Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 29 January 2015 [1]

Case C-28/12

European Commission
v

Council of the European Union

(Action for annulment — Article 218 TFEU — Decision on the signing and provisional application of international agreements — Hybrid decision of the Council and of the Representatives of the Governments of the Member States — Alternative procedure — Voting rules — Obligation of sincere cooperation — Principle of the organisational autonomy of the institutions — Unified representation of the European Union)

1. Following the entry into force of the Treaty of Lisbon, can the Council of the European Union and the Representatives of the Governments of the Member States of the EU jointly adopt decisions (known as 'mixed' or 'hybrid' decisions) in order to take the measures required at the various stages of the procedure for negotiating and concluding international agreements, as laid down by Article 218 TFEU? Is the merging of an act of the EU, such as a Council decision which, in the field of international agreements, must be adopted by a qualified majority, and an intergovernmental act which, by definition, must be adopted by all the interested States, permissible under EU law, notably in the case of the negotiation and conclusion of mixed agreements? What are the roles, in that context, of the requirement for the unified representation of the EU at international level, the associated duty of close cooperation between the EU and its Member States, the requirement of legal certainty in international law for the contracting parties to mixed agreements concluded with the EU and its Member States, and the principle of the autonomy of the EU institutions?

2. These are, in essence, the issues before the Court in the present case, in which the European Commission seeks the annulment of Decision 2011/708/EU, adopted on 16 June 2011 by the Council and the Representatives of the Governments of the Member States of the European Union, meeting within the Council [2] ('the contested decision'), on the signing on behalf of the EU and provisional application by the EU and its Member States of two international agreements in the field of air transport.

1 — Original language: French.

2 — Decision of the Council and of the Representatives of the Governments of the Member States of the European Union, meeting within the Council of 16 June 2011 on the signing, on behalf of the Union, and provisional application of the Air Transport Agreement between the United States of America, of the first part, the European Union and its Member States, of the second part, Iceland, of the third part, and the Kingdom of Norway, of the fourth part; and on the signing, on behalf of the Union, and provisional application of the Ancillary Agreement between the European Union and its Member States, of the first part, Iceland, of the second part, and the Kingdom of Norway, of the third part, on the application of the Air Transport Agreement between the United States of America, of the first part, the European Union and its Member States, of the second part, Iceland, of the third part, and the Kingdom of Norway, of the fourth part (OJ 2011 L 283, p. 1).

3. Whilst this case might initially appear to be primarily procedural in nature, the fact of the matter is that its implications go beyond procedural issues alone. This case touches on sensitive issues concerning the exercise of the EU's external competences. In finding a solution, the Court will therefore have to weigh up the various requirements that are relevant in the present case, while at the same time taking account of the reality of the practical operation of the EU's decision-making process and of EU external action.

I – **Background to the dispute**

4. On 25 and 30 April 2007, the European Community and its Member States, on the one hand, and the United States of America, on the other hand, signed an air transport agreement,[3] which was subsequently amended by a protocol signed in Luxembourg on 24 June 2010[4] ('the EU/USA Air Transport Agreement'). That agreement was intended, inter alia, to facilitate the expansion of international air transport opportunities by opening access to markets and maximising benefits for consumers, airlines, workers and communities on both sides of the Atlantic ocean.

5. The EU/USA Air Transport Agreement provided for the possibility of third countries acceding to it, and so in 2007 the Republic of Iceland and the Kingdom of Norway submitted a request for accession. Two international agreements were thus negotiated for the purpose of their accession. First, the EU and its Member States, the United States of America, the Republic of Iceland and the Kingdom of Norway negotiated an accession agreement to extend the scope of the EU/USA Air Transport Agreement, *mutatis mutandis*, to each contracting party (OJ 2011 L 283, p. 3; 'the Accession Agreement'). Secondly, the Ancillary Agreement between the European Union and its Member States, of the first part, Iceland, of the second part, and the Kingdom of Norway, of the third part, on the application of the Air Transport Agreement between the United States of America, of the first part, the European Union and its Member States, of the second part, Iceland, of the third part, and the Kingdom of Norway, of the fourth part (OJ 2011 L 283, p. 16; 'the Ancillary Agreement'), was negotiated. That agreement is intended to ensure that the bilateral nature of the EU/USA Air Transport Agreement is maintained.

6. On 2 May 2011, the Commission adopted a proposal for Council Decision COM(2011) 239 final on the signature and provisional application of the Air Transport Agreement between the United States of America, of the first part, the European Union and its Member States, of the second part, Iceland, of the third part, and the Kingdom of Norway, of the fourth part; and on the signature and provisional application of the Ancillary Agreement between the European Union and its Member States, of the first part, Iceland, of the second part, and the Kingdom of Norway, of the third part, on the application of the Air Transport Agreement between the United States of America, of the first part, the European Union and its Member States, of the second part, Iceland, of the third part, and the Kingdom of Norway, of the fourth part. That proposal envisaged a decision by the Council only, and was based on Article 100(2) TFEU,[5] in conjunction with Article 218(5) TFEU.[6]

7. In a departure from that proposal, the Council adopted the contested decision in the form of a hybrid decision, that is to say, a decision emanating both from the Council and from the Representatives of the Governments of the Member States meeting within the Council. The contested decision was based on Article 100(2) TFEU, in conjunction with Article 218(5) and (8) TFEU.[7]

3 — OJ 2007 L 134, p. 4.

4 — Protocol to amend the Air Transport Agreement between the United States of America and the European Community and its Member States, signed on 25 and 30 April 2007 (OJ 2010 L 223, p. 3).

5 — Under that provision, '[t]he European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may lay down appropriate provisions for sea and air transport. …'

6 — Under that provision, '[t]he Council, on a proposal by the negotiator, shall adopt a decision authorising the signing of the agreement and, if necessary, its provisional application before entry into force'.

7 — According to the first subparagraph of Article 218(8) TFEU, '[t]he Council shall act by a qualified majority throughout the procedure'.

8. Article 1 of the contested decision provides that '[t]he signing of [the Accession Agreement] and of the Ancillary Agreement … is hereby authorised on behalf of the Union, subject to the conclusion of the said Agreements'.

9. Article 2 of that decision states that '[t]he President of the Council is hereby authorised to designate the person(s) empowered to sign the Accession Agreement and the Ancillary Agreement on behalf of the Union'.

10. Article 3 of that decision states that '[t]he Accession Agreement and the Ancillary Agreement shall be applied on a provisional basis as from the date of signature by the Union and, to the extent permitted under applicable national law, by its Member States and by the relevant Parties, pending the completion of the procedures for their conclusion'.

11. The Accession Agreement and the Ancillary Agreement were signed in Luxembourg and in Oslo on 16 and 21 June 2011.

II – **Forms of order sought and procedure before the Court**

12. The Commission requests the Court to annul the contested decision, but none the less to maintain the effects of that decision and to order the Council to pay the costs.

13. The Council requests the Court to dismiss the action as inadmissible or unfounded, or alternatively, if, and to the extent that, the Court annuls the contested decision, to declare that the effects of that decision are definitive, and to order the Commission to pay the costs.

14. By order of 18 June 2012, the President of the Court granted the European Parliament leave to intervene in support of the form of order sought by the Commission, and the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the French Republic, the Italian Republic, the Kingdom of the Netherlands, the Republic of Poland, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland leave to intervene in support of the form of order sought by the Council.

