LUISS

CROIE Centro di ricerca sulle Organizzazioni Internazionali ed Europee

CROIE Working Paper

The EU Regulation on Short Selling

CROIE-WP/1/2016
May 2016

Alberto Monteverdi

The EU Regulation on Short Selling

Alberto Monteverdi

CROIE Working Paper 1/2016

Abstract

At the height of the financial crisis, in September 2008, short selling erupted on the European Union's agenda when a number of Member States imposed restrictions of varying types on short sales in an effort to shore up financial stability. However, measures adopted by Member States were divergent as the Union lacked a specific regulatory framework for dealing with short selling issues. In autumn 2012, in order to ensure the proper functioning of the financial markets and greater coordination and consistency between Member States where measures have to be taken in exceptional circumstances, the EU legislator adopted a Regulation aimed at harmonizing the rules on short selling and certain aspects of credit default swaps. The Regulation introduced a regime based on four main pillars: a) restrictions on uncovered transactions; b) transparency obligations; c) exemptions from restrictions on uncovered transactions and transparency obligations; d) intervention powers conferred upon national competent authorities and ESMA in exceptional circumstances. The adoption of the EU short selling Regulation has had positive impact both on market conditions and on the activities of national competent authorities.

Keywords

Financial Crisis, European Union, Regulation, Short Selling, Credit Default Swaps, ESMA, CONSOB

Table of Contents

I. Introduction

II. The legal Framework on Short Selling: Scope, Structure, and Objectives

III. Restrictions on Uncovered Transactions

IV. Transparency Obligations

V. Exemptions from Restrictions and Obligations

VI. Intervention Powers in Exceptional Circumstances

VII. The ESMA Case

VIII. Impact of the Short Selling Regulation

IX. EU Regulation and Consob Resolutions on Short Selling

X. Conclusion

References

I. Introduction

Short selling is the sale of a security that the seller does not own, with the intention of buying back an identical security at a later point in time to be able to deliver the security. There are two types of short selling: "covered", where the seller has made arrangements to borrow the securities before the sale, and "uncovered" (or "naked"), where the seller has not borrowed the securities when the short sale occurs. Short selling plays an important role in financial markets and is undertaken by a variety of market participants for a variety of different reasons. Short sales serve a number of purposes, including which respect to speculation, hedging and risk management against price decreases in long positions, arbitrage, and market making. In addition to short selling on cash markets, a net short position can also be achieved by the use of credit default swaps (CDSs), a derivative which acts as a form of insurance against the risk of credit default of a corporate or a government. In return for an annual premium, the buyer of a CDS is protected against the risk of default of a given reference entity by the seller. Buying a CDS without holding an underlying insurable interest ("naked CDS") is economically equivalent to short selling a bond, as the buyer benefits from a rising credit risk (i.e. if the price of CDS increases)[1].

It has long been assumed that short sales support market liquidity through the trades in which the short seller engages, and that they support efficient price formation by correcting over-pricing. However, a number of market efficiency risks have also been associated with short sales. In some situations short sales used in an abusive fashion to drive down the price of financial instruments can contribute to disorderly markets and, especially in extreme market conditions, can amplify price falls and have an adverse effect on financial stability. They can also result in lack of transparency and information asymmetries. Moreover, in the case of uncovered short sales there may be an increased risk of settlement failures (the risk that the short seller fails to deliver the shares to the buyer by the settlement date), and increased price volatility[2].

Short selling erupted on to the European Union (EU)'s agenda in September 2008 when a number of Member States' competent authorities adopted emergency measures to restrict or ban short selling in some securities in an effort to support financial stability[3]. In spring 2010 restrictions were also imposed on sovereign CDSs to address tensions on euro denominated sovereign bond markets[4]. Member States acted due to concerns that at the time of considerable financial instability, short selling could aggravate the downward spiral in the prices of shares or bonds, in a way which could ultimately threaten their viability and create systemic risks. However, the measures adopted by Member States were divergent as the European Union lacked a

[1] European Commission (2010d: 2).
[2] European Commission (2010d: 3).
[3] In autumn 2008, temporary prohibitions on short sales in shares were also adopted in major third countries, such as the U.S.A., the U.K., Australia and Japan.
[4] Moloney N. (2014: 543-545).

specific common regulatory framework for dealing with short selling and sovereign debt CDSs issues.
In that febrile environment, it became clear that to ensure the proper functioning of the (internal) financial market and to avoid regulatory arbitrage it was appropriate to lay down a common regulatory framework in order to harmonize rules and powers regarding short selling and CDSs and to ensure coordination and consistency between Member States where measures have to be taken in exceptional circumstances.
In June 2010 the European Commission launched a public consultation on short selling[5], and in September 2010 it published a proposal for a *Regulation on short selling and certain aspects of Credit Default Swaps*[6]. After tough negotiations between the European Parliament (EP) and the Council, and among member States within the Council, a joint text was finally agreed in November 2011[7]. The Regulation was adopted by the European Parliament and the Council in March 2012 (Regulation No. 236/2012) on the legal basis of Article 114 of the Treaty on the Functioning of the European Union (TFEU). In the following months, a number of delegated and implementing acts were adopted by the European Commission in order to define technical standards supplementing the Regulation No. 236/2012, as well as the European Securities and Markets Authority (ESMA) adopted *Questions & Answers* document and Guidelines to clarify the regime and to drive a consistent implementation. At the same time, at national level, Member States amended their domestic legislations to make them consistent with the new EU regime, notably in order to identify the national authorities responsible for implementing the measures and exercising the powers conferred by the EU Regulation. The new regime as a whole entered into force in November 2012.
The aim of this paper is to analyze the main features of the EU short selling Regulation. The structure of the paper is as follows. Section 2 analyzes scope, structure and objectives of the EU legal framework on short selling. Sections from 3 to 6 are devoted to discuss the four main "pillars" on which the 2012 Regulation is based: restrictions on uncovered transactions (Section 3); transparency obligations (Section 4); exemptions from restrictions and obligations (Section 5); intervention powers in exceptional circumstances (Section 6). Section 7 addresses the renowned "ESMA case" through which the European Court of Justice (ECJ) stated the consistency of the ESMA intervention powers under the short selling Regulation with the EU treaties and the so-called "Meroni Doctrine". Section 8 deals with the main findings about the impact of the EU Regulation on market conditions published by ESMA in 2013. Finally, Section 9 analyzes how the entry into force of the EU short selling Regulation has impacted on the Italian legal framework and on the activities of Consob.

[5] European Commission (2010a).
[6] European Commission (2010c).
[7] See: Moloney N. (2014: 545-547).

