Legal high Committee for
Financial markets of Paris

FEASIBILITY REPORT ON THE INTRODUCTION BY THE UNION LEGISLATURE OF A FORBEARANCE PROCEDURE INVOLVING THE EUROPEAN SECURITIES AND MARKETS AUTHORITY

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The Legal High Committee for Financial Markets of Paris (HCJP) has set in place a working group (see membership in Annex) chaired by Gérard RAMEX, former AMF Chairman (Autorité des Marchés Financiers), on the issue of the "no-action letters" issued by various non-French Financial Authorities in certain circumstances. Two rapporteurs have been appointed by the group: Professor Francesco MARTUCCI (Paris Panthéon Sorbonne University) and Professor Régis VABRES (Burgundy University). This report has been approved by the HCJP at its plenary meeting held on October 1st, 2018.

The internal market in financial services is based on a set of secondary-legislation provisions, many of which were created in the wake of the financial crisis. The basic acts, including MiFID II, EMIR and PRIIPs, thus provided the foundation for numerous delegated acts and implementing acts, which were adopted as Level 2 measures. But this process of regulatory inflation has raised practical difficulties. On multiple occasions, Level 2 measures proved to be inappropriate, particularly because they came into effect prematurely, with the result that some firms based in the European Union (EU) struggled to bring their activities into compliance with insufficiently operational measures. This put them at a competitive disadvantage compared with undertakings based in third countries where authorities followed a policy of regulatory forbearance, allowing them to postpone the application date for measures equivalent to those adopted by the Union. While the European Commission and the European Securities and Markets Authority (ESMA) responded to issues with one-off corrective measures, these measures were adopted only after a lengthy process, in accordance with the Level 1 legislation, which prevented them from having any real effect. The timelines used in the Level 1 procedure are ill-suited to the pace of the markets. Europe's system of financial supervision clearly needs an emergency mechanism that can be used, in a short and specified timeframe, to postpone the entry into force of Level 2 acts or to suspend a provision contained in a Level 2 act pending corrective measures. It should be stressed that the current situation creates a competitiveness gap between third countries and the EU, because the authorities of these countries possess a regulatory instrument that the European supervisory system singularly lacks.

This report proposes to introduce a forbearance mechanism to Europe's Level 1 legislation. The new procedure would be executed by ESMA and the European Commission, overseen by the European Parliament and the Council. This would entail a revision to Regulation (EU) No 1095/2010[1], which

[1] *Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC, OJEU L 331, 15 December 2010, p. 84.*

established ESMA as an EU body within the European financial supervision system.

Such an amendment would be especially helpful to ESMA given that a number of third-country supervisors enjoy such powers. To give an example, the US Securities and Exchange Commission (SEC) and Commodity Futures Trading Commission (CFTC) are empowered to issue no-action letters and exemptive letters.

Implementing this reform will however entail compliance with a number of constitutional requirements, which we recall in part one of this report (I). After recalling the requirements, we sketch out a number of potential scenarios (II). Of these, the option chosen by the working group and submitted to the HCJP offers the advantage of being easily integrated within the provisions of Regulation No 1095/2010 (III).

I – Compliance with the constitutional framework

The EU legislature has delegated to ESMA powers whose scope is dictated by Regulation (EU) No 1095/2010 and by other subsequently adopted legislative acts that have gradually filled out ESMA's regulatory framework. However, this framework remains limited, having regard to the delineation of responsibilities in terms of financial stability and the need to maintain institutional balance, as provided for by the treaty. With this in mind, it is necessary to assess the extent to which the constitutional framework established by the treaty permits or prevents the introduction of a forbearance procedure involving ESMA. For this, we need to establish the case law background surrounding this question. Ruling on a case involving short selling, the Court of Justice of the European Union (CJEU) has already issued a judgement (referred to below as "*ESMA* judgement") on the delegation by the EU legislature, in exceptional circumstances, of intervention powers to a body established by a regulation[2]. It considered that Article 114 of the Treaty on the Functioning of the European Union (TFEU) constituted an appropriate legal basis for adoption of the regulatory provision. It found, moreover, that such delegation was not incompatible with Articles 290 and 291 TFEU. It also interpreted the *Meroni v High Authority ("Meroni")* and *Romano* judgements as not preventing a delegation of powers as disputed in the case[3]. Furthermore, since *ESMA* judgement, the Court of Justice has fully recognised the general interest consisting in ensuring the stability of the financial system to justify limitations on the rights and principles enshrined in primary law (ownership rights[4] and the principle of legitimate expectations[5]) and provisions set down in secondary law (limits on shareholder rights[6] and bail-in measures imposed on shareholders and creditors[7]).

