

Heikki Marjosola

Bridging the constitutional gap in EU executive rule-making: the court of justice approves legislative conferral of intervention powers to European securities markets authority: Court of Justice of the European Union (Grand Chamber) judgment of 22 January 2014, case C-270/12, UK v. Parliament and Council (Grand Chamber)

**Article (Accepted version)
(Refereed)**

Original citation: Marjosola, Heikki (2015) *Bridging the constitutional gap in EU executive rule-making: the court of justice approves legislative conferral of intervention powers to European securities markets authority: Court of Justice of the European Union (Grand Chamber) judgment of 22 January 2014, case C-270/12, UK v. Parliament and Council (Grand Chamber)*. [European Constitutional Law Review](#), 10 (03). pp. 500-527. ISSN 1574-0196
DOI: [10.1017/S1574019614001333](https://doi.org/10.1017/S1574019614001333)

© 2015 [Cambridge University Press](#)

This version available at: <http://eprints.lse.ac.uk/68732/>
Available in LSE Research Online: January 2017

LSE has developed LSE Research Online so that users may access research output of the School. Copyright © and Moral Rights for the papers on this site are retained by the individual authors and/or other copyright owners. Users may download and/or print one copy of any article(s) in LSE Research Online to facilitate their private study or for non-commercial research. You may not engage in further distribution of the material or use it for any profit-making activities or any commercial gain. You may freely distribute the URL (<http://eprints.lse.ac.uk>) of the LSE Research Online website.

This document is the author's final accepted version of the journal article. There may be differences between this version and the published version. You are advised to consult the publisher's version if you wish to cite from it.

Bridging the Constitutional Gap in EU Executive Rule-making

The Court of Justice Approves Legislative Conferral of Intervention Powers to European Securities Markets Authority – Judgment of 22 January 2014, Case C-270/12, *UK v. Parliament and Council* (Grand Chamber)

Heikki Marjosola

INTRODUCTION

This case note analyses the judgement of 22 January 2014 of the Court of Justice of the European Union (Grand Chamber) in the Case C-270/12 *UK v. Parliament and Council (Short selling)*.¹ In this closely watched case the United Kingdom challenged the empowerment of the European Securities and Markets Authority (ESMA) under Article 28 of Regulation 236/2012 on Short Selling and certain aspects of Credit Default Swaps on various grounds (henceforth: the Short Selling Regulation).² The action forms a part of a series of measures brought by the UK in its attempt to protect the City of London from the increasingly interventionist forms of EU financial regulation.³ The UK's activism has not been without results, and after the Advocate General, in his opinion delivered on September 12, 2013 sided with the UK in the crucial question of the appropriate Treaty basis of the challenged powers, the odds again seemed to be in favour of the UK.⁴ The Court nevertheless dismissed the action in its entirety.

The Court's ruling eases constitutional tensions overshadowing the on-going reorganisation and vertical consolidation of financial supervisory powers in the EU. But the Court's findings are important more generally in the context of the Union's *agencification*, that is

¹ ECJ 22 January 2014, Case C-270/12, *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union Judgment of the Court* (Grand Chamber).

² Regulation 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps, O.J. L 86/1 (Short Selling Regulation).

³ For early criticism, see Financial Services Authority, Working towards effective and confident European Supervisory Authorities: The FSA's views on policy considerations, December 2010, at p. 11: 'It is therefore necessary that any proposed emergency decision is checked to ensure that it is not ultra vires or otherwise contrary to public law.'

⁴ 'Short selling win gives UK third victory in Brussels clash', *The Financial Times*, 12 September 2013. In addition to EU agency powers, the UK has fought the EU initiatives on financial transaction tax and Libor benchmark rate.

‘diversification of the EU executive by proliferation of independent bodies’.⁵ The financial crisis paved the way for a new generation of EU agencies which were more independent both vis-à-vis markets and EU political institutions.⁶ As noted by Advocate General Jääskinen, the European Supervisory Authorities (ESA) are of an entirely different breed in that they can, e.g. under the contested Article 28 of the Short Selling Regulation, issue ‘legally binding decisions directed at individual legal entities in substitution for either a decision, or the inaction, of a competent national authority.’⁷

Meanwhile, fundamental legal questions have remained unanswered. The rise of agencies has not been guided by an overall vision as to their role in the administration of EU law, and political initiatives on setting clearer rules for EU agencies have thus far been produced unimpressive results.⁸ No legal account of EU agencies fails to mention that the Union primary law does not explicitly recognise the competence of EU agencies to adopt legally binding measures. This has not slowed down the mushrooming of agencies⁹, or prohibited delegation of regulatory decision-making powers to agencies operating on various policy areas, such as plant varieties (CPVO), aviation safety (EASA) and chemicals (ECHA). Legal uncertainty nevertheless sheds doubt on the limits of institutional experimentation. The ‘delegation question’ has remained vital after the Lisbon Treaty, too, as the Treaty did not seem to close the growing gap between primary law, remaining silent on agencies’ decision-

⁵ As the trend is aptly described (but not presented as a distinct definition) by H.C.H. Hofmann and A. Morini in ‘The Pluralisation of EU Executive – Aspects of “Agencification”’ 37 *European Law Review* (2012) p. 419, at p. 421 For a less legalistic perspective, see D. Curtin and R. Dehousse, ‘European Union agencies: tipping the balance’, in J. Trondal, M. Busuioc and M. Groenleer (eds.), *The agency phenomenon in the European Union: Emergence, institutionalisation and everyday decision-making* (Manchester University Press 2012).

⁶ E. Chiti, ‘An Important Part of the EU’s Institutional Machinery: Features, Problems and Perspectives of European Agencies’, 46 *Common Market Law Review* (2009) p. 1395, at p. 1433.

⁷ Opinion of Advocate General Jääskinen, delivered on 12 September 2013 in ECJ, 22 January 2014, Case C-270/12, *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union Judgment of the Court* (Grand Chamber), para. 24.

⁸ See J.-D. Schneider, ‘A Common Framework for Decentralized EU Agencies and the *Meroni* doctrine’, 61 *Administrative Law Review* (2009) p. 29, at p. 33–34.

⁹ Creation of EU agencies accelerated in the 1990s and their present count exceeds 40. More than 30 of them are ‘decentralised’ agencies, which means that they operate in permanent capacity and carry out certain technical, scientific or managerial tasks allocated to them in order to help the EU institutions make and implement policies. See http://europa.eu/about-eu/agencies/index_en.htm. <last visited 15 September 2014> “Executive” agencies, on the other hand, are set up for a fixed period.

making powers, and a growing body of secondary law creating them.¹⁰ As it turned out, the Court in *Short selling* held that this gap had been closed.

An established non-delegation jurisprudence covers for TFEU's shortcomings. The general principles stated in the Court of Justice's *Meroni* judgement more than 50 years ago¹¹ still form the foundations of the Union's non-delegation doctrine. *Meroni* continues to be referenced by Courts¹², but its validity in the post-Lisbon Union has been questioned.¹³ However, until *Short Selling Meroni* requirements have not been directly applied to EU agencies. To that end, the less well-known *Romano* ruling, which concerned delegation of powers directly by the Council to a non-Treaty based body, has provided an important extension to *Meroni*. In that case the Court of Justice held that such bodies could not adopt acts having the 'force of law'.¹⁴

Finally, alongside these normative constraints of delegation, the creation of EU agencies and their empowerment through secondary law are substantively constrained by their legal basis.¹⁵ Article 114 TFEU, allowing the adoption of harmonizing measures to further the internal market, provides the legal basis for an increasing number of EU agencies, including the ESAs. Article 114 TFEU and the ESAs' unprecedented powers were a hard fit, and doubts were raised if there existed a gap between 'what is politically and economically desirable and constitutionally possible'.¹⁶ The Banking Union project has stretched the boundaries of the single market Article even further, especially as it was selected as the legal base also for the Single Resolution Mechanism (SRM).¹⁷

¹⁰ H. H. Hofmann, 'Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets Reality' 15 *European Law Journal* (2009) p. 482 at p. 501.

¹¹ ECJ, 13 June 1958, Case 9/56 *Meroni v High Authority*.

¹² As recorded by S. Griller and A. Orator in 'Everything Under Control? The 'way forward' for the European agencies in the footsteps of the Meroni Doctrine' 35 *European Law Review* (2010) p. 3, at p. 21.

¹³ R. Schütze, 'Delegated Legislation in the (new) European Union: A Constitutional Analysis' 74 *Modern Law Review* (2011) p. 661, at p. 674. In the words of Chiti: "[...]the jurisprudence of 1958 cannot be considered as a sufficient foundations to justify such clear-cut conclusions on the limits to European agencies' powers and tasks." Chiti, *supra* n 6, at p. 1422. See also Schneider *supra* n. 8, at p. 37–40.

¹⁴ ECJ, 14 May 1981, Case 98/80 *Romano v Institut nationa d'assurance maladie-invalidité*, at para. 20.

¹⁵ A distinction between normative and substantive constraints is highlighted by K. Lenaerts, 'Regulating the Regulatory Process: "delegation of powers" in the European Community' 18 *European Law Review* (1993) p. 23, at p. 44.