II. The Legal Framework on Short Selling: Scope, Structure, and Objectives

The short selling regime takes form of a Regulation in order to ensure uniform application and allow conferral of powers upon ESMA. The Regulation No. 236/2012 is designed to lay down a common regulatory framework with regard to the requirements and powers relating short selling and credit default swaps and to ensure greater coordination and consistency between Member States where measures have to be taken in exceptional circumstances[8]. The objectives of the Regulation are to: a) ensure Member States have the power to intervene in exceptional circumstances to reduce systemic risks and risks to financial stability and market integrity originating from short selling and CDSs; b) facilitate coordination between Member States and ESMA in emergency situations; c) increase transparency on the net short positions held by investors in certain securities; d) reduce settlement risks linked with naked short selling; e) reduce the risks to the stability of sovereign debt markets posed by uncovered CDSs[9].

The scope of the 2012 Regulation is very wide: the perimeter is set by the range of instruments subject to the Regulation, not by the market participants who, by holding positions in these instruments, become indirectly subject to the Regulation. Accordingly, the Regulation has wide extraterritorial reach beyond the EU, where short selling activities relate in-scope instruments.

Article 1 of the Regulation No. 236/2012 defines the scope by listing the financial instruments to which the provisions of the Regulation apply. For financial instruments referred to in Article 1a of the Regulation (MIFID II/MIFIR financial instruments), the only decisive criterion is the admission of the instrument in question to trading on a trading venue in the Union (except where the principal trading venue of that instrument is located in a third country), including when they are traded outside a trading venue. For debt instruments referred to in Article 1c (sovereign debt instruments), the main defining element is that these financial instruments are issued by a Member State or by the Union. The same criterion applies to sovereign CDSs related to debt instruments issued by a Member State or by the Union. Neither the domicile or establishment of the person entering into transaction on these financial instruments nor the place where these transactions take place, including in third countries, are of any relevance in this regard[10]. The range of emergency powers conferred upon national competent authorities (NCAs) and ESMA in exceptional circumstances (according to Articles 18, 20, 23-30) apply to financial instruments generally, regardless of where they are admitted to trading (Article 1.2).

Regulation No. 236/2012 generally operates at a relatively high level of generality. It articulates the difficult political compromise on the extent to which

[8] Regulation (EU) No. 236/2012, Preamble, point 2.
[9] European Commission (2010b: 2).
[10] ESMA (2013a).

short sales of shares and sovereign securities, and transactions in sovereign CDSs should be restricted. However, this compromise is based in part on further calibration and amplification of the regime through extensive administrative rules which clarify technical details as well as address the practical implications for risk management and for market liquidity and efficiency. The administrative rulebook reflects the good working relationship between the Commission and ESMA, as well as the European Commission willingness to rely on ESMA's technical expertise to draw regulatory and implementing technical standards process for adopting such rules[11].

The European Commission under Articles 290 and 291 TFEU adopted, on proposal by ESMA, four regulatory and implementing technical standards, which supplement the Regulation No. 236/2012:

- Commission Delegated Regulation No. 826/2012 of 29 June 2012 supplementing Regulation No. 236/2012 with regard to regulatory technical standards on notification and disclosure requirements with regard to net short positions, the details of the information to be provided to the ESMA in relation to net short positions and the method for calculating turnover to determine exempted shares;
- Commission implementing Regulation 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 ESMA 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 No. 236/2012.
- Commission Delegated Regulation No. 918/2012 of 5 July 2012 supplementing Regulation No. 236/2012 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.
- Commission Delegated Regulation No. 919/2012 of 5 July 2012 supplementing Regulation No. 236/2012 with regard to regulatory technical standards for the method of calculation of the fall in value for liquid shares and other financial instruments.

Furthermore, beyond the legislation, ESMA plays an active role in building a common supervisory culture by promoting common supervisory approaches and practices among national authorities. To this end, in September 2012 ESMA adopted an extensive *Questions & Answers* document that is regularly updated and expanded as and when appropriate[12]; and in February 2013, in accordance with Article 16 of its establishing Regulation (Regulation No. 1095/2010), ESMA published Guidelines "on the exemption for market

[11] Moloney N. (2014: 549-550).
[12] ESMA (2012); ESMA (2013a).

making activities and primary market operations under Regulation No. 236/2012"[13].

Overall, the EU legal framework on short selling is based on four main pillars: a) restrictions on uncovered transactions; b) transparency obligations; c) exemptions from restrictions on uncovered transactions and transparency obligations; d) intervention powers conferred upon NCAs and ESMA in exceptional circumstances. Each of these pillars is briefly discussed in the following sections.

III. Restrictions on Uncovered Transactions

At the core of the 2012 Regulation are the restrictions on uncovered short sales in shares (Article 12) and in sovereign debt (Article 13) and on transactions in uncovered sovereign CDSs (Article 14). The conditions which govern whether transactions are "covered", and therefore outside of the prohibition, were subject of intense negotiations and the resulting regime is complex and technical, as it is design to balance between the need to protect market hedging and risk management practices, and the need to reflect the strong political concern to prohibit uncovered short sales because considered a speculative instrument.

- Shares. Under Article 12 "a natural or legal person may enter into a short sale of a share admitted to trading on a trading venue only where one of the following conditions is fulfilled: a) the natural or legal person has borrowed the share or has made alternative provisions resulting in a similar legal effect; b) the natural or legal person has entered into an agreement to borrow the share or has another absolutely enforceable claim under contract or property law to be transferred ownership of a corresponding number of securities of the same class so that settlement can be effected when it is due; c) the natural or legal person has an arrangement with a third party under which that third party has confirmed that the share has been located and has taken measures vis-à-vis third parties necessary for the natural or legal person to have a reasonable expectation that settlement can be effected when it is due". The Commission Implementing Regulation No. 827/2012 determines the types of agreements and claims which can be employed (futures and swaps; options; repurchase agreements, standing agreements and rolling facilities; and other claims and arrangements) and the conditions which these agreements must meet, as well as it specifies the requirements for the "locate rule".
- Sovereign debt. Similar rules govern whether a short sale in sovereign securities is covered, and so permitted (Article 13). The conditions to be fulfilled are the same as those which apply to shares, however those restrictions "do not apply if the transaction serves to hedge a long position in debt instruments of an issuer, the pricing of which has a high correlation with the pricing of the given sovereign debt" (Article 13, par.2). In addition, the requirement for short sale to be covered can be temporally

[13] ESMA (2013b).

suspended by NCAs, for an initial period not exceeding 6 months (renewable for another six months) where the liquidity of sovereign debt falls below the thresholds specified by the Commission Delegated Regulation No. 918/2012. Before suspending those restrictions, the national competent authority must notify ESMA about the proposed suspension and ESMA must, within 24 hours from the notification, issue an opinion on the suspension. These provisions reflect the political sensitivities associated with restrictions on sovereign debt securities and in particular the fear that restrictions on sovereign debt market might impair the Member States' management of budget deficits[14].

