The European Court of Justice: Selling Us Short?

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Abstract

The conferral of powers on the European Securities Markets Authority ('ESMA') has involved tensions, particularly concerning the boundaries between national and EU powers. A case in point is the recently introduced European Short Selling Regulation: article 28 confers direct powers of intervention on ESMA in exceptional circumstances. Crucially, measures adopted by ESMA under article 28 prevail over measures taken by national regulators. Article 28's adoption led to a UK challenge at the European Court of Justice seeking its annulment. However the court's decision, delivered on 22 January 2014 upheld ESMA's powers.

This paper examines this landmark decision and suggests that while some important consequences result from it in relation to the development of the European Banking Union, the decision is disappointing, not least for its brevity and failure to fully engage with the Advocate General's arguments. Further the judgment also paves the way for future developments in ESMA's and other EU bodies' roles, whilst limiting the possibility of future legal challenges. Finally, the court's affirmation of the legislative view is also part of a more general and worrying trend that has been evident in its case law over the last decade.

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1 Introduction

The European Securities Markets Authority ('ESMA') was established on 1 January 2011.[1] ESMA is responsible for the integrity, transparency, efficiency, and orderly functioning of the financial markets,[2] and as part of its role, ESMA is granted some direct powers that can be used against market participants.[3] The conferral of these direct powers on ESMA has involved tensions, particularly concerning the boundaries of such powers, and a case in point is the adoption of article 28 of the European Short Selling Regulation (the 'Regulation').[4] Article 28 provides ESMA with direct powers of intervention with respect to short selling in exceptional circumstances and, crucially, measures adopted by ESMA under article 28 prevail over measures taken by national regulators.[5]

Article 28's adoption led to a UK challenge at the European Court of Justice ('ECJ') seeking its annulment. The UK contended that article 28 was unlawful on various grounds and its arguments included ESMA being granted a large measure of discretion at odds with EU principles relating to the delegation of powers. It also submitted that article 114 of the Treaty on the Functioning of the European Union ('TFEU'),[6] the key provision for adopting legislative acts that ties legislative harmonisation to the establishment and functioning of the internal market,[7] was the incorrect legal basis for its adoption.

However on 22 January 2014 the ECJ delivered a landmark ruling that upheld article 28 of the Regulation. Although some important practical consequences flow from the court's ruling in relation to the future development of the European Banking Union (the 'EBU'), the judgment is disappointing, and not least for its brief nature and the court's failure to fully engage with the arguments made by its Advocate General.

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[1] See 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 [2012] OJ L331/84. Two other authorities: the European Insurance and Occupational Pensions Authority ('EIOPA') and the European Banking Authority ('EBA') were also established on the same date as was the European Systemic Risk Board (the 'ESRB'), that has a mandate to oversee risk in the financial system as a whole. Together they form the European System of Financial Supervision ('ESFS'). This new institutional framework stemmed from a programme of reforms introduced by the European Commission (the 'Commission') in the light of the financial crisis, and the 2009 Jacques de Larosière Report, which had made far-reaching recommendations on how to strengthen the supervision of financial markets at the EU level, see further Jacques de Larosière, *The High-Level Group on Financial Supervision in the EU: Report* (2009); Case C-270/12 *United Kingdom of Great Britain v Council of the European Union and European Parliament* (ECJ, 12 September 2013), Opinion of AG.

[2] Carmine Di Noia and Matteo Gargantini, 'Unleashing the European Securities and Markets Authority: Governance and Accountability after the ECJ Decision on the Short Selling Regulation (Case C-270/12)' (2014) 15 EBOR 1, 5.

[3] Regulation 1095/2010, art 9(5) empowers ESMA to directly intervene in the market and temporarily prohibit or restrict certain financial activities that threaten the orderly functioning and integrity of the financial markets or the stability of the whole or part of the EU's financial system in cases specified in legislative acts, or in emergency situations in accordance with article 18 of Regulation 1095/2010.

[4] Council Regulation (EU) 236/2012 of the European Parliament and of the Council of 14 March 2012 on Short Selling and Certain Aspects of Credit Default Swaps [2012] OJ L86/1.

[5] Article 28 of the Regulation was adopted in accordance with article 9(5) of Regulation 1095/2010.

[6] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47. The TFEU came into force in December 2009 following the ratification of the Treaty of Lisbon.

[7] Stephen Weatherill, 'The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court's Case Law Has Become a "Drafting Guide"' (2011) 12 German LJ 827, 829-830.

This paper sets the case in context by providing an overview of short selling and the recent push to regulate it. It then explores the UK's constitutional challenge, the Advocate General's opinion, and the ECJ's findings. The paper suggests that it is hard to agree with the court's finding that article 28 is aimed at the harmonisation of Member State laws. Further, it is likely that the judgment will open the doors to the future transfer of powers to ESMA and other EU bodies whilst limiting the likelihood of subsequent legal challenges concerning the use of article 114 TFEU. In addition, as it remains unclear from the short selling judgment what the boundaries are in relation to the conferral of such powers, the question should be raised how much further we can proceed in terms of EU financial market integration without considering whether a Treaty change is required. Finally, the court's endorsement of these far-reaching powers in the name of harmonisation is also part of a more general and worrying trend that has been evident in its case law over the past decade.

2 Short Selling Regulation in the EU

2.1 Overview of Short Selling

Short selling can broadly be defined as the sale of a security not owned by the seller in the hope that an identical security can be bought back later for a lower price. The definition varies in different jurisdictions although the International Organization of Securities Commissions ('IOSCO') takes the view that whether a particular transaction is a short selling activity depends on the presence of two factors: a sale of stock that the seller does not own at the point of sale.[8]

Short selling can be divided into two types: covered short selling where the security is borrowed, or adequate arrangements are made to ensure it can be borrowed before the short sale is executed; and naked short selling where no prior arrangement has been made to cover the short sale.[9] With naked short selling an investor sells the securities before borrowing them or making arrangements that they can borrowed and this is possible because there is a gap of time between the agreement to transfer the securities to the buyer for a specified price and the payment and transfer.

Concerns about the need to regulate short selling tend to focus especially on the need to regulate naked short selling. The potential for abuse is perceived as being greater as naked short sellers are not constrained by the requirements to cover the short sale before trading so can short sell as quickly as they can find buyers and can also short sell over 100 per cent of a company.[10] Additionally, as naked short sellers do not have the shares to sell at the time of the sale, there is also the risk of them giving a false or misleading impressions as to the supply of shares on offer for sale.[11] Settlement risk is also perceived to be a big concern: for example, if the short seller has no incentive to settle there may be settlement default.

