Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 25 June 2015 [1]

**Joined Cases C-132/14, C-133/14, C-134/14, C-135/14 and C-136/14**

**European Parliament (Cases C-132/14 and C-136/14)**
**and**
**European Commission (Cases C-133/14 to C-135/14)**
**v**

**Council of the European Union**

(Actions for annulment — Regulation (EU) No 1385/2013 — Directive 2013/62/EU — Directive 2013/64/EU — Legal basis — Article 349 TFEU — Scope — Outermost region — Amendment of the status of Mayotte)

1. In the present set of proceedings, the Parliament and the Commission request the Court to annul Regulation No 1385/2013 [2] and Directive 2013/64. [3] In addition, the Commission also seeks the annulment of Directive 2013/62 [4] (taken together: 'the contested measures'). The issue in these actions is whether the contested measures were adopted on the correct legal basis.

2. The crux of the cases under consideration is this: what is the scope of Article 349 TFEU? This question has arisen due to the change of status, under EU law, of Mayotte. In the wake of a 2009 local referendum, the islands which form the archipelago of Mayotte have furthered their process of integration into the French Republic and become a French overseas department and region on 31 March 2011. Following a request by the French Republic to that effect, the European Council decided to change the status of Mayotte, as from 1 January 2014, from an Overseas Country or Territory ('OCT') to an Outermost Region ('OR'). [5]

3. However, an institutional dispute has since arisen in respect of the contested measures adopted in connection with that change in status. The Council, which disagreed with the proposed sectorial legal bases of the contested measures, decided to adopt them pursuant to Article 349 TFEU. The question is now whether the Council was justified in doing so, which, as we will see, I believe it was.

1 — Original language: English.

2 — Council Regulation (EU) No 1385/2013 of 17 December 2013 amending Council Regulations (EC) No 850/98 and (EC) No 1224/2009, and Regulations (EC) No 1069/2009, (EU) No 1379/2013 and (EU) No 1380/2013 of the European Parliament and of the Council, following the amendment of the status of Mayotte with regard to the European Union (OJ 2013 L 354, p. 86) ('the Regulation').

3 — Council Directive 2013/64/EU of 17 December 2013 amending Council Directives 91/271/EEC and 1999/74/EC, and Directives 2000/60/EC, 2006/7/EC, 2006/25/EC and 2011/24/EU of the European Parliament and of the Council, following the amendment of the status of Mayotte with regard to the European Union (OJ 2013 L 353, p. 8) ('the Horizontal Directive').

4 — Council Directive 2013/62/EU of 17 December 2013 amending Directive 2010/18/EU implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC, following the amendment of the status of Mayotte with regard to the European Union (OJ 2013 L 353, p. 7) ('the Mini-Directive').

5 — European Council Decision 2012/419/EU of 11 July 2012 amending the status of Mayotte with regard to the European Union (OJ 2012 L 204, p. 131).

## I – **Legal framework**

### A – *Relevant applicable and repealed Treaty provisions*

4. Following the entry into force of the Treaty of Maastricht, Article 227(2) of the EC Treaty was worded as follows:

‘With regard to the French overseas departments, the general and particular provisions of this Treaty relating to:

— the free movement of goods;

— agriculture, save for Article 40(4) [of the EC Treaty];

— the liberalisation of services;

— the rules on competition;

— the protective measures provided for in Articles 109h, 109i, and 226 [of the EC Treaty];

— the institutions;

shall apply as soon as this Treaty enters into force.

The conditions under which the other provisions of this Treaty are to apply shall be determined, within two years of the entry into force of this Treaty, by decisions of the Council, acting unanimously on a proposal from the Commission.

The institutions of the Community will, within the framework of the procedures provided for in this Treaty, in particular Article 226 [of the EC Treaty], take care that the economic and social development of these areas is made possible.’

5. Following the entry into force of the Treaty of Amsterdam, Article 227(2) of the EC Treaty was replaced by Article 299(2) EC, which stated:

‘The provisions of this Treaty shall apply to the French overseas departments, the Azores, Madeira and the Canary Islands.

However, taking account of the structural social and economic situation of the French overseas departments, the Azores, Madeira and the Canary Islands, which is compounded by their remoteness, insularity, small size, difficult topography and climate, economic dependence on a few products, the permanence and combination of which severely restrain their development, the Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament, shall adopt specific measures aimed, in particular, at laying down the conditions of application of the present Treaty to those regions, including common policies.

The Council shall, when adopting the relevant measures referred to in the second subparagraph, take into account areas such as customs and trade policies, fiscal policy, free zones, agriculture and fisheries policies, conditions for supply of raw materials and essential consumer goods, State aids and conditions of access to structural funds and to horizontal Community programmes.

The Council shall adopt the measures referred to in the second subparagraph taking into account the special characteristics and constraints of the outermost regions without undermining the integrity and the coherence of the Community legal order, including the internal market and common policies.'

6. Following the entry into force of the Treaty of Lisbon, Article 299 EC was replaced by Articles 349 and 355 TFEU; and, in substance, by Article 52 TEU. The latter provides:

'1. The Treaties shall apply to the Kingdom of Belgium, Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland.

2. The territorial scope of the Treaties is specified in Article 355 [TFEU].'

7. Article 349 TFEU, as amended by European Council Decision 2012/419/EU, reads:

'Taking account of the structural social and economic situation of Guadeloupe, French Guiana, Martinique, Mayotte, Réunion, Saint-Barthélemy, Saint-Martin, the Azores, Madeira and the Canary Islands, which is compounded by their remoteness, insularity, small size, difficult topography and climate, economic dependence on a few products, the permanence and combination of which severely restrain their development, the Council, on a proposal from the Commission and after consulting the European Parliament, shall adopt specific measures aimed, in particular, at laying down the conditions of application of the Treaties to those regions, including common policies. Where the specific measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act on a proposal from the Commission and after consulting the European Parliament.

The measures referred to in the first paragraph concern in particular areas such as customs and trade policies, fiscal policy, free zones, agriculture and fisheries policies, conditions for supply of raw materials and essential consumer goods, State aids and conditions of access to structural funds and to horizontal Union programmes.

The Council shall adopt the measures referred to in the first paragraph taking into account the special characteristics and constraints of the outermost regions without undermining the integrity and the coherence of the Union legal order, including the internal market and common policies.'

8. Article 355(1) TFEU, as amended by European Council Decision 2012/419/EU, is worded as follows:

'In addition to the provisions of Article 52 [TEU] relating to the territorial scope of the Treaties, the following provisions shall apply:

1. The provisions of the Treaties shall apply to Guadeloupe, French Guiana, Martinique, Mayotte, Réunion, Saint-Barthélemy, Saint-Martin, the Azores, Madeira and the Canary Islands in accordance with Article 349 [TFEU].'

