages in which stakeholders can provide feedback on the proposal and the impact assessment. Commission delegated and implementing acts will also be opened for public comment for four weeks before they are adopted, in parallel with a consultation of Member State experts (with limited exceptions). This will apply to delegated and implementing acts, but not technical standards.

# EU LEGISLATIVE PROCESS – LEVEL 1

The Commission is responsible for developing legislative proposals under its right of initiative. However, it may act at the request of other EU institutions or following a citizens' initiative. The Commission will usually carry out consultations before adopting its proposals and will prepare impact assessments to evaluate the policy options.



# EU LEGISLATIVE PROCESS – LEVEL 1 CONTINUED

The ordinary legislative procedure begins when the Commission adopts its legislative proposal and submits it to the Parliament and the Council (as well as to national Parliaments and to other advisory bodies):

- Under the 2015 Better Regulation package, the Commission will provide a webpage on which stakeholders can provide feedback on the legislative proposal and the accompanying impact assessment during the eight weeks following the transmission of those documents to the Parliament and the Council in all EU languages. The Commission will present a summary of the feedback to the Parliament and the Council.
- The Parliament will designate one or more of its committees to consider the proposal and to prepare the Parliament's position on it. For financial services, the economic and monetary affairs committee (ECON) will normally play an important role. The committee will prepare a report (under a rapporteur appointed by the relevant committee) on the proposal recommending whether the Parliament should adopt the proposal or make amendments, which the Parliament will consider at a plenary session in first reading. The Parliament will adopt its position by simple majority vote.
- In parallel with the consideration by the Parliament, the Council will consider the proposal and develop its own position on it. For financial services, the relevant Council configuration responsible for considering the proposal will usually be Ecofin. The Council will work towards political agreement among the Member States on the proposal and any amendments to it (also known as the general approach). The Council's work passes through three levels: working parties of Member State representatives, the Committee of Permanent Representatives (Coreper) and the Council

configuration itself. The general approach gives the Parliament an indication of the Council's position before the Parliament adopts its first reading opinion but the Council's final position cannot be adopted until after the Parliament's first reading opinion. The Council will generally act by qualified majority (55% of the Member States representing 65% of the EU population and a blocking minority must consist of at least four Member States). In February 2018, the EU Ombudsman published the conclusions of an enquiry into the legislative activities of the Council which made a number of recommendations to improve the transparency of the Council's procedures, in particular to improve access to working documents and information on Member State positions on legislative proposals. The EU Council was required to respond to these recommendations by 9 May 2018 but did not do so. On 17 May 2018, the Ombudsman followed up her recommendations with a special report to the EU Parliament calling for its support in prevailing upon the Council to act on her recommendations and suggestions.

After the Parliament has adopted its opinion in first reading, the Council can decide to accept the Parliament's position, in which case the legislative act is adopted in the form approved or amended by the Parliament. Alternatively, the Council can amend the Parliament's position and return the proposal to the Parliament for a second reading, after which additional procedures are followed with the aim of achieving agreement between the Parliament and the Council on the proposal.

However, in the area of financial services legislation the Parliament, the Council and the Commission commonly seek agreement on legislation at first reading and without proceeding to the second reading stage. In such cases, the three

institutions arrange informal meetings (so-called “trilogue” discussions) at which they aim to achieve a compromise acceptable to all three and with the objective of ensuring that any amendments which are voted on by the Parliament in its plenary are acceptable to the Council. Some have criticised the use of trilogue discussions because of a perceived lack of transparency. In July 2016 the EU Ombudsman concluded a public consultation on the process and called for more transparency. The Ombudsman recommended the publication of key documents relating to trilogue discussions including meeting dates and agendas.

