
A Tale of Two MiFIDs:

**The Impact of the Lisbon Treaty on the
EU's Delegated Legislation Process**

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Acronyms and abbreviations

BTS	Binding technical standards
CESR	Committee of European Securities Regulators
DA	Delegated acts
ECON	Economic and Monetary Affairs Committee of the European Parliament
ESA	European Supervisory Authority
ESC	European Securities Committee
ESMA	European Securities and Markets Authority
GUE/NGL	Confederal Group of the European United Left/Nordic Green Left
IA	Implementing acts
IGC	Intergovernmental conference
ITS	Implementing technical standards
MiFID	Markets in financial instruments directive
NGO	Non-governmental organisation
RCI	Rational choice institutionalism
RPS	Regulatory procedure with scrutiny
RTS	Regulatory technical standards
S&D	Progressive Alliance of Socialists and Democrats
TEC	Treaty establishing the European Community
TFEU	Treaty on the Functioning of the European Union

I Introduction

Although scholarly attention has tended to focus mainly on EU Treaties and legislative acts, the bulk of EU legislation is of the delegated kind – made by the European Commission (Commission) rather than the Council of Ministers (Council) and the European Parliament (Parliament). It has been estimated that about two thirds of directives, regulations and decisions in force are delegated ones as compared with only one third made by the Council and Parliament (Blom-Hansen 2014:55). Indeed some commentators have claimed that without this type of system “...the EU would be at a standstill...” (Guégen 2011:28). Nor is delegated legislation confined exclusively to technical detail; it often deals with matters of principle or political contestation (Craig 2010:49), covering substantial political, economic and financial measures across the policy spectrum (Kaeding and Hardacre 2010:1). The delegated legislation process is therefore an important part of the overall EU governance system.

Given the extent of delegation to the Commission, Member States have understandably been concerned about maintaining control of the process of making this secondary legislation. The solution adopted in the early 1960’s was ‘comitology’¹: the requirement for the Commission to produce delegated legislation with committees of Member State representatives who would be able to give their opinions on the legislation and, in the more salient policy areas, have it referred to the Council for final decision. This process was a long-standing source of inter-institutional dispute within the EEC/EU as the Parliament originally had no role in it and fought for greater oversight of comitology, seeking equal treatment with the Council (Vos 2009:3).

Various changes to the comitology system were made over time but, until the Lisbon Treaty (Lisbon), these were essentially incremental (Brandsma and Blom-Hansen 2011:39). However, Lisbon (taking the EU Constitutional Convention’s output) “revolutionised the constitutional principles” governing delegated legislation (Schütze 2011:681). The legislation was divided into two new categories – quasi-legislative ‘delegated acts’ (DA) and the more executive ‘implementing acts’ (IA) – with new control processes: an ex post system for the former and a

¹ In this dissertation use of the term ‘comitology’ is restricted to cases where a formal committee votes on delegated legislation.

modified version of comitology for the latter. For the first time the Parliament was placed on an equal footing with the Council, although only in respect of DA. However, it has been questioned whether, despite the advances made, the Parliament was actually the winner from the Lisbon changes or whether the Commission was the main beneficiary.

Comitology and delegated legislation have attracted increasing academic attention over the last twenty years. One particular debate has been whether the process was primarily one of control over the Commission and reflecting traditional bargaining behaviour or whether it had metamorphosed into a form of 'deliberative supranationalism', involving a collaborative search for the technically best outcome (Joerges and Neyer 1997). However, studies in recent years have mainly concentrated either on the contest over the design of the framework rules for delegated legislation or the preferences of institutional actors regarding choice of the different types of control mechanism available. Relatively little work has been done on the actual operation of the delegated legislation process in specific cases and academics such as Christiansen and Dobbels (2012:3) have pointed to the need "to analyse empirically if and how the formal legal changes actually determine the content of policymaking".

This dissertation aims to contribute to the empirical data on the operation of the new post-Lisbon system in practice and how it compares with the previous control framework. The focus will be on three questions:

Q1. What effects, if any, have the Lisbon changes had on the inter-institutional balance of power regarding delegated legislation? In particular, has the Parliament been able "to turn rights into results" (Christiansen and Dobbels 2013:1172) ?

Q2. What differences, if any, have the Lisbon changes made to the character of and approach to the operation of the delegated legislation process as regards the balance between the 'controlling' and 'deliberative' modes of policy-making ?

Q3. Is the new system of making delegated legislation operating in the way intended by the framers of the relevant Constitutional Treaty provisions subsequently enacted in the Lisbon Treaty ?

It will be argued that the Lisbon changes have made a significant difference to the inter-institutional balance of power, especially the relative positions of the Parliament and Council. The evidence is less clear cut on the second and third questions but Lisbon does seem to have had some effect on the mode of policy making and the DA system generally can be argued to be broadly operating as intended.

Method and Choice of Case Study

It is proposed to answer the questions through process tracing and a paired comparison of two case histories involving delegated legislation: one set produced before Lisbon and the other after its entry into effect. The chosen cases are the delegated legislation supplementing respectively the 2004 Markets in Financial Instruments Directive² ('MiFID I'), and the 2014 Markets in Financial Instruments Directive³ and Markets in Financial Instruments Regulation⁴ (collectively termed 'MiFID II').

These pieces of legislation have been chosen for three reasons. First, both concern the regulatory regime for the operation of investment business and financial markets in the EU, with MiFID II updating and amending the original regime in the light of financial market developments and the general financial crisis. It is therefore a matter of comparing like with like as regards policy area, with many of the same topics appearing in each set of legislation. Second, the two 'MiFIDs' are classic examples of 'framework acts' where the subsequent delegated legislation, while undoubtedly technical, is of more than purely technical importance, involving substantive policy issues. Third, the saliency of financial regulation also means this is an area where the three inter-institutional partners have a significant interest. Both packages were major ones: MiFID I was a flagship of the EU's Financial Services Action Plan of the early noughties; MiFID II one of the major post-financial crisis reform measures. Hence if the Lisbon changes have affected how delegated legislation is made, this should be observable by comparing the experience of the processes of producing, and outcomes of, the two sets of legislation. It is acknowledged that, as described in chapter 3 below, for the financial services area there are (and were) special variants of the standard delegated legislation regimes. So it is not claimed that the MiFIDs are absolutely typical EU legislative dossiers (if such exist). Nevertheless, they provide a good comparison in their own terms.

Given the extent of the delegated legislation in these dossiers – especially MiFID II which resulted in 42 delegated and implementing acts – the focus will be only on the key issues which arose during each process, with an illustrative case example for MiFID II. The research draws on documentary sources including proposals for legislation; versions of legislative texts; records of Parliamentary debates and expert group meetings; and inter-institutional letters. Six interviews were also

² 2004/39/EC

³ 2014/65/EU

⁴ 600/2014/EU

conducted with officials from each of the relevant actors involved: a Member State; Commission; Parliament; and ESMA. Two interviewees participated in both MiFID processes so were able to give their views on the impact of the changes.

Structure

The next chapter of the paper surveys the applicable theories relating to the delegated legislation process and summarises the conclusions of empirical evidence produced so far. On the basis of this material, some testable hypotheses are developed. Two empirical chapters follow. The first describes the pre- and post-Lisbon delegated legislation regimes, including the variants for financial services regulation, explaining the reasons for the variations. The second covers the two case studies. The paper concludes by summing up what can be observed from the evidence presented.

II Theory and Literature Survey

The two main theories explored in this dissertation are:

- (i) the rational choice institutionalist one of comitology (and the delegated legislation oversight process more generally) as a mechanism for controlling the power entrusted to the Commission to make EU secondary legislation and enabling the expression of the policy preferences of Member States and, with its increasing involvement in the process, of the Parliament; and
- (ii) the sociological institutionalist/constructivist view of comitology as a forum for ‘deliberative supranationalism’ – a culture of inter-administrative partnership promoting co-operation and identifying areas of interdependence and common interest (Joerges and Neyer 1997:620). The focus is not on bargaining for individual national interests but producing the best technical solution for the EU.

Rational choice institutionalism (RCI) posits that actors are motivated by self-interest and guided by instrumental logic (Blom-Hansen 2014:57). It applies a principal-agent perspective to comitology. Principals need to delegate powers to make secondary legislation to their agent for efficiency reasons to reduce legislative transaction costs (Brandsma and Blom-Hansen 2017:22). But principals need to monitor the agent’s use of those powers to prevent loss of control and the risk of the agent pursuing its preferences rather than those of the principals (ibid). The comitology/delegated legislation system is the means of doing this, meeting the twin needs for administrative efficiency and institutional control (Blom-Hansen 2011c:348). It is “first and foremost an oversight mechanism” reflecting the need to control the Commission (Blom-Hansen 2011a:8).

