



Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 3 April 2014¹

Case C-114/12

European Commission

v

Council of the European Union

(Negotiation of a Convention of the Council of Europe on the protection of the rights of broadcasting organisations — Competence — Procedure)

1. A dispute has arisen between the European Commission and the Council of the European Union about the competence to negotiate a Convention of the Council of Europe on the protection of the rights of broadcasting organisations ('the Convention').

2. On 19 December 2011, the Council *and* the Representatives of the Member States (meeting in the Council as representatives of their respective governments) authorised the Commission to participate in the negotiations for the Convention as regards matters falling within the European Union's competence and instructed the Presidency to negotiate on behalf of the Member States as regards matters falling within the latter's competence ('the Decision').² The Commission seeks annulment of the Decision on the ground that it fails to respect the European Union's exclusive external competence in the area of protection of rights of broadcasting organisations. Furthermore, the Commission submits that the Decision should be annulled because it was adopted in violation of the applicable procedural rules and the principle of sincere cooperation.³

The Convention

3. In 2002, the Council of Europe adopted Recommendation Rec(2002)7 on enhancing the protection of neighbouring rights of broadcasting organisations ('the 2002 Recommendation').⁴ By decision of 20 February 2008, its Committee of Ministers instructed the Steering Committee on Media and New Communication Services ('CDMC')⁵ to assess the feasibility of reinforcing such rights. Also in 2008, the CDMC's Ad-Hoc Stocktaking Group produced a memorandum on a possible Council of Europe instrument on the protection of broadcasting organisations and a feasibility assessment ('the 2008 Memorandum').

1 — Original language: English.

2 — Decision of 19 December 2011 of the Council and of the Representatives of Governments of the Member States meeting within the Council on the participation of the European Union and its Member States in negotiations for a Convention of the Council of Europe on the protection of the rights of broadcasting organisations. The Decision was not published; it was submitted in these proceedings as an Annex to the Commission's application. See points 40 to 44 below.

3 — The principle is sometimes expressed in different terms in certain languages: see, for example, Case C-246/07 *Commission v Sweden* [2010] ECR I-3317, paragraphs 70 and 71.

4 — The relevant content of this document as well as that of the other documentation regarding the negotiations for the Convention is described in the context of the analysis of the first plea at points 122 to 139 below.

5 — The acronyms CDMC and MC-S-NR (used in point 4 below) are those used by the Council of Europe itself.

4. In 2009, the CDMC approved the Terms of Reference ('the 2009 Terms of Reference')⁶ of the Ad-Hoc Advisory Group on the protection of neighbouring rights of broadcasting organisations ('the MC-S-NR'), which it instructed to work on the protection of neighbouring rights of broadcasting organisations and possibly to draft a convention.

5. The MC-S-NR has not yet been established. However, consultations have taken place regarding its future work. At the 2010 Consultation Meeting, questions relating to the object and scope of a possible convention were discussed.⁷ It appears from, in particular, the 2008 Memorandum and the report of the 2010 Consultation Meeting ('the 2010 Meeting Report') that the objective is to agree on a set of exclusive rights of broadcasting organisations, such as the right of fixation,⁸ the right of reproduction, the right of retransmission, the right of making available to the public, the right of communication to the public and the right of distribution, in technologically neutral terms.⁹ Other areas for discussion include the protection of pre-broadcast programme-carrying signals,¹⁰ the term of protection, the need for a non-exhaustive list of limitations and exceptions, the enforcement of rights and obligations concerning technological measures and rights-management information.¹¹

6. The Convention would complement existing international and regional treaty norms on the same subject-matter. A considerable number of those provisions and treaties have not been ratified and/or have not entered into force.¹² As technological developments continue at an intense pace, many of these norms also lose some of their effectiveness (rendering it correspondingly less likely that the treaties will be ratified and enter into force).

6 — The 2009 Terms of Reference were filed in these proceedings as an annex to Council of Europe, 'Consultation meeting on the protection of rights of broadcasting organisations' (Strasbourg, 28 and 29 January 2010) ('the 2010 Consultation Meeting'), Meeting Report, MC-S-NR (2010)Misc1rev. They are also available on the website of the Council of Europe.

7 — See the 2010 Meeting Report, cited in footnote 6 above, paragraphs 1 and 2.

8 — Broadcasting is in essence the activity of sending a signal containing image and/or sound data from one point to another. The signal is an electromagnetic pulse and exists only as it is being transmitted and thus until it has been received. It can be recorded (or 'fixated') in a particular form and then be transmitted in one or more different forms (for example, wireless or by cable) in order to reach the receiver which can be, for example, a television set, a radio player, a computer or a smartphone. Those receivers then produce the visual or audio output contained in the signal.

9 — See the 2010 Meeting Report, cited in footnote 6 above, paragraph 13.

10 — The signal carrying a programme which is sent, for example, from the place of an event to a transmitter or sent from one broadcasting organisation to another is called a pre-broadcast programme-carrying signal. The signal is often digital and is intended for use by broadcasting organisations rather than for direct reception by the public.

11 — On the concept of rights-management information, see point 137 below.

12 — See, for example, the Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971) ('the Berne Convention') (the European Union is not a contracting party but, by virtue of Article 9(1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights ('the TRIPS Agreement'), must comply with Articles 1 through 21 (except for Article 6*bis*) of the Berne Convention and the Appendix thereto); the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of 26 October 1961 ('the Rome Convention') (the European Union is not a contracting party); the European Agreement on the Protection of Television Broadcasts of 22 June 1960 (the European Union is not a contracting party); the European Convention Relating to Questions on Copyright Law and Neighbouring Rights in the Framework of Transfrontier Broadcasting by Satellite of 11 May 1994 (the European Union is a contracting party); the 1974 Brussels Convention Relating to the Distribution of Programme Carrying Signals Transmitted by Satellite ('the 1974 Brussels Satellite Convention') (the European Union is not a contracting party); the TRIPS Agreement (which is Annex 1C to the Agreement establishing the World Trade Organization ('the WTO')) (the European Union is a WTO Member); those international agreements were approved on behalf of the European Community with regard to that part of the WTO multilateral treaties falling within the European Communities' competence by Council Decision 94/800/EC (of 22 December 1994) concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1); the World Intellectual Property Organization ('WIPO') Copyright Treaty and the WIPO Performances and Phonograms Treaty 1996 (the European Union is a contracting party; both were approved on behalf of the European Community by Council Decision 2000/278/EC of 16 March 2000 on the approval, on behalf of the European Community, of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (OJ 2000 L 89, p. 6)).

7. In parallel with preparations for a possible Convention in the Council of Europe, negotiations continue on a WIPO treaty on rights of broadcasting organisations.¹³ The objective of those negotiations is, similar to those in the Council of Europe, to ‘update’ the rights of broadcasting organisations in response to changes and increasing use of technology. In 2001, the European Community and its Member States jointly submitted a proposal to WIPO on the Treaty on the Protection of Broadcasting Organisations.¹⁴

8. Partly due to the lack of significant progress in the WIPO discussions, the Council of Europe decided to start negotiations on a separate convention. Documents filed during these proceedings none the less show that those negotiations will take into account the WIPO negotiations as well as other existing and possible future international obligations of contracting parties.¹⁵

Legal background

Treaty on European Union

9. Article 5 TEU establishes the principle of conferral according to which competences not conferred by the Treaties upon the European Union remain with the Member States.¹⁶ Article 5(2) provides that ‘... the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States’.

10. Article 13(2) TEU states: ‘Each 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.’

11. Article 16(3) TEU provides: ‘The Council shall act by a qualified majority except where the Treaties provide otherwise.’

Treaty on the Functioning of the European Union

12. According to Article 2 TFEU,

‘1. When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.

13 — See, for example, WIPO, Standing Committee on Copyright and Related Rights, Working Document for a Treaty on the Protection of Broadcasting Organisations, SCCR/24/10 Corr.

14 — WIPO, Protection of the Rights of Broadcasting Organisations – Submitted by the European Community and its Member States, SCCR/6/2 (3 October 2001) (‘the 2001 WIPO Proposal’). An additional proposal regarding the definition of ‘broadcasting’ was filed in 2003 (see WIPO, Article 1bis – Proposal submitted by the European Community and its Member States, SCCR/9/12 (24 June 2003)). These documents were filed with the Commission’s application. No question has been put to the Court in connection with the competence to negotiate and eventually conclude that WIPO Treaty.

15 — Cited in footnote 6 above, paragraph 6.

16 — See also Article 4(1) TEU.

2. When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. [17] The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.

...'

13. The sole article in Protocol No 25¹⁸ on the exercise of shared competence states: 'With reference to Article 2(2) [TFEU] on shared competence, when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area.'

14. Article 3(1) TFEU lists the areas with regard to which the European Union has exclusive competence, including:

'...

(b) the establishing of the competition rules necessary for the functioning of the internal market;

...

(e) common commercial policy.'

15. Exclusive competence for the conclusion of an international agreement is conferred on the European Union by Article 3(2) TFEU '... when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope'.

16. Article 4 TFEU concerns shared competences and states:

'1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.

2. Shared competence between the Union and the Member States applies in the following principal areas:

(a) internal market;

...'

17. According to Article 26(1) TFEU, the European Union 'shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties'. Article 114(1) TFEU provides for the adoption by the Parliament and the Council, in accordance with the ordinary legislative procedure, of '... the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market'.

17 — See also Declaration No 18 in relation to the delimitation of competences in the declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon.

18 — OJ 2012 C 326, p. 307.

