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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

Heikki Marjosola



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European Regulatory Private Law: The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation (ERPL)

A 60 month European Research Council grant has been awarded to Prof. Hans-Wolfgang Micklitz for the project “European Regulatory Private Law: the Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation” (ERPL).

The focus of the socio-legal project lies in the search for a normative model which could shape a self-sufficient European private legal order in its interaction with national private law systems. The project aims at a new-orientation of the structures and methods of European private law based on its transformation from autonomy to functionalism in competition and regulation. It suggests the emergence of a self-sufficient European private law, composed of three different layers (1) the sectorial substance of ERPL, (2) the general principles – provisionally termed competitive contract law – and (3) common principles of civil law. It elaborates on the interaction between ERPL and national private law systems around four normative models: (1) intrusion and substitution, (2) conflict and resistance, (3) hybridisation and (4) convergence. It analyses the new order of values, enshrined in the concept of access justice (Zugangsgerechtigkeit).

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Abstract

This paper takes a critical look at the conclusions and reasoning of the Opinion of the Advocate General in the case C-270/12 UK v Council and Parliament that, at the time of writing this paper, is pending before the Grand Chamber of the Court of Justice of the European Union. In his Opinion delivered on 12 September 2013, Advocate General Jääskinen found, in agreement with the UK, that the Article 114 TFEU was not an appropriate legal basis for the powers granted to the European Securities Markets Authority under Article 28 of the Regulation 236/2012 on Short Selling and certain aspects of Credit Default Swaps. This paper has three aims: first, to underline the “systemic” importance of the case for the nascent system of EU financial supervision; second, to point out certain neglected dimensions in the Opinion, especially the insufficient attention paid to ex ante (political and procedural) safeguards and the problematic relationship between financial stability and financial integration; and third, to emphasise the need of the Court to find a second-best solution in order to ring-fence the damage that could be caused to the supervisory system in the event the Court were to agree with the Advocate General’s findings.

Keywords

Financial supervision, financial stability, European Securities Markets Authority, harmonisation, agencies, Treaty of Lisbon, delegation, Meroni, single market

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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

Heikki Marjosola

Introduction

An important and closely watched case *UK v Council and Parliament*¹ pending before the Grand Chamber of the Court of Justice of the European Union tests the resilience of the EU financial supervisory architecture. The United Kingdom seeks the annulment of a key provision of Regulation on short selling and certain aspects of credit default swaps (the “Short Selling Regulation”) for handing too generous powers to the European Securities Markets Authority (ESMA).² The case attracted all the more attention after Advocate General Jääskinen delivered on 12 September 2013 his controversial Opinion, finding, in agreement with the UK, that the Article 114 TFEU was not an appropriate legal basis for the powers granted to the European Securities Markets Authority under Article 28 of the Short Selling Regulation.³

The UK's challenge of the ESMA's powers 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. The UK's critical stance as regards widening powers of EU financial authorities is well known⁴ and its recent activism has not been without results.⁵ Following the Opinion, the Financial Times reported: "should Britain's legal challenge prevail in the final ruling, it will significantly bolster London's hand in limiting the clout of EU agencies across a host of policy areas."⁶

The case at hand concerns legality of Article 28 of the Short Selling Regulation, which gives the ESMA certain powers vis-à-vis Member State's competent authorities and financial market participants. These powers are parallel and secondary to those of national authorities, in that the ESMA can take action only if a competent authority has not addressed the threat at all, or that the threat has not been addressed adequately by one or more authorities (Article 28(2)(b)). But these powers are also *hierarchically superior* in the sense that any measure adopted by the ESMA will *prevail over any previous measure taken by a competent authority* (Article 28(11)). In the Advocate General's reasoning this fact, among others, constitutes a breach of Article 114 of the Treaty on the Function of the European Union (TFEU) acting as a legal basis for Article 28, because such powers do not amount to a harmonising measure under EU internal market law. The Advocate General suggests that such an EU level emergency mechanism should be based on Article TFEU 352 requiring unanimity between Member States.

¹ Case C-270/12 United Kingdom of Great Britain and Northern Ireland v Council of the European Union and European Parliament.

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 Opinion of Advocate General Jääskinen in Case C-270/12 (UK v Council and Parliament), delivered on 12 September 2013 (Opinion).

⁴ See e.g. Financial Services Authority, Working towards effective and confident European Supervisory Authorities. The FSA's views on policy considerations, December 2010. "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". Ibid, p. 11.

⁵ As reported e.g. by the *The Financial Times*, Short selling win gives UK third victory in Brussels clash, 12 September 2013.

⁶ *The Financial Times*, UK Wins Backing on Clash with EU over Short Selling Rules, 13 September 2013.

This paper takes a critical look at the conclusions and reasoning of the Opinion. The paper has three aims: first, to underline the “systemic” importance of the case for the nascent system of EU financial supervision (Section 3); second, to point out certain neglected dimensions in the Opinion, especially the insufficient attention paid to ex ante (political and procedural) safeguards and problematic relationship between financial stability and financial integration (Sections 4 and 5); and third, to emphasise the Court’s need to find a second-best solution to ring-fence the damage that could be caused to the supervisory system if the Court were to agree with the Advocate General’s findings (Section 6). The analysis will focus on the problems surrounding Article 114 TFEU as a single legal basis for the Short Selling Regulation and for several other EU financial reforms. Other important dimensions of the Case cannot be discussed in detail here.

Background

Political and economic context

The question of the validity of Article 28 of the Short Selling Regulation with regard to scope of Article 114 TFEU is essentially related to the question of what is the genuine purpose and function of the provision. To answer this question, it is material to understand the extreme economic and political conditions that gave rise to the Short Selling Regulation.