- Sovereign CDS. Under Article 14 "a natural or legal person may enter into sovereign credit default swap transactions only where that transaction does not lead to an uncovered position in a sovereign credit default swap". Whether or not a sovereign CDS is uncovered and so prohibited is a function of whether or not it is deployed for the hedging purposes which Article 4 of the Regulation permits. More specifically, two forms of hedging are permitted: a) against the risk of default of the issuer where the natural or legal person has a long position in the sovereign debt of that issuer to which the sovereign CDS relates; b) against the risk of a decline of the value of the sovereign debt where the person holds assets or is subject to liabilities, including but not limited to financial contracts, a portfolio of assets or financial obligations the value of which is correlated to the value of the sovereign debt.

  As with the restriction on uncovered sovereign debt short sales, the prohibition on uncovered sovereign debt CDSs may be suspended in exceptional circumstances, which are designed to consider situations in which the Member States' ability to raise funds might be compromised. Any such decision by a national competent authority shall be based on specified indicators: a) a high or rising interest rate on the sovereign debt; b) a widening of interest rate spreads on the sovereign debt compared to the sovereign debt of other issuers; c) a widening of the sovereign CDS spreads compared to the own curve and compared to other sovereign issuers; d) the timeliness of the return of the price of the sovereign debt to its original equilibrium after a large trade; e) the amounts of sovereign debt that can be traded. A suspension shall be valid for an initial period not exceeding 12 months, renewable for periods not exceeding 6 months if the grounds for the suspension continue to apply. Before suspending restrictions the NCA concerned must notify ESMA of the proposed suspension and the grounds on which it is based. ESMA must, within 24 hours from the notification, issue an opinion on the intended suspension.

IV. Transparency Obligations

The restrictions on uncovered short sales are accompanied by notification and disclosure requirements relating the net short positions. These obliga-

[14] Moloney N. (2014: 557).

tions are design to enhance NCA's ability to monitor short selling activities for potential systemic risk or abusive conduct and to enhance pricing mechanisms by providing disclosure to the market on short positions.[15] Reporting obligation concern both net short positions in shares and net short positions in debt issued by a Member State or by other sovereign issuers such as the European Investment Bank (EIB).

In case of shares, a short position is one which results from either a short sale of a share issued by a company or from a transaction that creates or relates a financial instrument other than shares where the effect of the transaction is to confer a financial advantage upon the person entering into that transaction in the event of a decrease in the price of the share (Article 1, par. 1). A long position, conversely, originates from holding a share issued by a company or from entering into a transaction that creates or relates a financial instrument other than shares where the effect of the transaction is to confer a financial advantage upon the person entering into that transaction in the event of an increase in the price of the share (Article 1, par. 2).

For net short position in shares (i.e. the position remaining after deducing the long position in relation to the issued share capital of the company concerned) two relevant reporting thresholds apply: one for notification to national competent authority and one for public disclosure. A person who has a net short position in relation to the issued share capital of a company that has shares admitted to trading on a trading venue must notify the NCA when the position reaches 0,2% of the issued share capital of the company concerned and each 0,1% above that (Article 5). Public disclosure of individual net short positions in shares is required where the position is equal to 0.5% of the issued share capital of the company concerned and each 0.1% above that (Article 6). Any notification or disclosure must set out details of the identity of the person who holds the relevant position, the size of the net short position, the issuer in relation to which the position is held and the date on which the relevant position was created, changed or ceased to be held. The public disclosure must be made in a manner ensuring fast access to information on a non-discriminatory basis and that information shall be posted on a website operated or supervised by the NCA. The NCA must communicate the address of that website to ESMA, which, in turn, shall put a link on its own website (Article 9). ESMA acts basically as a central repository for reporting on net short positions.

Article 7 governs reporting obligation on net short position in sovereign debt, i.e. a position remaining after deducing any long position that a person holds in relation to an issued sovereign debt from any short position held in relation to the same government debt. Given their complexity, the relevant thresholds were not set in 2012 short selling Regulation, but were specified in the 2012 Commission Delegated Regulation No. 918/2012 (Article 21). The Commission Regulation specifies that initial threshold categories are: a) 0.1% applicable where the total amount of outstanding issued sovereign debt

[15] European Commission (2010d: 3).

is between 0 and 500 billion euros; b) 0.5% applicable where the total amount of outstanding issued sovereign debt is above 500 billion euros or where there is a liquid futures market for the particular sovereign debt. The additional incremental levels are set at 50% of the initial thresholds (i.e. 0.05% when outstanding issued sovereign debt is below 500 billion euros and 0.25% for outstanding issued sovereign debt above 500 billion euros). The reporting thresholds are monetary amounts fixed by applying the percentage thresholds to the outstanding sovereign debt of the issuer. They are revised and updated quarterly to reflect changes in the total amount of outstanding sovereign debt of each Member State. According to the Commission Delegated Regulation, ESMA has placed Member States' sovereign debt in one of these baskets (0-500 billion; +500 billion) and has published online the particular monetary amounts, in relation to Member States' debt, to which the reporting obligation attaches[16]. The method of notification is the same used for net short positions in shares. However, for net short position in sovereign debt, public disclosure is not required given the potential for damage to liquidity, particularly in markets under liquidity pressure.

V. Exemptions from Restrictions and Obligations

Two exemptions apply to the 2012 short selling Regulation.

The first exemption restricts the extraterritorial reach of the Regulation. The notification and disclosure obligations regarding net short positions in shares and the restrictions on uncovered short sales in shares do not apply to shares of a company admitted to trading on a trading venue in the Union where the "principal venue", i.e. the venue for the trading of that share with the highest turnover, is located in a third country (Article 16). Determining whether the principal trading venue for a share is outside the EU is responsibility of the NCA and it is carried out on a two-yearly basis in accordance with the calculation rules stated by the Commission Delegated Regulation No. 826/2012 (for the calculation of turnover) and by the Commission Implementing Regulation No. 827/2012 (for the timing of the calculation). A list of exempted shares is maintained and published online by ESMA[17].

The second type of exemption excludes market-making activities and primary market operations from the reach of the Regulation No. 236/2012. Market-making activities are exempted from the notification and public disclosure obligations relating net short positions, and from the prohibitions on uncovered transactions (Article 17), in order to ensure that market liquidity, and the related ability of market makers to take short positions, is not prejudiced[18]. With regard to sovereign debt, authorized primary dealers are exempted from reporting obligations in relation to net short positions and from

[16] Available online.
[17] Available online.
[18] "Market maker" is defined as a person who holds himself out on the financial markets on a continuous basis as being willing to deal on own account by buying and selling financial instruments against his proprietary capital at prices defined by him (Article 4.1(8) of the Directive 2004/39/EC).

the prohibition on uncovered short sales of sovereign debt and on uncovered sovereign CDSs[19]. These exemptions must apply only where the market maker or the authorized primary dealer concerned has notified the competent authority of its home Member State that it intends to make use of the exemptions. The notification must be made not less than 30 days before the person first intends to use the exemptions. ESMA publishes and keeps up to date on its website a list of maker makers and authorized primary dealers who are using the exemptions[20].

