

Action brought on 1 June 2012 — United Kingdom of Great Britain and Northern Ireland v Council of the European Union, European Parliament

(Case C-270/12)

(2012/C 273/03)

Language of the case: English

Parties

Applicant: United Kingdom of Great Britain and Northern Ireland (represented by: A. Robinson, Agent, J. Stratford QC, A. Henshaw, Barrister)

Defendants: Council of the European Union, European Parliament

The applicant claims that the Court should:

— annul Article 28 of Regulation (EU) 236/2012 of the European Parliament and of the Council of 14 March 2012 on short-selling and certain aspects of credit default swaps ⁽¹⁾.

— order the Defendants to pay the costs of the application.

Pleas in law and main arguments

Article 28, headed ‘ESMA intervention powers in exceptional circumstances’, requires the European Securities and Markets Authority (‘ESMA’) to prohibit or impose conditions on the entry by natural or legal persons into short sales or similar transactions, or to require such persons to notify or publicise such positions.

ESMA shall take such measures if a) they address a threat to the orderly functioning and integrity of the financial markets, or to the stability of the whole or part of the financial system in the Union; b) there are cross-border implications; and c) competent authorities have not taken any measures to address the threat or the measures they have taken do not adequately address the threat. The measures are valid for up to three months, but ESMA is empowered to renew them indefinitely. The measures prevail over any previous measures taken by a competent authority pursuant to the Short Selling Regulation.

The United Kingdom submits that Article 28 is unlawful on the following grounds.

Firstly, it is contrary to the second principle established by the Court of Justice in Case 9/56 *Meroni v High Authority* [1957 & 1958] ECR 133, because:

1. The criteria as to when ESMA is required to take action under Article 28 entail a large measure of discretion.

2. ESMA is given a wide range of choices as to what measure or measures to impose, and what exceptions to specify, and these choices have very significant economic policy implications.

3. The factors which ESMA must take into account contain tests which are highly subjective.

4. ESMA is empowered to renew its measures without any limit on their overall duration.

5. Even if (contrary to the United Kingdom’s submissions) Article 28 did not involve ESMA in making macroeconomic policy choices, ESMA nonetheless has a broad discretion as regards the application of policy to any particular case, as in *Meroni* itself.

Secondly, Article 28 purports to empower ESMA to impose measures of general application which have the force of law, contrary to the Court’s decision in Case 98/80 *Giuseppe Romano v Institut national d’assurance maladie-invalidité* [1981] ECR 1241.

Thirdly, Article 28 purports to confer on ESMA a power to adopt non-legislative acts of general application, whereas in the light of Articles 290 and 291 TFEU, the Council has no authority under the Treaties to delegate such a power to a mere agency outside of these provisions.

Fourthly, if and to the extent that Article 28 were interpreted as empowering ESMA to take individual measures directed at natural or legal persons, it would be *ultra vires* Article 114 TFEU.

Article 28 can be severed from the remainder of the Short Selling Regulation. Its removal would leave essentially intact the remainder of the Regulation.

⁽¹⁾ OJ L 86, p. 1

Reference for a preliminary ruling from the Nejvyšší správní soud (Czech Republic) lodged on 4 June 2012 — Jiří Sabou v Finanční ředitelství pro hlavní město Prahu

(Case C-276/12)

(2012/C 273/04)

Language of the case: Czech

Referring court

Nejvyšší správní soud