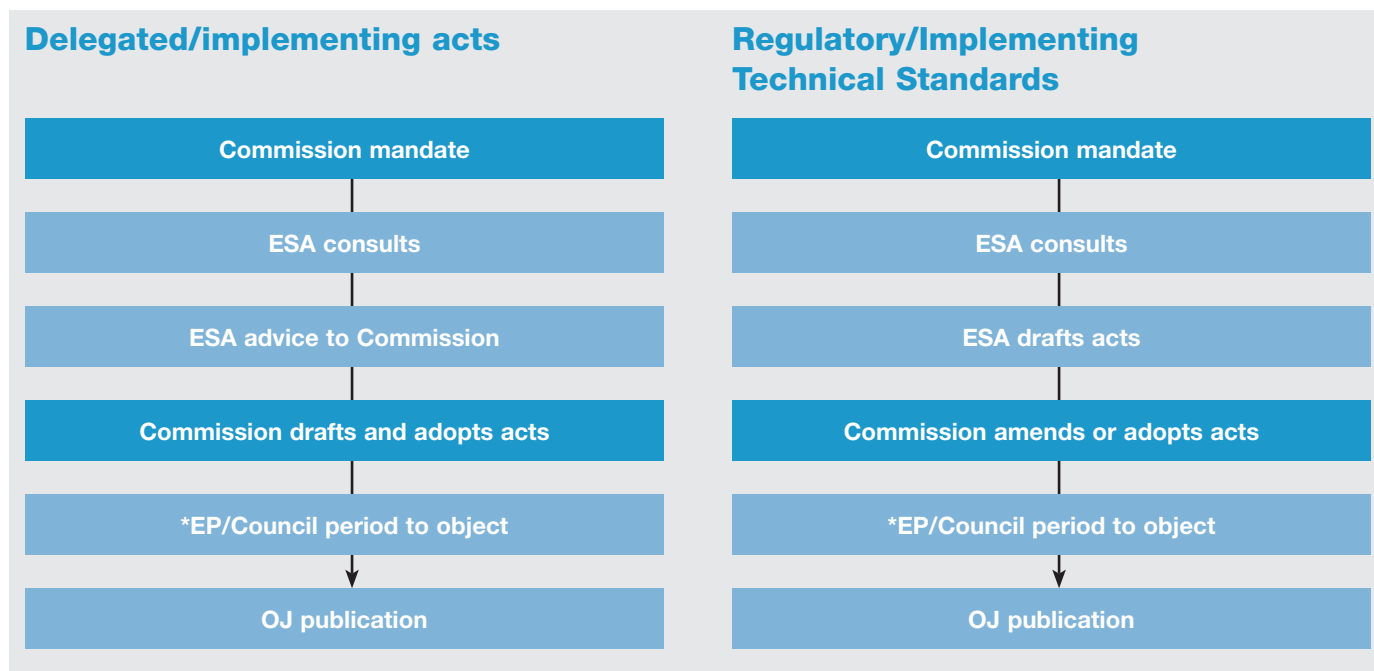
Following the approval by the Council of the position adopted by the Parliament in first reading (or agreement being reached between the co-legislators if the proposal goes to second reading), the text will be:

- reviewed and revised for consistency by specialist lawyer-linguists and translated into the 24 official languages;
- signed by the President of the Parliament and the President of the Council; and
- published in the Official Journal (and will enter into force on the date specified in the text).

## EU LEGISLATIVE PROCESS – LEVEL 2

In the financial services sector, Level 1 Directives and Regulations rarely provide the complete picture that firms need in order to comply with new rules. “Level 2” measures are frequently used to provide the requisite detail in the form of either delegated acts or implementing acts (which may take the form of regulatory or technical implementing standards prepared by one or more of the ESAs).

Level 2 delegated and implementing acts follow a distinct procedure which is different from the legislative procedures used to adopt Level 1 legislative acts. A separate procedure also applies where the delegated or implementing act takes the form of regulatory or implementing technical standards.



\* Does not apply to implementing acts or implementing technical standards



## Delegated acts

Level 1 legislation may provide the Commission with a mandate to adopt delegated acts in areas where the essential elements of Level 1 legislation require “fleshing out”. The Level 1 legislation will also indicate whether the Parliament and the Council are empowered to revoke the delegation or object to the delegated acts. In financial services legislation, the Parliament and the Council normally retain the power to revoke the delegation and to object to the delegated acts. Delegated acts normally take the form of Regulations or Directives.

In many cases, the Commission will seek technical advice on the delegated acts from one or more ESAs before adopting the delegated act. The ESAs will usually carry out a public consultation before submitting their technical advice to the Commission. The Commission may also carry out consultations with other experts and, under the 2015 Better Regulation package, the Commission has committed to a four week public consultation period before adopting delegated acts (subject to limited exceptions).

Once its preparatory work is complete, the Commission will adopt the delegated act and send it to the Parliament and the Council to consider. The Level 1 legislation under which the delegated act is being adopted normally indicates a defined period of time within which the Parliament and the Council may object to the delegated act. This period is typically three months and can be extended by an additional three months. If objecting to a delegated act, Parliament votes by simple majority and the Council votes by qualified majority. If no objection is registered by either the Parliament or the Council before the expiry of the non-objection period, or if the Parliament and the Council both tell the Commission that they will not object, the delegated act is then published in the Official Journal and will enter into force

on the date specified in the delegated act (normally 20 days following publication).

