Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 21 March 2013[1]

Case C-431/11

United Kingdom of Great Britain and Northern Ireland
v

Council of the European Union

(External relations — Coordination of social security systems — Envisaged agreement on the amendment of Annex VI (Social Security) and Protocol 37 to the EEA Agreement — Extension of the system under Regulation (EC) No 883/2004 to the European Economic Area — Council Decision 2011/407/EU on the position to be taken by the European Union within the EEA Joint Committee — Choice of the correct substantive legal basis — Article 48 TFEU, Article 79(2)(b) TFEU or Article 217 TFEU)

I – Introduction

1. On what legal basis may the European Union extend its internal social legislation to third countries? This politically sensitive question stands at the centre of the present dispute between the United Kingdom of Great Britain and Northern Ireland and the Council of the European Union, with their respective interveners.

2. The dispute was triggered by the extension of the new rules on the coordination of social security systems, which apply within the European Union, to the European Economic Area (EEA) by a decision of the EEA Joint Committee. To that end, by Decision 2011/407/EU[2] the Council had, in advance, established the position to be taken by the European Union and, in doing so, had regard to the rules on freedom of movement for workers within the European internal market, and more precisely Article 48 TFEU.

3. By the present action for annulment, the United Kingdom is challenging that decision. Unlike the Council and the Commission, the United Kingdom, supported by Ireland, takes the view that regard should be had not to the rules on freedom of movement for workers, but to the provisions concerning the rights of third-country nationals in the area of freedom, security and justice, and more precisely Article 79(2)(b) TFEU.

4. At first glance, the distinction between Article 48 TFEU and Article 79(2)(b) TFEU, and even the relationship between these two provisions and the general power to establish associations under Article 217 TFEU, may appear profusely technical. In reality, however, it is of considerable practical importance, in particular in relation to the United Kingdom and Ireland. On the basis of a derogation,

1 — Original language: German.

2 — Council Decision 2011/407/EU of 6 June 2011 on the position to be taken by the European Union within the EEA Joint Committee concerning an amendment to Annex VI (Social Security) and Protocol 37 to the EEA Agreement (OJ 2011 L 182, p. 12).

those two Member States are free to decide, in the context of Article 79(2)(b) TFEU, whether they wish to take part in European Union legislative acts ('opt-in solution'), whilst they do not enjoy any special rights in the context of the first paragraph of Article 48 TFEU and may at most apply the 'emergency brake mechanism' to legislative acts (second paragraph of Article 48 TFEU).

5. The Court's judgment in the present case will lay the ground for other similar cases in which the European Union would like to extend certain social legislation to third countries in the context of international agreements. Special mention should be made in this connection of the cases of Switzerland and Turkey, which are currently also the subject of actions for annulment brought by the United Kingdom against the Council. [3]

II – Legal framework

6. The legal framework for the present case is defined, first, by the Treaty on the Functioning of the European Union (FEU Treaty) and, second, by the Agreement on the European Economic Area (EEA Agreement), [4] including their respective additional protocols.

A – *The FEU Treaty*

7. The provisions on free movement of persons in Title IV of Part Three of the FEU Treaty include Article 48 TFEU, the first paragraph of which reads as follows:

'The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, they shall make arrangements to secure for employed and self-employed migrant workers and their dependants:

(a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;

(b) payment of benefits to persons resident in the territories of Member States.'

8. Article 79 TFEU, which is one of the rules on the 'area of freedom, security and justice' in Title V of Part Three of the FEU Treaty, includes the following provisions:

'1. The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas:

…

(b) the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States;

3 — Pending Cases C-656/11 *United Kingdom* v *Council* and C-81/13 *United Kingdom* v *Council*.

4 — OJ 1994 L 1, p. 1.

…’

9. Reference should also be made to Article 218(9) TFEU:

‘The Council, on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, shall adopt a decision suspending application of an agreement and establishing the positions to be adopted on the Union’s behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.’

Protocol No 21 to the TEU and to the TFEU

10. A Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice (Protocol No 21) is annexed to the EU Treaty and to the FEU Treaty. In the case of the United Kingdom that Protocol applies to the entire area of freedom, security and justice, whilst in the case of Ireland Article 75 TFEU is excluded from its scope (see Article 9 of Protocol No 21).

11. According to the first sentence of the first paragraph of Article 1 and Article 3 of Protocol No 21, the United Kingdom and Ireland will ‘not take part in the adoption by the Council of proposed measures’ pursuant to Title V of Part Three of the TFEU unless they notify the President of the Council in writing, within three months after a proposal or initiative has been presented, that they wish to take part in the adoption and application of the measure concerned.

