

Case C-270/12, UK vs Council and EP

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Case C-270/12. Legislation at stake.

Question at stake was the legality of ESMA's powers under Art. 28 of Regulation 236/2012 (on short selling)

Article 28, 'ESMA intervention powers in exceptional circumstances':

1. /.../ ESMA shall, subject to paragraph 2 of this Article, either:

(a) require natural or legal persons who have net short positions in relation to a specific financial instrument or class of financial instruments to notify a competent authority or to disclose to the public details of any such position; or

(b) prohibit or impose conditions on, the entry by natural or legal persons into a short sale or a transaction which creates, or relates to, a financial instrument other than financial instruments referred to in point (c) of Article 1(1) where the effect or one of the effects of the transaction is to confer a financial advantage on such person in the event of a decrease in the price or value of another financial instrument.

A measure may apply in particular circumstances, or be subject to exceptions specified by ESMA. Exceptions may in particular be specified to apply to market-making activities and primary market activities.

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2. *ESMA shall take a decision under paragraph 1 only if:*
 - (a) *the measures listed in points (a) and (b) of paragraph 1 address 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 Union and there are cross-border implications; and*
 - (b) *no competent authority has taken measures to address the threat or one or more of the competent authorities have taken measures that do not adequately address the threat.*

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Article 28 of Regulation 236/2012 is covered by Regulation 1095/2010 establishing ESMA

Article 9(5) of Regulation 1095/2010:

'5. [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 in the cases specified and under the conditions laid down in the legislative acts referred to in Article 1(2) or if so required in the case of an emergency situation in accordance with and under the conditions laid down in Article 18.

C-270/12. Opinion of Advocate General Jaaskinen.

52. Hence, the outcome of the activation of ESMA's powers under Article 28 of Regulation No 236/2012 is not harmonisation, or the adoption of uniform practice at the level of the Member States, but the replacement of national decision making under Articles 18, 20 and 22 of Regulation No 236/2012 with EU level decision making.

53. Therefore, while the written observations of the Parliament are correct in so far as they assert that, under the case law of the Court, agencies can be established and given a role under Article 114 TFEU provided that they form part of a normative context that approximates provisions relevant to the internal market, Article 28 of Regulation No 236/2012 goes beyond these limits.

.....

C-270/12. Judgement.

Compliance with Meroni

48. *Before taking any decision, ESMA must examine a significant number of factors set out in Article 28(2) and (3) of Regulation No 236/2012 and the conditions imposed are cumulative.*

49. *Moreover, the two kinds of measure which ESMA may take under Article 28(1) of Regulation No 236/2012 are strictly confined to those in Article 9(5).*

50. *Lastly, ESMA is required under ... Regulation No 236/2012 to consult ESRB and, if necessary, other relevant bodies and must notify the competent national authorities concerned of the measure ... [including the details and the evidence supporting the reasons for its adoption]. /.../. [Plus, 3 month review of the measure] . Thus, ESMA's margin of discretion is circumscribed by the consultation requirement and the temporary nature of the measures. [Plus technical assessment of exceptional circumstances].*

C-270/12. Judgement.

51. The detailed delineation of the powers of intervention available to ESMA is also set out clearly in Article 30 of Regulation No 236/2012, which provides that the Commission is empowered to adopt delegated acts ... specifying criteria and factors to be taken into account by the competent authorities and by ESMA ...

53. It follows ... that the powers available to ESMA under Article 28 of Regulation No 236/2012 are precisely delineated and amenable to judicial review in the light of the objectives established by the delegating authority. Accordingly, those powers comply with ... Meroni

54. Contrary to the applicant's claims, those powers do not, therefore, imply that ESMA is vested with a 'very large measure of discretion' that is incompatible with the FEU Treaty for the purpose of that judgment.

C-270/12. Judgement.

Adoption by ESMA of acts of general application is not problematic

64. It is clear from Article 28 of Regulation No 236/2012 that ESMA is required, in strictly circumscribed circumstances, to adopt measures of general application under that provision. Such measures may also include rules affecting any natural or legal person who has a specific financial instrument or ... enter into certain financial transactions.

65. ... the institutional framework established by the FEU Treaty, in particular the first paragraph of Article 263 TFEU and Article 277 TFEU, expressly permits Union bodies, offices and agencies to adopt acts of general application.

C-270/12. Judgement.

No breach of the system of Treaties for the delegation of power

82. ... Article 28 of Regulation No 236/2012 vests ESMA with certain decision-making powers in a technical area.

83. However, that conferral of powers does not correspond to any of the situations defined in Articles 290 TFEU and 291 TFEU.

84. ... The legal framework of Article 28 of Regulation No 236/2012 is established, *inter alia*, by Regulation No 1092/2010 and Regulation No 236/2012. 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 contagion risk of financial crises, endeavour to promote financial stability ...

C-270/12. Judgement.

No breach of the system of Treaties for the delegation of power

85. Consequently, Article 28 of Regulation No 236/2012 cannot be considered in isolation. On the contrary, that provision must be perceived as forming part of a series of rules designed to endow ESMA with powers of intervention ...

86. Therefore, Article 28 of Regulation No 236/2012, read in conjunction with the other regulatory instruments adopted in that field identified above, cannot be regarded as undermining the rules governing the delegation of powers laid down in Articles 290 TFEU and 291 TFEU.

C-270/12. Judgement.

The Court adjudicates on the question whether the system of intervention established by Article 28 of Regulation No 236/2012 may fall within the scope of Article 114 TFEU (p. 99)

100. With regard to the scope of Article 114 TFEU, ... a legislative act adopted on that legal basis must, first, comprise measures for the approximation of the provisions laid down by law, regulation or administrative action in the Member States and, second, have as its object the establishment and functioning of the internal market.

117. Article 28 of Regulation No 236/2012 satisfies all the requirements laid down in Article 114 TFEU. This Article therefore constitutes an appropriate legal basis for the adoption of Article 28.