15. The hearing before the Court was held on 11 November 2014.

III – **Analysis**

16. In its action, the Commission challenges the contested decision in its entirety, relying on three pleas in law. The first plea alleges infringement of the procedure and conditions relating to authorisation of the signing and provisional application of international agreements by the EU. The second plea alleges infringement of the voting rules in the Council, and the third plea alleges breach of the objectives set out in the Treaties and failure to comply with the principle of sincere cooperation. Before those three pleas are analysed, however, it is appropriate to examine the objection of inadmissibility raised by the Council.

A – *Admissibility*

17. The Council puts forward three grounds for the inadmissibility of the Commission's action. In the first place, it submits that the action is inadmissible because it should have been directed against the Member States and not against the Council. The Commission is actually contesting the Member States' participation in the contested decision, not any wrongdoing which can be attributed to the Council. In the second place, the Council maintains that the action is inadmissible because it

concerns a decision by Member States, which falls outside the scope of Article 263 TFEU and is thus not capable of being subject to judicial review by the Court. In the third place, according to the Council, the Commission has no interest in bringing proceedings because the annulment sought would have no legal consequence.

18. With regard to the first and second arguments put forward by the Council, it should be remembered at the outset that an action for annulment must be available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects. [8]

19. In the present case, the Commission's action concerns an act adopted jointly by the Council and the Representatives of the Member States on the basis, inter alia, of Article 218(5) and (8) TFEU. As is evident from points 8 to 10 of this Opinion, that act authorises both the signing and provisional application of the relevant international agreements with regard to the EU, and the provisional application of those agreements by the Member States to the extent permitted under applicable national law.

20. It follows from this, first, that the Council participated in the adoption of the contested decision and that that decision is indeed, therefore, a measure adopted by that institution, and, secondly, that the contested decision constitutes an act having legal effects which, as such, is amenable to judicial review. [9] The first and second of the Council's arguments must therefore be rejected.

21. As regards the Council's third argument, suffice it to note that, according to settled case-law, the second paragraph of Article 263 TFEU gives the institutions mentioned therein and any Member State the right to bring an action for annulment in order to challenge the legality of any Council act having legal effects, without making the exercise of that right conditional on proof of an interest in bringing proceedings. [10] The Commission does not therefore have to prove any interest in bringing proceedings in order to bring the present action. Since the Council's third argument must accordingly also be rejected, the action is in my view admissible with regard to the contested decision in its entirety.

B – *Substance*

1. Arguments of the parties

a) First plea in law, alleging infringement of the procedure and conditions relating to authorisation of the signing and provisional application of international agreements by the EU

22. The Commission, supported by the Parliament, submits that, in adopting the contested decision, the Council infringed the first sentence of Article 13(2) TEU, [11] in conjunction with Article 218(2) and (5) TFEU. Under the latter provision, the Council is the only institution empowered to authorise the signing and provisional application of international agreements by the EU. The contested decision should therefore have been adopted solely by the Council, and not also by the Member States meeting within the Council.

8 — Judgment in *Commission* v *Council* (C-114/12, EU:C:2014:2151, paragraph 39 and the case-law cited).

9 — Ibid., paragraphs 40 and 41.

10 — See, to that effect, *Commission* v *Council* (45/86, EU:C:1987:163, paragraph 3). In particular, the favourable treatment accorded to the institutions of the EU is warranted by their protective role within the system of the EU, which means that they do not, by definition, defend interests other than the interests of the EU itself.

11 — Article 13(2) TEU provides that '[e]ach institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation'.

23. According to the Commission, by including the Member States, acting collectively within the Council, in its decision-making, the Council unilaterally derogated from the procedure set out in Article 218 TFEU, although it is apparent from the case-law that the Council cannot break free from the rules laid down by the Treaties and have recourse to alternative procedures for the adoption of EU acts. In those circumstances, the Council also infringed its obligation to exercise its powers within the limits of the procedures and conditions set out in the Treaties in accordance with the first sentence of Article 13(2) TEU.

24. In particular, it is submitted that, following the entry into force of the Treaty of Lisbon, the EU procedures should be clearly distinguishable from the areas in which the Member States can still exercise their competences. It is therefore not possible to merge an intergovernmental act with an act of the EU. The previous practice of having recourse to hybrid acts, notably in the aviation sector, now distorts EU procedures and can no longer be accepted.

25. The mixed nature of an international agreement concluded by the EU and every Member State does not necessarily mean that the Council decision relating to the signing and provisional application of that agreement, adopted pursuant to Article 218 TFEU, can be altered by being merged with an intergovernmental decision of the Member States. Such inclusion in the decision-making process of the Council is not necessary as regards the signing of the agreement or as regards its provisional application.

26. The Council, supported by all the governments which intervened, considers, on the contrary, that the adoption of the contested decision in the form of a hybrid decision infringes none of the provisions of the Treaties.

27. First, the Council contends that it did not derogate from the provisions of Article 218(2) and (5) TFEU or have recourse to an alternative procedure. The representatives of the Member States meeting within the Council adopted two separate decisions which are contained in the contested decision. On the one hand, in accordance with Article 218 TFEU, in their capacity as members of the Council, they authorised the signing and provisional application by the EU of the agreements at issue. On the other hand, in their capacity as representatives of the Member States, they authorised the provisional application of those agreements by the Member States to the extent permitted under applicable national law. That last part of the contested decision was adopted on the basis of procedures not laid down by the Treaties. The Member States did not, therefore, participate in the procedure provided for in Article 218(2) and (5) TFEU.

28. Next, according to the Council, since the relevant agreements are mixed agreements, the adoption of a hybrid decision, of which the Member States are co-authors, is entirely consistent with the mixed nature of the underlying agreements and with the fact that the Member States are in certain respects exercising their own competences. It is a permissible consequence of concluding mixed agreements with which it is in legal symmetry.

29. The choice of the instrument of a hybrid decision is actually an expression of the duty of close cooperation between the EU and the Member States and of the requirement of the unified representation of the EU imposed by the case-law. This type of decision is the best way to ensure such unity in international representation and to guarantee a common and coordinated approach on the part of the EU and of its Member States. That is particularly so where, as in the case of the agreements at issue, the parts of the international agreement falling within the competence of the EU are intrinsically linked to the parts falling within the competence of the Member States, and those parts are therefore indissociable. The Commission's argument that decisions of the EU and intergovernmental decisions should be in separate instruments would jeopardise cooperation between the Member States and the EU and undermine the effectiveness of the institutional framework for concluding international treaties.

30. Furthermore, in accordance with the principle of autonomy of the institutions, the Council and the Member States are free to determine precisely how their work is to be organised. The fact that that authorisation is communicated in a single decision does not in any way undermine the integrity of the procedure laid down by Article 218(5) TFEU. In any event, the adoption of a hybrid decision would in practice lead to the same result as the adoption of two decisions (one by the Council, the other by the Representatives of the Governments of the Member States meeting within the Council) or as the adoption of a single Council decision. Lastly, the entry into force of the Treaty of Lisbon has not affected the legality of hybrid decisions and did not prohibit their adoption. On the contrary, the adoption of mixed decisions is an established practice, notably in the air transport sector, even after the entry into force of the Treaty of Lisbon.

b) Second plea in law, alleging infringement of the voting rules in the Council

31. By its second plea, the Commission, supported by the Parliament, submits that, in adopting the contested decision, the Council infringed the first subparagraph of Article 218(8) TFEU in conjunction with the substantive legal basis for the adoption of measures in the field of air transport, namely Article 100(2) TFEU. While a decision must, under those provisions, be adopted by the Council acting by a qualified majority, an intergovernmental act adopted collectively by the Representatives of the Governments of the Member States must, by contrast, due to its nature, be adopted by common accord of all the Member States. Merging those acts into a single decision and making them subject to common accord actually makes it impossible to apply qualified majority voting, rendering *de facto* void the introduction by the Treaty of Lisbon of such voting as standard procedure for the process of negotiation and conclusion of international agreements by the EU. It thus divests the procedure laid down by the first subparagraph of Article 218(8) TFEU of its very substance and generally undermines the effectiveness of EU procedures. Furthermore, the effect of merging those two acts is that the legal basis indicated in the hybrid decision does not really determine the voting procedure within the Council, which has been implicitly, but inevitably, replaced as a consequence of its intergovernmental elements.