[2] *CJEU, GC, 22 January 2014, United Kingdom v Parliament and Council, "ESMA", C-270/12, ECLI:EU:C:2014:18.*

[3] *ECJ, 3 June 1958, Meroni v High Authority, 9/56, Rec. p. 9. ECJ, 14 May 1981, Romano, 98/80, Rec. p. 1241.*

[4] *CJEU, GC, 20 September 2016, Ledra Advertising Ltd, C-8/15 P to C-10/15 P, ECLI:EU:C:2016:701, points 71-74.*

[5] *CJEU, GC, 19 July 2016, Kotnik e.a., C-526/14, EU:C:2016:570, point 69.*

[6] *CJEU, GC, 8 November 2016, Gerard Dowling e.a., C-41/15, ECLI:EU:C:2016:836, points 50-55. See also CJEU, 10 November 2016, "Private Equity Insurance Group" SIA, C-156/15, ECLI:EU:C:2016:851, point 51.*

[7] *CJEU, Kotnik e.a., C-526/14, EU:C:2016:570, op. cit., points 88 to 90.*

1.1 - Legal grounds

Granting ESMA powers that it can exercise over entities placed under its direct supervision or over competent national authorities with responsibility for such supervision would require an act of secondary legislation to be adopted. Consequently, we need to identify the legal basis for this.

1.1.1 - Article 352 TFEU

Article 352 TFEU is the legal foundation that would allow the EU legislature to adopt a legal act conferring such powers on ESMA[8]. In this regard, points 54 to 59 of the advocate general's opinion[9] in *ESMA* judgement are relevant, *mutatis mutandis*, when it comes to assessing whether Article 352 TFEU provides an appropriate legal basis on which to adopt a provision conferring powers on a body established by the EU legislature.

In the first place, action by the EU is necessary because, in the internal market in financial services, inadequate action by a competent national authority or the adoption by a competent national authority of insufficient measures could have serious cross-border implications. The advocate general points out, in the case of short-selling contracts, that "*in situations posing a threat to the orderly functioning and integrity of financial markets or to the stability of whole or part of the financial system in the European Union, a centralised decision making procedure enabling uniform application of EU rules on short selling would seem to be both necessary and proportionate*"[10]. The same justification offers grounds to argue that the adoption of a provision is "*necessary*" "*to attain one of the objectives*" set out in the treaties. Forbearance powers may be considered necessary to attain the objective of financial stability, given the cross-border implications of insufficient supervisory measures taken by a Member State.

Second, recourse to Article 352 TFEU must not constitute a means to get round the treaty. Accordingly, it must not be possible to adopt the act in question on the basis of any other provision. This would be the case if it is determined that Article 114 TFEU does not provide an appropriate legal basis. Whatever the case may be, Article 352 TFEU must not result in the scope of the Union's powers being widened "*beyond the general framework created by the provision*" of the treaty and "i*n particular, by those*

[8] *Article 352 TFEU: "1. If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament."*

[9] *CJEU, ESMA, op. cit., opinion ECLI:EU:C:2013:562.*

[10] *Ibid., point 54.*

defining the tasks and the activities" of the Union. In this instance, the proposed act forms an integral part of the scope of the Union's powers, since it would relate to the internal market in financial services. The question here is not about the assignment of responsibilities to the Union, but about the nature and the scope of the powers that the Union body is entitled to exercise under its responsibilities.

Third, the advocate general recalled in his opinion that recourse to Article 352 TFEU may be allowed for measures "*which are specifically aimed at individuals*", where the measures concerned fall within the scope of the objectives of the Union[11].