¹⁶ E. Fahey, 'Does the Emperor Have Financial Crisis Clothes? Reflections on the legal Basis of the European Banking Authority' 74 *The Modern Law Review* (2011) p. 581, at p. 582.

¹⁷ The SRM establishes an EU-level resolution fund for banks. Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit

The UK's pleas in *Short selling* addressed each of the above aspects and consequently the ruling clarifies several constitutional problems pertaining to habitual transfer of decision-making powers to non-Treaty based EU bodies. However, this case note shows that in its endeavour to bridge the constitutional gap in the EU executive rule-making, the Court at the same time made other constitutional problems more salient. Before examining the case in more detail, the complex political and economic background of the Short Selling Regulation will be presented.

BACKGROUND

ESMA's powers

The three ESAs, including ESMA, the European Banking Authority (EBA) and the European Insurance and Occupational Pensions Authority (EIOPA)¹⁸ constitute the Union level of the new European System of Financial Supervision. The system also entails a framework for macro-prudential supervision of financial markets. This function is primarily entrusted to the European Systemic Risk Board (ESRB), a body that operates under the auspices of the European Central Bank.¹⁹ Unlike ESAs, ESRB lacks legal personality.

The ESAs' have first of all a regulatory task to contribute to the establishment of common regulatory and supervisory standards and practices and to promote consistent application of legally binding Union acts.²⁰ In addition to issuing non-binding opinions, guidelines, and recommendations, ESAs have an important role in developing binding technical standards, which the Commission adopts in accordance with the post-Lisbon framework for delegated law-making (Articles 290 and 291 TFEU).²¹

The *Short selling* case did not concern ESMA's rule-making powers *per se* but rather its direct intervention powers. The Member State authorities remain in charge of day-to-day

(Contd.) _____

institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund, O.J. L 225.

¹⁸ Respective establishing Regulations are (EU) No. 1093/2010 (EBA), (EU) 1094/2010 (EIOPA), (EU) 1095/2010 (ESMA) [2010] OJ L331.

¹⁹ See generally E. Wymeersch, 'The reforms of the European Financial Supervisory System – An Overview', *European Company and Financial Law Review* (2010) Volume 7, Issue 2, Pages 240–265.

²⁰ Regulation 1095/2010 (The ESMA Regulation), Arts. 8(1)(a) and (b).

²¹ For a legal and constitutional analysis of the ESAs powers, see e.g. M. Busuioc, 'Rule-Making by the European Financial Supervisory Authorities: Walking a Tight Rope' 19 *European Law Journal* (2013) and P. Schammo, 'The European Securities and Markets Authority: Lifting the Veil on the Allocation of Powers' 48 *Common Market Law Review* (2011).

supervision of their markets and market participants, but ESAs have been allocated special powers to address decisions to national authorities, and in certain exceptional cases directly to financial market participants. The basic grounds for action are a) a ‘breach of EU law’, b) existence of an ‘emergency’ situation calling for ESMA’s action and c) settlement of disputes between national supervisors.²² These direct intervention powers are exceptional and subject to numerous conditions, but they are significant in that they represent a more intervention-based model of financial supervision, which rests on a degree of hierarchical control.²³

However, ESMA’s intervention powers under the challenged Article 28 of the Short Selling Regulation do not fall under the above-mentioned grounds for direct action either. The powers granted under Article 28 follow the formula adopted in Article 9(5) of the Regulation establishing ESMA (henceforth: the ESMA Regulation). That Article provides that in the cases specified and under the conditions laid down in the legislative acts covered by ESMA’s mandate, ESMA may temporarily prohibit or restrict certain financial activities that threaten the orderly functioning of financial markets or the stability of the whole or part of the financial system in the Union. Such intervention powers, even if they technically fall under ESMA’s consumer protection mandate, represent the “macro” side of ESMA’s powers which seek to promote the stability, integrity and transparency of financial markets.²⁴ The next Section presents the substance and context of Article 28 of the Short Selling Regulation.

Article 28 of the Short Selling Regulation

Under Article 28 of the Short Selling Regulation ESMA can either require disclosure of certain financial positions to the public or prohibit or restrict trading of short-like financial positions. Why were such powers allocated to an EU agency instead of keeping them at national level? The answer to this question lies in the unusual political and economic background that gave rise to the Short Selling Regulation.

²² The ESMA Regulation, Arts. 17–19.

²³ See P. Schammo, “EU Day-to-Day Supervision of Intervention-based Supervision: Which Way Forward for the European System of Financial Supervision, 32 *Oxford Journal of Legal Studies* (2012), p. 771, at p. 792.

²⁴ The ESMA Regulation, rec. 12. See also Art. 1(5) setting the objective for ESMA to protect the public interest by contributing to the short, medium and long-term stability and effectiveness of the financial system.

The purpose of short selling is to benefit from, or to hedge against, falling prices of a given financial instrument.²⁵ Though short selling is a well-established technique and serves a pivotal function in financial markets, it also gives a powerful tool for speculators, and in times of distress short selling can exacerbate a downward spiral in prices.²⁶ It is commonly held that short selling played an important role in the escalation of the financial crisis in Europe. Sovereign debt of several Member States as well as shares of (systemically) important financial institutions became an object of increased short selling activity. Member States' regulators tried to alleviate the situation with diverse regulatory responses. The interventions ranged from temporary bans on short selling of certain specified financial instruments (e.g. Greece) to statutory bans on naked short selling²⁷ (e.g. Germany) as well as enacting various kinds of disclosure requirements. Some Member States opted for no action.²⁸

The resulting uncertainty was made possible and fuelled by the lack of an EU level legislative framework and the inability of the Committee of European Securities Regulators (CESR, ESMA's predecessor) to coordinate regulatory responses of its member regulators.²⁹ Fragmentation and the absence of a level-playing field were feared to limit the effectiveness of the national measures imposed, to lead to a significant increase in compliance costs for firms³⁰, and ultimately push investors to circumvent jurisdiction-specific restrictions by

²⁵ Detailed definition is provided in the Art. 2(1) of the Short Selling Regulation. More simply, in a standard short sale transaction, a short seller sells certain financial instruments (e.g. shares, credit instruments, interest rates, currencies, commodities) that he or she does not really own, but which he or she has borrowed (or agreed to borrow) from the market through a securities lending arrangement. The rationale is to buy and return equivalent securities at a later time when the price has fallen, and pocket the difference. The Commission has described short selling as "the sale of a security that the seller does not own, with the intention of buying back an identical security at a later point in time in order to be able to deliver the security." See Commission, Proposal for a Regulation on Short Selling and Credit Default Swaps - Frequently asked questions, MEMO/10/409, Brussels, 15 September 2010.

²⁶ On the economic arguments in favor and against short selling, see J. Payne, 'The Regulation of Short Selling and Its Reform in Europe' 13 *European Business Organization Law Review* (2012) p. 414.

²⁷ Naked short selling happens where the seller has not actually borrowed the securities at the time of the sale, or ensured that such borrowing can happen in the future. The Short Selling Regulation presents several requirements limiting the use of and risks pertaining to naked short selling.

²⁸ On the measures adopted, see Commission, impact assessment, accompanying the Proposal for the Short Selling Regulation Brussels, SEC(2010) 1055, at p. 17–19. For a detailed list of measures taken in the Member States, see ESMA, Update on Measures adopted by Competent Authorities on Short Selling, ESMA/2011/39a, 24 July 2012.

²⁹ E. Ferran, 'Understanding the New Institutional Architecture of EU Financial Market Supervision', in E. Wymeersch, K. J. Hopt, and G. Ferrarini (eds.) *Financial Regulation and Supervision: A Post-Crisis Analysis* (OUP, 2012), p. 111–158, at p. 124–125.

³⁰ The compliance costs concerns were also reported by the CESR under its preparatory work. See CESR, Model for a Pan-European Short Selling Disclosure Regime, CESR/10-088, at p. 3.

carrying out transactions elsewhere.³¹ In light of these concerns, and following a recommendation from the CESR, the Commission introduced in 2010 a proposal for a Regulation, with the purpose to:

“harmonise requirements relating to short selling across the European Union, harmonise the powers that regulators may use in exceptional situations where there is a serious threat to financial stability or market confidence and ensure greater co-ordination and consistency between Member States in such situations.”³²

The primary target of the Short Selling Regulation was therefore not to consolidate market intervention powers within the EU authorities, but to harmonise the powers of national competent authorities in order to promote legal certainty and financial stability. All regulators would have similar powers to temporarily restrict or ban short selling in exceptional situations and ESMA would foster co-ordination (e.g. by issuing opinions).³³ However, harmonisation of powers of national authorities did not address the underlying problem caused by decentralised supervision. In increasingly integrated EU financial markets significant market disruptions often have cross-border effects that may affect the functioning of the entire internal financial market. In the face of grave market dysfunction, national authorities might not always be the best decision makers, nor might simple coordinative functions of ESMA be sufficient if swift intervention is needed.³⁴ Also, EU level action becomes indispensable whenever there is a real risk of regulatory arbitrage.