The purpose of short selling is to benefit from, or to hedge against, falling prices of a given financial instrument.⁷ Though it 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 downward spiral in prices. Short selling played an important role in the escalation of the 2008 financial crisis in Europe and in the following market upheaval. Especially sovereign debt of several Member States became an object of increased short selling activity. These problems intensified during autumn 2008 and again in 2010. In response, regulators in different EU Member States crafted different regulatory responses. The interventions ranged from temporary bans on short selling in general (e.g. Greece) to statutory bans on naked short selling⁸ (e.g. Germany) as well as enacting various kinds of disclosure requirements. Some Member States opted for no action.⁹

The resulting uncertainty was made possible and fuelled by lack of EU level legislative framework. Fragmentation and the absence of a level-playing field were feared to limit the effectiveness of the national measures imposed, lead to significant increase of compliance costs for firms, and ultimately push investors to circumvent jurisdiction specific restrictions by carrying out transactions in another

⁷ 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 from the markets through a securities lending arrangement. The rationale is to buy and return equivalent securities at a later time when the prices have fallen, and pocket the difference. The Commission has defined 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.

⁸ Especially the type of short selling known as “naked” or “uncovered” short selling, or just “naked short”, has been subject of wide criticism after the 2008 financial crisis. 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.

⁹ On adopted measures, see Commission, impact assessment, accompanying the Proposal for the Short Selling Regulation Brussels, SEC(2010) 1055, pp. 17–19. For an updated and 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

(regulatory arbitrage).¹⁰ In light of these concerns, the Commission introduced in 2010 an ambitious proposal for a Regulation, with a 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.”¹¹

Thus the primary target of the Short Selling Regulation was not to centralise market intervention powers within the EU financial supervisory authorities¹², but to harmonise the powers of national competent authorities in order to increase legal certainty and promote greater financial stability. Ideally, all authorities would be vested with similar powers to temporarily restrict or ban short selling of financial instruments in exceptional situations and the ESMA’s role would primarily be to foster co-ordination (e.g. by issuing opinions).¹³

However, harmonisation of powers of national competent authorities did not address the underlying problem.¹⁴ In increasingly integrated EU financial markets significant market disruptions may affect the functioning of the entire internal financial market. In the face of grave market dysfunction, national competent authorities might not always be the best decision makers, nor might the simple coordinative functions of the ESMA be sufficient if swift action is needed.¹⁵ Also, if there is a real risk of regulatory arbitrage, EU level action is indispensable.

The Case

The UK bases its claim on the illegality of Article 28 of the Short Selling Regulation on four grounds. This paper is concerned with the UK’s fourth claim according to which Article 114 TFEU is not an appropriate legal basis for measures adopted under Article 28 of Short Selling Regulation. Article 114 TFEU allows the adoption of measures for the approximation of national provisions aiming at the establishment and functioning of the internal market. The UK argues that this provision cannot authorise individual measures directed at particular natural or legal persons to the extent that Article 28 purports to do. This would be *ultra vires* of Article 114 TFEU. Conversely, the Council and the Parliament, supported by the Commission, argue that Article 28 of the Short Selling Regulation

¹⁰ Ibid., p. 30–32.

¹¹ 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, 15.9.2010

¹² Negotiations on European Supervisory Authorities coincided with negotiations on Short Selling Regulation.

¹³ 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 “Today’s proposals are a further step towards greater financial stability in Europe” http://europa.eu/rapid/press-release_IP-10-1126_en.htm?locale=en (5 January 2014).

¹⁴ The powers vested in competent authorities include, inter alia, the power to impose certain notification or disclosure requirements concerning short positions, or fees related thereto (Articles 18 and 19 of the Short Selling Regulation), but also the prohibition or imposition of conditions on entering into a short sale transaction (Article 20). Finally, competent authorities can restrict the ability of persons to enter into certain transactions involving sovereign credit default swaps (Article 21) or impose temporary restrictions on short selling in case of a significant fall in price (Article 23). Certain conditions must be met for any of these powers to be exercised. Most importantly, there must be adverse events or developments, which constitute a serious threat to financial stability or market confidence (Article 18(1)). The measure taken must also be necessary to address the threat and be proportionate to the benefits. The ESMA (and other competent authorities) must also be notified in advance of any measures.

¹⁵ On the problems of effective supervisory coordination and crisis resolution measures in the absence of a supranational authority, see Ferrarini and Chiodini, 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), pp. 193 – 231.

amounts to a harmonising measure under EU internal market law, and thus Article 114 TFEU supplies an appropriate legal basis for the ESMA's powers.

The other three claims can be presented here briefly. First, the UK claims that the authority vested in the ESMA under Article 28 of the Short Selling Regulation breaches the limits set by the Court in the *Meroni* judgment,¹⁶ which concerned delegation of powers by the Community institutions to agencies. Second, Article 28 seeks to empower the ESMA to pass measures of "general application" having the force of law and thus it is in contradiction with the Court's ruling in *Romano*;¹⁷ and third, Article 28 purports to confer power on the ESMA to adopt non-legislative acts of general application in a manner that breaches Articles 290 and 291 TFEU concerning EU non-legislative acts;

The Council and the Parliament (with the support of the Commission, Spain, France and Italy) resist these claims, inter alia, by calling on the Court to consider the case law on which the United Kingdom relies, not in a vacuum, but in the light of the "modernisation of EU agency law brought about by the Lisbon Treaty".¹⁸

Advocate General Jääskinen dismisses the first three of the UK's claims. With regard to the legality of delegation, the Advocate General states, inter alia, that Article 28 of the Short Selling Regulation "does not entail a delegation of authority by either of the EU executive institutions" (Commission, exceptionally the Council), but is rather concerned "with a direct conferral of power to an agency by the legislature".¹⁹ Interestingly, the Advocate General sympathizes with the idea expressed by the Council and Parliament that the EU agency regime has been modernised with TFEU, particularly through the introduction of more explicit and effective judicial safeguards.²⁰ Thus in Advocate General's view enhanced access to court under the TFEU somehow balances the ESMA's right to take direct, binding action. Therefore, principles established in *Romano* and *Meroni* do not support the UK's conclusions. Unfortunately these important and debatable findings cannot be discussed further in this paper.

Why is the case "systemically" important?