12. Furthermore, under Article 2 of Protocol No 21,‘none of the provisions of Title V of Part Three of the TFEU, no measure adopted pursuant to that Title, no provision of any international agreement concluded by the Union pursuant to that Title, and no decision of the Court of Justice interpreting any such provision or measure shall be binding upon or applicable in the United Kingdom or Ireland’; in addition, ‘no such provision, measure or decision shall in any way affect the competences, rights and obligations of those States’.

B – *The EEA Agreement*

13. The EEA Agreement was approved on behalf of the then European Communities by the Council and the Commission on 13 December 1993, with Article 238 of the EEC Treaty (now Article 217 TFEU) serving as the substantive legal basis.[5] It is a mixed agreement to which both the European Union, as the legal successor to the European Communities, and its Member States are Contracting Parties.

14. According to Article 1(1), the EEA Agreement is an agreement of association whose aim is ‘to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition, and the respect of the same rules, with a view to creating a homogeneous European Economic Area’.

15. In order to attain the objectives set out in the EEA Agreement, the Association entails the four fundamental freedoms of the European internal market, in particular ‘the free movement of persons’ (Article 1(2)(b) of the EEA Agreement) and ‘closer cooperation in other fields, such as … social policy’ (Article 1(2)(f) of the EEA Agreement).

5 — Decision 94/1/EC, ECSC of 13 December 1993 on the conclusion of the Agreement on the European Economic Area between the European Communities, their Member States and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation (OJ 1994 L 1, p. 1).

16. Under Article 7 of the EEA Agreement, 'acts referred to or contained in the Annexes to this Agreement or in decisions of the EEA Joint Committee shall be binding upon the Contracting Parties and be, or be made, part of their internal legal order', whilst under point (a) of that provision 'an act corresponding to an EEC regulation shall as such be made part of the internal legal order of the Contracting Parties'.

17. Article 28 of the EEA Agreement contains a provision similar to Article 45 TFEU on freedom of movement for workers within the EEA and Article 29 of the EEA Agreement contains a provision which corresponds to Article 48 TFEU.

18. In Article 98 of the EEA Agreement the EEA Joint Committee is accorded the power to amend the Annexes to the EEA Agreement and a number of Protocols to the EEA Agreement, including Protocol 37.

19. In the original version of Annex VI (Social Security) to the EEA Agreement,[6] the section 'Acts referred to' mentions Regulation (EEC) No 1408/71.[7] That same regulation is also referred to in the original version of Protocol 37 to the EEA Agreement[8] in connection with the 'Administrative Commission on Social Security for Migrant Workers'. These two references are now essentially to be replaced, under Decision of the EEA Joint Committee No 76/2011,[9] by references to Regulation (EC) No 883/2004[10] and Regulation (EC) No 988/2009.[11]

III – Background to the dispute

20. For a long time, the rules on the coordination of social security systems which applied within the Union were contained in Regulation No 1408/71. With effect from 1 May 2010, they were replaced by Regulation No 883/2004, which was in turn subsequently amended, inter alia, by Regulation No 988/2009.

21. Within the EEA Joint Committee it was intended to adapt the rules on social security in Annex VI of the EEA Agreement and in Protocol 37 to the EEA Agreement to the modified legal situation within the European Union and to incorporate Regulation No 883/2004 into the EEA Agreement. To that end, in particular the references to Regulation No 1408/71 contained in Annex VI and in Protocol 37 were to be replaced by references to Regulation No 883/2004 and to Regulation No 988/2009.

22. Accordingly, the Commission submitted a Proposal for a Council Decision on the position to be taken by the European Union in the EEA Joint Committee. The original version of that proposal dated from 9 September 2010 and was still based on Articles 48 TFEU, 352 TFEU and 218(9) TFEU.[12] Later, on 10 March 2011, the Commission amended its proposal so that it now cited only Articles 48

6 — OJ 1994 L 1, p. 327.

7 — Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (first published in OJ 1971 L 149, p. 2, and subsequently amended many times).

8 — OJ 1994 L 1, p. 206.

9 — Decision of the EEA Joint Committee No 76/2011 of 1 July 2011 amending Annex VI (Social Security) and Protocol 37 to the EEA Agreement (OJ 2011 L 262, p. 33).

10 — Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1).

11 — Regulation (EC) No 988/2009 of the European Parliament and of the Council of 16 September 2009 amending Regulation (EC) No 883/2004 on the coordination of social security systems, and determining the content of its Annexes (OJ 2009 L 284, p. 43).

12 — SEC(2010) 1013 final.

TFEU and 218(9) TFEU as legal bases.[13] The Commission justified the loss of Article 352 TFEU as an additional legal basis on the ground that the Treaty of Lisbon had extended the Union's competence set out in Article 48 TFEU beyond the conventional field of migrant workers to self-employed migrant workers.