32. The Parliament adds that merging those two types of act also entails a major shift in the institutional balance in the procedure for the conclusion of international agreements by the EU, contrary to Article 218(6) and (10) TFEU.

33. The Council, supported by the governments which intervened, considers that it complied with the voting rules laid down by the Treaties. According to the Council, the contested decision was adopted by a qualified majority in the Council as regards the EU's exclusive competences, and by common accord of the Representatives of the Governments of the Member States as regards Member State competences. It is therefore incorrect to claim that it was adopted unanimously or that the qualified majority rule was changed. The fact that there was no delegation within the Council opposing the contested decision does not mean that qualified majority voting was not applied. In any event, any decision adopted unanimously necessarily incorporates a qualified majority. Moreover, the fact that the Member States reached a consensus does not undermine the effectiveness of EU action or procedures.

34. The Council and certain governments also contend that, in the case of international agreements, the combination of various voting rules is a common practice that is consistent with the case-law. In addition, according to the Finnish Government, the voting method chosen by the Council was based on Article 293(1) TFEU, according to which the Council, acting on a proposal from the Commission, may amend that proposal only by acting unanimously. In the present case, as the Council had modified the Commission's proposal with regard to Article 3 of the Commission, it should in any event have voted unanimously.

c) Third plea in law, alleging breach of the objectives set out in the Treaty and of the principle of sincere cooperation

35. The Commission, supported by the Parliament, claims that the Council acted in breach of the objectives of the Treaties and of the principle of sincere cooperation set out in Article 13(2) TEU. By allowing the Member States to intervene in EU procedures, the Council, first of all, 'blurred' the independent personality of the EU in international relations. The Council's message to the international community is that the EU is not entitled to take a decision on its own. Next, in so doing, the Council failed to act in conformity with the principle of sincere cooperation, in that it should have exercised its powers so as not to circumvent the EU procedures set out in Article 218 TFEU. The Council breached that principle both in terms of inter-institutional relations and with regard to the EU as a whole. Lastly, the Council weakened the institutional framework of the EU by giving the Member States a role in the EU which is not foreseen by the Treaties or, in particular, by Article 218 TFEU, thus risking giving predominance to the interests of the Member States over those of the EU.

36. The Council, supported by the governments which intervened, takes the view that the contested decision is not liable to lead to any confusion for third parties or the international community. On the contrary, in the context of mixed agreements, third parties would have been confused if they had seen only the Council's decision and not also a decision involving the Member States. The contested decision is, moreover, not only consistent with the objective of unity in the international representation of the EU, but guarantees, promotes and strengthens it, by demonstrating the common position of the EU and its Member States. The adoption of such a decision embodies the obligation of close cooperation and the common approach of the EU and its Member States. By contrast, the adoption of a decision by the Council alone, without the Member States, might convey to the outside an image of a Union that is not united, and taking the approach of following a parallel intergovernmental procedure would involve the risk of divergence between Member States and of delays. That procedure would thus be less favourable in relation to the objectives of the Treaty. In any event, a hybrid decision is an internal act of the EU which is not intended to be brought to the attention of third countries and, even if it did, it is unlikely that any importance would be attached to determining its authors.

2. Analysis

37. By its action, the Commission requests the Court to annul the contested decision relating, first, to the signing by the EU and, secondly, to the provisional application by the EU and by its Member States of the Accession Agreement and the Ancillary Agreement, in view of the fact that that decision was adopted jointly by the Council and the Representatives of the Member States as a hybrid act merging an act of the EU and an intergovernmental act.

38. It should be noted, as a preliminary point, that the Commission has expressly stated that it did not, by its action, intend to challenge the mixed nature of the two international agreements at issue.[12] The scope of the action in the present case is therefore limited solely to the question of the legality of the adoption of the contested decision as a hybrid decision.

12 — In its written pleadings, the Commission explained that, given that the two agreements at issue concern only the Republic of Iceland's and the Kingdom of Norway's accession to the EU/USA Air Transport Agreement, which had already been concluded in the form of a mixed agreement, it did not intend to challenge the mixed nature of those agreements, so as to avoid creating legal and political uncertainty in the EU's relations with the United States of America.

39. Next, I note, also as a preliminary point, that although, in terms of form, the contested decision constitutes a single act, it actually contains two separate decisions in terms of substance, namely, on the one hand, a decision of the Council on the signing and provisional application of the relevant agreements by the EU, and, on the other, an intergovernmental act of the Representatives of the Member States on the provisional application of those agreements by the Member States. It is precisely the question of the legality of the joint adoption of those two different acts and of their merging in a single act that is being challenged by the Commission.

40. The three pleas in law which the Commission put forward in its action cover that issue from different angles but overlap, in my opinion, on different levels. The action raises, in essence, two types of problem. First, from what could be defined as an *internal* aspect, the present case concerns the application of provisions relating to the procedures and voting rules for the adoption of EU acts dealing with the negotiation and conclusion of international agreements within the procedural framework established by Article 218 TFEU. In that context, a question also arises as to the extent of the organisational and functional autonomy that is peculiar to the EU institutions. Secondly, as regards its *external* aspect, the present case also pertains to the requirements regarding the specific conduct of EU external action. In fact it raises issues concerning, in particular, the requirement of the unified representation of the EU in an international context, and the associated obligation of close cooperation between the EU and the Member States in the context of the process of negotiating and concluding mixed agreements. It also concerns the obligations under international law that flow from EU external action vis-à-vis the other contracting parties.

41. The solution to the legal difficulties raised in the present case cannot, therefore, be confined to consideration of internal procedural issues, but must also take account of the impact of those issues on the EU's external action. That, in turn, calls for an assessment to be made weighing up the various principles and requirements involved in the present case. In those circumstances, I consider it appropriate to analyse the three pleas together, starting with a general presentation of the issues raised in the present case, before going on to examine the complaints which the Commission put forward in its action in the light of the principles established by the case-law.

a) The procedural framework for the negotiation and conclusion of international agreements by the EU laid down by Article 218 TFEU

42. As regards its internal aspect, the present case raises, first of all, a question as to whether the procedure followed in adopting the contested decision is consistent with the provisions of Article 218 TFEU.

43. It is apparent from Article 218(1) TFEU that that article is designed to govern the procedure for negotiating and concluding agreements between the EU and third countries or international organisations. That article, which is contained in Title V, headed 'International agreements', of Part Five of the FEU Treaty, which is headed 'External action by the Union', is a general provision the purpose of which is to establish a single, unified procedure for the EU's negotiation and conclusion of such agreements. The provision is an expression, on the one hand, of the new structure of the EU following the formal disappearance of the pillars with the entry into force of the Treaty of Lisbon,[13] and, on the other, of the new, reinforced dimension of EU external action reflected by the introduction of Articles 21 TEU and 22 TEU and of Part Five of that Treaty.