18. The first sentence of Article 83(2) TFEU states: ‘If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned ...’.

19. Part Five, Title I, of the TFEU contains the general provisions on the European Union’s external relations. According to Article 207(1) TFEU, the common commercial policy (which is, in accordance with Article 3(1)(e) TEU, an exclusive competence) ‘... shall be based on uniform principles, particularly with regard to ... the commercial aspects of intellectual property ... The common commercial policy shall be conducted in the context of the principles and objectives of the Union’s external action’. Title V of the same part specifically concerns international agreements. Article 216 TFEU states:

‘1. The Union may conclude an agreement with one or more third countries or international organisations 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.

2. Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.’

20. Article 218 TFEU sets out the procedural rules governing, inter alia, the negotiation, signature and conclusion of international agreements:

‘1. Without prejudice to the specific provisions laid down in Article 207, agreements between the Union and third countries or international organisations shall be negotiated and concluded in accordance with the following procedure.

2. The Council shall authorise the opening of negotiations, adopt negotiating directives, authorise the signing of agreements and conclude them.

3. The Commission ... shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union’s negotiating team.

4. The Council may address directives to the negotiator and designate a special committee in consultation with which the negotiations must be conducted.

5. The 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.

6. The Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement.

... the Council shall adopt the decision concluding the agreement:

(a) after obtaining the consent of the European Parliament in the following cases:

...

(v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.

The European Parliament and the Council may, in an urgent situation, agree upon a time-limit for consent.

- (b) after consulting the European Parliament in other cases. The European Parliament shall deliver its opinion within a time-limit which the Council may set depending on the urgency of the matter. In the absence of an opinion within that time-limit, the Council may act.

7. When concluding an agreement, the Council may, by way of derogation from paragraphs 5, 6 and 9, authorise the negotiator to approve on the Union's behalf modifications to the agreement where it provides for them to be adopted by a simplified procedure or by a body set up by the agreement. The Council may attach specific conditions to such authorisation.

8. The Council shall act by a qualified majority throughout the procedure.

However, it shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of a Union act as well as for association agreements and the agreements referred to in Article 212 with the States which are candidates for accession. The Council shall also act unanimously for the agreement on accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms; the decision concluding this agreement shall enter into force after it has been approved by the Member States in accordance with their respective constitutional requirements.

9. The Council, on a proposal from the Commission ... 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.

10. The European Parliament shall be immediately and fully informed at all stages of the procedure.

11. A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.'

21. According to the first paragraph of Article 263 TFEU:

'The Court ... shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.'

22. Article 288 TFEU provides that:

'To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.

...

A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.

...'

EU legislation on related rights of broadcasting organisations

23. The Commission's application focuses on the competence to negotiate an agreement on related rights of broadcasting organisations. I therefore limit this summary to EU legislation governing such rights.

24. That legislation is somewhat fragmented and found in a number of instruments. Copyright and related rights were first treated together in Directive 92/100, which was repealed and replaced by Directive 2006/115 ('the Rental and Lending Rights Directive').¹⁹ According to recital 16 in the preamble to the latter, 'Member States should be able to provide for more far-reaching protection than that required by the provisions laid down in this Directive in respect of broadcasting and communication to the public.'²⁰

25. Directive 2006/115 applies in conjunction with Directive 2006/116 (as regards the term of protection of copyright and certain related rights),²¹ Directive 93/83 (containing separate rules for satellite broadcasting and cable retransmission)²² and Directive 2001/29 (harmonising certain aspects of copyright and related rights in the information society).

26. These directives stress the distinct character of copyright and related rights by providing that the protection of related rights shall leave intact and in no way affect the protection of copyright.²³

27. Article 7(2) of Directive 2006/115 sets out the *right of fixation* of broadcasting organisations, that is, the exclusive right to authorise or prohibit the fixation of their broadcasts which are transmitted by wire or over the air, including by cable or satellite. Article 7(3) provides that that right is not available to a cable distributor as regards the mere retransmission by cable of the broadcasts of broadcasting organisations. In accordance with Article 4(1) of Directive 93/83, that protection must apply also in case of communication to the public by satellite, which that directive defines in Article 1(2)(a) as '... the act of introducing, under the control and responsibility of the broadcasting organisation, the programme-carrying signals intended for reception by the public into an uninterrupted chain of communication leading to the satellite and down towards the earth'.

28. Article 2(e) of Directive 2001/29 sets out the *right of reproduction*²⁴ according to which 'Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part: ... for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite'. In accordance with Article 4(1) of Directive 93/83, that protection must apply also in case of communication to the public by satellite.

19 — Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 1992 L 346, p. 61), as amended by Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights (OJ 1993 L 290, p. 9) and then by Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10; 'the InfoSoc Directive') and finally codified and repealed by Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 (OJ 2006 L 376, p. 28).

20 — See points 29 and 32 below.

21 — Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (OJ 2006 L 372, p. 12), also referred to as the Term of Protection Directive.

22 — Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ 1993 L 248, p. 15). This directive cross-refers to Directive 92/100 but, in accordance with the second paragraph of Article 14 of Directive 2006/115, '... [r]eferences made to the repealed Directive [92/100] shall be construed as being made to this Directive ...'.

23 — Article 5 of Directive 93/83, Article 12(2) of Directive 2001/29 and Article 12 of Directive 2006/115. Directive 2006/116 sets out separate terms of protection for copyright and for related rights and therefore does not contain a similar provision.

24 — That right was initially set out in Article 7 of Directive 92/100; but Directive 2001/29 deleted that provision.

29. Article 8(3) of Directive 2006/115 requires Member States to provide for the exclusive right of broadcasting organisations to authorise or prohibit the *communication to the public* of their broadcasts if such communication is made in places accessible to the public against payment of an entrance fee. According to recital 16, Member States remain competent to offer wider protection for these rights. In accordance with Article 4(1) of Directive 93/83, that protection must apply also in case of communication to the public by satellite but Article 6(1) of that directive confirms that this is also a minimum standard of protection.

30. Article 3(2)(d) of Directive 2001/29 sets out the *right of making available to the public*, that is, ‘... the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them ... for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite’. Recital 24 in the preamble to Directive 2001/29 states that this right ‘... should be understood as covering all acts of making available such subject-matter to members of the public not present at the place where the act of making available originates, and as not covering any other acts’.

31. Article 9(1)(d) of Directive 2006/115 requires that Member States give broadcasting organisations the exclusive *distribution right* to make available to the public fixations of their broadcasts, including copies thereof, by sale or otherwise. Article 9(2) concerns exhaustion of that right and Article 9(3) adds that the distribution right is without prejudice to the provisions on rental and lending rights in Chapter I of the same directive. According to Article 9(4), ‘[t]he distribution right may be transferred, assigned or subject to the granting of contractual licenses’.

32. Article 8(3) of Directive 2006/115 requires that Member States provide for the exclusive right of broadcasting organisations to authorise or prohibit the *rebroadcasting* (also referred to as retransmission) of their broadcasts by wireless means. According to recital 16 in the preamble, Member States remain competent to offer wider protection for these rights. Article 4(1) of Directive 93/83 extended the right to communication to the public by satellite and Article 6(1) of that directive confirmed that this is a minimum standard of protection.

33. Article 10(1) of Directive 2006/115 sets out four grounds on which Member States are entitled to set *limitations to related rights* conferred under Chapter II of that directive. In addition, according to Article 10(2), Member States may provide for the same types of limitation as those that apply in connection with the protection of copyright in literary and artistic works. The same provision also states that ‘... compulsory licenses may be provided for only to the extent to which they are compatible with the Rome Convention’. In any event, according to Article 10(3), these limitations ‘... shall be applied only in certain special cases which do not conflict with a normal exploitation of the subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder’.

34. In Directive 2001/29, recital 31 in the preamble states that ‘... exceptions and limitations should be defined harmoniously’ and ‘[t]he degree of their harmonisation should be based on their impact on the smooth functioning of the internal market’. Recital 32 adds that Directive 2001/29 ‘provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public’. Exceptions and limitations are defined by reference to the specific right at issue. For example, Article 5(2) sets out the grounds on which exceptions or limitations to the reproduction right (in Article 2) may be provided. Article 5(3) identifies exceptions or limitations to both the right of reproduction and the rights in Article 3 (thus including the right of making available to the public). According to Article 5(5), these exceptions and limitations ‘... shall only be applied in certain specific cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder’.

35. Article 6 of Directive 2001/29 sets out obligations as to *protection against circumvention of effective technological measures*, which it defines in paragraph 3 as ‘... any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the rightholder of any copyright or any right related to copyright as provided for by law ...’. According to Article 6(1), ‘Member States shall provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective’. Recital 47 in the preamble to Directive 2001/29 states: ‘In order to avoid fragmented legal approaches that could potentially hinder the functioning of the internal market, there is a need to provide for harmonised legal protection against circumvention of effective technological measures and against provisions of devices and products or services to this effect.’

36. Article 7 of Directive 2001/29 provides for obligations concerning *rights-management information*, which it defines in paragraph 2 as ‘... any information provided by rightholders which identifies the work or other subject-matter referred to in [Directive 2001/29] ..., the author or any other rightholder, or information about the terms and conditions of use of the work or other subject-matter, and any numbers or codes that represent such information’. Pursuant to Article 7(1), Member States are to ‘... provide for adequate legal protection against any person knowingly performing without authority ... (a) the removal or alteration of any electronic rights-management information; (b) the distribution, importation for distribution, broadcasting, communication or making available to the public of works or other subject-matter protected under [Directive 2001/29] ... from which electronic rights-management information has been removed or altered without authority, if such person knows, or has reasonable grounds to know, that by so doing he is inducing, enabling, facilitating or concealing an infringement of any copyright or any rights related to copyright as provided by law ...’. Recital 56 in the preamble to Directive 2001/29 states: ‘In order to avoid fragmented legal approaches that could potentially hinder the functioning of the internal market, there is a need to provide for harmonised legal protection against any of these activities.’

