

How payments professionals can engage more effectively with regulatory colleagues: A short guide to technical advocacy

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Ruth Wandhöfer is highly regarded across the banking industry for her in-depth knowledge of the regulatory, market and competitive landscape. She holds a number of influential positions, including the Chairmanship of the European banking industry's Payments Regulatory Expert Group, the EPC's Information Security WG, the BAFT-IFSA Eurozone WG and Global Regulatory WG, membership of the European Payments Council (EPC) Plenary, the EU Commission's Payment Systems Market Expert Group and the ECB COGEPS. Ruth is responsible for Citi's Regulatory & Market Strategy globally. She has external responsibility for engaging with and influencing the evolving regulatory and market/standards environment as well as driving and coordinating the business response within Citi. Ruth speaks five languages and has completed studies in various countries, including an MA Financial Economics in the UK, an MA International Politics in France and an LLM in International Economic Law in the UK. She recently published her first book on 'EU Payments Integration' (Palgrave Macmillan) and is a fellow lecturer of the Pallas LL.M Program in European Business Law. A '2010 Financial News Rising Star', she has been named in Management Today's 2011 '35 Women under 35' list of women to watch (Sunday Times) and in 2012 was named one of the top 100 most influential people in finance by the Treasury and

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ABSTRACT

This paper examines the European Union (EU) decision-making process around financial legislation, with a particular focus on the payment services industry. Given the plethora of regulatory requirements emanating from the EU, it is important to understand the procedures and processes that lead to legislation. In that regard, the advice of industry experts is key and, therefore, this paper explores ways of applying and sharing expert knowledge at a technical level in appropriate ways. The engagement process and opportunity to influence and shape legislation is discussed in detail, with a view to enabling improved dialogue between market participants and those responsible for developing policy at EU level.

Keywords: European legislation, payments, technical advocacy, EU decision-making

INTRODUCTION

The last ten years have seen increased levels of regulatory activism in the payments industry in Europe. A key reason for



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these interventions has, of course, been the introduction of the euro with banknotes and coins in 2002, which led to a number of significant developments, ranging from the development of the Single Euro Payments Area (SEPA) to the Payment Services Directive (PSD), the E-Money Directive and other Single Payments Market initiatives. As with all regulatory changes, the dialogue and support of industry experts is crucial and necessary in order to allow the policy makers to propose sensible, targeted and effective regulatory measures that are able to address market failure and at the same time can be implemented practically without disproportionate implications on key affected stakeholders. Looking at the European Union (EU), where decision-making around policy in the payments space is taking place, one is faced with a complex process from initial policy objective to policy agreement and implementation. This paper examines in more detail how this process works today, and when and where technical experts from the payments field could or should offer their experience and advice to policy makers and decision makers in order to support a best possible policy outcome.

HOW EU LAWMAKING WORKS: A STEP-BY-STEP GUIDE

Before explaining the EU decision-making processes in more detail, this paper first presents a quick overview of who is involved in this process. There are three main bodies at play here: the European Commission, the European Parliament and the Council of the European Union.

The European Commission, a large body of EU civil servants divided into 27 areas of expertise (along the number of 27 member states) — so-called Directorate Generals — is responsible for proposing legislation. The European Parliament, the

only democratically elected body in Europe and composed of approximately 750 members, is responsible for deciding a legislative proposal, together with the Council of the EU, the body of member state government representatives. This joint decision-making process is also called co-decision. Final legislation has to be approved and voted on by the Plenary of the European Parliament.

Figure 1 represents the high-level process flow for regulatory decision-making in Europe.

With this topography in mind, it becomes clear very quickly that the EU Commission is a very important body when it comes to influencing legislation, given that they are at the start of the decision-making chain and remain influential until the very end. While the European Parliament also has the right to propose legislation directly, the EU Commission is responsible for the majority of proposals issued. Once a legislative proposal, which can come in different shapes — eg a Directive (to be implemented in member state law), a Regulation (applicable immediately on all member states) or a mere Recommendation (non-binding) — has been issued for formal decision-making between Parliament and Council, where the Commission again plays a key mediator and negotiator role (in the so-called Trilogues), it can be sometimes too late to influence in any other meaningful direction. Therefore, for any technical expert advice, the Commission should be a key target. At the same time, there have also been plenty of cases in which a legislative text will have departed considerably from the original Commission proposal during the ‘co-decision’ process. So an end-to-end engagement is clearly the most effective approach.