In order to foster supervisory convergence in the field and agree on a common approach towards application of the exemption, ESMA has launched on its own initiative, under Article 16 of its establishing Regulation, *Guidelines on the exemption for market making activities and primary market operations*[21]. ESMA's *Guidelines* clarify: a) the scope of the exemption for market making activities including the required link between the relevant financial instrument, the trading venue or "equivalent" third country venue and the membership of the notifying entity; b) how the relevant competent authority for notification is defined, in particular for notifying entities from third countries; c) the process of notification of the intent to use the exemption and its content, including common templates for notification as well as the approach to processing notifications received by relevant competent authorities and the standards that competent authorities should take into account when assessing the notifications received; d) transitional measures regarding notification of intention to use the exemption prior to the application of the *Guidelines*.

NCAs and financial market participants must make every effort to comply with the ESMA's *Guidelines*. Moreover, each national competent authority must confirm whether it complies or intends to comply with the *Guidelines* and in the event it does not comply or does not intend to comply it must inform ESMA, pointing to the reasons for non-compliance (Article 16, par. 3 of ESMA Regulation).

VI. Intervention Powers in Exceptional Circumstances

The short selling Regulation confers upon NCAs and ESMA special intervention powers in case of exceptional circumstances and emergency situations.

The additional and exceptional NCAs intervention powers are triggered when "a) there are adverse events or developments which constitute a serious threat to financial stability or to market confidence in the Member State concerned or in one or more other Member States; and b) the measure is

[19] "Authorized primary dealer" is defined as a person who has signed an agreement with a sovereign issuer or who has been formally recognized as a primary dealer by or on behalf of a sovereign issuer and who, in accordance with that agreement or recognition, has committed to dealing as principal in connection with primary and secondary market operations relating to debt issued by that issuer (Article 2.1(n) of the Regulation No. 236/2012).

[20] Available online.

[21] ESMA (2013b).

necessary to address the threat and will not have a detrimental effect on the efficiency of financial markets which is disproportionate to its benefits". When these two conditions are satisfied, the NCA may: 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 it or to disclose to the public details of the position when the latter reaches or falls below a notification threshold fixed by the competent authority (Article 18); b) require natural or legal persons engaged in the lending of a specific financial instrument or class of financial instruments to notify any significant change in the fees requested for such lending (Article 19); c) prohibit or impose conditions relating to natural or legal persons entering into a short sale, or into a transaction other than a short sale which creates, or relates to, a financial instrument and the effect of that transaction is to confer a financial advantage upon the person in the event of a decrease in the price of another financial instrument (Article 20); d) restrict the ability of natural or legal persons to enter into sovereign credit default swap transactions or limit the value of sovereign credit default swap positions that those persons are permitted to enter into (Article 21). All these measures are valid for an initial period not exceeding 3 months, which may be extended by further 3 months period if the grounds for taking these measures continue to apply.

Moreover, a specific "circuit-breaker" power, which is not subject to the previous two conditions, is conferred upon NCAs in case of "a significant fall in price" during a single trading day of a financial instrument on a trading venue (Article 23). In such a situation, the competent authority of the home Member State for that venue may temporary prohibit or restrict persons from engaging in short selling of the financial instrument concerned on that trading venue or otherwise limit transactions in that financial instrument on that trading venue in order to prevent a disorderly decline in the price of the financial instrument. The restriction can initially be imposed only in the trading day following the day on which the fall in price occurred, but it can be extended for two days more where a further significant fall in value has occurred.

The extent of the falls in value which trigger this power are specified by the Regulation No. 236/2012 and its supporting administrative rules. The Regulation No. 236/2012 (Article 23, par. 5) states that a fall in value of 10% or more in a single trading amounts to a "significant fall in price" for a liquid share. The required fall in value for illiquid shares and other classes of financial instruments is governed by the Commission Delegated Regulation No. 918/2012 (Article 23).

Before imposing any measure under Articles 18-21 or Article 23, a NCA must notify ESMA of the measure it proposes 24 hours in advance. ESMA, within 24 hours, issues an opinion on whether it considers the measure appropriate and proportionate to address the threat. The opinion is published on the ESMA website. Where a NCA takes measures contrary to the ESMA opinion, it must publish on its website a notice fully explaining its reasons for doing so. Where such a situation originates, ESMA may consider wheth-

er it is an appropriate case for the use of intervention powers under Article 28.

Under Article 28 (exceptional circumstances) ESMA may either: a) require natural and legal persons to notify a competent authority or to disclose to the public details of their net short positions in a specific financial instrument; b) or prohibit or impose conditions on the entry by the person into a short sale or a transaction which creates, or relates to, a financial instrument (other than sovereign debt or derivatives related to sovereign debt) where the effect is to confer a financial advantage upon such a person in the event of a decrease in the price of another financial instrument. These measures, which are valid for three months in first instance (renewable for another three months), prevail over any previous measure taken by a NCA under Articles 18-21 and 23. However, before ESMA can act several stringent conditions must be met.

Precisely, ESMA must take such measures only in case 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 and there are cross-border implications", and only if no national competent authority has taken measures to address the threat or has taken measures that do not adequately address the threat. Moreover, before taking action, ESMA must take into account the extent to which the measure: a) significantly addresses the threat; b) does not create a risk of regulatory arbitrage; c) does not create detrimental effect on the efficiency of financial markets that is disproportionate to the benefits of the measure. In addition, a number of procedural notification requirements must also be met. Before imposing any measure, ESMA must: a) consult the European Systemic Risk Board (ESRB); b) notify national competent authorities concerned the measure it proposes to take at least 24 hours in advance.

VII. The ESMA Case

ESMA intervention powers were a controversial issue during the negotiations within the Council on the short selling Regulation[22]. Some Member States were also of the view that ESMA powers under Article 28 were potentially in breach of the EU treaties and the European Court of Justice's jurisprudence. For this reason, in June 2012 the United Kingdom launched a challenge to Article 28 before the ECJ against the European Parliament and the Council, questioning the legality of that Article which allows ESMA to take *ad hoc* measures limiting short selling when required by "exceptional circumstances"[23]. The UK's plea was mainly grounded on the alleged violation of the *Meroni*[24] and *Romano*[25] judgments[26].