23. On 6 June 2011 the Council adopted Decision 2011/407, by which it established the position to be taken by the Union in the EEA Joint Committee (also 'the contested decision'). As the Commission proposed, that decision is based on Articles 48 TFEU and 218(9) TFEU.

24. By Decision No 76/2011 of 1 July 2011, the EEA Joint Committee made the envisaged amendments to Annex VI (Social Security) and Protocol 37 to the EEA Agreement. However, certain constitutional requirements still have to be satisfied by one of the Contracting Parties to the EEA Agreement before that decision enters into force.

IV – Procedure before the Court and forms of order sought by the parties

25. By written pleading of 16 August 2011, the United Kingdom brought an action for annulment against Decision 2011/407. It takes the view that the contested decision should not have been based on Article 48 TFEU, but on Article 79(2)(b) TFEU.

26. By order of 10 January 2012, the President of the Court granted Ireland leave to intervene in support of the applicant and the European Commission leave to intervene in support of the defendant.

27. The United Kingdom, supported by Ireland, claims that the Court should:

— annul Decision 2011/407;

— limit the temporal effects of such order until the Council adopts on the basis of Article 79(2)(b) TFEU a new Decision on the position to be taken by the European Union in the European Economic Area (EEA) Joint Committee concerning an amendment to Annex VI (Social Security) and Protocol 37 to the EEA Agreement; and

— order the Council to pay the costs of the proceedings.[14]

28. The Council, supported by the Commission, claims that the Court should:

— dismiss the application, and

— order the applicant to pay the costs of the proceedings.

29. The action brought by the United Kingdom was examined before the Court of Justice on the basis of the written documents and, on 6 February 2013, at a hearing.

13 — SEC(2011) 261 final.

14 — Ireland has not applied for costs as an intervener.

V – Assessment

30. The action brought by the United Kingdom is based on a single plea for annulment: in establishing the position taken by the Union, the Council has cited the incorrect legal basis and thus breached the principle of conferral (first sentence of Article 5(1) TEU). [15]

31. From a *procedural point of view*, all the parties agree that the Union's position was rightly established by the Council of the European Union in the form of a decision pursuant to Article 218(9) TFEU. The EEA Joint Committee is a body set up by the EEA Agreement which takes decisions having legal effects to amend the Annexes and a number of Protocols to that Agreement (Article 98 of the EEA Agreement).

32. It is also common ground that such a Council decision establishing the Community's position under Article 218(9) TFEU also requires a *substantive legal basis* from which the extent of the Union's powers and hence ultimately the scope given it by the Treaties appear. [16] However, it is a subject of fierce debate whether in the present case that legal basis is to be found in the rules on the internal market, in the provisions on the area of freedom, security and justice, or in the power to establish associations under Article 217 TFEU.

33. It is particularly clear in a case like the present one that the choice of the correct legal basis is of considerable practical and institutional, indeed constitutional importance. [17] The choice of legal basis paves the way for determining whether the United Kingdom and Ireland are able to exercise the special rights conferred on them by the 'opt-in' under Protocol No 21 to the TEU and to the TFEU.

A – *The choice of the correct substantive legal basis*

34. According to settled case-law, the choice of the legal basis for a Union measure must rest on objective factors amenable to judicial review, which include the aim and content of that measure. [18]

35. By the contested decision, the position to be taken by the European Union within the EEA Joint Committee was essentially established to the effect that the new rules on the coordination of social security systems under Regulations No 883/2004 and No 988/2009, [19] which had previously applied only within the European Union, should be extended to the entire EEA. [20]

15 — With specific regard to the principle of conferral in relation to the Union's external action, see Opinion 2/94 [1996] ECR I-1759, paragraphs 23 and 24; Opinion 2/00 [2001] ECR I-9713, paragraph 5; Opinion 1/08 [2009] ECR I-11129, paragraph 110; and Case C-370/07 *Commission* v *Council* [2009] ECR I-8917, paragraphs 46 and 47.

16 — Case C-370/07 *Commission* v *Council*, cited in footnote 15; see also Joined Cases 3/76, 4/76 and 6/76 *Kramer and Others* [1976] ECR 1279, paragraph 19, according to which 'regard must be had to the whole scheme of Community law no less than to its substantive provisions'; see also Opinion 2/94, cited in footnote 15, paragraph 23 et seq.

17 — See Opinion 2/00, paragraph 5; Opinion 1/08, paragraph 110; and Case C-370/07 *Commission* v *Council*, paragraph 47, each cited in footnote 15.