If the Court concurs with the Advocate General's opinion, the immediate effect of the ruling will be to disarm the ESMA of its power to directly intervene in the Member States' markets in certain emergency situations, e.g. by way of banning or restricting short selling activity. However, there is potentially more at stake. The approach adopted in the Opinion risks undermining a pivotal building block of the nascent EU financial supervision regime, that is, the ability of the EU's administrative and executive organs to take measures to preserve systemic stability and functioning of the internal financial markets. Contrary to Advocate General Jääskinen's view, which sees that the UK's *ultra vires* objections as regards Article 114 TFEU are "less ambitious than an all-out assault on the legal basis for the establishment of ESMA"²¹, the formula adopted in the Opinion risks throwing the baby out with the bath water. Article 28 is part of a wider emergency regime that hinges upon Article 114 TFEU.

¹⁶ Case 9/56 *Meroni v High Authority* [1957 and 1958] ECR 133.

¹⁷ Case 98/80 *Romano* [1981] ECR 1241.

¹⁸ Opinion, para. 5.

¹⁹ Pursuant to Article 289(3) TFEU legislative act. Opinion, para. 6.

²⁰ Pointing out that there is now a "confirmation" in EU primary law that the acts of agencies can be subject to judicial review and that this has already been established in Case T-411/06 *Sogelma v EAR* [2008] ECR II-2771.

²¹ Opinion, para. 35.

The essence of Advocate General Jääskinen's argument on the insufficient constitutional backing of the ESMA's powers under Article 28 is the fact that conferral of such decision-making powers in effect *substitutes the assessments of the competent national authorities*.²² However, all executive decisions by the new European Supervisory Authorities (ESAs) regarding competent national authorities or financial market participants directly prevail over any previous decision adopted by the competent authorities on the same matter.²³ Further, the Advocate General's restrictive and power centered reading of the Article 28 could present another difficult legal obstacle for the Eurozone's endeavour to centralise Banking supervision.²⁴

The wider post-crisis emergency action regime will be briefly introduced in Section 6, which also emphasises the role of non-judicial safeguards in understanding the system set up for centralised oversight and decision-making in emergency situations.

Mapping the contours of Article 114 TFEU

Integration vs. stability?

Article 114 TFEU endows the EU with the competence to adopt measures for the approximation of national provisions aiming at the establishment and functioning of the internal market. Hardly anybody would disagree with the statement that the ESMA, together with other ESAs, has an increasingly important role in driving harmonisation of the EU single financial market. The European System of Financial Supervision (ESFS) set up after the 2008 financial crisis tries to tackle the shortcomings of the previous Lamfalussy framework with a radical unification agenda. This "single rulebook" policy is supported by the more centralised institutional infrastructure and is further leveraged by the TFEU framework for delegated law-making. In terms of law-making, the role of the new financial authorities is to increase flexibility and adaptability of the regulatory system, with the aim of achieving uniformity and consistency without the corresponding loss of flexibility.²⁵

But the fact that Article 114 TFEU provides the sole legal foundation for a majority of EU reforms regarding financial supervision can be problematic because the "single rulebook" unification programme constitutes only a part of the EU's post-crisis project. Beyond aggressive harmonisation, financial stability concerns and the need to preserve functioning of the single financial market in difficult circumstances are been addressed by vertical relocation of supervisory functions from Member States authorities to EU financial authorities (existing and proposed).²⁶ This development straddles the boundaries of Article 114 TFEU single market legal basis *inter alia* because the link between financial stability on the one hand, and financial integration or harmonisation on the other, is not clear.

²² Opinion, paras. 37–52, 56 (emphasis added).

²³ See e.g. the Regulation 1095/2010 establishing the European Securities Markets Authority (the ESMA Regulation), Articles 17(7), 18(5) and 19(5).

²⁴ Particularly problematic is the Commission proposal on Single Resolution Mechanism (SRM) establishing an EU-level resolution fund. The SRM would be based on TFEU 114. For Commission proposals concerning the Banking Union, see http://ec.europa.eu/internal_market/finances/banking-union/index_en.htm (5 December 2013).

²⁵ H. Marjosola, "Regulating Financial Markets under Uncertainty: The EU Approach" (2014) *European Law Review* (forthcoming).

²⁶ See 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, pp. 198–200.

The institutional design of the ESFS separates between micro-supervision of financial entities, including the implementation of the single rulebook, and macro-prudential supervision of financial market stability. Table 1 clarifies this distinction.

Table 1. European System of Financial Supervision²⁷

EU Level

	Body	Predecessor Lamfalussy Committee	Main tasks/responsibilities
Macro-supervision	European Systemic Risk Board (ESRB)	-	Supported and hosted by the European Central Bank, the ESRB conducts macro-prudential oversight of EU financial markets seeking to prevent or mitigate systemic risks to EU's financial stability.
Micro-supervision	European Securities Markets Authority (ESMA)	Committee of European Securities Regulators (CESR)	In their respective fields, the ESAs participate, inter alia in: <ul style="list-style-type: none"> - creation of the "European Single Rulebook"
	European Banking Authority (EBA)	Committee of European Banking Supervisors (CEBS)	<ul style="list-style-type: none"> - prevention of regulatory arbitrage - protection of customers
	European Insurance and Occupational Pensions Authority (EIOPA)	Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS)	<ul style="list-style-type: none"> - international supervisory coordination - direct supervision by ESMA (e.g. Credit Rating Agencies) - enforcement (as a rule subject to Commission action and oversight)
	(Together, the ESAs)		
	Joint Committee of the ESAs	(3L3 committees)	Cooperation to ensure cross-sectoral consistency between the ESAs.