[22] Moloney N. (2014: 568-569).
[23] European Court of Justice (2014).
[24] European Court of Justice (1958).
[25] European Court of Justice (1981).
[26] More precisely, the UK employed four arguments in arguing annulment of Article 28 before the ECJ. In its first plea in law, it recalled the principle established in *Meroni*, and in its

According to *Meroni*, EU Member States have delegated powers to the Union level and one cannot presume that any such powers can, in turn, be delegated to administrative bodies without an explicit decision. If powers are delegated, they cannot be "discretionary power implying a wide margin of discretion" which may make possible the "execution of actual economic policy". The latter would mean an illegal transfer of responsibility (it is the delegator, not the delegate, making the policy choices) and would alter the balance of powers between EU institutions enshrined in the treaties. Any delegation of powers must involves "clearly defined executive powers" the exercise of which can, therefore, be subject to strict review in the light of objective criteria determined by the delegating authority. Furthermore, according to *Romano*, administrative bodies may not be empowered to adopt acts "having the force of law".

The UK argued that ESMA under Article 28 of the Regulation No. 236/2012 enjoys "a very large measure of discretion" with respect of triggering events, the selection of measures to adopt, and the scope of application. In particular, the UK highlighted that whether there is a "threat" to the orderly functioning and integrity of financial markets, or to the stability of the financial system, is itself a "highly subjective judgment", and the ESMA decisions entail the implementation of actual economic policy. With regard to Romano, the UK challenged the nature of the measures that ESMA may adopt under Article 28, by arguing that they would be "quasi-legislative measures of general application". According to the UK, the conditions set by ESMA to limit the acquisition of net short positions may have the force of law to the extent that they are addressed to a wide set of market participants and concern an equally wide variety of financial instruments.

In January 2014 the Court rejected the UK's challenge[27]. Firstly, the ECJ established that the "Meroni Doctrine" still applies. According to the Court, the powers of ESMA are precisely identified in the Level 1 and Level 2 Regulations and are subject to judicial review in the light of the objectives established by the three EU institutions which delegated those powers to ESMA; furthermore, those powers are compatible with the Treaty (paragraphs 53-54 of the Judgment). Precisely, according to the Court the excise of the powers under Article 28 is "circumscribed by various conditions and criteria which limit ESMA's discretion", for example: a) ESMA can intervene only in case of a threat to the orderly functioning and stability and integrity of financial markets and its measures are subject to the condition that no competent national authority has taken measures to address the threat in

---

second plea the principle established in *Romano*. The third plea in law of the UK concerned the infringement of Articles 290 and 291 TFEU. According to the UK, the Council could only confer upon the European Commission the powers to adopt non-legislative acts of general application as well as implementing acts. In its fourth plea in law, the UK alleged the infringement of Article 114 TFEU on the harmonization in the internal market, because its use as a legal basis for ESMA powers was ultra vires. The UK argued that this provision was not intended to authorize ESMA to take individual measures directed at natural and legal persons.

[27] European Court of Justice (2014).

question; b) when taking measures, ESMA must ensure that such measures significantly address the threat and do not create a risk of regulatory arbitrage and do not have a detrimental effect on the efficiency of financial markets which is disproportionate to the benefits of the measures (proportionality of the intervention); c) ESMA must examine a significant number of factors set out in Article 28 and the conditions imposed are cumulative; d) ESMA must respect certain procedure requirements, like consultation with the ESRB and notification to the NCAs of the measures it proposes to take.

Secondly, the Court by interpreting *Romano* stated that the institutional framework established by the TFEU expressly permits Union bodies, offices and agencies to adopt acts of general application; ESMA is also entitled to adopt such acts provided that the conditions set out in *Meroni* are met (paragraphs 65-66).

In reviewing both *Meroni* and *Romano*, the ECJ seems to adopt a single standard when evaluating the latitude of ESMA's powers, including discretion under *Meroni* and general applicability under *Romano*[28].

Overall, "the ESMA ruling is yet another step in a very gradual process of the EU coming to terms with the appropriate and justified degree of delegation to EU agencies (with some carefully circumscribed regulatory or intervention powers) for the completion and proper functioning of the single market. The ESMA ruling shows clearly that, with the important proviso of convincing conditions and appropriate guarantees of legitimacy, transparency and judicial review, the single market could benefit from EU agencies fulfilling similar functions in such sub-markets as (quasi-independent) technical agencies all over the world, and indeed in national markets in the EU, routinely do, namely by ensuring that such markets function properly by detailing the regulatory regimes and intervening, if necessary, immediately to prevent harm"[29].

In light of the Lisbon institutional framework as set in the Treaties and the ECJ case law, the ESMA Judgment seems to confirm the acceptability of a "mellow" interpretation of the Meroni Doctrine. "Mellowing Meroni is not about rejecting the constitutional principle of legitimate delegation itself, but it is rather about finding a balance between this fundamental principle and the principle of establishing and ensuring the functioning of the internal market surrounded by legal conditions and guarantees".[30]

---

[28] Di Noia C., Gargantini M. (2014: 35).

[29] Pelkmans J., Simoncini M. (2014: 5-6).

[30] Pelkmans J., Simoncini M. (2014: 6). Di Noia C., Gargantini M. (2014: 32) noted that: "When weighing the relevance of Meroni, some consideration must be given to the main concern that apparently drove the judges at the time the decision was rendered, i.e., the need to ensure that no substantial exercise of power could escape the CJEU's judicial review. Before the Lisbon Treaty was adopted, no review of legality was explicitly provided for acts passed by bodies other than the EU institutions, so that any substantial transfer of powers deprived the persons concerned of the standing to sue with regard to delegated acts. However, new Articles 263 and 267 TFEU now also cover acts of bodies, offices and agencies of the Union, and the rationale for ensuring legal protection for natural and legal persons within the EU appears much less of a concern. Therefore, the relevance of Meroni nowadays mainly depends

VIII. Impact of the Short Selling Regulation

In June 2013 ESMA published a review on the short selling Regulation in response to a Commission request for Technical Advice to inform its required Report to the European Parliament and the Council on the impact of the Regulation[31]. ESMA main findings, regarding the first six months of operation of the Regulation, were broadly positive. ESMA found mixed effects on liquidity of EU stocks, with a slightly decline in volatility, a decrease in bid-ask spreads and no significant impact on trade volumes, and a decrease in price-discovery effectiveness. The authority found that the reporting and disclosure thresholds in relation to shares were appropriate and suggested only minor technical improvements in the method for calculating net short positions. However, ESMA recommended a revision of the reporting thresholds for sovereign debt. With regard to restrictions on uncovered short sales in shares and in sovereign debt, ESMA found a reduction in the incidence of settlement failures, although it recommended some adjustments to the regime, notably with respect to the "locate rule". The prohibitions on uncovered sovereign CDSs have not had a "compelling impact" on the liquidity of the EU CDS markets or on the related sovereign bonds markets. ESMA suggested only some refinements to the regime to support legal certainty. However, in relation to the exemption for market-making activities, ESMA recommended an extent of the scope of the exemptions in order to protect liquidity. Finally, ESMA found that NCA's exercise of emergency powers under Article 23 of the Regulation (i.e. in case of "a significant fall in price") had been necessary and appropriate, although it suggested to reconsider the approach for introducing such temporary bans with a view to simplify the regime and ensure more consistency in their application. Especially, ESMA suggested to lowering the thresholds for Article 23 "circuit-breaker" intervention, given the evidence that most NCAs did not intervene to impose short sale prohibitions when the thresholds were crossed overly.