13 — Previously, different provisions of the Treaties provided for different procedural rules concerning the negotiation and conclusion of international agreements, depending on whether those agreements were concluded under the first pillar (Article 300 EC) or the second or third pillars (Articles 24 EU and 38 EU, respectively).

44. The procedure laid down by Article 218 TFEU is therefore intended to be applied to all agreements negotiated and concluded by the EU, irrespective of their nature and content, with the exception of those cases expressly provided for by specific provisions of the Treaties.[14] Article 218 TFEU applies, moreover, to agreements concluded in the context of the common foreign and security policy. In particular, there is nothing to suggest that that article would not apply should the international agreement be concluded in the form of a mixed agreement.

45. The procedure leading to the conclusion of an international agreement is in stages and Article 218 TFEU specifies the detailed arrangements for the conduct of those various stages and the role and respective powers of the different institutions involved in the negotiation and conclusion of international agreements by the EU.

46. Specifically, as regards the provisions relevant to the present case, it is apparent from Article 218(2) TFEU that the Council is the institution empowered to authorise the opening of negotiations, to adopt negotiating directives, to authorise the signing of EU agreements and to conclude them. Thus, in accordance with Article 218(5), it is the Council which, on a proposal by the negotiator, is to adopt a decision authorising the signing of the agreement and, if necessary, its provisional application before its entry into force. Article 218(6), on the one hand, provides that the Council, on a proposal by the negotiator, is to adopt a decision concluding the agreement, and, on the other, grants the Parliament a power of approval or merely of consultation, depending on the subject-matter of the agreement that is to be concluded. Article 218(8) TFEU lays down the general rule that the Council is to act by a qualified majority throughout the procedure, save in the context of the exceptions set out in the second subparagraph of that provision.

47. It follows from the context of Article 218 TFEU, as well as from the wording and broad logic of that provision — and, in particular, from its objective of establishing a general system and procedural rules for the negotiation and conclusion of international agreements by the EU — that, save in the cases of the exceptions expressly provided for by the Treaties themselves, the Council cannot break free from the procedures provided for therein by having recourse to alternative procedures or procedures differing from those envisaged by that article at the various stages of the procedure for the negotiation and conclusion of international agreements. The Council cannot, in particular, adopt acts which would not constitute one of the decisions envisaged at a given stage of that procedure or which would be adopted in conditions different from those required by Article 218 TFEU itself.[15] The Council's obligation to follow the procedures laid down by the Treaties also stems from Article 13(2) TEU, under which each institution is required to act in conformity with the procedures, conditions and objectives set out in the Treaties.

48. In that regard, it should also be noted that, save as regards two specific issues,[16] Article 218 TFEU does not provide for Member States to intervene at any time in the procedure for the EU's negotiation or conclusion of international agreements.[17] The Member States as such are not, therefore, supposed to have any role in the procedure as provided for in Article 218 TFEU, which is a procedure that is peculiar to the EU.

14 — Such as Article 207 TFEU or Article 219 TFEU.

15 — See, by analogy, judgment in *Commission* v *Council* (C-27/04, EU:C:2004:436, paragraph 81). In its written pleadings the Council disputes the applicability of that judgment to the present case, since it concerned a different situation, that is to say, a case in which the Council had not adopted an envisaged act and in a field other than that of EU international relations. I nevertheless consider that the statements of principle made by the Court in that judgment are of general application whenever, as in the case of Article 218 TFEU, the Treaties lay down specific provisions as to the procedure to be followed in certain matters.

16 — These are (i) the agreement on accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, referred to in the second subparagraph of Article 218(8) TFEU, and (ii) the possibility of obtaining the prior opinion of the Court, under Article 218(11) TFEU.

17 — See, to that effect, also the Opinion of Advocate General Sharpston in *Commission* v *Council* (C-114/12, EU:C:2014:224, point 174).

49. That finding is not called into question by the fact that Article 218 TFEU applies not only to the EU's own agreements, but also to mixed agreements. In the case of mixed agreements, Article 218 TFEU will apply only to the EU's participation in the mixed agreement and not to that of the Member States. The Member States' participation in mixed agreements will be governed, as regards the internal aspect of their participation, by national law in each case and, as regards the external aspect of their participation, by public international law. [18]

b) The legal basis and voting rules

50. The adoption of the contested decision as a hybrid decision merging an EU act and an intergovernmental act also raises questions concerning, on the one hand, the legal basis used and, on the other, compliance with the voting rules laid down by the Treaties.

51. It should be borne in mind in that regard that the Court has held that the requirement of legal certainty means that the binding nature of any EU act intended to have legal effects must be derived from a provision of EU law which prescribes the legal form to be taken by that act and which must be expressly indicated therein as its legal basis. That indication, first, is necessary in order to determine the voting procedure within the Council, secondly, has particular importance for preserving the prerogatives of the EU institutions concerned by the procedure for the adoption of a measure and, thirdly, determines the division of powers between the EU and the Member States, by avoiding giving rise to confusion as to the nature of the EU's powers or weakening the EU in the defence of its position in international negotiations. [19]

52. In addition, it must also be noted that the Court has stated, on a number of occasions, that the rules regarding the manner in which the EU institutions arrive at their decisions are laid down in the Treaties and are not at the disposal of the Member States or of the institutions themselves. [20] The Treaties alone may, in particular cases, empower an institution to amend a decision-making procedure established by them. Moreover, to acknowledge that an institution can depart from a decision-making procedure such as that provided for by the Treaties and adopt an alternative procedure is tantamount to according that institution the power to derogate unilaterally from the rules laid down by the Treaty, which is certainly not permissible, [21] and, moreover, to enabling it to undermine the principle of institutional balance which requires that each of the institutions must exercise its powers with due regard for the powers of the other institutions. [22]

53. In that regard, it should further be noted that the Court has adopted a somewhat sceptical approach towards the merging of different procedures for the adoption of EU acts. Thus, as regards recourse to a dual legal basis, it has consistently been held that no dual legal basis is possible where the procedures laid down for each legal basis are incompatible with each other. [23] That was precisely the case in what is known as the '*Titanium dioxide*' case, [24] the applicability of which to the present case was debated at length by the parties. In that case, the Council had unanimously adopted a directive [25] on the basis of Article 130s of the EEC Treaty, [26] whereas the Commission submitted in its

18 — See, to that effect, ibid., point 171.

19 — Judgment in *Commission* v *Council* (C-370/07, EU:C:2009:590, paragraphs 39, 48 and 49).

20 — See judgment in *United Kingdom* v *Council* (68/86, EU:C:1988:85, paragraph 38) and *Parliament* v *Council* (C-133/06, EU:C:2008:257, paragraph 54).

21 — See judgment in *Parliament* v *Council* (EU:C:2008:257, paragraphs 55 and 56).

22 — Ibid., paragraph 57, and judgment in *Parliament* v *Council* (C-70/88, EU:C:1990:217, paragraph 22). See also Article 13(2) TEU.

23 — Judgments in *Parliament* v *Council* (C-164/97 and C-165/97, EU:C:1999:99, paragraph 14); *Commission* v *Council* (C-338/01, EU:C:2004:253, paragraph 57); and *Parliament* v *Council* (C-130/10, EU:C:2012:472, paragraph 45 et seq. and the case-law cited).

24 — Judgment in *Commission* v *Council*, '*Titanium dioxide*' (C-300/89, EU:C:1991:244, in particular, paragraphs 17 to 21).

