Reports of Cases

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 12 September 2013 [1]

Case C-270/12

United Kingdom of Great Britain and Northern Ireland
v
European Parliament
and

Council of the European Union

(European Securities and Market Authority ('ESMA') — Validity of Article 28 of Regulation (EU) No 236/2012 on short selling and certain aspects of credit default swaps — Legal basis — Articles 114 and 352 TFEU — Institutional balance and division of powers — Conditions for the conferral of power on EU agencies — Delegation under Article 290 TFEU and implementation under Article 291 TFEU — Meroni case law — Romano case law — Interaction with provisions of the Lisbon Treaty on judicial review of acts of agencies with legally binding effects)

I – Introduction

1. The proceedings instituted by the United Kingdom against the European Parliament and the Council seek the annulment of Article 28 of 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. [2] This article vests the European Securities and Markets Authority ('ESMA') with certain powers to intervene, and by way of legally binding acts, in Member State financial markets 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 Union'. These circumstances are, in turn, further defined in Article 24(3) of Commission Delegated Regulation (EU) No 918/2012. [3] The action which ESMA is empowered to take under Article 28(1) of Regulation No 236/2012 includes the imposition on natural and legal persons of notification and disclosure requirements, and a prohibition on the entry into certain transactions or subjecting such transactions to conditions.

1 — Original language: English.

2 — OJ 2012 L 86, p. 1.

3 — Delegated Regulation of 5 July 2012 supplementing Regulation (EU) No 236/2012 of the European Parliament and of the Council on short selling and certain aspects of credit default swaps with regard to definitions, the calculation of net short positions, covered sovereign credit default swaps, notification thresholds, liquidity thresholds for suspending restrictions, significant falls in the value of financial instruments and adverse events (OJ 2012 L 274 p. 1). This delegated act was passed on the basis of Articles 2(2), 3(7), 4(2), 7(3), 13(4), 23(7) and 30 of Regulation No 236/2012.

2. ESMA was established on 1 January 2011 [4] at the same time as the European Banking Authority [5] and the European Insurance and Occupational Pensions Authority. [6] The three bodies are known collectively as the 'European Supervisory Authorities' or, as provided in recital 10 of Regulation No 1095/2010, the 'ESAs'. ESMA is also a by-product of the programme of reforms instigated by the Commission in the light of the 2008 financial crisis, and the Report of the High Level Group, chaired by Jacques de Larosière, which made recommendations on how to strengthen the supervision of financial markets at EU level, [7] and which resulted in a broad ranging implementation programme. [8] Pursuant to Article 5(1) of Regulation No 1095/2010, ESMA is a Union 'body' with legal personality.

3. In the light of a perceived need to harmonise the EU response to short selling, [9] Regulation No 236/2012 entered into force on 25 March 2012. Short selling is a practice which involves selling assets, and usually securities, that are not owned by the seller at the moment of sale, with the intention of profiting from a decline in the price of the assets before the transaction is settled. As was pointed out in the written observations of the Parliament, ESMA was created because the European Union wished to establish a body with the relevant expertise to supervise European securities and markets as a complement to the national supervisory authorities. [10] As a consequence, Regulation No 236/2012 vested ESMA with extensive advisory, notification, and regulatory powers with respect to short selling.

4. The United Kingdom frames its case on four grounds of annulment. The Member State first alleges that the authority vested in ESMA under Article 28 of Regulation No 236/2012 breached the limits set by the Court in the *Meroni* judgment for delegation of powers by the institutions. [11] Second, it is argued that Article 28 seeks to empower ESMA to pass measures of general application which have the force of law, contrary to the Court's ruling in *Romano*. [12] Thirdly, it contends that Article 28 purports to confer power on ESMA to adopt non-legislative acts of general application in breach of Articles 290 and 291 TFEU. Fourthly, the United Kingdom claims that, in as much as Article 28 of Regulation No 236/2012 empowers ESMA to adopt individual decisions that are binding on third parties in the event of insufficient or inadequate action by relevant competent authorities of the Member States, Article 114 TFEU is an incorrect legal basis for the adoption of such measures.

5. The United Kingdom's application for annulment is vigorously resisted by the Parliament and the Council, with the support of the Commission and the Kingdom of Spain, the Republic of France and the Republic of Italy. The Parliament and the Council frame their written observations by both meeting the grounds relied on by the United Kingdom, and 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

4 — Regulation (EU) No 1095/2010 of the European Parliament and 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), as amended by Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directive 2003/41 EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (OJ 2011 L 174 p. 1).

5 — Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ 2010 L 331, p. 12).

6 — Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC (OJ 2010 L 331 p. 48).

7 — Far reaching measures were recommended in the final Report of the Larosière Group of 25 February 2009. See http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf.

8 — For a detailed discussion see e.g. Tridimas, T., 'Financial Supervision and Agency Power: Reflections on ESMA', Shuibhne, N., and Gormley, L. (eds) *From Single Market to Economic Union: essays in memory of John A. Usher* (Oxford University Press, Oxford, 2012), pp. 55 to 83.

9 — For a detailed analysis see e.g. Payne, J., 'The regulation of short selling and its reform in Europe', *European Business Organization Law Review* 13(3) (2012), pp. 413 to 440; Juurikkala, O., 'Credit Default Swaps and the EU Short Selling Regulation: A Critical Analysis', *European Company and Financial Law Review* 9 (2012), pp. 307 to 341.

10 — See recitals 8 to 12 of Regulation No 1095/2010 and Commission Staff Working Document SEC(2009) 1234 of 23 September 2009, pages 27 and 28.

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

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

of EU agency law that occurred under the Lisbon Treaty, particularly with respect to judicial review of acts of agencies having legal effects. The Parliament and the Council, with the support of the Commission, also argue that Article 114 TFEU supplies an appropriate legal basis for ESMA's powers under Article 28 of Regulation No 236/2012 because it amounts to a harmonising measure under EU internal market law.

6. In my opinion, at the heart of this case lies the fact that Article 28 of Regulation No 236/2012 does not entail a delegation of authority by either of the EU executive institutions, that is the Commission or, exceptionally, by the Council to an agency, but is rather concerned with a direct conferral of power to an agency by the legislature pursuant to an Article 289(3) TFEU legislative act. To my mind, in the light of amendments wrought by the Lisbon Treaty,[13] and particularly the confirmation in primary law that the acts of agencies are subject to judicial review in EU law,[14] the principles established in *Romano* and *Meroni* do not support the conclusions the United Kingdom draws from these rulings.[15] However, in my opinion the United Kingdom's action should nonetheless succeed, but on its fourth ground of challenge. This is so because Article 114 TFEU is not an appropriate legal basis for Article 28 of Regulation No 236/2012.

II – Legal framework

A – *Treaty articles referring to agencies*

7. By virtue of Articles 15, 16 and 228 TFEU, all 'institutions, bodies, offices and agencies' of the European Union are bound to comply with the principle of good administration,[16] while Articles 287 and 325 TFEU subject agencies to the EU system for financial control and audit.

8. Pursuant to Article 263 TFEU, the EU organs over which the Court of Justice has power of judicial review include bodies, offices and agencies of the Union, and the rule on 'failure to act' applies to them under the terms of Article 265 TFEU. Pursuant to Article 267, questions on the validity and interpretation of acts of bodies, offices, or agencies of the Union can be referred to the Court by Member State courts and tribunals, while they can equally be questioned under the plea of illegality provided under Article 277 TFEU.[17]

13 — See Couzinet, J.-F., 'La prise en compte de l'existence des «Agences» par les récents traités', in *Les agences de l'Union européenne*, Brussels 2011, pp. 191 to 197.

14 — This had already been held to be the case by the General Court in Case T-411/06 *Sogelma* v *EAR* [2008] ECR II-2771, paragraphs 33 to 57.

15 — See, e.g. Griller, S., and Orator, A., 'Everything under control? The "way forward" for European agencies in the footsteps of the Meroni doctrine', *European Law Review* 35 (2010), pp. 3 to 35; Chamon, M., 'EU agencies: does the Meroni Doctrine make sense', *Maastricht Journal of European and Comparative Law* 17 (2010), pp. 281 to 305; Chamon, M., 'EU Agencies between Meroni and Romano or the Devil and the Deep Blue Sea', *Common Market Law Review* 48 (2011), pp. 1055 to 1075, p. 1072; Hofmann, H., and Morini, A., 'The Pluralisation of EU Executive-Constitutional Aspects of Agencification', *European Law Review* 37 (2012), pp. 419 to 443. For a detailed analysis of ESMA in EU Agency law see Schammo, P., 'The European Securities and Markets Authority: Lifting the Veil on the Allocation of Powers', *Common Market Law Review* 48 (2011), pp. 1879 to 1914; Busuioc, M., Groenleer, M., and Tondal, J., (eds) *The Agency Phenomenon in the European Union: Emergence, institututionalism and every-day decision making* (Manchester University Press, Manchester 2012); Busuioc, M., *European Agencies: Law and Practices of Accountability* (Oxford University Press, Oxford, 2013). See also Communication from the Commission to the European Parliament and the Council 'European Agencies – the Way Forward' COM(2008) 135 final.

16 — See also Article 41 of the EU Charter of Fundamental Rights.

17 — Further, under the case law of the General Court, damages actions can be instituted against agencies, upon satisfaction of the conditions laid down by Article 340 TFEU for the non-contractual liability of the European Union, although no express reference is made to agencies in this provision. See *Sogelma* v *EAR*, cited above in footnote 14, where the General Court considered an action for damages on this basis against the European Agency for Reconstruction.