B – *The contested measures*

9. For the purposes of the present proceedings, it is sufficient to note the following.

10. In substance, the *Regulation* amends five different regulations. While Article 1(1) thereof adds Mayotte to a list of bodies of maritime water which may be subject to EU measures to preserve the fishery resources, Article 1(2) bans the use of purse-seine on tuna and tuna-like schools of fish in the waters most closely surrounding it. Article 2 postpones until 31 December 2021 the deadline for implementation of certain EU rules on the common organisation of the markets in fishery and aquaculture products ('COMFA') relating to the labelling of fishery products. Article 3(1) and (2), respectively, derogate from and postpone, until 31 December 2025 and 31 December 2021, certain Common Fisheries Policy ('CFP') rules on fishing capacity and fleet registry, whereas Article 3(3) makes certain entries in respect of Mayotte in a list designating the fishing capacity ceilings. Article 4 postpones, until 1 January 2021, the application to Mayotte of certain rules relating to the processing of animal by-products and derived products. Lastly, while Article 5 postpones until 31 December 2021 the obligation for the French Republic to apply a number of CFP compliance rules in respect of Mayotte, it also obliges that Member State to set up a provisional control scheme by 30 September 2014.

11. The *Horizontal Directive* essentially postpones the application to Mayotte of a number of rules contained in six different directives regarding various policy areas such as water policy; urban waste water treatment; bathing water; the protection of laying hens; health and safety in relation to artificial optical radiation; and patient rights in the field of cross-border healthcare. The obligations laid down in those directives are instead to take effect at a later date, ranging between 1 January 2014 and 31 December 2031.

12. For its part, the *Mini-Directive* grants the French Republic, as regards Mayotte, an additional period to comply with EU rules on parental leave. That period ends on 31 December 2018.

## II – **Background to the dispute**

13. In the wake of the adoption of European Council Decision 2012/419/EU, set to enter into force on 1 January 2014, on 13 June 2013 the Commission submitted three proposals to the EU legislature intended to amend a number of pieces of secondary legislation.

14. The Commission proposal which would later become the Regulation was based on Articles 43(2) and 168(4)(b) TFEU. The proposal underlying the Horizontal Directive was founded on Articles 43(2), 114, 153(2), 168 and 192(1) TFEU. Lastly, the proposal which formed the basis of the Mini-Directive was based on Article 155(2) TFEU.

15. Thus, the Commission proposals all referred to sectorial legal bases. With the exception of Article 155(2) TFEU, those legal bases specified the ordinary legislative procedure and consultation of the Economic and Social Committee (and, in respect of certain of the proposed legal bases, the Committee of the Regions as well).

16. However, during the legislative process, the Council decided to change the legal basis for the three measures to Article 349 TFEU.

17. In respect of the Horizontal Directive and the Regulation, the Parliament suggested adding Article 349 TFEU to the sectorial bases originally proposed. Accordingly, as concerns those two measures, the Parliament considered itself not to be acting in a consultative but rather in a co-legislative capacity.

18. Nonetheless, on 17 December 2013, the Council adopted the contested measures, considering it had received the requisite view of the Parliament on the proposals.

## III – **Procedure before the Court and forms of order sought**

19. By applications lodged on 21 March 2014, the applicants initiated the present set of proceedings. In Case C-132/14, the Parliament claims the Court should:

— annul the Regulation;

— order the Council to pay the costs.

20. In Case C-133/14, the Commission claims the Court should:

— annul the Horizontal Directive;

— maintain the effects of the Horizontal Directive until the entry into force of a new directive founded on appropriate legal bases;

— order the Council to pay the costs.

21. In Case C-134/14, the Commission claims the Court should:

— annul the Mini-Directive;

— maintain the effects of the Mini-Directive until the entry into force of a new directive founded on appropriate legal bases;

— order the Council to pay the costs.

22. In Case C-135/14, the Commission claims the Court should:

— annul the Regulation;

— maintain the effects of the Regulation until the entry into force of a new regulation founded on appropriate legal bases;

— order the Council to pay the costs.

23. In Case C-136/14, the Parliament claims the Court should:

— annul the Horizontal Directive;

— order the Council to pay the costs.

24. By order of the President of the Court of 28 April 2014, the five cases were joined for the purposes of the written and oral procedure, as well as the judgment. In its joint defence lodged on 17 June 2015, the Council claims that the Court should:

— dismiss the Parliament's and the Commission's applications in their entirety;

— order the Parliament and the Commission to bear the costs;

— in the alternative, in the event that the Court might annul the contested measures, maintain their effects until the adoption of new legislative acts replacing them founded on appropriate legal bases determined by the Court.

25. By order of the President of the Court of 29 July 2014, the Kingdom of Spain, the French Republic and the Portuguese Republic were granted leave to intervene in support of the Council.

26. At the hearing held on 21 April 2015, the Parliament, the Commission and the Council presented oral argument, as did the three interveners.

## IV – **Arguments of the parties and the interveners**

27. In support of their applications for the annulment of the contested measures, the Parliament and the Commission raise the same single plea at law: the incorrect choice of legal basis made by the Council. However, the views of the Parliament and the Commission on the scope of Article 349 TFEU differ.

28. The *Parliament* takes the view that Article 349 TFEU allows only the adoption of specific measures directly aimed at the ORs which seek to remedy the disadvantages caused by the features and particular constraints of the region(s) in question. In doing so, those measures must be linked to the economic and/or social situation of the OR in question. Conversely, Article 349 TFEU cannot form the basis of measures falling within the scope of an EU policy which are not designed to adapt EU legislation to those constraints. A measure which concerns an OR does not automatically, by dint of that fact alone, fall within the scope of Article 349 TFEU. Although specific measures may, in the Parliament's view, take both a general and an ad hoc form, such measures must provide an advantage to the ORs linked to their specific situation and cannot consist solely of postponements of the application of certain provisions of EU law. Indeed, the Parliament argues that a postponement does not adapt EU law to the specific conditions of the OR, but on the contrary guarantees its full application at a later date.

29. Specifically, the Parliament concedes that the Council could lawfully have recourse, in respect of Articles 3(1) and (2) and 5 of the Regulation, to Article 349 TFEU. For the remainder it argues, first, that the purpose and content of Articles 1, 2 and 3(3) of the Regulation relate rather to the CFP under Article 43 TFEU than to Article 349 TFEU. Second, Article 4 of the Regulation, which merely postpones the application of certain rules concerning the processing of animal by-products, could not in its view validly be adopted under Article 349 TFEU instead of Article 168(4)(b) TFEU. Accordingly, the Parliament argues that the Regulation ought to have been adopted pursuant to Articles 43(2), 168(4) and 349 TFEU. Moreover, the Parliament contends that it was not open to the Council to adopt the Horizontal Directive on the basis of Article 349 TFEU either alone or jointly with other legal provisions, as it takes the view that the provisions of that directive essentially postpone certain obligations of the French Republic in respect of Mayotte. Derogations of that type are, the Parliament argues, relevant to any region required to live up to new standards.

30. The *Commission* contends that the Council could not have recourse to Article 349 TFEU, as the contested measures do not derogate from the Treaties but only amend secondary EU law, which that provision does not allow. The contested measures ought therefore to have been adopted on the sectorial bases originally proposed. The Commission finds support for this view in the wording of Article 349 TFEU read in conjunction with Article 355(1) TFEU, in the system of legal bases in the FEU Treaty and in the origins of Article 349 TFEU.