Moreover, as rational actors, the institutional parties involved have an interest in maximising the extent of respectively the control (in the case of the Council/Member States and Parliament as principals) or discretion (for the Commission as agent) which the process affords them so as to increase their influence over the outcomes on policy dossiers subject to the process (Héritier et al 2013:1). Indeed, they also have an interest in the other institutional partners being in a weak position in this regard (Brandsma and Blom-Hansen 2016:537). This accounts for the importance

attached by the parties to the design of the system and framework rules and the complexity of the arrangements (Blom-Hansen 2011c:348).

Regarding mode of operation, from the RCI perspective, comitology is seen for Member States as being a continuation of negotiations in the Council, with the committees as a mini-Council for Ministerial stand-ins (Brandsma and Blom-Hansen 2009:723). Inter-governmental bargaining to secure the interests of the individual Member States in the dossier under consideration is the decision style, with the actors' preferences being exogenous to the negotiation (ibid). So in this respect the theory aligns with Moravcsik's liberal intergovernmentalist conception of EU integration – bargaining in an inter-governmental forum to secure one's policy preferences with delegation to the Commission only to the extent necessary and controls in place over the Commission's discretion (Moravcsik 1993). However, as noted above, the RCI literature does not just focus on the Member States/Council as actors but also recognises that two supranational EU institutions – the Commission and the Parliament – both possess and strive to pursue their own preferences in this area. Case studies have shown that the Commission can play a very active policy promoting role in comitology committees and is not limited just to being a neutral secretary/mediator for Member States, although it does clearly perform this latter role too (Brandsma and Blom-Hansen 2010:500).

The constructivist view acknowledges that the comitology procedures were originally created to constrain the executive powers delegated to the Commission but contends that they have evolved into a different type of system (Böhling 2009:1). Pierson's historical institutional concept of the unintended consequences of processes is relevant here (Pierson 1996): the comitology process has created its own effects and there has been an unintended drifting away from Member States maximising their own interests in favour of a more supranational approach to the making of delegated legislation. Over time those Member State representatives attending comitology committees have, through a process of socialisation and long-term interaction, moved towards "a more consensual and problem-solving approach to decision-making between the Commission and the committees" (Vos 2009:25). Rather than strategic bargaining behaviour, the focus is on finding solutions to problems through persuasion, reasoning and good arguments (Joerges and Neyer 1997:620). The Commission acts as co-ordinator of a network of experts from Member States operating as a team in a mutual learning process searching for a Community solution to a transnational problem (Craig 2010:55). Thus the committees assist rather than check the Commission's exercise of executive powers (Böhling 2009:18).

In the same way as the RCI view overlaps with liberal intergovernmental perspectives, so does the constructivist with neo-functionalism. The socialisation process and shift towards deliberative supranationalism can be viewed as an example of Haas's concept of national actors shifting their loyalties towards a new [European] centre (Haas 1968) – in this case more to the idea of pursuing the common European good than to a European institution per se. Indeed, proponents of deliberative supranationalism do distinguish between this concept and 'orthodox supranationalism' in which the European institutions and, for comitology, specifically the Commission, play the dominant role (Joerges and Neyer 1997:617).

It is also important to note that proponents of the respective theories do not take an absolutist view. For example, Pollack, who favours the RCI view, acknowledges that this does not mean that deliberation never occurs in comitology committees or that the committees are used exclusively by Member States with fixed preferences to control the Commission (2003:153). Similarly, Joerges and Neyer recognised that the relative intensity of both modes of approach may vary according to the conditions prevailing (1997:619). Empirical studies of comitology have found elements of both controlling and deliberative modes. For example, a survey of the views of Dutch and Danish national representatives on how the committees functioned (conducted before the Lisbon changes) found that inter-governmental bargaining was the prevailing feature of some committees, in others it was deliberative supranationalism; in others again the two modes co-existed, while in some neither pre-dominated (Brandsma and Blom-Hansen 2009:729). Other studies have shown that the extent to which Member State representatives in comitology committees are accountable to their superiors in national capitals also varies (e.g. Brandsma 2010) and it is argued this is an important determining factor regarding mode of operation (Blom-Hansen 2011a).

In sum, based on the empirical evidence so far available, it is reasonable to expect that both modes will appear to a greater or lesser extent in the operation of the delegated legislation process. So it is worth investigating the impact of the Lisbon changes on the delegated legislation process from both the RCI and constructivist perspectives.

How has Lisbon changed the inter-institutional balance of power ?

From the RCI perspective the focus is on how Lisbon has changed the inter-institutional balance of power. As noted above, the academic literature emphasises the importance which the institutional partners attach to the design of the framework governing the making of delegated legislation. The main inter-institutional tension over the framework rules

has stemmed from the fact that, until the Lisbon changes, compared to the Council, the Parliament was an unequal partner in the process, waging a long battle to try to increase its powers (Georgiev 2012:111-2). But the Commission also considered comitology as interfering with its executive powers which it ought to be able to exercise alone (Vos 2009:5). The various actors have therefore spent considerable time and energy bargaining over the governance framework to try to secure outcomes in their favour (Pollack 2003:152).

Other studies have also shown that within the prevailing governance framework the institutional actors will seek those particular regimes which give them the best degree of control. Thus the Commission will opt for those variants which give it the maximum discretion, though it is strategically prepared to accept tougher control mechanisms in order to secure delegations; the Council chooses those which afford it the most stringent control powers; and the Parliament those which give it the greatest say or, in the absence of such mechanisms, ones which place the Commission under fewer constraints (e.g. Blom-Hansen 2011a; Brandsma and Blom-Hansen 2017). This is consistent with findings more widely that supranational institutions will behave strategically, tempering their ambitions with a realistic assessment of what can be achieved in given circumstances (Bickerton, Hodson and Puetter 2015:712-3).

Regarding the impact of the Lisbon changes, scholars generally acknowledge that the Parliament's position was significantly enhanced, putting it on an equal footing in terms of rights with the Council regarding the new DA regime. Some scholars have therefore judged that the Parliament emerged as the winner from Lisbon in this area (e.g. Craig 2010:58). It had at last succeeded in converting its decision-making powers into influence over comitology procedures (Georgiev 2012:119). However, others contend that the Commission is the real winner, on the assumption that the DA regime predominates (e.g. Curtin 2009:134; Hofmann 2009:504). Indeed it has been argued that "...democratic control of the Commission by those who have given it its mandate has ebbed away" (Guégen, 2011:16).

The doubts about Parliament as the winner from Lisbon are given support by an analysis of the post-Lisbon negotiations over the implementation of the new delegated legislation regimes (Christiansen and Dobbels 2012). The authors caution that it is necessary to analyse empirically if and how formal legal changes determine the actual conduct of policy-making. They contrast the Parliament's 'victory' in the Treaty negotiations with its failure to have a strong impact in the subsequent stage of completing the detailed framework rules – the negotiation of the 'Common Understanding

on Delegated Acts' and the Comitology Regulation⁵ (ibid:18). They seek to explain the Parliament's 'underperformance' by reference to factors such as the resources (in particular, time and scope available for intra-Parliamentary opinion formation) and the degree of politicisation and political attention a Commission proposal receives in the legislative process. The Parliament's loss of the implementation game is attributed, inter alia, to the shortness of the time available to consider the proposals and the failure of MEPs to engage sufficiently in the negotiations, leaving them predominantly to Parliamentary staff (ibid:14-15).

However, while these factors were formulated to explain the Parliament's underperformance, they could also be used to identify circumstances in which the Parliament would be expected to engage effectively to pursue its policy preferences in particular delegated legislation dossiers. On this basis the first hypothesis posited is therefore:

H1 Where the Parliament has adequate time and information to consider proposals for DA and their subject matter is of sufficient political interest to engage MEPs' attention, it will be able to use its new rights to influence the content of those measures.

Other things being equal, one should expect to see the differences in the inter-institutional balance of power between the pre-and post-Lisbon case histories reflected in the extent of the Parliament's involvement in and its impact on the two sets of delegated legislation.

Assessing Influence over Policy Outcomes

What should expectations be regarding the way in which institutional influence over the delegated legislation process is brought to bear? Studies of the pre-Lisbon comitology process have emphasised that the Commission was able to adopt more than 99% of implementing measures submitted to comitology committees, with few cases referred to the Council (e.g. Christiansen and Polak 2009:7). Indeed, this has been cited as evidence indicating the shift of comitology towards a more consensual and problem-solving approach (Vos 2009:25). More generally, it has been argued that parliamentary control of delegated legislation is severely restricted where (as is formally the case in the EU) it is not possible to amend measures but only either to approve or reject them (Pünder 2009:368). Schütze (2011:686-7) uses this reasoning to contend that the DA regime with its 'take it or leave it' ex post controls has enhanced the Commission's authority. And a recent survey of the exercise of the co-

⁵ Reg EU 182/2011

legislators' veto rights over delegated legislation including the DA regime showed "extremely modest formal use of legislative vetoes" (Kaeding and Stack 2015:1269).