B – *The relevant EU legislative acts*

1. Regulation No 1095/2010

9. Article 9(5) of Regulation No 1095/2010 empowers ESMA to 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 two ways. ESMA can do so in the cases specified and under the conditions laid down in the legislative acts referred to in Article 1(2) of Regulation No 1095/2010[18] or if so required in the case of an emergency situation in accordance with and under the conditions laid down in Article 18 of Regulation No 1095/2010.

2. Regulation No 236/2012

10. Article 2(1)(b) of Regulation No 236/2012 provides as follows:

'"short sale" in relation to a share or debt instrument means any sale of the share or debt instrument which the seller does not own at the time of entering into the agreement to sell including such a sale where at the time of entering into the agreement to sell the seller has borrowed or agreed to borrow the share or debt instrument for delivery at settlement, not including:

…'

11. Article 28, with the title 'ESMA intervention powers in exceptional circumstances', of Regulation No 236/2012 provides that;

'1. In accordance with Article 9(5) of Regulation (EU) No 1095/2010, 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.

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

18 — Article 1(2) of Regulation No 1095/2010, as amended, provides inter alia that ESMA shall act within the powers conferred by that Regulation and within the scope of several other measures.

(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.

3. Where taking measures referred to in paragraph 1 ESMA shall take into account the extent to which the measure:

(a) significantly addresses the 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 or significantly improves the ability of the competent authorities to monitor the threat;

(b) does not create a risk of regulatory arbitrage;

(c) does not have a detrimental effect on the efficiency of financial markets, including by reducing liquidity in those markets or creating uncertainty for market participants, that is disproportionate to the benefits of the measure.

Where one or more competent authorities have taken a measure under Article 18, 19, 20 or 21, ESMA may take any of the measures referred to in paragraph 1 of this Article without issuing the opinion provided for in Article 27.

4. Before deciding to impose or renew any measure referred to in paragraph 1, ESMA shall consult the ESRB and, where appropriate, other relevant authorities.

5. Before deciding to impose or renew any measure referred to in paragraph 1, ESMA shall notify the competent authorities concerned of the measure it proposes to take. The notification shall include details of the proposed measures, the class of financial instruments and transactions to which they will apply, the evidence supporting the reasons for those measures and when the measures are intended to take effect.

6. The notification shall be made not less than 24 hours before the measure is to take effect or to be renewed. In exceptional circumstances, ESMA may make the notification less than 24 hours before the measure is intended to take effect where it is not possible to give 24 hours' notice.

7. ESMA shall publish on its website notice of any decision to impose or renew any measure referred to in paragraph 1. The notice shall at least specify:

(a) the measures imposed including the instruments and classes of transactions to which they apply, and their duration; and

(b) the reasons why ESMA is of the opinion that it is necessary to impose the measures including the evidence supporting those reasons.

8. After deciding to impose or renew any measure referred to in paragraph 1, ESMA shall immediately notify the competent authorities of the measures taken.

9. A measure shall take effect when the notice is published on the ESMA website or at a time specified in the notice that is after its publication and shall only apply in relation to a transaction entered into after the measure takes effect.

10. ESMA shall review the measures referred to in paragraph 1 at appropriate intervals and at least every 3 months. If the measure is not renewed by the end of such a 3-month period it shall automatically expire. Paragraphs 2 to 9 shall apply to a renewal of measures.

11. A measure adopted by ESMA under this Article shall prevail over any previous measure taken by a competent authority under Section 1.'

12. Article 30, read together with Article 42, of Regulation No 236/2012 empowers the Commission to adopt, inter alia, delegated acts specifying the criteria and factors to be taken into account by ESMA in determining in which cases the threats referred to in point (a) of Article 28(2) arise.

13. Article 44 of Regulation No 236/2012, in Chapter VIII on "Implementing Acts" contains rules on the applicable Committee procedure in the context of the adoption of implementing acts by the Commission. [19]

14. Article 24(3) of Commission Delegated Regulation No 918/2012 provides as follows;

'For the purposes of Article 28(2)(a), 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 shall mean:

(a) any threat of serious financial, monetary or budgetary instability concerning a Member State or the financial system within a Member State when this may seriously threaten the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union;

(b) the possibility of a default by any Member State or supra-national issuer;

(c) any serious damage to the physical structures of important financial issuers, market infrastructures, clearing and settlement systems, and supervisors which may seriously affect cross-border markets in particular where such damage results from a natural disaster or terrorist attack when this may seriously threaten the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union;

(d) any serious disruption in any payment system or settlement process, in particular when it is related to interbank operations, that causes or may cause significant payments or settlement failures or delays within the Union cross-border payment systems, especially when these may lead to the propagation of financial or economic stress in the whole or part of the financial system in the Union.'

C – *The proceedings before the Court*

15. The United Kingdom, by application of 31 May 2012, received at the Court 4 June 2012, brought an action against the European Parliament and the Council of the European Union under Article 263 TFEU, asking the Court to annul Article 28 of Regulation No 236/2012 and order the defendant to pay the costs of the application.

16. The European Parliament and the Council of the European Union contend that the Court should dismiss the application in its entirety on substantive grounds and order the United Kingdom to pay the costs.

19 — Commission Implementing Regulation (EU) No 827/2012 of 29 June 2012 laying down implementing technical standards with regard to the means for public disclosure of net position in shares, the format of the information to be provided to the European Securities and Markets Authority in relation to net short positions, the types of agreements, arrangements and measures to adequately ensure that shares or sovereign debt instruments are available for settlement and the dates and period for the determination of the principal venue for a share according to Regulation (EU) No 236/2012 of the European Parliament and of the Council on short selling and certain aspects of credit default swaps (OJ 2012 L 251, p. 11).

17. The European Commission, and the Kingdom of Spain, the Republic of France, and the Republic of Italy have intervened in support of the Parliament and the Council.

18. The United Kingdom, the European Parliament, the Council and the Commission participated at the hearing which took place on 11 June 2013, along with Spain, France, and Italy.

III – Legal assessment

A – *Agencies in the European Union*

19. The Commission has characterised a 'European Regulatory Agency' as 'an independent legal entity created by the legislator in order to help regulate a particular sector at European level and help implement a particular Community policy'.[20] There are currently over thirty decentralised agencies operative in the European Union,[21] or in the making, several of them with binding decisions making authority. As is well known, 'agencification' in the European Union is a process that has intensified significantly since the new millennium. As one commentary observes, the challenge now, and has always been, is to balance the functional benefits and independence of agencies against the possibility of them becoming 'uncontrollable centres of arbitrary power'.[22]

20. Agencies in the European Union differ, however, in terms of the legal foundations on which they are based, their organisation, and the powers with which they have been entrusted. ESMA is not among the handful of agencies that have been created directly by Treaty provision.[23] At the other end of the spectrum, nor is ESMA among the class of agencies with purely advisory functions, although advisory powers form an important part of ESMA's work.[24]

21. ESMA can be classified as a regulatory agency which assists with the task of regulation at EU level related to the expansion of the internal market. The main differences between executive and regulatory agencies is that executive agencies implement spending programmes and are directly dependent on the Commission, and exclusively accountable to it, whereas regulatory agencies mainly provide common rules and services and operate under a management or supervisory board composed of Member States' representatives and some representatives of the Commission.[25]

20 — 'Draft Inter-Institutional Agreement on the operating framework for the European regulatory agencies' of 25 February 2005 COM(2005) 59 final, p. 5. Various definitions have also been proposed in academic commentaries. For example, Griller and Orator, op. cit., pp. 3 and 4, have posited that agencies are relatively independent permanent bodies with legal personality emanating from secondary EU law and charged with specific tasks. See also, Chiti, E., 'Existe-t-il un modèle d'Agence de l'Union européenne',pp. 73 and 74 in *Les agences de l'Union européenne*, Brussels 2011, pp. 49 to 74.

21 — http://europa.eu/about-eu/agencies/index_en.htm.

22 — Busuioc, op. cit., p. 4, citing Everson, M., 'Independent Agencies: Hierarchy Beaters', 1 *European Law Journal* 1 (1995), pp. 180 to 204, at 190. See also Weiler, J., 'Epilogue: Comitology as Revolution Infranationalism, Constitutionalism and Democracy', in Joerges, C., and Vos, E. (eds), *EU Committees: Social Regulation, Law and Politics* (Hart Publishing, Oxford, 1999), pp. 347 to 349.

23 — This is the case, for example, with respect to the European Defence Agency (Articles 42(3) and 45 TEU) and the European Police Office (Article 88 TFEU).

24 — For an overview of ESMA's functions see Moloney, N., 'The European Securities and Markets Authority and institutional design for the EU financial market – a tale of two competences: Part 1: rule making', *European Business Organization Law Review* 12 (1) (2011), pp. 41 to 86, and Part 2 'rules in action', *European Business Organization Law Review* 12(2) (2011), pp. 177 to 225.

25 — Hofmann and Morini, op. cit., p. 436.

22. ESMA is not an executive agency established by the Commission under the auspices of Article 6 of Regulation No 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes.[26] These are bodies which operate under a sub-delegation of powers from the Commission.[27]

23. ESMA is, however, a decision-making agency of the same kind as the Office for Harmonisation in the Internal Market ('OHIM'),[28] the Community Plant Variety Office ('CPVO'),[29] the European Aviation Safety Agency ('EASA'),[30] the European Chemicals Agency ('ECHA'),[31] the European Medicines Agency,[32] and the Agency for the Cooperation of Energy Regulators,[33] in the sense that it is ESMA itself which takes some of its decisions, including those made under Article 28 of Regulation No 236/2012, without the intervention of the Commission.[34]

24. However, there is an important difference between ESMA and the regulatory agencies active in fields other than the financial markets, and which is crucial to the resolution of the case to hand. While some of the more recently established bodies such as the EASA or the ECHA have been endowed with greater regulatory powers than earlier ones, the contorted way in which this was done, and the multiple controls to which these powers are subject shows that it was not intended to grant them a clear hierarchical authority over their national counterparts.[35] As was acknowledged by the Commission at the hearing, other regulatory agencies cannot make legally binding decisions directed at individual legal entities *in substitution* for either a decision, or the inaction, of a competent national authority which may well disagree with a decision taken by ESMA. Yet this is precisely what Article 28 of Regulation No 236/2012 empowers ESMA to do.[36] Pursuant to Article 28(11) of Regulation No 236/2012, a measure adopted by ESMA shall prevail over any previous measure taken by a competent national authority.