Member State level

The competent supervisory authorities of the Member States

The developments in the EU mirror a wider post-crisis trend. The depth of 2007/2008 financial crisis and the magnitude of its repercussions pushed policy-makers around the globe to redesign existing systems of financial market supervision and administration. The financial crisis led to a more general shift of focus towards "rules in action", in other words, to the practice of operative supervision. Reflecting the (now notorious) shortcomings of the UK's pre-crisis principles-based financial supervisory regime, Hector Sants, then Chief Executive of the Financial Supervisory Authority (FSA), stated that "The FSA's effectiveness should [...] primarily be judged on the effectiveness of our supervision and not the quality of the rules." He added that whereas the "old-style" FSA "rarely intervened until there was clear evidence that something had gone wrong" a more "outcomes-based approach" launched after the crisis should be centred on a more proactive way of intervening.²⁸

In the EU one result of this reorientation of prudential objectives has been that "the border line between rules and supervisory practices is blurring as rules become more focused on outcomes and as

²⁷ Table adapted from Marjosola, op.cit. (n 25).

²⁸ Speech by Hector Sants, Chief Executive, FSA, "UK Financial Regulation: After the Crisis". Annual Lubbock Lecture in Management Studies, 12 March 2010. Available at: http://www.fsa.gov.uk/pages/Library/Communication/Speeches/2010/0312_hs.shtml (6 January 2014).

operational supervisory practices are shaped by process-based rules.”²⁹ The shift towards more proactive and operative financial supervisory model has resulted in constitutional tensions. The appropriateness of Article 114 TFEU as the single legal basis for the European Supervisory Authorities (ESAs) has been an issue of academic and political debate.

Reading the regulations establishing the ESAs quickly reveals that building of the internal market is not their only or even the primary goal.³⁰ The thrust of the ESFS is to preserve and strengthen orderly functioning of the internal market and the Union’s financial system as a whole. However, micro-supervision and prudential macro-supervision functions are intertwined. The so-called de Larosière Report that provided the blueprint and policy programme for the post-crisis EU reforms already stated that the only way for macro-prudential oversight to be meaningful is to make sure it has a tangible impact on supervision at the micro-level. At the same time micro-level supervision could not contribute to the preservation of financial stability without taking into consideration macro-level developments.³¹ This target is explicitly confirmed by the Regulation establishing the European Systemic Risk Board (ESRB), which states that the ESRB should contribute directly to achieving the objectives of the internal market and that the macro-prudential aspect of supervision is closely linked to the micro-level supervisory tasks attributed to the ESAs.³² Correspondingly, the ESMA’s tasks are not limited to the creation of single rulebook or even to the supervision of its consistent implementation and interpretation, but it is designed to play an important part in maintaining and promoting stability, integrity and transparency of financial markets.³³ The latter task is part of the ESMA’s consumer protection mandate.³⁴ Such an oversight function would be meaningless without powers to interfere in certain risky financial activities having cross-border effects.

Looking at this dual role of new EU supervisory authorities, there might indeed exist a gap between “what is politically and economically desirable and constitutionally possible”.³⁵ In constitutional terms, the problem boils down to the relationship between stability and integration. Financial stability is often portrayed as a companion objective with further financial integration, or even as a necessary precondition for integration. For instance, the regulation establishing the ESRB, also relying solely 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.³⁶ This presumed connection between stability and integration is nevertheless not entirely clear. Burst of the US housing bubble in 2007 shook the entire global financial system because mortgage-based assets had been distributed globally with the help of esoteric securitization techniques. Similarly, the fall of Lehman Brothers in 2008 revealed that when significant financial institutions get into trouble, repercussions are hard, if not impossible, to contain. However, the fact that financial integration and systemic stability are not often mutually enforcing does not necessarily mean that they are mutually exclusive. The problem is

²⁹ N. Moloney, *op.cit* (n 26), p. 179.

³⁰ See Fahey, “Does the Emperor Have Financial Crisis Clothes? Reflections on the legal Basis of the European Banking Authority”, (2011) 74 *The Modern Law Review* 581, p. 586.

³¹ Report by the High-Level Group on Financial Supervision, chaired by Jacques de Larosière, Brussels, 25 February 2009 (de Larosière Report).

³² Regulation 1092/2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board, OJ 2010, L 331/1 (ESRB Regulation) “Only with arrangements in place that properly acknowledge the interdependence of micro- and macro-prudential risks can all stakeholders have sufficient confidence to engage in cross-border financial activities.” (Rec. 30.)

³³ The ESMA Regulation, rec. 12.

³⁴ The ESMA Regulation, Art. 9.

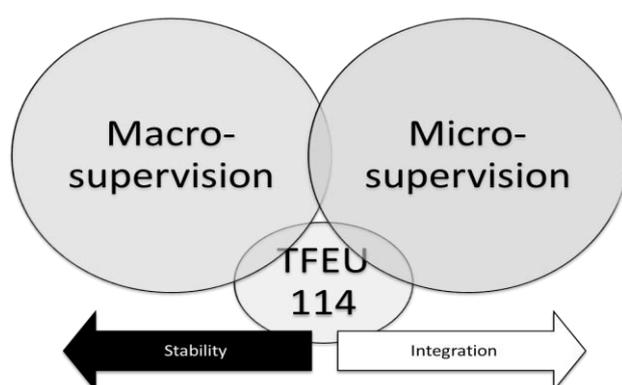
³⁵ Fahey, *op.cit.* (n **Error! Bookmark not defined.**), p. 582.

³⁶ The ESRB Regulation, rec. 31.

political: as capital flows and risks increasingly surpass national borders, their regulation and supervision should follow.

To conclude, in the EU the debate about the relationship between integration and stability has a particular legal dimension. Article 114 TFEU provides a legal basis for measures to preserve functioning of the Single Market, but such measures should always entail a sufficient element of harmonisation. With regard to legislative measures giving rise to new financial supervisory authorities, the EU initiatives have been more concerned with the functioning of the internal financial market than approximation of laws and regulations. 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 (TFEU 114) 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”.³⁷ After the financial crisis it seems clear that more integrated markets are not necessarily more stable. This presents a challenge for EU financial supervision, which now must assume a more proactive and prudential approach (Figure 1). Without more centralised and consolidated EU supervision and crisis resolution mechanisms, there is a risk that the process of market integration reverses and is replaced by more fragmentation and less competition.³⁸

Figure 1. Stability vs. integration?