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[8] IOSCO, 'Regulation of Short Selling, Consultation Report' (March 2009) 8 and Appendix III. For a detailed discussion of the pertinent issues relating to short selling regulation, see e.g. Jennifer Payne, 'The Regulation of Short Selling and Its Reform in Europe' (2012) 13 EBOR 413. See also Emilios Avgouleas, 'The Vexed Issue of Short Sales Regulation When Prohibition Is Inefficient and Disclosure Insufficient?' in Kern Alexander and Niamh Moloney (eds), *Law Reform and Financial Markets* (Edward Elgar 2011).

[9] IOSCO (n 8) Appendix III.

[10] FSA, 'Short Selling Discussion Paper 09/1' (2009) 11.

[11] Ibid 11.

2.2 Should Short Selling be Regulated?

The issue of regulating short selling was brought into the limelight during the recent financial crisis when the drastic drop in the price of listed financial securities following the collapse of Lehman Brothers in 2008 was described as a 'watershed moment in the regulation of short selling.'[12] Due to considerable pressure from governments, the public and the press, many regulators took the view that short selling was exacerbating the downward spiral of prices and introduced temporary short selling bans. Subsequent to the crisis, the regulation of short selling was then placed firmly on the legislative agenda and permanent short selling restrictions have now been introduced in the EU.

However despite populist concerns that suggest short selling can destabilise markets, both types of short selling improve market efficiency: it contributes to efficient pricing, liquidity, and a more efficient price discover process.[13] In addition short selling constraints generally make markets less efficient and there is also little convincing evidence that short selling constraints support prices and prevent price declines.[14] Further despite regulators' concerns, neither type of short selling was behind the price falls or the systemic effects experienced following the collapse of Lehman Brothers in 2008.[15] In fact long, rather than short, sellers accounted for most of the downward price pressure,[16] and other factors including poor company results, rumours, and a lack of investor confidence played a more significant role in the upsurge of volatility and systemic effects.[17]

Next, although naked short selling can be used abusively, it is not abusive per se, and most jurisdictions have comprehensive market manipulation regimes that could be enforced more

[12] Avgouleas (n 8) 72.

[13] See e.g. the seminal paper by Edward M. Miller, 'Risk, Uncertainty, and Divergence of Opinion' (1977) 32 J Fin 1151. Miller found that where investors have differing beliefs, permitting short selling tended to moderate the tendency for riskier stocks to be bid up to higher prices. This was because investors with negative information could reveal their beliefs through trading, meaning that all information was fully reflected in the price.

[14] See e.g. Yang Bai, Eric Chang and Jiang Wang, 'Asset Prices under Short-Sales Constraints' (2006) Working Paper <http://web.mit.edu/wangj/www/pap/BCW_061112.pdf> accessed 10 December 2012. Bai et al. demonstrated that short sale constraints could in fact cause prices to drop and volatility to increase. This happened because short sale constraints had a significant impact on informed investors, lowering the informative value of prices. See also Harrison Hong and Jeremy C. Stein, 'Differences of Opinion, Short-Sales Constraints, and Market Crashes' (2003) 16 Rev Fin Stud 487.

[15] See e.g. Veljko Fotak, Vikas Raman and Pradeep Yadav, 'Naked Short Selling: The Emperor's New Clothes' American Finance Association Denver Meetings Paper (2010) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1573163> accessed 19 November 2012. Fotak et al found that naked short sellers did not precipitate the collapse of Lehmans or others, nor did they trigger credit rating downgrades or the large stock price declines.

[16] Long selling is the more conventional practice of investing in securities. See e.g. Office of Economic Analysis, 'Analysis of Short Selling Activity During the First Weeks of September 2008' (2008) that suggested that long sellers were mainly responsible for the price falls.

[17] See e.g. Commission, Impact Assessment Accompanying Document to the Proposal for a Regulation of the European Parliament and of the Council on Short Selling and Certain Aspects of Credit Default Swaps COM (2010) 482, 24; FSA (n 10) 12. Indeed when considering the temporary bans imposed on short selling in 2008, the US temporary naked short selling ban failed to slow price declines, and securities subject to the UK short selling ban demonstrated a significant deterioration in liquidity. See e.g. Fotak, Raman and Yadav (n 15) 6; Matthew Clifton and Mark Snape, 'The Effect of Short-Selling Restrictions on Liquidity: Evidence from the London Stock Exchange' (2008).

effectively to combat any such behaviour occurring.[18] Such fears do not merit introducing additional ex ante short sale restrictions that would eliminate legitimate short selling activity and would also likely create greater costs than benefits.[19]

Finally, although naked short selling has the potential to disrupt the orderly operation of the market if a seller is unable to deliver the securities to the buyer, it is not necessary to restrict naked short selling to address such settlement concerns. Abusive naked short selling already constitutes market abuse, and the tightening of existing settlement procedures, for example by imposing strict settlement periods with penalties for fails to deliver should be sufficient to tackle this problem.[20]

Ultimately the arguments in favour of short selling restrictions do not stand up to scrutiny and when considering the recent push to regulate short selling, it is evident that the rationale did not derive from clear economic justifications. Rather, the motivation stemmed more from considerable pressure from politicians, the public and the press, plus the desire for regulators to demonstrate that they were combating unruly market forces.[21] This is problematic: such concerns do not provide a sufficient basis from which to introduce short selling constraints when legal and economic arguments exist suggesting that such measures can have negative effects. The benefits of market efficiency are far more intricate and long term in nature than any such perceived short-term benefits.[22]

2.3 EU Short Selling Regulation

Turning specifically to the introduction of the Regulation, one of its main motivations was the European sovereign debt crisis, which surfaced particularly in 2010, when the Greek government, amongst others, began to show signs of financial collapse. As the Greek situation worsened, short sales and credit default swaps ('CDSs') [23] on Greek sovereign debt increased, and speculators taking these positions were blamed for Greece's financial problems, particularly speculators purchasing CDSs on Greek sovereign debt.[24]

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[18] For example measures in the UK include administrative and criminal sanctions for market manipulation in sections 123 and 397 Financial Services and Markets Act 2000 respectively.

[19] Further, given that such concerns arise for both long and short positions, the correct regulatory response should be to target all such behaviour without singling out short sales, see Michael Powers, David Schizer and Martin Shubik, 'Market Bubbles and Wasteful Avoidance: Tax and Regulatory Constraints on Short Sales' (2003) 57 Tax L Rev 233, 246.

[20] Avgouleas (n 8) 92.

[21] See e.g. Henry T. C. Hu, 'Efficient Markets and the Law: A Predictable Past and an Uncertain Future' (2012) 4 Annual Review of Financial Economics 179, 192; Niamh Moloney, 'EU Financial Market Regulation after the Global Financial Crisis: "More Europe" or More Risks?' (2010) 47 CML Rev 1317, 1372-1373.