Article 352 TFEU does however contain two major institutional stumbling blocks. The Council rules unanimously on Commission proposals. European Parliament approval is required.

1.1.2 - Article 114 TFUE

Article 114, paragraph 1, TFEU states:

"*Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.*"

ESMA judgement established the conditions under which Article 114 TFEU forms an appropriate legal basis for adopting EU legislative acts that widen ESMA's powers. The advocate general states in his opinion that "*given ESMA's authority to 'impose binding decisions on local supervisors and market participants', it is unsurprising that the appropriateness of Article 114 TFEU as a legal basis for such powers has been queried*"[12]. *However, he says, making particular reference to the ENISA judgement*[13], *that Article 114 TFEU allows the Union legislature not only to establish a body (agency), but also to entrust it with "general powers […] to pass measures that are legally binding on third parties*"[14].

[11] *Ibid., point 57.*

[12] *Ibid., point 27; note 41 includes references to Anglo-Saxon literature questioning the legal basis of the ESAs.*

[13] *ECJ, 2 May 2006, United Kingdom v Parliament and Council, "ENISA", C-217/04, Rec. p. I-3771.*

[14] *Opinion ECLI:EU:C:2013:562 op. cit., points 29-34.*

"*Article 114 TFEU can be used as a legal basis only where it is actually and objectively apparent from the legal act that its purpose is to improve the conditions for the establishment and functioning of the internal market.*"[15] In this context, the *"measures for the approximation"*, as defined by Article 114 TFEU, give the legislature *"a discretion, depending on the general context and the specific circumstances of the matter to be harmonised, as regards the method of approximation most appropriate for achieving the desired result, in particular in fields of complex technical features*"[16].

In *ESMA* judgement, the Court considers that recourse to Article 114 TFEU requires two conditions to be satisfied.

1.1.2.1 - "Measures for the approximation"

The legislature must seek the adoption of "*measures for the approximation*". The Court follows the advocate general's opinion in considering that this condition should be assessed "*depending on the general context and the specific circumstances of the matter to be harmonised*" and confers "*discretion as regards the most appropriate method of harmonisation for achieving the desired result, especially in fields with complex technical features*"[17]. When it comes to exercising this discretion, the Union legislature may provide for the establishment of an EU body responsible for contributing to the implementation of a process of harmonisation[18]. It may also delegate to a Union body "*powers for the implementation of the harmonisation sought. That is the case in particular where the measures to be adopted are dependent on specific professional and technical expertise and the ability of such a body to respond swiftly and appropriately*"[19].

In *ESMA* judgement, the Court of Justice considers that the legislature established sufficient justification to provide "*an appropriate mechanism which would enable, as a last resort and in specific circumstances, measures to be adopted throughout the EU which may take the form, where necessary, of decisions directed at certain participants in those markets*"[20]. Specifically, "*faced with serious threats to the orderly functioning and integrity of the financial markets or the stability of the financial system in the EU, the EU legislature sought [...] to provide an appropriate mechanism*"[21].

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[15] *Ibid., point 31.*

[16] *Ibid.*

[17] *ECJ, C-270/12, op. cit., point 102. Our italics.*

[18] *Ibid., point 104.*

[19] *Ibid., point 105.*

[20] *Ibid., point 108.*

[21] *Ibid.*

The Court also notes that the legislature indicated in the first recital of the regulation that national authorities had adopted emergency measures to restrict or ban short selling and that the measures were divergent as the Union lacks a specific common regulatory framework for monitoring short selling[22]. This created a "*fragmented situation*" because Member States had taken divergent measures, justifying the need "*to address the potential risks arising from short selling and credit default swaps in a harmonised manner*"[23].

It must be demonstrated that:

- the proposed act seeks to address threats to the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union;

- the measures to be adopted by ESMA have already been introduced by national authorities and there are divergences between Member States.