26 — OJ 2003 L 11, p. 1. These are the Executive Agency for Competitiveness and Innovation, the Executive Agency for Health and Consumers, the Education, Audio-visual and Culture Executive Agency, the Trans-European Transport Network Executive Agency, the Research Executive Agency, and the European Research Council Executive Agency. See http://europa.eu/about-eu/agencies/executive_agencies/index_en.htm.

27 — Prior to the Lisbon treaty there was a distinction between 'Commission' agencies and 'Council' agencies, the former being established under the old first pillar, with the latter arising from the second and third pillars. See Busuioc, op. cit., pp. 21 and 22.

28 — Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1).

29 — Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (OJ 1994 L 227, p. 1).

30 — Regulation No 1592/2002 of the European Parliament and of the Council of 15 July 2002 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency (OJ 2002 L 240, p. 1). Regulation 1592/2002 was repealed by Regulation (EC) No 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/EC, OJ 2008 L 79, p. 1.

31 — Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC (OJ 2006 L 396, p. 1).

32 — Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency (OJ 2004 L 136, p. 1).

33 — Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators (OJ 2009 L 211, p. 1).

34 — The distinction between pre-decision and decision making agencies appears in Griller and Orator, op. cit., and Chamon, M. (2011), op. cit.

35 — See Curtin, D., and Dehousse, R., 'European Union agencies: tipping the balance?', Busioiuc, M., Groenleer, M., and Tondal, J. (eds), op. cit., p. 193, at p. 195.

36 — Moloney, Part 1, op. cit., point 2.1, observes that the Board of Supervisors of ESMA, the central decision making body established under Articles 40 to 44 of Regulation No 1095/2010, broadly represents the heads of the competent Member State authorities, but it mostly operates on a majority voting basis, and in some limited circumstances qualified majority voting (see Article 44 of Regulation No 1095/2010). This means, therefore, that no Member Sate competent authority has a power to veto Article 28 measures.

25. It has been pointed out in the written observations of the Parliament that apart from the three ESAs, only the European Chemicals Agency is established solely on the legal basis of Article 114 TFEU. However, it does not enjoy intervention powers that are similar to those provided in Article 28 of Regulation No 236/2012.[37] I would note that the European Medicines Agency was set up on the basis of a combination of Articles 114 and 168 TFEU,[38] both OHIM and the CPVO were established on the basis of Article 352 TFEU, while the EASA came into being on the basis of Article 100 TFEU.[39]

26. In my opinion the fourth ground of annulment in the United Kingdom's action pertaining to the appropriateness of Article 114 TFEU as the legal basis for the adoption of Article 28 of Regulation No 236/2012 logically precedes the question of the compliance of ESMA's powers under this provision with EU constitutional law, and more particularly the precepts of the *Romano* and *Meroni* judgments. From a constitutional law point of view the assessment of the legal basis of Article 28 of Regulation No 236/2012, an Article 289(3) TFEU legislative act, precedes subordinate legal issues relating to its content. Therefore I shall start by analysing the fourth ground of annulment raised by the United Kingdom and then address the remaining three issues together.

B – *Article 114 TFEU and issues appertaining to legal basis*

1. Article 114 TFEU as a legal basis for establishing ESMA

27. According to one recent commentary, up until a decade ago most agencies were established on the basis of Article 352 TFEU.[40] In the light of this, and given ESMA's authority to 'impose binding decisions on local supervisors and market participants', it is unsurprising that the appropriateness of Article 114 TFEU as a legal basis for such powers has been queried.[41] In my opinion rigorous judicial control of recourse to Article 114 TFEU is particularly important, in the light of the tendency of the EU legislature, in the last eight years or so, to found agencies on 'the basis of special competences in specific sectors' rather than Article 352 TFEU.[42] However, a distinction needs to be drawn in this respect between the legal basis for establishing an agency and that applicable to conferral of particular powers on it.

28. The case law of the Court on recourse to Article 114 TFEU to support the establishment of agencies, and their involvement in the promulgation of EU measures, has developed considerably in the course of the last decade or so. The steps that have been taken are as follows.

37 — The decisions of the European Chemicals Agency that are appealable to its Board of Appeal are set out in Article 91 of the REACH Regulation and Article 77 of the Biodical Products Regulation. See (i) Regulation No 1907/2006 and (ii) Regulation (EU) No 528/2012 of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocidal products (OJ 2012 L 167, p. 1).

38 — Cited above in footnote 32.

39 — Cited above in footnotes 28, 29 and 30, respectively.

40 — Busuioc, M., op. cit., p. 18.

41 — Moloney, N., 'EU Financial Market Regulation after the Global Financial Crisis: "More Europe" or More Risks?', *Common Market Law Review* 47 (2010), pp. 1317 to 1383, p. 1341. For an expression of doubt on the appropriateness of Article 114 TFEU as the legal basis for the EBA see Fahey, E., 'Does the Emperor Have Financial Crisis Clothes? Reflections on the legal Basis of the European Banking Authority', *The Modern Law Review* (74) (2011), pp. 581 to 595, p. 593, and House of Commons Treasury Committee, 'The Committee's Opinion on proposals for European financial supervision', *Sixteenth Report of Session 2008-2009*, paragraph 32. For arguments that Article 114 TFEU is a correct legal basis for the establishment of ESMA see Hänle, F.: *Die neue Europäische Finanzaufsicht*, Hamburg 2012, pp. 40 to 44, and Frank, A., *Die Rechtswirkungen der Leitlinien und Empfehlungen der Europäischen Weltpapier- und Marktaufsichtsbehörde*, Baden-Baden 2012, pp. 53 to 55. However, the latter author leaves open the question as to whether this also applies to the competences of ESMA to adopt binding implementation measures.

42 — See the Opinion of Advocate General Kokott in Case C-217/04 *United Kingdom* v *Parliament and Council (ENISA)* [2006] ECR I-3771, point 2.

29. In *United Kingdom* v *Parliament and Council (Smoke flavourings)*[43] the Court held that Article 114 TFEU was the correct legal basis for the adoption of measures by the Commission, working in close collaboration with the Food Safety Authority, because this was 'an appropriate means' for achieving 'a desired approximation' of Member State law.[44] In that case the Court approved a multi-stage legislative model as an approximation measure within the meaning of Article 114 TFEU, when the regulation in issue constituted 'an intermediate step on the way to an approximation of the laws of the Member States',[45] with the Commission working to this end with the Food Safety Authority.

30. The scope of Article 114 TFEU as a legal basis for setting up agencies was further developed in *ENISA*.[46] The Court found that the creation of an agency that provided an opinion to the Commission concerning technical matters could amount to an Article 114 measure for approximation both because of the need for technical advice,[47] and due to the fact that the 'Community legislature considered that the establishment of a Community body such as the Agency was an appropriate means for preventing the emergence of disparities likely to create obstacles to the smooth functioning of the internal market in the area'.[48]

31. The Court further noted in *ENISA* that 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] The authors of the Treaty, by using the expression 'measures for the approximation' in that article intended to confer on the legislature a discretion, depending on the general context and the specific circumstances of the matter to be harmonised, as regards the method of approximation most appropriate for achieving the desired result, in particular in fields of complex technical features.[50]

32. On this basis the Court reached an important conclusion on the general powers of agencies to pass measures that are legally binding on third parties. As nothing in the wording of Article 114 TFEU implied that the addressees of the measures adopted on the basis of Article 114 TFEU could only be the individual Member States, the legislature was allowed to deem it necessary to provide for the establishment of an EU body responsible for contributing to the implementation of a process of harmonisation.[51] In consequence, Article 114 TFEU was an appropriate legal basis for the adoption of Regulation No 460/2004, pursuant to which ENISA was established.

33. It would appear that concerns that were similar to those addressed by the Court in *ENISA* were a pre-occupation of the EU legislature when it elected to pass specific measures concerning short selling, and more particularly when it decided to allocate several tasks and responsibilities to ESMA in this field. This is exemplified by recital 1 of Regulation No 236/2012, which notes that the measures adopted by the Member States with respect to short selling, in the light of the September 2008 financial crisis, 'were divergent as the Union lacks a specific common regulatory framework for dealing with short selling issues'. A similar sentiment is reflected in recital 2 of Regulation

43 — Case C-66/04 [2005] ECR I-10553.

44 — Paragraph 63.

45 — See the Opinion of Advocate General Kokott at point 25.

46 — Cited above in footnote 42.

47 — Paragraph 64.

48 — Paragraph 62.

49 — Paragraph 42, citing *Smoke flavourings*.

50 — Paragraph 43, citing *Smoke flavourings*.

51 — Paragraph 44. See also Case C-359/92 *Germany* v *Council* [1994] ECR I-3681, paragraph 37.

No 236/2012,[52] according to which it is necessary to harmonise the rules for short selling and certain aspects of credit default swaps, to prevent the creation of obstacles to the proper functioning of the internal market because of the likelihood that, otherwise, Member States will continue to take diverging measures.