37. As regards the *term of protection*, recital 3 in the preamble to Directive 2006/116 stated that terms of protection should be identical throughout the European Union. Article 3(4) of Directive 2006/116 provides that rights of broadcasting organisations are to expire 50 years after the first transmission of a broadcast, whether it is transmitted by wire or over the air, including by cable or satellite.

38. Finally, as regards *enforcement of related rights*, Article 8(1) of Directive 2001/29 requires Member States to provide appropriate sanctions and remedies and to take all the measures necessary to ensure the application of those sanctions and remedies. It specifies that the sanctions must be effective, proportionate and dissuasive.²⁵ Article 8(2) and (3) concerns actions for damages, applications for an injunction (including against intermediaries) and the seizure of infringing material.

39. Directive 2004/48²⁶ was adopted against the background that major disparities continued to exist in Member States’ enforcement of intellectual property rights regarding, inter alia, the application of provisional measures, the calculation of damages and the arrangements for applying injunctions.²⁷ Its provisions are without prejudice to those of Directive 2001/29 and recital 23 in the preamble to Directive 2004/48 refers to ‘a comprehensive level of harmonisation’ in the former as far as infringements of copyright and related rights are concerned.²⁸ According to recital 28 in the preamble to Directive 2004/48, ‘... criminal sanctions also constitute, in appropriate cases, a means of ensuring the enforcement of intellectual property rights ...’. Article 2(3)(b) and (c) provides that Directive

25 — See also recital 58 in the preamble to Directive 2001/29.

26 — Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ 2004 L 157, p. 45).

27 — See recital 7 in the preamble to Directive 2004/48.

28 — See Article 2(2) and recital 16 in the preamble to Directive 2004/48. See also recital 23 as regards Article 8(3) of Directive 2001/29.

2004/48 is not to affect ‘Member States’ international obligations and notably the TRIPS Agreement, including those relating to criminal procedures and penalties’ or ‘any national provisions in Member States relating to criminal procedures or penalties in respect of infringement of intellectual property rights’.

The Decision

40. On 9 February 2011, the Commission recommended that the Council authorise it to negotiate the Convention. The Commission took the position, without referring to any basis in the Treaties, that it had exclusive competence on the grounds that the subject-matter of the Convention falls within the scope of existing directives and that the Convention will be based on the EU *acquis*. Documents filed by the Council in response to a request by the Court²⁹ show that the Commission’s proposal was discussed on several occasions in the Working Party on Intellectual Property (Copyright) and that the Presidency then prepared a compromise proposal that formed the basis for the Decision. During that process, a formal statement by the Commission was entered in the Council minutes to the effect that the Commission took the view that the conclusion of the Convention concerned an exclusive competence and that the Decision, which it characterises as being a ‘hybrid act’, infringed Article 218(2) and (3) TFEU.

41. The Council and the Representatives of the Member States meeting in the Council adopted the Decision on 19 December 2011. To my knowledge, no documents explaining the voting process are available. On 21 December 2011, the Decision was notified to the Commission.

42. The preamble to the Decision, which is addressed to the Commission,³⁰ reads as follows:

‘Having regard to the [TFEU], and in particular Article 218(3) and (4) thereof,

Having regard to the recommendation from the European Commission,

Whereas:

- (1) The Commission should be authorised to participate, on behalf of the Union, in the negotiations for [the Convention] as regards matters falling within the Union’s competence and in respect of which the Union has adopted rules.
- (2) The Member States should participate on their own behalf in those negotiations only in so far as matters that arise in the course of the negotiations fall within their competence. With a view to ensuring the unity of the external representation of the Union, the Member States and the Commission should cooperate closely during the negotiation process,

...’

43. Article 1 of the Decision provides:

‘1. The Commission is hereby authorised to participate in the negotiations for [the Convention] and to conduct these negotiations on behalf of the Union as regards matters falling within the Union’s competence and in respect of which the Union has adopted rules, in consultation with the Intellectual Property Working Party (Copyright) (the “special committee”).

29 — See point 48 below.

30 — Article 2 of the Decision.

2. The Commission shall conduct the negotiations in question in accordance with the negotiating directives set out in the Annex to this Decision and/or agreed positions of the Union established specifically for the purposes of these negotiations within the special committee.

3. Where the subject-matter of the negotiations falls within Member States' competence, the Presidency shall fully participate in the negotiations and shall conduct them on behalf of the Member States on the basis of a prior agreed common position. Where an agreed common position cannot be reached, the Member States shall be entitled to speak and vote on the matter in question independently, without prejudice to paragraph 4.

4. The Commission and the Member States shall cooperate closely during the negotiating process, with a view to aiming for unity in the international representation of the Union and its Member States.

5. The Commission and/or the Presidency shall make sure that documents relating to the negotiations are circulated to the Member States in due time. They shall report to the Council and/or to the special committee in an open and transparent way on the outcome of the negotiations before and after each negotiating session and, where appropriate, on any problems that may arise during the negotiations.'

44. The Annex to the Decision sets out the negotiating directives, according to which:

- '1. The Commission shall ensure that the draft agreement for the protection of the rights of broadcasting organisations proposed by the Council of Europe contains appropriate provisions enabling the European Union to become a Contracting Party thereto.
2. The Commission will conduct the negotiations in such a way as to ensure that the planned provisions are compatible with Directive 2006/115/EC ..., Directive 2006/116/EC ..., Directive 93/83/EEC ... and Directive 2001/29/EC ... and with the commitments assumed by the European Union and its Member States within the framework of the TRIPS Agreement ... under the auspices of the WTO.
3. These negotiating directives may be adapted in line with progress made in the course of negotiations.'

Complaint and procedure

45. The Commission advances four pleas in law in its application seeking annulment of the Decision.

46. The Commission's first plea relates to competence. The Commission alleges that the Council infringed Articles 2(2) and 3(2) TFEU by considering that the matter to be covered by the Convention falls within a shared competence and by authorising the Member States or an institution other than the Commission to negotiate in an area where the European Union has exclusive competence.

47. The other three pleas concern the procedures used to adopt the Decision. In particular, the Commission alleges breach of:

- the procedure and the conditions for authorising negotiations of international agreements by the European Union;
- the voting rules in the Council (Articles 16(3) TEU and Article 218(8) TFEU); and
- the objectives set out in the Treaties and the principle of sincere cooperation (Article 13 TEU).

48. Written observations were submitted by the Council, the Parliament and the Commission and by the Czech, German, Netherlands, Polish and United Kingdom Governments. In response to a request made by the Court pursuant to Article 62(1) of its Rules of Procedure, the Council submitted on 25 July 2013 documentation regarding the procedure leading to the adoption of the Decision.

49. At the hearing on 24 September 2013, oral submissions were made by all parties, except the Netherlands Government, that had filed written observations.

The scope of the Court's review of the Decision

50. Whilst the Council raises no formal plea of inadmissibility, it submits that the Court has no jurisdiction under Article 263 TFEU to consider decisions adopted by Member States regarding matters for which they are competent. Thus, the Court cannot review the Decision in so far as it is a decision of the Representatives of the Member States acting *not* in their capacity as members of the Council. The German and Netherlands Governments in essence support the Council.

51. The Commission and the Parliament submit that the Decision authorises the European Union to negotiate an international agreement. It is therefore taken in the exercise of the Council's competences and amenable to review by the Court. Whilst the Commission accepts that the negotiating directives or the position taken by the special committee (whose establishment is foreseen by the Decision) are not binding, it argues that the legal effect of the Decision is that it limits the authorisation to negotiate to matters 'in respect of which the Union has adopted rules'.

52. I cannot accept the Council's argument.

53. Pursuant to the first paragraph of Article 263 TFEU, the Court is competent to review the legality of acts of the Council which are intended to produce legal effects vis-à-vis third parties. Neither the nature nor the form of the act matters in this regard.³¹ Review may relate both to the substance of the act and to the procedural rules under which it was adopted.

54. The Decision is a single act of the Council adopted on the basis of Article 218(3) and (4) TFEU, authorising the Commission to negotiate the Convention in accordance with the division of competence and negotiating directives it contains. It therefore has legal effects.³²

55. Under Article 263 TFEU, the Court is competent to review the Decision, including the aspect relating to the intergovernmental action of the Member States. In so doing, the Court is not taking a position on the Member States' intergovernmental action as such – that would lie outwith its jurisdiction.³³ The focus of the Court's review is solely upon the Council: in particular, whether it was authorised under the Treaties to include intergovernmental action in such a type of decision.

31 — See, for example, Joined Cases C-181/91 and C-248/91 *Parliament v Council and Commission* [1993] ECR I-3685, paragraph 13 and the case-law cited, and Case C-27/04 *Commission v Council* [2004] ECR I-6649, paragraph 44 and the case-law cited.