## Implementing acts

Level 1 legislation may provide the Commission with a mandate to adopt implementing acts in specific areas with the aim of ensuring the uniform implementation of the Level 1 requirements (in some limited cases, this power can be conferred on the Council). The implementing acts may take the form of Regulations, Directives or decisions.

In some cases, the Commission will seek technical advice on the implementing acts from one or more ESAs before adopting the implementing act and the ESAs may carry out a public consultation before submitting their technical advice to the Commission. The Commission may also carry out consultations with other experts and, under the 2015 Better Regulation package, the Commission has committed to a four week public consultation period before adopting implementing acts (subject to limited exceptions).

The Commission’s use of implementing powers is subject to the control of Member States under the Comitology Regulation (Regulation (EU) No 182/2011). The Level 1 legislation will specify whether this control takes the form of the “advisory procedure” or the “examination procedure”.

When the Commission’s preparatory work is complete, the Commission prepares a draft of the implementing act which it then submits to a committee made up of representatives from all the Member States. The Commission maintains a register of these committees. Relevant committees for financial services include the European Securities Committee and the European Banking Committee.

## EU LEGISLATIVE PROCESS – LEVEL 2 CONTINUED

The relevant committee reviews the Commission's draft implementing act and issues an opinion on it. The status and effect of the committee opinion varies according to which of two alternative procedures is followed (alternative procedures apply in the case of urgency):

- Under the “advisory procedure” (Article 4 of the Comitology Regulation) the Commission must take “utmost account” of the committee's opinion but may disregard it if it chooses to.
- Under the “examination procedure” (Article 5 of the Comitology Regulation) the committee's opinion binds the Commission; if the opinion is positive, the Commission must adopt the implementing act; if the opinion is negative the Commission may not adopt the act (but may submit a revised draft of the act to repeat the comitology process or submit the draft act to an appeals committee); and if the committee issues no opinion the Commission may adopt the act (except in limited cases).

In contrast to the position with delegated acts, the Parliament and the Council do not play any role in the adoption of implementing acts and once the comitology process is complete and the Commission formally adopts an implementing act, it will be published in the Official Journal and will take effect as specified in the implementing act.

### Technical standards

For ordinary delegated and implementing acts the Commission “holds the drafting pen” (although the text of the acts may be influenced by the process of consultation with experts, which may include the ESAs). By contrast, for Level 2 measures which take the form of technical standards, the ESAs themselves have the drafting initiative. In relevant areas, Level 1 legislation will usually require the relevant ESA (the EBA, ESMA or EIOPA) to

draft technical standards and to submit them to the Commission by a certain date. The ESAs will produce preliminary drafts of technical standards and conduct public consultations before finalising their drafts and sending them to the Commission. Technical standards are used to make technical rules, often involving quantitative thresholds and standards or complex methodologies for calculating them, as well as in order to achieve consistent reporting and disclosure standards. The procedure for adoption of technical standards is regulated by the regulations establishing the ESAs.

### Regulatory Technical Standards

Once the Commission receives final draft RTS from an ESA, it must forward them immediately to the Parliament and the Council. Within three months of receiving the draft RTS the Commission must decide whether to endorse the RTS and to adopt them or whether it wishes to amend the ESA's draft RTS.

If the Commission wishes to amend the ESA's draft RTS (or decides not to adopt the RTS), it must first send the draft RTS back to the ESA explaining the reasons for its decision. The ESA then has six weeks in which to amend its draft RTS and resubmit the draft RTS to the Commission.

If the Commission decides to adopt the RTS without amending the ESA's draft, the Parliament and the Council then have a one month “non-objection period” within which to consider the RTS. This period can be extended by a month. If the Commission adopts the RTS with amendments to the ESA's draft, then the non-objection period for Council and Parliament is three months (extendable by an additional three months).

If the Parliament and the Council do not object to the RTS within the relevant non-objection period, or both the Parliament and the

Council tell the Commission before the end of the period that they do not intend to object to the RTS, then the RTS will be published in the Official Journal and will enter into force on the date specified in the RTS. If either the Parliament (voting by simple majority) or the Council (by qualified majority) raise objections to the draft RTS then the RTS will not enter into force.

### **Implementing Technical Standards**

The process for the adoption of ITS is similar to that used for RTS. Level 1 legislation will require an ESA to draft the ITS and to submit the ITS for adoption by the Commission by a particular date and the ESA will carry out a public consultation before submitting its draft ITS to the Commission. As with RTS, the Commission may only amend the ESA's draft ITS if it first gives the ESA the opportunity to amend and resubmit its draft ITS to the Commission.