31. Specifically, the Commission submits that the use of the expression 'in particular' in the wording of Article 349 TFEU means that that provision covers any specific measure which derogates from the Treaties, irrespective of whether that measure sets particular 'conditions of application of the Treaties'. Therefore, Article 349 TFEU and Article 355(1) TFEU, read together, enable the Council to derogate from the 'provisions of the Treaties'. The Commission argues that the acts of the institutions apply exclusively within the limits of Article 355 TFEU. Unless otherwise stated, such an act does not apply to the ORs. As for the system of legal bases of the FEU Treaty, the Commission contends that

State aids granted to the ORs on the basis of the factors listed in Article 349 TFEU have always been authorised under Article 88 EC rather than Article 299 EC. The current wording of Article 107(3)(a) TFEU, which refers to Article 349 TFEU, arguably codifies this. The Commission's view is that the contested measures address transitory issues rather than those 'permanent' factors listed in Article 349 TFEU. Here, it claims that the sectorial bases already give the possibility of making such arrangements, and notes that acceding Member States have also been granted transitional periods to comply with the EU *acquis*. Regarding the Regulation specifically, the Commission argues that Article 1 thereof amends the areas subject to conservation under the CFP, most of which have no relation to the ORs. Lastly, the historical evolution of Article 349 TFEU arguably lends support to the view that unlike Article 227(2) of the EC Treaty, apart from adding certain Spanish and Portuguese territories to the list of ORs, Articles 299(2) EC and 349 TFEU allow the Council to derogate from primary law in its entirety.

32. The *Council* submits that Article 349 TFEU constitutes a *lex specialis* of limited geographic application which takes priority over other legal bases every time the EU legislature intends to adopt specific measures which truly aim to take into account the adverse situation of ORs, in so far as such measures are necessary, proportionate and precisely determined. The Council argues that the wording of Article 349 TFEU confers upon it the necessary flexibility as far as the nature, content and form of the specific measures are concerned — such as temporary derogations of a shorter or longer duration — and that the concept of 'Treaties' includes the acts of the institutions. This is supported, in its view, by the historic evolution of Article 349 TFEU as well as by its wording, which refers to 'free zones' and access to 'horizontal Union programmes'. The Council holds that no reason exists to require the use of the sectorial legal bases. Such a requirement would risk compromising the effectiveness of Article 349 TFEU and run counter to case-law.

33. In response to the Parliament, the Council disagrees that Article 349 TFEU cannot serve as a legal basis for the adoption of postponements: distinguishing between temporary and permanent derogations would be artificial and unworkable in practice. Moreover, the Council argues that the aims of the Regulation and the Horizontal Directive are to provide support to Mayotte in accordance with the requirements of Article 349 TFEU. It objects to the idea that it might be possible to grant such significant postponements to any region of a Member State. Furthermore, the Council argues that the expression 'taking account of', as used in Article 349 TFEU, does not require that the specific measures in question must be designed to remedy the adverse situation of the ORs. Conceding that Articles 1(1) and 3(3) of the Regulation are accessory to the main provisions set out in Articles 1(2) and 3(1) of that same regulation, the Council goes on to argue that Article 349 TFEU constitutes the 'centre of gravity' of both measures contested by the Parliament. The Council does not, at any rate, see how the different provisions in those measures are inextricably linked to enable, exceptionally, recourse to multiple legal bases.

34. As for certain of the Commission's arguments, the Council submits that the Commission underestimates the significance of the historical evolution of Article 349 TFEU. The concept of 'specific measures' comprises, in the view of the Council, a measure specifically designed for the ORs of an altogether new type. Although not contesting the view that State aid decisions in respect of the ORs have been taken by the Commission in the past, the Council retorts that those decisions merely constitute an application of the Treaty and do not justify a similar approach in respect of other areas and, moreover, that State aids are specifically mentioned in the second paragraph of Article 349 TFEU. Specifically as regards the Mini-Directive, the Council argues that it falls within the scope of Article 349 TFEU and not the sectorial bases proposed by the Commission.

35. The *Portuguese Government* observes that irrespective of its duration, a derogation is a derogation. Although, in that government's view, it follows from the third paragraph of Article 349 TFEU that the Council may not adopt perpetual derogations, there is no basis in the wording of Article 349 TFEU for a distinction between permanent and temporary derogations. That government agrees with the Council that Article 349 TFEU renders irrelevant — to the point of excluding — recourse to other legal bases.

36. The *Spanish Government* emphasises, inter alia, the use of the term 'in particular' in the wording of Article 349 TFEU, and the fact that under the Treaty of Lisbon, Article 349 TFEU was separated from Article 355(1) TFEU. That government goes on to add that the reference, in Article 349 TFEU, to the special legislative procedure presupposes that it can be applied to amend secondary legislation. Moreover, if Article 349 TFEU can be relied upon to adapt the application of primary law to those regions, *a fortiori* this would, in its view, also include provisional or transitory measures.

37. In response to the Commission, the *French Government* states, first, that the territorial scope of secondary EU legislation is laid down in Articles 52 TEU and 355 TFEU. Second, it argues that a number of provisions of primary law, such as Article 19 TEU, use the concept of 'Treaties' in the broad sense. Third, emphasising the broad terms of Article 349 TFEU as well as the historical evolution of that provision, that government suggests that Article 349 TFEU ought to receive a broad application. The Council ought, in that government's view, to have recourse to Article 349 TFEU as a *lex specialis* every time it contemplates adopting measures specific to the ORs. Fourth, it argues that granting a postponement can indeed be designed to counter the economic and/or social hardships which the ORs face, and that certain of the postponement provisions (such as Articles 3 to 5 of the Regulation and Articles 1, 2 and 5 of the Horizontal Directive) impose specific obligations or conditions during the transitory periods. Fifth, the French Government adds that not only economic or social considerations in the narrow sense may justify having recourse to Article 349 TFEU, but also other factors such as environmental factors. Lastly, that government questions the fact that, in respect of the Regulation, the Parliament recognises, on the one hand, the underdeveloped state of parts of the Mayotte fleet, yet refuses, on the other hand, to do so when it comes to the commercialisation of fish products there or the industrial capacity for the processing of animal by-products.

## V – **Analysis**

### A – *Preliminary comments*

38. To begin, and as all agree, the choice of the legal basis for an EU measure must rest on objective factors amenable to judicial review, which include the aim and content of that measure. If that measure pursues a twofold purpose or has a twofold component of which one is identifiable as the predominant purpose or component, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely, that required by the predominant purpose or component. By way of exception, if it is established that the measure pursues several objectives which are inseparably linked without one being secondary and indirect in relation to the other, the measure must be founded on the various corresponding legal bases. However, no dual legal basis is possible where the procedures required by each legal basis are mutually incompatible.[6] Moreover, if the Treaties contain a more specific provision that is capable of constituting the legal basis for the measure in question, the measure must be founded on that provision.[7]

39. It emerges from the arguments of the parties that, in essence, the Commission takes a restrictive view of the scope of Article 349 TFEU while the Council, on the other hand, interprets it broadly. The Parliament, for its part, seems to favour a middle-of-the-road approach, although in substance more in line with the Council's view.

