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## **KEY PRINCIPLES FOR THE DELEGATION OF TASKS BETWEEN COMPETENT AUTHORITIES**

### **I. INTRODUCTION**

#### **1. Background information**

The Ecofin Council has on several occasions urged the L3 Committees to examine the issue of delegation of tasks/competences <sup>1</sup> between the competent authorities and to assist the European Commission in the review of the financial services directives with a view to include provisions on the voluntary delegation of tasks and in the analysis of the options for voluntary delegation of supervisory competences. Moreover, the 3L3 Committees have conducted sectoral work in the area of delegation and similar areas.

The 3L3 Committees consider that there is an increasing need for the reinforcement of cooperation and coordination among competent authorities of the financial sector.

Following the Ecofin's requests and the need for enhancing cooperation among competent authorities, the 3L3 Committees have agreed on the creation of a specific Task Force on delegation which-according to its mandate- would examine and analyse the legal/technical aspects of the delegation of tasks and of the delegation of competences such as:

- a. What supervisory competences will the task force include in its analysis;
- b. The legal basis for delegation of those competences;
- c. The possible legal impediments to delegation of those competences that may exist at the EU and/or national levels;
- d. The applicable law;
- e. The possible scope/extent and content of the delegation of tasks/competences;
- f. The legal forms under which delegation may take place; and
- g. The possible EU or national law amendments that may be required.

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<sup>1</sup> Extract of the Ecofin Council conclusions of 4 December 2007 : “*The Council STRESSES the need for efficient and effective supervision of cross-border groups and to that end:*  
– INVITES the Commission to review financial services Directives, where still necessary, to include provisions to enable the use of the voluntary delegation of tasks. In addition, the Commission, as well as the Level 3 Committees, are INVITED to analyse the options for the voluntary delegation of supervisory competences;  
The Commission and the level 3 committees by the end of 2008 to review financial services Directives to include provisions to enable the use of the voluntary delegation of tasks and analyse the options for voluntary delegation of supervisory competences”.



Last June the European Commission addressed a letter<sup>2</sup> to the Chairs of the 3L3 Committees asking for a report to be prepared on the delegation of tasks with particular focus on the establishment of key common principles for delegation of tasks and responsibilities and the identification of possible EU and national legal and practical obstacles to delegation. The deadline indicated in the European Commission's letter for the accomplishment of this work was mid-September. Given the tight timetable and the particular workload of the 3L3 Committees, the work on the delegation of tasks is delivered with a small delay. The work on the delegation of responsibilities will be accomplished and delivered to the European Commission at a second stage, before the end of this year.

## 2. Delegation of tasks versus delegation of powers/responsibilities/decisions

The delegation of tasks should be distinguished from the delegation of decisions/ responsibilities/ powers.

According to the CEBS paper on delegation, *delegation of task (or entrustment of tasks) means that tasks are carried out by another supervisory authority (the delegate) instead of the responsible authority, and the findings reported back to the delegating authority. The responsibility for supervisory decisions remains with the delegating authority. This definition is in line with the Francq report<sup>3</sup>.*

According to the Francq report, *delegation of tasks is where individual supervisors delegate specific pieces of supervisory work to one another. Where tasks are delegated, the decision-making responsibility remains with the delegating competent authority, but the other authority carries out processes on its behalf and reports the outcome back to the delegating authority or other interested authorities. In this case, the delegating authority retains full political responsibility for all decisions made. Another type of delegation is the delegation of responsibilities, where the delegating authority delegates the power to make decisions on its behalf to the other authority. Where responsibilities are delegated, the delegating authority would delegate the power to make decisions on its behalf to the other authority<sup>4</sup>.*

It comes out of the above definitions that in the case of delegation of tasks, there is no transfer of responsibility and the delegating authority remains responsible for supervisory decisions, in charge of the supervision. The tasks are carried out by another authority (the delegatee) instead of the responsible authority and reported back to the delegating authority. The delegation of tasks has no "external" effects i.e. has no effects on the division of responsibility/ liability and competence of the delegating competent authority. The division of work that is agreed between the supervisors under the delegation of tasks is related to them and does not affect the "outside world". Liability questions may arise between the delegating authority and the delegatee but these questions only affect the internal relationship between the signatory authorities and not the supervised persons nor third parties.