However, other scholars have noted that in practice matters are not so straightforward. Dehousse et al have argued that the infrequency of formal contestation of Commission proposals "should not be taken as an indicator of the consensual nature of decision-making within committees" (2014:854). Their analysis of comitology committee voting records for measures adopted in 2008 showed that in over a quarter of cases in the sample there had been some opposition to Commission proposals during the process (ibid:844). It has also been argued that the Commission operates in the shadow of the Council's formal powers which influences its behaviour in seeking to secure approval of its proposals (Curtin 2009:118). Nor does the fact that controls are only formally exercisable after a measure's adoption by the Commission mean it is impossible to obtain amendments to a draft measure on an ex ante basis in the process's preparatory phase. A study of the Regulatory Procedure with Scrutiny (RPS), introduced by the 2006 Comitology Decision and giving the Parliament as well as the Council an ex post right of veto on the measures subject to it, showed that in certain cases the Parliament was prepared to threaten using its veto power to secure modifications to measures – giving it "a de facto right of amendment" (Hardacre and Damen 2009:16). It is argued that this pattern of behaviour can be expected to continue under the DA regime which, like the RPS process, provides no formal right of modification (Kaeding and Hardacre 2010:17).

On this basis the second hypothesis posited is:

H2 Although the co-legislators' formal control powers over DA are ex post ones, in practice the control regime will operate on ex ante basis: the key phase in the process will be the preparatory one before an act's adoption by the Commission.

The best impact assessment measure should therefore be the extent to which an actor's policy preferences can be secured in this phase rather than focusing on use of formal objection powers.

Balance between Controlling and Deliberative modes

Finally, what do previous studies indicate regarding how the new delegated legislation processes will affect the balance between 'controlling' and 'deliberative' forms of policy-making, given both modes have been found in operation ? Brandsma and Blom-Hansen's pre-Lisbon

survey of Dutch and Danish representatives across comitology committees found that the inter-governmental bargaining mode was primarily associated with distributive effects and preference intensity (although technical complexity also had an effect), while technical complexity had a strong impact on the deliberative mode (although – somewhat surprisingly – political interest also affected deliberation) (2009:734-5). Their central finding was that participants' interaction style was caused by the nature of the cases they discuss (ibid:736).

Obviously the post-Lisbon regime is different in a number of significant areas. The Parliament is an explicitly political actor which is not expert in its own right. Its involvement in DA might be expected to increase the process's politicisation, particularly where MEPs are keenly interested in the legislation's subject matter. Since DA are the 'quasi-legislative' ones, this can also be expected to increase the saliency of this category of measure. Against this, the absence of comitology committees for DA and involvement of Member States representatives in the process as pure experts rather than voting members might be factors favouring the deliberative mode. Nevertheless, for DA it seems likely that Brandsma and Blom-Hansen's central finding will continue to hold true. However, given that under the post-Lisbon regime IA will tend to concern more purely technical issues not involving policy decisions and likely to have fewer distributive effects and less preference intensity, this process may move more towards the deliberative mode. The final hypothesis put forward is therefore:

H3 For DA the mode of operation will be determined by the nature of the subject matter of the legislation. For IA the Lisbon changes will favour greater use of the deliberative mode.

III The Delegated Legislation Regimes Before and After Lisbon

The Pre-Lisbon Regime

The general comitology regime during the preparation of the MiFID I implementing legislation was that established by the 1999 Comitology Decision⁶, based on Article 202 TEC. This provided that, except in specific cases, the Council should confer on the Commission powers for the implementation of rules which the Council laid down and that the Council could impose certain requirements (to be established in advance) regarding the exercise of these powers (Schütze 2011:677). Comitology procedures were limited to three, plus one special 'safeguarding' procedure⁷:

- i) Advisory: no binding consequences if the committee voted against the Commission proposal and no appeal to the Council to prevent the Commission's adopting a measure;
- ii) Management: if a qualified majority voted against a proposal the Commission could adopt it but it was referred to the Council which had three months to take a different decision by qualified majority;
- iii) Regulatory: if there was no qualified majority in favour of a proposal, it was referred to the Council which had three months to object to the Commission's proposal by qualified majority, otherwise the Commission could adopt the measure (Brandsma 2013:72)

Member State control powers were somewhat weaker than under the previous 1987 Comitology regime: the Council's ability in some circumstances to reject a draft measure through a simple majority vote was abolished, replaced by a non-binding declaration that the Commission was to avoid going against any 'predominant position' that might emerge in the Council (ibid:71).

In contrast, the Parliament gained a new prerogative in areas where it acted as co-legislator to adopt a non-binding resolution if it considered the Commission had exceeded its implementing powers (Kaeding and Hardacre 2010:1). An inter-institutional agreement between the

⁶ Council Decision 1999/468/EC

⁷ This covered very sensitive dossiers where any Member State could refer the Commission's proposal to the Council for decision. This procedure was hardly ever used.

Commission and Parliament in 2000 also provided for the latter to receive simultaneously with comitology committee members and on the same terms information such as: draft agendas for committee meetings; draft implementing measures submitted to the committees under co-decision legislative acts; voting results; and summary records of meetings (European Parliament and Commission 2000:19).

The Parliament's powers were subsequently significantly increased by the 2006 Comitology Decision⁸, adopted after pressure from the Parliament when the Constitutional Treaty changes, described below, were blocked following the no votes in the French and Dutch 2005 referenda (Blom-Hansen 2011b:358). The new RPS was added to comitology⁹. This procedure applied to measures of general scope taken under co-decision and allowed the Parliament and the Council to block a measure proposed by the Commission if it:

- exceeded the Commission's implementing powers; or
- was not compatible with the aim or content of the legal act; or
- exceeded the EU's powers or remit (subsidiarity and proportionality).

This took the form of a right of veto by either institution, usually up to 3 months after the committee had approved the Commission proposal. If the committee failed to issue a positive opinion on a proposal, the Council could intervene either to block it, or adopt it itself unless the Parliament opposed it (European Commission 2018). The Parliament obtained veto rights over delegated legislation for the first time (Blom-Hansen 2011b:347) while still not on an entirely equal footing with the Council¹⁰ (Kaeding and Stack 2015:1271).

The Lamfalussy Regime for Financial Services

While the general comitology framework at the time of MiFID I gave the Parliament very limited powers, there was a special regime for the financial markets sector which redressed the balance somewhat. This was the product of an initiative to promote faster integration and deregulation of European financial markets, with the creation of a 'committee of wise men' under the chairmanship of Baron Alexandre de Lamfalussy (Hix and Høyland 2011:199). Their recommendations included establishing a new legislative framework for this area. 'Level 1'

⁸ Council Decision 2006/512/EC

⁹ The RPS did not come into force until after the adoption of the MiFID I implementing measures.

¹⁰ If the Council blocked a proposal it went back to the Commission without the Parliament having a say.

legislation enacted under the normal EU legislative procedure would be limited to broad policy outlines; detail would be left to implementing measures ('Level 2') adopted by the Commission but overseen by a new (regulatory) comitology committee – the European Securities Committee (ESC) (Pollack 2003:149). There would also be an EU Securities Regulators Committee (CESR) responsible inter alia for providing technical advice (ibid). Lamfalussy did not specify a clear dividing line between Level 1 and 2 measures (Blom-Hansen 2011a:76). However, as the background to the initiative was regulatory flexibility and ability to fast track legislation, a reasonable assumption was that much of financial market regulation would be set at Level 2 (Blom-Hansen 2011c:350).

The European Council accepted the Lamfalussy proposals but the Parliament was concerned that significant policy issues would be pushed from Level 1, where it was co-legislator, to Level 2, where it would have many fewer rights. It therefore sought a call-back right (ability to insist a measure was handled through the normal legislative procedure) if it was dissatisfied with the operation of the delegation of Level 2 powers (Pollack 2003:150). It did not achieve this but, after negotiations, a compromise was agreed, including a 'Solemn Declaration' to the Parliament by then Commission President Romano Prodi. Parliament would have three months rather than the standard one in which to examine draft implementing measures concerning this sector and the scrutiny would involve not only the scope of the measures (whether they were ultra vires) but also their substance (Héritier et al 2013:39). A 'sunset clause' would also be included in Level 1 legislation setting a specific date when the delegation of powers would automatically expire (ibid). In the Solemn Declaration Prodi also assured the Parliament that the Commission would "always take the utmost account of its position" (European Commission, 2002:1). The Parliament was therefore placed in a slightly more equal position vis a vis the Council.

