

JUDGMENT OF THE COURT (Grand Chamber)

22 January 2014(*)

(Regulation (EU) No 236/2012 – Short selling and certain aspects of credit default swaps – Article 28 – Validity – Legal basis – Powers of intervention conferred on the European Securities and Markets Authority in exceptional circumstances)

In Case C-270/12,

ACTION for annulment under Article 263 TFEU, brought on 31 May 2012,

United Kingdom of Great Britain and Northern Ireland, represented by A. Robinson, acting as Agent, J. Stratford QC and A. Henshaw, Barrister,

applicant,

v

European Parliament, represented by A. Neergaard, R. Van de Westelaken, D. Gauci and A. Gros-Tchorbadjiyska, acting as Agents,

Council of the European Union, represented by H. Legal, A. De Elera and E. Dumitriu-Segnana, acting as Agents,

defendants,

supported by:

Kingdom of Spain, represented by A. Rubio González, acting as Agent,

French Republic, represented by G. de Bergues, D. Colas and E. Ranaivoson, acting as Agents,

Italian Republic, represented by G. Palmieri, acting as Agent, and F. Urbani Neri, avvocato dello Stato,

European Commission, represented by T. van Rijn, B. Smulders, C. Zadra and R. Vasileva, acting as Agents,

intervening parties,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano, R. Silva de Lapuerta (Rapporteur), M. Ilešič, E. Juhász, A. Borg Barthet, C. G. Fernlund and J. L. da Cruz Vilaça, Presidents of Chambers, G. Arestis, J. Malenovský, E. Levits, M. Berger, A. Prechal and E. Jarašiūnas, Judges,

Advocate General: N. Jääskinen,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 11 June 2013,

after hearing the Opinion of the Advocate General at the sitting on 12 September 2013,

gives the following

Judgment

- 1 By its action, the United Kingdom of Great Britain and Northern Ireland seeks 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 (OJ 2012 L 86, p. 1).

Legal background

- 2 The European Securities and Markets Authority (ESMA) was established by Regulation (EU) No 1095/2010 of the European Parliament and of 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) ('the ESMA Regulation').
- 3 In accordance with Article 1(2) and (3) of Regulation (EU) 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), ESMA is part of the European System of Financial Supervision ('ESFS'), the purpose of which is to ensure the supervision of the European Union's financial system.
- 4 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) and 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) respectively provided ESFS with a European Banking Authority and a European Insurance and Occupational Pensions Authority. ESFS also comprises a Joint Committee of the European Supervisory Authorities, as well as the competent or supervisory authorities of the Member States.
- 5 Article 1(2) of the ESMA Regulation provides that ESMA 'shall act within the powers conferred by this Regulation and within the scope of [any] legally binding Union act which confers tasks on [ESMA]'.
- 6 Articles 8 and 9 of the ESMA Regulation set out ESMA's tasks and powers. These include taking certain decisions addressed to competent national authorities and to financial market participants.
- 7 Article 9(5) of the ESMA Regulation provides as follows:

'5. [ESMA] may temporarily prohibit or restrict certain financial activities that threaten the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union in the cases specified and under the conditions laid down in the legislative acts referred to in Article 1(2) or if so required in the case of an emergency situation in accordance with and under the conditions laid down in Article 18.

[ESMA] shall review the decision referred to in the first subparagraph at appropriate intervals and at least every 3 months. If the decision is not renewed after a three-month period, it shall automatically expire.

A Member State may request [ESMA] to reconsider its decision. In that case, [ESMA] shall decide in accordance with the procedure set out in the second subparagraph of Article 44(1) whether it maintains its decision.

[ESMA] may also assess the need to prohibit or restrict certain types of financial activity and, where there is such a need, inform the Commission in order to facilitate the adoption of any such prohibition or restriction.’

8 Regulation No 236/2012 was adopted on the basis of Article 114 TFEU, which confers power on the European Parliament and the Council of the European Union to adopt measures for the approximation of the provisions laid down by law, regulation or administrative action in the Member States which have as their object the establishment and functioning of the internal market.

9 In accordance with Article 1(1) thereof, Regulation No 236/2012 is to apply to:

- ‘(a) financial instruments within the meaning of point (a) of Article 2(1) that are admitted to trading on a trading venue in the Union, including such instruments when traded outside a trading venue;
- (b) derivatives referred to in points (4) to (10) of Section C of Annex I to Directive 2004/39/EC [of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ 2004 L 145, p. 1)] that relate to a financial instrument referred to in point (a) or to an issuer of such a financial instrument, including such derivatives when traded outside a trading venue;
- (c) debt instruments issued by a Member State or the Union and derivatives referred to in points (4) to (10) of Section C of Annex I to Directive 2004/39/EC that relate or are referenced to debt instruments issued by a Member State or the Union’.

10 Article 2(1) of Regulation No 236/2012 is worded as follows:

‘For the purpose of this Regulation, the following definitions apply:

- (a) “financial instrument” means an instrument listed in Section C of Annex I to Directive 2004/39/EC;
- (b) “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, ...