[22] Hu (n 21) 192.

[23] A CDS is a type of credit derivative: a contract designed to lay off credit risk in relation to loans, debt securities, other assets, or a particular entity or country. The purchaser of the CDS will be obliged to make specified fee payments to the seller. If a credit event occurs, the buyer may serve a credit event notice, and the seller will be obliged to make a payment to the buyer. A naked or uncovered CDS referencing EU sovereign debt would be a CDS that used government issued debt as its reference entity and meant that the purchaser would purchase the CDS on the government issued debt without having an underlying interest in the EU sovereign debt.

[24] Robert S. Bloink, 'Does the Dodd-Frank Wall Street Reform Act Rein in Credit Default Swaps? An EU Comparative Analysis' (2010) 89 Neb L Rev 587, 598; 591.

Although advocates of the Regulation subsequently hailed its passage as a victory over speculating on a country's default,[25] the swift endorsement of tough short selling rules was more due to the existence of narrow political agendas and political pressure than any clear economic evidence. Indeed this is particularly evident when considering the Regulation's focus on restricting naked, rather than covered, short selling, and on regulating the short selling of sovereign debt. It was far easier for politicians to accuse speculators, a vague group never clearly defined, than to deal directly with the real problems facing the EU economy.[26]

Ultimately the Regulation was a product of politicians' and regulators' desire to act in the face of public discontent, and it was also the consequence of domestic political agendas in particular Member States. Hot on the heels of the global financial crisis, the sovereign debt crisis led to political entrepreneurs attempting to make gains on their home turf, aiming to increase their political capital through blaming short sellers for the crisis.[27] Essentially the EU found in short sellers the ideal scapegoats to justify the drama of recent financial turmoil:[28] a classic case of blaming the messenger.[29]

2.4 The Regulation's Restrictions

The end product was the Regulation. It came into force in November 2012 and laid down a common regulatory framework with regard to the requirements and powers relating short selling and certain aspects of CDSs. Of particular relevance to this paper are the measures the EU introduced in relation to the perceived concerns that short selling could exacerbate negative price spirals in falling markets. To this end the EU implemented permanent restrictions on naked short selling of all shares in the form of a 'locate' rule.[30] This rule requires a person to either have borrowed a share; have entered into an agreement to borrow the share; or have an arrangement with a third party (e.g. a broker) under which the third party confirms the share has been located and the person has taken measures vis-à-vis a third party necessary for the person to have a reasonable expectation that settlement can be effected when due.[31]

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[25] Oskari Juurikkala, 'Credit Default Swaps and the EU Short Selling Regulation: A Critical Analysis' (2012) 9 ECFR 307, 308. See also European Parliament, 'Parliament Seals Ban on Sovereign Debt Speculation and Short Selling Limitations' (2011) <http://www.europarl.europa.eu/news/en/pressroom/content/20111115IPR31525/html/Parliament-seals-ban-on-sovereign-debt-speculation-and-short-selling-limitations> accessed 20 August 2013.

[26] Raoul Ruparel, 'Trading Rules Driven by Political Agenda' (7 April 2011) <www.publicserviceeurope.com/article/215/trading-rules-driven-by-political-agenda 1/> accessed 10 June 2013.

[27] This was particularly true of France and Germany. Both countries sought to capitalise on opportunities presented by the crisis to further their own interests on the domestic front where various elections were on the horizon. Taking a hard stance on the euro crisis and against short sellers was likely to prove popular with the voters.

[28] Thomas del Marmol, 'Short Selling: Need or Fear? Impact on Financial Markets and Implications for Regulation' 2011, 89 <http://www.professionsfinancieres.com/docs/2012102306_174_vn_m_short-selling.-need-or-fear.pdf> accessed 20 June 2013.

[29] Clas Wihlborg, Thomas D. Willett and Zhang Nan, 'The Euro Debt Crisis' (2010) 11 World Economics 51, 55.

[30] Regulation 236/2012, art 12.

[31] These restrictions have proven to be particularly onerous in practice due to the restrictive interpretation ESMA has chosen to take of the technical rules defining the precise parameters of the locate arrangements and measures.

Further, due to the unfounded concerns of regulators that short selling could amplify price falls in distressed markets and have a contagion effect, the EU also introduced a host of temporary restrictions on short selling. The rules provide that national regulators can impose a number of temporary measures on all forms short selling in exceptional circumstances.[32] Under article 20 the restrictions include temporary bans on all short sales where there is an 'adverse event or development' that constitutes a serious threat to financial stability or to market confidence in the Member State or in one or more Member States, and the measure is necessary to address the threat and would not have a detrimental effect on the efficiency of financial markets disproportionate to the threat.[33] Further under article 23, national regulators also have the power to restrict short selling of financial instruments temporarily using a 'circuit breaker' mechanism that would restrict short selling following a significant fall in the price of a financial instrument.[34]

2.5 ESMA's Powers

Turning to ESMA, it is required under the Regulation to perform a 'facilitation and coordination role' in relation to any such temporary measures taken by competent authorities.[35] In particular it is to ensure a consistent approach by competent authorities in relation to emergency measures taken. After receiving a notification from a competent authority that a temporary restriction is to be imposed, ESMA is required within 24 hours to issue an opinion, published on its website, on whether it considers the measure or proposed measure to be necessary to address the exceptional circumstances.[36] Further, if a competent authority proposes to take or takes measures contrary to an ESMA opinion, or it declines to take measures contrary to an ESMA opinion, the competent authority is required to publish on its website within 24 hours of receiving ESMA's opinion a notice fully explaining the reasons for doing so. Where this arises ESMA is to consider whether the conditions are satisfied and whether it is an appropriate case for the use of its powers of intervention under article 28.

Turning specifically to article 28, ESMA's direct intervention powers include the ability to prohibit or impose conditions on the entry to short sales or equivalent transactions.[37] Under article 28, ESMA is to take such a decision if this addresses a threat to the orderly functioning

[32] Regulation 236/2012, arts 20 and 23.

[33] Article 24(1) of Commission Delegated Regulation (EU) 918/2012 of 5 July 2012 supplementing Regulation (EU) No 236/2012 of the European Parliament and of the Council on Short Selling and Certain Aspects of Credit Default Swaps with Regard to Definitions, the Calculation of Net Short Positions, Covered Sovereign Credit Default Swaps, Notification Thresholds, Liquidity Thresholds for Suspending Restrictions, Significant Falls in the Value of Financial Instruments and Adverse Events [2012] OJ 274/1 provides a non-exhaustive qualitative list of criteria and factors to be taken into account in determining when such an adverse event or development and threat arises. Notably the list extends beyond financial and economic events to also include relevant damage to physical structures of important financial issuers and others that may adversely affect markets in particular where this results from a natural disaster or terrorist attack.