18 — Case C-300/89 *Commission* v *Council* [1991] ECR I-2867, paragraph 10; Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation* v *Council and Commission* [2008] ECR I-6351, paragraph 182; and Case C-130/10, *Parliament* v *Council* [2012] ECR, paragraph 42.

19 — For the sake of simplicity I will refer hereinafter solely to Regulation No 883/2004.

20 — See in particular the second recital of the contested decision: 'It is appropriate to include [Regulations No 883/2004 and No 988/2009] in the EEA Agreement …'.

1. Article 79 TFEU is not an appropriate legal basis

36. By extending Regulation No 883/2004 to the entire EEA, its territorial scope is widened beyond the European Union to the three EFTA States Norway, Iceland and Liechtenstein. This inevitably means that the personal scope of that regulation will also henceforth encompass a number of additional persons who are not Union citizens, but are third-country nationals. This has been emphasised by the United Kingdom and Ireland.

37. At first glance, Article 79(2)(b) TFEU might therefore be the *sedes materiae*, given that this provision expressly permits 'the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States'. These can include rules on social security for third-country nationals. [21]

38. It is undisputed that several measures which were intended, in the context of agreements with third countries, to include their nationals within the scope of European Union social legislation have been based on that provision. [22] However, this fact alone cannot be the crucial factor in determining the correct legal basis for the contested Council decision. [23]

39. It must be borne in mind that Article 79 TFEU is one of the rules on the area of freedom, security and justice and forms part of the chapter on policies in respect of border controls, asylum and immigration. According to paragraph 1 thereof, Article 79 TFEU has a specific purpose. That provision seeks to develop a common immigration policy aimed at ensuring 'the efficient management of migration flows, fair treatment of third-country nationals … and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings'. All measures based on Article 79(2)(b) TFEU must be seen in this context and must also be adopted expressly only 'for the purposes of paragraph 1'.

40. That purpose and that regulatory context of Article 79(2)(b) TFEU are not commensurate with a measure like that which is the subject-matter of the present case.

41. The contested decision does not merely provide, in the context of a common immigration policy, certain third-country nationals residing legally within the European Union with certain social rights in order to afford them 'fair treatment' within the meaning of Article 79(1) TFEU. The decision goes much farther. It further develops the association with the three EFTA States Norway, Iceland and Liechtenstein, established by the EEA Agreement and is one of the measures by which the law governing the European internal market is extended as far as possible to the EEA. [24] Nationals of the three EFTA States Norway, Iceland and Liechtenstein, are to benefit from free movement of persons under the same social conditions as Union citizens.

21 — This is clear in particular from the Declaration on Articles 48 and 79 of the Treaty on the Functioning of the European Union (Declaration No 22 annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007; OJ 2008 C 115, p. 346, and OJ 2012 C 326, p. 348).

22 — These are the six Council Decisions 2010/697/EU (OJ 2010 L 306, p. 1), 2010/698/EU (OJ 2010 L 306, p. 8), 2010/699/EU (OJ 2010 L 306, p. 14), 2010/700/EU (OJ 2010 L 306, p. 21), 2010/701/EU (OJ 2010 L 306, p. 28) and 2010/702/EU (OJ 2010 L 306, p. 35) of 21 October 2010 on the positions to be taken by the European Union within the Stabilisation and Association Councils with Morocco, Tunisia, Algeria and Israel, and within the Stabilisation and Association Councils with Macedonia and Croatia, and the three Council Decisions 2012/773/EU (OJ 2012 L 340, p. 1), 2012/774/EU (OJ 2012 L 340, p. 7) and 2012/775/EU (OJ 2012 L 340, p. 13) of 6 December 2012 on the positions to be taken by the European Union within the Stabilisation and Association Councils with Albania and Montenegro and within the Cooperation Committee with San Marino. Furthermore, within the European Union, Article 79(2)(b) TFEU (formerly Article 63(4) EC) served as the legal basis for the adoption of Council Regulation (EC) No 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality (OJ 2003 L 124, p. 1) and Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality (OJ 2010 L 344, p. 1).

23 — Case C-155/07 *Parliament* v *Council* [2008] ECR I-8103, paragraph 34; Case C-411/06 *Commission* v *Parliament and Council* [2009] ECR I-7585, paragraph 77; Opinion 1/94 [1994] ECR I-5267, paragraph 52; and Opinion 1/08, cited in footnote 15, paragraph 172.

24 — With regard to this objective of the EEA, see in general Case C-452/01 *Ospelt and Schlössle Weissenberg* [2003] ECR I-9743, paragraph 29, Case T-115/94 *Opel Austria* v *Council* [1997] ECR II-39, paragraph 107, and the fifth recital in the preamble to the EEA Agreement.