...’

11 Article 3(1) of Regulation No 236/2012 provides as follows:

‘For the purposes of this Regulation, a position resulting from either of the following shall be considered to be a short position relating to issued share capital or issued sovereign debt:

- (a) a short sale of a share issued by a company or of a debt instrument issued by a sovereign issuer;
- (b) entering into a transaction which creates or relates to a financial instrument other than an instrument referred to in point (a) where the effect or one of the effects of the transaction is to confer a financial advantage on the natural or legal person entering into that transaction in the event of a decrease in the price or value of the share or debt instrument.’

12 Article 28 of Regulation No 236/2012, entitled ‘ESMA intervention powers in exceptional circumstances’, is worded as follows:

‘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
- (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 [European Systemic Risk Board ('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 1.⁷

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

14 Commission Delegated Regulation (EU) 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 (OJ 2012 L 274, p. 1) provides in Article 24(3) thereof, as follows:

For the purposes of Article 28(2)(a) [of Regulation No 236/2012], 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.⁸

15 The Commission adopted 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 No 236/2012 (OJ 2012 L 251, p. 11).

16 Section C of Annex I to Directive 2004/39 defines financial instruments as follows:

1. Transferable securities;
2. Money-market instruments;
3. Units in collective investment undertakings;
4. Options, futures, swaps, forward rate agreements and any other derivative contracts relating to securities, currencies, interest rates or yields, or other derivatives instruments, financial indices or financial measures which may be settled physically or in cash;
5. Options, futures, swaps, forward rate agreements and any other derivative contracts relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event);
6. Options, futures, swaps, and any other derivative contract relating to commodities that can be physically settled provided that they are traded on a regulated market and/or an MTF [multilateral trading facility];
7. Options, futures, swaps, forwards and any other derivative contracts relating to commodities, that can be physically settled not otherwise mentioned in C.6 and not being for commercial purposes, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are cleared and settled through recognised clearing houses or are subject to regular margin calls;
8. Derivative instruments for the transfer of credit risk;
9. Financial contracts for differences.
10. Options, futures, swaps, forward rate agreements and any other derivative contracts relating to climatic variables, freight rates, emission allowances or inflation rates or other official economic statistics that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event), as well as any other derivative contracts relating to assets, rights, obligations, indices and measures not otherwise mentioned in this Section, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are traded on a regulated market or an MTF, are cleared and settled through recognised clearing houses or are subject to regular margin calls.²

- 17 In order to ensure the orderly functioning of the ESFS, Directive 2010/78/EU of the European Parliament and of the Council of 24 November 2010 amended Directives 98/26/EC, 2002/87/EC, 2003/6/EC, 2003/41/EC, 2003/71/EC, 2004/39/EC, 2004/109/EC, 2005/60/EC, 2006/48/EC, 2006/49/EC and 2009/65/EC in respect of the powers of the European Supervisory Authority (European Banking Authority), the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority) (OJ 2010 L 331, p. 120).

The procedure before the Court and the forms of order sought by the parties

- 18 The United Kingdom claims that the Court should:
- annul Article 28 of Regulation No 236/2012, and
 - order the defendants to pay the costs.
- 19 The Parliament contends that the Court should:
- dismiss the action, and

- order the United Kingdom to pay the costs.

20 The Council contends that the Court should:

- dismiss the action in its entirety as unfounded, and
- order the United Kingdom to pay the costs.

21 By order of the President of the Court of 16 November 2013, the Kingdom of Spain, the French Republic, the Italian Republic and the Commission were granted leave to intervene in support of the forms of order sought by the Parliament and the Council.

The possible reopening of the oral procedure

22 By letters of 24 September 2013, the Parliament, the Council and the Commission raised the possibility of reopening the oral procedure, in accordance with Article 83 of the Court's Rules of Procedure.

23 Those three institutions have stated that the main argument in the Opinion of the Advocate General, namely the question of the conferral of certain decision-making powers on ESMA on the basis of Article 114 TFEU, 'has not been raised ... by any of the parties' and is therefore a 'new argument' which the parties have not had any opportunity to debate.

24 However, it should be noted that, by its fourth plea in law, the applicant alleges breach of Article 114 TFEU, and that the argument in question was addressed at the hearing before the Court.

25 In those circumstances and in the light of the situation addressed in Article 83 of the Rules of Procedure, the Court cannot agree to the suggestion made.

The action

Preliminary observations

26 With regard to the purpose of the action, it should be observed that the applicant simply seeks the annulment of Article 28 of Regulation No 236/2012 and does not call into question the establishment of ESMA.