Revising the system for dealing with delegated legislation: the Constitutional and Lisbon Treaties

Neither the 1999 Comitology Decision nor the Lamfalussy compromise significantly redressed the Parliament's weak position regarding scrutiny of the Commission's use of delegated powers. The Parliament was increasingly concerned that too many matters were being dealt with under delegated powers, thereby undermining the co-decision procedure for primary legislation (Héritier et al 2013:38). The findings of a study of inter-institutional preferences following the agreement of the Amsterdam Treaty confirm the Parliament was right to be concerned. With the advent of co-decision, the Council and Commission increasingly favoured delegation

over legislation without delegation, while the Parliament sought to oppose delegation except under the condition of limited scope (Héritier and Moury, 2011:159-161). The Parliament therefore continued to press that “...implementing measures adopted on the basis of a legal act adopted under the co-decision procedure should also be subject to equal control by the two co-legislators” (European Parliament 2002:2).

There was also a more fundamental logical problem with comitology. The Commission’s implementing powers covered two very different types of measure under the same mechanism:

- i) The power to apply or implement all or part of a legislative act at EU level (where the primary legislation provided for this); and
- ii) The power to update certain provisions of a basic act, thereby giving the Commission powers to amend or adapt non-essential elements of the legislative act - i.e. quasi-legislative powers.

While there was logic in Member States having a role in the first category of measure, scrutiny of the latter category should properly lie with the legislature (Piris 2010:99).

Delegated legislation procedures were an issue examined by the EU Constitutional Convention, established by the 2001 Laeken European Council. The topic was allocated to Working Group IX on Simplification which considered how to streamline decision-making procedures and introduce “some logic and clarity into the delegation of powers to the Commission” (Piris 2010:95). The Working Group pursued the idea of distinguishing between acts which develop a legislative act and those of a purely implementing nature: in the former case it envisaged there could be a call-back system permitting the legislator to reconsider these executive acts, especially if they went beyond the legislator’s framework (Brandsma and Blom-Hansen 2017:66).

In its final report¹¹ the Group elaborated on its ideas and outlined the rationale for its proposals:

“At present there is no mechanism which enables the legislator to delegate the technical aspects or details of legislation while retaining control over such delegation. As things stand, the legislator is obliged either to go into minute detail in the provisions it adopts, or to entrust to the Commission the more detailed or technical aspects of the legislation as if they were implementing

¹¹ CONV 424/02

measures, subject to the control of Member States.... To remedy this situation the Group proposes a new type of ‘delegated’ act which, accompanied by strong control mechanisms could encourage the legislator to look solely to the essential elements of an act and to delegate the more technical aspects to the executive, provided that it had the guarantee that it would be able to retrieve, as it were, its powers to delegate.” (European Convention 2002:8-9)

The DA would be additional to IA which would continue to be made under comitology procedures. The control mechanisms for DA would be exercised equally by the two co-legislators and would include: right of call back “should the delegated powers be exceeded (*ultra vires*) or where the issues are of major political sensitivity or have major financial implications”; an *ex post* right of objection to measures; and a sunset clause so that the delegation would lapse after a certain period and require renewal by the legislator to continue (*ibid*:10-11). The right of objection was not limited to particular grounds.

The Group’s proposals were included in the draft Constitutional Treaty (as Articles 35 and 36) subject to only two changes: clarification that for delegated acts call-back could be used independently by either co-legislator; and abandonment of the idea of sunset clauses as a control mechanism (Brandsma and Blom-Hansen 2017:67). To apply the controls the Parliament would need an absolute majority of its members; and the Council a qualified majority¹².

Despite the significance of splitting delegated legislation into two categories, giving the Parliament equal rights over DA and changing the *ex ante* comitology control mechanism into an *ex post* objection one for DA, the Convention’s proposals were not reopened for negotiation at the Inter-Governmental Conference (IGC) on the Constitutional Treaty (Héritier et al 2013:42). Through all the subsequent twists and turns of the process, they survived into the final Lisbon Treaty (as Articles 290 and 291 TFEU), with only minor drafting changes (Brandsma and Blom-Hansen 2017:67). However, in both IGCs, declarations were adopted aimed at preserving the right of Member States’ experts to be consulted on DA in the area of financial regulation: “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 legislation in the

¹² As from November 2014 under Article 290(3) TFEU a ‘superqualified’ majority is required - at least 72% of the members of the Council, representing Member States comprising at least 65% of the Union’s population (Brandsma and Blom-Hansen 2017:10).

financial services area, in accordance with its established practice”¹³ (Héritier et al 2013:46).

The Council was seen as the clear loser from the changes - “ The Council dropped the ball” (Craig 2010:76) – while the creation of DA has been described as a significant move to increasing parliamentary political control over delegated powers (Hofmann 2009:504). As noted above, however, there is dispute over which institution was the real winner, particularly in the light of the post Lisbon negotiations in this area.

The Common Understanding and the Comitology Regulation

These negotiations were needed to complete the new framework rules for delegated powers. For IA, Article 291(3) TFEU provided that “...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”. While Article 290 required no adoption of secondary legislation to ensure its implementation, the institutions wanted an a priori understanding to be reached on using this regime (Brandsma and Blom-Hansen, 2011:6). Agreeing these detailed framework rules – the Common Understanding and the 2011 Comitology Regulation - caused more friction between the institutions than agreement of the Treaty provisions themselves.

A detailed description of the negotiations is beyond the scope of this dissertation and they have already been the subject of much scholarly analysis (e.g. Brandsma and Blom-Hansen 2011; Craig 2011; Hardacre and Kaeding 2011; Christiansen and Dobbels 2012). However, in the context of the theoretical debate it is notable that the positions taken by the institutions support the RCI view of them as competence/control maximisers. Thus the Commission sought to expand its discretion. The Parliament and Council opposed this and tried to enhance the strength of their respective influence over production of delegated legislation. For example, in respect of DA, the Commission originally consulted on the basis that the delegation of power should be of infinite duration (Brandsma and Blom-Hansen 2017:72). This met opposition, especially from the Parliament, and the issue was left open in the Common Understanding: “The basic act may empower the Commission to adopt delegated acts for an undetermined or determined period of time” (European Commission, European Parliament, and Council 2011:2).

¹³ Declaration (39) on Art. 290 TFEU.

There was particular inter-institutional conflict over the description of experts to be consulted by the Commission in preparing DA (Blom-Hansen 2011a:20). The Commission's Communication on the implementation of Article 290 stated that "... the Commission intends to consult systematically experts from the national authorities of all Member States ..." (European Commission 2009c:6). The Council supported privileging Member State experts while the Parliament was opposed (Brandsma and Blom-Hansen 2011:10). A neutral compromise was eventually agreed: "The Commission when preparing and drawing up delegated acts will...carry out appropriate and transparent consultations well in advance, including at expert level"¹⁴ (European Commission, European Parliament and the Council 2011:1). A separate Framework Agreement between the Parliament and Commission provided that, on request, the Commission may decide to invite the Parliament's experts to preparatory expert meetings (European Parliament and European Commission 2010:55).

The Comitology Regulation negotiations followed a similar pattern. The Commission's proposal¹⁵ involved fewer and weaker constraints on its powers than in the pre-Lisbon comitology system. Procedures were limited to two: the non-binding advisory (envisaged as the general rule); and the examination (CEPS/Egmont/EPC 2010:99).The latter would be both more limited in scope and less stringent than the previous regulatory procedure as the Commission would be able to adopt a proposed implementing act unless there was a qualified majority against in the committee Brandsma and Blom-Hansen 2017:76). Nor was provision made for referral to the Council in the event of a negative opinion from a committee, or a right of scrutiny for the Parliament (Christiansen and Dobbels 2012:11).

The IA regime was of lesser importance to the Parliament than that for DA since Article 291(3) specifically referenced Member State control of the Commission's exercise of these powers, thus limiting the role Parliament could play here (Schütze 2010:1423). However, again both co-legislators opposed the Commission's attempt to dilute the controls: the Council sought more constraining voting procedures and the creation of an appeals committee under the examination procedure, while the Parliament pressed for reinstatement of its scrutiny right regarding ultra vires measures and to prevent the procedure for dealing with negative

¹⁴ The Guidelines for the Services of the Commission on Delegated Acts subsequently stated that, regarding preparation of acts, as the general rule "... The Commission services should systematically consult experts. Consultations must involve experts from all the 27 Member States" (European Commission, 2011a:23).

¹⁵ COM (2010) 83 final

votes in examination committees from re-establishing the Council as the appellate body (Brandsma and Blom-Hansen 2017:76).

The final Regulation took account of the co-legislators' preferences. The Council secured more stringent control procedures for some policy areas and an Appeals Committee in the event of relevant negative committee opinions. The Parliament's successes were arguably more formal than substantive. The scrutiny right (awarded to both co-legislators) was limited to whether it was considered that "... a draft act exceeds the implementing powers provided for in the basic act..." and then the only obligation on the Commission was to review the measure and inform the co-legislators of its intentions (European Parliament and Council 2011:17). While the Parliament did secure that the Commission chaired the Appeals Committee, the fact that it is otherwise composed of Member State representatives means that "there is no real loss to the Council" (Héritier et al 2013:55). Such outcomes led to Christiansen and Dobbels's conclusion that, while the Parliament had done well in the Treaty phase of revising the delegated legislation regime, it was the loser in the subsequent implementation game (2013:1166).