1.1.2.2 - The objective of improving the conditions for the establishment and functioning of the internal market

Article 114 TFEU can be used as a legal basis only where it is actually and objectively apparent from the legal act that its purpose is to improve the conditions for the establishment and functioning of the internal market. In *ESMA* judgement, the Court of Justice analyses the recitals of the short selling regulation to identify elements that demonstrate that this objective is truly pursued by the act in question. Since the aim is to improve the conditions for the functioning of the internal market "*with regard to the financial markets*", the EU legislature is entitled to "*lay down a common regulatory framework with regard to the requirements and powers relating to short selling and credit default swaps and to ensure greater coordination and consistency between Member States where measures have to be taken in exceptional circumstances*"[24]. Consequently, the harmonisation of the rules governing such transactions is indeed intended "*to prevent the creation of obstacles to the proper functioning of the internal market and the continuing application of divergent measures by Member States*"[25].

[22] *Ibid., point 109.*

[23] *Ibid., point 111.*

[24] *Ibid., point 114.*

[25] *Ibid.*

Even more tellingly in our view, the Court adds the following point:

"*While competent national authorities will often be best placed to monitor and react immediately to an adverse development, ESMA should also have the power to take measures where short selling and other related activities threaten the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union, where there may be cross-border implications and competent national authorities have not taken sufficient measures to address the threat.*" [26]

This is sufficient to demonstrate that the powers vested in ESMA as regards short selling are effectively intended to improve the conditions for the establishment and functioning of the internal market in the financial area.

In the case of the proposed forbearance procedure, it is necessary to show that ESMA's intervention is needed to preserve the orderly functioning and integrity of financial markets or financial stability.

1.2 - Framework for delegating powers

In *ESMA* judgement, the United Kingdom also argued that the authority's power of intervention was inconsistent with the principles governing delegation as established by *Romano* and *Meroni*.

1.2.1 - The *Romano* judgement

In ESMA judgement, the Court of Justice interprets *Romano* as not preventing the European Supervisory Authority (ESA) from adopting, "*in strictly circumscribed circumstances [...] measures of general application*" that *"may also include rules affecting any natural or legal person*"[27]. Two reasons explain this flexible reading of *Romano*; first, in *Romano*, the "*administrative commission*" hase nothing to do with ESMA; second, Articles 263, 265 and 267 TFEU provide for the ability to contest the legality of measures by bodies established by the legislature. The legislature may confer on the ESA the power to adopt measures of general application as well as measures including rules affecting any natural or legal person. However, such delegation must take place in strictly

[26] *Ibid., point 115.*

[27] *CJCE, C-270/12, précité, point 64.*

circumscribed circumstances. Accordingly it is important to be as precise as possible when determining the delegated powers. It is also necessary to stress the legally challengeable nature of ESMA measures.

1.2.2 - The *Meroni* judgement

According to the principle followed by the Court of Justice, the treaty allows for powers to be delegated but such delegation can only involve "*clearly defined executive powers the exercise of which can, therefore, be subject to strict review in the light of objective criteria determined by the delegating authority*", while any delegation of "*a discretionary power implying a wide margin of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy*" is excluded, This is because of the "*transfer of responsibility*" involved in a delegation of the second type. ESMA judgement also contextualises the scope of Meroni, pointing out that the case related to private entities.

Elsewhere, the Court notes in *ESMA* judgement that:

- the disputed legislative provision does not confer any autonomous power on ESMA that goes beyond the bounds of the regulatory framework established by the ESMA Regulation;

- the exercise of the powers is circumscribed by various conditions and criteria which limit ESMA's discretion[28].

The Court of Justice notes that ESMA is authorised to adopt measures only where they "*address a threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union and there are cross-border implications*". Furthermore, "*all ESMA measures are subject to the condition that either no competent national authority has taken measures to address the threat or one or more of those authorities have taken measures which have proven not to address the threat adequately*". Whatever the case may be, the measures that ESMA may take strictly are confined to those set out in the provision of the ESMA Regulation in question, while ESMA's margin of discretion is circumscribed by both the requirement to consult with other bodies and by the temporary nature of the measures, since the authority must review the measures at appropriate intervals and at least every month. Accordingly, *Meroni* does not prevent the EU legislature from delegating to ESMA the power to adopt measures of general or individual application.