25 — See, in particular, Council Directive 89/428/EEC of 21 June 1989 on procedures for harmonising the programmes for the reduction and eventual elimination of pollution caused by waste from the titanium dioxide industry (OJ 1989 L 201, p. 56).

26 — That article provided, in respect of actions relating to the environment, for the Council to act unanimously after merely consulting the Parliament.

action for annulment that that directive should have been adopted on the basis of Article 100a of the EEC Treaty, which provided for the Council to act by a qualified majority.[27] The Court concluded that if there were more than one legal basis, the Council would have been required in any event to act unanimously, which would have undermined an essential element of the cooperation procedure, that is qualified majority voting, thus divesting that procedure of its very substance.[28] [29]

c) The principle of autonomy of the institutions

54. The Council and certain Member States submit that the adoption of hybrid decisions is an expression of the principle of autonomy of the EU institutions, which enables the Council to choose the form in which to grant the necessary authorisations in the procedure for the negotiation and conclusion of international agreements.

55. Among the powers of the institutions of the EU is the power to organise as they wish how they are to function. That power is an expression of the principle of the autonomy of the institutions that is derived from the provisions of the Treaties which confer on those institutions the power to adopt their own rules of procedure so as to ensure that both they and their departments operate properly.[30] That principle, which the Court has repeatedly recognised,[31] is the corollary of the particular task conferred on the institutions of operating in the interest of the EU, and is an essential requirement for the proper functioning of the EU institutions.[32] The Council has thus adopted its own rules of procedure, which lay down the rules on its functioning and organisation.[33]

56. The principle of autonomy of the institutions is not without its limits, however. This autonomy must be exercised, in the words of Article 13(2) TEU, 'within the limits of the powers conferred on it in the Treaties' and 'in conformity with the procedures, conditions and objectives set out in them'. Consequently, while each institution is authorised — by the power to determine its own internal organisation conferred on it by the relevant provisions of the Treaties — to adopt appropriate measures to ensure the due functioning and conduct of its proceedings,[34] those measures or their application cannot derogate from the procedures laid down by the Treaties. Furthermore, the power to determine its own internal organisation cannot undermine the institutional balance or the division of powers between the EU and the Member States.

27 — That article, which essentially corresponds to what is now Article 114 TFEU, provided for the application of the procedure for cooperation with the Parliament, in which the Council acted by a qualified majority.

28 — See paragraphs 16 to 20 of that judgment. In paragraph 21 of the same judgment the Court also considered that the Parliament's prerogatives would have been infringed. However, as is apparent from the judgments cited in the next footnote to this Opinion, infringement of the Parliament's prerogatives is not a prerequisite in the case-law for a finding that the legal bases are incompatible, the irreconcilable nature of the voting rules being sufficient for that purpose.

29 — In other cases the Court found that the two legal bases in question were incompatible, since unanimity was required for the adoption of an act on the basis of one, while a qualified majority was sufficient for an act to be validly adopted on the basis of the other. See judgments in *Commission* v *Council* (EU:C:2004:253, paragraph 58) and *Parliament* v *Council* (EU:C:2012:472, paragraphs 47 and 48).

30 — See, in particular, with regard to the Parliament, Article 232 TFEU; with regard to the European Council, Article 235(3) TFEU; with regard to the Council, Article 240(3) TFEU; and, with regard to the Commission, Article 249(1) TFEU.

31 — The Court has recognised the principle of autonomy of the institutions in the light of various aspects of their activities: for example, with regard to the choice of their officials and servants, see, inter alia, judgment in *AB* (C-288/04, EU:C:2005:526, paragraphs 26 and 30), or, in the context of compensation for damage caused by its institutions and by its servants in the performance of their duties, judgment in *Sayag* (9/69, EU:C:1969:37, paragraphs 5 and 6).

32 — See, in that regard, the Opinion of Advocate General Geelhoed in *Betriebsrat der Vertretung der Europäischen Kommission in Österreich* (C-165/01, EU:C:2003:224, point 98) and in *AB* (C-288/04, EU:C:2005:262, point 23).

33 — See the Rules of Procedure of the Council, annexed to Council Decision 2009/937/EU of 1 December 2009 adopting the Council's Rules of Procedure (OJ 2009 L 325, p. 36), as subsequently amended.

34 — See, to that effect, judgment in *Luxembourg* v *Parliament* (230/81, EU:C:1983:32, paragraph 38).

57. Moreover, the principle of autonomy of the institutions constitutes a limit vis-à-vis the Member States. The principle means that the institutions must operate, from the internal, organisational point of view, entirely independently of the Member States, [35] which must refrain from interfering in the EU institutions' ability to determine themselves how they are organised and their procedures and functions, within the limits laid down by the Treaties. That obligation of non-interference on the part of the Member States is, moreover, an expression of the principle of sincere cooperation provided for in Article 4(3) TEU.

d) The requirement for unity in the international representation of the EU and the principle of sincere cooperation

58. As regards its external aspect, the present case raises, first of all, questions concerning the international representation of the EU, and the configuration of relations between the EU and its Member States in that respect.

59. The parties' views on that point are totally opposed. The Commission takes the view that the adoption of hybrid decisions is likely to 'blur' the independent personality of the EU in international relations, whereas in the Council's opinion, hybrid decisions are the ultimate expression of cooperation between the EU and the Member States.

60. In that regard, it should be borne in mind first of all that the Treaties expressly provide for a reciprocal duty of sincere cooperation between the EU and its Member States (Article 4(3) TEU), and between the EU institutions (second sentence of Article 13(2) TEU). [36] In particular, in accordance with the third subparagraph of Article 4(3) TEU, the Member States are under an obligation to facilitate the achievement of the EU's tasks and to refrain from any measure which could jeopardise the attainment of its objectives.

61. Next, it should also be noted that when it has had to address issues relating to EU external action, the Court has, on numerous occasions, emphasised the need for the EU to be represented internationally in a unified way, [37] as well as the need to ensure the coherence and consistency of the action and of the EU's representation in external relations. [38]

62. Those requirements are particularly pressing where the subject-matter of an agreement or convention falls partly within the competence of the EU and partly within that of the Member States and the agreements are concluded as mixed agreements, as in the case of the Accession Agreement and the Ancillary Agreement. In those circumstances, the case-law has placed particular emphasis on the fact that those requirements of the unified representation of the EU and of ensuring coherence and consistency in the EU's external relations render it necessary to ensure close cooperation between the Member States and the EU institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into. [39] There is, therefore, a close link between the requirement of the unified representation of the EU in an international context and the duty of sincere cooperation that exists between the EU and the Member States. [40]

35 — See the Opinion of Advocate General Geelhoed in *Betriebsrat der Vertretung der Europäischen Kommission in Österreich* (EU:C:2003:224, point 98) and in *AB* (EU:C:2005:262, point 23).

36 — See, in that regard, judgment in *Parliament* v *Council* (C-65/93, EU:C:1995:91, paragraphs 23, 27 and 28).

37 — See, inter alia, Opinion 2/91 (EU:C:1993:106, paragraph 36); Opinion 1/94 (EU:C:1994:384, paragraph 108); and judgment in *Commission* v *Sweden* (C-246/07, EU:C:2010:203, paragraph 73 and the case-law cited).

38 — Judgments in *Commission* v *Luxembourg* (C-266/03, EU:C:2005:341, paragraph 60); *Commission* v *Germany* (C-433/03, EU:C:2005:462, paragraph 66); and *Commission* v *Sweden* (EU:C:2010:203, paragraph 75).