34. Consequently, in my opinion there can be no in principle objection to the establishment of ESMA and regulation of its tasks and powers on the legal basis of Article 114 TFEU. In general terms, and from the perspective of its broader functions[53] the role of ESMA in the context of approximation of the Member States rules on short selling fulfils the conditions that the Court set down in *ENISA*. However, ESMA's special powers under Article 28 of Regulation No 236/2012 require closer assessment.

2. Article 114 TFEU as a legal basis for Article 28 of Regulation No 236/2012

35. The objections raised by the United Kingdom in its fourth ground of annulment are less ambitious than an all-out assault on the legal basis for the establishment of ESMA. It concerns instead the powers with which ESMA has been endowed by Article 28 of Regulation No 236/2012.[54] The United Kingdom has formulated its challenge under Article 114 TFEU on the basis that this Treaty provision cannot authorise individual measures directed at particular natural or legal persons so that, to the extent to which Article 28 of Regulation No 236/2012 purports to allow such measures it is *ultra vires* Article 114 TFEU.[55]

36. As I have already mentioned, there can be no *in principle* objection to recourse to Article 114 TFEU as the legal basis empowering agencies to adopt legally binding decisions with respect to third parties. The touchstone, however, for assessing whether the conferral of such powers on an agency falls within the scope of Article 114 TFEU is whether or not the decisions of the agency concerned either contribute or amount to internal market harmonisation, in the sense this notion is used in EU law.

37. However, reliance on Article 114 TFEU as the sole legal basis for Article 28 of Regulation No 236/2012 is not supported by the Court's case law because the conferral of decision making powers under that article 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.[56]

52 — The Court has held that 'when there are obstacles to trade, or it is likely that such obstacles will emerge in the future, because the Member States have taken, or are about to take, divergent measures with respect to a product or a class of products, which bring about different levels of protection and thereby prevent the product or products concerned from moving freely within the Community, Article 95 EC authorises the Community legislature to intervene by adopting appropriate measures, in compliance with Article 95(3) EC and with legal principles mentioned in the Treaty or identified in the case-law, in particular the principle of proportionality'. See Joined Cases C-154/04 and C-155/04 *The Queen on the Application of Alliance for Natural Health and Nutri-Link Ltd* [2005] ECR I-6451, paragraph 32 and case law cited. See similarly *Smoke flavourings*, cited above in footnote 43, paragraph 41.

53 — See Moloney, op. cit.

54 — The United Kingdom relies, inter alia, on the Opinion of Advocate General Jacobs in Case C-359/92 *Germany* v *Council*, in which the Advocate General observed at point 36 of his opinion that the former Article 100 a, now Article 114 TFEU, 'may be used only to adopt measures which lay down uniform rules; the application of those rules to individual cases is then a matter for the national authorities'.

55 — As novel as the terminology of this pleading may be, and the absence of express reference to 'lack of competence' in the part of the United Kingdom's application concerning Article 114 TFEU, their case is sufficiently clearly pled to enable all parties and interveners to answer it. Moreover, 'lack of competence' is one of the grounds which the Court raises of its own motion on public policy grounds. See e.g. Case C-210/98 P *Salzgitter* v *Commission* [2000] ECR I-5843, paragraph 56; the Opinion of Advocate General Mengozzi in Case C-355/10 *Parliament* v *Council* [2012] ECR, paragraph 54.

56 — For the sake of completeness I recall that Article 115 TFEU has the same general material scope of application as Article 114 but subordinates the harmonisation measures in fields referred to therein to a special legislative procedure and requires unanimity of the Council.

38. The powers vested in ESMA under Article 28 of Regulation No 236/2012 go beyond internal market harmonisation for the following reasons.

a) Analysis of the content of the powers vested in ESMA under Article 28 of Regulation No 236/2012

39. The effect of Article 28 of Regulation No 236/2012 is to elevate to the EU level, and more precisely to ESMA, an intervention competence that operates in circumstances that are equivalent to those that trigger the intervention powers of the competent authorities of the Member State under Articles 18, 20 and 22 of Regulation No 236/2012. Moreover, Article 28 powers can only arise if the aforementioned national authorities have failed to act so as to adequately address the "threat to the orderly functioning and integrity of the financial markets or the stability of the whole or part of the financial system in the Union' (see Article 28(2)(a) and (b) of Regulation No 236/2012.)

40. As was pointed out by the United Kingdom at the hearing, by definition ESMA will be forming a judgment on a matter on which the relevant competent authority has formed a different judgment. Further, pursuant to Article 28(4) and recital 33 of Regulation No 236/2012, the only entity ESMA is bound to consult before imposing these measures is the European Systemic Risk Board 'ESRB',[57] and neither the Council nor the Commission are associated with the decision-making process as institutions. As I have already mentioned, pursuant to Article 28(11) of Regulation No 236/2012, a measure adopted by ESMA shall prevail over any previous measure taken by a competent national authority.

41. That said, it cannot plausibly be argued that the powers of ESMA under Article 28 of Regulation No 236/2012 are wholly open-ended. As I have already noted, the notion appearing in Article 28(2)(a) of Regulation No 236/2012 has been given deeper precision by Article 24(3) of Commission Delegated Regulation No 918/2012.[58]

42. The following conditions and limitations are placed on the exercise of the powers vested by Article 28 of Regulation No 236/2012. ESMA is bound to consider the extent to which the measure; 'significantly addresses the 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 or significantly improves the ability of the competent authorities to monitor the threat' (see Article 28(3)(a)); 'does not create a risk of regulatory arbitrage' (Article 28(3)(b)); 'does not have a detrimental effect on the efficiency of financial markets, including by reducing liquidity in those markets or creating uncertainty for market participants, that is disproportionate to the benefits of the measure' (Article 28(3)(c)).

43. In addition, Article 28 of Regulation No 236/2012 supplies the following procedural safeguards. As I have already mentioned ESMA is bound to consult the ESRB. Where appropriate, other relevant authorities are also to be consulted, but there is no obligation to do so (Article 28(4)). ESMA is bound to notify the competent authorities of the measures it proposes to take or renew, and no less than 24 hours before the measure is to take effect or be renewed, unless there are 'exceptional circumstances' (Article 28(5) and (6)), and the measures once taken, are to be notified to the competent authorities (Article 28(8)). And finally, ESMA is obliged to publish on its website any decision to impose or renew measures, including the reasons for them (Article 28(7)) and is additionally bound to review any measures taken every three months. If not they expire (Article 28(10)). I will return to the caveats on the exercise of ESMA's powers under Article 28 of Regulation No 236/2012 when I consider the pertinence of the *Meroni* case law to resolution of the dispute.

57 — Which was established under Regulation No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board (OJ 2010 L 331, p. 1).

58 — Above point 14.

44. However, it is important to be mindful the scale of the powers vested in ESMA vis-à-vis third parties. As mentioned above, ESMA intervention under Article 28(1)(a) of Regulation No 236/2012 may entail disclosure obligations on natural or legal persons with respect to their net short positions in relation to a specific financial instrument or a class thereof. Furthermore, ESMA may impose prohibitions, or conditions related to short selling and similar transactions as provided in Article 28(1)(b) of Regulation No 236/2012.

45. In my opinion, and contrary to arguments appearing in the written observations of the Commission, this goes much further than a power to 'lay down measures relating to a specific product or class of products and, if necessary, individual measures concerning those products'.[59] In fact, in this context ESMA is not developing specific and more detailed rules applicable to a given financial product or service, which is the case, for example, when the Commission exercises its powers to unify the Member States' approach towards a dangerous product under Article 13 of Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety, adopted under Article 114 TFEU.[60] Rather ESMA is intervening on the conditions of competition in a particular financial market, falling within the remit of a national competent authority, when it is confronted with certain exceptional circumstances. In my opinion, the closest analogy in EU law to ESMA's powers under Article 28 of Regulation No 236/2012 is provided by the Commission intervention powers in the field of agriculture and anti-dumping, that is in areas where the Commission implements a common EU policy.

46. Thus, a measure adopted on the basis of Article 114 TFEU must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market. 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. The Court would then be prevented from discharging the function entrusted to it by Article 19 TEU of ensuring that the law is observed in the interpretation and application of the Treaty.[61] So in considering whether Article 114 TFEU is a correct legal basis for a given EU measure, the Court must verify whether the measure whose validity is in issue in fact pursues the genuine objectives of improving the conditions for the establishment and functioning of the internal market as stated by the EU legislature.[62]

47. Moreover, the potential for the emergence of future obstacles to trade resulting from disparities in Member State law is not enough. The emergence of such obstacles must be likely and the measure in question must be designed to prevent them.[63]

b) Article 28 of Regulation No 236/2012 in the context of the Court's case law concerning Article 114 TFEU as a legal basis

48. In *ENISA* the Court held that the EU 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'.[64]

59 — The Commission cited Case C-359/92 *Germany* v *Council*, paragraph 37, in which this principle appears.

60 — OJ 2002 L 11, p. 4. It is interesting to note that Commission decisions under this provision require implementation by the competent national authorities within a period of 20 days, unless a different period of time is specified in those decisions.

61 — Case C-376/98 *Germany* v *Parliament and Council* [2000] ECR I-8419, paragraph 84.

62 — Paragraph 85 and case law cited.

63 — Paragraph 86. See similarly Case C-58/08 *Vodafone and Others* [2010] ECR I-4999, paragraph 33.

64 — Cited above in footnote 42, paragraph 44.