[34] For liquid shares, a significant fall in price is where the price has fallen by 10% or more during a single trading day in relation to the closing price on that venue on the previous trading day, see Regulation 236/2012 art 23(1) and (5).

[35] Ibid, art 27(1).

[36] Ibid art 27(2).

[37] Ibid art 28(1)(b). Article 28(1)(a) also grants ESMA powers to require persons who have net short positions in relation to a financial instrument to notify a competent authority or disclose details of the position to the public. Note however that ESMA's powers under this article exclude the power to prohibit or restrict sovereign credit default swaps or the short selling of sovereign debt.

and integrity of financial markets or the stability of the whole or part of the EU's financial system, there are cross-border implications, and no competent authority have taken measures to address the threat or one or more authorities have taken measures that do not adequately address the threat.[38]

Article 24(3) of Delegated Regulation 918/2012 elaborates on the criteria and factors ESMA is to take into account in determining whether such a threat arises. These include any threat of serious financial, monetary or budgetary instability concerning a Member State or the financial system within a Member State where this could serious threaten the orderly functioning and integrity of financial markets or the stability of the whole or part of the EU's financial system.[39] Under articles 24(3)(b)-(d) such circumstances also include the possibility of default by any Member State or supranational issuer; any serious damage to physical structures of important financial issuers, market infrastructures, clearing and settlement systems, and supervisors, that could seriously affect cross-border markets; and serious disruption in any payment system or settlement process when it relates to interbank operations that could cause significant payment or settlement failures or delays within the EU cross-border payment systems.

Under article 28(3) of the Regulation, when taking such measures, ESMA is to also take into account the extent the measure significantly addresses the threat to the orderly functioning and integrity of financial markets or to the stability of the financial system in the EU or significantly improves the ability of the competent authority to monitor the threat. It is also to take into account the extent to which the measure does not create a risk of regulatory arbitrage, and that it does not have a detrimental effect on the efficiency of financial markets including reducing liquidity in those markets or creating uncertainty for market participants that is disproportionate to the benefits of the measure.[40]

A number of procedural requirements are also placed on ESMA in relation to article 28. These include prior consultation with the ESRB,[41] and prior notification to the competent authorities concerned by the measure.[42] As with the article 20 and 23 measures observed above, ESMA is required to publish notice of the decision on the website including which instruments are affected, their duration, and the reasons why ESMA is of the opinion they are necessary. The measure takes effect when published on ESMA's website or at a time specified in the notice after publication.[43] Measures adopted by ESMA under article 28 prevail over any previous measure taken by a competent authority.[44]

Separately, ESMA also has a number of other miscellaneous powers under the Regulation, including the ability to conduct inquiries and publish a report into a particular issue or practice relating to short selling, the power to coordinate on-site inspections or investigations with cross-border effects, and the power to coordinate the development of cooperation

[38] Ibid articles 28(1) and (2).

[39] Delegated Regulation 918/2012, art 24(3)(a).

[40] Regulation 236/2012, art 28(3).

[41] As observed, the 2009 Jacques de Larosière Report recommended establishing this Union level body with a mandate to oversee risk in the financial system as a whole, see further Jacques de Larosière (n 1) 44-46.

[42] Regulation 236/2012, arts 28(4)-(5).

[43] Ibid art 28(7) and (9).

[44] Ibid art 28(11).

arrangements between competent authorities and relevant supervisory authorities of third countries.[45]

3 UK's Constitutional Challenge to Article 28

The vesting of direct intervention powers in ESMA in article 28 raises concerns. The question of whether there is a threat to the orderly functioning and integrity of financial markets with cross-border implications involves highly complex factual assessments on the part of ESMA plus the need for it to apply opaque terms such as 'orderly functioning' and the 'integrity of financial markets'. Indeed there is very little concrete guidance provided to ESMA beyond the wording of article 28 itself and the subjective criteria set out in article 24(3) of Delegated Regulation 918/2012. Further ESMA is also not provided with any factors to help it determine whether taking such a measure will significantly address such a threat or that it will not have a detrimental effect on the efficiency of financial markets.[46]

More generally ESMA's direct intervention powers have been described as having the 'hue of autumn 2008'[47] about them with their focus on crisis-driven intervention and they should not be lightly dismissed.[48] Indeed the combination of its direct intervention powers, its central role in coordinating competent authority emergency action, its 'softer practice-shaping powers,'[49] plus the limiting of national competent authority powers, all place ESMA at the heart of crucial and delicate decisions concerning short selling and it is likely ESMA will be able to exert considerable influence going forward.[50] Further, the move towards centralising powers in ESMA is also evident in other post-crisis initiatives, for example the Alternative Investment Fund Managers Directive ('AIFM'), and the European Market Structure Regulation ('EMIR') both greatly empower ESMA's role.[51]

3.1 UK's Grounds of Challenge

With this in mind, it is perhaps unsurprising that a constitutional challenge was raised to ESMA's article 28 emergency powers. In 2012 the UK brought an application to the ECJ in relation to the conferral of powers on ESMA under article 28, contending it was unlawful on various grounds and seeking its annulment.[52]

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[45] Ibid art 31; arts 37-38.

[46] Ibid art 28(3).

[47] Niamh Moloney, 'The European Securities and Markets Authority and Institutional Design for the EU Financial Market – a Tale of Two Competences: Part (2) Rules in Action' (2011) 12 European Business Organization Law Review 177, 212.

[48] Ibid 212.

[49] Niamh Moloney, 'Reform or Revolution? The Financial Crisis, EU Financial Markets Law, and the European Securities and Markets Authority' (2011) 60 ICLQ 521, 532. For example as observed, its miscellaneous powers in the Regulation include the ability to conduct inquiries and coordinate on-site inspections.

[50] Ibid 532. See also Moloney, 'The European Securities and Markets Authority and Institutional Design for the EU Financial Market – a Tale of Two Competences: Part (2) Rules in Action' (n 47) 192, 208.

[51] Moloney, 'The European Securities and Markets Authority and Institutional Design for the EU Financial Market – a Tale of Two Competences: Part (2) Rules in Action' (n 47) 208-210.

[52] *United Kingdom of Great Britain v Council of the European Union and European Parliament* (Application brought on 1 June 2012, Case C-270/12).