40. That being so, I find it puzzling that the Court is, once more, requested to solve a rather complicated legislative dispute yet, at the same time — as all agree that the contested measures are benign and ought not to be struck down immediately — is asked to make sure that its ruling will have no consequences. This is not the typical role of a judicial body.

6 — See, inter alia, the judgment in *Commission* v *Council*, C-377/12, EU:C:2014:1903, paragraph 34 and case-law cited.

7 — See, inter alia, the judgment in *Parliament* v *Council*, C-48/14, EU:C:2015:91, paragraph 36 and case-law cited.

41. Moreover, first, both sides to the dispute make — to a certain extent — reasonable points. Second, although the Parliament and the Commission both reject the interpretation defended by the Council, they do not agree as to the correct legal basis. As the hearing made clear, it seems that the approaches taken in these proceedings are more a matter of preference than legal reasoning. That is regrettable in view of the fact that, as mentioned, the choice of a legal basis ought to be objective. Be that as it may, this seems attributable to the wording of Article 349 TFEU, which is not exactly a model of lucidity. [8]

B – *Principles governing the relationship of the ORs with the EU: integration and adaptation*

42. The Janus-faced relationship between the ORs and the EU is based on two seemingly opposed principles. Their interplay remains yet to be fully seen and understood.

43. Since 1957, Community law, as it was then known, has been — in principle — fully applicable to the precursors to the ORs, namely the French overseas departments. This is in contrast to the OTCs, in respect of which EU law applies only to the extent specifically provided. [9] This principle which, as we will see below, now follows from a joint reading of Articles 52(2) TEU and 355(1) TFEU, is known as the *principle of integration*, and demonstrates the complete assimilation of the ORs into the EU legal order.

44. On the other hand, one size seldom fits all. Fortunately, the integral application of EU law does not require applying the same set of rules, but merely applying them uniformly. In particular, the various structural handicaps from which the ORs suffer make it difficult to maintain an ambition of a wholly unmodulated application of EU law. Therefore, the need to deal separately with the particularities of the ORs was already recognised at an early stage. This principle, now embodied by Article 349 TFEU, is known as the *principle of adaptation*.

45. Over time however, those principles evolved differently. In its original incarnation, while Article 227 of the EEC Treaty stated, in its first paragraph, that the EEC Treaty 'shall apply to' the Member States of the time, the second paragraph thereof then set out rules on the application of that treaty to certain French overseas territories. In the 1970's, the Court in a seminal judgment held the principle of integration to be the rule: after the expiry of an initial two-year deadline, the EEC Treaty, as such, applied to those territories, albeit that the Council was still entitled 'to adopt specific measures in order to meet the needs of those territories'. [10] However, in the early 1990's certain judgments questioned that power of adaptation conferred upon the Council. [11]

8 — See, similarly, Ziller, J., 'The European Union and the Territorial Scope of the European Territories', 38 Vict. U. Wellington L. Rev. 51, p. 62, referring to the 'very complicated formulation' of Article 299(2) EC ('Ziller, J. (2007)'), and Omarjee, I., 'Specific Measures for the Outermost Regions after the Entry into Force of the Lisbon Treaty', in Kochenov, D. (ed.), *EU Law of the Overseas: Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis*, 2011, Kluwer Law, the Netherlands, p. 135, who finds the text of Article 349 TFEU 'disappointing'.

9 — See, in respect of Article 299(2) EC, the judgment in *X and TBG*, C-24/12 and C-27/12, EU:C:2014:1385, paragraph 45 and case-law cited.

10 — See the judgment in *Hansen & Balle*, 148/77, EU:C:1978:173, paragraphs 10 and 11. See, moreover, the judgment in *Coopérative agricole d'approvisionnement des Avirons*, 58/86, EU:C:1987:164, paragraphs 13 and 14.

11 — See the judgments in *Legros and Others*, C-163/90, EU:C:1992:326, and *Lancry and Others*, C-363/93 and C-407/93 to C-411/93, EU:C:1994:315. In the latter case, the Court held that the power of adaptation conferred upon the Council by Article 227(2) of the EEC Treaty was limited to those matters not stated in that provision as being immediately applicable to the territories listed there (see paragraphs 37 and 38 of that judgment).

46. At the other end of the spectrum, political calls for greater account to be taken of the special situation of ORs had become increasingly frequent.[12] This finally led to the adoption of an entirely revised provision: Article 299(2) EC. The new wording of that provision placed greater emphasis on the principle of adaptation, explaining that the 'structural social and economic situation' of the ORs 'is compounded by their remoteness, insularity, small size, difficult topography and climate, economic dependence on a few products, the permanence and combination of which severely restrain their development' ('the OR features'). Moreover, it created a self-standing legal basis for the adoption of 'specific measures' in respect of the ORs. Meanwhile, in a somewhat surprising parallel move, the Court handed down a judgment in early 1998 which seemingly re-acknowledged the Council's powers of adaptation under Article 299(2) EC.[13]

47. However, the fact remains that the Court has interpreted neither Article 299(2) EC nor Article 349 TFEU substantively.[14] I will revert to analysing the latter provision below — where relevant — when considering the arguments raised by the parties. Nevertheless, at this juncture it is appropriate to make certain observations of a general nature relating to the scope of Article 349 TFEU.

48. First, it is clear that the two guiding principles, the principle of integration and that of adaptation, do not make for happy bedfellows, and it seems rather paradoxical to maintain both as overarching goals. In that context, it ought not to be overlooked that ranking the principle of adaptation above that of integration does involve, to a certain extent, allowing the ORs — unlike the OCTs — to 'cherry-pick', so to speak.[15] That issue becomes even thornier when considering that certain disadvantaged regions within the continental area of the EU might be equally or even more in need of special treatment, at least following the wave of enlargements since 2004.

49. Second, as the Council admits, the legislature has not always followed a consistent approach in deciding whether to have recourse to Article 349 TFEU (or its previous incarnations) or to sectorial legal bases in respect of specific measures applicable to the ORs.

50. Third, although Article 299 EC was separated by the Treaty of Lisbon into three provisions, namely, Article 52 TEU and Articles 349 and 355 TFEU, the significance of that separation is unclear.[16] Under Article 52(1) TEU, the 'Treaties' apply to the Member States — seemingly as addressees, as the second paragraph thereof, which sets out the territorial scope of application of the 'Treaties', refers to Article 355 TFEU. Thus, and unlike previously, it is clear that the territorial scope of the EU Treaty is the same as that of the FEU Treaty. In respect of the ORs, Article 355(1) TFEU then proceeds to state that the 'provisions of the Treaties' apply to them 'in accordance with' Article 349 TFEU. However, the latter provision does not spell out in detailed geographic terms how the 'Treaties' apply to the ORs, other than mentioning a list of territories. Nonetheless, it does enable

12 — See, inter alia, the Declaration on the outermost regions of the Community, annexed to the Treaty of Maastricht (OJ 1992 C 191, p. 104); the 'Funchal Declaration' made by the Presidents of the Outermost Regions on 14 March 1996; the Resolution of the European Parliament on development problems in the outermost regions of the European Union of 24 April 1997 (OJ 1997 C 150, p. 62); and Declaration No 30 on island regions, annexed to the Treaty of Amsterdam (OJ 1997 C 340, p. 136).