The general post-Lisbon DA and IA regimes are summarised in this dissertation's Annex. However, the key difference is that for DA the co-legislators have equal control rights; while for IA the Council (in the guise of Member States) retains its predominant position, with the Parliament having very limited powers. Scholars have criticised the lack of a clear dividing line between Article 290 and 291 measures and noted the potential for further inter-institutional conflict over choice of DA or IA procedure (e.g. Craig 2010; CEPS/Egmont/EPC 2010; Blom-Hansen 2014). The Parliament has a clear incentive to choose the DA mechanism; the Council, IA. Surveys of the choice of empowerment mechanism in post-Lisbon legislative acts have confirmed this (e.g. Brandsma and Blom-Hansen, 2016; 2017). However, like the pre-Lisbon regime, the post-Lisbon one made special provision for financial services delegated legislation. This affects the inter-institutional dynamics here.

The Special Financial Services Regime

This regime stemmed from changes to the governance framework for EU financial services regulation recommended by the de Larosière committee established to review the regulatory framework following the general financial crisis. A core part of the vision was the creation of new European Supervisory Authorities (ESAs), formal EU institutions with a significant role (European Commission 2009a:2). Responding positively to the

recommendations, the Commission stressed a particular need to define for the financial sector “one harmonised core set of standards (a single rulebook) ... applied throughout the EU by all supervisors” while noting that “the new European financial supervisory framework must be fully accountable to political authorities in the EU” (ibid:4). One of the new ESAs’ most important functions would be developing “binding technical standards in specific areas and on the basis of community legislation”, the standards applying “provided the Commission endorses [them] by non-opposition” (ibid:9). The detail of the binding technical standards (BTS) regime and the process for producing them were elaborated in the subsequent Regulations dealing with the ESAs’ establishment. This dissertation will focus on the European Securities and Markets (ESMA) Regulation¹⁶ as ESMA was responsible for the MiFID II measures, although the relevant provisions are common to all three Regulations.

The proposal for and negotiation of the Regulations again provide evidence for the RCI view of the delegated powers regime: the Commission sought to give itself discretion regarding adoption of BTS; the co-legislators to institute a tighter control regime in line with their preferences. The Commission’s proposal provided for ESMA to produce “draft technical standards which do not involve policy choices” which would have to be endorsed by the Commission to have legal effect (European Commission 2009b:16). The Commission would be able not to endorse them or endorse only in part or with amendments if “for example, the draft technical standards were incompatible with Community law, would not respect the principle of proportionality or would run counter to the fundamental principles of the internal market for financial services as reflected in the *acquis* of Community financial services legislation” (ibid). The proposal noted that this regime was without prejudice to the Commission’s own powers to adopt implementing measures under comitology procedures. Only one category of BTS was envisaged and neither co-legislator would be involved in the process of endorsing the standards.

The Council’s General Approach included amendments imposing constraints on the scope of BTS: they should respect both existing and foreseen Level 2 measures and would be limited to determining the conditions of application of legislation (Council 2009:9). It also set out a process to be followed if the Commission wanted to change draft BTS adopted by ESMA, including allowing ESMA to resubmit amended standards (ibid:27). The Parliament’s ECON Committee voted for more far reaching amendments. These included splitting BTS into regulatory and implementing ones. The former would be treated as DA: after

¹⁶ 1095/2010/EU

adoption by the Commission, they would have to be notified to the Parliament and Council which would have a right of objection exercisable within a prescribed period (European Parliament 2010 Amendments 63 & 82). An amendment also specified that, if the Commission did not endorse or amended a draft BTS adopted by ESMA, the Parliament or Council could convene a meeting with the relevant Commissioner and ESMA Chair so they could present and explain their differences (ibid Amendment 86). One of the Parliament's motivations was to try to protect the standards drafted by ESMA as the expert technical body from subsequent political interference (Interview 1). In this respect the Parliament can be seen as promoting a technocratic deliberative supranational approach to standard making, while also ensuring its own oversight powers over the process.

After intensive inter-institutional negotiations the ESMA Regulation contained a very different regime for BTS to the Commission's proposal. Parliament succeeded in differentiating between regulatory technical standards (RTS), adopted by means of DA under Article 290 TFEU, and implementing ones (ITS), adopted by means of IA under Article 291 TFEU. A formal procedure had to be followed if the Commission rejected or amended ESMA draft BTS: the Commission had to justify its action and ESMA then had the opportunity to amend its proposed standard by issuing an Opinion. Recital 23 states that standards adopted by ESMA "should be subject to amendment only in very restricted and extraordinary circumstances, since the Authority is the actor in close contact with and knowing the daily functioning of financial markets" and Recital 24 noted "the Commission's stated intention to rely, as a rule, on the draft regulatory technical standards submitted to it by the Authority in view of the adoption of the corresponding delegated acts" (European Parliament and Council, 2010:87). The provision for the Parliament or Council to summon the Commission and ESMA to explain their differences over disputed BTS was also included.

The Commission was sufficiently unhappy with the outcome to make a statement:

"As regards the process for adoption of regulatory standards, the Commission emphasizes the unique character of the financial services sector, following from the Lamfalussy structure and explicitly recognized in Declaration 39 to the TFEU. However, the Commission has serious doubts whether the restrictions on its role when adopting delegated acts and implementing measures are in line with articles 290 and 291 TFEU." (European Commission 2011b:6).

The Regulation's effect was to give the Parliament and the Council equal standing on RTS as well as DA proper, with ITS implicitly limited to lower level standards. The Parliament and, to a lesser extent, the Council had an incentive to favour the use of RTS over DA proper since the former involved ESMA as drafter in a very transparent process, including public consultation. Moreover, a prescribed and transparent process had to be followed if the Commission wished to reject or amend drafts. In contrast, DA proper gave the Commission more discretion: ESMA was limited to providing advice, with the Commission drafting the act and no special procedure required if ESMA's advice was not followed.

If Parliament had 'lost the battle' over the implementation of the general Lisbon delegated legislation provisions, it had been successful in securing its preferences in the special financial services regime. The question was now whether it would take advantage of its rights.

IV Case Histories – the Two MiFIDs

This chapter examines the process of producing the two sets of delegated legislation under the first and second MiFID packages. It outlines the background to the legislation and the main points of inter-institutional contention over the Level 1 measures before analysing how the respective Level 2 processes operated.

MiFID I

MiFID I was a major plank in the initiative to accelerate the EU single market in financial services. It was designed to strengthen the capacity of the EU legislative framework to:

- i) protect investors and market integrity by establishing harmonised regulatory requirements for authorised financial services intermediaries (and provide a single passport for these firms to operate across the EU) ; and
- ii) promote fair, transparent, efficient and integrated financial markets and trading infrastructure (European Commission 2002b:66).

Regarding investor protection, MiFID prescribed the obligations for investment firms providing services to clients, including provisions on managing conflicts of interest and best execution of transactions. In relation to financial markets it enabled increased competition to traditional exchanges through a new category of trading platform ('Multilateral Trading Facilities'), as well as codifying requirements for internal execution of client trades by investment firms themselves without going through an external market ('systematic internalisers'). It also imposed transparency requirements for 'pre-trade' quotes/orders and 'post-trade' executed transactions in securities, seeking to balance transparency and market liquidity.

Amendments to the Level 1 Directive from the co-legislators were in line with the main principles of the proposal (European Commission, 2003a, 2003b). The main areas of debate were the transparency requirements for equity trading, especially relating to the obligation and conditions for the display of price quotes by systematic internalisers, and the provisions concerning best execution of client orders (see, for example, European Parliament 2003:92-96). The Directive was adopted in April 2004 after eighteen months of negotiation. The Commission had sought to limit the use of comitology to provisions where detailed harmonisation was crucial

to the application of the rules and the smooth development of the single financial market, and one or two proposals for delegated powers had been rejected during the legislative process. Nevertheless, eighteen out of the Directive's seventy two articles provided for implementing measures covering such matters as details of the pre- and post-trade transparency requirements; organisational requirements for investment firms; and best execution requirements.

The Level 2 Process

Work on implementing measures was initiated by the Commission, having consulted the ESC, mandating CESR to provide technical advice. CESR undertook calls for evidence and opinions, held public hearings and publicly consulted on its draft advice (twice for some topics) before producing final reports. There were occasional discussions between CESR and the Parliament on this work in the context of wider meetings but there is no evidence of any systematic involvement of the Parliament during this stage. Nor were the Commission particularly active in CESR's work (Interview 5).