Therefore, Article 28 gives ESMA intervention powers that are parallel to those harmonised at the Member State level. ESMA can, when specified conditions (Art. 28(2) and 28(3)) are met, either (1) require certain net short positions in relation to a specific financial instrument to be disclosed to the public or (2) prohibit or impose conditions on the entry into a short sale or a similar transaction with respect to certain financial instruments. Intervention powers of ESMA are secondary to those of national authorities³⁵ but superior in the sense that measures

³¹ A well-known art also known as regulatory arbitrage. Ibid., p. 30–32.

³² Commission, 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 final, Brussels, 15 September 2010.

³³ See Commission, Press Release, New framework to increase transparency and ensure coordination for short selling and Credit Default Swaps, IP/10/1126, Brussels, 15 September 2010.

³⁴ On the problems of effective supervisory coordination and crisis resolution measures in the absence of supranational authority, see G. Ferrarini and F. Chiodini, ‘Nationally Fragmented Supervision over Multinational Banks as a Source of Systemic Risk: A Critical Analysis of Recent Reforms’ in E. Wymeersch, K. J. Hopt, and G. Ferrarini (eds.) *Financial Regulation and Supervision: A Post-Crisis Analysis* (OUP, 2012), at p. 193 – 231.

³⁵ ESMA can take action only if the threat has not been addressed by a competent authority at all, or that it has not been addressed adequately. The Short Selling Regulation, Article 28(2)(b)).

adopted by ESMA *will prevail over any previous measure taken by a competent authority* (Art. 28(11)). The ESMA Regulation imposes several conditions and constraints on the use of these exceptional and far-reaching powers. This issue, in large part determining the lawfulness of the challenged empowerment, will be taken up below.

THE JUDGEMENT OF THE COURT

The UK based its plea on the illegality of Article 28 of the Short Selling Regulation on four grounds:

- First, the authority vested in ESMA breaches the limits set in the *Meroni* judgment;
- Second, the article allows ESMA to pass measures of ‘general application’ having the force of law and thus it contradicts the Court’s ruling in *Romano*;
- Third, the article purports to confer the power on ESMA to adopt non-legislative acts of general application in a manner that breaches Articles 290 and 291 TFEU; and
- Fourth, Article 114 TFEU is not an appropriate legal basis for the powers granted.

In his Opinion delivered on 12 September 2013, Advocate General Jääskinen proposed that the Court dismisses the first three of the UK’s pleas. The Advocate General agreed with the Council and Parliament in that the EU agency regime has been ‘modernised’ with changes brought about by the TFEU, particularly regarding the more effective judicial safeguards.³⁶ In the Advocate General’s view enhanced access to court under TFEU balances ESMA’s right to take direct, binding action. However, Advocate General Jääskinen found, in agreement with the UK, that Article 114 TFEU was not an appropriate legal basis for the powers granted to ESMA under Article 28 of the Short Selling Regulation, concluding:

‘The conferral of decision making powers under [Article 28] on ESMA, *in substitution for the assessments of the competent national authorities*, cannot be considered to be a measure “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” within the meaning of Article 114 TFEU’.³⁷

The Court of Justice dismissed all four pleas.

³⁶ Opinion of AG Jääskinen, *supra* n. 7, paras. 5–6.

³⁷ *Ibid.*, para. 37 (emphasis added).

Meroni

The Court in *Meroni* found that the possibility to delegate implementing powers to non-Treaty based bodies (in that case, entities established under private law) was inherent in the powers of the European Steel and Coal Community.³⁸ It is therefore rather the conditions and qualifications laid down in *Meroni* for delegation of powers that have made the ruling so persistently influential. The ‘doctrine’ is made up of the following elements: First, a delegating Authority ‘could not confer upon the authority receiving the delegated powers different from those which the delegating authority itself received under the Treaty’ (the so-called *nemo plus* principle).³⁹ Second, delegation of powers must always be based on an express decision thereto and cannot be presumed.⁴⁰ Third, delegation is acceptable if it is restricted to ‘clearly defined executive powers the exercise of which can [...] be subject to strict review in the light of objective criteria determined by the delegating authority’ whereas a delegation is illegal if it implies a ‘wide margin of discretion’ that makes possible the execution of actual economic policy.⁴¹ Finally, the *Meroni* case evoked the principle of ‘balance of powers’, which provided a fundamental guarantee of the institutional structure of the Community.⁴²

In the spirit of *Meroni* the essence of the UK’s plea was that Article 28 of the Short Selling Regulation had given ESMA a “very large measure of discretion” and that factual assessments envisaged by the article would be “highly subjective”⁴³ including judgements that could not be subjected to objective review.⁴⁴ The UK acknowledged that ESMA’s decisions based on the article would be temporary, but because the decisions could have long-term consequences, this did not change legal assessment of the powers.⁴⁵

The Court found first that the Short Selling Regulation does not confer on ESMA autonomous power that goes beyond the regulatory framework established by the ESMA Regulation.

³⁸ ‘...the power of the High Authority to authorize or itself to make the financial arrangements mentioned in [...] the Treaty gives it the right to entrust certain powers to such bodies subject to conditions to be determined by it and subject to its supervision.’ ECJ, 13 June 1958, Case 9/56 *Meroni v High Authority*, p. 151.

³⁹ ECJ, 13 June 1958, Case 9/56 *Meroni v High Authority*, p. 150.

⁴⁰ *Ibid.*, p. 151.

⁴¹ *Ibid.*, p. 152, 154.

⁴² *Ibid.*, p. 152.

⁴³ ECJ, 7 March 2014, Case 270/12 *UK v Council and Parliament*, para. 28.

⁴⁴ *Ibid.*, paras. 31 and 32.

⁴⁵ *Ibid.*, para. 33.

Secondly, unlike what was the case in *Meroni*, ESMA's discretionary power under Article 28 of the Short Selling Regulation is circumscribed by various conditions and criteria.⁴⁶ The Court recorded the following limitations: ESMA can adopt measures only if they address a threat, with cross-border implications, to the orderly functioning, integrity or stability of financial markets (Art. 28(2) of the ESMA Regulation). ESMA's powers are always secondary to those of national authorities.⁴⁷ ESMA must also consider the extent to which the measure in question, e.g. does not create a risk of regulatory arbitrage or have a detrimental effect on the efficiency of financial markets, (Art. 28(3)).⁴⁸ Substantive criteria delineating ESMA's powers are further specified in the Commission delegated regulation No 918/2012⁴⁹. That regulation, as the Court notes, places emphasis on the technical factual assessment and confines the use of intervention powers to exceptional circumstances.⁵⁰ With regard to procedural constraints, ESMA is always obliged to consult the ESRB and, when necessary, other ESAs. Prior notice of the proposed measures must be given to national authorities, and once adopted, the measures must be reviewed periodically (Art. 28(4) and (5)). Finally, the measures that ESMA can adopt are strictly confined to two.⁵¹

Against these conditions and constraints, the Court concluded that even if the powers conferred under Article 28 of the Short Selling Regulation arguably involve discretionary elements, the claim of delegation concerning "very large measure of discretion" was without basis. The powers are in compliance with *Meroni*, as they are 'precisely delineated and amenable to judicial review in the light of the objectives established by the delegating authority.'⁵²

⁴⁶ Ibid., paras. 46 and 48.

⁴⁷ Ibid., para. 46.

⁴⁸ Ibid., para. 47.

⁴⁹ Commission delegated regulation No 918/2012 of 5 July 2012 O.J. L 274/1. Article 24 sets out the criteria and factors to be taken into account in determining when adverse events or developments and threats arise. The regulation is binding upon both ESMA and national competent authorities.

⁵⁰ ECJ, 22 January 2014, Case 270/12 *UK v Council and Parliament*, paras. 51 and 52.

⁵¹ Ibid., paras. 49–50.

⁵² Ibid., paras. 53–54.

Romano

The Court's ruling in *Romano* has been held as 'the most drastic expression' of an expansive reading of the *Meroni* prohibition.⁵³ Even if less famous than its *Meroni* cousin, *Romano* is relevant for EU agencies particularly because it concerned delegation of powers by the Council directly to a body established by secondary Community law. A constitutional problem was raised by the fact that a Community body called Administrative Commission was delegated powers to adopt decisions of general application. In the Court's reasoning it followed from both Article 155 of the EEC Treaty concerning Commission's power to implement legislation (now, as amended, under Arts 290 and 291 TFEU) and the judicial system created by the Treaty, in particular by Articles 173 and 177 (now, as amended, Arts. 263 and 267 TFEU), that a body such as the Administrative Commission could not be empowered by the Council to adopt acts having the force of law.⁵⁴

The UK claimed that the authorisation provided by Article 28 of the Short Selling Regulation was contrary to the principles established in *Romano* because it grants ESMA the power to adopt quasi-legislative measures of general application. For example, prohibition of short selling of a specific financial instrument is not an individual decision because it affects the entire class of persons engaging in transactions in that instrument. Therefore, a decision like that amounts to a 'measure of general application having the force of law'.⁵⁵

The Court submitted that Article 28 indeed concerns measures that are meant to be generally applicable but this was of no consequence for the legality of Article 28 powers because the institutional framework established by TFEU (in particular Arts 263 and 277 TFEU) 'expressly permits Union bodies, offices and agencies to adopt acts of general application.'⁵⁶ Thus in the Court's view, *Romano* added nothing to the conditions already laid down in *Meroni*.⁵⁷

⁵³ Schütze, *supra* n. 13, p. 674 (footnote 88).