*The first plea in law, alleging breach of the principles relating to the delegation of powers laid down in *Meroni v High Authority**

Arguments of the parties

27 The United Kingdom's first plea in law is based on five arguments.

28 First, the United Kingdom claims that ESMA's determination as to whether the criteria set out in Article 28(2) of Regulation No 236/2012 are met entails 'a very large measure of discretion'. In particular, it argues that whether there is a 'threat' to the orderly functioning and integrity of financial markets, or to the stability of the whole or part of the financial system, is itself a 'highly subjective judgment'. The fact that the Member States have adopted different approaches to short selling demonstrates the discretionary nature of the choices that may be made.

29 The United Kingdom is of the view that, in determining whether or not competent authorities have taken measures which address such a threat or have taken measures which do not adequately address the threat, ESMA will be required to take potentially controversial decisions. The taking of such decisions will involve ESMA in the implementation of actual economic policy and require it to arbitrate between conflicting public interests, make value judgments and carry out complex economic assessments.

- 30 Secondly, the United Kingdom considers that, under Article 28(1) of Regulation No 236/2012, ESMA has a wide range of choices as to which measure or measures to impose and as to any exceptions that may be specified. Those choices have very significant economic and financial policy implications.
- 31 The United Kingdom states that ESMA has extremely wide-ranging discretion when deciding how to take account of the factors set out in Article 28(3) of Regulation No 236/2012. Such decisions will require an analysis of the significant economic policy implications, such as the impact on liquidity and the level of uncertainty that will be created in financial markets, which, in turn, have long-term consequences as to general overall confidence in the markets. These are 'unquantifiable ... judgments' and cannot be categorised as decisions made on the basis of set criteria amenable to objective review.
- 32 Thirdly, the United Kingdom points out that, in deciding which measures to impose, ESMA must be guided by the factors set out in Article 28(3) of Regulation No 236/2012. However, those factors encompass tests which are 'highly subjective'. Moreover, ESMA enjoys a wide margin of discretion when taking account of the criteria set out in that provision. Indeed, that provision does not specify the course of action to be adopted by ESMA if it considers, for example, that a measure which it is contemplating adopting might have a detrimental effect on the efficiency of financial markets that is disproportionate to the benefits of the measure.
- 33 Fourthly, the United Kingdom submits that whilst measures adopted by ESMA are theoretically temporary, that makes no difference to their fundamental nature. Even temporary bans on financial market transactions can have significant long-term consequences, including an impact on market liquidity, with potentially enduring effects on overall confidence in the markets. The principles established in Case 9/56 *Meroni v High Authority* [1957-1958] ECR 133 apply to temporary measures as much as to permanent measures.
- 34 Fifthly, the United Kingdom contends that, even if Article 28 of Regulation No 236/2012 were to be interpreted as not involving ESMA in making policy choices in the form of decisions on macroeconomic policy, it would still be bound by the principle established in *Meroni v High Authority*. In the same way as the bodies which were the subject of that judgment, ESMA enjoys a broad discretion as to the application of the policy in question.
- 35 The Parliament contends that it is not policy considerations but complex professional considerations that determine the decisions to be taken. It is apparent from Article 28(2) of Regulation No 236/2012 that a measure is permissible only if it is intended to address certain well-defined threats. The measures to be taken require a high level of technical and economic expertise and information. Moreover, the powers conferred on ESMA are designed to allow swift intervention to deal with a threat that has materialised.
- 36 The Parliament adds that the powers conferred under Article 28 of Regulation No 236/2012 are subject to very specific criteria and limitations. Those powers are implemented in the context of a highly developed professional supervisory methodology and culture as well as a legislative and regulatory framework which cannot be compared with that in *Meroni v High Authority*.
- 37 The Council submits that ESMA does not have any margin of discretion as regards the adoption of measures under Article 28 of Regulation No 236/2012 but is obliged to adopt such measures if certain circumstances arise, namely where there is a threat to the orderly functioning and integrity of financial markets or the stability of the financial system of the Union.
- 38 The Council maintains that, in all its activities, including those falling under Article 28 of Regulation No 236/2012, ESMA must exercise a certain power of assessment to subsume facts into legal rules. However, that power is consistent with *Meroni v High Authority*. There is a difference between the wide degree of discretion referred to in that judgment and the ability to adopt executive decisions in a specific factual context.
- 39 The Commission submits that the powers conferred on ESMA by Article 28 of Regulation No 236/2012 are fully in line with the balance of powers enshrined in the Treaties, as interpreted by the Court. It is apparent

from, inter alia, *Meroni v High Authority* that, even in the absence of any reference in the ECSC Treaty [now expired] to delegating powers, an institution can, under the conditions set out in that judgment, delegate clearly defined executive decision-making powers to a distinct body, since such delegation does not constitute an actual transfer of responsibility by which the choices of the delegator are replaced by the choices of the delegate.

- 40 The Commission is of the opinion that European Union bodies such as ESMA, which may be vested with executive decision-making powers, are not prevented from assessing the factual elements referred to in the relevant legislation, which does not entail them in making economic policy choices but simply in making a technical assessment in their field of expertise. A measure chosen by ESMA should ensure the orderly functioning of and integrity of the financial markets or the stability of the whole or part of the financial system in the Union.