The delegation of tasks should take place under prescribed conditions and should involve clearly defined tasks/ in clearly specified areas, the exercise of which should be subject to a review from the part of the delegating authority and does not involve a discretionary power implying a wide margin of discretion which may make possible the execution of actual economic policy from the part of the delegatee<sup>5</sup>.

The delegation of tasks should not result to the delegation of critical or important aspects of the supervision to the extent that the delegating authority becomes a letter box entity. Such extremely extended delegation could be assimilated to the delegation of responsibilities and, therefore, could overturn the supervisory choices in terms of who is the competent authority that were made at the level of the European Parliament and the Council.

## 3. Scope

The scope of this paper is restricted to the **delegation of tasks** among competent authorities who are members of CESR, CEBS and CEIOPS and does not cover the delegation of responsibilities/powers/decisions. Future work of the Task Force would be focused on the delegation of

<sup>2</sup> EC letter of the 5<sup>th</sup> of June 2008 (DG Markt/BPC/Ip(2008)6108)

<sup>3</sup> CEBS, Groupe de Contact, Executive summary regarding work on delegation, 3 September 2008., p. 3.

<sup>4</sup> FSC Report on Financial Supervision (the "Francq Report", 17<sup>th</sup> February 2006).

<sup>5</sup> For relevant criteria, see Meroni Case 9/56



powers/ responsibilities/ decisions and on the real/ practical obstacles to the delegation such as obstacles arising out of deposit guarantee schemes (differences of the schemes), crisis management, local issues such as those related to IT systems, transferability of assets etc.

This paper deals with several aspects of the **cross- border** delegation of tasks and not the delegation of tasks that can take place at the national level from the competent authority to another authority of the same Member State or from the competent authority to a third entity within the same Member State.

In drafting this paper, the Task Force took into account the work already undertaken by the 3L3 Committees in the area on delegation<sup>6</sup>.

## II. KEY PRINCIPLES

Delegation of tasks among competent authorities who are members of CESR, CEBS and CEIOPS should be based on the following principles:

1. **Responsibility of the delegating authority:** Delegation of tasks takes place under the final responsibility including civil liability of the delegating authority.
2. **Sufficient legal basis:** The delegation of tasks could be understood in the context of the provisions of the EU Directives (and the relevant national implementing provisions) regarding cooperation and exchange of information between competent authorities as an extended form of cooperation. Therefore, there is a legal basis in EU law for the delegation of tasks. However, some reinforcement of the legal basis could be achieved (see below under III)
3. **Compliance with the national law:** The delegation of tasks should be consistent with the relevant national legal and regulatory framework, in both jurisdictions.
4. **Efficiency and proportionality:** The delegation procedures will be applied in a proportionate and reasonable manner to avoid duplication of tasks by different Competent Authorities and, as a result, with the aim of optimising resources and expertise, reducing supervisory costs and pressure on scarce supervisory resources. Other benefits/incentives to be considered may be for the supervisory authorities in terms of networking, learning opportunities and improved information sharing. The delegation should reflect the manner in which supervised entities are organised and should be proportionate to the nature, scale and complexity of the supervised entities concerned.
5. **Delegation to the best placed authority:** One of the criteria that should be considered while delegating tasks should be the principle of which authority might be best placed to conduct the specific task e.g. in terms of technical skills, business lines, expertise in local markets or in terms of significance of the group and relevance for the local financial market.
6. **Cooperation agreement between the competent authorities:** The competent authorities shall have agreements in place laying down the basis for the cooperation and the practical organisation of the

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<sup>6</sup> Such as: CESR «Protocol on the supervision of branches under MiFID» (Ref: CESR/07-672)

CEBS: Groupe de Contact, Work on Delegation, September 2008

CEIOPS: “Statement on the role of the lead supervisor” (CEIOPS-DOC-07/06), “Guidelines on information exchange between lead supervisors and other competent authorities” (CEIOPS-DOC-16/07), Guidelines for the coordination of Committees in the context of supplementary supervision as defined by the Insurance Groups Directive (Co-Co guidelines, 2005); Protocol relating to the collaboration of the supervisory authorities of the Member States of the European Union with regard to the application of Directive 98/78/EC on the supplementary supervision of insurance undertakings in an insurance group (Helsinki Protocol, 2000); and General Protocol relating to the collaboration of the insurance supervisory authorities of the Member States of the European Union (March 2008).