32 — In that regard, the legal effect of the negotiating directives must be distinguished from the formal instrument that contains a legally binding act of the Council which is the subject of the annulment action and on which the Commission's four pleas are based. Thus, were the Decision to be annulled on the basis of any or all of these pleas, that would also affect the negotiating directives because they cannot produce any effect in connection with negotiations whose subject does not fall within the European Union's competence and/or which were not properly authorised. Put differently, they cannot produce effects (irrespective of whether and if so precisely why they are in principle binding) as long as the Commission is not properly authorised to participate in negotiations.

33 — *Parliament v Council and Commission*, cited in footnote 31 above, paragraph 12.

56. In fact, the question here is not whether the Decision is *either* an act of the Council *or* an intergovernmental decision.³⁴ Rather, the question is whether a decision within the meaning of Article 218(3) and (4) TFEU and which is subject to review by the Court, can be both. The answer depends in essence on the merits of the Commission's second and third pleas which concern the legality of a hybrid act. However, merging the content of an intergovernmental act with that of an EU act cannot be used as a tool to circumvent the requirements of EU law and put that act outwith the scope of the Court's review.³⁵

Order of analysis of the pleas

57. The Commission has formulated the second to fourth pleas regarding the legality of a hybrid act as alternative grounds for annulment but submits that those pleas are effective irrespective of whether the Court holds that the European Union has exclusive competence to negotiate the Convention.

58. If the provisions of the Treaties cited in the second to fourth pleas do not permit the Council's adoption of a hybrid act such as the Decision, there is formally no longer any need to consider its content. That said, it is evident that the question of competence is of great importance to parties and interveners alike: indeed, they have all focused in particular on the first plea in their observations. I shall therefore address the Commission's pleas in the order in which they are presented.

First plea: competence

Arguments

59. The Commission's first plea is that the Council infringed Articles 2(2) and 3(2) TFEU by taking the view that what is to be negotiated in the Council of Europe falls within the scope of shared competence and by authorising Member States or an institution other than the Commission to negotiate an international agreement which in reality falls within the exclusive competence of the European Union. The essence of the first plea is that the Council was not authorised to recognise any Member State competence in the negotiations.

60. The Commission, supported by the Parliament, submits that the European Union has exclusive external competence to negotiate and conclude international agreements in an area that is largely covered by EU rules which are more than minimum requirements. In that regard, it relies on the Court's *ERTA* case-law.³⁶

61. Even if the Convention when finalised may go beyond the EU *acquis*, the Commission argues that every issue to be negotiated may none the less affect or alter the scope of the *acquis*. The European Union has exercised its competence to harmonise rights of broadcasting organisations and therefore it must now act alone. The fact that, under those harmonising rules, Member States might retain some

34 — That was the question in *Parliament v Council and Commission*, cited in footnote 31 above. There, the Court held, at paragraph 14 of its judgment, that the description of the act was not relevant and that the question of jurisdiction had to be resolved through a determination of '... whether, having regard to its content and all the circumstances in which it was adopted, the act in question is not in reality a decision of the Council'.

35 — The Court said exactly that in *Parliament v Council and Commission*, cited in footnote 31 above, as regards a decision taken by the Member States but adopted in the Council (see paragraph 12). The mere fact that a decision is labelled as an act of the Member States meeting in the Council (or is an act characterised in similar terms) is an insufficient basis for rejecting jurisdiction (paragraph 14). See also, in a slightly different context, Case C-170/96 *Commission v Council* [1998] ECR I-2763, paragraphs 12 to 18.

36 — Case 22/70 *Commission v Council* [1971] ECR 263 (European Agreement on Road Transport or '*ERTA*').

competence to create limitations or to opt for a higher level of protection does not affect the exclusive character of that competence because, in particular, common rules exist regarding the right of fixation, the right of reproduction, the right of retransmission, the right of communication to the public, the right of making available and the right of distribution.

62. The Commission, supported by the Parliament, rejects the notion that the Lisbon Treaty has reduced the scope of the European Union's external competence. Article 2(2) TFEU and Protocol No 25 have not replaced the *ERTA* case-law. If the framers of the Treaties had intended to limit the European Union's external competence and amend 40-year old case-law, the Commission assumes that they would have made that intention clear.

63. If a competence is exclusive within the meaning of Article 3(2) TFEU, then by definition Article 2(2) cannot apply. The fact that the internal market is a shared competence does not mean that the external competence to conclude an international agreement on intellectual property is also shared. It is not contested that Article 2(2) TFEU can apply to international agreements: thus, the European Union can decide to adopt new common rules in the form of an international agreement which would then also be binding on the Member States. Even if the Court were to hold that the competence is not exclusive, the European Union could still negotiate and conclude the Convention alone because the exercise of shared competence is not based on the prior adoption of common rules.

64. As regards methodology, the Commission argues against an approach whereby each provision of existing EU law is compared with a possible provision in a future international agreement. Rather, EU law must be approached as a consistent and balanced body of legislation. The Commission therefore presents a 'topic by topic' analysis as well as an overall analysis – even if, it submits, it is not necessary to show that each and every issue to be discussed in the negotiations affects the proper functioning of the internal market (the basis upon which the relevant EU directives were adopted). As part of the latter analysis, the Commission relies on the Court's statement to the effect that EU law covers the subject-matter of the Berne Convention to a very great extent.³⁷ Opinion 1/03 shows that the fact that there might be some residual freedom for the Member States to act does not of itself render a competence non-exclusive; the Court must then examine whether that freedom may affect or alter the scope of EU law.³⁸ The Court has accepted that a competence does not lose its exclusive character because harmonisation is not complete. In that regard, the present case satisfies the conditions set out in Opinion 2/91: the area is covered to a large extent by EU law, which does not simply lay out minimum requirements.³⁹

65. The Commission compares the present case with Case C-45/07 *Commission v Greece*, involving a regulation which made the substance of two international instruments part of EU law. In the light of the *ERTA* case-law, the Court held that a Member State could not initiate a process that might possibly lead to changing those instruments.⁴⁰

66. As regards the content of the Convention, the Commission submits that the definition of a broadcast and the description of the beneficiaries of protection (possibly including webcasters and simulcasters) will have an immediate impact on the EU *acquis*. At present, Directive 2006/115 and Directive 2001/29 protect broadcasting organisations which transmit their signals by wire or over the air (this category includes terrestrial and satellite broadcasters) whereas Directive 93/83 does not recognise cable distributors as a separate category of rightholders.

37 — See Case C-13/00 *Commission v Ireland* [2002] ECR I-2943, paragraph 17.

38 — [2006] ECR I-1145, paragraphs 148 to 151.

39 — [1993] ECR I-1061, paragraphs 22 to 26.

40 — [2009] ECR I-701, paragraphs 21 and 22.

67. With respect to the rights protected under EU law, the Commission submits that:

- proposals also to protect retransmissions of broadcasts by wire (including the internet) and deferred retransmissions would affect or alter the scope of the *right of retransmission* under EU law and
- the proposal to widen the scope of the *right of communication to the public* so as to apply in places other than those accessible to the public against payment of an entrance fee would affect the more limited right of communication to the public under EU law as well as the rights of other rightholders where that concept is used.

68. The Commission accepts that EU law does not protect *pre-broadcast programme-carrying signals* because they do not constitute an act of broadcasting or transmission as such. However, it submits that proposals to protect such signals, whether by way of granting a separate right, a broad definition of 'broadcast' or the right of adequate legal protection, are inextricably linked to existing EU law because they would apply to the same material as is already protected but at an earlier stage of transmission. Moreover, such protection would need to be considered in the light of Directive 93/83 which sets out rules for programmes carrying signals transmitted by satellite.

69. The Commission further submits that the *term of protection* is harmonised and that EU law regulates the *protection against circumvention of effective technological measures* and protection against unauthorised removal or alteration of *rights management information*.

70. Finally, the Court has interpreted notions, such as the term 'public' in 'communication to the public', in a uniform manner and (in so far as possible) in the light of international law and has sought to apply principles or concepts found in one directive governing intellectual property law to other directives despite the lack of specific harmonisation. It follows that amending one directive may affect the overall body of legislation that is to be interpreted and applied as regards any category of rightholder.

71. According to the Council, supported by the intervening Member States, reading Article 3(2) TFEU together with Article 2(2) TFEU and Protocol No 25 shows that the exclusive external competence of the European Union is confined to those elements of an international agreement that are governed by the EU acts in question. Put differently, Article 3(2) TFEU should not be read as codifying the test of 'an area already largely covered by the EU rules' in Opinion 1/03.⁴¹ Alternatively, even if it is read in that way, the Council submits that case-law such as Opinion 2/91,⁴² Case C-467/98 *Commission v Denmark*⁴³ and Opinion 1/03⁴⁴ must be distinguished from the present case.

72. Despite the fact that many issues that may possibly be covered by the Convention are already subject to EU rules and therefore fall within the European Union's exclusive competence, the European Union does not have exclusive competence to negotiate the entire Convention.

73. The Council does not accept that the protection of rights of broadcasting organisations will affect the overall balance of protection of copyright and related rights and their exercise, because the former are independent and self-standing rights in relation to the latter. That is illustrated by, inter alia, the judgment in *SCF*,⁴⁵ in which the Court interpreted the concept of 'communication to the public'

41 — Cited in footnote 38 above.

42 — Cited in footnote 39 above.

43 — [2002] ECR I-9519 (this is one of the so-called 'Open Skies' judgments).

44 — Cited in footnote 38 above.

45 — Case C-135/10 *SCF Consorzio Fonografici* [2012] ECR ('SCF'), paragraphs 75 and 76.

differently in Article 3(1) of Directive 2001/29 and in Article 8(2) of Directive 92/100 (as codified by Directive 2006/115). Moreover, the Council submits that it is likely that the Convention will include the customary principle according to which the protection it grants shall leave intact and in no way affect the protection of copyright in literary and artistic works.