42. Furthermore, as the Commission rightly points out, the contested decision certainly does not seek only to regulate the social rights of *third-country nationals* – Norwegians, Icelanders and Liechtensteiners – in the Union, but also, conversely, to regulate the social rights of *Union citizens* in the three EFTA States concerned. Consequently, by virtue of the amendment to the EEA Agreement intended by the contested decision, not only does a Norwegian national, to name one example, benefit from the coordination of social security systems under Regulation No 883/2004 within the territory of the European Union, but also a Union citizen in Norway. Under Article 7(a) of the EEA Agreement, a European Union regulation, referred to in an Annex to the EEA Agreement, is binding upon all the Contracting Parties – including the three EFTA States concerned – and, as such, is made part of their internal legal order. It does not require any national implementing measures, contrary to the view taken by Ireland.

43. Against this background, the claim made by the United Kingdom and Ireland that Article 79(2)(b) TFEU is the correct legal basis for the contested decision must be rejected.

2. Article 48 TFEU is also not an appropriate legal basis

44. However, in my view, the contested decision also cannot be based on Article 48 TFEU, which is cited by the Council and the Commission.

45. This is not so much because the rules on the coordination of social security systems under Regulation No 883/2004 also include economically non-active persons within their scope.[25] That regulation does not deal primarily with the social security of persons who are themselves not in gainful employment. Rather, the regulation relates predominantly to social security for those in gainful employment, in particular employed and self-employed persons. The social security of economically non-active persons represents at most a peripheral area which is also regulated by Regulation No 883/2004, but is far from being identifiable as its primary object. Consequently, this aspect is not relevant to the choice of legal basis.[26] The choice of legal basis for a Union measure must be based on the main focus of its regulatory content.[27]

46. The United Kingdom and Ireland are nevertheless entirely correct in their view that Article 48 TFEU can only serve as a basis for the adoption of measures within the European Union and, in addition, concerns only social security for Union citizens, but not for third-country nationals.

47. Article 48 TFEU permits only the adoption of 'such measures in the field of social security as are necessary to provide freedom of movement for workers'. It is part of the same chapter of the Treaty as Article 45(1) TFEU, which provides that freedom of movement for workers must be secured only 'within the Union'. In addition, the Court has found that Article 45 TFEU (formerly Article 48 of the EEC Treaty) guarantees free movement of persons 'only to workers of the Member States',[28] that is to say Union citizens.[29]

25 — As is clear from the papers in the case and from the hearing, the real bone of contention for the United Kingdom, *politically*, is this proposed inclusion of economically non-active persons within the scope of the regime for the coordination of social security systems which applies to the EEA. In the proceedings before the Court, the United Kingdom has indicated its willingness to reach a bilateral solution with the three EFTA States, Norway, Iceland and Liechtenstein, which is equivalent to Regulation No 883/2004, but excludes the category of economically non-active persons.

26 — See Joined Cases C-95/99 to C-98/99 and C-180/99 *Khalil and Others* [2001] ECR I-7413, paragraphs 55 to 58, in particular paragraph 56, with regard to the inclusion of stateless persons and refugees in the system of Regulation No 1408/71.

27 — If examination of a measure reveals that it pursues two aims or that it has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely that required by the main or predominant aim or component (Case C-155/07 *Parliament* v *Council*, cited in footnote 23, paragraph 35, and Case C-130/10 *Parliament* v *Council*, cited in footnote 18, paragraph 43; see also Case C-155/91 *Commission* v *Council* [1993] ECR I-939, paragraphs 19 and 21).

28 — Case 238/83 *Meade* [1984] ECR 2631, paragraph 7.

29 — Opinions of Advocate General Mancini of 30 May 1984 in *Meade* (cited in footnote 28) and of Advocate General Jacobs of 30 November 2000 in *Khalil and Others* (cited in footnote 26, point 19).

48. Accordingly, third-country nationals cannot rely on the right to free movement under Article 45 TFEU within the European Union [30] and the Union legislature does not have the power to adopt specific measures for the coordination of social security systems between the EU and third countries solely on the basis of Article 48 TFEU. Such measures are not necessary to provide (intra-Union) freedom of movement for workers within the meaning of Articles 45 TFEU and 48 TFEU.

49. Contrary to the view taken by the United Kingdom and Ireland, I certainly do not consider that the Union institutions are prevented from relying on the competences conferred on them for the creation of the internal market in order to join in regulating the situation of third-country nationals when they adopt rules governing Union citizens and undertakings, if that is necessary, for example, for bringing about equal conditions of competition within the internal market. [31]

50. However, in the present case it is not only a question of the situation of third-country nationals being regulated *for the territory of the European Union* upon the adoption of social legislation. Rather, the contested decision relates primarily to the extension of existing social legislation, Regulation No 883/2004, to third countries – the three EFTA States Norway, Iceland and Liechtenstein. [32]

51. Accordingly, like Article 79 TFEU, Article 48 TFEU also cannot serve as the legal basis for the contested decision.

3. Article 217 TFEU would have been the correct substantive legal basis

52. The crucial factor in determining the correct legal basis for the contested decision is that the decision constitutes the necessary first step, internally, on the way to the amendment and further development of the EEA Agreement. The *substantive* authorisation for this should be the same as originally for the adoption of the EEA Agreement, namely the power to establish associations under Article 217 TFEU.