39 — See, to that effect, judgment in *Commission* v *Sweden* (EU:C:2010:203, paragraph 73 and the case-law cited).

40 — See, in that regard, judgments in *Commission* v *Ireland* (C-459/03, EU:C:2006:345, paragraphs 173 and 174) and *Commission* v *Sweden* (EU:C:2010:203, paragraphs 69 to 71 and 73 and the case-law cited).

63. In that context, the Court has recognised that the institutions and the Member States must take all necessary steps to ensure the best possible cooperation in that regard.[41] Moreover, it has recognised that it follows from the obligation of sincere cooperation, as provided for in the third subparagraph of Article 4(3) TEU, that the Member States are not to intervene in the exercise of the EU's prerogatives — that right having been conferred on the EU institutions alone — and must not call in question the EU's capacity for independent action in its external relations.[42]

e) The relevance of the contested decision for third countries

64. The present case also raises the question of the relevance of hybrid decisions for third country contracting parties to the international agreement. The Council and certain governments describe decisions such as the contested decision as purely internal acts. It follows from this, in their view, that those acts are not intended to be brought to the attention of third countries and that, accordingly, those countries do not attach any importance to determining the authors of those acts.

65. It should be borne in mind in that regard that when the EU adopts an act, it is bound to observe international law in its entirety, including customary international law, which is binding upon the institutions of the EU.[43] Moreover, when the EU and its Member States enter into international agreements, whether these are mixed or not, they must comply with international law, as codified, with regard to the customary rules of the law of treaties, by the Vienna Conventions of 1969 and 1986.[44]

66. The general rule in international law is that the measures by which a party performs its obligations under an international treaty in a manner consistent with its internal law or, in the case of an international organisation, its internal organisational rules, do not concern, in principle, the other States parties to the convention.[45]

67. However, international law recognises that provisions of internal law regarding competence to conclude treaties and the internal rules of an international organisation have a certain — albeit limited — relevance.[46] The relevance for the other contracting States of a decision adopted under the procedure provided for in Article 218 TFEU is not, therefore, ruled out altogether under international law.

68. Moreover, where an agreement is concluded as a mixed agreement and, therefore, the EU and its Member States are liable to be regarded as certainly linked, but distinct, parties to the agreement, the requirements of legal certainty among the parties to an international agreement and the duty to perform treaties in good faith[47] require, to my mind, that the internal act of the EU by which they approve a mixed agreement should not be liable to conceal the fact that the EU is a full contracting party to the agreement.

41 — See, in that regard, Opinion 2/91 (EU:C:1993:106, paragraph 38) and judgment in *Commission* v *Council* (C-25/94, EU:C:1996:114, paragraph 48).

42 — See, to that effect, Ruling 1/78 [1978] ECR 2151, paragraph 33, in relation to Article 192 of the EAEC Treaty, the text of which corresponds in essence to the third subparagraph of Article 4(3) TEU.

43 — Judgment in *Air Transport Association of America and Others* (C-366/10, EU:C:2011:864, paragraph 101 and the case-law cited).

44 — Vienna Convention on the Law of Treaties of 23 May 1969 (United Nations, *Treaty Series*, vol. 1155, p. 331), and the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations of 21 March 1986 (A/CONF.129/15).

45 — It is apparent, in fact, from Article 27 of those Vienna Conventions of 1969 and 1986 that a party to a treaty may not invoke the provisions of its internal law — or, in the case of an international organisation, the rules of the organisation — as justification for its failure to perform a treaty. This rule is, however, without prejudice to Article 46 of those two conventions (see next footnote).

46 — Under Article 46 of the aforementioned Vienna Conventions of 1969 and 1986, a violation of internal law regarding competence to conclude a treaty becomes relevant only if there is a manifest violation of the rules in question or if the violation concerns a rule of fundamental importance. See also Article 5 of those conventions.

47 — See Article 26 of each of the Vienna Conventions of 1969 and 1986.

f) The legality of the contested decision

69. In the present case, the legality of the contested decision must be assessed in the light of all the principles set out above and the requirements to which attention has been drawn. Accordingly, it is necessary to start by examining that decision.

70. So far as concerns the authors, first of all, it is apparent from the title of the contested decision and the particulars set out above the first citation that it is an act adopted jointly by the Council and the Representatives of the Member States meeting within the Council. Next, as regards the legal basis on which the contested decision was adopted, it must be noted that it is expressly stated that it is based on Article 100(2) TFEU, in conjunction with Article 218(5) and the first subparagraph of Article 218(8) TFEU. Those legal bases all provide for acts to be adopted by a qualified majority. The contested decision does not mention any other legal basis.

71. Next, with regard to the content of the contested decision, it is apparent from points 8 to 10 and 19 of this Opinion that it authorises both the signing and provisional application of the relevant international agreements with regard to the EU, and provisional application of those agreements by the Member States, to the extent permitted under applicable national law. The act combines all these elements without it being possible to distinguish clearly which part is to be attributed to the decision (in the material sense) of the Council, and which part is to be attributed to the decision of the Representatives of the Member States. That is particularly evident from the wording of Article 3 of the contested decision, which combines in a single provision authorisation of the provisional application of the relevant agreements by the EU and by the Member States.

72. In the light of the content of the contested decision and the way in which it is structured, it must be stated that both the Council and the Representatives of the Member States participated in the adoption of that decision in its entirety and in all its respects. Thus, the Representatives of the Member States were involved in the authorisation of the signing and provisional application of the relevant agreements by the EU, and the Council was involved in the authorisation of the provisional application of those agreements by the Member States. [48]

73. That finding is, moreover, confirmed by the procedure used in order to adopt the contested decision, which shows that there was no separation between the procedure for the adoption of the EU's decision and that used for the intergovernmental act of the Member States. Although, in their written pleadings, a number of Member States contemplated the possibility that the two material aspects of the contested decision were adopted by following separate voting procedures, the Council nevertheless definitively stated at the hearing before the Court that the contested decision was adopted just once by consensus, following a simplified procedure without any discussion and without proceeding to a vote. Recourse was therefore had not to separate decision-making procedures in respect of the two aspects of the act, but to a single adoption procedure.

74. The foregoing findings lead me to consider the following.

75. In the first place, the contested decision, as a hybrid act, is an act which is not provided for by the Treaties. More specifically, it is an act which the Council adopted in the context of one of the stages of the procedure for negotiating and concluding international agreements by the EU, but for which there is no provision in Article 218 TFEU. That act was, moreover, adopted using a procedure for which there is also no provision in that article. As I have already emphasised in point 48 of this Opinion, Article 218 TFEU makes no provision for the Member States, as such, to have a role in the procedure

48 — The Court interpreted in the same way a hybrid decision of the Council and of the Representatives of the Member States meeting within the Council in its analysis of the admissibility of the action in the judgment in *Commission* v *Council* (EU:C:2014:2151, paragraph 41).

for the adoption of measures which the EU has to take in the various stages of the procedure laid down in that article. Therefore, by involving the Member States in the adoption of the contested decision, the Council unilaterally derogated from that procedure and adopted an act not provided for by the Treaties.

76. In the second place, the adoption of the hybrid act in a single operation, with all its indissociable components, had the effect that a single decision-making process was followed in adopting it, a process conflating the procedure laid down by Article 218(5) and (8) TFEU for the adoption of an EU act by a qualified majority, and a procedure that falls outside the legal framework of the EU and which, moreover, relates to the adoption of an act not provided for by the Treaties whose adoption requires the common accord of all the participating States. Furthermore, the Council and certain governments have themselves admitted that the procedural rules for the adoption of the intergovernmental decision are outside the legal framework of the Treaties.