The Court's assessment

- 41 At pages 152 and 154 of *Meroni v High Authority*, the Court stated, in essence, that the consequences resulting from a delegation of powers are very different depending on whether it 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, or whether it involves a 'discretionary power implying a wide margin of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy'.
- 42 The Court also stated in that judgment that a delegation of the first kind cannot appreciably alter the consequences involved in the exercise of the powers concerned, whereas a delegation of the second kind, since it replaces the choices of the delegator by the choices of the delegate, brings about an 'actual transfer of responsibility'. As regards the case which gave rise to *Meroni v High Authority*, the Court held that the powers delegated by the High Authority to the bodies in question by Decision No 14-55 of 26 March 1955, establishing a financial arrangement for ensuring a regular supply of ferrous scrap for the common market, gave those bodies 'a degree of latitude which implied a wide margin of discretion', which could not be considered compatible with the 'requirements of the Treaty'.
- 43 It should be observed that the bodies in question in *Meroni v High Authority* were entities governed by private law, whereas ESMA is a European Union entity, created by the EU legislature.
- 44 As to the powers vested in ESMA under Article 28 of Regulation No 236/2012, it should be noted first of all that that provision does not confer any autonomous power on that entity that goes beyond the bounds of the regulatory framework established by the ESMA Regulation.
- 45 Next, it should be noted that, unlike the case of the powers delegated to the bodies concerned in *Meroni v High Authority*, the exercise of the powers under Article 28 of Regulation No 236/2012 is circumscribed by various conditions and criteria which limit ESMA's discretion.
- 46 First of all, ESMA can adopt measures under Article 28(1) of Regulation No 236/2012 only if, as provided for in Article 28(2), such measures 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. Moreover, all ESMA measures are subject to the condition that either no competent national authority has taken measures to address the threat or one or more of those authorities have taken measures which have proven not to address the threat adequately.
- 47 Second, when taking measures under Article 28(1) of Regulation No 236/2012, ESMA is required to take into account, in accordance with Article 28(3), 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 national authorities to monitor the threat in question, does not create a risk of regulatory arbitrage and 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, which is disproportionate to the benefits of the measure.

- 48 It follows from this that, before taking any decision, ESMA must examine a significant number of factors set out in Article 28(2) and (3) of Regulation No 236/2012 and the conditions imposed are cumulative.
- 49 Moreover, the two kinds of measure which ESMA may take under Article 28(1) of Regulation No 236/2012 are strictly confined to those set out in Article 9(5) of the ESMA Regulation.
- 50 Lastly, ESMA is required under Articles 28(4) and (5) of Regulation No 236/2012 to consult ESRB and, if necessary, other relevant bodies and must notify the competent national authorities concerned of the measure it proposes to take, including the details of the proposed measure and the evidence supporting the reasons why it must be adopted. ESMA is also required to review the measure at appropriate intervals, at least every 3 months. Thus, ESMA's margin of discretion is circumscribed by both the consultation requirement referred to above and the temporary nature of the measures authorised, which, established on the basis of best current practice in the field of supervision and sufficient information, are taken to address a threat calling for intervention at EU level.
- 51 The detailed delineation of the powers of intervention available to ESMA is also set out clearly in Article 30 of Regulation No 236/2012, which provides that the Commission is empowered to adopt delegated acts, in accordance with Article 42 of the regulation, specifying criteria and factors to be taken into account by the competent authorities and by ESMA in determining in which cases certain adverse events or developments and the threats referred to in point (a) of Article 28(2) of the regulation arise.
- 52 In that connection, Article 24 of Regulation No 918/2012 places even greater emphasis on the technical factual assessment that must be carried out by ESMA. Article 24(3) of that regulation restricts ESMA's powers of intervention to exceptional circumstances, in particular by specifying the type of threat which may justify intervention by ESMA on financial markets.
- 53 It follows from all the foregoing considerations that the powers available to ESMA under Article 28 of Regulation No 236/2012 are precisely delineated and amenable to judicial review in the light of the objectives established by the delegating authority. Accordingly, those powers comply with the requirements laid down in *Meroni v High Authority*.
- 54 Contrary to the applicant's claims, those powers do not, therefore, imply that ESMA is vested with a 'very large measure of discretion' that is incompatible with the FEU Treaty for the purpose of that judgment.
- 55 The first plea in law cannot, therefore, succeed.

The second plea in law, alleging breach of the principle established in Romano

Arguments of the parties

- 56 The United Kingdom is of the view that Article 28 of Regulation No 236/2012 authorises ESMA to adopt quasi-legislative measures of general application and that such power is contrary to the principle established in Case 98/90 *Romano* [1981] ECR 1241.
- 57 The United Kingdom observes that a prohibition on short sales affects the entire class of persons engaging in transactions in that instrument or category of instruments. At issue, therefore, is not an individual decision or a bundle of individual decisions, even if confined to a very limited range of stocks, but a 'measure of general application having the force of law'.
- 58 The Parliament contends that the power to issue prohibitions under that provision is limited to allowing intervention in connection with specific financial instruments. The acts that can be adopted are thus always

executive measures. Because of their highly technical nature, such measures are executive decisions, even though they may contain certain elements of general application.