49. Moreover, the Court emphasised that the tasks conferred 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, which is the case in particular where the body provides services to national authorities or operators which affect the homogenous implementation of harmonising instruments and which are likely to facilitate their application. [65]

50. However, the decision making powers of ESMA under Article 28 of Regulation No 236/2012 bear little resemblance to the measures described by the Court in these important passages of the *ENISA* ruling. First decisions taken under Article 28 of Regulation No 236/2012 are legally binding, while the Court in *ENISA* was considering non-legally binding measures. While this is not objectionable in and of itself, it is difficult to envisage how the exercise of a power under Article 28 of Regulation No 236/2012 could contribute to harmonisation of the kind described by the Court in *ENISA*. Rather its function is to lift implementation powers contained in Article 18, 20 and 22 of Regulation No 236/2012 from the national level to the EU level when there is disagreement between ESMA and the competent national authority or between national authorities.

51. In fact Article 28 of Regulation No 236/2012 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. Due to ESMA's voting rules, this action can be taken on the basis of a qualified majority of its Board of Supervisors. [66]

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, [67] Article 28 of Regulation No 236/2012 goes beyond these limits.

3. Article 352 TFEU as an adequate legal basis for Article 28 of Regulation No 236/2012

54. For the sake of completeness, I would add that in my opinion Article 352 TFEU would have been an appropriate legal basis for Article 28 of Regulation No 236/2012. This is so because there is clearly a need for action at the EU level since, in an integrated market of financial instruments, inaction or inadequate action by a competent national authority in relation to short selling may have significant cross-border effects. These might include distortions in the banking systems of other Member States other than that of the marketplace where short selling takes place. Hence, in situations posing a threat to the orderly functioning and integrity of financial markets or to the stability of whole or part of the financial system in the European Union, a centralised decision making procedure enabling uniform application of EU rules on short selling would seem to be both necessary and proportionate. But for the reasons I have explained above, a centralised emergency decision making process that replaces the decision of the competent Member State authority, without its consent, or which provides a substitution for the absence of one, cannot be considered to be encompassed by the concept of 'approximation of the provisions laid down by law, regulation or administrative action in Member States' under Article 114 TFEU.

65 — Paragraph 45.

66 — ESMA's decisions are adopted by the Board of Supervisors. The voting members are comprised exclusively of the heads of the national public authorities that are competent to supervise financial market participants (Article 40 of Regulation No 1095/2010). As mentioned in footnote 36, decisions of the board are taken either by simple majority or exceptionally by a qualified majority of the voting members. (Article 44(1) of Regulation No 1095/2010)).

67 — The Parliament cites *ENISA*, cited above in footnote 42, paragraphs 42 to 45, 59 and 60, in support of this contention.

55. That said, in my opinion Article 28 of Regulation No 236/2012 is 'necessary' in the sense of Article 352 'to attain one of the objectives' set out in the treaties. Here I have in mind *Massey-Ferguson*[68] in which the court held that the functioning of a customs union required 'of necessity' the uniform determination of the valuation due for customs purposes of goods imported from third countries so that the level of protection effected by the Common Customs Tariff was the same throughout the Community.[69] For reasons that I have explained above, the intervention powers of ESMA under Article 28(1) of Regulation No 236/2012 have the similar quality of 'necessity' to achieve the aims of the internal market due to the cross-border implications of inadequate Member State action with respect to short selling.

56. At the same time, I would note that the fact that the functioning of the common market is 'affected' by short selling is insufficient to support Article 114 TFEU as the legal basis of Article 28 of Regulation No 236/2012.[70] In other words, Article 114 TFEU is not an available and alternative legal basis that would preclude recourse to Article 352 TFEU.[71] The interventions which ESMA is empowered to undertake under Article 28 of Regulation No 236/2012 go beyond harmonising under Article 114 TFEU. However, they are necessary for the functioning of the EU internal market due to the disruption that might result from failure of any individual Member State to avert the consequences of short selling in exceptional circumstances.[72] Nor would recourse to Article 352 TFEU 'serve as a basis for widening the scope' of Union powers 'beyond the general framework created by the provision' of the EU Treaty, and 'in particular, by those defining the tasks and the activities' of the Union.[73]

57. Moreover, the Court has expressly approved recourse to Article 352 TFEU for measures 'which are specifically aimed at individuals',[74] when the measures concerned fall within the scope of the objectives of the Union for the purposes of Article 352 TFEU.[75] In my opinion, and due to the impact on the operation of the internal market that might follow from a lack of appropriate action from competent Member State authorities with respect to short selling, the objectives of Article 28 of Regulation No 236/2012 match those of the European Union for the purposes of Article 352 TFEU.[76]

58. Given that Article 352 TFEU requires unanimity among the Member States, the adequacy of legal basis of the adoption of Regulation No 236/2012, in terms of the depth of the consensus that supported the adoption of Article 28 of Regulation No 236/2012, is not an irrelevant issue. The United Kingdom opposed Article 28 of Regulation No 236/2012 in the Article 114 TFEU legislative process, which requires only qualified majority voting in the Council.[77] As noted above, there is no

68 — Case 8/73 [1973] ECR I-897

69 — Paragraph 3.

70 — Case C-271/94 *Parliament* v Council[1996] ECR I-1689, paragraph 32.

71 — Case 45/86 *Commission* v *Council* [1987] ECR I-1493 paragraph 13; Case C-350/92 *Spain* v *Council* [1995] ECR I-1985, paragraph 26

72 — I agree with A. Dashwood's statement in the article entitled 'Article 308 EC as the Outer Limit of Expressly Conferred Community Competence', in Barnard, C., and Odudu, O. (eds), *The Outer Limits of European Union Law* (Hart Publishing, Oxford, 2009), pp. 35 to 44, at p. 40, in that 'Article 308 [now 352] can still perform a useful and constitutionally proper function by allowing the powers of the institutions under specific legal bases to be supplemented, where this proves necessary to attain the Community objective for which the power in question has been conferred'.

73 — Case C-402/05 P *Kadi and Al Barakaat International Foundation* v *Council and Commission* [2008] ECR I-6351, paragraph 203.

74 — *Kadi and Al Barakaat*, paragraph 235.

75 — *Kadi and Al Barakaat*, paragraph 220.

76 — *Kadi and Al Barakaat*, paragraph 227.

77 — Minutes of the 3148th meeting of the Council of the European Union held in Brussels on 21 February 2012, Agenda item 1. It goes without saying that the general principles of constitutionality and rule of law preclude reliance on any consideration of political expediency in the determination of the appropriate legal basis for an EU legislative act, which must be exclusively based on objective criteria. However, it is recognised in the Court's case law that whether the legislative procedure to be followed is affected by a choice of legal basis will determine whether the Court needs to rule on this issue (Joined Cases C-184/02 and C-223/02 *Spain and Finland* v *Parliament and Council* [2004] ECR I-7789, paragraphs 42 to 44; see similarly Case T-213/00 *CMA CGM and Others* v *Commission* [2003] ECR II-913, paragraphs 85 to 103). At paragraph 103 the Court concluded that 'the applicants' plea in law alleging an incorrect legal basis must be rejected, because the alleged error did not deprive the applicants of the procedural guarantees laid down by the relevant rules of procedure and did not have any adverse effect on their legal position'. This case was appealed unsuccessfully to the Court as Case C-236/03 P *Commission* v *CMA CGM and Others*, order of the Court of 28 October 2004.

right of veto operative when the ESMA Board of Supervisors exercises its powers under Article 28 of Regulation No 236/2012. Since the Lisbon Treaty, there has been a requirement in Article 352(2) TFEU for the Commission to bring proposals based on that article to the attention of national parliaments.[78] Recourse to Article 352 TFEU as the legal basis of Article 28 of Regulation No 236/2012 would have thus opened up an important channel for enhanced democratic input.[79]

59. For these reasons, I therefore conclude that the Court should annul Article 28 of Regulation No 236/2012 for lack of competence, given that Article 114 TFEU was not an appropriate legal basis for its adoption.[80]

C – *The United Kingdom's pleas on the basis of the Meroni and Romano case law in the light of Articles 290 and 291 TFEU*

1. Preliminary remarks

60. Given my conclusion on the fourth ground of challenge put to the Court by the United Kingdom, my reasoning with regard to the first to third grounds of challenge is offered only in the event that the Court finds that Article 114 TFEU provides an appropriate legal basis for the adoption of Article 28 of Regulation No 236/2012. In my opinion, the changes introduced by the Lisbon Treaty, both with respect to the clarification of the distinction between (normative) delegated measures and implementing (executive) powers,[81] and amendments that copper-fasten judicial review of the acts of EU agencies into the judicial architecture of the European Union, mean that the *Romano* and *Meroni* case law needs to be re-positioned into the contemporary fabric of EU constitutional law.

a) The ruling of the Court in *Meroni*

61. The *Meroni* case of 1958 concerned a challenge to the system for the equalisation of ferrous scrap imported from third countries established under the ECSC Treaty, and more particularly to a sum levied by the High Authority pursuant to two decisions made by the Joint Bureau of Ferrous Scrap Consumers and the Imported Ferrous Scrap Equalisation Fund (the 'Brussels agencies') both of whom had been entrusted by the High Authority of the ECSC with the implementation of the scheme. The Brussels agencies were both private law bodies established under Belgian law.

62. The Court stated in *Meroni* that the High Authority was entitled to delegate its powers to an external body or bodies. However, the delegation was subject to restrictions imposed by the ECSC Treaty. The Court held that the High Authority could not confer on the authority receiving the delegation powers that differed from those which the High Authority possessed under the ECSC Treaty.[82] For example, the decisions of the Brussels agencies were not subject to review of the Court

78 — In contrast, as one commentary has observed, as 'agencies started to be set up on the basis of the co-decision procedure, the EP had the possibility to play a significant role in their contract design' (Busuioc, op. cit., p. 117).