Interim Working Committee on Financial Conglomerates: list for the European Commission including the coordinator, the Relevant Competent Authorities and the Competent Authorities of each Financial Conglomerate with a head office in the EU, in the USA and in Swiss, it has informed the European Commission on the way the Relevant Competent Authorities are determined in practice for Financial Conglomerates and it has started to work on a multilateral template for coordination arrangements for financial conglomerates.



supervisory assistance such as sufficient detail of the activities that will be shared or delegated, the supervisory matter concerned, the rules to be applied, the role and the responsibilities of the involved authorities, the type of information to be exchanged among supervisors, the language, frequency and the means/forms of this information exchange, the standards under which tasks should be executed, possible instructions by the delegating authority and the effect thereof, the working methods to be used and the intensity of the assistance, the timetable for completion of the delegated activities, risk identification and coordination of any enforcement action. The cooperation agreement may be complemented by a planning to be arranged between the competent authorities. On a regular basis, the signatory competent authorities shall review the effectiveness of the arrangements in place. The three Level 3 Committees will, at a later stage, establish some model topics to be included in cooperation agreements. Delegation agreement could take several forms such as:

- Multilateral (e.g. with all the CESR authorities as signatories) or bilateral agreements (e.g. between two CESR authorities) or a combination of multilateral and bilateral MOUs whereby the multilateral MOU sets the general framework and is complemented by bilateral MOUs. Delegation may also be used within colleges of supervisors.
- Sectoral (e.g. between CESR authorities) or cross-sectoral (i.e. between a CESR authority and a CEBS or CEIOPS authority)
- From the Home to the Host competent authority or vice-versa regarding branches or both subsidiaries and branches
- On a case by case basis (e.g. for the supervision of a particular financial group) or general approach (e.g. for all the EU supervised entities if multilateral agreement or for all the entities that are supervised by two authorities that have signed a bilateral agreement)
- Joint and coordinated supervision by the competent authorities that sign the agreement on the basis of a common program (sharing of tasks) or a model whereby a competent authority requests another competent authority to provide supervisory assistance (pure delegation)

The delegation arrangements will not replace but could complement already existing cooperation arrangements between the competent authorities such as for example the CESR MMOU for the cooperation and the exchange of information between the CESR authorities<sup>7</sup>.

7. **Voluntary character of the delegation:** No authority can be forced to delegate tasks or to accept the delegation of tasks. Supervisors can share and delegate tasks to each other to the extent and under the terms and conditions agreed bilaterally or multilaterally. When delegation is needed to facilitate the efficiency of supervision, the refusing authority shall present / describe to the requesting authority the reasons of its refusal.
8. **Temporary character of the delegation:** Delegation should take place during a specified period of time to be determined in the delegation agreement. The delegating authority or the delegatee can terminate the agreement/ can recall the delegation by notifying the other authority, reasonably in advance.
9. **Liability:** Regarding the liability among the parties to the delegation agreement, in principle, each party to a delegation agreement remains liable for its work. However, the delegation agreement may include clauses for the organization of responsibility between the supervisors or competent authorities may agree to take out liability insurance. This internal organization of the responsibility shall not affect the liability regime vis-à-vis third parties, which is prescribed by the national public laws.
10. **Good communication/ Reporting:** Information should be exchanged between the delegating authority and the delegatee before, during and after the execution of the delegated tasks. They will stipulate in the agreement the information to be exchanged (e.g. information drawn from regulatory reports and examination reports), the frequency of the information exchange, the ways

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<sup>7</sup> Ref. CESR «Multilateral Memorandum of Understanding on the Exchange of Information and Surveillance of Securities Activities» (Ref: CESR/05-335)



of exchanging the information (e.g. meetings between employees of the delegating authority and employees of the delegatee, documentation, means such as electronic means), the extent to which the delegating authority will give instructions to the delegatee and be involved in its work and the frequency of such involvement. The delegatee communicates to the delegating authority sufficient detail of the outcome of the delegation and, if necessary, they discuss and agree on the wording of the documentation. Depending on their national laws, the delegating authority and the delegatee may agree that the delegate will provide the delegating authority with a signed report.

