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NOTE

from:	Presidency
to	Delegations
Subject:	Proposal for a Directive of the European Parliament and of the Council amending Directives 1998/26/EC, 2002/87/EC, 2003/6/EC, 2003/41/EC, 2003/71/EC, 2004/39/EC, 2004/109/EC, 2005/60/EC, 2006/48/EC, 2006/49/EC, and 2009/65/EC in respect of the powers of the European Banking Authority, the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority - Presidency note on "delegated and implementing acts"

Delegations will find hereby a Presidency note on control procedures for technical standards (delegated and implementing acts) concerning the above Commission proposal, following the meeting of 18 March 2010.

CONTROL PROCEDURES FOR THE OMNIBUS I TECHNICAL STANDARDS

(DELEGATED AND IMPLEMENTING ACTS)

A. Introduction

This document provides a classification of the technical standards in the Omnibus Directive into delegated and implementing acts, together with the wording referring to the recitals, empowerments and applicable control procedures, to be incorporated into the appropriate legal text, when suitable.

B. Classification of the technical standards in the Omnibus Directive into delegated and implementing acts

Below are listed the technical standards included in each sectoral directive amended by the Omnibus, with a brief description and whether it is a delegated (290) or an implementing (291) act.

Directive 2002/87/EC (Financial Conglomerates). Articles referred to in new Article 21a:

- 2(11) (definition of participation): **290**
- 2(17) (procedures or criteria to establish relevant competent authority): **290**
- 3(5) (alternative parameters to identify a financial conglomerate): **291**
- 6(2) (specification of the calculation methods in the annex): **291**
- 7(2) (modalities for including the items within the scope of the definition of 'risk concentrations'): **291**
- 8(2) (modalities for including the items within the scope of the definition of 'intra group transactions'): **291**

Directive 2003/6/CE (Market Abuse). Articles:

- 1(5) (accepted market practices, further specifying level-2 measures): **291**
- 6 (investment recommendations, further specifying level-2 measures): **291**
- 8 (buy-backs , further specifying level 2 measures): **291**
- 16(5): (Exchange of information between supervisors): **291**

Directive 2003/41/EC (IORP). Articles:

- 13(2) (minimum information to be provided to the competent authorities): **291**
- 20(11) (procedures, formats and templates to provide information to EIOPA): **291**

Directive 2003/71/CE (Prospectus). Articles:

- 5(2) (format of the summary, further specifying level-2 measures): **291**
- 7(4) (minimum content of the prospectus, further specifying level-2 measures): **291**
- 8(5) (omission of information, further specifying level-2 measures): **291**
- 13(5) (forms templates and procedures for notification): **291**
- 16(3) (obligation to present a supplement): **290**
- 18(4) (notification of certificate): **291**
- 22(4) (Exchange of information between supervisors): **291**

Directive 2004/39/CE (MiFID). Articles:

- 7(4) (authorisation)
 - Formats of the communications: **291**
 - Specification of the requirements: **290**
- 10b(8) (acquisitions, communication between supervisors): **291**
- 31(7) (freedom to provide services, communication between supervisors): **291**
- 32(10) (Branches, communication between supervisors): **291**
- 56(2) (Co-operation arrangements):
 - Specifying the obligation: **290**
 - Forms, templates and procedures: **291**
- 57(2) (Co-operation in supervisory functions, on-site verification...): **291**
- 58(4) (Exchange of information): **291**
- 60(4) (Consultation prior to authorisation): **291**

Directive 2004/109/CE Transparency). Articles:

- 12(9) (major holdings, standard form): **291**
- 13(3) (derivatives, standard form): **291**

Directive 2005/60/EC (AML). Articles:

- 31(4) (3rd countries): **290**
- 34(3) (3rd country subsidiaries, minimum content of the communication): **291**

Directive 2006/48/CE (“CRD”). Articles:

- 6 (authorisation):
 - Formats of the communications: **291**
 - Specification of the requirements: **290**
- 19(9) (acquisitions, communication between supervisors): **291**
- 22(3) (internal organisation): **290**
- 26(5) (branches, communication between supervisors): **291**
- 28(4) (freedom to provide services, communication between supervisors): **291**
- 42 (Co-operation arrangements):
 - Specifying the information: **290**
 - Format etc: **291**
- 63a(6) (hybrid capital): **290**
- 74(2) (Reporting): **291**
- 81(2) (eligible ECAI in SA): **290**
- 84(2) (IRB model validation): **290**
- 97(2) (eligible ECAI in securitisations): **290**
- 105 (model validation): **290**
- 106(2) (exceptions to large exposures and connected clients): **290**
- 110(2) (formats for large exposure reporting): **291**
- 122a(10) (5% retention): **290**
- 124(6) (risk assessment): **290**
- 129(2) (joint decision process): **291**
- 129(3) (joint decision process): **291**
- 131a(2) (colleges): **291**
- 144 (aggregate statistical data): **291**
- 150(3) (technical standards in annexes) **291**

Directive 2006/49/CE (CAD). Article:

- 18(5) (model validation): **290**

Directive 2009/65/CE (UCITS). Articles:

- 5(8) (authorisation of UCITS, specification of the information): **290**
- 7(6) (authorisation of the MC):
 - Formats of the communications: **291**
 - Specification of the requirements: **290**
- 11(3) (acquisitions, communication between supervisors): **291**
- 12(4) (organisational requirements, further specifying level-2 empowerment): **291**
- 14(3) (rules of conduct, further specifying level-2 empowerment): **291**
- 29(5) (authorisation of self-managed IC):
 - Formats of the communications: **291**
 - Specification of the requirements: **290**
- 43(6) (merger, information to be provided, further specifying level-2 empowerment): **291**
- 50(4) (eligible assets, develops the L-1 definition directly): **290**
- 51(5) (risk management process, further specifying level-2 empowerment): **291**
- 60(7) (master-feeder, further specifying level-2 empowerment): **291**
- 61(4) (master-feeder with different depositaries, further specifying level-2 empowerment):
291
- 64(5) (Conversion of existing UCITS into feeder UCITS and change of master UCITS, further specifying level-2 empowerment): **291**
- 69(5) (Prospectus, yearly and half-yearly report): **290**
- 78(8) (KII, further specifying level-2 empowerment): **291**
- 83(3) (borrowing): **290**
- 84(4) (temporary suspension of withdrawals): **290**
- 95(2) (the standard replaces an existing level-2 empowerment to develop forms, procedures for cross-border sales): **291**
- 101(9) (procedures for cooperation in on-site inspections): **291**
- 105 (technical standards replace level-2 empowerment on procedures, templates and formats for exchange of information between supervisors and ESMA): **291**

C. DRAFTING OF RECITALS AND PROVISIONS

1. Recitals

The following should be inserted into the text of the Omnibus Directive:

(10a) The Commission should be empowered to adopt delegated acts in accordance with Article 290 of the Treaty in respect of ... [reference to the subjects covered by the technical standards listed above]

(10b) In accordance with Declaration 39, on Article 290 of the TFEU, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon*, signed on 13 December 2007, the Commission should continue to consult experts appointed by the Member States in the preparation of draft delegated acts in the financial services area, in accordance with its established practice. This commitment is fulfilled in the case of technical standards, by providing in the ESA Regulations for the mandatory submission by the European Supervisory Authorities of a draft technical standard to the Commission prior to its endorsement and thus ensure that the expertise of Member States' supervisors is made available to the Commission in the development of all technical standards.

* OJ C 115, 09.05.2008, p. 350.”

(10c) The Commission should be empowered to adopt implementing acts in accordance with Article 291 of the Treaty in respect of ... [reference to the subjects covered by the technical standards listed above]

(10d) In order to provide a streamlined procedure for the approval of technical standards and to reinforce confidence in the ESA, the mechanisms for control by Member States of the Commission's exercise of implementing powers, as well as the possibility for the European Parliament or the Council to object the entry into force of the delegated acts, should only apply to situations where the Commission amends the draft technical standards proposed by the Authorities. Moreover, the possibility to revoke the delegation should be limited to a 6-month period every 4 years, so as to guarantee that the ESA can operate with the necessary continuity.

2. Empowerments

The following should be inserted into the text of the Omnibus Directive:

For delegated acts:

“The Commission may adopt the draft technical standards referred to in the [first] subparagraph by means of delegated acts in accordance with the procedure laid down in Article 7 of Regulation .../... [EIOPA/EBA/ESMA]. If the Commission adopts the draft standards with amendments, as foreseen in the fifth subparagraph of Article 7(1) of that Regulation, Article xxc [of this ...] shall apply”.

For implementing acts:

“The Commission may adopt the draft technical standards referred to in the [first] subparagraph by means of implementing acts in accordance with the procedure laid down in Article 7 of Regulation .../... [EIOPA/EBA/ESMA]. If the Commission adopts the draft standards with amendments, as foreseen in the fifth subparagraph of Article 7(1) of that Regulation, it shall act in accordance with the regulatory procedure referred to in Article xxd (2) [of this]”.

[The reference to the relevant acts will be specified at a later stage].

3. Control procedure for delegated acts

The following should be inserted into the appropriate legal text:

Article xxa Exercise of the delegation

“1. The powers to adopt delegated acts referred to in Articles xxx shall be conferred on the Commission for a period of 4 years following the entry into force of this [...]. The delegation of powers shall be automatically extended for periods of an identical duration, unless the European Parliament or the Council revokes it in accordance with Article xxb.

2. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

3. The powers to adopt delegated acts are conferred on the Commission subject to the conditions laid down in Articles xxb and xxc.

Article xxb Revocation of the delegation

1. The delegation of power referred to in Articles xxx may be revoked by the European Parliament or by the Council only during a period of 6 months following the automatic extension referred to in Article xxa (1).

2. The institution which has commenced an internal procedure for deciding whether to revoke the delegation of power shall endeavour to inform the other institution and the Commission within a reasonable time before the final decision is taken, indicating the delegated powers which could be subject to revocation and possible reasons for a revocation.

3. The decision of revocation shall put an end to the delegation of the powers specified in that decision. It shall take effect at the end of the 6-month period referred to in the first paragraph. It shall not affect the validity of the delegated acts already in force. It shall be published in the Official Journal of the European Union.

Article xxc Objections to delegated acts

1. The European Parliament or the Council may object to the delegated act within a period of three months from the date of notification.

2. If, on expiry of that period, neither the European Parliament nor the Council has objected to the delegated act it shall be published in the Official Journal of the European Union and shall enter into force at the date stated therein.

The delegated act may be published in the Official Journal of the European Union and enter into force before the expiry of that period if the European Parliament and the Council have both informed the Commission of their intention not to raise objections.

3. If the European Parliament or the Council objects to a delegated act it shall not enter into force. The institution which objects shall state the reasons for objecting to the delegated act.

4. Control procedure for implementing acts

The following should be inserted into the appropriate legal text, if necessary:

Article xxd Implementing acts

1. The Commission shall be assisted by the European Securities Committee / European Banking Committee / European Insurance and Pensions Committee established by Commission Decision xxxx / yyyy/ zzzz (hereinafter referred to as ‘the Committee’).

2. Where reference is made to this paragraph, Articles 5 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

The period laid down in Article 5(6) of Decision 1999/468/EC shall be set at three months.