CESR delivered its technical advice to the Commission in May 2005. The Commission turned this into draft legal instruments (a directive and a regulation). These were considered in the ESC but only after preliminary discussions had been held between the Commission and France, Germany and the UK (in line with intergovernmental theory about the greater weight of big Member States) (Interview 4). Various drafts were produced: it was an iterative process between Commission and ESC, not just a matter of rubber-stamping the approach CESR had proposed (ibid). The Commission put forward proposals of its own not covered in CESR's advice – for example, on requiring reports from investment firms on execution quality and mandatory taping of conversations between investment firms and clients – but had to back down (as in these examples) where a sufficient number of Member States disagreed (ibid). When a sufficient ESC consensus had emerged, the Commission produced formal drafts of the measures which were sent to the Parliament in February 2006 (European Commission 2006a). However, ESC discussions continued, with the Commission proposing further possible compromises to meet remaining concerns of ESC delegations (European Commission 2006b:1).

The draft measures were scrutinised by the Parliament's ECON committee which adopted forty four proposed modifications on 30 May 2006 (European Parliament 2006a). These focused on the detail of the measures rather than whether they were ultra vires (where ECON raised no concerns). Twelve modifications related only to Recitals and those

concerning Articles were mainly minor ones. More substantive proposed amendments included some relaxation of the transparency requirements (modifications 7 and 12) and a prohibition on further Member States requiring client identifiers to be included in transaction reports to regulators (modification 4). The Commission quickly produced new drafts of the measures which were discussed and further amended at the 8-9 June ESC meeting. The Commission then informed the Parliament on 9 June which of their amendments had or had not been accepted. Most of the minor modifications were incorporated but some of those dealing with transparency and that on client identifiers were rejected. The Commission explained that, on the former, the Parliament's modification 7 risked weakening transparency requirements, while on the latter, it did not want harmonised requirements (European Parliament 2006b:4). The Parliament acquiesced in this outcome, voting to accept the measures in toto on 15 June. The ESC then unanimously adopted the texts on 26 June, agreeing one last amendment to one measure just before the vote (European Commission 2006c:1).

In the debate on adopting the measures the ECON rapporteur noted that the MiFID Level 2 procedure was the first time Parliament had been fully involved in concluding implementing legislation at the comitology phase (European Parliament 2006b:1). However, in fact the process had mostly been a traditional comitology one, with the Commission and Member State representatives negotiating acceptable texts in the ESC. Parliament was kept at arm's length until a late stage and then there was an abbreviated endgame to the process. A speech by then Commissioner McCreevy in June 2006 indicated the relative involvement of the Council and Parliament: "The implementing measures have been in intensive negotiations with Member States in the European Securities Committee for over twelve months and more recently with the Parliament" (Commission 2006d). The view of two national representatives involved was that, while the Parliament's input had some effect, it did not significantly impact the final outcome on the measures (Interviews 4 and 5).

It is difficult to assess how the negotiations were conducted: the records of the ESC meetings do not provide an insight into the mode of approach and a statistically significant survey of participants' views is beyond the scope of this dissertation (if indeed possible this far from the events). However, one national official involved in both MiFID I Level 1 and 2 work considered that the character of the ESC discussions was very similar to Council Working Group negotiations on the Directive itself (Interview 4), although another thought the CESR stage was "a bit of a mix" – in some

cases a continuation of Council negotiations but in others a group effort to problem solve (Interview 5).

MiFID II

The MiFID I regime was in operation only a couple of years before work started on revising it. This reflected various factors. The Commission's legislative proposals¹⁷ noted that increased competition in financial markets had created problems, such as market fragmentation, as well as benefits. Markets and technology had outgrown the MiFID I regulatory framework, with particular concerns about the impact of high frequency trading and non-transparent trading venues. The weaknesses exposed by the financial crisis in the regulation of non-equity financial instruments also required improving the organisation, transparency and oversight of these markets. Commodity derivative markets were a particular focus here. MiFID II was presented as an integral part of the reforms to establish a safer, more transparent and responsible financial system as well as a more integrated, efficient and competitive EU financial market. In line with the de Larosière recommendations, MiFID II sought to contribute to establishing a single rulebook for EU financial markets (European Commission 2011b).

Two legislative acts were proposed. A Regulation covered matters such as disclosure requirements for trading and transaction data, mandatory trading of derivatives on organised venues, and specific supervisory actions regarding positions in derivatives. The new Directive's measures included enhancing the organisational and conduct of business requirements for investment firms, tightening organisational requirements for trading venues, and increasing regulatory authorities' powers. The package was more complex and wide-ranging than MiFID I, involving a step change in the amount of delegated legislation, with 100 separate empowerments for Level 2 measures.

Contentious issues in the Level 1 negotiations included the stringency of the controls over high frequency trading and the position limit regime for commodity derivatives – where the Parliament wanted tighter controls than the Council or the original Commission proposals; the transparency regime for non-equity products; and the restrictions on inducements which independent financial intermediaries and portfolio managers could accept from firms wanting them to place client business with them (see e.g. European Parliament 2012). The Commission and the co-legislators disagreed about the Level 2 empowerments, with a number of the

¹⁷COM(2011) 652 final & COM(2011) 0656 Final

Commission proposals for DA changed into requirements for RTS. This prompted the Commission to make another protesting public statement: “These amendments do not respect the limitations set out in the [ESMA Regulation] in so far as technical standards can only cover aspects requiring technical expertise and cannot imply strategic decisions or policy choices.” (Council 2010:1). The Level 1 texts were adopted in 2014.

The Level 2 Process

Superficially the Level 2 process was similar to that for MiFID I. The Commission again initiated matters by giving a mandate to a specialised technical body to produce advice and, in this case, also draft measures. This material was produced by the same methods as used in MiFID I. To produce the DA the Commission again convened the ESC (now purely as an expert group) to help it turn the advice into legal measures. As with MiFID I, there was no formal public consultation on the Commission drafts. The ESC also performed its traditional comitology committee role regarding the draft ITS. The Level 2 process produced amendments to some of the draft measures in the light of representations from the Parliament and others. And, as with MiFID I, the finalised measures (with one exception) once adopted by the Commission progressed smoothly through the formal Parliament and Council oversight procedures: “The process essentially came to an end with the adoption of the measures” (Interview 1).

But in significant respects the MiFID II process was very different. The biggest change was that the Parliament was far more engaged than in MiFID I and at a far earlier stage. Its Negotiating Team for the Level 2 measures was closely plugged into the ESMA drafting work (Interview 1). The ECON Committee held public scrutiny hearings (four in 2015 alone) with ESMA on the measures while ESMA was working up its advice and draft technical standards. The Team (or its staff) also made extensive comments on the ESMA consultation papers and held private meetings with the ESMA staff working on this dossier as well as exchanging emails and letters (Interviews 1&6). The Parliament was pro-active in seeking information from ESMA, wanting access to drafts of technical standards before they had been formally approved by the ESMA Board (European Parliament 2015a:1)¹⁸. An ECON staff member attended ESC meetings on the DA as an observer and there were also parallel exchanges of views between ECON and the Commission on these measures (Interview 1). The Negotiating Team actively lobbied the Commission throughout the

¹⁸ ESMA refused but undertook to produce more frequent and earlier statements regarding options its Board was considering.

Level 2 procedure, with regular meetings with relevant Directorate General staff as well as the Commissioner's cabinet, including meetings to agree on the drafting of key points in the texts (Interviews 1&2).

This lobbying was enhanced by the fact that the rapporteur and shadow rapporteurs were aware of the need to work as a team and to be able to threaten rejection of measures with credibility: "It was tough to achieve a co-ordinated position but we knew that we would only be able to be effective if we could get the votes we needed to block things" (Interview 1). The Commission was sensitive to the need to get the buy-in of Parliament as well as Member States – "In particular, we do take a strong negotiating position from the EP Negotiating Team very seriously" (Interview 2). It is probably no coincidence that the three ESMA draft RTS the Commission required to be modified before adoption, including the case example discussed below, were ones where the Parliament had expressed concerns and were amended in line with Parliament's preferences (albeit not in their entirety). Indeed, the Commission in its communications both internally and with ESMA stated explicitly that its amendments took into account the Parliament's concerns (e.g. European Commission 2016a:2 and 2016b:1). It should, however, be noted that some Member States and the industry were also lobbying the Commission on these standards and the Commission had its own concerns (Interview 3). But the Parliament undoubtedly carried much more weight in the MiFID II delegated legislation process than in MiFID I.