13 — See the judgment in *Chevassus-Marche*, C-212/96, EU:C:1998:68 (confirmed by the judgment in *Sodiprem and Others*, C-37/96 and C-38/96, EU:C:1998:179), in which the Court seems to have attempted to distinguish the circumstances of that case from *Legros and Others*, C-163/90, EU:C:1992:326. Commentators have suggested that the Court was inspired by the new Article 299(2) EC, the wording of which had been published in the Official Journal on 10 November 1997; that is to say, before the Court was to deliver its judgment in that case (which it did on 19 February 1998), see Ziller, J. (2007), p. 62, and Kochenov, D., 'The application of EU Law in the EU's overseas regions, countries, and territories after the entry into force of the Treaty of Lisbon', 20 Mich. St. Int'l. L. Rev. 669, p. 708.

14 — See, however, the order in *Região autónoma dos Açores* v *Council*, C-444/08 P, EU:C:2009:733. See also the judgment of the General Court in *Sinaga* v *Commission*, T-321/00, T-222/01 and T-217/99, EU:T:2006:251.

15 — This is a matter which, it is argued, the Court was aware of when dealing with the cases which led to the judgments in *Legros and Others*, C-163/90, EU:C:1992:326, and *Leplat*, C-260/90, EU:C:1992:66; see Ziller, J. (2007), p. 60.

16 — Commentators suggest that the reason for this split was nothing more than to 'clean up' the wording of Article 299 EC; see Ziller, J., 'Outermost Regions, Overseas Countries and Territories and Others after the Entry into Force of the Lisbon Treaty', in Kochenov, D. (ed.), *EU Law of the Overseas: Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis*, 2011, Kluwer Law, the Netherlands, pp. 81 and 82 ('Ziller, J. (2011)'); and Murray, F., *The European Union and Member State Territories: A New Legal Framework Under the EU Treaties*, 2012, TMC Asser Press, the Netherlands, p. 89.

the Council to adopt specific measures, inter alia, modifying the 'application of the Treaties' to those regions under certain conditions. Therefore, it seems to me that Article 349 TFEU not only constitutes a legal basis for the adoption of 'specific measures', but also further delimits the territorial scope of the 'Treaties' to the ORs by reference to those measures.

51. Fourth, Article 349 TFEU has been slightly improved as compared to previous versions. To begin with, gone is the reference, in general terms, to the French overseas departments — which gave the impression that OR status depends on the internal law qualification of a territory. Next, unlike before, the second paragraph of Article 349 TFEU does not state that the Council is to 'take into account' certain policy areas,[17] but instead that specific measures 'concern in particular' such policy areas. The OR policy areas have thus become the subject-matter of specific measures, rather than the cause thereof — a role already filled by the enumeration of the OR features.

52. Lastly, however, one amendment brought about by the Treaty of Lisbon has unfortunately muddied the waters. I refer to the seemingly anodyne reference in the first paragraph, second sentence of Article 349 TFEU to the possibility that 'specific measures … [might be] adopted by the Council in accordance with a special legislative procedure'. For one thing, it seems to me that Article 349 TFEU itself constitutes a special legislative procedure under Article 289(2) TFEU. Still, commentators disagree on the implications of this sentence,[18] as did the parties and interveners during their oral argument.[19] However, in the present cases, it is not necessary to settle that point authoritatively.

### C – *Is Article 349 TFEU limited to adaptations of primary law (the Commission's theory)?*

53. Since the adoption of the Treaty of Amsterdam, the Commission has steadfastly defended a narrow interpretation of Article 349 TFEU.[20] It is essentially based on a particular reading of Articles 349 and 355(1) TFEU in unison according to which, in the default situation, only the 'provisions of the Treaties'[21] apply to the ORs, to the exclusion of secondary legislation. As Article 349 TFEU states that the Council is to 'adopt specific measures aimed … at laying down the *conditions of application of the Treaties* to those regions' (emphasis added), the Commission infers from this that said provision only empowers the Council to adjust the way in which primary law applies to the ORs.

54. The Commission's interpretation has the advantage of being straightforward. Nonetheless, it troubles me on a number of levels.

17 — Those policy areas are: customs and trade policies, fiscal policy, free zones, agriculture and fisheries policies, conditions for supply of raw materials and essential consumer goods, State aids and conditions of access to structural funds and to horizontal programmes ('the OR policy areas').

18 — Perrot., D., argues in 'Les régions ultrapériphériques françaises selon le Traité de Lisbonne', R.T.D. Eur. 2009, p. 733, that this 'sibylline' sentence aims to overrule other special legislative procedures which lay down voting requirements stricter than those which follow from Article 16(3) TEU (qualified majority). Omarjee., I., seems to take the opposite point of view; see op.cit., p. 134. Ziller, J. (2011), argues that this sentence ought to be understood in the light of the wording of Article III-330 of the Constitutional Treaty, which referred to certain categories of legislative acts within a new hierarchy of norms arguably corresponding, under the Treaty of Lisbon, to the triptych consisting of legislative, delegated and executive acts.

19 — As I understood those arguments, the *Council* and the *Kingdom of Spain* submitted, on the basis of the historical interpretation of Article 349 TFEU, that the purpose of that sentence is to give the Council the possibility of adopting specific measures both in the form of legislative and non-legislative acts. The *Portuguese Republic* took the view that the aim of that sentence is to give priority to Article 349 TFEU over other special legislative procedures while the *French Republic*, in contrast, submitted that said aim is to cumulate the requirements of those procedures. The *Commission* disagreed with all these views, arguing, inter alia, that the distinction between a legislative and a non-legislative act does not equate to the dichotomy 'primary/secondary EU law'.

20 — See, inter alia, the answer given by Commission President Prodi of 4 September 2001 to parliamentary question P-1691/2001 (OJ 2002 C 81 E, p. 52) according to which 'the Commission stands by its view that Article 299(2) [EC] should be used as the legal basis only for exceptions to the provisions of the Treaty, without prejudice to the use of the specific legal bases for the common policies'.

21 — I should point out that certain language versions of Article 355(1) TFEU (such as the DA and DE versions) do not refer to 'the provisions of the Treaties', but simply to the 'Treaties'.

55. First, I have set out above at point 50 how the 'Treaties', as a concept used in Article 52 TEU as well as in Articles 349 and 355(1) TFEU, apply to the ORs. As I am about to explain, those provisions do not support the Commission's view.

