



Press and Information

Court of Justice of the European Union
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Judgment in Case C-270/12
United Kingdom v Parliament and Council

The power of the European Securities and Markets Authority to adopt emergency measures on the financial markets of the Member States in order to regulate or prohibit short selling is compatible with EU law

Circumscribed by various conditions and criteria which limit that authority's discretion, the exercise of that power does not undermine the rules governing the delegation of powers laid down by the FEU Treaty

In 2012, the EU adopted a regulation aimed at harmonising short selling, against the background of the financial crisis¹. Short selling is a practice consisting in the sale of shares and securities not owned by the vendor at the time of the sale with a view to benefiting from a fall in the price of the shares and securities. In the event of disturbance on the financial markets, the regulation seeks, inter alia, to prevent an uncontrolled fall in the price of financial instruments as a result of the effect of short selling.

The regulation was adopted on the basis of Article 114 TFEU, which permits the adoption of harmonisation measures necessary for the establishment and functioning of the internal market. Article 28 of the regulation vests the European Securities and Markets Authority (ESMA) with certain powers of intervention. Accordingly, ESMA may adopt measures that are legally binding on the EU Member States' financial markets where there is a threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the EU.

In May 2012, the United Kingdom brought an action before the Court of Justice seeking annulment of Article 28 of the regulation. The United Kingdom contends, inter alia, that ESMA has been given a very large measure of discretion of a political nature which is at odds with EU principles relating to the delegation of powers. The United Kingdom also submits that Article 114 TFEU is not the correct legal basis for the adoption of the rules laid down in Article 28 of the regulation.

In its judgment today, the Court finds, first, that Article 28 of the regulation does not confer any autonomous power on ESMA that goes beyond the powers granted to that authority when it was created². The Court also points out that the exercise of the powers laid down in that provision is circumscribed by various conditions and criteria which limit ESMA's discretion.

First, ESMA can adopt measures under the provision in question only if such measures address a threat to the financial markets or the stability of the EU's financial system and there are cross-border implications. Moreover, all ESMA measures are subject to the condition that no competent national authority has taken measures to address the threat or one or more of those authorities have taken measures which have proven not to address the threat adequately.

Second, ESMA is required to take into account the extent to which such measures (i) address the threat to the financial markets or the stability of the financial system of the EU or (ii) significantly improve the ability of the competent national authorities to monitor the threat. ESMA must also

¹ Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps (OJ 2012 L 86, p. 1).

² See Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ 2010 L 331, p. 84).

ensure that such measures do not create a risk of regulatory arbitrage and do not have a detrimental effect on the efficiency of financial markets, including by reducing liquidity in those markets or creating uncertainty for market participants which is disproportionate to the benefits of the measure.

The Court also observes that ESMA is required to consult the European Systemic Risk Board and, if necessary, other relevant bodies. Furthermore, ESMA must notify the competent national authorities concerned of the measure it proposes to take. ESMA is also under a duty to review the measures at appropriate intervals (at least every three months), so that such measures may only be temporary. Moreover, the detailed delineation of the powers of intervention available to ESMA is apparent from the fact that the Commission is empowered to adopt delegated acts specifying criteria and factors to be taken into account by the competent authorities and ESMA in determining in which cases certain adverse events or developments and the threat to the financial markets or the stability of the EU's financial system arise.

In those circumstances, the Court finds that **the powers available to ESMA are precisely delineated and amenable to judicial review in the light of the objectives established by the authority which delegated those powers to it.** The Court concludes that **those powers are compatible with the FEU Treaty.**

Second, the Court states that, as the FEU Treaty expressly permits EU bodies, offices and agencies to adopt acts of general application, ESMA is also entitled to adopt such acts.

Third, the Court finds that Article 28 of the regulation does not undermine the rules governing the delegation of powers laid down by the FEU Treaty. The Court observes that that provision, which vests ESMA with certain decision-making powers in an area which requires specific technical and professional expertise, cannot be considered in isolation. On the contrary, it must be perceived as forming part of a series of rules designed to endow the competent national authorities and ESMA with powers of intervention to cope with adverse developments which threaten financial stability within the EU and market confidence. To that end, those authorities must, *inter alia*, be in a position to impose temporary restrictions on the short selling of certain stocks and credit default swaps in order to maintain financial stability within the EU.

Fourth, the Court points out that Article 114 TFEU does not provide that the addressees of the measures adopted by the EU legislature on the basis of that provision can only be Member States. In that context, the Court states that, by the adoption of Article 28 of the regulation, the EU legislature sought to provide an appropriate mechanism to enable ESMA to adopt, as a last resort and in very specific circumstances, measures applicable throughout the EU, it being understood that those measures may take the form of decisions directed at certain participants in the financial markets. Moreover, Article 28 of the regulation is in fact directed, in keeping with the spirit of Article 114 TFEU, at the harmonisation of the Member States' laws, regulations and administrative provisions relating to the supervision of a number of stocks and the monitoring, in specific situations, of certain commercial transactions concerning those stocks. Similarly, the purpose of the powers provided for in Article 28 of the regulation is to improve, in accordance with Article 114 TFEU, the conditions for the establishment and functioning of the internal market in the financial field. Accordingly, the Court finds that **Article 114 TFEU constitutes an appropriate legal basis for the adoption of Article 28 of the regulation.**

As all the pleas in law relied on by the United Kingdom have been rejected, **the Court dismisses the action in its entirety.**

NOTE: An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to European Union law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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