11. **Access to the information of the delegatee:** The delegating authority should have access to the information and the relevant supporting documentation (audit trail) that has been used by the delegatee during the execution of the delegated tasks. If those working documents have to be transmitted to a third party that has a legitimate common interest in the matter (e.g. a court), prior notification/request for authorisation should be forwarded to the delegatee.
12. **Confidentiality:** While the EU Directives contain confidentiality provisions covering the exchange of information among EU supervisors, some supervisory authorities may want to specify in written form the conditions under which members of other supervisory authorities working for such supervisory authorities in the context of any arrangement of delegation or sharing of tasks, will have access to confidential information of the institutions under its supervision<sup>8</sup>.
13. **Transparency:** Competent authorities will provide the individuals and legal entities concerned by the execution of the delegated tasks with clarity as to the arrangements for the supervision and as to which competent authority is going to be in charge of communicating with said individuals and legal entities. Termination of the delegation agreements should be disclosed in the same way.
14. **Fees:** Competent authorities will not charge fees for the execution of tasks in the context of the delegation. However, competent authorities may agree that the delegating authority will cover the costs of the delegatee arising out of the execution of the delegated tasks.
15. **Accountability:** Competent authorities may provide periodically (e.g. annually) to the national institutions (e.g. Parliament) general information about the use of the delegation of tasks without, however, providing specific information on actual cases of delegation.

### III. PROPOSALS TO FACILITATE THE DELEGATION OF TASKS

Delegation of tasks is legally based on the provisions on cooperation and exchange of information between competent authorities (see above under II.2) and on confidentiality (see above under II.12). These provisions exist in all the Directives of the financial sector. However, the wording of these provisions is not the same across the several Directives. The 3L3 Committees consider that, delegation of tasks could be facilitated if the wording of these provisions were the same to the extent possible across the EU legal texts of the three sectors. This proposal could be examined in the context of the Ecofin conclusions according to which, *the Commission with the assistance of L3 Committees, by the end of 2008, to review the financial services directives with a view to ensuring that provisions underpinning supervisory cooperation and the exchange of information between competent authorities are satisfactory*.

Moreover, although the 3L3 Committees consider that sufficient legal basis for the delegation of tasks is provided in the EU legislation of the financial sector (see above under II.2), they believe that delegation of tasks would be easier to achieve if there were a clear/ specific reference in the Directives laying down the possibility of delegation and the conditions of such delegation. All competent authorities should have similar legal powers to enter into delegation agreements as outlined under Key Principle 6 above.

The 3L3 Committees consider that the EC Decisions creating the three L3 Committees and in their respective Charters should foresee the support of the delegation of tasks between competent authorities<sup>9</sup>.

<sup>8</sup> CEBS 2008 102- 5 June 2008, p.8

<sup>9</sup> CESR Charter (Ref. CESR/08-375) contains explicit provision on the delegation of tasks Article 4.4. *The Committee will enhance the cooperation between its members including, where appropriate, the development of colleges of supervisors and the voluntary delegation by one authority and the voluntary acceptance by another of supervisory*



The 3L3 Committees consider that creating a common EU ground on the delegation of tasks on the basis of the above key principles (see above under II) and the above proposals could contribute to a more efficient supervision of the financial sector around the EU.

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*tasks. For that purpose CESR may establish framework agreements or templates. In establishing the above agreements or templates, the Committee will coordinate with the other two level 3 Committees (CEBS and CEIOPS). The Charters of CEBS (Article 4) and CEIOPS (Article 2) do not contain explicit provisions on the delegation of tasks between competent authorities. However, they contain provisions on relevant general notions such as the cooperation, the exchange of information and the colleges of supervisors.*