56. Indeed, save indication to the contrary, the concept of 'Treaties' must normally be understood as referring to the EU legal order as a whole (the *acquis*), rather than in the narrow sense. This is particularly so where the word appears in the plural, as it does in the aforementioned provisions. Recognising the power only to adapt primary and not secondary law would be counter-intuitive and contrary to the principle according to which the greater usually includes the lesser. Elsewhere, the references to the 'Treaties' are usually understood to comprise secondary legislation, such as Article 19 TEU and Article 258 TFEU. The Commission is, of course, right to say that each provision must be understood on its own terms. At the risk of stating the obvious, that is why the reference, for instance, to the 'Treaties' in the first sentence of Article 6(1) TEU and the second sentence of Article 1(2) TFEU, in relation to their status within the general hierarchy of norms, does not encompass secondary legislation. However, Article 52 TEU and Articles 349 and 355(1) TFEU are provisions of a general nature (the latter two being included in Part Seven of the FEU Treaty under the heading 'General and Final Provisions'). Moreover, despite what the Commission may argue, case-law in respect of the OCTs does not support its view. [22]

57. Second, the idea — given in response to a question put by the Court — that the Commission's theory might derive from Article 288 TFEU is untenable: apart from governing its legal effects, that provision spells out *to whom* secondary legislation is directed (the recipients). By contrast, it is silent as to *where* that legislation applies.

58. Third, the Commission's reading of Article 349 TFEU seems selective. The first paragraph of that provision allows the Council 'to adopt specific measures aimed, *in particular*, at laying down the conditions of application of the Treaties to those regions, *including common policies*' (emphasis added). Therefore, although the specific measures in question may clearly include differentiated terms of application of the Treaties, they are not limited to that sole aspect.

59. Fourth, the second paragraph of Article 349 TFEU states that specific measures concern 'in particular' the OR policy areas. To the extent that many of those policy areas are not governed exhaustively by primary law, a fair reading of Article 349 TFEU would have to include the power of the Council to amend secondary legislation.

60. Fifth, the very fact that specific measures might possibly be adopted by the Council 'in accordance with a special legislative procedure' lends support to the idea that Article 349 TFEU may be used to adapt secondary legislation, regardless of the precise purpose of that sentence.

61. Lastly, the Commission suggests its interpretation is consonant with the historical evolution of the provision that is now Article 349 TFEU. On that point, I do not think that Article 349 TFEU can be understood by reference to (especially) the wording of Article 227(2) of the EC Treaty, which is fundamentally different. On the contrary, it is necessary to interpret Article 349 TFEU on its own terms.

62. On the basis of the foregoing, and notwithstanding other arguments put forward by the Commission, I conclude that Article 349 TFEU is not limited to adaptations of primary law. Accordingly, Cases C-133/14 to C-135/14 ought to be dismissed.

22 — In *van der Kooy* (C-181/97, EU:C:1999:32), the Court held that as the EC Treaty did not apply, under Article 227(3) of the EC Treaty (now Article 355(2) TFEU), to the Netherlands Antilles as an OCT, failing a specific provision to the contrary, this had as consequence to exclude the application of secondary legislation there as well, see paragraphs 35 to 41.

D – *Does Article 349 TFEU preclude postponements of the application of EU law (the Parliament's main argument)?*

63. The Parliament appears to take the middle ground among the quarrelling institutions. Indeed, its main contention is that simple postponements of the application of EU law may not be provided under Article 349 TFEU, but ought to be adopted on the sectorial legal bases. In its view, the sectorial bases already give the EU legislature the possibility of setting differentiated periods of implementation. Conversely, none of the OR features arguably justify in themselves taking such action.

64. Although I have a certain measure of sympathy for balanced approaches, this one must fail. For one thing, the fact that the Parliament did not bring an action for annulment against the Mini-Directive testifies to a lack of conviction.[23] Yet more importantly, Article 349 TFEU simply refers to 'specific measures'. It does not, on its face, exclude the possibility for the Council of postponing the date of implementation of an EU measure.

65. To be sure, Article 349 TFEU explains what is meant by the 'specific measures' which the Council may adopt: 'the Council … shall adopt specific measures aimed, *in particular*, at laying down the conditions of application of the Treaties to those regions, *including* common policies … The [specific measures] concern *in particular* areas such as [the OR policy areas]' (emphasis added). As can be seen, non-exhaustive expressions are used. So even on the assumption that postponing the date of implementation of the contested measures cannot be understood as coming within these types of situation, the terms of that provision do not rule out that possibility.

66. More importantly however, if the Council decides to postpone, pursuant to Article 349 TFEU, the date of implementation of an EU measure, that would indeed constitute a 'specific measure' which derogates from the general norm. As the Council and the Portuguese Republic rightly observe, an artificial distinction between whether the specific measures in question are of a permanent or a temporary nature, which the Parliament's interpretation in fact entails, has no legal basis in Article 349 TFEU itself. The fact that Article 349 TFEU describes the OR features as being permanent is of no importance to the temporal nature of the specific measures which the Council may adopt. Or rather, as I will revert to below — and as argued by the Portuguese Republic — a permanent derogation would surely be more likely to infringe the third paragraph of Article 349 TFEU. Moreover, if the Council can adopt a specific measure on the basis of Article 349 TFEU excluding a given OR from the scope of application of EU law entirely — subject to periodic review at a later date — I fail to see why it could not postpone the date of application of secondary legislation in such a region as well.

67. On the basis of the above, I propose that the Court should reject the Parliament's argument that Article 349 TFEU precludes postponements of the application of EU law. Accordingly, Case C-136/14 and the challenge to Article 4 of the Regulation in Case C-132/14 ought to be dismissed. What remains to be decided is the Parliament's argument that the Council could not have recourse to Article 349 TFEU for the adoption of Articles 1, 2 and 3(3) of the Regulation, which I will analyse below at point 78 *et seq*. However, as it is appropriate to do so, I will make certain additional remarks first.

23 — In response to a question put at the hearing, the Parliament confirmed that it had not challenged the Mini-Directive for political reasons.

E – *Further reflections on the approach taken by the Council*

68. It emerges from the foregoing that I am left with the Council's view, to which I can in principle subscribe. However, although it might not be strictly necessary, given the discussion which Article 349 TFEU has given rise to and in order to bring a measure of clarity for the future, I will take this opportunity to state what are, essentially, my views and reservations in respect of the Council's interpretation.

69. To begin with, I am left unpersuaded by the Council's (and the interveners') view that Article 349 TFEU, as a *lex specialis*, *must* be used whenever ORs are the subject of a legislative proposal. First, the sole authority relied upon by the Council to justify such a view dealt with greatly different circumstances.[24] Second, basing its view mainly on the geographic specificity of Article 349 TFEU, the Council fails to explain — with the exception of Article 114 TFEU — why Article 349 TFEU is more specific as regards its normative content than the sectorial bases proffered by the Commission. Third, although the legal basis used for the adoption of other EU measures is irrelevant,[25] I find the Council's approach not in tune with its own current practice.[26] Fourth, the interpretation of Article 349 TFEU suggested by the Council seems out of touch with the fact that the ORs do not have an automatic right under that provision to have their specific situation taken into account.[27]

70. In my view therefore, nothing in the Treaties suggests that Article 349 TFEU takes precedence over the sectorial bases. Put differently, Article 349 TFEU is not a 'legislative black hole'. Assuming that the conditions of that provision are met, the Council has a choice between having recourse to that provision or to the sectorial provisions, but is not required to choose one rather than the other. This, of course, is without prejudice to the application of the other general principles mentioned above at point 38.