The 2013 Commission Report agreed with ESMA findings, concluding that, on the limited data available at that time, the Regulation had a positive impact in terms of greater transparency of short sales and reduced settlement failures, and a relatively mixed economic impact[32]. Moreover, it found that there was no compelling evidence of a substantial negative impact of the Regulation in terms of reduced liquidity of sovereign CDSs. Although ESMA had made some recommendations for adjustments to the Regulation, the Commission was of the view that it was too early to draw firm conclusions

---

on the fact that it reflects the perspective that agencies are executive or (quasi-) regulatory bodies detached from the Commission, and that delegated policymaking faces the limitations set by the Treaties, as made clear by Arts. 290 and 291 TFEU. This perspective hinges upon the nature of EU institutions as entities entrusted with powers assigned by Member States under the Treaties, so that sub-delegation should be allowed within the limits set by the Treaties".

[31] ESMA (2013c).

[32] European Commission (2013).

on the operation of the short selling framework which would warrant a revision of the legislation at that stage. The Commission, before taking any action, decided to call for a second review on the appropriateness and impact of the Regulation, based on more empirical data, to be concluded by end 2016.

IX. EU Regulation and Consob Resolutions on Short Selling

The adoption of the EU short selling Regulation in 2012 required Member States to amend their domestic legal frameworks to make them consistent with the new regime. In October 2012 the Italian legislator amended the Consolidated Law on Financial Intermediation (Legislative Decree No. 58 of February 1998) in order to identify the national authorities with competences under the EU Regulation. Article 4-ter of the amended Consolidated Law states that: i) the Ministry of Economy and Finance (MEF), the Bank of Italy and Consob are the national competent authorities under the Regulation; ii) Consob is the competent authority for receiving the notifications, implementing the measures and exercising the functions and powers in relation to financial instruments other than sovereign debt instruments and sovereign debt CDSs; iii) the Bank of Italy and Consob, within the sphere of their respective powers, are the competent authorities for receiving the notifications, implementing the measures and exercising the functions and powers contemplated by the Regulation with regard to sovereign debt instruments and sovereign CDSs; iv) the MEF is the competent authority for the powers of intervention in exceptional circumstances in relation to sovereign debt and sovereign CDSs, powers to be exercised on a proposal from the Bank of Italy and after consultation with Consob; e) Consob is the authority responsible for coordinating the cooperation and exchange of information with ESMA, and the NCAs of other Member States.

The tasks of each authority and the procedures for their cooperation in the exercise of their respective functions were established in the Memorandum of Understanding between the MEF, the Bank of Italy and Consob signed in April 2013[33], and in the Joint Communication by Bank of Italy and Consob of June 2013[34]. According to the Memorandum, notifications of net short positions in sovereign debt and notifications by market makers and primary dealers in government securities claiming exemption must be addressed to the Bank of Italy[35]. Moreover, the Bank of Italy conducts analyses and monitoring of the liquidity of the Italian sovereign debt market, in order to possibly propose to the MEF the temporary suspension of the restrictions on short selling or the adoption of further restrictions on short selling when exceptional circumstances pose a threat to financial stability or market confidence.

As mentioned above, Consob is the Italian competent authority for implementing the measures and exercising the functions and powers with regard to

[33] Memorandum of Understanding between Consob, Ministry of Economy and Finance and Banca d'Italia pursuant to article 4ter, paragraph 6, of D.Lgs. No. 58/1998, 12 April 2013.
[34] Bank d'Italia, Consob (2013).
[35] Banca d'Italia (2012).

financial instruments other than sovereign debt and sovereign CDSs. Since September 2008[36] Consob has imposed restrictions of varying types on short sales in order to support financial stability and the integrity of the market, by imposing disclosure requirements on net short positions, prohibiting naked short sales, and short sales in general.

While the previous restrictions on short sales were temporary, in 2011 considering the extraordinary markets condition and the persistent high level of price volatility, Consob issued two resolutions by which it established the obligation of communicating net short positions on shares and the ban on naked short selling in shares for an indefinite period ("until their amendment or revocation").

Consob Resolution No. 17862 of 10 July 2011 imposed on persons holding a net short position in relation to the issued share capital of a company whose main shares' market was an Italian regulated market to notify Consob when this position reached 0.2% of the issued share capital of the company concerned and each 0.1% above that[37]. While Consob Resolution No. 17993 of 11 November 2011 prohibited uncovered short sales of shares listed on an Italian regulated market[38]. Exemptions from the two Resolutions were provided for market-making activities.

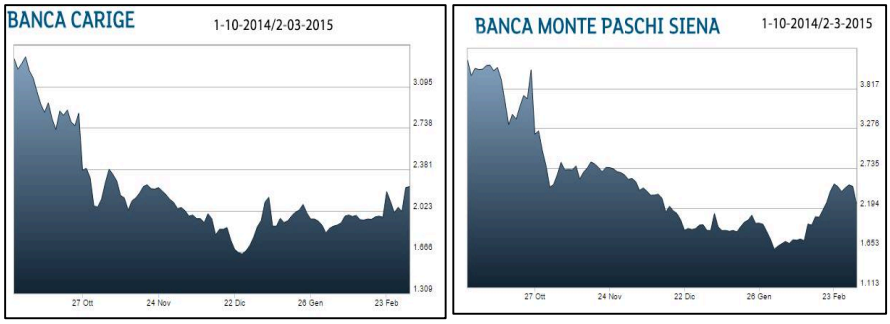
The two 2011 Consob Resolutions ceased to have effect with the entry into force of the EU Regulation No. 236/2012 on 1 November 2012, of which they had basically anticipated some features[39].

From November 2012 to December 2015 Consob issued 22 resolutions to impose restrictions on short sales in shares: 20 measures were adopted to temporary prohibit short selling in order to deal with a "significant fall in price" of a share under Article 23 of the EU Regulation, while 2 times Consob intervened to address "a threat to market confidence" according to Article 20[40].