Thus the EU’s actions pursuing more effective mechanisms to preserve stability and functioning of financial markets lack a clear constitutional backing, at least one that would be politically flexible enough. Against this backdrop, the next Section will turn to analysing Article 28 of the Short Selling Regulation more closely.

What function is the ESMA exercising under Article 28?

In assessing the suitability of Article 114 TFEU as a legal basis for the establishment of the ESMA the Advocate General distinguishes between “the legal basis for establishing an agency” on the one hand, and the legal basis “applicable to conferral of particular powers on it” on the other.³⁹ With respect to

³⁷ House of Commons, Treasury Committee, Sixteenth Report of Session 2008–09, The Committee’s Opinion on proposals for European financial supervision, para. 31. The report, inter alia, cited Barbara Ridpath, the Chief Executive of the International Centre for Financial Regulation, saying: “Financial integration and financial stability are sadly not mutually reinforcing. They are important. Financial integration and capital flows are critical but unfortunately financial integration permits more rapid transmission of crisis and contagion, not less, and what you need is effective circuit breakers to contain that contagion”

³⁸ Ferrarini and Chiodini, op.cit. (n 15), p. 202, 208.

³⁹ Opinion, para. 27.

the first, the Advocate General concludes that in light of established case law (primarily *ENISA*⁴⁰) there is no “in principle objection to the establishment of ESMA and regulation of its tasks and powers on the legal basis of Article 114 TFEU”.⁴¹ However, as regards examination of the legality of the ESMA’s special powers under Article 28 of Short Selling Regulation, the relevant touchstone is whether decisions of the relevant agency contribute or amount to internal market harmonisation, as viewed against the general requirements of EU law.⁴²

The Advocate General answers the second question in the negative:

“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.”⁴³

In the Advocate General’s opinion the outcome of activation of the ESMA’s powers under Article 28 is not harmonisation, or the adoption of uniform practice at the Member States level, but the replacement of national decision making under certain provisions with EU level decision making.⁴⁴ The fact that the functioning of the common market is affected by short selling does not alone justify the use of Article 114 TFEU as the legal basis of Article 28.⁴⁵

But if not harmonisation or approximation or laws and regulations, what is the purpose of Article 28 of the Short Selling Regulation? The Advocate General concludes that Article 28 “creates an EU level emergency decision-making mechanism that becomes operable when the relevant competent national authorities do not agree as to the course of action to be taken.”⁴⁶ Indeed, Article 28 gives the ESMA certain parallel intervention powers. The ESMA can, when certain conditions 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 the ESMA are secondary to those of national authorities, in that the 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 by one or more authorities (Article 28(2)(b)). But these powers are also superior in the sense that any measure adopted by the ESMA will prevail over any previous measure taken by a competent authority (Article 28(11)).

In the eyes of Advocate General Jääskinen, the exercise of these powers by the ESMA would not amount or contribute to harmonisation, by way of approximating laws, regulations or administrative acts of the Member States. What is particularly striking is that the analysis of the Advocate General leading to this conclusion is so power-centered. Legality and constitutional aspects of inter-institutional delegation of discretionary powers are classic EU law problems with an established (if dated) case law doctrine (*Meroni* and *Romano*) and abundant legal literature dealing with the problems. At the outset it would seem that the *scope* of implementing or executive powers granted under Article 28 is less connected with the assessment of whether the exercise of these powers amount to a harmonising measure under TFEU 114. However, as mentioned, in this case the Advocate General sees that the delegation of authority itself is valid because of “modernised agency regime”.

⁴⁰ Case C-217/04 United Kingdom v Parliament and Council (ENISA) [2006] ECR I-3771.

⁴¹ Opinion, para. 34.

⁴² Opinion, para. 36.

⁴³ Opinion, para. 37 (emphasis added).

⁴⁴ Opinion, para. 52.

⁴⁵ Opinion, para. 56.

⁴⁶ Opinion, para. 51.

Nevertheless, the fact that the excessive powers granted substitute the powers of national authorities seems to be a crucial element in the Advocate General's argument of the Article 28 of Short Selling Regulation being *ultra vires* of Article 114 TFEU.

For the sake of clarity there should be a clearer distinction between questions regarding the extent of powers and discretion delegated to the ESMA on the one hand, and the function and purpose of these powers (harmonisation, safeguarding function of markets) on the other. Notwithstanding, the Advocate General also assesses the question of under which conditions such individual measures adopted by an EU agency could be interpreted as amounting to harmonisation. The next Section will briefly deal with the arguments presented as well as the relevant case law cited.

A harmonising measure or not

The Advocate General frames his conclusions with a significant body of case law, all of which cannot be dealt with here. But in the following a few important aspects of selected cases will be raised.

The *ENISA* decision of the ECJ⁴⁷ provides an important (and explicit) justification for the choice to base all new EU supervisory bodies (including the ESMA) on the Article 114 TFEU. In *ENISA*, the Court held that:

“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. The legislature may deem it necessary to provide for the establishment of a Community body responsible for contributing to the implementation of a process of harmonisation in situations where, in order to facilitate the uniform implementation and application of acts based on that provision, the adoption of non-binding supporting and framework measures seems appropriate.”⁴⁸

In *ENISA* the Court nevertheless qualified the scope of Article 114 TFEU as a legal basis for Community agencies by stating, “Article 114 TFEU can be used as a legal basis only where it is actually and objectively apparent from the legal act that its purpose is to improve the conditions for the establishment and functioning of the internal market”.⁴⁹ Moreover, any tasks conferred on the basis of Article 114 TFEU on such a body “must be closely linked to the subject-matter of the acts approximating the laws, regulations and administrative provisions of the Member States.”⁵⁰

Advocate General Jääskinen sees that the powers of the ESMA under Article 28 of the Short Selling Regulation, which are binding, exceed the limits of *ENISA*: “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*.”⁵¹ The Advocate General holds that it is not enough that future obstacles to trade potentially emerge as a result of disparities in Member States' laws. The emergence of such obstacles must be likely and the measure in question must be designed to prevent them.⁵² He therefore concludes that,

“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

⁴⁷ Case C-217/04 *United Kingdom v Parliament and Council (ENISA)* [2006] ECR I-3771. The case concerned the Regulation establishing the European Network and Information Security Agency (ENISA).

