



Press and Information

Court of Justice of the European Union

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Advocate General's Opinion in Case C-270/12
United Kingdom v Council & Parliament

Advocate General Jääskinen considers that Article 28 of the Short Selling Regulation should be annulled

The emergency powers granted by that article to the European Securities and Markets Authority to intervene in the financial markets of Member States so as to regulate or prohibit short selling go beyond what could be legitimately adopted as a harmonising measure necessary for the establishment or functioning of the internal market

In 2012, in order to harmonise its response to short selling in light of the financial crisis, the EU adopted a Regulation on short selling¹. Short selling is a practice whereby assets and securities, which are not owned by the seller at the moment of sale, are sold with the intention of profiting from a decline in the price of the assets before the transaction is settled. The Regulation was adopted on the basis of Article 114 TFUE which allows for the adoption of harmonising measures where necessary for the achievement and functioning of the internal market. Article 28 of the Regulation vests the European Securities and Markets Authority ("ESMA") with certain powers to intervene, by way of legally binding acts, in the financial markets of EU Member States in the event of 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, having unsuccessfully opposed Article 28 during the legislative process, brought an action before the Court of Justice seeking its annulment on the grounds that, *inter alia*, Article 114 TFUE was not the correct legal basis for its adoption. It also argued that the powers vested in ESMA by Article 28 infringe EU constitutional law principles on the delegation of powers by the institutions.

In today's opinion, Advocate General Niilo Jääskinen **proposes that Article 28 of the Regulation be annulled on the grounds that Article 114 TFUE is not a proper legal basis for its adoption.**

The Advocate General considers that whilst in principle there can be no objection to using Article 114 TFUE as a legal basis for EU agencies which adopt legally binding decisions, the determining factor is whether the decisions of the agency in question either contribute to or amount to internal market harmonisation. In his view, the powers vested in ESMA under Article 28 of the Regulation go beyond these limits.

The Advocate General points out that **ESMA is uniquely empowered to make legally binding decisions in substitution for those of a competent national authority**, which may well disagree with the decision of ESMA. This decision will prevail over any previous measure taken by the national authority. In the Advocate General's view, the effect of this is to create an EU level emergency decision-making mechanism that becomes operable when the national authorities do not agree on a course of action. Hence, **the outcome is not harmonisation but the replacement of national decision-making with EU level decision-making**. This goes beyond the limits of Article 114.

¹ Regulation (EU) 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps (OJ 2012 L 86, p. 1)

Recognising, however, that there is clearly a need for action at the EU level in this field to prevent distortions in the banking systems of other Member States following inaction or inadequate action in relation to short selling by a national authority, Advocate General Jääskinen suggests that a more appropriate legal basis for the adoption of Article 28 would have been Article 352 TFUE. In his opinion, recourse to Article 352 would have opened up an important channel for enhanced democratic input as that article requires unanimity among Member States (Article 114 requires only a qualified majority vote in the Council) and the Commission is required to bring all proposals based on that article to the attention of national parliaments.

Finally, if, however, the Court should decide, contrary to his proposal, that Article 114 TFUE is an appropriate legal basis for Article 28 of the Regulation, the Advocate General considers that the other arguments advanced by the United Kingdom should be rejected. In his view, the powers vested in ESMA are in line with the relevant EU constitutional rules in relation to the delegation of powers to an agency and do not leave too wide a margin of discretion to EMSA. He points out that Article 28 imposes specific procedural safeguards as to the measures that ESMA is empowered to take, including express definitions of the content of measures, the procedure for their adoption, and their temporal effect. Article 28 stems from a basic policy choice by the EU legislature in that the essential value judgments have been made by the latter and have not been left to ESMA.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

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 Opinion is published on the CURIA website on the day of delivery.

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