79 — An analogous observation was made by the Court with respect to the European Parliament in *Kadi and Al Barakaat*, paragraph 235.

80 — I would acknowledge that, under the established case law of the Court, as exemplified by Case C-338/01 *Commission* v *Council* [2004] ECR I-4829, paragraphs 56 and 57, by way of exception, 'if it is established that the measure simultaneously pursues several objectives which are inseparably linked without one being secondary and indirect in relation to the other, the measure must be founded on the corresponding legal bases (see, inter alia, Case C-336/00 *Huber* [2002] ECR I-7699, paragraph 31; Case C-281/01 *Commission* v *Council* [2002] ECR I-12049, paragraph 35, Case C-211/01 *Commission* v *Council*, paragraph 40, and Opinion 2/00 [2001] ECR I-9713, paragraph 23). However, no dual legal basis is possible where the procedures laid down for each legal basis are incompatible with each other' (citing Case C-300/89 *Commission* v *Council* ('*titanium dioxide*') [1991] ECR I-2867, paragraphs 17 to 21, and Joined Cases C-164/97 and C-165/97 *Parliament* v *Council* [1999] ECR I-1139, paragraph 14). These principles self-evidently apply to any alternative legal bases on which Article 28 of Regulation No 236/2012 might be founded.

81 — See Lenaerts, K., and van Nuffel, P., *European Union Law* (Third edition, Sweet and Maxwell, London, 2011), paragraphs 17-008 to 17-011

82 — *Meroni*, cited above in footnote 11, p. 150. Here the Court observed that 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'.

of Justice under the conditions laid down by Article 33 CS, when this constraint applied to legal acts of the High Authority. [83] Moreover, the Court pointed out that delegations of power were only legitimate if they were necessary for the performance of the tasks of the High Authority. Any delegation of power could only relate to clearly defined executive powers, the use of which had to be subject, in their entirety, to the supervision of the High Authority. [84]

63. It was in this context that the Court came to its well-known conclusion that 'the delegation of powers granted to the Brussels agencies by Decision No 14/55 gives those agencies a degree of latitude which implies a wide margin of discretion and cannot be considered as compatible with the requirements of the Treaty'. [85]

64. It is clear to me, therefore, from the context in which the Court reached its decision in *Meroni* that its preoccupations were two-fold; first, the Court was concerned about the absence of any judicial review of acts of the Brussels agencies; secondly, the Court sought to prevent the High Authority from delegating powers that were wider than its own, and which were so broadly defined as to be arbitrary. In my opinion, the Court was therefore upholding the constitutional imperatives of effective judicial control and institutional balance.

b) The Findings of the Court in *Romano*

65. Similar pre-occupations traverse the Court's findings in *Romano*. There the Court considered a reference from a Belgian labour tribunal on the interpretation and validity of Decision No 101 of the Administrative Commission of the European Communities on Social Security for Migrant Workers, (the 'Administrative Commission') [86] and the interpretation of Regulation No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community. [87] The Administrative Commission had been established pursuant to this latter regulation, and had taken a decision that had impacted adversely on the sum payable to Mr Romano by way of pension entitlements.

66. In ruling on the powers of the Administrative Commission, the Court came to the following well-known conclusion:

'… it follows both from Article 155 of the Treaty and the judicial system created by the Treaty, and in particular by Articles 173 and 177 thereof, that a body such as the Administrative Commission may not be empowered by the Council to adopt acts having the force of law'. [88]

67. As was pointed out at the hearing, the French, Dutch, German and Spanish language versions of the *Romano* judgment show that its scope was limited to a prohibition on the adoption by agencies of *normative measures*. For example, the 'acts having the force of law' in paragraph 20 of the Court's judgment in *Romano* is expressed in the French text of the judgment as 'actes revêtant un caractère normatif'. The English translation 'acts having the force of law' therefore needs to be read in the light of other language versions.

83 — Ibid., p. 149.

84 — Ibid., p. 152.

85 — Ibid., p. 154.

86 — OJ 1976 C 44, p. 3.

87 — OJ English Special Edition 1972(I), p. 160.

88 — *Romano*, cited above in footnote 12, paragraph 20. Advocate General Warner was firmer in his reliance on absence of judicial review powers for precluding decisions of the Administrative Commission from having the 'force of law'. See his Opinion at p. 1265.

2. *Meroni* and *Romano* case law in the context of present day EU law on regulatory agencies

68. It has been asserted that the Court is yet to apply the precepts of the *Meroni* judgment to any present-day EU agency.[89] In a nutshell, the problem lies in reconciling the proliferation of agencies with the prohibition on the delegation to agencies and other bodies of inordinately broad and/or insufficiently well-defined discretionary powers that was laid down in *Meroni*,[90] and the prohibition on adoption by agencies of measures having the 'force of law' that was established in *Romano*.

69. The fundamental differences in the factual and legal context between the agencies considered by the Court in 1958 in *Meroni* and the way in which agencies operate today are worth underscoring. They have been described in one commentary as follows;

'The Brussels agencies [considered in Meroni] were bodies established under private law, whereas the EU agencies are public bodies under EU law. Although it makes perfect sense to qualify the former as "outside bodies", this is not so for the latter. The Brussels agencies had received powers from the High Authority, whereas EU agencies are established and endowed with powers by the Union legislature. Moreover the ruling in *Meroni* was given under the ECSC Treaty, whereas the current EU agencies operate under the EU Treaties.'[91]

70. The limitations on the pertinence of the *Romano* ruling to contemporary agency law are illustrated in the judgment itself. In my opinion it is clear that the Court was mindful, in precluding the conferral of legislative power on the agency concerned, of the absence of a facility under the EEC Treaty, as then cast, for the judicial review of such measures. However, the Lisbon Treaty has filled this gap, reconfigured the delegation of legislative powers under Article 290 TFEU, and clarified the scope and operation of implementing powers under Article 291 TFEU.

71. As for *Meroni*, the concerns of the Court appertaining to institutional balance and the need to outlaw inordinately broad and/or arbitrary delegations of power are as pertinent today as they were in 1958. However, they too need to be considered with due account taken of developments in the primary law of the European Union, as reflected in Articles 290 and 291 TFEU.

72. As will be illustrated in the next section, the evolution in the EU constitutional law that occurred under the Lisbon Treaty has indeed accommodated the pivotal concerns with which the Court had to deal in *Meroni* and *Romano*; namely the absence of treaty based criteria for the conferral and delegation of powers so as to ensure respect for institutional balance, and the vacuum in terms of judicial review of legally binding acts of agencies.

3. The changes brought about by the Lisbon Treaty

73. As noted above, the authority of the Court to review the acts of 'bodies, offices, or agencies of the Union intended to produce legal effects *vis-à-vis* third parties' is now confirmed by the first paragraph of Article 263 TFEU, while the second paragraph of Article 263 TFEU provides that the Court has as at its disposal, in reviewing acts of agencies, the grounds traditionally available in EU law.[92] Under the first paragraph of Article 265 TFEU, the action for failure to act is also available to challenge the work of agencies, and point (b) of the first paragraph of Article 267 TFEU ensures that validity review via

89 — Chamon (2011), op. cit., p. 1056. The author notes, however, that Advocate General Geelhoed in Case C-378/00 *Commission* v *Parliament and Council* [2003] ECR I-937 postulated in a footnote that *Meroni* applies to agencies, but did not develop the point.

90 — Chamon (2011), op. cit., p. 1058.

91 — Chamon (2011), op. cit., p. 1059.

92 — According to the fifth paragraph of Article 263 TFEU acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them. Under Article 61 of Regulation No 1095/2010 the General Court, and ultimately the Court of Justice, exercise the judicial review regarding application of Article 28 of Regulation No 236/2012.

national courts is also available with respect to agencies. Agencies are brought into the last plank of the EU judicial architecture through their mention in the Article 277 plea of illegality, which is applicable to acts of general application. In contrast, no reference is made to agencies in the provision concerning the non-contractual liability of EU institutions and damages, namely Articles 268 and 340 TFEU, but according to the case law damages are available with respect to measures taken by agencies. [93]

74. In view of the abovementioned Treaty provisions, 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. Otherwise these Treaty amendments would be meaningless. Therefore, in my opinion, just as there can be no *per se* objection to agencies such as ESMA passing measures having legal effects on third parties such as investors and securities traders, nor can there be any *per se* objection to such measures on the basis of either *Meroni* or *Romano*.

75. That said, I would acknowledge that, while the Lisbon Treaty clearly maps out the scheme for judicial review of laws and decisions made by agencies, the Treaty is more enigmatic when it comes to delimiting the powers of agencies. [94] This is so because no mention is made of agencies in either Article 290 TFEU, which provides for delegation of rule-making in legislative acts to the Commission, or Article 291 TFEU which confers implementing powers on the Member States, the Commission, and in some limited circumstances the Council. Before the Lisbon Treaty two types of power were combined under the expression 'implementing powers', despite their different nature. They were the power to adopt a normative act which amended or supplemented a basic legislative act, and the power to implement or execute at the EU level an EU legislative act or some of its provisions. [95] A clear demarcation between these two phenomena was proposed by the European Convention, [96] and it was included in the Treaty establishing a Constitution for Europe. [97] This change ultimately made its way into the Lisbon Treaty in Articles 290 and 291 TFEU. [98]

76. In essence Article 290 TFEU allows for the delegation of powers for adoption of rules which supplement or amend certain non-essential elements of a legislative act. [99] These powers can be delegated to the Commission only. In other words, an Article 290 delegated act transfers to the Commission a power to make non-essential changes to specified legislative acts and/or an authority to supplement them. However, at the same time Article 290 subjects the delegation to strict conditions, in order to preserve democratic accountability in EU rule making. Pursuant to Article 290(1) the 'objectives, content, scope and duration of the delegation of power' must be 'explicitly defined' in the relevant legislative acts. [100]

93 — *Sogelma* v *EAR*, cited above in footnote 14.