74. The Council goes on to identify three aspects of the protection of rights of broadcasting organisations that will be covered by the negotiations but are not yet harmonised. As a result, Member States' negotiation and conclusion of international commitments concerning those aspects would not affect or alter the scope of EU rules.

75. First, Member States remain free to establish or not an *exclusive right to authorise or prohibit communication to the public where there is no entrance fee*. Article 8(3) of Directive 2006/115 only regulates communication to the public where there is an entrance fee.

76. Second, no EU law provision (including Article 6 of Directive 2001/29) is aimed at protecting the *transmission of the pre-broadcast programme-carrying signal* before its broadcast to the public. Whilst the content of that signal might be protected by copyright, the object and beneficiaries of that right are not the same as in the case of broadcasting.

77. Third, whilst the Council accepts that EU rules on *enforcement* exist, those rules do not preclude Member States from providing for remedies that are more favourable to rightholders than those provided for in Directive 2004/48. Nor do they deal with criminal sanctions or contain a minimum rule based on Article 83(2) TFEU. The Council acknowledges that, at the time of the adoption of the Decision, the content of the Convention was not sufficiently precise to make it possible to determine the exact scope, nature and content of the provisions concerning enforcement.

78. The Polish Government adds that the Convention might also set out a wider definition of the concept of broadcasting and, as the United Kingdom Government also submits, that EU law does not provide for a right of retransmission by wire.

79. The Council, supported by the Netherlands, Polish and United Kingdom Governments, further objects to the Commission's suggestion that the Court should opt for a broad assessment without focusing on individual provisions (such as the provisions related to the three aspects which the Council views as falling within Member States' competence). In that regard, it submits that there is no basis for claiming that all rightholders should enjoy identical rights. All rights and obligations must be interpreted in the light of their context and purpose. The fact that a term in one intellectual property directive might need to be interpreted in the light of rules and principles established by other such directives⁴⁶ does not mean that one necessarily affects the other.

80. Finally, the Council accepts that, should the Convention as negotiated not contain any matter falling within the Member States' competence, only the European Union would be a party to the Convention.

46 — Joined Cases C-431/09 and C-432/09 *Airfield and Canal Digitaal* [2011] ECR I-9363, paragraph 44.

Assessment

Meaning of the phrase ‘in so far as its conclusion may affect common rules or alter their scope’ in Article 3(2) TFEU

81. All parties agree that the European Union has external competence to negotiate an international agreement on rights of broadcasting organisations. The issue is whether that competence is exclusive or shared with the Member States.

82. It is also common ground that the Treaties do not expressly provide for exclusive competence as regards the protection of rights of broadcasting organisations, that the conclusion of the Convention is not deemed necessary to enable the exercise of the European Union’s internal competence in the area to be covered by the proposed Convention and that, in principle, that internal competence is shared. Whether external competence is exclusive depends on whether the conclusion of the Convention affects common rules or alters their scope within the meaning of Article 3(2) TFEU.

83. Rather, the parties disagree in their interpretation of Article 3(2) TFEU and on the answer to the question, when does the European Union have exclusive competence to negotiate an entire international agreement in circumstances where EU rules cover a part of the area falling under the proposed international agreement? The Commission submits that, where the area is largely covered by EU rules, there is exclusive competence. The Council favours a stricter approach according to which exclusive competence cannot exist with regard to areas where the European Union has not acted.⁴⁷

84. The question at issue has been characterised in the parties’ submissions as whether Article 3(2) TFEU codifies the *ERTA* case-law. In that regard, this is not the first case in which the Council’s position on the relation between Article 3(2) TFEU and the *ERTA* case-law has been debated before the Court. In Case C-137/12 *Commission v Council*, the competence in question fell within the scope of the common commercial policy and there was therefore no need to consider Article 3(2) TFEU.⁴⁸ However, Advocate General Kokott did address the question in her Opinion in that case. She concluded that the final part of Article 3(2) TFEU codifies the *ERTA* case-law and found no evidence to support the Council’s argument that the framers of the Lisbon Treaty had intended otherwise. Nor was she convinced that Protocol No 25 could be read as restricting the European Union’s competence under Article 3(2) TFEU.⁴⁹

85. I am not convinced that it is helpful to frame the issue at stake as being whether Article 3(2) TFEU codifies the *ERTA* case-law, not least because there is disagreement as to what (precisely) that case-law establishes. What matters is the meaning of the phrase ‘in so far as its conclusion may affect common rules or alter their scope’ in Article 3(2) TFEU. The wording used there must be read together with the context found in other parts of the Treaties and taking into account the historical background of which the Court’s case-law obviously forms part.

86. I start with the wording of the TFEU.

47 — I should like to note that no party has argued that the Convention (or part(s) thereof) falls within the exclusive external competence of the European Union on the basis that, taking into account the fact that substantive standards of protection of intellectual property rights might be the same irrespective of the character of the international agreement in which they are found, exclusive rights of broadcasting organisations and conditions, exceptions, limitations and reservations with respect to those rights are covered by the TRIPS Agreement (in particular Article 14) and that, after the entry into force of the Lisbon Treaty, the European Union now has exclusive competence as regards the common commercial policy which, in accordance with Article 207(1) TFEU ‘... shall be based on uniform principles, particularly with regards to ... the commercial aspects of intellectual property ...’. As regards the meaning of ‘the commercial aspects of intellectual property’, see Case C-414/11 *Daichi Sankyo and Sanofi-Aventis Deutschland* [2013] ECR, paragraphs 49 to 61.

48 — [2013] ECR, paragraph 77.

49 — Points 111 to 117 of Advocate General Kokott’s Opinion in Case C-137/12, cited in footnote 48 above.

87. The TFEU twice uses the phrase ‘affect common rules or alter their scope’. Apart from Article 3(2) TFEU, it appears also in Article 216(1) TFEU, which describes the grounds for the European Union’s competence to conclude an international agreement without distinguishing between exclusive and shared competence.

88. Whilst there are similarities between the two provisions, there are also differences in the wording. In many but not all language versions those differences appear to suggest that it might be easier to establish exclusive external competence under Article 3(2) TFEU than competence under Article 216(1) TFEU.⁵⁰ Thus, in the English version, ‘may’ in the former refers to a simple possibility whereas ‘is likely to’ in the latter implies a degree of probability. However, that distinction cannot be right. If *exclusive* external competence is established under Article 3(2) TFEU, external competence *per se* could not possibly be denied under Article 216(1) TFEU. At the same time, if it is correct that the analysis under Article 216(1) (‘is there competence?’) should precede examination of the competence’s character (‘is the competence exclusive?’), then showing that concluding the international agreement is likely to affect or distort the scope of common rules automatically means that the competence is exclusive and excludes the possibility of establishing shared external competence.

89. I read the final phrase of Article 3(2) TFEU as implying that EU rules must already exist in the area covered by the international agreement. If no such rules exist, it is difficult to imagine how the conclusion of the latter could affect or alter the scope of the former. That suggests that the analysis always involves examining (in sequence): (i) the scope and content of the envisaged international agreement; (ii) whether the European Union has already exercised an internal competence and, if so, the scope and content of EU law; and (iii) whether the conclusion of that international agreement may affect EU rules or alter their scope. That last possibility might exist for various reasons and might be more obvious in some circumstances than in others.

90. It is probably of little consequence that Article 3(2) TFEU does not expressly state whether it is the conclusion of an international agreement ‘by the European Union’ or ‘by the Member States’ of which it must be established that it ‘may affect common rules or alter their scope’. It is the substance of the international agreement rather than the identity of the contracting party(ies) that will affect common rules or alter their scope. If the starting point is that competence is shared, logically the focus is then on what would happen if Member States conclude an international agreement in an area where EU rules already exist. The use of the words ‘in so far as’ makes it clear that parts of an international agreement can fall within the exclusive competence of the European Union on this basis whereas competence might still be shared with respect to other parts.

91. Furthermore, the use of the phrase ‘shall also have exclusive competence’ makes it clear that, apart from the grounds in Article 3(1), the list of (broadly defined) grounds in Article 3(2) is exhaustive.

92. I now turn to the context of Article 3(2) TFEU and the effect of, in particular, Article 2(2) TFEU and Protocol No 25.

93. In my opinion, neither Protocol No 25 nor Article 2(2) TFEU limits as such the scope of Article 3(2) TFEU. Both concern shared competences. The first sentence of Article 2(2) stipulates the consequence of defining a competence as shared. The second and third sentences concern the situation where EU competence and Member States’ competence coexist. Thus, it follows from a combined reading of the second sentence with Protocol No 25 (which refers only to Article 2(2)) that, if the European Union has exercised such competence in a certain area, the Member States can no longer exercise their competence with respect to matters covered by the EU act in question. However,

50 — One notable exception is the French version of Articles 3(2) and 216(1) TFEU which uses identical wording in the two provisions: ‘est susceptible d’affecter des règles communes ou d’en altérer la portée’.

they might still have freedom to act in other areas. If the European Union has not exercised its competence, the Member States can still act to the extent that the European Union has not acted. And, Member States regain (their original) competence to act in any area in which the European Union has ceased its action.