53. When the EEA Agreement was concluded, Regulation No 1408/71, which was applicable at the time, was incorporated into its Annex VI (Social Security) and into its Protocol 37, and the rules on the coordination of social security systems contained in it were thus extended to the entire EEA.

54. Only the validity of Regulation No 1408/71 within the European Union was, at the time, based on Article 48 TFEU (formerly Article 51 of the EEC Treaty), whilst the system created by that regulation was extended to the EEA by virtue of the EEA Agreement itself, i.e. it was based on the power to establish associations under Article 217 TFEU (formerly Article 238 of the EEC Treaty).

55. It would be absurd if the situation were any different now for the replacement of Regulation No 1408/71 by its successor legislation, Regulation No 883/2004.

56. Rather, having regard to Regulation No 883/2004, it must be assumed that only its validity within the European Union is based on Article 48 TFEU. On the other hand, the decision of the EEA Joint Committee by which that regulation, rather than Regulation No 1408/71, will in future be incorporated into Annex VI (Social Security) and into Protocol 37 to the EEA Agreement and thus extended to the entire EEA takes its legitimacy, from the point of view of EU law, from the power to

30 — Freedom of movement for workers within the EEA is secured by Article 28 of the EEA Agreement.

31 — See *Khalil and Others*, cited in footnote 26, paragraph 56; see also my Opinion in Case C-13/07 *Commission* v *Council* ('Vietnam', not published in the ECR, point 149), in which I examine the passage from Opinion 1/94 (cited in footnote 23, in particular paragraphs 81 and 86) invoked here by the United Kingdom and Ireland.

32 — See above, point 42 of this Opinion.

establish associations under Article 217 TFEU. The same must apply to the contested decision, which establishes the Union's position in advance of any action by the EEA Joint Committee and thus, in the final analysis, prepares the Union's action at international level and the intended adjustments to the EEA Agreement.

57. Unlike Article 48 TFEU, there is no doubt that Article 217 TFEU permits rules to be laid down governing the relationship between the Union and third countries and also the benefit of those rules to be extended to persons other than Union citizens, including economically non-active persons. Precisely such rules which concern the Union's relationship with third countries and the legal status of nationals of those third countries distinguish an association agreement. In this regard, the Court found some time ago that Article 217 TFEU (formerly Article 238 of the EEC Treaty) necessarily empowers the Union to guarantee commitments towards non-member countries in all the fields covered by the Treaties. [33]

58. Even if it were to be assumed that the same or at least similar rules on the coordination of social security systems in respect of third-country nationals could also be adopted on the basis of Article 79(2)(b) TFEU, however, Article 217 TFEU would have to be regarded as a *lex specialis* in the context of an association agreement with third countries, in particular in the context of such a close association as the EEA Agreement. [34]

59. It is not possible to raise the objection to the use of Article 217 TFEU as the authorisation for a decision like the one at issue that this would render the procedure for producing decisions of the EEA Joint Committee excessively difficult.

60. First of all, it is not procedures that define the legal basis of a measure but the legal basis of a measure that determines the procedures to be followed in adopting that measure. [35]

61. Second, the use of Article 217 TFEU as a substantive legal basis in the present case does not result in any modification of the procedure. From a procedural point of view, the relevant provision is still Article 218(9) TFEU, within the scope of which the Council acts by a qualified majority (Article 16(3) TEU). According to its purpose, the unanimity requirement within the Council (second subparagraph of Article 218(8) TFEU), like the requirement of consent of the European Parliament (Article 218(6)(a)(i) TFEU), concerns only the initial conclusion of an association agreement or structural amendments to such an agreement, to which Article 218(9) TFEU does not apply according to its last clause ('with the exception of …').

62. Against this background, I conclude that Article 217 TFEU would have been the correct substantive legal basis for the contested decision, in which case Article 218(9) TFEU would have still been relevant from a procedural point of view.