⁴⁸ *Ibid.*, para. 44.

⁴⁹ *Ibid.*, para. 42 (citing Case C-66/04 *United Kingdom v Parliament and Council* [2005] ECR I-0000).

⁵⁰ *Ibid.*, para. 45.

⁵¹ *Opinion*, para. 50.

⁵² Case C-58/08 *Vodafone and Others* [2010] ECR I-4999, paragraph 33, 86.

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.”⁵³

In the Advocate General’s view, if obstacles to trade were merely abstract and the risk of their emergence potential but not likely, the Court would be prevented from discharging the function of ensuring that the law is observed in the interpretation and application of the Treaty.⁵⁴

Interestingly, in *ENISA* Advocate General Kokott’s conclusion deviated from the final ruling of the Court.⁵⁵ Her reasoning was partly similar to that adopted by Advocate General Jääskinen. 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”.⁵⁶ In other words, the contribution of ENISA to the process of harmonisation was too unpredictable.

The Advocate General Kokott’s narrow view in *ENISA* has been critiqued inter alia by Professor Tridimas, who sees that such an approach would foreclose institutional experimentation and serve as an obstacle for finding optimum structures of government.⁵⁷ Tridimas 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.⁵⁸

The relevance of *Tobacco Advertising* case, which partly supports the findings of both Advocate General Kokott in *ENISA* as well Advocate General Jääskinen in the case at hand, is somewhat debated. In the 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[...].”⁵⁹ Because the genuine objective of the directive in question was not the internal market, but rather public health the Court held that the cover of harmonisation was used merely to smuggle public health policy considerations into the Official Journal.⁶⁰

However, Professor Weatherill’s examination of the subsequent case law ten years after *Tobacco Advertising* ruling makes him conclude that the case looks more like an anomaly. According to Weatherill, “intelligent drafting” meets easily the established limits of TFEU 114, and even when this is not the case, the Court generally finds the existence of an “adequate contribution to the functioning of the internal market”.⁶¹ Moreover, there are good reasons for being critical against the ECJ case law presenting any palpable and effective limits to the EU legislature, which seems to take the rulings’ vague provisions as a mere “drafting guide” – a sort of a road map to comply with the principle of conferral vested in TEU.⁶²

⁵³ Opinion, para. 46, Citing the ruling in Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419 (*Tobacco Advertising*), para. 84.

⁵⁴ Opinion, para. 46.

⁵⁵ Opinion of the Advocate General Kokott delivered on 22 September 2005.

⁵⁶ *Ibid.*, para.

⁵⁷ T. 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* (Oxford 2012), p. 66.

⁵⁸ *Ibid.*

⁵⁹ 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* 827, p. 828.

⁶⁰ *Ibid.*, p. 829.

⁶¹ *Ibid.*, p. 843.

⁶² *Ibid.*, (see e.g. p. 833) Weatherill points out that to trust the judiciary with the ultimate authority with respect to lawful scope of Treaty Mandate is deceptive, noting e.g. that the Court places “enormous weight on slippery adjectives and adverbs [...]” in defining the limits. *Ibid.* p. 832.

Another case of crucial importance is the *Germany v Council* (Product Safety), which the Commission has invoked in its written observations. In that case the Court held that in certain fields such as product safety, the approximation of general laws alone might be insufficient to ensure the unity of the market, and consequently “the concept of ‘measures for the approximation’ of legislation must be interpreted as encompassing the Council’s power to lay down measures relating to a specific product or class of products and, if necessary, individual measures concerning those products”.⁶³

The Court thus allowed interpretation of the harmonisation measures as also including the taking of individual measures. Nevertheless, for the Advocate General Jääskinen the case is of limited relevance because in his view Article 28 of Short Selling Regulation goes further than this. Instead of just developing specific and detailed rules applicable to a given financial product or service, the ESMA would be intervening on the conditions of competition in a particular financial market, falling within the remit of a national competent authority.⁶⁴ Again, the essence of Advocate General’s arguments is not the *function* of the Article 28, rather than the competence the Article creates and the extent of power it confers.

To conclude, the relevant case law regarding the limits of Article TFEU 114 and the “slippery” guidelines⁶⁵ set forth in the court’s practice does not seem to provide a clear path to either outcome. However, there is good reason to doubt whether the drafting of Article 28 of the Short Selling Regulation has been “intelligent”⁶⁶ enough in taking into account all the relevant criteria determined in CJEU case law. As the following section shows, the position of Article 28 of the Short Selling Regulation (including its legal basis) seems ambiguous when placed in the wider financial emergency regime context.

Role of non-judicial safeguards

Ambiguous relevance of non-judicial safeguards in the Opinion

At the risk of repetition, the essence of Advocate General Jääskinen’s argument on the insufficient constitutional backing of the ESMA’s powers under Article 28 is the fact that conferral of such decision-making powers in effect substitutes the assessments of the competent national authorities.⁶⁷ The Advocate General emphasises in particular the role of effective judicial review of such acts, in ensuring that effective judicial compliance with the proper legal basis is not rendered nugatory.⁶⁸ In his reasoning, the possibility of judicial review would not provide a sufficient check against the discretionary powers granted under Article 28 of Short Selling Regulation.

How about *ex ante* (political and procedural) safeguards? In contemplating the Treaty basis of the ESMA’s powers, the Opinion does not completely disregard them. The Opinion notes the “significant shortage” of procedural constraints as to the ESMA’s exercise of powers, i.e. the fact that the ESMA is only bound to consult the ESRB before imposing these measures and that neither the Council nor the

⁶³ C-359/92 *Germany v Council* [1994] ECR I-3681, para. 37 Article 9(d) of the Product Safety Directive recognised that certain “risk can be eliminated effectively only by adopting appropriate measures at Community level, in order to ensure the protection of the health and safety of consumers and the proper functioning of the Common Market”. *Ibid.* para. 36.