- 59 The Parliament submits that measures that may be taken by ESMA under Article 28 of Regulation No 236/2012 cannot be regarded as ‘quasi-legislative’ provisions or as constituting ‘law’ within the meaning of *Romano*. All the measures that can be taken under that provision share three further features which underline the executive nature of ESMA decisions, namely the technical nature of the measures, the intention to respond, by the measure in question, to a specific situation, and the temporary nature of the measure.
- 60 The Council states that the Court did not refer to the concept of ‘quasi-legislative measures’ or that of ‘measures of general application’ in *Romano* and has not done so in any subsequent judgment. Accordingly, *Romano* is to be understood as prohibiting the conferral of legislative powers on bodies other than the EU legislature.
- 61 The Council points out that ESMA is required, under Article 28 of Regulation No 236/2012, to adopt a decision under certain circumstances, which are clearly defined, as are the criteria defining the content of such measures. Thus, ESMA confines itself to putting into practice EU legislation, so that decisions adopted under that provision are executive and not legislative in nature.
- 62 The Commission explains that in the case which gave rise to the judgment in *Romano* it was not possible to submit the acts adopted by the entity in question, even if of general application, to judicial control. The Court was therefore correct in concluding that such a conferral of powers to adopt acts having force of law was not in line with the FEU Treaty.

Findings of the Court

- 63 For the purposes of addressing the second plea in law, it should be recalled that the Court observed, at paragraph 20 of *Romano*, that it follows both from primary law concerning the powers conferred by the Council on the Commission for the implementation of rules established by the Council and from the judicial system created by the [FEU] Treaty that a body, such as that at issue in the case which gave rise to that judgment, that is, an administrative commission, may not be empowered by the Council to adopt acts ‘having the force of law’. According to the Court, whilst a decision of such a body may provide aid to institutions responsible for applying Union law, it is not of such a nature as to require those institutions to use certain methods or adopt certain interpretations when they come to apply Union rules. The Court concluded that the decision adopted by that administrative commission ‘did not bind’ the referring court.
- 64 It is clear from Article 28 of Regulation No 236/2012 that ESMA is required, in strictly circumscribed circumstances, to adopt measures of general application under that provision. Such measures may also include rules affecting any natural or legal person who has a specific financial instrument or specific class of financial instruments or who enter into certain financial transactions.
- 65 However, that does not mean that Article 28 of Regulation No 236/2012 is at odds with the principle established in *Romano*. It should be recalled that the institutional framework established by the FEU Treaty, in particular the first paragraph of Article 263 TFEU and Article 277 TFEU, expressly permits Union bodies, offices and agencies to adopt acts of general application.
- 66 Accordingly, it cannot be inferred from *Romano* that the delegation of powers to a body such as ESMA is governed by conditions other than those set out in *Meroni v High Authority*, as referred to at paragraphs 41 to 42 above.
- 67 As is apparent from the assessment of the first plea in law relied on by the United Kingdom, the latter has failed to establish that the delegation of powers to ESMA under Article 28 of Regulation No 236/2012 is at odds with those conditions, in particular the condition that only clearly defined executive powers may be delegated.

68 Consequently, the second plea in law cannot be accepted.

The third plea in law, alleging delegation of powers incompatible with Articles 290 TFEU and 291 TFEU

Arguments of the parties

69 The United Kingdom submits that, as Articles 290 TFEU and 291 TFEU circumscribe the circumstances in which certain powers may be given to the Commission, the Council has no authority under the Treaties to delegate powers such as those provided for in Article 28 of Regulation No 236/2012 to an EU agency.

70 The United Kingdom points out that any prohibition on short sales under Article 28(1) of Regulation No 236/2012 is intended to bind the entire class of persons engaging in transactions in that instrument or category of instruments. It is therefore a measure of general application, which cannot be entrusted to such an agency.

71 The Parliament observes that Articles 290 TFEU and 291 TFEU do not provide for the conferral of powers on Union agencies. However, those provisions do not, in any event, indicate that the powers which may be conferred on such a body should be more restrictive now than they were before the FEU Treaty came into force. Accordingly, the fact that the Commission can exercise powers under those provisions does not rule out the possibility of conferring other powers on such agencies.

72 The Parliament is of the view that the EU legislature may confer powers on Union agencies to adopt measures of an executive nature in areas which require specific technical expertise. Those powers must not, however, allow the adoption of general regulatory measures that could be classified as 'law' or which require genuine discretionary powers. Provided that the powers are defined by the Union legislature, are of an executive nature and are determined by professional, technical or scientific considerations, they will not upset institutional balance.