94. Finally, I turn to the historical background to Article 3(2) TFEU.

95. The language of the final phrase of Article 3(2) TFEU is evidently taken from *ERTA*. The Court there articulated a test for establishing the existence of external competence (now the subject of Article 216(1) TFEU)⁵¹ and the exclusive character of that competence (now the subject of Article 3(2) TFEU). With respect to the latter, the Court held that as and whenever the European Union adopts common rules, in whatever form, in order to implement a common policy envisaged by the Treaties, the European Union becomes exclusively competent⁵² and the Member States can no longer undertake obligations with third countries which ‘affect those [common] rules’.⁵³ I will refer to this as ‘the *ERTA* principle’. The rationale behind the *ERTA* principle was the need to protect the unity of the common market and the uniform application of Community law.⁵⁴

96. If the negotiating history of Article 3(2) TFEU shows anything, it is that there was no intention to depart from the *ERTA* principle.⁵⁵ In that regard, I agree with Advocate General Kokott in her Opinion in Case C-137/12.⁵⁶

97. The Court should therefore be guided by its past case-law in this area, which includes (obviously) *ERTA* and a range of other judgments and Opinions pursuant to what is now Article 218(11) TFEU.

98. In that case-law, the Court has elucidated further the rationale behind the *ERTA* principle. Thus, the principle applies where Member States’ conclusion of the international agreement (or parts thereof) would be incompatible with the unity of the common market and the uniform and consistent application of EU law,⁵⁷ or would undermine the proper functioning of the system which common rules establish,⁵⁸ or where, given the nature of existing EU law, any international agreement would

51 — Thus, the European Union has external competence when, despite the absence of express conferral, the adoption of common rules necessarily vests in the European Union’s competence to conclude international agreements relating to the subject-matter governed by those common rules. In *ERTA*, those common rules also applied to international transport from or to third countries as regards the part of the journey taking place on Community territory (see *ERTA*, cited in footnote 36 above, paragraph 28). In *Kramer and Others*, an analogous position was confirmed in the context of competence of conserving biological resources of the sea (Joined Cases 3/76, 4/76 and 6/76 [1976] ECR 1279, paragraphs 30 and 33). See also Opinion 1/76 [1977] ECR 741, paragraph 3; Opinion 2/91, cited in footnote 39 above, paragraph 7; Opinion 2/94 [1996] ECR I-1759, paragraph 26; and Opinion 1/03, cited in footnote 38 above, paragraphs 114 and 115.

52 — *ERTA*, cited in footnote 36 above, paragraphs 17 and 18; see also, for example, *Commission v Denmark*, cited in footnote 43 above, paragraph 77.

53 — *ERTA*, cited in footnote 36 above, paragraph 17.

54 — *ERTA*, cited in footnote 36 above, paragraph 31.

55 — Article I-12(2) of the Draft Treaty establishing a Constitution for Europe, on which Article 3(2) TFEU appears to be modelled, stated that: ‘The Union shall have exclusive competence for the conclusion of an international agreement when its conclusion ... affects an internal Union act’ (available at <http://european-convention.europa.eu/EN/DraftTreaty/DraftTreaty2352.html?lang=EN>). Working Group VII of the Convention on External Action, in its final report, also referred to the Court’s recognition of ‘... implicit external Community competences when the conclusion of international agreements [was] necessary for the implementation of internal policies or as a reflection of its internal competencies in areas where it had exercised this competence by adopting secondary legislation ...’ and ‘... saw merit in making explicit the jurisprudence of the Court to facilitate the action of the Union in a globalised world, in particular when dealing with the external dimension of internal policies and action’ (Final report of Working Group VII on External Action CONV 459/02 (16 December 2002), paragraph 18). See also IGC 2007 Mandate POLGEN 74 (26 June 2007), paragraph 18 and footnote 10.

56 — See point 83 and footnotes 48 and 49 above.

57 — See *ERTA*, cited in footnote 36 above, paragraph 31, and Opinion 1/03, cited in footnote 38 above, paragraphs 122 and 133.

58 — Opinion 1/03, cited in footnote 38 above, paragraphs 128 and 133.

necessarily affect EU law.⁵⁹ Moreover, the Court has added that in all areas corresponding to the objectives of the Treaty, Article 10 EC⁶⁰ (now expressed in Article 4(3) TEU as the principle of sincere cooperation) requires Member States to abstain from any measure which could jeopardise the attainment of the Treaty's objectives.⁶¹

99. What further clarifications has the Court provided as to the meaning of the *ERTA* principle itself?

100. Application of the *ERTA* principle presupposes that there has been some internal action; the mere existence of internal competence is insufficient.⁶² Indeed, as long as the internal competence has not been exercised, there will be no EU rules that can be affected or whose scope can be altered. Equally, the existence of initiatives and instruments aimed at avoiding contradictions between EU law and the envisaged international agreement cannot obviate the need to compare the two in order to determine the effect of the latter on the former.⁶³ Also irrelevant are the legal basis in itself for the EU rules in question⁶⁴ and (as the Council correctly notes) the fact that negotiating a mixed agreement might involve disadvantages and practical inconveniences.⁶⁵ Nor is the mere fact that Member States' conclusion of an international agreement might affect the normal functioning of the internal market in some way sufficient to establish that the *ERTA* principle is satisfied.⁶⁶

101. Provided that there has been internal action, the *ERTA* principle can be applied to an entire international agreement or parts thereof.

102. If the internal action has taken the form of complete harmonisation in a given area, there is exclusive external competence with respect to that area.⁶⁷ In that event, Member States can no longer maintain or enact measures which are inconsistent with that EU act or otherwise undermine its objectives and effect (even if stricter rules might result in a higher level of protection).⁶⁸ Any discretion to derogate from EU law is entirely controlled by the harmonising measures themselves.⁶⁹ Thus, if the international agreement regulates area A and the entirety of area A is harmonised, conclusion of an international agreement in that area automatically satisfies the *ERTA* principle and EU competence is exclusive. Member States' involvement might constrain the way in which the

59 — See Opinion 1/03, cited in footnote 38 above, paragraph 122.

60 — That provision stated: 'Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.'

61 — See also, for example, Opinion 2/91, cited in footnote 39 above, paragraph 10, and Opinion 1/03, cited in footnote 38 above, paragraph 119.

62 — See, for example, Opinion 1/94 [1994] ECR I-5267, paragraph 77 (also paragraph 88), and Opinion 2/92 [1995] ECR I-521, paragraphs 31 and 36. However, the action need not be within the framework of common policies: see Opinion 2/91, cited in footnote 39 above, paragraphs 10 and 11, and Opinion 1/03, cited in footnote 38 above, paragraph 118.

63 — Opinion 2/91, cited in footnote 39 above, paragraph 25; *Commission v Denmark*, cited in footnote 43 above, paragraphs 101 and 105; and Opinion 1/03, cited in footnote 38 above, paragraphs 129 and 130. In *Commission v Denmark*, such an instrument consisted of a clause providing that the international agreement in question would not affect Member States' application of relevant Community law.

64 — Opinion 1/03, cited in footnote 38 above, paragraph 131.

65 — In that event, the EU institutions and the Member States must, pursuant to the requirement of unity in the international representation of the European Union, cooperate closely in the negotiation, conclusion and implementation of the commitments assumed under the international agreement: see, for example, Opinion 2/00 [2001] ECR I-9713, paragraph 18 and the case-law cited.

66 — See, for example, Opinion 1/94, cited in footnote 62 above, paragraphs 78 and 79, and *Commission v Denmark*, cited in footnote 43 above, paragraph 95.

67 — See, for example, *Commission v Denmark*, cited in footnote 43 above, paragraph 84; Opinion 1/94, cited in footnote 62 above, paragraph 96; and Opinion 2/92, cited in footnote 62 above, paragraph 33. At the same time, if EU law excludes harmonisation in an area, the European Union cannot conclude an international agreement that foresees that there will nevertheless be harmonisation of Member States' legislative or regulatory measures in that area: see Opinion 1/03, cited in footnote 38 above, paragraph 132.

68 — See, for example, Joined Cases C-261/07 and C-299/07 *VTB-VAB and Galatea* [2009] ECR I-2949, paragraph 52.

69 — See, for example, Case C-52/00 *Commission v France* [2002] ECR I-3827, paragraph 19 ('... the fact that [a] Directive provides for certain derogations or refers in certain cases to national law does not mean that in regard to the matters which it regulates harmonisation is not complete').

European Union subsequently exercises its internal competences. If the international agreement covers area B as well as area A but area B is not yet harmonised, the European Union has exclusive competence at least for area A. Apart from the difficulty in establishing whether and with respect to what there has been complete harmonisation, this is what I would describe as the ‘easy case’.

103. Whether there is complete harmonisation depends on how intensely a particular area is regulated. That is established based on, in particular, the wording and the objective(s) of the pertinent EU acts: their content, scope of application and the nature of the obligations they set out. The particular area may be, for example, a sector of the economy, a type of business practice, a category of individuals or a type of property.

104. Can the European Union also have exclusive competence to negotiate and conclude an entire international agreement where there has not yet been complete harmonisation with respect to the area(s) covered by the international agreement (or part thereof)?