With regard to the payments legislative space in particular, the EU Commission’s DG MARKT (Director General Internal

Market and Services) is in charge of retail payments and consumer protection, which is one of its units. In this unit, work is continuously ongoing around market analysis and policy options to improve payment services in Europe further. Once an idea or theme has ripened in the minds of this civil servant team, a first ‘non-official’ document could be prepared and shared with market experts. These types of documents are usually called ‘non-papers’, a typical EU policy term for designating a piece that has no official approval (yet, at least), but reflects the views of the Commission (or for that matter any of the other EU bodies, eg Council, Parliament) on a specific topic. But the crucial time for technical advocacy is way before that ‘initial’ step.

DG MARKT has two official advisory bodies: the Payment Systems Market Expert Group (PSMEG) and the Payments Committee (PC) — these are standing committees that have the function of advising the Commission in relation to payments legislative developments from a market and government perspective. The PSMEG is composed of supply-side and demand-side stakeholders and other experts from the industry, while the PC is composed of member state representatives. In the past, these committees have been actively involved in reviewing and commenting on ideas and proposals in the pre-legislative and pre-proposal stages. In a recent trend, however, DG MARKT has been less active in consulting the PSMEG and PC, even though the revision of the PSD and a proposal for a Regulation on card interchange fees — two key payments legislative developments that the Commission has been working on over the last few months — are going to be officially published for EU decision-making this year. This behaviour is unfortunate in the sense that technical and political views from a broad stakeholder community are not always available before

the finalisation of these legislative proposals. In a best-case example, however, these two committees — if consulted — offer an excellent opportunity to bring forward empirical data and other relevant facts and comments in order to help shape a forthcoming legislative proposal.

How to do this? There is no need to worry if one is not a member of these committees (a member either has to be a member state civil servant responsible for payments in the finance ministry or local supervisor, or has to have been handpicked by the Commission as a leading expert or stakeholder representative in the field of payments). One’s views and expertise can still be brought forward by working directly with representatives in both committees, so either via the member state or via one or several of the market experts in the PSMEG.

Once the Commission, following the so-called inter-services consultation, where internal Commission agreement across relevant DGs is being sought, has published the official proposal for a Directive or Regulation, the above outlined decision-making process begins.

When this has happened, the first phase of potential advocacy would involve dialogue with the European Parliament. In the context of payments legislation, the European Parliament Economic and Monetary Affairs Committee (ECON) would normally be the lead committee in the Parliament, responsible for preparing the initial position of the Parliament on a proposed legislation. The key interlocutor in the ECON would be the ‘rapporteur’ — for each legislation a ‘rapporteur’ is appointed who will lead the work on developing the report for that specific legislative proposal. In addition, so-called ‘shadow rapporteurs’, those that represent other key parties in the Parliament, will be appointed and will also be important stakeholders in the dialogue. Furthermore, the

secretariat of the ECON Committee also plays a key role in preparing the Parliament position and should be liaised with.

The Parliament will prepare amendments to the proposed legislation, which represent areas where members have identified a need to modify the Commission proposal. The number of amendments can sometimes be astonishingly high — the PSD had well over 1,000 amendments proposed by the Parliament — and it will be important to bring technical amendment input to the table early on. Amendments can be proposed to Members of the European Parliament (MEPs) via relevant trade bodies, such as the European Banking Federation or national banking or payments associations, which will all propose their position on a legislative proposal and share this information with the Parliament. Alternatively, technical information can also be shared directly with MEPs, but it is usually recommended to represent one's views as part of a broader stakeholder group via a trade body.