⁵⁴ ECJ, 14 May 1981, Case 98/80 *Romano v Institut nationa d'assurance maladie-invalidité*

⁵⁵ ECJ, March 22 January 2014, Case 270/12 *UK v Council and Parliament*, para. 57

⁵⁶ *Ibid.*, para. 64–65.

⁵⁷ *Ibid.*, paras. 66–67.

Articles 290 TFEU and 291 TFEU

The essence of the UK's third plea was that the Treaties gave the EU legislator no authority to delegate powers to adopt acts of general application (including those provided for in Article 28 Short Selling Regulation) to an EU agency, because Articles 290 and 291 TFEU foresee that such powers may be given only to the Commission (and exceptionally to the Council).⁵⁸

The Court thus had to decide whether Articles 290 and 291 TFEU were indeed meant to provide a 'single legal framework' for executive powers or 'whether other systems for the delegation of such powers to Union bodies, offices or agencies may be contemplated by the Union legislature.'⁵⁹ The Court first acknowledged the fact that no Treaty provision explicitly allows conferral of such powers to a Union agency or other body. However, this fact could not mean that such powers were impossible, because a number of provisions in the TFEU 'presuppose that such a possibility exists'.⁶⁰ The provisions the Court referred to were the mechanisms of judicial review, as modernised by the TFEU.⁶¹ These mechanisms will be reviewed below.

In what followed, the Court stated that conferral of powers under Article 28 of the Short Selling Regulation 'does not correspond to any of the situations defined in Articles 290 TFEU and 291 TFEU.'⁶² Therefore the powers conferred needed to be examined against their wider legal (and political) framework, including the ESMA Regulation, the Short Selling Regulation, but also the Regulation 1092/2010 establishing the European Systemic Risk Board (ESRB), the macro-supervisory arm of the European System of Financial Supervision:

'[...]those regulations form part of a series of regulatory instruments adopted by the EU legislature so that the Union may, in view of the integration of international financial markets and the

⁵⁸ Ibid., paras. 69–70.

⁵⁹ Ibid., para. 78.

⁶⁰ Ibid., para. 79.

⁶¹ Ibid., para. 80.

⁶² Ibid., para. 83. This view is in contradiction with the view adopted by the Advocate General, who assessed the delegation, or rather conferral, of powers seemingly in the context of Article 291 TFEU. 'It is of course true that Article 291 TFEU, like Article 290 TFEU, does not refer to agencies as subjects on whom implementing powers can be conferred at the EU level. However, given that [Article 291 TFEU] implementing powers do not extend to amending or supplementing legislative acts with new elements, fundamental constitutional principles do not in my opinion prevent the legislator from conferring such powers on agencies as a midway solution between vesting implementing authority in either the Commission or the Council, on the one hand, or leaving it to the Member States, on the other.' Opinion of AG Jääskinen, *supra* n. 7, para. 86.

contagion risk of financial crises, endeavour to promote international financial stability, as stated in recital 7 in the preamble to Regulation No 1092/2010.⁶³

Consequently, the Court read Article 28 powers not ‘in isolation’ but contextually as a necessary part of the Union toolkit to preserve financial stability.⁶⁴

Article 114 TFEU

In the first three of its pleas, the UK claimed in essence that Article 28 of the Short Selling Regulation did *not* intend to authorise ESMA to take individual measures, but rather measures of general application having the force of law. However, for the purposes of the fourth plea, the UK held that in the event the Court would regard Article 28 as also authorising the taking of individual decisions applicable to natural or legal persons, such powers would be *ultra vires* in light of Article 114 TFEU.

The Court held that individual decisions were indeed possible: Article 28 enables the adoption of measures that ‘may take the form, where necessary, of decisions directed at certain participants in those markets.’⁶⁵ So the problem was could such individual measures satisfy the requirements of Article 114 TFEU, which, as the Court noted, presents two different conditions. First, measures should be adopted for the purposes of approximation of provisions laid down by law, regulation or administrative action in the Member States and, second, have as their objective the establishment and functioning of the internal market.⁶⁶ The Advocate General’s had answered the questions in the negative: in his opinion the outcome of the activation of ESMA’s powers under Article 28 is not harmonisation, or the adoption of a uniform practice at the Member States level, but replacement of national decision-making under certain provisions with EU level decision making.⁶⁷

With regard to the first condition, the Court relied on two important cases, *United Kingdom v Parliament and Council (ENISA)*⁶⁸ and *United Kingdom v Parliament and Council (Smoke*

⁶³ ECJ, March 22 January 2014, Case 270/12 *UK v Council and Parliament*, para. 84.

⁶⁴ *ibid.*, para. 85.

⁶⁵ *Ibid.*, paras. 98 and 108.

⁶⁶ *Ibid.*, para. 100.

⁶⁷ *Ibid.*, para. 52.

⁶⁸ ECJ, 2 May 2006, Case C-217/04 *United Kingdom v Parliament and Council*.

flavourings).⁶⁹ In *Smoke flavourings* the Court interpreted the expression ‘measures for the approximation’ as set forth in Article 114 TFEU, as representing an intention

‘to confer on the Union legislature, depending on the general context and the specific circumstances of the matter to be harmonised, discretion as regards the most appropriate method of harmonisation for achieving the desired result, especially in fields with complex technical features’.⁷⁰

In *ENISA*, on the other hand, it was held that the EU legislature can establish an EU body responsible for contributing to the implementation of a process of harmonisation, because:

‘nothing in the wording of Article 95 EC [now Article 114 TFEU] implies that the addressees of the measures adopted by the Community legislature on the basis of that provision can only be the individual Member States’.⁷¹

Accordingly, the Court concluded, the discretion of the EU legislature as regards the method of harmonisation for achieving the desired result allows delegation to an agency of certain implementation powers to further the harmonisation process. This is particularly the case where such measures require specific professional and technical expertise and the ability to respond swiftly and appropriately.⁷² To the extent that the measures adopted would be applicable to specific persons or products, the Court evoked the case *Germany v Council* (General product safety), in which the notion of ‘measures for the approximation’ was interpreted as also encompassing measures that relate ‘to a specific product or class of products as well as, if necessary, individual measures concerning those products.’⁷³

In more substantive assessment the Court merely recorded that the measures adopted by Member States on their respective markets had clearly been divergent and the legislature’s target was to end the fragmented situation.⁷⁴ To reach that target ESMA was conferred powers to coordinate national measures or to take the measures itself when necessary. Therefore, Article 28 Short Selling Regulation ‘is in fact directed at the harmonisation of the Member States’ laws, regulations and administrative provisions.’⁷⁵

⁶⁹ ECJ, 6 December 2005, Case C- 66/04 *United Kingdom v Parliament and Council*.

⁷⁰ *Ibid.*, para. 45.

⁷¹ ECJ, 2 May 2006, Case C-217/04 *United Kingdom v Parliament and Council*, para. 44.

⁷² ECJ, 7 March 2014, Case 270/12 *UK v Council and Parliament*, para. 105.

⁷³ ECJ, 9 August 1994, Case C-359/92 *Germany v Council*, para. 37.

⁷⁴ ECJ, 7 March 2014, Case 270/12 *UK v Council and Parliament*, paras. 109 and 111

⁷⁵ *Ibid.* paras. 110 and 112.

With regard to the second condition, namely that the object of the measures in question must be to further the establishment and functioning of the internal market, the Court, citing various recitals in the preamble of the Short Selling Regulation, held that it was objectively apparent that the purpose of Article 28 of the Short Selling Regulation was in fact to improve the conditions for the establishment and functioning of the internal market in the financial field.⁷⁶

COMMENTS

An updated Meroni jurisprudence

Meroni and *Romano* were decided at a time of an underdeveloped system of judicial protection. In *Meroni* the Court reasoned quite correctly that if the delegation of powers renders them ineligible to judicial review, the powers in effect become more extensive.⁷⁷ This gap in the Union's constitutional system of judicial protection is now closed. Article 263 TFEU explicitly extends the judicial review of the Court of Justice to acts of EU agencies when they intend to produce legal effects vis-à-vis third parties. The validity and interpretation of acts of agencies can be referred to review by Member States' courts and tribunals (Art. 267 TFEU) and such acts may be subject to a plea of illegality (Art. 277 TFEU). Because of the better coverage of the Union's system of judicial review the powers delegated under Article 28 of the Short Selling Regulation are not 'different from those which the delegating authority itself received', which was the finding in *Meroni*.

As is well known, this Treaty fix did not bring about a constitutional revolution in the sense that judicial review of acts of agencies had already been confirmed in the practice of the Court of Justice. *Les Verts* provided that 'in a Community based on the rule of law acts intended to produce legal effects have to be subject to judicial review.'⁷⁸ In *Sogelma* it was confirmed that this principle also applied to agency acts in accordance with the principle that '[...]any act of

⁷⁶ Here the Court used the test applied in *ENISA*, where it was held that Article 114 TFEU may 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.' *Ibid.*, paras 42, 116.

⁷⁷ 'The fact that it is possible for the Brussels agencies to take decisions which are exempt from the conditions to which they would have been subject if they had been adopted directly by the High Authority in reality gives the Brussels agencies more extensive powers than those which the High Authority holds from the Treaty.' ECJ, 13 June 1958, Case 9/56 *Meroni v High Authority*, at p. 150.