In contrast, the Council played a lesser role. While the ESC was consulted in preparing the DA, no Council group was involved in consideration of the more numerous RTS: the Commission took the view that, as the drafts produced by ESMA were fully worked up legal texts which had already been consulted on, they should go directly to the Commission to consider (Interview 2). Only bilateral contacts between the Commission and Member States took place here. Even for the DA, since the ESC was acting as expert group rather than comitology committee, there was no formal vote prior to adoption. And, unlike MiFID I where ESC was meeting and discussing amendments to measures right up to their adoption by the Commission, the final meeting of the ESC experts on the MiFID II DA was in May 2015 while the Commission did not adopt the acts until well into 2016. Again there were only bilateral contacts after this point. Moreover, the MiFID II ITS, where Member States collectively had an in-built advantage through the ESC's comitology function, were limited to second order matters such as systems and reporting specifications. Interviews with Commission officials confirm they remained mindful of the possibility of the Council's rejecting an adopted measure, but one noted that to avoid this "You probably need just a few of the big

Member States on side or not to have an opinion” (Interview 3). The Council itself does seem to have been aware of its loss of influence. An ESMA official attending Council group discussions noted “There was a general unease in the Council about the lack of Council involvement in the Level 2 process as they were seeing Parliament becoming more active and realising they don’t have a similar role” (Interview 6).

The Commission also had a greater role in some respects than in MiFID I. Its representatives participated in the MiFID II Level 2 work at all ESMA levels, from working groups to the Board of Supervisors, and were prepared to give steers and advice on policy issues, although this depended on the particular Commission personnel involved (Interviews 2, 4 and 6). The Commission was also at the centre of the web of networking and lobbying, talking to Member States, the Parliament, ESMA and external parties and therefore having a uniquely informed position. This role was enhanced by the fact that so much of the process was now informal and bilateral rather than focused predominantly on a single formal committee as in MiFID I. In addition, under the post Lisbon process, adoption of DA is now at the Commission’s discretion without needing prior committee approval. Finally, it is again perhaps not coincidental that the draft RTS which the Commission required to be modified involved issues where the Commission itself had expressed concerns when ESMA was adopting its draft standards – position limits for commodity derivatives, ancillary business and market transparency for non-equity products (Interview 6). However, it is difficult in these cases to distinguish how far the Commission was pursuing its own policy preferences as opposed to anticipating or reflecting the concerns of other actors in the process, particularly the Parliament.

The MiFID II process also involved another EU institution: ESMA. It drafts the texts of BTS rather than just providing advice and can, to a certain extent, contest Commission modifications to its draft standards through the Opinion process. This makes it an actor in the delegated legislation process in its own right, unlike CESR which, after its advice was delivered to the Commission, had no formal role to play. ESMA sees its job as providing the best technical view on what should be implemented even though it is conscious that this might be politically controversial and that the Commission might have problems with its proposals (Interview 6). Nor is it simply a proxy for Member States. In ESMA’s MiFID II Level 2 work not all national regulators did what their Member States wanted (Interview 3) and, in some cases, while the regulator was content with ESMA’s output, the Finance Ministry was not and subsequently sought changes (Interview 4). Unlike MiFID I where in preparing advice CESR had essentially acted as a secretariat for the groups of national regulators, in

MiFID II ESMA staff were “in many cases holding the pen and driving the approach” (Interview 6). So the establishment of ESMA as a formal institution with defined procedures governing the production of technical standards did introduce a new element into the Level 2 process.

Case example: setting the range for commodity derivative position limits

Aspects of these various factors are illustrated in the case of the RTS determining the commodity derivative position limit regime. This was one of the most salient issues in the MiFID II process. Article 57 of the MiFID II Directive requires Member States to ensure that national regulators set limits on the size of a position which a person can hold in such derivatives traded on trading venues and any equivalent instruments. The aim was to improve the stability and integrity of financial markets and also address excessive commodity price volatility (agricultural foodstuff products were a particular concern here). ESMA was tasked with producing a methodology which would establish a harmonised regime across the EU in this area.

ESMA originally consulted on the basis of setting a baseline cap of 25% of the deliverable supply in a commodity derivative contract. This could be adjusted upwards or downwards by a further 15% in line with specified factors – thus no position limit could be higher than 40% or lower than 10% of deliverable supply (ESMA 2015:338). The ECON Negotiating Team was concerned that this range would not only fail to stop speculation in very liquid markets but also might break down very illiquid markets. They urged ESMA to reconsider its thresholds to make the limits more effective (European Parliament 2015a:2). This stance reflected a compromise between the Green and S&D members who wanted tighter limits for agricultural commodities and the EPP and ECR rapporteurs who wanted more generous limits for less liquid contracts (Interview 2).

ESMA made some changes to this RTS in the light of feedback to its proposal: it kept the 25% baseline figure while amending the ability to deviate from this. The overall position limit range would be 5% - 35% but new/illiquid contracts would be subject to a special, more flexible regime (ESMA 2015:341). This formulation was in the draft RTS submitted to the Commission in September 2015. However, it did not satisfy the ECON Negotiating Team who returned to the charge, this time directly with the Commission, arguing that ESMA’s approach did not fulfil the political objective of MiFID II. They wanted the position limits for liquid contracts to be lower and stated that “the Commission should devise a regime that

reflects appropriately the specificities of each relevant derivatives class” (European Parliament 2015b:2).

The Commission took these concerns into account in considering the draft RTS¹⁹. On 20 April 2016 it formally wrote to ESMA stating that it would only endorse the RTS if it was amended. It noted that the amendments sought reflected concerns raised by Parliament and, in line with ECON’s thinking, told ESMA that the methodology needed to take greater account of the specificities of each type of underlying commodity. ESMA should therefore set lower limits for highly liquid contracts and ones which may directly affect food prices but higher limits where there were few market participants (European Commission, 2016b:1-2). This triggered the process whereby ESMA issued an Opinion, which it did on 2 May 2016. ESMA chose not to change its 25% baseline figure but instead to permit national regulators both to impose a lower minimum limit (2.5%) on derivative contracts involving foodstuffs and to increase the limit for illiquid/limited market participant contracts to 50% (ESMA 2016:16-18). The RTS adopted by the Commission kept the overall 2.5% - 50% range but reduced the baseline figure for food derivative contracts to 20%²⁰.

The changes were still insufficient for the S&D, GUE/NGL and Green groups who tabled resolutions to object to the RTS, seeking a lower baseline figure for foodstuff contracts and other amendments to tighten the position limits regime (European Parliament 2017). However, these resolutions were rejected – though on a tied vote on the S&D motion (ibid).

Although ESMA’s draft RTS was based on extensive consultation and deliberation by regulatory experts, it is significant that the Parliament was prepared to challenge this and, as with the two other MiFID II RTS it had problems with²¹, ask the Commission in effect to substitute Parliament’s judgement for ESMA’s. Given the Parliament’s concern in the ESMA Regulation to try to protect ESMA standards from subsequent interference, this is somewhat ironic.

¹⁹ As noted, Member States and external parties were also lobbying the Commission to make changes to this RTS (Interview 3).

²⁰ Article 9(4) of Commission Delegated Regulation (EU) 2017/591 of 1 December 2016

²¹ Those concerning the pre-trade transparency standards for non-equity products, where the Parliament wanted a less stringent regime than ESMA proposed, and those concerning the definition of ancillary business where, in contrast, a tightening of the ESMA proposals was sought (European Parliament 2015b).

Mode of Operation

As regards the mode of operation of the Level 2 process, objective measures of the style of the negotiations are again lacking. Nor has a survey of a representative sample of participants been attempted. However, interviewees involved in the negotiations thought they were a mix of bargaining and problem solving depending on the issue (and sometimes on the nature of the personnel involved – for example, if an official had been involved in the Level 1 negotiations). At the ESMA stage of the process, on some issues certain national regulators were given strict instructions by their Finance Ministries from which they could not deviate (Interview 6). A Commission official attending ESMA meetings noted “When the issue involved a politically hot potato, there was no room for [the national regulators] to take a purely technical approach to a topic. But when it was a more neutral topic there was an esprit de corps within the group that could be helpful for arriving at an agreed solution” (Interview 2). This was also reflected at ESMA Board level. While a lot of the ESMA technical advice and proposals for draft standards were adopted on a consensus basis, some issues (for example the proposals on pre-trade transparency for non-equity products and those regarding inducements for financial intermediaries) were particularly contentious, involving split votes at the Board of Supervisors (Interview 6). Similarly, the work in the ESC expert group assisting the Commission in turning the ESMA advice into DA was considered to be informed by the views representatives had taken on issues either in the ESMA or the Level 1 negotiations, with efforts to amend the policy position taken in the ESMA advice on various issues (Interview 4). In contrast, due to their detailed and technical nature, work on the ITS was considered to be only occasionally contentious (Interview 6).

Parliament’s increased influence in the MiFID II Level 2 process clearly brought a heightened political element to the negotiations, as illustrated by the position limits example. As previously noted, there is also evidence of bargaining behaviour by the Parliament’s party political groups to achieve a co-ordinated stance in order to maximise the influence it could deploy in the negotiations.

Nevertheless, those involved in both MiFID processes considered that, overall, the approach in MiFID II was more technical, problem-solving and European, with the ESMA discussions generally not being a reprise of the Level 1 Council Working Group negotiations (Interviews 4, 6). However, it would be unsafe to place too much weight on such a small sample.