Once the ECON has finalised its set of amendments, it has a Committee vote on these and, subsequently, this information is shared with the relevant body within the Council of the EU; in a payments context, this would be the ECON. With regard to the Council, it is important to keep in mind that the representation of member states and their individual perspectives is at the centre of their focus. The permanent representatives of the different member states in Brussels are therefore an important counterpart when it comes to discussing specific points in relation to country positioning on a legislative proposal.

The Council, of course, will have already had a look at the Commission proposal in the meantime and will have started preparing its own position and proposed changes to the original Commission text. So both Council and Parliament are work-

ing in parallel on their respective positions. Once the Council has agreed on the so-called 'general approach', which is similar to the European Parliament report in terms of constituting a 'red line' of negotiation, the 'Triologue' begins, with the goal of getting to a final consensus between all these positions. The Commission is an influential player in this process, acting as a mediator between Parliament and Council, while also operating under the objective of returning to its own original proposal as much as possible.

This last phase of negotiation is more difficult to engage with as an external party, and success in bringing forward any further arguments at this stage will naturally depend on one's own level of credibility and networking that one brings to the table.

The final legislation is then voted upon by the Plenary of the European Parliament and subsequently published in the Official Journal of the EU.

Depending on the type of legislative measure and the field of financial services it covers, technical standards may be developed following the approval of principal legislation. As illustrated in Figure 1, the European Banking Authority (EBA), European Securities and Markets Authority (ESMA) and European Insurance and Occupational Pensions Authority (EIOPA) are the three EU-level supervisors responsible for drafting technical standards across banking, securities services and insurance, which afterwards will need to be endorsed by the Commission. In the payments space, no EU supervisory body technical guidance has yet been seen. In fact, for both the PSD and the SEPA Regulation, the industry itself (and the present author happened to lead these efforts), composed of the European Banking Federation, the European Payments Council, European Cooperative Banks and card schemes,

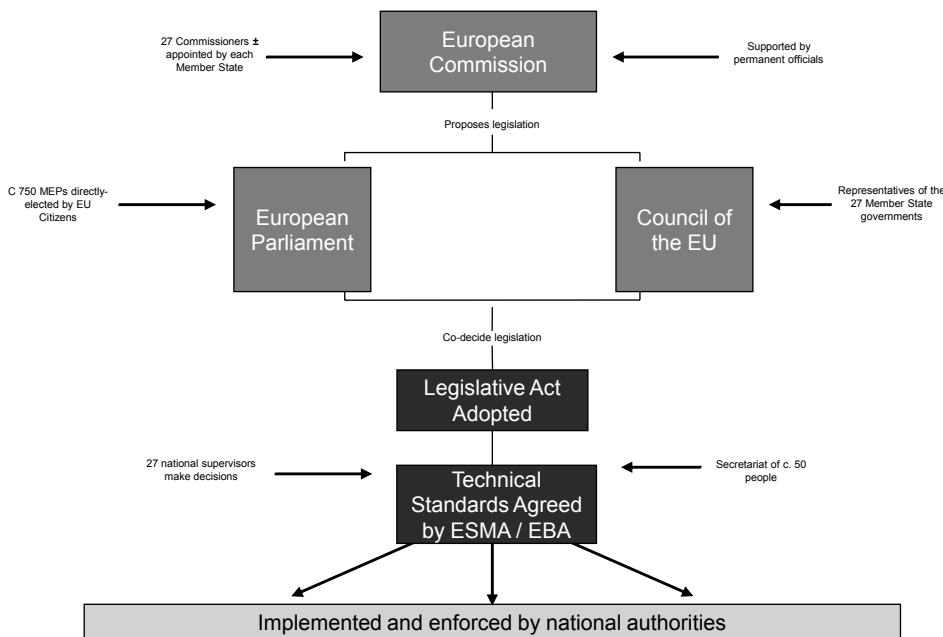


Figure 1 The high-level process flow for regulatory decision making in Europe

effectively drove the development of industry guidance to help market participants understand and implement the legislation properly and consistently.¹