73 The Council agrees that no provision in the Treaties refers specifically to the conferral of powers on Union agencies. However, that does not mean that any such conferral by the EU legislature is incompatible with Articles 290 TFEU and 291 TFEU. The nature of measures that may be adopted by ESMA under Article 28 of Regulation No 236/2012 is completely different from that of measures adopted under those FEU Treaty provisions.

74 The Council observes that Article 290 TFEU lays down only procedural requirements relating to the control of the powers conferred on the Commission to adopt delegated acts whose purpose is to 'supplement or amend certain non-essential elements of the legislative act'.

75 With regard to implementing acts which may be adopted under Article 291 TFEU, the Council states that that provision does not impose any procedural constraints, except for an obligation on the EU legislature to adopt provisions relating to the implementation of the powers referred to in that provision.

76 The Commission states that, unlike the delegation of quasi-legislative powers, which is expressly governed by Article 290 TFEU, there is no mention in the Treaties as to whether or to what extent executive powers may be delegated. As regards executive powers, Articles 17 TFEU and 291 TFEU do not rule out the possibility that the EU legislature or the Commission may, in principle, delegate such powers to a non-institutional body.

Findings of the Court

77 It should be noted, first, that Article 28 of Regulation No 236/2012 delegates powers not to the Commission but to a Union body, office or agency.

78 Accordingly, for the purpose of addressing the third plea in law, the Court is called upon to adjudicate on whether the authors of the FEU Treaty intended to establish, in Articles 290 TFEU and 291 TFEU, a single

legal framework under which certain delegated and executive powers may be attributed solely to the Commission or whether other systems for the delegation of such powers to Union bodies, offices or agencies may be contemplated by the Union legislature.

- 79 It should be noted in that regard that, while the treaties do not contain any provision to the effect that powers may be conferred on a Union body, office or agency, a number of provisions in the FEU Treaty none the less presuppose that such a possibility exists.
- 80 Under Article 263 TFEU, the Union bodies whose acts may be subject to judicial review by the Court include the 'bodies, offices' and 'agencies' of the Union. The rules governing actions for failure to act are applicable to those bodies pursuant to Article 265 TFEU. Article 267 TFEU provides that the courts and tribunals of the Member States may refer questions concerning the validity and interpretation of the acts of such bodies to the Court. Such acts may also be the subject of a plea of illegality pursuant to Article 277 TFEU.
- 81 Those judicial review mechanisms apply to the bodies, offices and agencies established by the EU legislature which were given powers to adopt measures that are legally binding on natural or legal persons in specific areas, such as the European Chemicals Agency, the European Medicines Agency, the Office for Harmonisation in the Internal Market (Trade Marks and Designs), the Community Plant Variety Office and the European Aviation Safety Agency.
- 82 As regards the present case, it should be noted that Article 28 of Regulation No 236/2012 vests ESMA with certain decision-making powers in an area which requires the deployment of specific technical and professional expertise.
- 83 However, that conferral of powers does not correspond to any of the situations defined in Articles 290 TFEU and 291 TFEU.
- 84 As indicated at paragraphs 2 to 4 above, the legal framework of Article 28 of Regulation No 236/2012 is established, inter alia, by Regulation No 1092/2010, the ESMA Regulation and Regulation No 236/2012. Those regulations form part of a series of regulatory instruments adopted by the EU legislature so that the Union may, in view of the integration of international financial markets and the contagion risk of financial crises, endeavour to promote international financial stability, as stated in recital 7 in the preamble to Regulation No 1092/2010.
- 85 Consequently, Article 28 of Regulation No 236/2012 cannot be considered in isolation. On the contrary, that provision must be perceived as forming part of a series of rules designed to endow the competent national authorities and ESMA with powers of intervention to cope with adverse developments which threaten financial stability within the Union and market confidence. To that end, those authorities must be in a position to impose temporary restrictions on the short selling of certain stocks, credit default swaps or other transactions in order to prevent an uncontrolled fall in the price of those instruments. Those bodies have a high degree of professional expertise and work closely together in the pursuit of the objective of financial stability within the Union.
- 86 Therefore, Article 28 of Regulation No 236/2012, read in conjunction with the other regulatory instruments adopted in that field identified above, cannot be regarded as undermining the rules governing the delegation of powers laid down in Articles 290 TFEU and 291 TFEU.
- 87 It follows that the third plea in law must be rejected.