71. As for the choice between the sectorial bases and Article 349 TFEU, the Council deduces (together with the interveners) from the expression 'taking into account', as used in that provision, that the measures taken do not, as such, have to be designed to remedy the structural handicaps from which the ORs suffer. Besides, it infers from the use of the terms 'in particular' and 'including', as well as its lengthy enumerations, that Article 349 TFEU ought to receive a wide application, including, where relevant, environmental matters. It concedes however that the specific measures must be 'necessary, proportionate and precisely determined'.

24 — See the judgment in *Commission* v *Council*, C-533/03, EU:C:2006:64. That judgment concerned the question of the legal basis of secondary legislation on fiscal cooperation. Paragraph 45 thereof, which the Council relies on, dealt with the *lex specialis* status of Article 93 EC (now Article 113 TFEU) on the harmonisation of certain taxes in relation to the general provision on approximation of laws set out in Article 95 EC (now Article 114 TFEU). The latter provision explicitly states that it applies 'save where otherwise provided' and, moreover, does not apply to the harmonisation of 'fiscal provisions'. Therefore, unlike the cases under consideration, this example of a *lex specialis* situation seems rather self-evident.

25 — See the judgment in *Parliament* v *Council*, C-48/14, EU:C:2015:91, paragraph 30 and case-law cited.

26 — See, for recent examples, Regulation (EU) No 228/2013 of the European Parliament and of the Council of 13 March 2013 laying down specific measures for agriculture in the outermost regions of the Union and repealing Council Regulation (EC) No 247/2006 (OJ 2013 L 78, p. 23), which was adopted on the joint basis of Articles 42(1), 43(2) and 349 TFEU; and Council Directive 2013/61/EU of 17 December 2013 amending Directives 2006/112/EC and 2008/118/EC as regards the French outermost regions and Mayotte in particular (OJ 2013 L 353, p. 5), adopted on the basis of Article 113 TFEU (requiring unanimity), on the same day as the contested measures. Questioned on this point at the hearing, the Council answered that for 'practical reasons', the legal basis of the latter directive was not changed to Article 349 TFEU.

27 — See, to that effect, the order in *Região autónoma dos Açores* v *Council*, C-444/08 P, EU:C:2009:733, paragraphs 38 and 39.

72. I agree with the Council that Article 349 TFEU has been drafted in unusually wide terms. This does lend substantial support to its view. It appears that, where the possibility of taking a 'specific measure' arises, the legislative powers of the Council are nigh unlimited, encompassing even adaptations of primary law. [28]

73. However, I am not convinced that the Council can simply pay lip service to the OR features; they must truly be accounted for. Ensuring this seems, first and foremost, a matter for the legislature. [29] Consequently, judicial review thereof ought to be, as with other legislative policy choices, kept to a minimum. [30] In line with this approach, I will refrain from taking a position on the issue as to whether environmental factors may justify recourse to Article 349 TFEU, as it is unnecessary for the purpose of these proceedings. But this I will say: in cases such as these, it follows from Article 293 TFEU that the Council must act unanimously when changing the legal basis of a legislative proposal. What is more, in such a situation it cannot be ruled out that the Commission might withdraw its proposal, in so far as the requirements therefore are met. [31]

74. Following that line of thought, I ought to point out — first — that Article 349 TFEU contains a built-in safety valve: specific measures may not 'undermine the integrity and the coherence of the Union legal order'. But what does that mean? Does it in fact equate to an ordinary review of proportionality in the terms that the specific measures must be 'necessary, proportionate and precisely determined'?

75. That expression hails from the judgment in *Chevassus-Marche*, [32] which concerned Article 227(2) of the EC Treaty, a provision which has been revised thoroughly. It is therefore doubtful whether that line of authority can simply be transferred to Article 349 TFEU. In truth, the possibility of 'undermin[ing] the integrity and the coherence of the Union legal order' appears to be somewhat akin to the concept of a 'serious risk of the unity or consistency of Union law being affected', as used in Article 256(2) TFEU. Still, it has — rightly — been questioned whether it is at all possible, under Article 349 TFEU, to derogate from the regulations relating to the internal market or common policies without undermining their functioning and the integrity and the coherence of the Union legal order. [33] Yet, I see no other possibility — the contrary would compromise the very purpose of Article 349 TFEU. In fact, there is already some authority to support this view (although admittedly not concerning Article 299(2) EC or Article 349 TFEU directly): in *RAR*, [34] Advocate General Mischo argued that the uninhibited possibility of exporting sugar produced with the benefit of agricultural aid from the Azores to the rest of the Community would amount to a 'perversion of the system'. However, the Court's response was that, failing an express prohibition and in the light of the fundamental principle of the free movement of goods, no restriction existed on shipping such sugar to the Community. Moreover, the framework programme authorising that aid did not intend to partition the market in the Azores or to create insurmountable obstacles to trade, but to contribute to their involvement in the internal market while granting them certain benefits. [35]

28 — Former judge Puissochet, writing extrajudicially in 'Aux confins de la Communauté européenne : Les régions ultrapériphériques', in Rodríguez Iglesias, G. C. *et al.* (eds.), *Mélanges en hommage à Fernand Schockweiler*, 1999, Nomos, Baden-Baden, p. 506, footnote 54, hinted at the possibility that it might not have been necessary to base the decision on dock dues, which was at the heart of the judgment in *Chevassus-Marche* (C-212/96, EU:C:1998:68), on Article 235 of the EC Treaty (now Article 352 TFEU) *in addition to* Article 227(2) of the EC Treaty.

29 — Compare with Perrot, D., op.cit., footnote 56. See, by way of analogy, the judgment in *Sodiprem and Others* (C-37/96 and C-38/96, EU:C:1998:179), paragraph 33.

30 — Cf., in respect of Article 227(2) of the EEC Treaty, the judgment in *Coopérative agricole d'approvisionnement des Avirons*, 58/86, EU:C:1987:164, paragraphs 14 and 17.

31 — See, in respect of the ordinary legislative procedure, the judgment in *Council* v *Commission*, C-409/13, EU:C:2015:217.

32 — C-212/96, EU:C:1998:68, point 49.

33 — See Omarjee, I., op.cit., p. 135.

34 — Opinion in *RAR*, C-282/00, EU:C:2002:299, points 81 to 92.

35 — See the judgments in *RAR*, C-282/00, EU:C:2003:277, paragraphs 55 and 59 and, moreover, *Sodiprem and Others* (C-37/96 and C-38/96, EU:C:1998:179), paragraph 33, where the Court held that disturbances of the internal market caused by such derogations must be 'as little as possible and may thus not adversely affect the terms of trade to an extent contrary to the common interest'.

76. Second, I believe that it follows from the third paragraph of Article 349 TFEU that there must be a legislative limit to the Council's powers which reflects the distinction between the ORs and the OCTs. Indeed, the whole idea of acceding to the status of an OR is that EU law ought, in principle, to apply in full, in so far as the local situation does not make that ambition impossible. In that light, I doubt that accepting a perpetual derogation, without any form of periodic review or 'sunset clause', would be compatible with the purpose of that provision. [36]

77. Be that as it may, it is not argued in the present proceedings that the contested measures jeopardise the legal order of the Union. It is therefore not necessary for the Court to rule upon that issue.