63. Moreover, as a matter of procedural law, the Court is not prevented, in the present case, from identifying Article 217 TFEU as the correct legal basis for the contested decision. The complaint of the incorrect legal basis was expressly raised by the United Kingdom, supported by Ireland, and was thus made an issue in the proceedings. In addition, in its independent assessment of the issue of the legal basis, the Court cannot be restricted solely to the provisions of primary law mentioned by the parties (Article 79 TFEU on the one hand and Article 48 TFEU on the other). The Court is not the 'mouthpiece of the parties'. [36] Accordingly, it cannot be obliged to take into account solely the

33 — Case 12/86 *Demirel* [1987] ECR 3719, paragraph 9.

34 — See also Case C-155/07 *Parliament* v *Council*, cited in footnote 23, paragraph 34, according to which a measure must always be based on the more specific of two possible legal bases.

35 — Case C-130/10 *Parliament* v *Council*, cited in footnote 18, paragraph 80.

36 — In the words of Advocate General Léger in his Opinion of 2 April 1998 in Case C-252/96 P *Parliament* v *Gutiérrez de Quijano y Lloréns* [1998] ECR I-7421, point 36.

arguments on which the parties have based their submissions because its decision might otherwise be based on incorrect legal considerations.[37] Lastly, there are also no doubts in relation to the right to be heard and the requirements of an adversarial process,[38] since the possibility of using Article 217 TFEU as the substantive legal basis was expressly discussed with all the parties at the hearing.

4. In the alternative: recourse to Article 216(1) TFEU

64. Only in the event that the Court did not concur with my arguments on Article 217 TFEU, I would add that recourse to Article 216(1) TFEU is also conceivable in the present case. That provision essentially codifies the 'ERTA doctrine',[39] to which the Council in particular referred in its written submissions to the Court and on which the other parties were also able to submit observations.

65. Article 216(1) TFEU authorises the Union to conclude an international agreement with one or more third countries 'where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope'.

66. The EEA Agreement is an international agreement with third countries concluded by the European Communities as the legal predecessor to the Union. Under Article 216(2) TFEU, that agreement is binding upon both the Union and the Member States and must therefore be regarded as a legally binding Union act for the purposes of Article 216(1) TFEU.

67. Substantively, the aim of the EEA Agreement is to promote equal conditions of competition and the respect of the same rules, with a view to creating a homogeneous European Economic Area (Article 1(1) of the EEA Agreement). The object of the EEA is not least to guarantee the free movement of persons (Article 1(2)(b) of the EEA Agreement), which is accompanied by close cooperation inter alia in the field of social policy (Article 1(2)(f) of the EEA Agreement).

68. To achieve these aims of the EEA Agreement it is necessary to replicate at the level of the EEA any modernisation and simplification of the rules on the coordination of social security systems which apply within the European Union, as happened with the replacement of Regulation No 1408/71 by Regulation No 883/2004.[40] Without substituting the reference to the old regulation by a reference to the new regulation in Annex VI (Social Security) and in Protocol 37 to the EEA Agreement, the free movement of persons would not be exercised within the EEA under the same social conditions as within the European Union. This would entail the risk of undermining the fundamental aim of the EEA, which is to create equal conditions of competition with the same rules in a homogeneous economic area.

69. Ultimately, the extension of Regulation No 883/2004 to the entire EEA intended by the contested decision ensures that 'common rules' within the meaning of Article 216(1) TFEU – in this instance the EEA Agreement which is binding upon the Union and all its Member States – are not affected.[41]

37 — See the order of 27 September 2004 in Case C-470/02 P *UER/M6 and Others*, not published in the ECR, paragraph 69, and Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden* v *API and Commission* [2010] ECR I-8533, paragraph 65.

38 — Case C-89/08 P *Commission* v *Ireland and Others* [2009] ECR I-11245, in particular paragraphs 50 and 51, and Case C-197/09 RX-II, Review *M* v *EMEA* [2009] ECR I-12033, paragraphs 39 to 42.

39 — The ERTA doctrine dates back to Case 22/70 *Commission* v *Council* ('ERTA') [1971] ECR 263, paragraphs 15 to 19; a recent summary can be found, for example, in Opinion 1/03 [2006] ECR I-1145, paragraphs 114 to 133.

40 — See recital 3 in the preamble to Regulation No 883/2004.

41 — With regard to the Union's external competence in connection with the adoption of common rules which could be affected, see also Opinion 1/03, cited in footnote 39, paragraph 116.

70. Consequently, the contested decision can also be based on the ERTA doctrine, as expressed in Article 216(1) TFEU. Since, however, in Article 217 TFEU there is another, more specific substantive legal basis for the contested decision,[42] recourse should not be had, in the final analysis, to Article 216(1) TFEU, but to Article 217 TFEU.[43]

B – *The effet utile of Protocol No 21 to the TEU and to the TFEU*

71. I would also like to note that the application of Article 217 TFEU – like the application of Article 48 TFEU or of Article 216(1) TFEU – in a case like the present one does not deprive Protocol No 21 to the TEU and to the TFEU of its *effet utile*.