The key difference from RTS is that the Parliament and the Council are not involved in the review of ITS. Once the Commission receives draft ITS from the relevant ESA the Commission has three months (extendable by an additional month) within which to decide whether to adopt the ITS (with or without amendments). Once the Commission adopts the ITS, it will proceed immediately to publication in the Official Journal and the Council and Parliament have no power to object to the ITS.

### **Guidelines and Q&A**

Unlike regulatory authorities in some other jurisdictions, neither the Commission nor the ESAs have any general power to make Level 2 rules entirely on their own initiative. Instead, they require specific empowerment, through a delegation in Level 1 legislation, to make Level 2 legislation in identified areas.

By contrast, the ESAs do have a general power, under the Regulations establishing the ESAs, to issue formal Guidelines and Recommendations to competent authorities and financial market participants to ensure the consistent application of EU rules across Member States (and in some cases the Level 1 legislation will require the ESAs to produce Guidelines on particular topics). An ESA is under an obligation, where appropriate, to carry out a public consultation and a cost benefit analysis before issuing Guidelines or Recommendations. Although they are not themselves legally binding, the Regulations establishing the ESAs require competent authorities and financial market participants to “make every effort” to comply with Guidelines and Recommendations addressed to them – so regulators and firms do not have the choice of simply ignoring Guidelines or Recommendations of this kind. When an ESA issues Guidelines or Recommendations, competent authorities must inform the ESA whether they comply or intend to comply (and, if not, must state their reasons) The Guidelines or Recommendations can also require financial market participants to report on whether they comply with the Guidelines or Recommendations.

The ESAs and the Commission can also issue informal interpretative guidance which often takes the form of Q&A or FAQs. However, only the European Court of Justice can provide definitive interpretations of EU legislation and interpretative guidance is not binding on the ESAs, the Commission or national regulators.

The ESAs also conduct other activities to promote the consistent application of EU legislation, including peer reviews of national implementation.

# THE UK EXIT FROM THE EU

On 23 June 2016, the UK voted in a referendum to leave the EU and on 29 March 2017 the UK gave notice to the European Council of its intention to leave the EU in accordance with Article 50 of the Treaty on European Union. This notice started a process during which the EU and the UK negotiated the terms of the agreement under which the UK withdrew from the EU. The Withdrawal Agreement was ratified by both the EU and the UK in January 2020. The UK left the EU at 11.00 p.m. UK time on 31 January 2020 and no longer has any role in the EU's institutions or law-making processes.

In particular, the UK ceased to have a seat in the European Council and the Council of the EU. The UK no longer nominates a member of the Commission, all its 73 MEPs ceased to be members of the European Parliament and it ceased to be represented in the governing bodies of the ESAs and the ESRB. The Bank of England also ceased to be a member of the European System of Central Banks. EU agencies based in the UK, such as the EBA, have made arrangements to move to one of the continuing Member States.

The UK's withdrawal affects the relative influence of the remaining 27 Member States in voting decisions. In particular, most votes in the Council of the EU (and some votes in the boards of supervisors of the ESAs) are taken by qualified majority – where a qualified majority consists of 55% of the Member States representing 65% of the EU population (and a blocking minority must include at least four Member States). Previously, this required a positive vote of 16 out of the 28 Member States with a population of at least approximately 330 million, where the UK's population of 65 million represented some 13% of the total of approximately 510 million. After the UK exit, a qualified majority requires the support of 15 out of the 27 continuing Member States with a population of at least approximately 290 million out of a total of approximately 445 million (ignoring any future changes in population size). This

increased the relative voting influence of the other larger Member States.

The Withdrawal Agreement provides that the UK's departure from the EU will be followed by a transition period during which the UK will remain subject to EU law (including new laws coming into force during the transition period) and participate in the EU's single market and customs union but not its institutions. The transition period is intended to provide time for the UK and EU to reach agreement on the UK's future relationship with the EU (as set out in the New Political Declaration published on 19 October 2019), whilst minimising disruption for citizens and businesses in the UK and the EU while this happens.

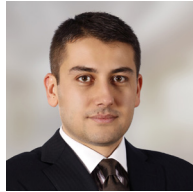
The transition period ends on 31 December 2020. The parties may extend the period by up to one or two years by a joint decision before the end of June 2020. However, the UK has indicated that it does not intend to agree any extension.

For more information and resources on Brexit, visit the Topic Guide on the Clifford Chance Financial Markets Toolkit at <https://financialmarketstoolkit.cliffordchance.com/brexit>

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