Temporary prohibitions of taking and increasing net short positions were intensively adopted in autumn 2014 with regard to shares issued by Banca Carige and Banca Monte dei Paschi di Siena (BMPS). On 26 October 2014 the results of the Comprehensive Assessment carried out by the European Central Bank (ECB) showed capital shortfalls for Banca Carige and BMPS much higher than expected by markets[41]. On 27 October 2014, the price of the shares of the two banks dropped significantly, Banca Carige shares by about 17% and BMPS shares by about 15%[42]. Consob "taking the relevant increase in volatility and the significant decrease in price of shares issued by

[36] Consob (2008).
[37] Consob (2011a).
[38] Consob (2011b).
[39] Consob (2012a); Consob (2012b).
[40] See online.
[41] Banca MPS suffered from a shortfall of about 2.1 billion euros, against a market capitalization of roughly 4.5 billion euros; and Banca Carige spa suffered from a shortfall of about 813 million euros against a market capitalization of roughly 900 million euro. See European Central Bank (2014).
[42] See online.

BMPS and Carige during the month of October 2014", and considering "no more sufficient" the restrictions on uncovered short sales in shares previously imposed under Article 12 of the EU Regulation, in order to "preserve market confidence" decided to prohibit any natural or legal person (except marker-makers) to take net short positions or to increase existing net short positions, regardless of the place where the transaction was executed, on BMPS and Carige shares from 28 October 2014 to 10 November 2014[43].
Before taking such a decision, in accordance with Article 26 of the EU Regulation, CONSOB notified ESMA its intention to make use of its powers of intervention in exceptional circumstances and to introduce an emergency measure under Article 20. ESMA published an opinion in which it agreed with Consob on the presence of developments which constituted a "serious threat to market confidence" in the credit institutions concerned. ESMA considered the measure proposed by Consob "appropriate and proportionate" to address the threat[44].



Price of shares issued by Banca Carige and Banca Monte dei Paschi di Siena
(01/10/2014 –02/03/2015)
(source: www.borsaitaliana.it)

On 10 November 2014, the projected expire date of the ban, the ECB had not yet approved the remedial action plans provided by the two Italian banks, and this created a strong uncertainty in the market. Although no increase in net short positions was detected during the restriction period, a relevant selling pressure and high volatility in both banks' shares continued. As a consequence, Consob notified ESMA its intention to renew the ban on net short positions until 27 January 2015 in order to minimize the risk of a loss of market confidence on those shares and reducing the risk of contagion to the Italian banking sector[45]. Again, ESMA's opinion agreed with Consob on the existence of a serious threat to market confidence, as well as on the appropriateness and proportionality of the measure and duration proposed[46].

[43] Consob (2014a).
[44] ESMA (2014a).
[45] Consob (2014b).
[46] ESMA (2014b).

List of Resolutions on Short Selling adopted by Consob, November 2012 - December 2015

Restrictions under Article 20 of the Regulation No. 236/2012

Consob resolution No. 19063 of 11 November 2014 - Extension of the temporary prohibition of creating and increasing net short positions in shares issued by Banca Monte dei Paschi di Siena spa and Banca Carige spa

Consob resolution No. 19053 of 27 October 2014 - Temporary prohibition of taking and increasing net short positions in shares issued by Banca Monte dei Paschi di Siena spa and Banca Carige spa

Restrictions under Article 23 of the Regulation No. 236/2012

Consob resolution No. 19159 of 4 June 2015 - Temporary prohibition of short selling in shares issued by SAIPEM spa

Consob resolution No. 19098 of 12 January 2015 - Temporary prohibition of short selling in shares issued by Saipem spa

Consob resolution No. 19052 of 27 October 2014 - Temporary prohibition of short selling in shares issued by Banca Monte dei Paschi di Siena spa

Consob resolution No. 19050 of 16 October 2014 - Temporary prohibition of short selling in shares issued by Banca Monte dei Paschi di Siena spa

Consob resolution No. 19019 of 3 September 2014 - Temporary prohibition of short selling in shares issued by Safilo Group spa

Consob resolution No. 19009 of 08 August 2014 - Temporary prohibition of short selling in shares issued by TOD's spa

Consob resolution No. 19008 of 08 August 2014 - Temporary prohibition of short selling in shares issued by Banca Monte dei Paschi di Siena spa

Consob resolution No. 19007 of 07 August 2014 - Temporary prohibition of short selling in shares issued by Banca Popolare Emilia Romagna sc

Consob resolution No. 18919 of 07 May 2014 - Temporary prohibition of short selling in shares issued by Fiat spa

Consob resolution No. 18863 of 15 April 2014 - Temporary prohibition of short selling in shares issued by Banca MPS spa

Consob resolution No. 18862 of 14 April 2014 - Temporary prohibition of short selling in shares issued by Banca Popolare di Milano scarl

Consob resolution No. 18772 of 27 January 2014 - Temporary prohibition of short selling in shares issued by Banco Popolare sc

Consob measure No. 12/2013 of 17 June 2013 - Temporary prohibition of short selling in shares issued by SAIPEM spa

Consob resolution No. 18512 of 2 April 2013 - Temporary prohibition of short selling in shares issued by Banca Monte dei Paschi di Siena spa

Consob resolution No. 18480 of 26 February 2013 -Temporary prohibition of short selling in shares issued by Banco Popolare sc

Consob resolution No. 18479 of 26 February 2013 - Temporary prohibition of short selling in shares issued by Mediolanum spa

Consob resolution No. 18478 of 26 February 2013 - Temporary prohibition of short selling in shares issued by Banca Carige spa
Consob resolution No. 18477 of 26 February 2013 - Temporary prohibition of short selling in shares issued by Intesa Sanpaolo spa
Consob resolution No. 18465 of 12 February 2013 - Temporary prohibition of short selling in shares issued by Finmeccanica spa
Consob resolution No. 18454 of 30 January 2013 - Temporary prohibition of short selling in shares issued by Saipem spa

In both cases mentioned, the entire notification, evaluation and decision process involving Consob and ESMA took place in few hours, by reflecting the well-functioning of the regulatory system, as well as a good working relationship between the two authorities.

X. Conclusion

The 2012 short selling Regulation is designed to lay down a harmonized regulatory framework with regard to the requirements and powers relating short selling and CDSs and to ensure greater coordination and consistency between Member States. The Regulation articulates the hard-fought political compromise on the extent to which short sales and sovereign CDSs should be restricted. It is integrated by four European Commission delegated and implementing regulations, setting regulatory and implementing technical standards, as well as by a number of soft law instruments issued by ESMA.

The aim of the EU Regulation is to: i) ensure Member States have the power to intervene in exceptional circumstances to reduce systemic risks and risks to financial stability and market integrity originating from short selling and CDSs; ii) facilitate coordination between national authorities and ESMA in emergency situations; iii) increase transparency on the short positions held by investors in certain securities; iv) reduce settlement risks linked to naked short selling; v) reduce the risks to the stability of sovereign debt markets posed by uncovered CDSs.