⁷⁸ ECJ, 26 September 1984, Case 294/83 *Parti écologiste "Les Verts" v European Parliament*.

a Community body intended to produce legal effects vis-à-vis third parties must be open to judicial review.⁷⁹

The practical relevance of the *Short selling* judgement with regard to *Meroni* is the guidance it provides for the *in casu* assessments of the boundaries and conditions for the delegation (and conferral) of powers. The Court restated the importance of both sufficient substantive and procedural constraints, which should render the powers ‘precisely delineated and amenable to judicial review in the light of the objectives established by the delegating authority.’⁸⁰

ESMA’s direct intervention powers are indeed subjected to numerous conditions and safeguards, both *ex ante* and *ex post*.⁸¹ ESMA’s positive powers under Article 28 of the Short Selling Regulation are strictly confined, which means that despite the powers are far-reaching, ESMA has little discretion as to *how* to intervene. In terms of level of discretion conferred on ESMA, the question of *when* to intervene seems much more problematic.⁸² Here the Court underlined the importance of conditions set forth in the Commission Delegated Regulation (EU) No 918/2012. That act indeed provides an additional yardstick in line with the *Meroni* requirement that a delegation must be exposible ‘to strict review in the light of objective criteria’.⁸³ Article 24 of the Regulation (EU) No 918/2012 seeks to specify the types of threats justifying intervention and emphasizes the technical and factual nature of the assessment. However, technical as they may be, such assessments most certainly are not simple exercises of ‘subsuming facts into rules’⁸⁴ but require difficult balancing between conflicting objectives and risks involved. Product regulation in the environment of financial markets is a task that is

⁷⁹ Court of First Instance, 8 October 2008, Case T-411/06 *Sogelma v EAR*, para. 37.

⁸⁰ ECJ, 7 March 2014, Case 270/12 *UK v Council and Parliament*, para. 53.

⁸¹ See P. Schammo, *supra* n. 23, at p. 787–791.

⁸² These ‘types of discretion’ are different, but they both seemingly fall under the concept of implementation. Implementation comprises both ‘the drawing up of implementing rules and the application of rules to specific cases by means of acts of individual application.’ ECJ, 24 October 1989, Case 16/88 *Commission v. Council*, para 11.

⁸³ However, *Meroni* also required that the ‘delegating authority’ determines the criteria, which strictly speaking is not the case here. Rather the Commission, by a delegated act and acting itself within the confines of delegated powers, has adopted the criteria specifying the use of the powers under Article 28 of the Short Selling Regulation. What is more, the criteria have actually been developed by ESMA itself by invitation from the Commission. ESMA, Final Report, ESMA's technical advice on possible Delegated Acts concerning the regulation on short selling and certain aspects of credit default swaps ((EC) No 236/2012).

⁸⁴ Which was the view of the Council, see ECJ, March 22 January 2014, Case 270/12 *UK v Council and Parliament*, paras. 36, 38.

‘notoriously complex’.⁸⁵ One may question if ESMA is the most appropriate body to make such systemic assessments (e.g. effects on liquidity). ESMA’s core tasks relate to micro-prudential supervision and the establishment of the single rulebook.

To that end, it makes sense that ESMA must consult ESRB, the macro-prudential arm of EU financial supervision. ESRB’s input serves a legitimizing function with respect to the general requirement of rationality of Union administrative action.⁸⁶ But the setting strikes as peculiar if we look at the role agencies have usually played in the administration of Union law. The agencies have traditionally offered scientific and other expertise to aid the implementation of EU law (usually by the Commission), not executed EU law on the basis of expert opinions acquired elsewhere. The European System of Financial Supervision, with its micro–macro division and silo-based model of supervision is not a seamlessly functioning community of experts, but rather a collection of bodies with differing powers and agenda.

Far from rendering the *Meroni* doctrine obsolete, the *Short Selling* ruling brings the jurisprudence to the post-Lisbon age. As expected, the Court confirmed for the first time that the *Meroni* restrictions also circumscribe the empowerment of Union agencies. But what is particularly important is that *Meroni* applies regardless of whether the act under scrutiny is a sub-delegation by the Commission, or a direct empowerment embedded in the legislative act itself. The Court in *Short Selling* thus authorised a relatively wide application of *Meroni* principles to generally police the creation and transfer of implementing power within the Union. Wide reading also dodges the difficult problem on the nature of ‘delegation’, i.e. the question of if the powers delegated were vested in the delegating authority, i.e. the legislator, in the first place, or if something new was created.⁸⁷ Advocate General Jääskinen was right in his view that Article 28 of the Short Selling Regulation actually makes possible the replacement of national decision-making under certain provisions with EU level decision

⁸⁵ N. 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.’ 12 *European Business Organization Law Review* (2011) p. 177, p. 204.

⁸⁶ On the role judicial rationality review in the context of EU risk regulation, see C. Anderson, ‘Contrasting models of EU administration in judicial review of risk regulation’ 51 *Common Market Law Review* (2014) p. 425–454.

⁸⁷ Meaning that the powers were not actually ‘delegated’ but ‘conferred’. See M. Chamon, ‘The empowerment of agencies under the *Meroni* doctrine and article 114 TFEU: comment on *United Kingdom v Parliament and Council (Short-selling)* and the proposed single resolution mechanism.’ (2014) 39 *European Law Review* 380, at p. 383. Actually the Court in *Meroni* Court also remarked that speaking of ‘delegation’ makes sense only when speaking of powers that the delegating authority itself had received under the Treaty, ECJ, 13 June 1958, Case 9/56 *Meroni v High Authority*, at p. 150. The judgement in *Short selling* is not consistent in this terminological respect (see e.g. paras 79 and 83).

making.⁸⁸ ‘Delegation’ indeed appears ill-suited to describe such *vertical* transfer of powers from the national to the EU level.⁸⁹ Moreover, while the Court widened the applicability of the ‘essential’ *Meroni* principles, it at the same time dismissed several important elements from the original decision, introducing something that could be called a ‘*Meroni*-light doctrine’.⁹⁰ It remains to be seen to what extent *Meroni* principles will need to accommodate democratic legitimacy concerns. Indeed, as democracy is a founding principle of EU law (Arts 2 and 10 TEU), any delegation of power beyond the remit of the treaty-based European institutions should be democratically legitimised.⁹¹

However, the Court’s non-restrictive reading of *Meroni* can be welcomed. *Meroni* principles will undoubtedly serve an important function in filling another constitutional gap in EU law that is becoming more visible by the day, that is, the lack of consistency in controls for various forms of executive rule-making taking place beyond the TFEU-based hierarchy of norms. Next section will reflect more upon this.

Articles 290 and 291 TFEU and the hierarchy of Union acts

After the *Short selling Romano*’s precedential value appears rather crippled. The notion in *Romano* of ‘acts having the force of law’ has raised some controversy, not least because of the apparent disparity between the Judgement’s different language versions. Did the Court refer to legislative measures of general application or to all kinds of legally binding acts, including decisions in individual cases?⁹² This question does not seem relevant anymore. However, *Romano* also concerned the problem of ‘exclusivity’ of implementing powers, i.e.

⁸⁸ Opinion of AG Jääskinen, *supra* n. 7, para. 52.

⁸⁹ In Dehousse’s opinion *Europeanization* would be a better description in these cases. R. Dehousse, ‘Misfits: EU law and the transformation of European governance’ In C. Joerges and R. Dehousse (eds), *Good governance in Europe’s integrated market* (OUP, 2002), p. 207–229.

⁹⁰ Chamon, *supra* n. 87, at p. 393. Most importantly the Court disregarded the problem of institutional balance, which is a constituent part of the *Meroni* doctrine. However, if we look at institutional balance as a legal principle concerning primarily the horizontal dimension of the division of powers between Treaty-based institutions this seems less surprising: in the case the Council, Parliament and Commission were all lined-up against the UK’s challenge. However, this disregards the principle’s vertical, political side, which pursues the preservation of democratic values. See K. Lenaerts and A. Verhoeven, ‘Institutional Balance as a Guarantee for Democracy in EU Governance’ in Joerges and Dehousse (eds.) *Good Governance in Europe’s Integrated Market* (OUP, 2002), p. 35–88, at p. 43–44.

⁹¹ Griller and Orator, *supra* n. 12, at p. 15. It has even been argued that the notion of democratic legitimacy is the underlying concern behind the *Meroni* prohibitions. D. Curtin and R. Dehousse, ‘European Union agencies: tipping the balance’, in Busuioc, Groenleer and Trondal (Eds.), *The agency phenomenon in the European Union: Emergence, institutionalisation and every-day decision-making* (2012, Manchester University Press), p. 200.

⁹² See M. Chamon, ‘EU agencies between *Meroni* and *Romano* or the devil and the deep blue sea’ 48 *Common Market Law Review* (2011) p. 1055, at p. 1064–1065.

the possibility to delegate implementing powers to a body different than that foreseen in the Treaty (i.e. Commission).⁹³ Here *Romano* merges with the ‘exclusivity question’ concerning the Union framework for non-legislative acts as laid down in Articles 290 and 291 TFEU.