[28] *Ibid., points 44-45.*

In view of the foregoing, the introduction of a forbearance procedure must meet the following conditions and criteria:

1 – The forbearance procedure must be expressly provided for in an EU legislative provision. To do this, the most logical solution is to revise the ESMA Regulation in order to provide expressly for the forbearance procedure by laying down the conditions for ESMA's involvement.

2 – It must be explicitly stated that the forbearance measures are intended to address "*a threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union, where there are cross-border implications*".

3 – The relationship between the procedure and the action of the competent national authorities must be determined. Option 1 is for the authorities not to act. In this case, ESMA can substitute itself for them and deal with the threat. Option 2 is for some authorities to act; the Court notes that the legislature makes provision for ESMA to act if national measures have proven not to address the threat adequately. It is reasonable to consider that the risk of divergences within the internal market is sufficient to justify ESMA's intervention. In any event, ESMA must provide the national authorities with notification of the duly substantiated measure taken.

4 – Measures must be temporary in nature and regularly reviewed.

5 – The conditions under which the measures may be adopted and the criteria for activating ESMA's powers must be defined with the utmost precision.

II – Possible scenarios for introducing a forbearance procedure for use by the European Supervisory Authorities and especially ESMA

The introduction of forbearance powers for use by the ESAs is a measure that would allow the authorities to temporarily suspend the application of certain European standards relating to banking, finance and insurance participants. Modelled on the no-action letters used by the SEC in the United States, this power would be designed to help professionals adapt to regulatory developments by allowing them a period of respite, without challenging the content of the rules.

Such powers do not exist as the legislation stands. To grant them would entail a reform that could potentially take various forms, including adoption by the co-legislators of a specific regulation, amendment of the regulations that established the ESAs or changes to the texts establishing sector-specific legislation, such as the MiFID, EMIR and Prospectus regulations.

However, with the European Commission initiating steps in September 2017 to reform the powers assigned to the ESAs, it was felt that the most appropriate solution was to propose amending the proposal currently in the process of adoption by the European Parliament, which provides, among other things, for an extension to ESMA's direct supervisory powers over capital markets.

Under Regulations Nos 1093, 1094 and 1095/2010, the ESAs, namely EIOPA, EBA and ESMA:

- coordinate national supervisors,
- propose regulatory technical standards and implementing technical standards,
- adopt individual decisions in the event of emergencies, disputes between authorities or breaches of EU law,
- supervise certain participants, notably rating agencies, directly.

These four sets of powers have the distinctive feature of being subsidiary and/or shared powers, with the exception of direct supervision, which is still relatively marginal and confined to certain categories of participant.

ESAs intervene only when disputes between national authorities persist within the framework of supervision. In addition, they intervene only in close collaboration with the European Commission and potentially the co-legislators in drawing up standards.

Accordingly, the introduction of a forbearance procedure must dovetail with the specific features of the current powers wielded by the ESAs and maintain the institutional balance.

Three scenarios were suggested during discussions within the HCJP working group:

2.1 - Create a specific new power

The working group quickly ruled out the option of creating a specific new power for the ESAs, although this would be consistent with what European regulations allow in some instances[29]. Empowering an ESA to suspend application of a standard established jointly by the European institutions - whether at Level 1 or Level 2 - or delay its entry into application, without having to justify the exercise of this power would severely infringe on the distribution of powers between the European institutions and would be inconsistent with the European case law cited earlier.

2.2 - Create a new scenario in which individual decisions may be adopted

Regulations Nos 1093, 1094 and 1095/2010 define the situations where the ESAs are empowered to adopt individual decisions[30]. Three scenarios are considered: a breach of EU law, an emergency situation or a dispute between national authorities. The procedures relating to this power offer valuable information about the scope of the ESAs' powers. In this instance, if we focus only at ESMA level, in the event of a breach of EU law, the power to take an individual decision is exercised in two stages. In the first instance, individual decisions are addressed to the affected national authorities. Only if the authorities fail to comply with the decisions sent to them may ESMA subsequently take an individual decision relating to a financial market participant.