The fourth plea in law, alleging breach of Article 114 TFEU

Arguments of the parties

- 88 The United Kingdom is of the view that Article 28 of Regulation No 236/2012 is not intended to authorise ESMA to take individual measures directed at natural or legal persons. On the contrary, measures that may be adopted under that provision are of general application.
- 89 The United Kingdom considers that, if, however, Article 28 of Regulation No 236/2012 is to be regarded as authorising ESMA to direct decisions at natural or legal persons, that provision is *ultra vires* Article 114 TFEU. That provision does not empower the EU legislature to take individual decisions that are not of general application or to delegate to the Commission or a Union agency the power to adopt such decisions.
- 90 The United Kingdom submits that decisions directed at financial institutions overriding those made by competent national authorities cannot be regarded as Article 114 TFEU harmonisation measures. Rather, such individual decisions constitute direct regulatory measures by an EU agency directed at individuals in Member States.
- 91 The Parliament argues that the notion of 'harmonisation' within the meaning of Article 114 TFEU encompasses the power to adopt, if necessary, individual measures. Moreover, the EU has the power to establish agencies and give them a role in the application of that provision, provided such agencies form part of a normative context requiring the approximation of provisions relating to the internal market.
- 92 The Parliament claims that the possibility available to ESMA to intervene, where necessary, in the EU financial market is intended for situations in which action at national level has not been sufficient or adequate. Accordingly, measures adopted under Article 28 of Regulation No 236/2012 are designed to ensure that risks related to short selling are addressed in a harmonised manner and thereby ensure the orderly functioning of the internal market.
- 93 The Council contends that Article 114 TFEU may serve as the legal basis for empowering ESMA to adopt individual measures. That provision confers on the EU legislature, depending on the general context and the specific circumstances of the matter to be harmonised, discretion as regards the most appropriate method of harmonisation for achieving the desired result, especially in fields with complex technical features.
- 94 The Council states that measures which may be adopted by ESMA in the context of Article 28 of Regulation No 236/2012 are intended to address threats to the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union. Article 28 establishes that ESMA may proceed with the adoption of measures of intervention only where there are cross-border implications and where no national measures have been adopted or such measures are insufficient.
- 95 The Commission points out that Article 28(1) of Regulation No 236/2012 refers to Article 9(5) of the ESMA Regulation, which empowers the latter, under specific conditions, to prohibit or restrict certain financial activities, the ESMA Regulation also having been adopted on the basis of Article 114 TFEU. It is therefore difficult to see how Article 28 of Regulation No 236/2012 may be regarded as going beyond the competences conferred on the EU legislature by Article 114 TFEU.
- 96 The Commission claims that the measures set out in Article 28(1) of Regulation No 236/2012 should not be looked at in isolation but considered together with other provisions regulating the control of short selling activities. Thus, ESMA's tasks are closely linked to the rules aimed at approximating the divergent national provisions in this field.

The Court's findings

- 97 It should be noted, first, that the fourth plea put forward by the applicant is relied on only in the event that Article 28 of Regulation No 236/2012 must be interpreted as authorising ESMA to adopt individual decisions directed at natural or legal persons.
- 98 While, as is apparent from paragraph 64 above, Article 28 of Regulation No 236/2012 empowers ESMA to adopt measures of general application, in strictly circumscribed circumstances, the possibility cannot be ruled

out that it may also be required, under the powers conferred on it by that provision, to take decisions directed at specific natural or legal persons.

- 99 In order to address the fourth plea, the Court must adjudicate on the question whether the system of intervention established by Article 28 of Regulation No 236/2012 may fall within the scope of Article 114 TFEU.
- 100 With regard to the scope of Article 114 TFEU, it should be recalled that a legislative act adopted on that legal basis must, first, comprise measures for the approximation of the provisions laid down by law, regulation or administrative action in the Member States and, second, have as its object the establishment and functioning of the internal market.
- 101 It is therefore necessary to examine whether Article 28 of Regulation No 236/2012 satisfies those two conditions.
- 102 First, by the expression ‘measures for the approximation’, the authors of the FEU Treaty intended to confer on the Union legislature, depending on the general context and the specific circumstances of the matter to be harmonised, discretion as regards the most appropriate method of harmonisation for achieving the desired result, especially in fields with complex technical features (see Case C-66/04 *United Kingdom v Parliament and Council* [2005] ECR I-10553, paragraph 45).
- 103 The Court has held in that regard that such discretion may be used in particular to choose the most appropriate method of harmonisation where the proposed approximation requires highly technical and specialist analyses to be made and developments in a specific field to be taken into account (see, to that effect, *United Kingdom v Parliament and Council*, paragraph 46).
- 104 Moreover, in Case C-217/04 *United Kingdom v Parliament and Council* [2006] ECR I-3771, paragraph 44, the Court stated, inter alia, that the EU legislature may deem it necessary to provide for the establishment of an EU body responsible for contributing to the implementation of a process of harmonisation.
- 105 Accordingly, the EU legislature, in its choice of method of harmonisation and, taking account of the discretion it enjoys with regard to the measures provided for under Article 114 TFEU, may delegate to a Union body, office or agency powers for the implementation of the harmonisation sought. That is the case in particular where the measures to be adopted are dependent on specific professional and technical expertise and the ability of such a body to respond swiftly and appropriately.
- 106 As the applicant maintains, inter alia, that Article 114 TFEU cannot serve as the legal basis for the adoption of measures that are legally binding on individuals, it should be recalled that, in Case C-359/92 *Germany v Council* [1994] ECR I-3681, paragraph 37, the Court held that, in certain fields, the approximation of general laws alone may not be sufficient to ensure the unity of the market. Consequently, the concept of ‘measures for the approximation’ of legislation must be interpreted as encompassing the EU legislature’s power to lay down measures relating to a specific product or class of products as well as, if necessary, individual measures concerning those products.
- 107 In that regard, the Court pointed out, at paragraph 44 of Case C-217/04 *United Kingdom v Parliament and Council*, that nothing in the wording of Article 114 TFEU implies that the addressees of the measures adopted by the EU legislature on the basis of that provision can only be Member States.
- 108 It should be noted that, faced with serious threats to the orderly functioning and integrity of the financial markets or the stability of the financial system in the EU, the EU legislature sought, by Article 28 of Regulation No 236/2012, to provide an appropriate mechanism which would enable, as a last resort and in very specific circumstances, measures to be adopted throughout the EU which may take the form, where necessary, of decisions directed at certain participants in those markets.