105. That is possible.

106. The Court accepted this proposition in Opinion 2/91 where it found that the area was largely covered by EU rules, taking into account the historical evolution and the objectives of the EU regulation as well as the fact that the international agreement offered wider protection as a result of broader definitions of the elements that affected its scope of application.⁷⁰ In those circumstances, the Court held that the relevant part of the international agreement was of such a kind as to affect EU law and that Member States therefore could no longer undertake commitments outside the framework of the EU institutions.⁷¹ In *Commission v Denmark* the Court relied on that finding, which it there appeared to summarise as meaning that common rules are affected or distorted by international commitments where the international commitments fall within an area which is already largely covered by such rules.⁷² Then, in Opinion 1/03, the Court described that situation as merely one example of where exclusive competence was recognised and emphasised the need to take account of the scope, nature and content of EU rules and any foreseeable future developments.⁷³

107. As I read that case-law, the sole fact that an international agreement (or part(s) thereof) concerns an area that is ‘largely covered’ by EU rules (or an area defined by reference to some other abstract threshold in terms of the degree of regulation) does not of itself automatically lead to the conclusion that there is exclusive competence to negotiate that entire international agreement (or the relevant part) without any examination of whether the *ERTA* principle applies. Obviously, the larger the area already covered by EU law, the more likely it becomes that the remaining part of the international agreement may have an impact on existing EU rules. However, that will not always be the case. Everything depends on the content of the commitments entered into and their possible connection with EU rules. The relationship between the proposed Convention and EU rules on the protection of rights of broadcasting organisations, which I shall go on to discuss, illustrates this point well.

108. Application of the *ERTA* principle requires the precise content of the obligations assumed under both the international agreement and EU law to be determined in order to identify whether and, if so, to what degree Member States can no longer regulate a particular matter and consequently can no longer enter into their own international commitments (even if those might not conflict with EU law). Contradiction between the international agreement and EU rules is not required for the application of the *ERTA* principle.⁷⁴ In that regard, Advocate General Tizzano in his Opinion in the *Open Skies* cases usefully explained that, even where existing EU rules are imported into an international agreement,

70 — See, in particular, Opinion 2/91, cited in footnote 39 above, paragraph 25.

71 — See, in particular, Opinion 2/91, cited in footnote 39 above, paragraph 26.

72 — Cited in footnote 43 above, paragraphs 81 and 82.

73 — Opinion 1/03, cited in footnote 38 above, paragraphs 121 and 126.

74 — See Opinion 2/91, cited in footnote 39 above, paragraph 25.

there is no guarantee that ‘... the rules would then in fact be uniformly applied and, especially, that any amendments which might be adopted internally would be fully and promptly transposed into the agreements ...’; the nature and legal regime of the common rules might thus be distorted and there would be ‘... a real and serious risk that they would be removed from review by the Court ...’.⁷⁵ In Opinion 1/03, the Court stated in general terms that application of the *ERTA* principle requires an assessment on the basis of the scope, nature and content of the rules, taking into account the current state of EU law as well as its future development in so far as is foreseeable at the time of analysis.⁷⁶

109. Thus, whether the European Union has exclusive external competence under the final phrase of Article 3(2) TFEU in essence depends on a detailed and comprehensive comparison between the areas covered by the envisaged international agreement and EU law.⁷⁷

110. In its case-law, the Court has focused in particular on what are relevant considerations in assessing the state of EU law in the area to be covered by the international agreement, such as: whether the Community has exercised its internal competences; the subject-matter of the provisions offering the basis for internal action; the scope, nature and content of (current) EU law;⁷⁸ the objective of EU rules;⁷⁹ the structure of any relevant EU act;⁸⁰ the extent to which the EU rules only set minimum standards;⁸¹ the historical background of the development of EU law in a particular area;⁸² the future developments of EU law in so far as foreseeable at the time of the analysis;⁸³ the full effectiveness of EU law;⁸⁴ and the proper functioning of the system established by EU rules.⁸⁵ Some of these considerations will also, in my view, be relevant in describing the envisaged international agreement.

111. This type of analysis must be applied to each and every part of the international agreement to be negotiated and concluded.

112. One particular consideration can significantly affect the result of applying the *ERTA* principle: where EU law sets out minimum standards of protection in a particular area. In that case, Member States remain competent to conclude an international agreement that also imposes minimum standards because such an agreement may not affect EU law which the Member States can and must fully apply.⁸⁶ Whether in fact they remain competent will depend on the degree of freedom given to Member States under both the international agreement and EU rules. If the international agreement sets a lower minimum standard than EU law, Member States’ conclusion of that agreement would not undermine EU law: primacy of EU law means that the Member States cannot implement in their territory a lower standard than the standard set by EU law (even if that lower standard were consistent with the international agreement). Nor is EU law undermined if the international agreement sets a higher minimum standard provided that EU law authorises Member States to adopt such a higher standard.

75 — Opinion of Advocate General Tizzano in Case C-466/98 *Commission v United Kingdom* [2002] ECR I-9427, point 72.

76 — See Opinion 1/03, cited in footnote 38 above, paragraph 126; see also Opinion 2/91, cited in footnote 39 above, paragraph 25.

77 — See, for example, Opinion 1/03, cited in footnote 38 above, paragraphs 124 and 133. Examples of cases where such an analysis resulted in the conclusion that there was no exclusive competence are summarised in paragraph 123 of Opinion 1/03.

78 — Opinion 2/91, cited in footnote 39 above, paragraphs 25 and 26, and Opinion 1/03, cited in footnote 38 above, paragraph 126. The Court has discussed these factors with regard to the test of ‘an area which is already covered to a large extent by Community rules’; but it would be odd if the same factors did not also apply in other contexts. In any event, paragraph 133 of Opinion 1/03 suggests a more general application.

79 — See, for example, Opinion 1/03, cited in footnote 38 above, paragraph 135.

80 — See, for example, Opinion 1/03, cited in footnote 38 above, paragraph 138.

81 — See Opinion 1/03, cited in footnote 38 above, paragraphs 123 and 127, and Opinion 2/91, cited in footnote 39 above.

82 — See Opinion 2/91, cited in footnote 39 above, paragraphs 25 and 26, and Opinion 1/03, cited in footnote 38 above, paragraph 120.

83 — Opinion 2/91, cited in footnote 39 above, paragraph 25, and Opinion 1/03, cited in footnote 38 above, paragraph 126.

84 — Opinion 1/03, cited in footnote 38 above, paragraph 128.

85 — Opinion 1/03, cited in footnote 38 above, paragraph 133.

86 — See, in particular, Opinion 2/91, cited in footnote 39 above, paragraph 18, read against the background of Opinion 1/03, cited in footnote 38 above, paragraphs 123 and 127.

113. What happens if EU law sets a minimum standard and the international agreement sets a maximum level of protection? Suppose EU law states that the term of protection of a related right shall be ‘no less than 70 years’ and the international agreement defines the term of protection as ‘no more than 50 years’. In that event, Member States cannot apply EU law without infringing the international agreement. That affects Member States’ responsibility under public international law but not the EU rule of ‘no less than 70 years’, which still binds them as Member States.

114. Against that background, I turn to examine whether the European Union has exclusive competence to negotiate the entire Convention.

The European Union’s competence to negotiate the Convention

– Determining external competence prior to the start of the negotiations on the Convention

115. In the present case, negotiations on the Convention still need to start⁸⁷ and no (draft) treaty text⁸⁸ is available.

116. Undoubtedly, resolving the question of competence before the start of negotiations ensures that only the competent parties sit at the negotiating table. This offers a degree of legal certainty and is in the interests of the European Union, the Member States and third parties involved in those negotiations.⁸⁹

117. However, treaty negotiations can be unpredictable and the content of the international agreement to be negotiated can be a moving target. How does that reality affect the use of the available procedures before this Court to determine whether, in any particular case, EU competence is exclusive or shared with the Member States?

118. I first observe that there might be circumstances in which the Court has to declare itself unable to rule for lack of sufficient information. That might be the case (for example) if the sole information available here were a declaration of intent to negotiate an international agreement on the protection of rights of broadcasting organisations without any indication at all as to the likely content of such a future agreement.

119. Next, an Opinion pursuant to Article 218(11) TFEU can be requested ‘... before the commencement of international negotiations, where the subject-matter of the envisaged agreement is known, even though there are a number of alternatives still open and differences of opinion on the drafting of the texts concerned, if the documents submitted to the Court make it possible for the Court to form a sufficiently certain judgment on the question raised ...’.⁹⁰ So far as I can see, the same criteria should apply where (as here) the Court is seised of an application for annulment.⁹¹ Provided that sufficient information is available about the essential features of the proposed

87 — The present case is however not the sole precedent for such a situation. See, for example, Opinion 1/78 [1979] ECR 2871 (regarding the competence of the (then) Community to negotiate the International Agreement on Natural Rubber which was the subject of ongoing negotiations in the United Nations Conference on Trade and Development) and Opinion 2/94, cited in footnote 51 above (regarding possible accession of the Community to the European Convention on Human Rights).

88 — For example, in Opinion 1/03, cited in footnote 38 above, paragraph 137, the Court examined the Community’s exclusive competence to conclude a new Lugano Convention by relying on a text resulting from the revisions of the Lugano Convention and the Brussels Convention as well as negotiating directives.

89 — See also Opinion 2/94, cited in footnote 51 above, paragraphs 10 and 17; Opinion 1/78, cited in footnote 87 above, paragraph 35; and Opinion 1/09 [2011] ECR I-1137, paragraph 48.

90 — Opinion 1/09, cited in footnote 89 above, paragraph 53 and the case-law cited.

91 — See also, for example, Opinion 1/78, cited in footnote 87 above, paragraph 35.

international agreement, the presence of some remaining degree of uncertainty as to its final content does not prevent the Court from fulfilling its function by applying the legal test to determine whether the Commission has established the European Union's exclusive competence and making a ruling in the case.