Meroni

First, the UK contended that the authority vested in ESMA under article 28 breached the limits set by the court in the *Meroni* judgment for the delegation of powers by the institutions.[53] This well-known doctrine arose from a challenge brought against the High Authority of the Coal and Steel Community (subsequently replaced by the European Commission (the 'Commission')). The court stated that the High Authority was entitled to delegate its powers to an external private body, however such powers were subject to restrictions imposed by the European Coal and Steel Community ('ECSC') Treaty. Such powers could only relate to clearly defined executive powers, the use of which, had to be subject in their entirety, to review by the High Authority.[54] The court drew a distinction between such clearly defined executive powers, the exercise of which could be subject to strict review in the light of objective criteria determined by the delegating authority, and discretionary powers implying a wide measure of discretion, which may make possible the execution of economic policy.[55] The former could be delegated but the latter could not. The court came to its famous conclusion that the delegation of powers granted to the agencies in question gave them a degree of latitude implying a wide measure of discretion that could not be considered compatible with the requirements of the ECSC Treaty.[56]

On the basis of *Meroni,* the UK submitted that article 28 was unlawful because the criteria as to when ESMA was required to take action under article 28 entailed a large measure of discretion. Further, ESMA was also given a wide range of choices as to what measures to impose and what exceptions to specify and these choices had very significant economic policy implications. In addition, the factors ESMA had to take into account contained tests that were highly subjective and ESMA was empowered to renew the measures without any limit on their overall duration. Finally even if (contrary to the UK's submissions) article 28 did not involve ESMA making macro-economic policy choices, ESMA nonetheless had a broad discretion as regards the application of policy to any particular case, as in *Meroni* itself.[57]

Romano

Secondly, the UK contended that article 28 purported to empower ESMA to impose measures of general application that had the force of law contrary to the *Romano* judgment.[58] In *Romano* the court had considered the delegation of power by the Council to the Administrative Commission for the Social Security of Migrant Workers (the 'Admission Commission') whose duties included comprehensive law-making competences. In another well-known conclusion the court stated that it followed from article 155 of the Treaty establishing the European Economic Community (the 'EEC Treaty') and the judicial system created by it that a body such as the Administrative Commission could not be empowered by

[53] Case 9/56 *Meroni v High Authority* [1957 and 1958] ECR 133. It should be recognised that ESMA is not technically an agency but a Union body with legal personality, see Regulation 1095/2010, art 5. However the restrictions that shaped agency design have been influential on ESMA's design, see further Niamh Moloney, 'The European Securities and Markets Authority and Institutional Design for the EU Financial Market - a Tale of Two Competences: Part (1) Rule-Making' (2011) 12 European Business Organization Law Review 41, 73.

[54] *Meroni* (n 53) 152.

[55] Ibid 152.

[56] Ibid 154.

[57] *United Kingdom of Great Britain v Council of the European Union and European Parliament* (n 52).

[58] Ibid.

the Council to adopt acts having the force of law.[59]

Articles 290 and 291

Thirdly, the UK submitted that article 28 purported to confer on ESMA a power to adopt non-legislative acts of general application in breach of articles 290 and 291 TFEU. Articles 290 and 291 provided for the two possible avenues for delegations of power at the EU level and the UK argued that the Council had no authority to delegate powers such as those provided in article 28 to an EU agency outside of these provisions.[60]

Article 114 TFEU: Incorrect Legal Basis

Finally the UK submitted that article 114 TFEU, the key provision for adopting legislative acts that tied legislative harmonisation to the establishment and functioning of the internal market,[61] was the incorrect legal basis for the adoption of article 28.[62] The UK contented that article 114 was the incorrect legal basis if and to the extent that article 28 empowered ESMA to adopt individual decisions that were binding on third parties in the event of insufficient or inadequate action by national regulators.

3.2 The Advocate General's Opinion

Overview

In September 2013, Advocate General Jääskinen delivered a carefully considered and detailed legal opinion. Significantly, he supported the UK's application, although only with respect to its article 114 TFEU submission.[63] The Advocate General tackled the question of the appropriate legal basis for article 28 first as he considered this preceded the question of the compliance of ESMA's powers under the provisions of EU constitutional law.[64]

For reasons that will be discussed in this section, the Advocate General considered that article 28 went beyond the limits of article 114 TFEU: the article 28 powers did not contribute to harmonisation but instead replaced national decision making with EU level decisions. He also suggested that the residual legal basis of article 352 TFEU would have been the correct legal basis for adopting article 28. Crucially, as article 352 TFEU requires the unanimity of all the Member States, unlike article 114 TFEU that only requires qualified majority voting in Council, this would have enabled the UK a veto on the adoption of article 28. This is an important point: if the ECJ had chosen to agree with its Advocate General in relation to this question, article 352 TFEU would have ensured the existence of an important check and balance on future attempts to centralise supervisory functions at the EU level. Notably however this would also have brought the future of the EBU into question.

Article 114 TFEU to establish ESMA

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[59] Case 98/90 *Giuseppe Romano v Institut National D'assurance Maladie-Invalidité* [1981] ECR 1241, 1256.

[60] *United Kingdom of Great Britain v Council of the European Union and European Parliament* (n 52).

[61] Stephen Weatherill (n 7) 829-830.

[62] *United Kingdom of Great Britain v Council of the European Union and European Parliament* (n 52).

[63] *United Kingdom of Great Britain v Council of the European Union and European Parliament* (n 1).

[64] Ibid para 26.

Advocate General Jääskinen stated there could, in principle, be no objection to the establishment of ESMA using article 114 TFEU. He considered the case law on the recourse to article 114 for establishing agencies, and particularly drew on the *ENISA* ruling.[65] In *ENISA* the court stated that article 114 could only be used where it was actually and objectively apparent from the legal act that its purpose was to improve the conditions for the establishment and functioning of the internal market.[66] The authors, by using the expression 'measures for the approximation' intended to confer on 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.[67] The court stated that as nothing in the wording of article 114 TFEU implied that the addressees of the measures adopted could only be individual Member States, the legislature was allowed to deem it necessary to provide for the establishment of an EU body responsible for contributing to the implementation of a process of harmonisation.[68] Thus it concluded that the creation of an agency (ENISA) that provided an opinion to the Commission concerning technical matters could amount to an article 114 measure because of the need for technical advice.[69]

The Advocate General stated that concerns similar to those addressed in *ENISA* were a pre-occupation of the EU legislature when it had elected to pass measures related to short selling and had allocated several tasks and responsibilities to ESMA.[70] He concluded there could therefore not in principle be any objection to the establishment of ESMA on the basis of article 114: it fulfilled the conditions set down in *ENISA*.[71]

Article 28: Use of Article 114 TFEU

However he considered that ESMA's direct intervention powers under article 28 required closer assessment. Advocate General Jääskinen stated that the touchstone for assessing whether the conferral of such powers of an agency fell within the scope of article 114 TFEU was whether the agency's decisions contributed or amounted to internal market harmonisation.[72] Reliance on article 114 TFEU as the sole basis for article 28 was not supported by the court's case law because the conferral of such powers on ESMA in substitution for the assessment of national regulators could not be considered to be a measure for the approximation of Member State laws which have as their object the establishment and functioning of the internal market within the meaning of article 114.[73]

The Advocate General also observed that the article 28 powers bore little resemblance to the measures described by the court in *ENISA*. Article 28 decisions were legally binding while

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[65] Case C-217/04 *United Kingdom v Parliament and Council (ENISA)* [2006] ECR I‒3771.