By dealing with the main features of the EU legal framework on short selling, we argued that the Regulation shaped a regulatory regime based on four main pillars: i) restrictions on uncovered transactions; ii) notification and disclosure obligations; iii) exemptions from restrictions on uncovered transactions and transparency obligations; iv) intervention powers conferred upon NCAs and ESMA in exceptional circumstances.

This paper also discussed the compatibility of the EU's delegation of powers to ESMA under Regulation No. 236/2012 with the Meroni and Romano judgments, by discussing the renowned "ESMA case". It was highlighted that the European Court of Justice found an effective balance between con-

stitutional principles and the principle of establishing and ensuring the functioning of the internal market surrounded by legal conditions and guarantees.
With regard to the impact of the Regulation on market conditions, data available so far suggest that the Regulation has had positive effects in terms of transparency of short sales and reduced settlement failures, and a relatively mixed economic impact, without evidence of a substantial negative impact on the liquidity of the CDSs market or on the related sovereign bonds market.
Finally, the paper investigated the impact of the new EU regime on the activities of national competent authorities. We argued that the regulatory process introduced by the Regulation No. 236/2012 showed the capacity to promote an effective coordination between CONSOB and ESMA when the significant decrease in price of Banca Carige's and Banca Monte dei Paschi di Siena's shares posed a serious threat to confidence on Italian stock market.

References

Banca d'Italia (2012), *2012 Exemption regime on sovereign debt and sovereign credit default swap*, Communication, 19 October;

Banca d'Italia, Consob (2013), *Joint Communication on ESMA Guidelines on market making activities and primary market operations under Regulation (EU) 236/2012 of the European Parliament and the Council on short selling and certain aspects of Credit Default Swaps*, 5 June;

Borsa Italiana, *FTSE Italia All-Share Index*;

Consob (2008), *Measures on short sales of securities aimed at ensuring the orderly conduct of trading and the integrity of the market*, Resolution No. 16622, 22 September;

Consob (2011a), *Measures on reporting obligations of net short positions on shares*, Resolution No. 17862, 10 July;

Consob (2011b), *Measures on short sales aiming at ensure the orderly conduct of trading and the integrity of the markets*, Resolution No. 17993, 11 November;

Consob (2012a), *Expiration of the measures on short selling and net short positions*, Resolution No. 18348, 17 October;

Consob (2012b), *Communication regarding the application of the Regulation (EU) no. 236/2012 on short selling and certain aspects of credit default swaps*, Communication No. DME/12083249, 19 October;

Consob (2012c), *Exemption regime for Italian market makers in shares*, Communication No. 12083249, 19 October;

Consob (2014a), *Temporary prohibition of taking and increasing net short positions in shares issued by Banca Monte dei Paschi di Siena spa (BMPS) and Banca Carige spa (CARIGE), pursuant to Article 20 of the Regulation (EU) of the European Parliament and of the Council No. 236 of 14 March 2012*, Resolution No. 19053, 27 October;

Consob (2014b), *Extension of the temporary prohibition of creating and increasing net short positions in shares issued by Banca Monte dei Paschi di Siena spa (BMPS) and Banca Carige spa (CARIGE), pursuant to Article 20 of the Regulation (EU) of the European Parliament and of the Council no. 236 of 14 March 2012*, Resolution No. 19063, 11 November;

Di Noia C., Gargantini M. (2014), *Unleashing the European Securities and Markets Authority: Governance and Accountability After the ECJ Decision on the Short Selling Regulation (Case C-270/12)*, in *European Business Organization Law Review*, Issue 1, March, pp. 1-57;

European Central Bank (2014), *Aggregate Report on the Comprehensive Assessment*, October;

European Commission (2010a), *Public Consultation on Short Selling*, DG Internal Market and Services, 14 June;

European Commission (2010b), *Public consultation on Short Selling and Credit Default Swaps – Frequently Asked Questions*, 14 June;

European Commission (2010c), *Proposal for a Regulation of the European Parliament and of the Council on Short Selling and certain aspects of Credit Default Swaps*, COM(2010) 482 final, 15 September;

European Commission (2010d), *Summary of the Impact Assessment*, Accompanying document to the Proposal for a Regulation of the European Parliament and of the Council on Short Selling and certain aspects of Credit Default Swaps, Commission Staff Working Paper, SEC(2010) 1056, 15 September;

European Commission (2013), *Report on the evaluation of the Regulation (EU) No 236/2012 on short selling and certain aspects of credit default swaps*, COM(2013) 885 final, 13 December;

European Court of Justice (1958), *Meroni & Co., Industrie Metallurgiche Spa v. High Authority of the European Coal and Steel Community*, Case 9/56, Judgment of the Court, 13 June;

European Court of Justice (1981),*Giuseppe Romano v. Institut national d'assurance maladie-invalidité*, Case 98/80, Judgment of the Court, 14 May

European Court of Justice (2014), *United Kingdom of Great Britain and Northern Ireland v. European Parliament and Council of the European Union*, Case 270/12, Judgment of the Court, 22 January;

European Securities and Markets Authority (2012), *Questions and Answers. Implementation of the Regulation on short selling and certain aspects of credit default swaps*, ESMA/2012/572, 13 September;

European Securities and Markets Authority (2013a), *Questions and Answers. Implementation of the Regulation on short selling and certain aspects of credit default swaps (2nd Update)*, ESMA/2013/159, 30 January;

European Securities and Markets Authority (2013b), *Guidelines on the exemption for market making activities and primary market operations under Regulation (EU) 236/2012 of the European Parliament and the Council on short selling and certain aspects of Credit Default Swaps*, ESMA/2013/158, 1 February;

European Securities and Markets Authority (2013c), *Final Report ESMA's technical advice on the evaluation of the Regulation (EU) 236/2012 of the European Parliament and of the Council on short selling and certain aspects of credit default swaps*, ESMA/2013/614, 3 June;

European Securities and Markets Authority (2014a), *Opinion – Emergency measure by the Italian CONSOB under Section 1 of Chapter V of Regulation*

No. 236/2012 on short selling and certain aspects of credit default swaps, ESMA/2014/1312, 27 October;

European Securities and Markets Authority (2014b) *Opinion – Renewal of emergency measure by the Italian CONSOB under Section 1 of Chapter V of Regulation No. 236/2012 on short selling and certain aspects of credit default swaps*, ESMA/2014/1355, 10 November;

Consob, Ministry of Economy and Finance, Banca d'Italia (2013), *Memorandum of Understanding pursuant to article 4ter, paragraph 6, of D.Lgs. No. 58/1998*, 12 April;

Moloney N. (2014), *EU Securities and Financial Markets Regulation*, Third Edition, Oxford;

Pelkmans J., Simoncini M. (2014), *Mellowing Meroni: How ESMA Can Help Build the Single Market*, CEPS Commentary, 18 February.