⁶⁴ Opinion, para. 45.

⁶⁵ See Weatherill, *op.cit.* (n 59).

⁶⁶ *Ibid.*

⁶⁷ Opinion, paras. 37–52, 56 (emphasis added).

⁶⁸ Opinion, para. 46 (referring to Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419, para. 84).

Commission is part of the decision-making process.⁶⁹ Moreover, the Opinion lists the conditions and limitations that are placed on the exercise of the powers vested by Article 28 of Short Selling Regulation.⁷⁰ The Advocate General appears to weigh these procedural and political safeguards of Article 28 against “the scale of the powers vested in ESMA vis-à-vis third parties.”⁷¹ His reasoning nevertheless does not make it clear whether stronger safeguards and constraints should affect the outcome of judgment on the assessment of validity of TFEU 114 as the legal basis for such powers. In this respect his reasoning seems incomplete, and unfortunately so.

Why is this omission important? It bears to remember that *all executive decisions* adopted by the ESAs regarding competent national authorities or financial market participants directly “prevail over any previous decision adopted by the competent authorities on the same matter” (see Section 3). For instance, the ESMA has the power to address decisions directly to national authorities in three primary scenarios: 1) where there has been a “breach of EU law” (Art. 17); 2) in emergency situations, when the existence of one has been declared (Art. 18); 3) where the ESMA settles a dispute that has risen between supervisors of the Member States (Art. 19). These last resort powers are subject to Commission oversight and their details need not be presented here.⁷² However, the executive authority (even if last resort) imposed by the ESMA on national supervisors is always substitutive. Following the Advocate General’s reasoning, Article 114 TFEU could be regarded as an insufficient legal basis for any such direct measures, rendering the entire post-crisis emergency decision-making regime “nugatory”. The only way to distinguish between these executive powers is to look at their respective functions and purposes as well the political and procedural safeguards constraining their use. The latter will be briefly dealt with in the following.

Wider context of emergency decision-making

The powers granted under Article 28 of the Short Selling Regulation are based on a specific legislative mandate in the Regulation establishing the ESMA (hereafter, “the ESMA Regulation”)⁷³ Article 9(5) of the ESMA Regulation provides that the ESMA may temporarily prohibit or restrict certain financial activities that threaten the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union. 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 the ESMA’s mandate *or* (2) if so required in the case of an “emergency situation” in accordance with and under the conditions laid down in the Article 18 of the ESMA Regulation. The word “or” above is of fundamental importance. It distinguishes two independent and very different legal grounds for the ESMA’s direct action. Before analysing the role of Article 9(5) of the ESMA Regulation acting as a legal basis for the Article 28 now being challenged, it should be placed into a broader “emergency” decision-making framework where Article 18 of the ESMA regulation acts as the default platform (number (2) above).

Article 18 of the ESMA Regulation concerns certain financial emergency situations and forms a part of a “superstructure” which has been established in the post-crisis EU to prevent and handle crisis.⁷⁴

⁶⁹ Opinion, para. 40.

⁷⁰ Opinion, paras. 42-43. These include certain notification requirements (Article 28(5) and (6), 28(8)); publication requirements (Article 28(7)) and mandatory periodical review of measures adopted (Article 28(10)).

⁷¹ The Opinion, para. 44.

⁷² For a brief description, see e.g. Moloney, *op.cit.* (n 26), pp. 198–200.

⁷³ Regulation 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 (The ESMA Regulation).

⁷⁴ Moloney, *op.cit.* (n 26), p. 200.

Article 18(1) states that in the case of certain serious, adverse developments jeopardising the functioning and integrity of financial markets or their stability, the ESMA shall actively facilitate and, if necessary, coordinate any actions undertaken by the relevant national competent supervisory authorities. In such emergency situations the ESMA may, within the limits of its mandate, adopt *individual decisions* that require competent authorities to take action in order to ensure that both financial market participants and competent authorities satisfy the requirements laid down in legislation (Art. 18(3) and (4)).

The ESMA's power under Article 18 is functionally similar to the powers granted under article 28 of Short Selling Regulation. However, there is one significant difference relating to preconditions for the use of such powers. While Article 9(5) leaves it for the subsequent legislative acts to lay down rules and requirements for taking any direct action, measures taken by the ESMA pursuant to Article 18 emergency framework is subject to default, mandatory political safeguards.

Under Article 18 of the ESMA Regulation, it is up to the Council, acting in consultation with the Commission, the ESRB (the body responsible for macro-prudential supervision) and if needed the ESAs, to adopt a decision addressed to the ESMA in which the existence of an emergency situation is determined. The 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 the decision expiring. The Council may discontinue the emergency situation at any time (Art. 18(2)). These political safeguards serve an important legitimising function. It has been held that if the ESMA could take such decisions without the Council's prior enabling decision, the resulting wide discretionary powers would seem to contradict the established *Meroni* non-delegation regime.⁷⁵

Nevertheless, the described Article 18 emergency measures adopted by the ESMA (or the other two ESAs for that matter) shall *prevail over any previous decisions adopted by the competent authorities on the same matter* (Art. 18(5)). The effect of Article 18 powers when used is therefore identical with the powers granted under the Article 28 of Short Selling Regulation.

The ESMA's discretionary powers under Article 9(5) of the ESMA Regulation are not consistent with the emergency decision-making mechanism created by Article 18. Article 9(5) powers are fundamentally different in that their exercise is not dependent on mandatory political safeguards, but they rather rely on *ad hoc* safeguards established by subsequent sectoral legislation. This is exactly what Article 28 of the Short Selling Regulation has done. This means that the ESMA's superior "substitutive" powers vis-à-vis national authorities are not subject to Council oversight. The ESMA's discretion is nevertheless limited by a specific requirement that the Commission further specifies (by way of delegated acts) criteria and factors to be taken into account by the ESMA (as well as national authorities) in determining the existence of adverse events or developments that demand actions (Short Selling Regulation, Article 30).