[66] Ibid para 42. See also Case C-66/04 *United Kingdom v European Parliament and Council of the European Union (Smoke Flavourings)* [2005] ECR I-10553.

[67] *ENISA* (n 65) para 43; *Smoke Flavourings* (n 66); *United Kingdom of Great Britain v Council of the European Union and European Parliament* (n 1) para 31.

[68] *ENISA* (n 65) para 44; *United Kingdom of Great Britain v Council of the European Union and European Parliament* (n 1) para 32.

[69] *ENISA* (n 65) para 64.

[70] *United Kingdom of Great Britain v Council of the European Union and European Parliament* (n 1) para 33.

[71] Ibid para 34.

[72] Ibid para 36.

[73] Ibid para 37.

the court in *ENISA* was considering non-legally binding measures.[74] Although not objectionable of itself, the Advocate General noted that it was difficult to envisage how the exercise of powers could contribute to harmonisation as described by the court in *ENISA*. Indeed he suggested that the function of the powers was rather to lift intervention powers from the national to the EU level when there was disagreement between the national competent authorities and ESMA.[75]

Further, due to ESMA's voting rules, action under article 28 could also be taken on the basis of a majority, or exceptionally a qualified majority, of its central decision making body: the Board of Supervisors. Its voting members were comprised exclusively of the heads of the Member State public authorities that were competent to supervise financial market participants and its rules meant that no Member State public authority had a power to veto article 28 measures.[76] With this in mind the Advocate General concluded that the activation of ESMA's powers under article 28 went beyond the limits in article 114 TFEU: article 28 replaced national decision making with EU level decision making.[77]

These are important issues and it is hard to disagree with the Advocate General with respect to article 114 TFEU. It is clear that the effect of article 28 is not harmonisation: instead it elevates to the EU level, and more precisely to ESMA, an intervention competence that would operate in circumstances equivalent to those triggering the intervention powers of national regulators.[78] Indeed, as the powers apply when no national competent authority has taken measures to address the threat or has failed to act to adequately address the threat, ESMA is therefore forming judgment on a matter that a national regulator has already reached a different conclusion.[79] Further, a measure adopted by ESMA under article 28 will also prevail over any previous measure taken by a national regulator.

With these issues in mind, when viewing the case in isolation it is evident that it would have been preferable for the residual legal basis of article 352 TFEU to have been used to adopt article 28.[80] As the Advocate General observed, given that article 352 TFEU required unanimity, unlike article 114 TFEU, which required only qualified majority voting in Council, and given that the UK opposed article 28, this was not an irrelevant issue. Indeed, this was all the more important given that ESMA's voting rules meant there could be no subsequent veto option for a Member State public authority when ESMA voted to exercise its powers.

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[74] Ibid para 50.

[75] Ibid para 50.

[76] See further Regulation 1095/2010, arts 40(1) and 44(1). See also Moloney, 'The European Securities and Markets Authority and Institutional Design for the EU Financial Market - a Tale of Two Competences: Part (1) Rule-Making' (n 53) 62; *United Kingdom of Great Britain v Council of the European Union and European Parliament* (n 1).

[77] *United Kingdom of Great Britain v Council of the European Union and European Parliament* (n 1) paras 50-51.

[78] For example the intervention powers provided for in Regulation 236/2012, arts 18; 20; and 23. See *United Kingdom of Great Britain v Council of the European Union and European Parliament* (n 1) para 39.

[79] ESMA is also only required to consult the ESRB and neither the Commission nor the Council are associated with the decision making process. See Regulation 236/2012 art 28(4); *United Kingdom of Great Britain v Council of the European Union and European Parliament* (n 1) para 40.

[80] This was the residual basis that could be used to attain one of the objectives in the Treaty where no other provision gave the EU institutions the necessary powers to adopt the measures.

UK's Other Submissions

Although the Advocate General supported the UK in relation to its submission concerning article 114 TFEU, he then dismissed the UK's other grounds of submission. First, he was supportive of the idea expressed by the Council and the European Parliament that the EU agency regime had been modernised with the TFEU especially through the introduction of more explicit and effective judicial safeguards.[81] He considered the Lisbon Treaty accommodated pivotal concerns the court had to deal with in *Meroni* and *Romano,*[82] and that agencies could be vested with powers to take legally binding decisions intended to produce legal effects with respect to third parties otherwise the Lisbon Treaty amendments would be meaningless.[83] Therefore on this basis there could be in principle no objection to ESMA passing measures having legal effect on third parties.

He also considered that article 28 did not entail a sub-delegation to an agency of article 291 implementing powers.[84] Instead ESMA's article 28 powers had been conferred directly by the EU legislature by legislative act,[85] and conferral of these powers by the legislature could not be subject to the *Meroni* restrictions.[86] Despite this, the Advocate General considered that the principle in *Meroni* concerning the prohibition of inordinately broad and/or arbitrary implementing powers remained relevant to the assessment of article 28's legality.[87] The legislature could not vest ESMA with an authority that would breach *Meroni* because an implementing power would be validly conferred only if it was sufficiently specific.[88] The question was whether article 28 conferred sufficiently clearly defined executive powers and Advocate General Jääskinen considered it was clear that the exercise of these powers had been vested with precision and definition. The essential value judgments underpinning article 28 had been made by the legislature and not been left to ESMA.[89]

This aspect of the opinion is more debatable: although the rules give the appearance of providing strict criteria to assist ESMA in exercising its powers, the terms it must consider are in fact opaque and grant it considerable freedom of judgment. Further, very little concrete guidance is given to ESMA beyond the actual wording of the Regulation and the subjective criteria set out in article 24(3) of Delegated Regulation 918/2012.

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[81] See Heikki Marjosola, 'Case C-270/12 (UK v Parliament and Council) – Stress Testing Constitutional Resilience of the Powers of EU Financial Supervisory Authorities – a Critical Assessment of the Advocate General's Opinion' (European University Institute, Working Paper, February 2014) 4; *United Kingdom of Great Britain v Council of the European Union and European Parliament* (n 1) paras 5-6.