V Conclusions

The balance of power

The evidence from the study of the two MiFID dossiers is that the Lisbon changes to the EU delegated legislation process in its financial regulation variant had an appreciable impact on the inter-institutional balance of power particularly as regards producing RTS. The main difference, as one Commission interviewee noted, was that “Parliament’s much more powerful” (Interview 3). In MiFID I the Parliament only became involved in the delegated legislation late in the process: the main actors were Member States in the Council and the Commission. In MiFID II it was a significant actor from near the start, being both proactive and influential in pursuing its policy preferences. This was assisted by the length and transparency of the Level 2 process which allowed the Negotiating Team the time and information resources to make an impact. They had regular access to ESMA and Commission staff and were also obtaining information from the industry and other groups such as NGOs. The Negotiating Team members showed themselves committed to pursuing in Level 2 matters of concern to them in the Level 1 legislation and, as the outcome on position limits illustrates, were prepared to negotiate a common position among themselves in order to maximise their influence. There is therefore evidence in support of Hypothesis 1.

The Commission too has been a clear beneficiary. Whereas all the MiFID I implementing measures were channelled through the ESC, with Member States en bloc able to maintain close scrutiny over the Commission, the MiFID II process is more diffuse. The Commission itself is now the real focal point of the process: it drafts the delegated acts free from the requirement for formal committee approval and, even though ESMA drafts the BTS, the Commission is involved in their production and makes the final decision on what it is adopted. Negotiations are mostly characterised by informal, bilateral engagement, with no provision for inter-institutional trilogues as with legislative acts. Clearly the Commission does have an eye to the co-legislators’ right of objection to adopted measures. But the hurdles for exercising this right are high ones, which in practice leaves the Commission with a significant measure of discretion.

In contrast, the Council/Member States do seem less important post Lisbon. Member States (as opposed to national regulators) and the Council had no direct involvement in drafting the RTS, the largest category of MiFID II delegated legislation. The Council did assist in the drafting of DA proper via the ESC expert group but this was a lesser role than in MiFID I. The only category of measure where Member States/the

Council retained a definite advantage through the operation of traditional comitology procedures – ITS – was limited to technical issues of little or no policy saliency.

The experience of producing the MiFID II delegated legislation also supports Hypothesis 2. All the negotiations and changes to measures happened in the preparatory phase before the Commission's adoption of the acts triggered the formal scrutiny procedure. Indeed, a significant amount of the interaction occurred even before the technical advice and draft RTS were submitted to the Commission – as the Parliament's dealings with ESMA demonstrated. Although the formal DA control mechanism was an ex post one, as with the RPS, the shadow of possible objection to adopted acts was used to secure amendments at the draft stage. Once measures were adopted, with the exception of the position limits RTS, the actual oversight stage was a formality.

Did the new system operate in the way intended ?

The primary intention of the originators of the new DA regime was that issues which were important but too detailed to be included in legislative acts could be handled under delegated powers which gave co-legislators satisfactory control of the process. There is some evidence from MiFID II to support that this was achieved for the measures adopted under Article 290 TFEU, although matters are complicated by the special regime for financial services and the hybrid nature of RTS (subject to a separate procedure for preparation but adopted as DA). In MiFID II the Parliament certainly made its presence felt and the democratic legitimacy of the process has undoubtedly been increased by its involvement, with MEPs able to press issues of concern to them and seek to object to a measure where concerns were particularly strong.

It must be acknowledged, however, that the oversight system is more diffuse than under comitology, with the formal control procedure used only exceptionally and less important (except for using the threat of possible objection to a measure as a bargaining tool) than informal negotiations and lobbying prior to adoption. The control powers of the Council have definitely diminished. Even with the greater involvement of Parliament, there is a question as to whether overall control of the Commission is as tight as when it was essentially exercised by the Council alone. However, Guégen's contention (2011:16) that 'democratic control of the Commission...has ebbed away' certainly looks exaggerated.

Regarding the special procedure for financial services, the provision for RTS does ensure extra transparency in the preparation of this category of

delegated legislation and leaves implementing measures to cover second order issues. The equal standing of the Parliament and the Council/Member States regarding RTS means that use of this type of empowerment is not a matter of contention between the co-legislators but between the co-legislators and the Commission where the latter considers that a measure should be a DA proper. However, if the intention of the BTS regime was to protect standards developed by ESAs from political interference and ensure they were only changed in extraordinary circumstances, the evidence from MiFID II is this has not succeeded. The Parliament showed itself unable in practice to follow the norm it had sought to impose.

Mode of operation

Finally, as regards whether the post Lisbon system has altered the character of the delegated legislation process and favoured either the controlling or deliberative mode, it must be acknowledged that the evidence regarding the two MiFIDs is both subjective and, given the restricted number of interviews it was possible to conduct in the study, limited. The evidence from the negotiation of the various framework rules firmly supports the RCI perspective, with the institutional actors generally seeking to enhance or protect their powers of control/discretion. Regarding the MiFID negotiations themselves, there is some evidence for Hypothesis 3, with the interviewees' considering that the mode of approach did change according to the subject matter under discussion (as well as factors such as whether the participants in the Level 2 work had been involved in negotiating the legislative acts). Moreover, the more detailed, second order ITS were viewed as having been less contentious and less subject to bargaining behaviour than the other delegated legislation. And those interviewees with knowledge of both MiFID processes suggested there might have been some overall shift towards the deliberative mode. However, more evidence involving a larger sample of those involved in the Level 2 work would be needed to draw firmer conclusions on this aspect of enquiry.

The two MiFIDs obviously only represent one particular dossier, albeit a significant one, and involve a sector where there is a special delegated legislation regime. However, the study confirms the value of process tracing and the importance of qualitative evidence given that, with the high hurdles necessary to object to delegated legislation, there are unlikely to be many occasions where formal votes of opposition occur. It is therefore necessary to examine the whole process, especially the

preparatory stages, in order to make an assessment. Hence, as Christiansen and Dobbels argue, there is a need for further case studies on how the delegation legislation system is working in practice. In particular, it will be important to examine dossiers where the process involves no special procedure or formal ESA-type expert body. In these cases it is likely that the choice between DA and IA will be starker than in the financial services sector, with IA involving genuine matters of substance. It would also be worth studying further how the creation of the ESAs has altered the institutional dynamics of producing delegated legislation in the financial services sector.

ANNEX

SUMMARY OF POST-LISBON DELEGATED LEGISLATION REGIME

Delegated Acts

Scope of application:	Acts of general application to supplement/amend certain non-essential elements of a legislative act.
Controllers:	European Parliament and Council of Ministers
Type of Control:	Ex post – after the Commission has adopted an instrument
Control instruments:	1. Veto of delegated act by qualified majority of the Council and/or absolute majority of Parliament members (standard time limit for objection 2 months after notification of adoption of a measure plus a further 2 months if either co-legislator has indicated intention to object) 2. Revocation of delegation of powers to the Commission (requires same majorities as 1)
Preparation of acts:	Consultation of experts (including Member State experts). Parliament experts can be represented in expert groups on request.

Implementing Acts

Scope of Application:	“Where uniform conditions for implementing legally binding Union acts are needed”. Acts can be of individual or general application.
Controllers:	Member States in comitology committees; Appeals Committee (Member States); non-binding right of scrutiny for EP and Council.
Type of control:	Ex ante (except for acts adopted under urgency procedures when would be ex post)
Control instruments:	Veto of draft measure (conditions according to comitology procedures)

Comitology Procedures

	<u>Advisory</u>	<u>Examination</u>	<u>‘Stringent Examination’</u>	<u>Appeal</u>
Veto condition	N/A	Simple or QM	Blocking Minority against	QM against
Veto consequences act	N/A	Commission may send draft measure to same committee within 2 months or use appeal procedure within 1 month	Commission may send draft measure to same committee within 2 months or use appeal procedure within 1 month	Commission may not adopt the

Under the examination and ‘stringent examination’ procedures, where the committee gives a positive opinion by qualified majority, the Commission shall adopt the act and where it gives a negative opinion by qualified majority it shall not do so. Where a committee gives no opinion, the Commission may adopt the draft act except where:

- a) the act concerns taxation, financial services, the protection of the health and safety of humans, animals and plants, or definitive multi-lateral safeguard measures;

- b) the basic act provides that the draft act may not be adopted where no opinion is delivered; or
- c) a simple majority of the component members of the committee oppose it.²²

The Commission may adopt a measure which has been referred to the Appeals Committee if that Committee gives no opinion.

²² There is a special procedure for anti-dumping/countervailing measures.

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Interviews

All interviewees were promised anonymity

1. European Parliament official at time of MiFID II
2. European Commission official involved in MiFID II
3. European Commission official at time of MiFID II
4. Member State/National Regulatory Authority official involved in MIFID I and II
5. National Regulatory Authority official at time of MiFID I
6. ESMA official involved in MiFID II