Therefore the relationship between emergency measures based on Article 9(5) and Article 18 of the ESMA Regulation seems ambiguous: the powers overlap but the political and procedural safeguards they are subjected to are very different. Is there a reasonable explanation for this? 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 the ESAs but the addition was introduced to the legislative draft by the Parliament in the first reading.⁷⁶ It responded, again, to the heightened concerns raised by serious coordination problems pertaining to short selling regulation in

⁷⁵ Tridimas, op.cit. (n 57), pp. 74–75.

⁷⁶ 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 (*Giegold report*) (amendment 76); European Parliament, first reading, P7_TA(2010)0270, 7 July 2010.

the EU markets.⁷⁷ Of course the fact that the Article 9(5) of the ESMA Regulation was designed with short selling problems in mind does not preclude using it as a template for further transfer of executive power to the ESAs.

To conclude, there are reasons to be critical of the emergency decision-making mechanism created by Article 28 of Short Selling Regulation and even that of Article 9(5) of the ESMA regulation, which mandates the adoption of such acts. Particularly troublesome seems to be the unclear relationship of this decision-making structure with the emergency action framework created by Article 18 of the ESMA Regulation. The latter curbs the use of any substitutive powers by the ESMA with stronger ex ante political oversight. But if the Court sides with the Opinion and decides to annul the Article, the reasoning it adopts may significantly affect the legal assessment of other forms of direct executive powers granted to EU financial supervisory authorities.

Ring-fencing possible damage

It is of course possible that accumulation of EU institutional reforms and their increasing importance have resulted in a political and legal equivalent of the “too big to fail” problem, which may deter the Court from exercising strong judicial review.⁷⁸ However, if the Grand Chamber finds itself unable or unwilling to build a credible link between the powers granted by the contested Article 28 and Article 114 TFEU, it should, as a second-best solution, seek to ring-fence the potential damage to the financial supervisory system.

Possible damage could be limited by way of looking beyond mere judicial safeguards and internal market justifications and by viewing the post-crisis emergency measures as a special supervisory structure with carefully designed political and procedural safeguards constraining the use of supranational executive power. Such an approach might not save Article 28 or relinquish the pressure placed on certain discretionary powers handed to the ESMA, but it could prove important for preventing destabilisation of the wider emergency decision-making structure. Secondly, by emphasising the important role of political safeguards in addition to judicial safeguards, the case could provide drafters of Banking Union legislation important guidance.

Interestingly, the Advocate General hints at a possibility of a more functionalist reading of Treaty requirements. For instance, in assessing the unanimity requirement of Article 352 TFEU, which he supports as a more suitable legal basis for the powers of the ESMA under Short Selling Regulation, the Advocate General notes that there is no operative right of veto when the ESMA Board of Supervisors exercises its powers under Article 28. However, it should be acknowledged that a more functionalist reading of the unanimity requirement would not necessarily solve the competence problem. Even if there were stronger institutional oversight of the use of executive, substitutive powers (for instance in the form of a Council decision declaring an “emergency situation”), this requirement would not offset the demand for unanimity under Article 352 TFEU. Therefore, if legislative delegations of supranational executive powers to the ESAs will be subjected to a strict unanimity requirement, political and procedural safeguards will hardly provide a sufficient substitute. The Advocate General’s recommendation to resort to Article 352 TFEU, if adopted by the Court, could hinder institutional experimentation.⁷⁹

⁷⁷ Moloney, *op.cit.* (n 26), p. 203, 208.

⁷⁸ See E. Fahey, *op.cit.* (n **Error! Bookmark not defined.**), p. 582, 593.

⁷⁹ See Tridimas, *op.cit.* (n 57), p. 66.

Conclusions

The dual role of the ESMA (and the other ESAs) in the European System of Financial Supervision is not easy to accommodate within the limits of Article 114 TFEU. EU financial authorities are engaged in writing and implementing a radical maximum harmonisation agenda but they have also been vested with direct decision-making powers with respect to protection of consumers and safeguarding stability and integrity of markets. Article 28 of the Short Selling Regulation, handing the ESMA certain powers vis-à-vis Member State's competent authorities and financial market participants, is clearly representative of the latter function.

The ESMA's powers under Article 28 are secondary to those of national authorities but once these powers are exercised they are hierarchically superior by prevailing over any previous decision on the same matter. This paper aimed to show the risks of viewing Article 28 of the Short Selling Regulation (and the Article 9(5) of the ESMA Regulation forming its legal basis) in isolation from the wider "emergency regime" which forms an essential part of the EU's innovative post-crisis reforms. Insufficient regard by Advocate General Jääskinen's opinion of the various political and procedural safeguards designed to check and balance these powers, which all have substitutive effect vis-à-vis national authorities' decisions, might risk throwing the baby out with the bath water.

Time and space constraints did not allow taking into consideration other highly controversial and important aspects of the case. Particularly problematic is idea accepted in the Opinion that the Article 291 TFEU (non-legislative implementing acts) introduced by the Lisbon Treaty, together with enhanced judicial safeguards, have modernised the EU agency regime and thereby affected certain dated but well established doctrines on delegated EU law-making (*Meroni, Romano*). Another controversial aspect of the Advocate General's opinion is the way it analogously equals the ESMA's executive decisions that have temporary validity (and that seem to amount to application of EU law rather than its implementation) with implementing acts of general application.

The developments within the EU financial supervisory regime more generally are setting interesting questions with regard to the variant of European "executive federalism", which has thus far avoided hierarchical structures of administration.⁸⁰

⁸⁰ See Robert Schütze, "From Rome to Lisbon: "Executive Federalism" in the (New) European Union" (2010) 47 *Common Market Law Review* 1385.



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