[82] As observed, such concerns were namely the absence of treaty based criteria for the conferral and delegation of powers to ensure respect for institutional balance, and the vacuum in terms of judicial review of legally binding acts of agencies. See further *United Kingdom of Great Britain v Council of the European Union and European Parliament* (n 1) para 72.

[83] See e.g. article 263(1) TFEU that grants the court authority to review acts of bodies, offices, or agencies of the Union intended to produce legal effects vis-à-vis third parties; ibid paras 73-74.

[84] Ibid para 90.

[85] Article 289(3) TFEU.

[86] *United Kingdom of Great Britain v Council of the European Union and European Parliament* (n 1) para 91.

[87] Ibid para 92.

[88] Ibid para 92.

[89] Ibid para 97-100.

3.3 The ECJ's Judgment

Although Advocate General opinions are only of persuasive weight, in practice the ECJ often follows them. Despite this however, in January 2014 the ECJ dismissed the UK's challenge in its entirety, choosing to disagree with the Advocate General's opinion on the choice of legal basis for article 28. Further, in contrast to the Advocate General's thoughtfully considered and detailed legal opinion, the ECJ's judgment was short, at times vague, and lacked any deep analysis.

First the ECJ considered the *Meroni* principle to be satisfied as ESMA's exercise of its article 28 powers was limited by various conditions and criteria that limited ESMA's discretion.[90] The court stated that ESMA had to examine a significant number of factors in article 28(2) and (3) of the Regulation and that ESMA's margin of discretion was circumscribed both by the requirement to consult the ESRB as to any proposed measure and the temporary nature of the measures authorised.[91] Second, the ECJ considered that ESMA did adopt measures of general application but this had been envisaged by the TFEU that expressly allowed EU bodies, offices, and agencies to adopt such acts.[92]

Next, the court dismissed the UK's argument concerning articles 290 and 291 TFEU. It stated that the conferral of powers under article 28 did not correspond to any of the situations defined in article 290 and 291 TFEU, however it noted that article 28 should not be considered in isolation but should be treated as part of a series of rules designed to give powers of intervention to national regulators and ESMA so they could cope with adverse developments that could threaten the financial stability of the EU and market confidence.[93]

Finally, rather than directly engaging with the Advocate General's analysis concerning the appropriateness of article 114 TFEU as the legal base, the ECJ instead merely based its reasoning on the text of the Regulation. It stated that article 28 of the Regulation was directed at the harmonisation of the Member States' laws, regulations and administrative provisions relating to the supervision of a number of stocks, and simply affirmed the legislative view as to the choice of legal basis for article 28.[94]

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[90] Case C-270/12 *United Kingdom v Council of the European Union and European Parliament* (ECJ, 22 January 2014) para 45. See Jacques Pelkmans and Marta Simoncini, 'Mellowing Meroni: How ESMA Can Help Build the Single Market' (CEPS Commentary, 18 February 2014) that suggests that the case is another manifestation of the slow process of 'mellowing Meroni'. See also e.g. Valia S.G. Babis, 'The Power to Ban Short-Selling: The Beginning of a New Era for EU Agencies?' University of Cambridge Faculty of Law Research Paper No 27/2014, 3 April 2014 <http://ssrn.com/abstract=2420011> accessed 7 May 2014.

[91] *United Kingdom v Council of the European Union and European Parliament* (n 90) paras 47 and 50. However see e.g. Herwig C.H. Hofmann, 'C-270/12 UK v EP and Council (ESMA - Short Selling) of 22 January 2014' (Conference on the Landmark 2014 ESMA decision of the ECJ, Luxembourg, 27 March 2014). Hofmann notes that the court does not attempt to define the notion of 'discretion' that has many meanings in the case law and queries whether a temporary limitation has anything to do with the extent of powers conferred on an agency. See also Herwig CH Hofmann, 'The Internal Market in a Context of Deepening Integration – Long on Content and Short on Modes of Delivery?' in Kieran Bradley, Noel Travers and Anthony Whelan (eds), *Of Courts and Constitutions: Liber Amicorum in Honour of Nial Fennelly* (Hart Publishing 2014).

[92] See articles 263 and 277 TFEU; *United Kingdom v Council of the European Union and European Parliament* (n 90) para 65. See also Noia and Gargantini (n 2) 34-35 where the authors note that in evaluating *Meroni* and *Romano* the ECJ seems to have adopted a single standard when evaluating the latitude of ESMA's powers.

[93] *United Kingdom v Council of the European Union and European Parliament* (n 90) paras 83-85.

[94] Ibid para 112 and paras 114-115.

4 Implications of the Ruling

Although there are some important practical benefits that derive from the judgment in relation to the development of the EBU, the ruling is disappointing, and not merely for its brevity and its failure to engage with the Advocate General's arguments concerning article 114 TFEU.[95]

First, it is hard to agree with the court's finding that article 28 is directed at the harmonisation of Member State laws. Rather, in line with the Advocate General's opinion, the effect of article 28 is to transfer national intervention powers to an EU body, and in circumstances where a national regulator has already reached a different conclusion as to whether a threat exists to the orderly functioning of financial markets. Article 28 does not contribute to harmonisation: it overrules national decisions and replaces them with EU level decisions.[96] Thus, viewing the case in isolation, it is clear that article 352 TFEU would have been the preferable legal basis for adopting article 28.

Further, the view of the court and the Advocate General that there was no violation of *Meroni* as the essential value judgments had been made by the EU legislature and had not been left to ESMA is also misleading. As observed in section 3, despite the appearance of strict criteria to guide ESMA in exercising its article 28 powers, the terms it must consider are in fact vague and admit it much freedom of judgment. Indeed ESMA is given very little guidance to assist it in making intricate and complex factual assessments on whether there is a threat to the orderly functioning and integrity of financial markets beyond article 28 and the subjective criteria in Delegated Regulation 918/2012. Further, although ESMA is comprised of national expert authorities, it is unrealistic to assume there will not be disagreements between such experts on the highly subjective and political issue as to whether a threat exists to the functioning of financial markets.[97]

Next, it is clear that this case has consequences that potentially stretch well beyond short selling regulation. In this regard the decision's importance was never really about short selling bans but rather about the future of the EBU, and it is evident that the court was mindful of such political and practical realities.[98] Although the precise details of the EBU are beyond the scope of this paper, one of the EBU's pillars, the Single Resolution Mechanism (the 'SRM'), is based upon article 114 TFEU.[99] An ECJ ruling that followed the Advocate

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[95] See also e.g. Herwig C.H. Hofmann (n 91). Hofmann notes that, amongst other issues, the ECJ did not question the applicability of the *Meroni* doctrine to this case. He suggests that the situation in *Meroni*, concerning the legality of delegation of powers from the High Authority to private bodies was not comparable with the current case that involved the legislative delegation of powers to EU agencies. Further he notes that the ECJ had not used *Meroni* historically to review the legislative delegation of powers to EU agencies.