The same applies in emergency situations. The European Commission must have noted the emergency, either at its own initiative or at the request of the European Parliament, the Council, the European Systemic Risk Board (ESRB) or ESMA. Once the emergency is noted, coordinated action by the national authorities must be necessary "*to respond to adverse developments which may seriously jeopardise the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union*". Here again, the power to take individual decisions is exercised as part of a two-stage process. In the first instance, the affected national authorities are the sole recipients of these individual decisions. Only if the authorities fail to comply with the decisions sent to them may ESMA subsequently take an individual decision relating to a financial market participant.

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[29] See for example on short selling Article 28 of Regulation (EU) No 236/2012, which was deemed consistent with the Treaty by the CJEU (CJEU, 22 Jan. 2014, case C-270/12; RTDE 2/2015, p. 337, note L. Clément-Wilz).

[30] JurisClasseur Société Traité, v° "Autorité européenne des marchés financiers", fasc. 1514, spec. No 47.

This recap of the procedures for adopting individual decisions shows that the introduction of a forbearance procedure cannot take this form, for at least two reasons.

First, the temporary suspension of certain standards is intended to apply to a set of participants as a whole and not to a specific undertaking.

Second, the current procedure for adopting individual decisions is unwieldy and is not sufficiently responsive for financial market participants.

For these reasons, the working group ruled out this option.

2.3 - Create a new type of technical standard: technical standards relating to suspension

ESAs take part in setting the standards that implement legislative measures adopted by the European Parliament and the Council[31]. Echoing Articles 290 and 291 TFEU, Regulations Nos 1093, 1094 and 1095/2010 draw a distinction between two types of technical standards: regulatory technical standards and implementing technical standards.

2.3.1 - Regulatory technical standards

Article 10 § 1 of Regulation No 1095/2010 provides that "*where the European Parliament and the Council delegate power to the Commission to adopt regulatory technical standards by means of delegated acts [...] the Authority may develop draft regulatory technical standards. The Authority shall submit its draft standards to the Commission for endorsement [...]* ". In principle, these standards shall not imply "*strategic decisions or policy choices*", to borrow the expression used by the regulation. In other words, they must deal with the technical aspects of regulation. However, regulatory technical standards may amend "*certain non-essential elements of the legislative act*".

For this reason, it is not surprising that the procedure for adopting regulatory technical standards should include a right of scrutiny for the Parliament and the Council[32]. This allows them, among other things, to lodge objections. However, they have just one month to do so, if the regulatory

[31] *R. Vabres, « Autorité européenne des marchés financiers et élaboration des normes techniques », RTDF, 2010, n° 3, p. 64 ; « Les compétences de la Commission et de l'Autorité européenne des marchés financiers dans l'élaboration de la législation financière européenne », RD bancaire et fin. mai/juin 2012, étude 12.*

[32] *JurisClasseur Société Traité, v° Autorité européenne des marchés financiers, fasc. 1514, spéc. n° 41.*

technical standard adopted by the Commission is consistent with ESMA's draft. Consensus between the European Commission and ESMA thus limits the room for the European Parliament and the Council to lodge objections.

Regulatory technical standards enter into force only once the time period for lodging objections has expired. However, if before that time period has elapsed the European Parliament and the Council decide not to lodge objections, the standards can enter into force immediately[33].

2.3.2 - Implementing technical standards

According to Article 15 of Regulation No 1095/2010, the European Commission, aided by ESMA, may be empowered to adopt implementing technical standards when it is necessary to contribute to the consistent application of legally binding Union acts. In other words, like regulatory technical standards, implementing technical standards are ultimately designed to implement legislative acts and may be used to clarify the scope of directives and regulations. However, implementing technical standards differ from regulatory technical standards in that they cannot amend or supplement a legislative act[34]. As regards the approach used to draw them up, implementing technical standards are based on a draft prepared by ESMA and adopted by the European Commission. In this case, the Council and the Parliament have no power to lodge official objections to the draft.

