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

Parties to the main proceedings

Applicant: Jiří Sabou

Defendant: Finanční ředitelství pro hlavní město Prahu

Questions referred

1. Does it follow from European Union law that a taxpayer has the right to be informed of a decision of the tax authorities to make a request for information in accordance with Directive 77/799/EEC? [1] Does the taxpayer have the right to take part in formulating the request addressed to the requested Member State? If the taxpayer does not derive such rights from European Union law, is it possible for domestic law to confer similar rights on him?

2. Does a taxpayer have the right to take part in the examination of witnesses in the requested State in the course of dealing with a request for information under Directive 77/799/EEC? Is the requested Member State obliged to inform the taxpayer beforehand of when the witness will be examined, if it has been requested to do so by the requesting Member State?

3. Are the tax authorities in the requested Member State obliged, when providing information in accordance with Directive 77/799/EEC, to observe a certain minimum content of their answer, so that it is clear from what sources and by what method the requested tax authorities have obtained the information provided? May the taxpayer challenge the correctness of the information thus provided, for example on grounds of procedural defects of the proceedings in the requested State which preceded the provision of the information? Or does the principle of mutual trust and cooperation apply, according to which the information provided by the requested tax authorities may not be called in question?

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[1] Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336, p. 15).

Reference for a preliminary ruling from the Oberlandesgericht Koblenz (Germany) lodged on 7 June 2012 — Deutsche Lufthansa AG v Flughafen Frankfurt Hahn GmbH

(Case C-284/12)

(2012/C 273/05)

Language of the case: German

Referring court

Oberlandesgericht Koblenz

Parties to the main proceedings

Applicant: Deutsche Lufthansa AG

Defendant: Flughafen Frankfurt Hahn GmbH

Questions referred

1. Does an uncontested decision of the Commission to initiate a formal investigation procedure under the second sentence of Article 108(3) TFEU have the result that, in appeal proceedings concerning the recovery of payments made and an order to refrain from making future payments, a national court is bound by the Commission's legal opinion in that decision as to whether a measure constitutes State aid?

2. If Question 1 is answered in the negative:

   Are measures adopted by a public undertaking within the meaning of Article 2(b)(i) of Commission Directive 2006/111/EC, [1] which operates an airport, to be regarded, for the purposes of State aid law, as selective measures within the meaning of Article 107(1) TFEU, simply because they benefit only airlines which use the airport?

3. If Question 2 is answered in the negative:

   (a) Is the criterion of selectivity not satisfied if the public undertaking which operates the airport offers the same conditions, and in a transparent manner, to all airlines which opt to use the airport?

   (b) Is this still the case if the airport operator adopts a specific business model (cooperation with 'low-cost carriers', in this instance), which tailors its conditions of use to such customers, with the result that those conditions are not equally attractive to all airlines?

   (c) Is there a selective measure, at any rate, if the vast majority of the airport's passengers has been attributable to a single airline for a number of years?

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[1] Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ 2006 L 318, p. 17).