- 109 It is apparent from recital 1 in the preamble to Regulation No 236/2012 that the competent authorities of several Member States have adopted emergency measures to restrict or ban short selling in some or all securities on account of the threat to the viability of financial institutions and the resulting systemic risks. It is also pointed out in that recital that the measures adopted by Member States are divergent as the Union lacks a specific common regulatory framework for monitoring short selling.
- 110 The EU legislature also indicated, at recital 3 in the preamble to Regulation No 236/2012, that it is appropriate and necessary for the rules provided for in the regulation to take the legislative form of a regulation in order to ensure that provisions directly imposing obligations on private parties to notify and disclose net short positions relating to certain instruments and regarding uncovered short selling are applied in a uniform manner throughout the Union. A regulation was also deemed necessary to confer powers on ESMA to coordinate measures taken by competent authorities or to take the necessary measures itself in the area concerned.
- 111 Moreover, the EU legislature stated, at recital 5 in the preamble to Regulation No 236/2012, that to end the current fragmented situation, in which some Member States have taken divergent measures, and to restrict the possibility that divergent measures may be taken by competent authorities, it is important to address the potential risks arising from short selling and credit default swaps in a harmonised manner.
- 112 Article 28 of Regulation No 236/2012 is in fact directed at the harmonisation of the Member States' laws, regulations and administrative provisions relating to the supervision of a number of stocks and the monitoring, in specific situations, of certain commercial transactions concerning those stocks, namely net short positions in relation to a financial instrument or a specific class of financial instruments.
- 113 Second, with regard to the requirement laid down in Article 114 TFEU that harmonisation measures adopted by the EU legislature must have as their object the establishment and functioning of the internal market, it should be noted that the Court stated, at paragraph 42 of Case C-217/04 *United Kingdom v Parliament and Council*, that that provision may 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.
- 114 In that regard, recital 2 in the preamble to Regulation No 236/2012 states that the purpose of the regulation is to ensure the proper functioning of the internal market and to improve the conditions of its functioning, in particular with regard to the financial markets. The EU legislature therefore considered it appropriate to lay down a common regulatory framework with regard to the requirements and powers relating to 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. Therefore, the harmonisation of the rules governing such transactions is intended to prevent the creation of obstacles to the proper functioning of the internal market and the continuing application of divergent measures by Member States.
- 115 It should be added that, as stated in recital 33 in the preamble to Regulation No 236/2012, while competent national authorities will often be best placed to monitor and react immediately to an adverse development, ESMA should also have the power to take measures where short selling and other related activities threaten the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union, where there may be cross-border implications and competent national authorities have not taken sufficient measures to address the threat.
- 116 It follows that the purpose of the powers provided for in Article 28 of Regulation No 236/2012 is in fact to improve the conditions for the establishment and functioning of the internal market in the financial field.
- 117 It is apparent from all the foregoing considerations that Article 28 of Regulation No 236/2012 satisfies all the requirements laid down in Article 114 TFEU. The latter provision therefore constitutes an appropriate legal basis for the adoption of Article 28.
- 118 Accordingly, the fourth plea in law must be rejected.

119 It follows from all the foregoing considerations that the action must be dismissed in its entirety.

Costs

120 In accordance with Article 138(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the defendants have applied for costs and the United Kingdom has been unsuccessful, the latter must be ordered to pay the costs. The Kingdom of Spain, the French Republic, the Italian Republic and the Commission, which have intervened in support of the form of order sought by the defendants, are to bear their own costs, in accordance with Article 140(1) of the Rules of Procedure.

On those grounds, the Court (Grand Chamber) hereby:

1. **Dismisses the action;**
2. **Orders the United Kingdom of Great Britain and Northern Ireland to pay the costs;**
3. **Orders the Kingdom of Spain, the French Republic, the Italian Republic and the European Commission to bear their own costs.**