The hierarchy of EU norms as established in the Lisbon Treaty appears straightforward. All legislative acts are crafted through and adopted by legislative procedures (Art. 289(3)). In addition, TFEU recognizes two categories of binding non-legislative acts: Delegated acts are quasi-legislative acts that can amend or supplement non-essential elements of legislative acts (Art. 290 TFEU)⁹⁴ whereas implementing acts can be used where uniform conditions for implementing legally binding Union acts are needed (Art. 291 TFEU). Given that binding Union acts can exist in the form of regulations, directives or decisions, a simple arithmetic assessment gives us 9 basic categories of binding Union acts (3 levels of acts x 3 types of acts).⁹⁵

But how do ESMA’s powers under Article 28 of the Short Selling Regulation fit into this hierarchy of Union’s norms? Clearly, they do not. The post-Lisbon hierarchy of norms has rightly been criticized as misleadingly simple.⁹⁶ Perhaps the most serious limitation of the TFEU based hierarchy is the constitutional ambiguity that surrounds the implementation of EU law through various binding executive acts. The Lisbon Treaty did not change the fact that this area of rule-making ‘operates in a constitutional twilight zone.’⁹⁷ *Short selling* underlines these existing constitutional pitfalls. The Court held that TFEU does not prevent delegation of executive powers by the Legislature directly to non-Treaty based bodies, in a manner that ‘does not correspond to any of the situations defined in Articles 290 TFEU and 291 TFEU’.⁹⁸ This view represents another step forward in the restructuring of EU executive law-making after the Lisbon Treaty, which indeed seems to have brought about nothing less

⁹³ Griller and Orator, *supra* n. 12, at p. 19.

⁹⁴ Delegated acts are ‘substantive but not formal legislation’ because even though they clearly address legislative matters, they do that via a non-legislative decision-making procedure. H. Hofmann, ‘Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets Reality’ 15 *European Law Journal* (2009) p. 482, at p. 491.

⁹⁵ *Ibid.*, at p. 486. (Also pointing out that the reality is much more complex.)

⁹⁶ A well-known limitation is the fact that various non-binding ‘soft law’ acts, of which the TFEU recognizes only recommendations and opinions (Art. 288(4)), can have indirect but substantive legal effects. L. Senden, ‘Soft Post-Legislative Rulemaking: A time for More Stringent Control’ 19 *European Law Journal* (2013) p. 57.

⁹⁷ Lenaerts and Verhoeven, *supra* n. 90, at p. 48.

⁹⁸ ECJ, 7 March 2014, Case 270/12 *UK v Council and Parliament*, para. 83.

than an ‘executive revolution’.⁹⁹ As noted above, the possibility of judicial review of acts of agencies had already been confirmed in the practice of the Court of Justice and here the TFEU did little more than elevate to the level of the Treaties what was already firmly established in jurisprudence. But in the case at hand, the Court took the provisions beyond confirmatory status and gave them a *constitutive* effect. The reasoning goes that a constitutional mandate to confer powers to agencies and other bodies is, despite omitted from the text of the Treaties, a *sine qua non* of the existence of the judicial review mechanism as set up by the TFEU.¹⁰⁰ The Court thus bridged, or at least narrowed, the gap that has been widening between increasing powers of European agencies and the lack of express recognition of such powers in the Treaties.¹⁰¹

So if Articles 290 and 291 TFEU do not set up a closed system of delegation, like the Court stated in *Short selling*, how does such an ‘open system of delegation’ fit with the ‘constitutional checks and balances’ historically vested in the Treaties?¹⁰² The answer to this question is problematic for the simple reason that the mechanisms of political control over the use of delegated powers operate in closed system. The comitology regime, providing the most important political safeguard for the conferral of implementing powers,¹⁰³ allows the Member States to control through committees the adoption by the Commission of implementing acts.¹⁰⁴ However, comitology applies only to Article 291 TFEU implementing acts. So the obvious question arises: how is the use of executive power by EU agencies, now explicitly recognized, controlled? Indeed, when the delegation of executive power is done in a manner that ‘does not correspond to any of the situations defined in Articles 290 TFEU and 291 TFEU’ there is no systematic approach.

⁹⁹ *Ibid.*, at p. 663.

¹⁰⁰ Griller and Orator also hold that Article 263 confirms the constitutional “authorisation” to establish decision-making agencies, see *supra* n. 12, at p. 27. The Court shared the view of the Advocate General who opined, in view of the Treaty amendments, that ‘it is evident that agencies can be vested with powers to take legally binding decisions intended to produce legal effects in relation to third parties.’ Opinion of AG Jääskinen, *supra* n. 7, para. 74. However, the fact that the Court went as far as *presuming* the existence in the treaties of a possibility to confer powers on a Union agency is somewhat ironic, given that case centered on *Meroni*: In *Meroni* the court explicitly stated that delegation could never be presumed, but an express decision thereto was always required.

¹⁰¹ See Hoffman and Morini, *supra* n. 5, at p. 421.

¹⁰² See K. Lenaerts, “Regulating the Regulatory Process: “delegation of powers” in the European Community” 18 *European Law Review* (1993) p. 23, at p. 34.

¹⁰³ Schütze, *supra* n. 13, at p. 669.

¹⁰⁴ Comitology has been modernised by Regulation (EU) No 182/2011 of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers, OJ L 55.

Nevertheless, controlling executive rule-making of an EU agency such as ESMA through special committees composed of Member State experts would seem impractical. In the case of ESMA the heads of national authorities are the only voting members sitting in the Board of Supervision of ESMA.¹⁰⁵ Granted, like the Commission, ESMA's Board of Supervisors should, when carrying out its tasks, act independently and objectively in the sole interest of the Union as a whole.¹⁰⁶ The extent to which this requirement matches political reality is debatable, but it would nevertheless seem peculiar to subject board members of ESMA, the highest ranking national officials in the field of securities markets supervision, to the control of national experts. In this respect, the agency as a Union executive organ, indeed appears to be 'a midway solution between vesting implementing authority in either the Commission or the Council, on the one hand, or leaving it to the Member States, on the other.'¹⁰⁷

The above-said does not mean that legitimacy concerns are without basis. A number of governance issues relate to the implementation of EU policies by specialised agencies and this discussion is by no means a new one.¹⁰⁸ Lack of sufficient mechanisms for accountability and control of agency decision-making has aroused critical academic discussion for quite some time already¹⁰⁹ and demands for constitutionalising¹⁰⁹ and systematising the forms of EU executive rule-making outside existing formal procedures seem more pressing than ever.¹¹⁰ The Commission-lead political process on placing EU agencies within Union administration has hitherto built on establishing guiding principles and operationalizing them into Commission guidelines.¹¹¹

¹⁰⁵ The ESMA Regulation, Art. 40.

¹⁰⁶ The ESMA Regulation, Art. 42.

¹⁰⁷ Opinion of AG Jääskinen, *supra* n. 7, para. 86.

¹⁰⁸ See Commission White paper on European Governance, COM(2001) 428 final.

¹⁰⁹ M. Busuioc, 'Accountability, control and independence: The case of European agencies' 15 *European Law Journal* (2009), p. 599 at p. 600–602.

¹¹⁰ D. Curtin, H. Hofmann, and J. Mendes, "Constitutionalising EU Executive Rule Making Procedures: A Research Agenda" 19 *European Law Journal* (2013), p. 1; O. Mir-Puigpelat, "Arguments in Favour of a General Codification of the Procedure Applicable to EU Administration – Briefing Note" (2011), European Parliament, Policy Department C: Citizen's Rights and Constitutional Affairs (PE 432.776).

¹¹¹ In 2009, following a communication from the Commission (EU Agencies – the way forward, Brussels, 11.3.2008, COM(2008) 135 final) the Parliament, the Council and the Commission established the Inter-Institutional Working Group to lead the discourse on the role of decentralised agencies in the Union governance. In July 2012, the Working Group documented the reached conclusions, the so-called Common Approach, covering a range of issues such as the overall institutional role of agencies, their structure, management, funding and supervision. See Common Approach, as included in the Annex to the Joint Statement of the European Parliament, the Council of European Union and the Commission on decentralised agencies, 19 July 2012. Available from <http://europa.eu/about->

The next section assesses something that neither the Court nor the Advocate General did, i.e. the wider system of ESAs emergency powers. The purpose is to demonstrate how there exists significant incoherence in the system of oversight of the most far-reaching of ESMA's intervention powers.

Safeguards against ESMA's emergency powers

As noted above, the powers conferred by Article 28 of the Short Selling Regulation follow the formula set up in Article 9(5) of the ESMA Regulation. That Article provides that ESMA may temporarily prohibit or restrict certain financial activities that threaten the orderly functioning and integrity of financial markets or the stability of the Union's financial system. Such action can be taken in two different scenarios: (1) in cases that are specified and under the conditions laid down in the legislative acts covered by ESMA's substantive mandate (as set forth in Art. 1(2) of the ESMA Regulation) *or* (2) if so required in the case of an 'emergency situation' in accordance with Article 18 of the ESMA Regulation. The word 'or' above is important as it distinguishes two independent and very different legal grounds for ESMA's direct action. What are the latter Article 18 emergency situations and how do they relate to the powers conferred on ESMA under Article 28 of the Short Selling Regulation?