1.3.3 - Technical standards relating to suspension

To enable the ESAs to temporarily suspend a piece of European Level 2 legislation, the working group has come up with a solution based on a new type of technical standard known as technical standards relating to suspension. These technical standards are a hybrid between regulatory technical standards and implementing technical standards and would borrow from their respective regimes. Like regulatory technical standards, they would seek to amend a non-essential element of the legislative act, namely the date on which the legislation comes into application, and would require approval or at least no objections from the European institutions. Like implementing technical standards, they would contribute to the consistent application of EU law. In all cases, the goal is to give the ESAs the power to take the initiative, while leaving the European Commission, after consultation with the European Parliament and the Council, the task of adopting the temporary suspension of the affected standards.

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[33] T. Bonneau, P. Pailler, A.-C. Rouaud, A. Tehrani et R. Vabres, Droit financier, LGDJ, 2017, spéc. n°231.

[34] JurisClasseur Société Traité, v° Autorité européenne des marchés financiers, fasc. 1514, spéc. n° 44.

III. Content of the proposed amendment

It is proposed that the EU legislature should confer upon ESMA the power of regulatory forbearance, allowing the authority, in exceptional and strictly delineated circumstances, to temporarily suspend application of the provisions of a delegated act. Suspension would be limited to the provisions of delegated acts adopted by the Commission on the basis of Article 290 TFEU, *i.e.* provisions relating to non-essential elements of the legislative act.

Suspension would necessarily be temporary and limited to nine months, renewable once. Once application of the delegated act is suspended, the European Commission may adopt corrective measures by amending the delegated act in question, in accordance with the procedure set out in Articles 10 to 14 of Regulation (EU) No 1095/2010 or by the provision of the Level 2 act providing for the exercise by the Commission of its power of delegation.

ESMA would exercise its power of regulatory forbearance by sending a proposal for a "*suspensory technical standard*" to the European Commission so that the latter can adopt a delegated act in accordance with Article 290 TFEU. The Commission would restrict itself in the act to designating the Level 2 provision that is subject to the suspension after setting out the reasoning in the recitals.

The suspended Level 2 provision must cause, or have the potential to cause, damage to market confidence, investor protection, the orderly functioning and integrity of financial markets, the stability of the whole or part of the financial system in the European Union or conditions governing competition between firms based in the EU and in third countries. In some cases, only the date on which the Level 2 provision comes into application is concerned. The temporary suspension of the provision would thus make it possible to delay the provision's entry into application. Such postponement might be useful for example in a situation, which has already arisen in the past, where third countries have decided to delay the entry into application of certain provisions by several months and where non-postponement by the EU would put European participants at a major competitive disadvantage.

3.1 - Duration of the suspension

The working group proposes that suspensions should last nine months, renewable once at the request of the ESAs.

3.2 - Suspended measures

Measures that may be suspended are Level 2 measures, not legislative measures that have been voted on under the co-decision procedure.

3.3 - Reasons for suspension

The suspension should make it possible to address threats to the orderly functioning and integrity of financial markets, the stability of the whole or part of the financial system in the European Union or fair competition between firms based inside and outside the EU. For a suspension to be announced, it is necessary for the provision in the delegated act in question to disrupt the internal market in financial services or to threaten financial stability, the integrity of financial markets, investor protection in the EU or fair competition with third countries.

3.4 - Adoption procedure

Since it requires the Commission to be involved, the regulatory forbearance procedure maintains the institutional balance as established by the constitutional framework enshrined in the treaties. In accordance with Article 290 TFEU, the Commission is responsible for adopting the legal act with a view to suspending application of the Level 2 provision. ESMA merely makes a proposal that the Commission is free to follow. In any case, the European Parliament and the Council may be involved in the process under the conditions set down in Article 290 TFEU.

The ESA in question submits to the European Commission draft technical standards relating to suspension, which are immediately forwarded to the European Parliament and the Council. The Commission will adopt the draft within one month of receiving it. Before this time period elapses, it may lodge an objection with the ESA, which is entitled to amend its proposal within 15 days. Following the expiry of this period, the Commission may adopt or reject an amended draft standard.

Once the draft technical standard relating to suspension is adopted by the European Commission, the European Parliament and the Council have 15 days, renewable once, to lodge objections. If objections are lodged, the standard may not come into force. The European Parliament and the Council therefore have a right of veto.

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