72. Protocol No 21 contains special rules for the United Kingdom and Ireland with regard to the area of freedom, security and justice. Under that Protocol, proposed measures pursuant to Title V of Part Three of the TFEU apply to the United Kingdom and to Ireland only if those two Member States give express notification in writing that they wish to take part in such measures ('opt-in', see the first sentence of the first paragraph of Article 1 in conjunction with Article 3 of Protocol No 21).

73. The material scope of this special rule is expressly limited to the area of freedom, security and justice. Furthermore, as an exception, it must be given a strict interpretation.

74. It is not the spirit and purpose of Protocol No 21 to give the United Kingdom and Ireland free discretion as regards participation in measures adopted by the Union institutions and the binding effect on them in other areas of EU law, in particular in the context of the internal market or the association of third countries.

75. Consequently, the opt-in cannot be applicable to the adoption of measures which – like the Council decision at issue – concern the extension of the rules applicable within the internal market to third countries.

76. It would significantly affect the functioning of an association agreement – especially the functioning of the EEA Agreement, which leads to a full association in the field of the internal market and free movement of persons – if individual European Union Member States applied, vis-à-vis the Associated States or their nationals, only some of the Union *acquis* and could thus insist on special treatment.

77. If it were also intended to apply the opt-in and thus ultimately the idea of an *à la carte* Europe for measures like the contested decision, not only would this jeopardise the internal market, as one of the central pillars of the European Union, but it would also fundamentally call into question the existence of the EEA. There would be a danger of fragmentation of this internal market, expanded to include the three EFTA States Norway, Iceland and Liechtenstein, with negative repercussions for the equal treatment of all persons and undertakings active in this internal market and for the uniformity of the conditions of competition applicable to them.

42 — See above, points 52 to 63 of this Opinion.

43 — See again Case C-155/07 *Parliament* v *Council*, cited in footnote 23, paragraph 34, according to which a measure must always be based on the more specific of two possible legal bases.

C – Effects of the choice of the incorrect legal basis on the validity of the contested decision

78. As has been established above, the Council chose the incorrect legal basis for the contested decision. It would have been correct for that decision to have been based on the power to establish associations under Article 217 TFEU as the substantive legal basis, in conjunction with the procedural legal basis of Article 218(9) TFEU.

79. However, the choice of the incorrect legal basis for a Union measure does not necessarily mean that the Union measure would have to be annulled. According to case-law, the measure is not to be annulled where the recourse to the incorrect legal basis could not affect the substance of the measure or the procedure for its adoption and was thus a purely formal error.[44]

80. That is the situation in the present case. Under Article 218(9) TFEU, the contested decision had to be taken within the Council by a qualified majority and without the participation of the European Parliament,[45] irrespective of whether Article 217 TFEU, Article 216(1) TFEU or Article 48 TFEU is regarded as the correct legal basis. Furthermore, none of the abovementioned substantive legal bases permits the United Kingdom and Ireland to avail themselves of the special rule provided for in Protocol No 21 to the TEU and to the TFEU.

81. The choice of the incorrect legal basis in the present case cannot therefore justify the annulment of the contested decision.

82. Should the Court nevertheless – contrary to my above arguments – wish to grant the application made by the United Kingdom, I consider that the effects of the contested decision should be maintained pending the adoption of a new, substantively identical Council decision on the correct legal basis (Article 264(2) TFEU). This has been advocated not least by the United Kingdom and Ireland themselves.

VI – Costs

83. Under Article 138(1) of the Rules of Procedure of 25 September 2012, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since, according to my proposed solution, the United Kingdom has been unsuccessful and the Council has applied for costs, the United Kingdom must be ordered to pay the costs. On the other hand, Ireland and the Commission, as interveners, must each bear their own costs in accordance with Article 140(1) of the Rules of Procedure.

VII – Conclusion

84. In the light of the foregoing observations, I propose that the Court should:

1. Dismiss the application;

2. Order Ireland and the European Commission each to bear their own costs;

3. Order that the United Kingdom of Great Britain and Northern Ireland pay the remainder of the costs.

44 — Case 165/87 *Commission* v *Council* [1988] ECR 5545, paragraphs 18 to 21; Joined Cases C-184/02 and C-223/02 *Spain and Finland* v *Parliament and Council* [2004] ECR I-7789, paragraphs 42 to 44; and Case C-210/03 *Swedish Match* [2004] ECR I-11893, paragraph 44; see also my Opinion in Case C-94/03 *Commission* v *Council* [2006] ECR I-1, point 53.

45 — See above, point 61 of this Opinion.