Article 18 of the ESMA Regulation is a constituent part of a 'superstructure' which has been established to prevent and handle financial crises.¹¹² Under that Article, ESMA can in situations of emergency adopt individual decisions requiring competent authorities to take action in order to ensure that the requirements laid down in EU legislation are met (Art. 18(3) and (4)). Like ESMA's powers under Article 28 of the Short Selling Regulation, Article 18 measures can exceptionally be directly applicable to financial market participants, e.g. requiring cessation of a stability threatening practice. Such decision can be taken if the national competent authority does not apply the relevant EU legislation (falling under ESMA's mandate), or applies them in a way that is in manifest breach of that legislation, and 'where urgent remedying is necessary' to restore the functioning and integrity of financial

(Contd.) _____

eu/agencies/overhaul/index_en.htm <last visited September 15th, 2014>. On the actions taken and proposed, see Commission, Roadmap on the follow-up to the Common Approach on EU decentralised agencies, December 2012 (introducing in total of 90 initiatives); and Commission progress report on the implementation of the Common Approach, 10 December 2013.

¹¹² Moloney, *supra* n. 85, p. 200.

markets or the stability of the financial system. Again, the measures adopted prevail over any previous decisions adopted by the national authorities on the same matter (Art. 18(5)).

Unlike Article 28 of the Short Selling Regulation, the emergency framework of Article 18 of the ESMA Regulation is subject to default ex ante political safeguards. As a rule it is up to the Council, after consulting the Commission, the ESRB and, if needed, other ESAs, to adopt a decision addressed to ESMA in which the existence of an emergency situation is determined. ESMA, the Commission or the ESRB can each alone request such a decision. Once adopted, the Council must review the decision at appropriate intervals and at least once a month, at the risk of said decision expiring. The Council may discontinue the emergency situation at any time (Art. 18(2)). These safeguards counterbalance the discretionary powers conferred and serve an important legitimising function.¹¹³

In terms of substance of powers, Article 9(5) of the ESMA Regulation overlaps with the Article 18 emergency situations. In Article 18 emergency situations (requiring ‘declaration’) ESMA could in theory intervene also in the event the requirements of Short Selling Regulation are not being met and the measures could go beyond what is prescribed in Article 28 of the Short Selling Regulation. But in terms of political and procedural safeguards, the powers granted by Article 28 of the Short Selling Regulation are fundamentally different from the above ‘emergency situation’ powers. Instead of mandatory political safeguards, their exercise relies primarily on *ad hoc* safeguards established by subsequent legislation. This means that the Council does not exercise any direct control over ESMA’s ‘substitutive’ powers vis-à-vis national authorities. The only relevant procedural limitation of ESMA’s discretion under Article 28 is the mandatory consultation of the ESRB.¹¹⁴

Consequently, the relationship between emergency measures based on Article 9(5) and Article 18 of the ESMA Regulation seems obscure: the powers are of a similar legal status, but they have two important differences: first, the powers under Article 28 of the Short Selling Regulation are more limited in substance and second, action under Article 9(5) is

¹¹³ Tridimas suspects that if ESMA could take such decisions without the Council’s prior enabling decision, the resulting wide discretionary powers would seem to contradict the *Meroni* non-delegation regime. Tridimas, ‘Financial Supervision and Agency Power: Reflections on ESMA’ in N.N. Shuibhne and L.W. Gormley (eds.) *From Single Market to Economic Union: Essays in Memory of John A. Usher* (OUP, 2012), at p. 74–75.

¹¹⁴ Interestingly, this consultation requirement was omitted from the temporary intervention powers handed to ESMA under Article 40 of the Regulation No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments, O.J. L 173 (MiFIR).

always temporary which is not the case in Article 18 situations. Especially the latter point emphasizes the importance of effective procedural safeguards *after* the decision has been made (e.g. mandatory review). These differences justify at least in part the disparity in safeguards. But the respective scope and functions of these very different intervention powers are not entirely clear. For instance, while Article 9(5) refers to ‘certain financial activities that threaten the orderly functioning and integrity of financial markets’, Article 18 refers to ‘adverse developments which may seriously jeopardise the orderly functioning and integrity of financial markets’. The difference appears to be a matter of degree. It is equally hard to tell the difference between powers that have financial stability and orderly functioning of financial markets as their target *per se*, and powers that seek to prevent instability and market malfunction in order to somehow protect consumers or investors.

Why was Article 9(5) of the ESMA regulation created then? Again, a particular political background surrounds Article 9(5) of the ESMA regulation. The provision was not included in the original Commission proposal for the legislative foundation of ESAs, but the addition was introduced by the Parliament in the first reading.¹¹⁵ It responded, again, to the heightened concerns raised by serious coordination problems pertaining to regulation of short selling in the EU markets.¹¹⁶ Nevertheless, the fact that Article 9(5) of the ESMA Regulation was designed with a specific set of problems in mind does not preclude using it as a template for further transfer of executive power to the ESMA.¹¹⁷ Indeed, in its recent review of the European System of Financial Supervision, the Commission even elaborated whether Article 9(5) could be converted into a ‘self-standing empowerment’.¹¹⁸ Such development would certainly marginalise further the emergency framework under Article 18 of the ESMA Regulation. Another possibility is that declaration by the Council of an emergency situation will become the *ultima ratio* option reserved solely for situations where full-blown and serious crises need to be contained rather than prevented.

¹¹⁵ See Report on the proposal for a regulation of the European Parliament and of the Council establishing a European Securities and Markets Authority, ECON, Rapporteur: Sven Giegold, A7-0169/2010 (amendment 76); European Parliament, first reading, P7_TA(2010)0270, 7 July 2010.

¹¹⁶ Moloney, *supra* n. 85, at p. 203, 208.

¹¹⁷ See Article 40 MiFIR which empowers ESMA to impose certain temporary prohibitions or restrictions with respect to financial instruments or activities on a precautionary basis.

¹¹⁸ Report from the European Commission to the Parliament and the Council on the operation of the European Supervisory Authorities (ESAs) and the European System of Financial Supervision (ESFS), Brussels, 8.8.2014 COM(2014) 509 final, at p. 8. (accompanied by a Commission Staff Working Documents, SWD(2014) 261 final).

Financial stability measures and Article 114 TFEU

With regard to the dismissal of the fourth and final plea of the UK, the judgement of the Court of Justice relinquishes some of the pressure placed on Article 114 TFEU that provides the primary Treaty anchor of the EU's nascent financial supervisory system. Had the Court concurred with the Advocate General's opinion, and especially his reasoning, a pivotal building block of the supervisory system would have been undermined.¹¹⁹ The Advocate General's key reasoning is worth repeating:

‘The conferral of decision making powers under [Article 28] on ESMA, *in substitution for the assessments of the competent national authorities*, cannot be considered to be a measure “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” within the meaning of Article 114 TFEU’.¹²⁰

This line of reasoning risked throwing the baby out with the bath water in the sense that all executive decisions taken by the ESAs concerning financial market participants directly, or national authorities in case of settlement of disagreements, prevail over any previous decision adopted by the competent authorities on the same matter.¹²¹ Had the court agreed and given in its assessment a central role to the fact that ESMA's powers are *substitutive* in nature, this might have encouraged further incredulity towards direct intervention powers based on Article 114 TFEU.¹²²

The *ENISA* case¹²³ provides an explicit justification for the choice to base all new EU supervisory bodies (including ESMA) on Article 114 TFEU.¹²⁴ The Advocate General argued however that the powers of ESMA under Article 28 of the Short Selling Regulation, which are binding, exceed the limits established in *ENISA*.¹²⁵ In his view,

¹¹⁹ ‘UK Wins Backing on Clash with EU over Short Selling Rules’ *The Financial Times*, 13 September 2013.

¹²⁰ *Ibid.*, para. 37 (emphasis added).

¹²¹ See the ESMA Regulation, Articles 17(7), 18(5) and 19(5).

¹²² A ready candidate was the Single Resolution Mechanism (SRM) establishing an EU-level resolution fund for troubled banks. For ‘systemic risks’ posed by the opinion, see H. 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’, EUI Department of Law Research Paper No. 2014/02 (ERC ERPL 06). See also ‘UK Wins Backing on Clash with EU over Short Selling Rules’.

¹²³ ECJ, 2 May 2006, Case C-217/04 *United Kingdom v Parliament and Council*. The case concerned the Regulation establishing the European Network and Information Security Agency (ENISA).

¹²⁴ The case is cited in the Regulations establishing the ESAs. See e.g. the ESMA Regulation, rec. 17.

¹²⁵ “It is difficult to envisage how the exercise of a power under Article 28 [...] could contribute to harmonisation of the kind described by the Court in *ENISA*.” AG Jääskinen, *supra* n. 7, para. 50.