F – *Outstanding issues in respect of Case C-132/14 and consequences for the actions for annulment*

78. I have already concluded that the Commission's three actions for annulment (Cases C-133/14 to C-135/14), as well as the Parliament's actions against the Horizontal Directive in Case C-136/14 and its challenge to Article 4 of the Regulation in Case C-132/14, must fail. As for the remainder of Case C-132/14, the Parliament does not deny that the Council may adopt Articles 3(1) and (2) and 5 of the Regulation under Article 349 TFEU. Accordingly, the Court must decide whether the Council was empowered to have recourse to the latter provision for the adoption of Articles 1, 2 and 3(3) of the Regulation, or whether it ought instead to have relied upon Article 43(2) TFEU.

79. Turning, therefore, first to Article 1(2) of the Regulation, I believe that the Parliament's argument in respect of that provision, which concerns the ban on purse-seine fishing, is, as the Council observes, based on a misunderstanding of the aim of the Regulation and, specifically, the 3rd recital in the preamble thereto. [37] Rather than attempting to preserve the large migratory fish such as tuna and tuna-like species for the sake of those species (which would seem pointless, given their migratory nature), the aim is instead to preserve them *near the coasts of Mayotte for the benefit of the local fleet* which, still largely using mechanical long-liners rather than the more advanced purse-seiners, cannot compete with foreign fleets. Accordingly, as such a ban appears to take into account the specific socio-economic situation of Mayotte, it could indeed be adopted on the basis of Article 349 TFEU.

80. Similarly, Article 2 (which derogates from rules concerning the labelling of fishery products offered for retail sale to the final consumer in Mayotte) also appears to take into account the same factors, as evidenced by the 4th recital in the preamble to the Regulation. [38]

81. As for the remaining provisions of the Regulation at issue, namely Articles 1(1) and 3(3), I agree with the Council that they appear to be accessory to the predominant purpose of the Regulation, which is to provide for certain specific rules and derogations which take into account the particular socio-economic situation of Mayotte. Hence, it follows from the case-law mentioned above at point 38 that the Council was justified in having recourse to Article 349 TFEU alone, and, in my view, the issue of a dual (or triple) legal basis does not arise.

82. Consequently, in light of all the above, I take the view that the Parliament's remaining challenges to Articles 1, 2 and 3(3) of the Regulation in Case C-132/14 ought to be dismissed as ill-founded as well and so, accordingly, ought all five actions in their entirety.

36 — Concurring, see, inter alia, Kochenov, op.cit., p. 712.

37 — That recital states: 'the use of purse-seines on tuna and tuna-like schools of fish inside the area within 24 miles from the baselines of the island should be prohibited, in order to preserve the shoals of large migratory fish in the vicinity of the island of Mayotte'. Furthermore, the 7th recital in the preamble to the Regulation describes the Mayotte fleet as an 'underdeveloped fleet of mechanical long-liners'.

38 — That recital states, inter alia, that 'in view of the very fragmented and under-developed marketing schemes of Mayotte, the application of the rules on the labelling of fishery products would impose on retailers a burden disproportionate to the information that would be transmitted to the consumer.'

G – *Considerations in the alternative*

83. If the Court were not to consider that the Council was entitled to have recourse to Article 349 TFEU alone as legal basis for the contested measures, certain further remarks would appear to be called for.

1. Full or partial annulment?

84. The Commission's interpretation is rather straightforward: were the Court to endorse it, the contested measures ought to be annulled purely and simply in their entirety.

85. However, if the Court were instead to confirm the Parliament's views, the consequences would be diversified. On the one hand, it is clear that the Horizontal Directive would have to be annulled because it could not validly be adopted on the basis of Article 349 TFEU. On the other hand, the situation is less obvious as regards the Regulation. Here, the solution would depend on whether the Court agrees with the Parliament (i) that Article 349 TFEU does not allow specific measures in the form of simple postponements (which would lead to the annulment of Article 4 of the Regulation); (ii) that Articles 1, 2 and 3(3) of the Regulation do not take account of the socio-economic situation of Mayotte but are rather general CFP measures (which would mean voiding those provisions); or (iii) on all of the above.

86. In that connection, the Parliament submits that the sectorial legal bases and Article 349 TFEU ought to have been used concurrently to adopt the Regulation, as no single preponderant legal basis can be identified. However, the Council retorts — and in my view rightly so, which the hearing amply showed — that the Parliament has not explained in what way the provisions of the Regulation, which the Parliament claims could not be adopted on the basis of Article 349 TFEU alone, are not severable from the rest. For instance, I fail to see what the rules on the labelling of fishery products offered for retail sale in Mayotte under the COMFA (Article 2 of the Regulation) have to do with rules on fishing capacity and fleet registry under the CFP (Article 3(1) and (2) of the Regulation).

87. However, as the Parliament's action in Case C-132/14 ought not to succeed in my view, I will not pursue that line of thought any further.

2. The request for the effects of the contested measures to be maintained

88. In the event of an annulment, the Commission and the Council, relying on Article 264(2) TFEU, request the Court to maintain the effects of the contested measures, to which the Parliament subscribed in its rejoinder. I interpret this to include the possibility of a partial annulment of the Regulation in respect of the provisions so annulled.

89. If the Court were to annul the contested measures in part or in whole, the effect would be that the rules which they seek to amend would apply to Mayotte at the time generally prescribed in those rules, much in the same way as elsewhere in the Union. It is common ground that the contested measures are necessary and that their content is justified in view of the current situation of Mayotte.

90. In those circumstances, I believe that it would, exceptionally, be disproportionate not to maintain the effects of the measures so annulled.

91. I have taken note of the fact that the Commission and the Council do not indicate a specific period of time during which the effects of the measures so annulled should be maintained, but request that they should be maintained until the entry into force of new measures founded on appropriate legal bases.

92. However, it is of fundamental importance that the effects of unlawful acts are not maintained in force for longer than what is strictly necessary. In that connection, I remark that the duration of the legislative process in the cases at hand — which was also subject to time constraints — lasted, from proposal to adoption, about six months. As the institutions do not disagree politically on the need of or on the content of the contested measures, a swift legislative procedure ought to be feasible. Hence, to encourage the EU legislature to act accordingly, in the event that the Court were to annul the contested measures in full or in part, it is my view that the effects of the measures so annulled ought to be maintained for a period not exceeding six months as from the date of delivery of the judgment in the present joined cases.

## VI – **Costs**

93. Under Article 138(1) of the Rules of Procedure of the Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the pleadings of the successful party. In all five cases, the Council has applied for costs and the Parliament and the Commission have been unsuccessful in their respective cases.

94. In accordance with Article 140(1) of the Rules of Procedure, Member States and institutions which have intervened in the proceedings are to bear their own costs. The Kingdom of Spain, the French Republic and the Portuguese Republic ought therefore to bear their own costs in all five cases.

## VII – **Conclusion**

95. Having regard to all the above, I propose that the Court:

— dismiss the actions;

— order the Parliament and the Commission to pay the costs; and

— order the Kingdom of Spain, the French Republic and the Portuguese Republic to bear their own costs.