77. A further effect of that merging was that the legal bases mentioned in the contested decision did not really determine the voting rule necessary for the adoption of the hybrid act. Although those legal bases require decisions to be adopted by a qualified majority, adoption of the hybrid act in that form required common accord, because it was configured as an act the two material aspects of which formed an indissociable whole. In my view, that necessarily meant that the qualified majority procedure was divested of its substance and that the majority rule, an essential element of the procedure laid down by Article 218 TFEU, was undermined as referred to in the *Titanium dioxide* case-law. [49]

78. It follows from those considerations that the adoption of the contested decision in the form of a hybrid act is not consistent with Article 218(2), (5) and (8) TFEU or with the requirements set out in the case-law mentioned in points 47, 51, 52 and 53 above.

79. As regards compliance with the voting rules, I must also point out that this is not a matter of calling into question the manner in which voting procedures are carried out within the Council, the organisation of those procedures being within the Council's autonomy. The subject-matter of this case does not relate to the legality of the internal simplified voting procedure involving no discussion that was used for the adoption of the contested decision and to which the Council referred at the hearing. However, in this instance, that simplified procedure was used for the adoption of a decision merging an act adopted in accordance with a procedure provided for by the Treaties, and an act that is outside the legal framework of the EU which was adopted in accordance with procedures that are also outside that framework, and whose adoption calls for a different voting rule from that required for the adoption of the EU act.

49 — The Council and certain governments which intervened dispute the applicability to the present case of the *Titanium dioxide* case-law (EU:C:1991:244). In my view, it is true that the *Titanium dioxide* case and the present case differ in that the first concerned the application of two legal bases of EU law, while in the second, a legal basis in EU law is not necessary for the intergovernmental component of the hybrid decision. However, in my view, the principles laid down in the case-law and expressed in that judgment (see point 53 of this Opinion) can undoubtedly be applied by analogy, and even *a fortiori*, in a case such as this which deals with the merging not of two internal EU procedures, but of an EU procedure with a procedure that is outside the legal framework of the EU.

80. I believe that to accept such a merger could, notwithstanding that it may be an established practice [50] or one that is *sui generis*, [51] constitute a dangerous precedent of contamination of the autonomous decision-making process of the EU institutions that is liable, therefore, to cause damage to the autonomy of the EU as a specific legal system, [52] even though, as is evident from point 53 of this Opinion, the case-law of the Court takes a restrictive approach even in relation to the merging of the EU's internal procedures and to multiple legal bases. [53]

81. Furthermore, I do not believe that the argument that, in the present case, the voting rule laid down in Article 218 TFEU was not infringed because unanimity always includes a qualified majority can succeed. First of all, as I have noted in points 76 and 77 of this Opinion, the contested decision was adopted not unanimously in accordance with a procedure laid down by — and enshrined in — the Treaties, but in accordance with a procedure and voting rule that are outside the framework of the Treaties. That finding precludes, moreover, the possibility that the Council may have used Article 293(1) TFEU, as contended by the Finnish Government. Next, as has already been correctly noted by Advocate General Sharpston, a decision to which no one is opposed is not necessarily the same as a decision on which a qualified majority can agree, in so far as the content of a decision which can command a qualified majority might need to be watered down in order to be approved unanimously or without any opposition. [54]

82. As regards the reliance on the principle of autonomy, it follows from the considerations in point 56 of this Opinion that that principle cannot justify a derogation from the procedures laid down by the Treaties. While it is true that the Council is free to organise its internal operations and the arrangements for adopting its decisions, it cannot use alternative procedures or change the voting rules prescribed by the Treaties. In fact, in the light of what I have said in point 57 of this Opinion, I would go so far as to wonder whether the principle of autonomy of the institutions has not been infringed by allowing the Member States to participate in the decision-making process of an EU institution.

83. Was the adoption of a hybrid decision none the less a necessary consequence of the mixed nature of the underlying international agreements? Was the adoption of such a decision necessary to ensure the unified representation of the EU on the world stage? I am not convinced it was.

84. In the first place, it is true that the adoption of a common decision constitutes the closest form of cooperation between the EU and its Member States and that, in the case of the conclusion of mixed agreements, the Court has particularly emphasised the need for such close cooperation. However, as has already been rightly observed, [55] the principle of sincere cooperation — from which, as noted in

50 — The fact put forward by the Council that the adoption of hybrid decisions is an established practice, particularly in the air transport sector, even after the entry into force of the Treaty of Lisbon, can neither justify it nor affect the legality of the contested decision since, according to settled case-law, a mere practice on the part of the Council cannot derogate from rules laid down in the Treaty (see Opinion 1/08, EU:C:2009:739, paragraph 172, and judgment in *Commission* v *Council*, EU:C:2009:590, paragraph 54 and the case-law cited).

51 — The fact, emphasised at the hearing, that the adoption of hybrid acts is a practice that is virtually *sui generis* and used notably in the aviation sector when there is clearly no disagreement between those involved (Member States and institutions) is no justification for the adoption of an unlawful practice. In addition, it was apparent from the discussion at the hearing that the application of that practice is not necessarily limited to such cases.

52 — On the autonomy of the EU legal order, see judgment in *Costa* (6/64, EU:C:1964:66, p. 593) and Opinion 2/13 (EU:C:2014:2454, paragraphs 174, 183 and 201 and the case-law cited).

53 — It should be observed that the Council, supported by several Member States, maintains that the combination of different voting rules is not at all unusual in the Council and that the Court has acknowledged the combination of different voting rules within the Council. The Council refers to the judgments in *Kadi and Al Barakaat International Foundation* v *Council and Commission* (C-402/05 P and C-415/05 P, EU:C:2008:461, paragraphs 211 to 214) and *Parliament* v *Council* (C-166/07, EU:C:2009:499, paragraph 69). However, that case-law, which relates exclusively to the use of the Treaty article corresponding to what is now Article 352 TFEU, does not in any way invalidate the principle laid down in the case-law set out in point 53 of this Opinion, according to which the use of multiple legal bases is precluded if the procedures prescribed are incompatible. In the present case, it is not even a question of the compatibility of two different legal bases in the context of EU procedures, but of the merging of an EU act and an act adopted entirely outside EU procedures under a different voting rule. That case-law principle applies, therefore, in my view, all the more in the present case.

54 — See, to that effect, the Opinion of Advocate General Sharpston in *Commission* v *Council* (EU:C:2014:224, point 189).

55 — See, to that effect, ibid., point 195.

point 62 of this Opinion, the duty of close cooperation flows — cannot be invoked in order to justify an infringement of procedural rules. Close cooperation between the EU and its Member States in the context of mixed agreements must therefore take place in compliance with the rules laid down by the Treaties.

85. The involvement of the Member States as such in the EU procedure was not necessary for the signing of the agreement on behalf of the EU or for its provisional application by the EU. In allowing the Member States to intervene in the EU decision, the Council did not serve the interests of the Member States in accordance with Article 13(1)TEU, as it contended at the hearing; rather it allowed them to intervene in the exercise of the EU's prerogatives, calling into question the EU's capacity for independent action in its external relations, contrary to the case-law mentioned in point 63 of this Opinion.

86. That intervention might suggest that the EU is not entitled to act on its own in deciding to sign and provisionally apply international agreements in the areas in which it exercises its own competences, which have been conferred on it by the Member States. Far from reinforcing the EU's international image, that approach is in my view liable to weaken the EU as a full player on the world stage by concealing its independent and autonomous international personality.