‘If a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or distortions of competition liable to result therefrom were sufficient to justify the choice of Article 114 TFEU as a legal basis, judicial review of compliance with the proper legal basis might be rendered nugatory.’¹²⁶

Interestingly, Advocate General Kokott’s conclusion in *ENISA* also deviated from the final ruling of the Court.¹²⁷ Her narrow view on Article 114 TFEU in *ENISA* has been critiqued inter alia by Tridimas, who argues that such an approach would foreclose institutional experimentation and serve as an obstacle for finding optimum structures of government.¹²⁸

Another case that could have supported restrictive reading of Article 114 TFEU is *Tobacco advertising*.¹²⁹ In that case the Court seemed to assert its ‘constitutional role in controlling political infidelity to the principle that the EU’s scope for action is limited to that mandated by the founding Treaties[...].’¹³⁰ The Court concluded that the genuine objective of the directive in question was not the internal market, but rather public health.¹³¹ However, subsequent case law has made *Tobacco advertising* look more like an anomaly.¹³²

The Court in *Short selling* reads the internal market Article in a way that seems consistent with the established jurisprudence. Article 114 TFEU provides a legal basis for measures to preserve the functioning of the Single Market, but it requires that such measures must always entail a sufficient element of harmonisation. After a succinct and straightforward analysis the Court found that Article 28 fulfilled both these conditions. Contrary to the proposal of the Advocate General, the Court decided not to give weight to the fact that Article 28 gives ESMA powers that can substitute the assessments of the competent national authorities. For the Court this was merely a question of an appropriate ‘method of harmonisation’¹³³

¹²⁶ Ibid., para. 46

¹²⁷ Opinion of Advocate General Kokott delivered on 22 September 2005 in ECJ, 2 May 2006, Case 217/04 *United Kingdom v Parliament and Council* (*ENISA*). Advocate General Kokott found that the [Regulation establishing the *ENISA*] was not “so much an intermediate step on the way to the approximation of laws of the Member States as a step into the uncertain” Ibid., para. 36.

¹²⁸ Tridimas, *supra* n. 113, at p. 66. He also finds that Article 114 TFEU is a valid foundation for the ESMA because, in line with the requirements of *ENISA*, the ESMA’s core objectives and tasks are closely connected with the subject matter as well as the objectives of harmonisation legislation. Ibid.

¹²⁹ ECJ, 5 October 2000, *Federal Republic of Germany v European Parliament and Council of the European Union*, C-376/98.

¹³⁰ S. Weatherill, ‘The Limits of Legislative Harmonization Ten Years after *Tobacco Advertising*: How the Court’s Case Law has become a Drafting Guide’ 12 *German Law Journal* (2011) p. 827, at p. 828.

¹³¹ Ibid., p. 829.

¹³² Ibid., p. 843.

¹³³ ECJ, March 22 January 2014, Case 270/12 *UK v Council and Parliament*, para. 105.

The Court's approach can be welcomed in the sense that constitutional analysis of delegated powers should distinguish between questions regarding the extent of powers and discretion delegated or conferred on the one hand, and the function and purpose of these powers on the other. But with regard to the latter, one increasingly salient problem pertaining to the use of Article 114 TFEU as the Treaty basis for financial supervisory reforms was neither addressed by the Advocate General nor by the Court. The broadening concept of harmonization is becoming increasingly elusive, as it must accommodate legislative initiatives whose primary function and purpose is to preserve the stability and orderly functioning of the financial system.¹³⁴ Article 9(5) of the ESMA Regulation, for instance, is more closely related to issues of financial stability and systemic risk than to 'micro-protection' issues.¹³⁵ The Court in *Short selling* also noted as part of its contextual interpretation of the challenged powers that they form 'part of a series of rules that endow the national authorities and ESMA with intervention powers 'to cope with adverse developments which threaten financial stability within the Union'.¹³⁶

Why might this be problematic for the use of Article 114 TFEU as the legal basis for such measures? After all, established jurisprudence states that legislative measures based on Article 114 TFEU can be aimed at preservation of the functioning of the Single Market as long as the measures entail a sufficient element of harmonisation. Constitutionally speaking, the problem boils down to the relationship between financial stability and harmonisation-lead integration. Traditionally, the latter promotes competition rather than stability. The financial crisis spurred a general debate about the relationship between financial integration and financial stability. In the EU financial stability is often portrayed as a companion objective with further financial integration. For instance, the regulation establishing the ESRB, also based on Article 114 TFEU, explicitly states that the role of the ESRB is to contribute to *financial stability necessary for further financial integration* in the internal market.¹³⁷ But even if financial

¹³⁴ For instance in the UK a report by the Treasury Committee of House of Commons acknowledged the need to foster financial stability and avoid financial shocks, but with regard to legal basis of the emerging supervisory regime (Article 114 TFEU) the report added "it is not clear that these proposals are inherently related to the single market, rather than the orderly functioning of the financial system". House of Commons, Treasury Committee, Sixteenth Report of Session 2008–09, The Committee's Opinion on proposals for European financial supervision, para. 31

¹³⁵ The fact that Article 9 should concern 'tasks related to consumer protection and financial activities' seems to be a misnomer in this respect. See Wymeersch, *supra* n. 19, at p. 461.

¹³⁶ ECJ, March 22 January 2014, Case 270/12 *UK v Council and Parliament*, paras. 84–85.

¹³⁷ The ESRB Regulation, rec. 31.

stability and financial integration are seemingly tightly coupled, they are not mutually reinforcing.¹³⁸ Financial crisis threw doubt on the accepted maxim that integration of global financial markets automatically leads to greater financial stability.¹³⁹ As financial globalisation has been hit by the crisis, this can actually mean that contagion problems diminish.¹⁴⁰

If more unified financial markets breed more instability, they are undoubtedly in need of more centralised and consolidated supervision and crisis resolution mechanisms on the EU level. Without such measures there is a risk that the process of market integration reverses and is replaced by more fragmentation and less competition.¹⁴¹ But basing such governance structures on Article 114 TFEU would need a fuller elaboration as to how these stability enhancing measures can be linked to approximation of the laws of the Member States. Handing hierarchically superior intervention powers to an EU financial agency does not seem to promote unification of markets, but rather prevent and contain risks that more unified markets are prone to create.

CONCLUSION

The on-going transformations in the sphere of prudential regulation of EU financial markets can be seen as a result of the deregulatory pressures that have dismantled the barriers to more integrated financial markets and finally being followed by a pressing need for EU-level mechanisms of prudential risk regulation.¹⁴² Indeed, it is by no means the first time the European Union expands its activities into new realms, despite tenuous legal base. In the past accommodating Treaty amendments, especially in the area of social or risk regulation, has

¹³⁸ See House of Commons, Treasury Committee, *supra* n. 134, para 31, citing Barbara Ridpath, the Chief Executive of the International Centre for Financial Regulation.

¹³⁹ J. E. Stiglitz. Risk and global economic architecture: Why full financial integration may be undesirable. No. 15718. NBER Working Paper Series, National Bureau of Economic Research, 2010.

¹⁴⁰ Financial fragmentation – too much of a good thing, *The Economist*, Special report: World Economy, 12 October 2013.

¹⁴¹ Ferrarini and Chiodini, *supra* n. 34, at p. 202, 208.

¹⁴² See R. Dehousse on the development on social and risk regulation in *supra* n. 89 at p. 209. This is not say that the EU financial market would form a complete integrated entity. The basic findings of the Giovannini Group still hold: EU financial markets remain “a juxtaposition of domestic markets.” The Giovannini Group, Second Report on EU Clearing and Settlement Arrangements Brussels, April 2003 (foreword). After the crisis, the single market has rather struggled with economic and financial fragmentation. European Central Bank, *Integration in European financial markets improved, but still worse than before crisis, new European Commission, ECB reports show*, Press release, 28 April 2011.

followed such movements.¹⁴³ On the other hand, the on-going developments could also be symptomatic of a more fundamental constitutional mutation launched by the financial crisis, with financial stability, as rooted in the ‘Maastricht macroeconomic constitution’, transforming itself into a new overriding objective.¹⁴⁴ Time will tell if future Treaty developments will give the nascent EU structures of prudential regulation of financial markets a firmer legal basis. Until that, the judgement by the Court of Justice in *Short selling* provides interim relief.

In *Short selling* the Court bridged a pervasive constitutional gap in EU executive rule-making. The step was arguably brave: with the help of the enhanced judicial review mechanisms of the Lisbon Treaty, the Court *presumed* that there exists a possibility to vest hierarchically superior executive power in an EU agency. For this reason, *Meroni* principles will serve an important function in filling another constitutional gap that is becoming more visible by the day, that is, the lack of consistency in safeguards against executive rule-making that takes place beyond the hierarchy of norms set up by the Treaty of Lisbon.

Short selling also reveals the creeping shadow of hierarchy that is being casted upon national financial supervisors. Ferran considers it a ‘safe bet’ that ESAs will follow in their predecessors’ footsteps and accumulate more power and influence over time.¹⁴⁵ After *Short Selling* this bet seems safer still, perhaps with the exception of EBA that undoubtedly will have to do some turf searching in the shadow of the ECB’s expanding mandate.

¹⁴³ Dehousse, *supra* n. 89 at p. 208–209.

¹⁴⁴ See K. Tuori and K. Tuori, *Eurozone Crisis: A Constitutional Analysis* (Cambridge University Press, 2014), e.g. at p. 183 et. seq. Maastricht principles still left primary responsibility for prudential supervision of financial institutions and the stability of the financial system for the Member States. *Ibid.*, at. p. 34.

¹⁴⁵ Ferran, *supra* n. 29 at. p. 156.