HOW THE EU PAYMENTS REGULATORY MACHINE HAS EVOLVED OVER THE LAST TEN YEARS

During the development of the PSD, for example, the stakeholder dialogue with the EU DG MARKT policy team was very intense and lengthy. At the time, roughly seven PSD draft ‘non-paper’ proposals were gone through before the official text was published by the Commission for decision-making between Parliament and Council. Almost ten years later — the original PSD drafting took place between 2005 and 2008 — the Commission is looking at the PSD revision, and the industry has not seen any pre-legislative drafting proposal, apart from a reminder of the areas that have to be reviewed in line with the original Directive. Given the repeated announce-

ments of the Commission that publication of PSD II was to be expected before summer 2013, this is at best a disconcerting outcome. New elements and services are expected to be added to the text but, apart from a few selected voices, the Commission had thus far not been prepared to listen to the broader stakeholder and expert community. The very latest developments, with the official publication of the PSD II proposal on 24th July, 2013, now confirm that no additional effort has been made by the Commission in 2013 to involve stakeholders before issuing the final proposal.²

The European Central Bank (ECB), which has recently issued guidelines for security in online and card payments, is another important stakeholder that can be added to the list of ‘people to see’ in the context of payments legislation. The ECB is a body that is able to propose specific legislation in relation to maintaining the stability and soundness of payment systems in Europe. While the ECB has thus far made little use of this power, one can see an increase in activity in relation to the

area of security in payments, where guidelines for national supervisors have been issued for implementation by 2015, which will directly affect payment services and providers in Europe. With regard to PSD II, the ECB has been collaborating with the Commission in relation to discussions on potential new services to be introduced into the legislative framework. Here, they are talking about ‘access to accounts’ and ‘payment initiation services’, which have become something of a hot topic since last year. To tackle this particular topic, a technical workshop arrangement has been put in place, whereby the Commission, ECB and supply and buy-side members have met several times in order to discuss how best to regulate this area. Clearly, this topic will gain renewed impetus now that the final legislative proposal for PSD II is out.

SOME GENERAL TIPS ON EFFECTIVE ADVOCACY

To conclude, the author would like to share some additional general advice in relation to successful and effective advocacy. The key ground rules are as follows:

- (i) One needs to be a skilled negotiator, prepared to listen as well as to provide information and views. It makes no sense to send senior representatives of an organisation that represents a certain stakeholder view, if these individuals are not also willing to listen and negotiate.
- (ii) Understand the topic at hand in great detail and be able to translate the cause and effect impacts into real-life examples to which a broad group of stakeholders, including politicians, can relate.
- (iii) Be able to paint alternative scenarios under which the legislative drafting would trigger different outcomes.
- (iv) Understand and factor in the views

and positions of other stakeholders and try to develop common ground with them where possible — a broader base of stakeholders agreeing to a certain position sends a stronger signal to policy and decision-makers.

- (v) Keep a high level of integrity and honesty throughout the process and be prepared to have some room to give/provide a counter-offer (this is about giving and taking).
- (vi) Know when to stop trying to influence — do not overdo it.

By following these ground rules, one’s input is much more likely to be qualitatively meaningful and appreciated by policy makers, who in the end need expert help, but need to make sure that they engage with the right counterparties.³

REFERENCES AND NOTES

- (1) Both guidance documents can be found on the following links: PSD Guidance (2009) and Addendum (2010). Available at http://www.ebf-fbe.eu/uploads/documents/publications/Reports/Others/Brochure_24-08-09-PSD-Web-2009-01152-01-E.pdf and <http://www.ebf-fbe.eu/uploads/documents/positions/Social/14-06-D0459G-2010%20final%20PSD%20Guidance%20Addendum%20%208%20June%202010%20final-LAYOUT.pdf> SEPA Regulation Guidance (2012). Available at <http://www.ebf-fbe.eu/uploads/SEPA%20guidance%20final.pdf>
- (2) <http://eur-lex.europa.eu/LexUriServ.do?uri=COM:2013:0547:FIN:EN:PDF>
- (3) For more detail, see Wandhöfer, R. (2010) ‘EU Payments Integration: The Tale of SEPA, PSD and Other Milestones along the Road’, Palgrave Macmillan, Basingstoke, which explains in greater depth the ways to provide technical input to regulatory developments in the European payments space.