87. It follows from this that, in so doing, the Council, in my view, went beyond the limits of the powers conferred on it by the Treaties and acted contrary to the objectives set out in the Treaties, contravening Article 13(2) TEU.[56]

88. In the second place, it should be noted that the Council itself has admitted that there are alternative solutions to the adoption of a hybrid decision, such as the simultaneous adoption of two separate decisions, one by the Council and the other by the Representatives of the Member States.[57] The Council and the Member States submit, however, that that solution would clearly be less preferable as it would be less efficient and would be liable to create significant practical problems, notably in relation to the delimitation of competences where, as is normally the case with regard to agreements in the air transport sector, the agreement forms an indivisible whole, so that the competences of the EU and those of the Member States are indissociable.

89. In that regard, I would observe, first of all, that reasons of efficiency or convenience cannot justify infringement of procedures laid down by the Treaties. The procedural framework for the negotiation and conclusion of the EU's international agreements was established by the Treaty of Lisbon which, among others, introduced the qualified majority rule as a general rule. The Member States approved and ratified that treaty, and are bound by it. They cannot escape it or disregard the rules which they themselves have laid down by putting forward reasons of alleged expediency or efficiency.

56 — I must add, in that regard, that I am not convinced by the possibility, put forward by the Commission, of configuring a duty of cooperation on the part of the EU institutions towards the EU as such. The EU institutions are part of the EU, and therefore they constitute the EU itself. The configuration of such a duty of cooperation would seem to me to amount to confirmation of a duty to cooperate with oneself. It seems to me, however, that the conduct which, according to the Commission, would constitute a breach of the Council's duty to cooperate with the EU could instead be described as a breach of the principle of cooperation between institutions and/or breach of the obligation to act in the interests of the EU, in accordance with the objectives set out by the EU, as provided in Article 13(2) TEU.

57 — It does not seem to me to be necessary, for the purposes of the outcome of the present case, to address the somewhat sensitive issue, raised by the Commission, of the possibility in this instance of ensuring the provisional application of the relevant agreements by a decision of the Council alone, notwithstanding the mixed nature of the underlying agreements. That issue does not in fact, in my opinion, have any bearing on the legality of the contested decision. It does, however, leave open a number of legal questions which have clearly emerged in the course of the proceedings. The Council explained in its written pleadings that it never had the political will to adopt a decision authorising the EU to exercise its potential competence in full, not even at the level of provisional application of the agreements. Such a — political — choice does, however, inevitably generate a certain degree of legal uncertainty as to the possibility of provisionally applying international agreements in those Member States where provisional application of international treaties is not permitted constitutionally, or where it is subject to the application of rules of domestic law. While I am conscious of the sensitivity of this issue, which may touch on the prerogatives of national parliaments, I nevertheless ask myself whether the solution envisaged by the Commission - which consists of ensuring provisional application of the agreements by the EU, in so far as that falls within its competences — would not be preferable from a legal point of view. Provisional application of those agreements 'administratively' — to which the Council and certain Member States referred — which would take place in those Member States where provisional application of international agreements is problematic, would seem in any event to present problems of conformity with the constitutional requirements of those Member States.

90. The legal problem which arises in the present case is not, in my view, linked to the fact that the two decisions have been adopted in coordination with each other or even that they are contained, formally, in a single act. The problem, it seems to me, is the hybrid nature of the contested decision, the effect of which has been that the Council permitted the inclusion in the procedure for the adoption of an act peculiar to the EU of an external element which has distorted it, and, furthermore, was involved in the adoption of an act which does not fall within its competence, namely a decision authorising the Member States provisionally to apply the agreements concerned. Where it is clear from a Council decision adopted in accordance with Article 218 TFEU that EU procedures, including voting procedures, have been complied with and that, so far as concerns the competences conferred on it, the EU has adopted a decision of its own as a full player on the world stage, I would have no objection to that decision and an intergovernmental decision of the Member States adopted in coordination with each other being contained formally within a single act.

91. Next, as regards the question of the indissociability of the competences, while it is true that the Court has emphasised that the duty of close cooperation between the EU and the Member States is all the more imperative in that type of case,[58] the Council none the less does not explain why, where two coordinated decisions are adopted — namely one by the Council concerning provisional application by the EU of the mixed agreement, in so far as the EU is competent to do so, and the other by the Representatives of the Member States concerning provisional application of the same mixed agreement, in so far as the matters governed by that agreement fall within their competence — it would be necessary systematically to specify which parts of the agreement fall within the competence of the EU and which parts fall within that of the Member States. I note, moreover, that that information is not specified in the hybrid decision either.

92. Lastly, contrary to what is maintained by the Council and certain governments, the decisions adopted in accordance with Article 218(5) TFEU are not exclusively internal in their scope. The fact that they are notified to the contracting parties and published in the *Official Journal of the European Union* proves that those decisions are intended to be brought to the attention of the other parties to the international agreement and of third parties in general. Consequently, in so far as, as I noted in point 86 of this Opinion, the adoption of such decisions as hybrid decisions is liable to conceal the independent international personality of the EU, when in fact it is a full party to the mixed agreement, that adoption is, in my opinion, also liable to present problems of legal certainty in relations between the parties to the international agreement.

g) Conclusion

93. It follows from all the foregoing considerations that, in adopting the contested decision as a hybrid decision, the Council infringed Article 218(2), (5) and (8) TFEU and acted beyond the powers conferred on it by the Treaties and thus contrary to Article 13(2) TEU. Accordingly, I consider that the contested decision must be annulled.

C – *Maintaining the temporal effects of the annulled decision*

94. In accordance with the wishes of the parties and in order to avoid any negative repercussions on relations between the EU and the third country parties to the agreements whose signature and provisional application have already been decided by means of the contested decision, I consider it appropriate to accede to the parties' request that the Court avail itself of the possibility afforded by the second paragraph of Article 264 TFEU of maintaining the temporal effects of the annulled decision until the adoption of a new decision.

58 — See Opinion 1/94 (EU:C:1994:384, paragraph 109).

IV – **Costs**

95. Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Council has been unsuccessful and the Commission has applied for costs, the Council must be ordered to pay the costs. In accordance with Article 140(1) of the Rules of Procedure, under which the Member States and institutions which have intervened in the proceedings are to bear their own costs, the interveners in the present dispute must bear their own costs.

V – **Conclusion**

96. In the light of the above considerations, I propose that the Court should:

(1) annul Decision 2011/708/EU of the Council and of the Representatives of the Governments of the Member States of the European Union, meeting within the Council of 16 June 2011 on the signing, on behalf of the Union, and provisional application of the Air Transport Agreement between the United States of America, of the first part, the European Union and its Member States, of the second part, Iceland, of the third part, and the Kingdom of Norway, of the fourth part; and on the signing, on behalf of the Union, and provisional application of the Ancillary Agreement between the European Union and its Member States, of the first part, Iceland, of the second part, and the Kingdom of Norway, of the third part, on the application of the Air Transport Agreement between the United States of America, of the first part, the European Union and its Member States, of the second part, Iceland, of the third part, and the Kingdom of Norway, of the fourth part;

(2) maintain the effects of Decision 2011/708 until the adoption of a new decision;

(3) order the Council of the European Union to pay the costs;

(4) order the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the French Republic, the Italian Republic, the Kingdom of the Netherlands, the Republic of Poland, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland and the European Parliament to bear their own costs.