94 — As noted by Hofmann and Morini, op. cit., p. 420.

95 — Piris, J-C., *The Constitution for Europe. A legal Analysis* (Cambridge University Press, Cambridge, 2006), p. 73.

96 — See the Final report of Working Group IX on Simplification of 29 November 2002, CONV 424/02, WG IX 13, p. 10-12.

97 — Treaty establishing a Constitution for Europe (OJ 2004 C 310 p. 1), Article I-36 on delegated European Regulations and Article I-37 on implementing acts. For a detailed analysis of the legal norms ultimately adopted under the Lisbon Treaty see Hofmann, H., 'Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets Reality', *European Law Journal* 15 (2009), pp. 482 to 505.

98 — See generally Schwarze, J., 'European Administrative Law in the Light of the Treaty of Lisbon', *European Public Law* 18 (2012), pp. 285 to 304, at pp. 294 to 296; Peers, S., and Costa, M., 'Accountability for Delegated and Implementing Acts after the Treaty of Lisbon', *European Law Journal* 18 (2012), pp. 427 to 460, at pp. 439 to 460. Articles 290 and 291 TFEU were preceded by Articles 145 and 155 EEC, and Articles 202 and 211 EC which, however, made no distinction between delegation of normative powers and implementation in the sense of execution.

99 — See generally on Article 290 Blumann, C., 'À la frontière de la fonction législative et de la fonction exécutive: les "nouveaux" actes délégués', *Mélanges en l'honneur de Jean Paul Jacqué* (Dalloz, Paris, 2010), pp. 127 to 144; Garzón, C., 'Les actes délégués dans le système des sources du droit de l'Union Européenne', *ERA Forum* 12 (2011), pp. 105 to 134.

100 — The Court held as follows in Case C-355/10 *Parliament* v *Council* [2012] ECR at paragraphs 64 to 66; 'According to settled case-law, the adoption of rules essential to the subject-matter envisaged is reserved to the legislature of the European Union … The essential rules governing the matter in question must be laid down in the basic legislation and may not be delegated … Thus, provisions which, in order to be adopted, require political choices falling within the responsibilities of the European Union legislature cannot be delegated … It follows from this that implementing measures cannot amend essential elements of basic legislation or supplement it by new essential elements.'

77. Article 291 TFEU on implementing powers has a different aim. First, it sets out the fundamental rule that implementation of EU law falls within the remit of Member States. Secondly, when securing implementation of legally binding EU measures in a more uniform manner than would otherwise be possible, implementing powers can be conferred on the Commission, or under certain restrictive conditions, the Council. As a consequence implementing powers can be exercised at the EU level instead of the national level. I agree, therefore, with commentators who view the objective of Article 291 TFEU implementing powers as enabling the promulgation of the normative content of the act that is being implemented, in a more detailed manner, in order to facilitate its application. This is quite different from the aim of measures passed pursuant to an Article 290 delegation, which is to discharge the EU legislature from the need to amend or supplement non-essential elements of a legal act while at the same time reserving to the legislature decision-making over the essential elements of an area. [101]

78. Granted, the borderline between supplementing a legislative act with non-essential elements and providing more detailed implementing rules is not always easy to draw. [102] However, as one philosopher has noted, 'the existence of borderline cases does not imply the absence of clear positive or negative ones'. [103]

79. Yet, contrary to arguments appearing in the United Kingdom's application for annulment, this does not mean that an Article 291 TFEU implementing measure cannot be of general application. When it is, it will amount to a regulatory act in the sense of the fourth paragraph of Article 263. [104] This conclusion necessarily follows from the fact that the Lisbon Treaty added a reference to agencies in Article 277 TFEU which, as pointed out in the written observations of the Parliament, provides for the plea of illegality with respect to acts of 'general application'. To this I would also add the reference to agencies under Article 267 validity review, which is classically concerned with normative acts.

80. Moreover, Article 291 TFEU implementing measures can take the form of individual administrative decisions. [105] However, individual administrative decisions are, self-evidently, wholly precluded under Article 290 TFEU. Therefore, Article 290 TFEU and Article 291 TFEU only overlap in that acts being materially regulatory under the fourth paragraph of Article 263 TFEU, and which have the legal form of a regulation or a decision of general application can be passed pursuant to both of these provisions.

81. From this it follows that the FEU Treaty, unlike the preceding Treaties, has introduced a sharp conceptual distinction between delegated acts and implementing acts. Article 290 TFEU delegated acts are non-legislative (regulatory) acts of general application adopted by the Commission in order to amend or supplement non-essential elements of a legislative act. Article 291 TFEU implementing acts can be either regulatory acts or individual administrative decisions. They can be adopted by the

101 — Kröll, T.: 'Delegierte Rechtsetzung und Durchführungsrechtsetzung und das institutionelle Gleichgewicht der Europäischen Union', *Zeitschrift für öffentliches Recht*, Band 66, 2011, pp. 253 to 298, p. 284.

102 — On the demarcation between Article 290 and Article 291 see Communication from the Commission to the European Parliament and the Council 'Implementation of Article 290 of the Treaty on the Functioning of the European Union' Brussels 9.12.2009 COM(2009) 673 final, point 2.2. For a summary of the Court's case law on implementing powers see points 26 to 29 of the Opinion of Advocate General Mengozzi in Case C-355/10 *European Parliament* v *Council*.

103 — Körner, S., *Experience and Conduct. A Philosophical Enquiry into Practical Thinking* (Cambridge University Press, Cambridge, 1980), p. 186.

104 — See the Opinion of Advocate General Kokott of 17 January 2013 in Case C-583/11 P *Inuit Tapiriit Kantami and Others* v *Parliament and Council*, point 56.

105 — C-122/04 *Commission* v *Parliament* [2006] ECR I-2001, paragraph 37 and case law cited. See also Article I-37(4) of the Treaty establishing a Constitution for Europe, cited above in footnote 97, pursuant to which implementing acts of the Union could have been adopted as European implementing regulations or as European implementing decisions.

Commission or the Council in order to secure uniform implementation of legally binding EU measures. Further, because of the obligatory insertion of the words 'delegated' or 'implementing' in their title, both types of executive act are now formally distinguishable from the instruments used for the adoption of legislative acts. [106]

82. Indeed, this distinction is reflected in Regulation No 236/2012 itself, where delegated powers and implementing powers are provided for in different chapters. Implementing powers are conferred on the Commission by Article 44 (in Chapter VIII) of Regulation No 236/2012, while the power to adopt delegated acts is conferred on the Commission by Article 42 (in Chapter VII) of Regulation No 236/2012. [107]

4. Constitutional consequences

83. The main constitutional concern relating to Article 290 TFEU delegated acts appertains to democratic accountability. [108] In other words, how much legislative power can be delegated and how can the exercise of such delegated powers be controlled by the legislature? In contrast, the main constitutional focus in relation to Article 291 TFEU implementing acts relates to respect for the primary competence of the Member States with respect to implementation of EU law, and the institutional balance between the Council and the Commission when they assume implementing roles.

84. In my opinion, as has been pointed out in the written observations of the Commission, only the Commission can be the recipient of Article 290 TFEU delegated powers. This means that, in this context the *Romano* prohibition on agencies being conferred with legislative or quasi-legislative powers remains good law both in the sense that the EU legislature cannot delegate its legislative powers to an agency, and that a sub-delegation by the Commission of the powers delegated to it under Article 290 TFEU to an agency would be unlawful. [109]

85. Agencies necessarily have to be precluded from Article 290 delegations of power because the exercise of such powers changes the normative content of legislative acts, albeit with respect to their non-essential elements. The exclusion of agencies and all other bodies external to the Commission also follows from the wording of Article 290 TFEU. Moreover, the mechanism relating to the conditions to which the legislature may subject the delegation under Article 290(2) TFEU clearly excludes agencies, because they cannot participate in the system of inter-institutional checks and balances. The principle of democracy, enshrined in Articles 2 and 10 TEU, necessarily dictates that any power to adopt an EU measure that can alter the non-essential elements of an EU legislative act must be exercised by an EU institution that is democratically accountable, in other words by the Commission, which is ultimately accountable to the European Parliament. [110]

106 — Lenaerts and van Nuffel, op. cit., paragraph 17-006.

107 — See also recitals 42 and 43 of Regulation No 236/2012. It is interesting to note that the Commission has expressed the view that it has 'serious doubts whether the restrictions on its role when adopting delegated acts and implementing measures [in the financial services sector] are in line with Articles 290 and 291 TFEU'. See 'Commission Statements', Addendum to 'I/A' Item Note of the Agenda of the Council of the European Union, 10 November 2011, Council Document 15649/10 Add 1.

108 — For examples of cases in which the Court has decided questions of institutional balance and authority by reference to protection of the principle of democracy see Case C-138/79 *Roquette Frères* v *Council* [1980] ECR 3333; Case 294/83 *Les Verts* v *Parliament* [1986] ECR 1339; Case C-70/88 *Parliament* v *Council* [1990] ECR I-2041; *titanium dioxide*, cited above in footnote 80. Before the Court of First Instance see Case T-135/96 *UEAPME* v *Council* [1998] ECR II-2335.