[96] *United Kingdom of Great Britain v Council of the European Union and European Parliament* (n 1) para 52. In fact such powers also strain against the principle of subsidiarity in article 5 of the Treaty on European Union ('TEU'), see further Moloney, 'The European Securities and Markets Authority and Institutional Design for the EU Financial Market – a Tale of Two Competences: Part (2) Rules in Action' (n 47) 219.

[97] See *United Kingdom of Great Britain v Council of the European Union and European Parliament* (n 1) paras 99-100.

[98] Eilís Ferran, 'European Banking Union: Imperfect, but It Can Work' University of Cambridge Faculty of Law Research Paper No 30/2014, Working Paper Draft, 17 April 2014, 19 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2426247> accessed 23 April 2014.

[99] Under the SRM, a single resolution mechanism is to apply to all banks in Member States participating in the Single Supervisory Mechanism ('SSM'). The SRM is to be coordinated by a Single Resolution Board ('SRB'), a new EU agency that will assess whether a bank is failing and prepare for its resolution. For a detailed discussion of the EBU see further e.g. Ibid.

General's opinion on the choice of legal basis would clearly have placed the future of the EBU in some jeopardy as the SRM's legal basis would have been eliminated. Instead by the ECJ endorsing the use of article 114 TFEU in this instance, it lends its support to the development of the EBU and considerably reduces the risk of any future legal challenge to the SRM's legal basis.

However although the judgment can be welcomed in relation to this, it also raises more general concerns. First, the transfer of national powers to the EU level is a serious issue and it remains unclear from the short selling judgment what the boundaries are in relation to the conferral of such powers. Although the court's narrow and case-specific reasoning may well limit the case's importance as a precedent going forward,[100] the question should still be raised how much further we can stretch article 114 TFEU and proceed in terms of EU financial market integration without also considering whether a Treaty change is required.[101]

Next, it should also be questioned whether short selling was actually a sensible model for taking more general decisions concerning the future centralisation of powers in ESMA and other EU bodies.[102] Specifically, decisions concerning short selling constraints have special features: if a decision is taken to impose short selling restrictions, it is clear that a uniform and coordinated cross-border response is essential otherwise a prohibitory measure will have little effect.[103] With this in mind it may have been easier to find a justification for transferring powers to ESMA in this instance, and may also, to an extent, help explain the court's case-specific reasoning, rather than in other contexts where the rationale for centralisation may be weaker.[104]

Finally, it is evident that the stretching of the use of article 114 TFEU by the EU legislature is not a new phenomenon. Indeed the ECJ's simple endorsement of the legislative view in this instance is in fact part of a more general and worrying trend that has been evident in the court's case law on article 114 TFEU over the last decade.[105] Although in the first *Tobacco Advertising*[106] case the ECJ ruled that the EU legislature had overstepped the limits of its competence to harmonise national laws granted by (what is now) Article 114 TFEU, almost all subsequent applications that have sought annulment of measures of legislative harmonisation have been let down by the court.[107] Indeed it has been suggested that the EU legislature now simply relies on the ECJ's case law on article 114 as a 'drafting guide' for its measures, and then draws on it again when asked to defend it.[108] The court consequently ends

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[100] Ibid 20.

[101] See e.g. Alexandria Carr, *The European Court's Dismissal of the UK's Challenge to the Short Selling Regulation* (February 2014). See also e.g. Valia S.G. Babis (n 90).

[102] Matteo Gargantini, 'The ESMA Decision: Implications for the Governance of ESAs' (Conference on the Landmark 2014 ESMA decision of the ECJ, Luxembourg, 27 March 2014).

[103] Ibid. Gargantini notes that when there is an absence of coordination, for example through imposing a ban only on one market, this can lead to direct externalities on other markets through short sellers simply moving to another market where short selling is permitted.

[104] Ibid. However Gargantini also queries whether the ESAs are actually in a better position than the national regulators to take sensible decisions concerning the imposition of short selling restrictions.

[105] For a detailed discussion of these issues, see Stephen Weatherill (n 7).

[106] Case C-376/98 *Germany v European Parliament and Council of the European Union* [2000] ECR I-8419.

[107] Stephen Weatherill (n 7) 828. See e.g. Case C-491/01 *R v Secretary of State Ex Parte BAT & Imperial Tobacco* [2002] ECR I-11543; Case C-380/03 *Germany v European Parliament and Council of the European Union* [2006] ECR I-11573.

[108] Stephen Weatherill (n 7) 843.

up with little option other than to approve the legislative measure in question.[109] This has resulted in increasingly generous judicial approval of wide-ranging measures by the EU in the 'unverifiable name of market-making harmonisation'[110] and it is clear that the goalposts have not shifted with respect to the court's 'rubber-stamping' of the legislative view in this instance.

5 Conclusion

It was always going to be a challenge to draw the dividing line between ESMA's powers and those of the national authorities.[111] Nonetheless, the court's approval of ESMA's article 28 powers illustrates that the line is starting to move too far in favour of ESMA. The replacement of national powers with EU level decisions is a serious and sensitive issue and although it remains to be seen what use ESMA will make of its new powers of intervention in practice, it seems fair to suggest it will want to embrace its enhanced role going forward.[112]

Further although the ruling should be welcomed in terms of providing support to the development of the EBU, it may also whet the appetite of EU legislators to grant further broad powers to ESMA and other EU bodies going forward. Based on the ECJ's decision, it remains to be seen how far article 114 TFEU can now be stretched in the context of financial market integration without considering whether a Treaty change is required. Although the confined reasoning of the ECJ may limit the case's value as an important precedent going forward, the court's narrow analysis also introduces new uncertainties in relation to the boundaries of article 114 TFEU.[113] Finally it is evident that there is a continuing lack of adequate judicial control over the wide-ranging legislative measures that are being adopted in the name of harmonisation: with respect to this issue the court has continued to sell us short.

[109] Ibid 843, 849, 861. Weatherill notes that the suggestion that lenient judicial control has become a drafting guide for the legislature stems from the dissenting opinion of Sandra Day O'Conner in the US Supreme Court decision *Gonzales v Raich* 545 1 US (2005).

[110] Stephen Weatherill (n 7) 849.

[111] Moloney, 'The European Securities and Markets Authority and Institutional Design for the EU Financial Market – a Tale of Two Competences: Part (2) Rules in Action' (n 47) 225.

[112] Moloney also notes that ESMA also has no experience as an operational supervisor. For an interesting discussion of some of the challenges ESMA may face as an operational supervisor see further ibid.

[113] Ferran (n 98) 20-21.