109 — It has also been observed that comitology procedures are not pertinent to the exercise of Article 290 TFEU powers. See Piris, J.C., 'Les articles 290 et 291 du TFUE: Les compétences "déléguées" ou "conférées" à la Commission par le législateur européen. Les actes délégués et les actes d'exécution', *Publications de Congrès* FIDE XXIII 2008-2009, pp. 247 to 251.

110 — See Article 17(8) TEU.

86. In contrast, a similar restriction does not apply to Article 291 TFEU implementing powers. 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 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.

87. This course of action might be particularly appropriate when complex technical assessments are required in order to implement an EU measure. As pointed out in the written observations of the Parliament, a conferral of such powers on agencies has always derogated from general principles on implementation in the Treaty. This is a subject matter in which agencies have long maintained an important function, and express reference in the Lisbon Treaty to its abolition would have been required to change this. Further, as I have already explained, several Treaty provisions now implicitly acknowledge the potential for agencies to take legally binding decisions with effects on third parties. For example, it is difficult to envisage what the decisions of bodies, offices or agencies referred to in point (b) of the first paragraph of Article 267 TFEU could be if the legislator could not vest these entities with implementing powers.

88. Thus, as is pointed out in the written observations of the Commission, the *Meroni* case law remains pertinent in the context of delegation of implementing powers to an agency. More specifically, *Meroni* remains relevant in that (i) powers cannot be delegated to an agency that are different from the implementing powers the EU legislature has conferred on the delegating authority, be it the Commission or the Council, and (ii) the powers delegated must be sufficiently well defined so as to preclude arbitrary exercise of power. In other words, the delegating act must supply sufficiently clear criteria so that the implementing power is amenable to judicial review. The delegating authority 'must take an express decision transferring them and the delegation can relate only to clearly defined executive powers'. [111]

5. Application of these general principles to the case to hand

89. Of course, the fundamental constitutional principle, now expressed in the second subparagraph of Article 290(1) TFEU, reserving the essential elements of a field to a legislative act, restricts not only the scope of delegated acts but of implementing acts as well. This principle has clearly been observed in Article 28 of Regulation No 236/2012. Otherwise Article 290 TFEU is irrelevant to assessing the compatibility with EU constitutional law of ESMA's powers under Article 28 of Regulation No 236/2012. As was pointed out in the written observations of the Commission, Article 28 of Regulation No 236/2012 does not empower ESMA to supplement or amend the provisions thereof. But if it did, for the reasons I have explained above, the conferral of powers of this kind on ESMA, as an agency, would necessarily be unlawful.

90. However, nor does Article 28 of Regulation No 236/2012 entail a sub-delegation to an agency of Article 291 TFEU implementing powers that have previously been conferred on the Commission or the Council. In other words, ESMA's powers under Article 28 of Regulation No 236/2012 have not been conferred on it by an Article 291(4) 'implementing' act that was passed by the Commission or the Council, but directly from the EU legislature through an Article 289(3) TFEU legislative act.

91. This distinction is important because conferral of power by the legislature cannot, in and of itself, be subject to the restrictions set out in *Meroni*. Indeed, the EU legislature is not acting as a 'delegating authority' in the sense of the *Meroni* judgment when it confers implementing powers on institutions, agents, or other bodies of the Union, but a constitutional actor exercising its own legislative

111 — Case C-301/02 P *Tralli* v *European Central Bank* [2005] ECR I-4071, paragraph 43, citing *Meroni*.

competence, as conferred on it by the higher constitutional charter, i.e. the Lisbon Treaty. The executive and judicial powers that the EU legislature can confer on institutions or bodies are qualitatively different from its own powers. The European Parliament and the Council may, for example, pursuant to the first paragraph of Article 257 TFEU establish specialised courts. However, it goes without saying that under no circumstances could they themselves be considered as having judicial powers that they could then delegate to other bodies. All that is required is that the specialised courts are established on an appropriate legal basis as provided in the Lisbon Treaty.

92. However, in my opinion, the principle first expressed in the *Meroni* judgment appertaining to the prohibition on inordinately broad and/or arbitrary implementing powers remains relevant to the assessment of the legality under EU constitutional law of Article 28 of Regulation No 236/2012. The European Union legislature may not vest ESMA with an authority to pass implementing measures that would breach this principle because an implementing power will be validly conferred only if it is sufficiently specific, that is to say it must clearly specify the bounds of the power conferred. Otherwise the institutional balance and the possibility of effective judicial control of the use of implementing powers would not be safeguarded. [112]

93. In addition, ESMA cannot be empowered to take policy decisions. [113] For example, a legislative provision empowering an EU level implementing authority to prohibit short selling 'where necessary', would represent an unconstitutional conferral of excessive implementing powers, irrespective of whether they were conferred on the Commission or an agency. [114] This reflects the general principle of the primary role of the democratic legislature, recognised in the constitutions of several Member States, and in Article 290 TFEU, to the effect that legislation may not be so vague or open-ended that essential policy choices or value judgements remain to be decided at the implementation phase.

94. I agree with arguments made by the Government of France at the hearing that the action ESMA is both empowered and obliged to adopt under Article 28 of Regulation No 236/2012 consists of implementation (execution). This conclusion is not affected by the fact that, in applying Article 28 of Regulation No 236/2012, ESMA may be required to make complex factual assessments or to apply semantically vague terms such as 'seriously', 'orderly' and 'integrity of financial markets' as provided in Article 24(3) of the Commission Delegated Regulation No 918/2012. The question is whether Article 28 of Regulation No 236/2012 confers sufficiently clearly defined executive powers. As I have foreshadowed at points 41 to 43 above, the exercise of these powers have been vested with precision and definition in several different ways.

95. Article 28 of Regulation No 236/2012 imposes an obligation on ESMA to take certain measures under certain conditions that are listed in that article, the meaning of which is further elaborated in Article 24(3) of Commission Delegated Regulation No 918/2012. Moreover, Article 28 of Regulation No 236/2012 expressly defines the content of the measures, the procedure for their adoption, and their temporal effect. The addressees of such measures are either natural or legal persons having certain net short positions in a specific financial instrument or financial instruments, or who intend to engage in short selling of a financial instrument.

112 — Case 291/86 *Central-Import Münster* [1988] ECR I-3679, paragraph 13; *Tralli*, paragraph 43.

113 — Case C-355/10 *Parliament* v *Council*, paragraph 65, where the Court held that 'provisions which, in order to be adopted, require political choices falling within the responsibilities of the European Union legislature cannot be delegated'. Unlike the Advocate General, the Court made a link between elements that are essential and those entailing policy choices. See Chamon, M., 'How the concept of essential elements of a legislative act continues to elude the Court', *Common Market Law Review* 50 (2013), pp. 849 to 860, p. 854.

114 — In fact, nor can the execution of an EU programme be delegated to an executive agency where this would involve 'discretionary powers in translating political choices into action'. See recital 5 to Regulation No 58/2003 and Article 6(1) of Regulation No 58/2003.

96. Hence, under Article 28 of Regulation No 236/2012 ESMA is obliged to take action, under limited circumstances, in relation to certain financial instruments or classes of financial instruments, as the case may be. The measures taken under Article 28 of Regulation No 236/2012 would normally concern an abstract category of persons and therefore, once exercised, would amount to an administrative decision of general application.

97. Regulation No 236/2012, and more specifically Article 28 thereof, results from a basic policy choice made by the legislator to the effect that under normal conditions short selling is useful but in defined exceptional circumstances it can pose a threat to the proper functioning of the internal market. The further policy choice has been made that this threat needs to be addressed, if necessary by action taken at the EU level. Hence, the essential value judgements underpinning Article 28 of Regulation No 236/2012 have been made by the EU legislature and have not been left to ESMA.

98. Further when the exceptional situation arises, pursuant to Article 28 of Regulation No 236/2012 and Article 24(3) of Commission Delegated Regulation No 918/2012, ESMA has no discretion as to whether or not to act. ESMA is obliged to take action.

99. Finally, while the application of the criteria and terms of Article 28 of Regulation No 236/2012 require complex assessments of facts, ESMA was established for precisely this purpose. ESMA is a compound structure that brings together national expert authorities who are obliged to consult the ESRB. In my opinion, the need to make such technically difficult assessments on an objective and non-political basis is an argument in support of conferral of the powers concerned on an expert agency rather than on the Commission.

100. Contrary to the arguments presented by the United Kingdom at the hearing, the possibility of disagreement between experts on a subject matter does not necessarily imply the existence of subjective judgements or untrammelled discretion in any legally relevant sense. It is not uncommon for experts, and indeed judges, to disagree. Objectivity is in fact dependent on procedural guarantees ensuring that decision makers base their assessments on a broad factual basis and sound methodology, after having consulted the relevant actors. These requirements are reflected in Article 28 of Regulation No 236/2012.

101. In my opinion, if the Court were to consider it necessary to rule on the compliance of Article 28 of Regulation No 236/2012 with the constitutional law rules on conferral of authority directly by the EU legislature to an agency (and in this case ESMA), it should find that the requirements set out in Article 291 TFEU and general constitutional principles governing conferral of implementing powers have been fully respected.

IV – Conclusion

102. Therefore, while I conclude that the United Kingdom should be granted the first of the orders it seeks, and that Article 28 of Regulation No 236/2012 should be annulled because Article 114 TFEU was not an appropriate legal basis, the second order sought by the United Kingdom concerning costs should be refused. The United Kingdom has failed on the first three grounds it has raised, to the effect that the powers accorded to ESMA under Article 28 of Regulation No 236/2012 breached the *Romano* and *Meroni* case law. Thus, pursuant to Article 138(3) of the Court's Rules of Procedure, all parties should bear their own costs.

103. I propose therefore that the Court should annul Article 28 of 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, and that all the parties should bear their own costs.