120. An *ex ante* determination of competence based on the material available to the Court at that stage does not, however, necessarily preclude re-examination should the negotiation process result in a situation in which the final (draft treaty) text differs significantly from what was originally envisaged. In such circumstances, it may be appropriate to ask the Court for a further ruling on competence and, if necessary, to return to the negotiating table.⁹²

121. In that regard, EU institutions and the Member States must cooperate closely. That requirement applies at the time of negotiation, conclusion and implementation of an international agreement of which the substance falls partly within the competence of the European Union and partly within that of the Member States.⁹³ Thus, if the Court were to conclude here that the Commission has established that only the European Union is competent but the negotiations subsequently moved in a different direction and included new matters, the EU institutions would then have to assess their competence as regards those matters. If necessary, they would have to invite the Member States to participate. At the very least, they would have to inform the Member States of these developments so as to enable them to exercise their rights under the Treaties. Conversely, where Member States retain some competence, they must participate in good faith in the negotiations and refrain from acting in a manner that would undermine the European Union's competence. If the Court were to conclude now that there is shared competence but the final text of the Convention as negotiated contained only matters already covered by EU law, only the European Union would be competent to conclude the Convention.

– The Convention

122. There is presently no draft text of the Convention. However, the Commission has submitted a set of documents in which the objectives and scope of the negotiations (and thus of the possible final text) are set out, namely: (i) the 2002 Recommendation, including its appendix and explanatory memorandum; (ii) the 2008 Memorandum; (iii) the 2009 Terms of Reference; and (iv) the 2010 Meeting Report. No objection was raised by the other parties or the interveners as to those documents.

123. That documentation indicates what might be negotiated. The evidentiary value of each document must depend on its author, content and proximity to the actual negotiating process. The 2010 Meeting Report appears to contain the most recent statement as to the objective(s) and scope of the negotiations. However, whilst its content reflects debates in the 2010 Consultation Meeting, it does not elaborate in a systematic manner on any agreed substance of the envisaged Convention. The 2002 Recommendation and the 2009 Terms of Reference are political documents, in the sense that they were adopted by the Committee of Ministers of the Council of Europe. The 2009 Terms of Reference merely instruct the MC-S-NR to '[p]ursue work on the protection of neighbouring rights of broadcasting organisations and, if the requisite conditions are met, submit a draft convention on the subject'. The most detailed account of a possible negotiating mandate is the 2008 Memorandum,

92 — In the same way as use of the wrong legal basis may lead, for example, to the renegotiation of an international agreement: see Joined Cases C-317/04 and C-318/04 *Parliament v Council and Commission* [2006] ECR I-4721. That risk is not unique, however, to the European Union's external action.

93 — See Opinion 2/91, cited in footnote 39 above, paragraph 36; see also Opinion 1/78, cited in footnote 87 above, paragraphs 34 to 36, and Opinion 1/94, cited in footnote 62 above, paragraph 108.

authored by the Ad-hoc Stocktaking Group and intended as a working document for the CDMC. It assesses the feasibility of preparing a convention and explores the need and function of such a convention. It also relies on the 2002 Recommendation, describing that as a possible starting point for discussions on the content of the Convention.

124. A separate set of documents submitted by the Commission relates to ongoing negotiations on a WIPO Treaty on the Protection of Broadcasting Organisations the slow progress of which⁹⁴ has apparently prompted the Council of Europe's initiative to prepare a Convention. The evidentiary value of these WIPO documents is limited. Nor can international agreements, such as the Rome Convention,⁹⁵ that govern (in part) the rights of broadcasting organisations be used as a basis for identifying the content of the Convention without any clear indication whether the intention is to use existing international agreements or parts thereof as a model.

125. In setting out my understanding of what it is envisaged that the Convention will cover, I base myself essentially on the 2008 Memorandum and the 2010 Meeting Report. I shall also take into account elements found in other documents where relevant.

126. The objective of the proposed Convention is to increase protection of rights of broadcasting organisations and to adapt those rights to, in particular, the risks of theft of signals (which often move across borders). This should be done through conferring exclusive rights on broadcasting organisations which are enforceable and defined in technologically neutral terms. Nothing in the available documentation suggests that the Convention is intended also to cover copyright or related rights of, for example, producers or performers.

127. It is unclear how the Convention will define 'broadcasting': in particular whether that term will include also, for example, transmission over the internet (whether that be webcasting, simulcasting or some other form). As the Polish Government correctly points out, the 2008 Memorandum (referring to the European Union's WIPO proposals⁹⁶) appears to exclude such a definition whilst the 2010 Meeting Report focuses on the need to preserve technological neutrality but also calls for further inquiry into whether the Convention should protect new media services, including the protection of on-demand and catch-up services. It seems clear from the 2008 Memorandum that, in any event, any attempt to widen the definition so as to include one or another form of broadcasting through the internet would considerably broaden the scope of protection (and thus that of the exclusive rights of broadcasting organisations) as compared to the protection now offered under the Rome Convention which refers, in Article 3(f), only to transmission by wireless means.

128. The 2008 Memorandum defines six exclusive rights, states that those rights should also apply to pre-broadcast programme-carrying signals, stresses the need for legal protection and effective legal remedies against circumvention of technological measures and for obligations concerning rights-management information, and defines the term of protection.

94 — On the reasons for that slow progress, see WIPO Standing Committee on Copyright and Related Rights, informal paper prepared by the Chairman of the Standing Committee on Copyright and Related Rights (SCCR). According to the Decision of the SCCR at its 16th Session (March 2008), SCCR/17/INF/1 (3 November 2008) (see paragraphs 13 to 22), that paper was submitted with the Commission's application.

95 — Cited in footnote 12 above.

96 — Cited in footnote 14 above. The definition of broadcasting in Article 1*bis* of the 2003 Proposal included '... the transmission by wire or over the air, including by cable or satellite, for public reception of sounds or of images and sounds or of the representations thereof ...' and, by analogy, '... the simultaneous and unchanged retransmission on computer networks of its broadcast by a broadcasting organisation ...' but excluded '... the mere retransmission by cable of broadcasts of a broadcasting organisation, transmissions on computer networks, or the making available of fixations of broadcasts ...'. The authors of the proposal explicitly stated that they were open to discussion on whether other definitions should be added.

129. As regards the substance of the protection, the 2002 Recommendation suggests that there should be a *right of retransmission*, which is intended to encompass all forms of rediffusion by whatever means. Broadcasting organisations would be able to rely on that right to authorise or prohibit retransmission of their broadcasts by wire or wireless means, whether simultaneous or deferred (based on fixation).⁹⁷

130. The intention (as is also apparent from the 2002 Recommendation) is that the Convention should establish a *right of fixation* on which broadcasting organisations can rely to authorise or prohibit fixations of their broadcasts.⁹⁸

131. The 2002 Recommendation indicates that the Convention might also cover a *right of reproduction* on which broadcasting organisations can rely to authorise or prohibit direct and indirect reproduction of fixations in any manner or form.⁹⁹

132. The 2002 Recommendation suggests that the *right of making available to the public* will be described as the right of broadcasting organisations to authorise or prohibit the making available to the public fixations of their broadcasts, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.¹⁰⁰ The 2008 Memorandum indicates that that right might also cover making broadcasts available on demand on the internet.

133. According to the 2002 Recommendation, the Convention would establish a *right of distribution* or the right to authorise or prohibit the making available to the public through sale or other transfer of ownership of fixations and copies of fixations of their broadcasts, including broadcasts of programmes that are not protected by copyright.¹⁰¹ The 2008 Memorandum suggests that the Convention might widen the scope of that right in the Rome Convention by offering protection also with respect to distribution by wire.

134. The 2002 Recommendation foresees that the Convention might establish a *right of communication to the public*, that is, the right of broadcasting organisations to authorise or prohibit the communication to the public of their broadcasts if such communication is made in places accessible to the public against payment of an entrance fee, though Member States would have the right to define the term ‘entrance fee’ in national law and to decide whether or not to protect this right in case of communication in places accessible to the public against payment of an indirect entrance fee.¹⁰²

97 — The protection conferred would thus be wider than that offered in Article 13 of the Rome Convention, which gives no protection against cable retransmission or deferred retransmission, and in Article 1 of the European Agreement on the Protection of Television Broadcasts, which does not cover radio broadcasts and which offers no protection against wireless retransmission.

98 — That right is not intended to differ from that contained in Article 13 of the Rome Convention and Article 1 of the European Agreement on the Protection of Television Broadcasts (which is, however, more specific and limited in that it refers to fixations of ‘still photographs thereof’).

99 — That right is not intended to be subject to the limitations of the right of reproduction in Article 13(c) of the Rome Convention. Article 1 of the European Agreement on the Protection of Television Broadcasts also contains a right of reproduction.

100 — The intention is that the wording of the provision will resemble that of the ‘Right of Communication to the Public’ in the 1996 WIPO Treaties. Article 8 of the 1996 WIPO Copyright Treaty states: ‘Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorising any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.’ According to the agreed statement concerning Article 8: ‘It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention. It is further understood that nothing in Article 8 precludes a Contracting Party from applying Article 11bis(2).’

101 — Neither the Rome Convention nor the European Agreement on the Protection of Television Broadcasts contains such a right. By contrast, the 1996 WIPO Treaties do have it, but only for other categories of holders of neighbouring rights.

102 — Both the Rome Convention and the European Agreement on the Protection of Television Broadcasts contain this right and the intention is to base the proposed right in the Convention on the former. However, the Rome Convention does not protect the communication to the public of sound broadcasts.

135. From the available documentation it is clear that one of the main purposes of the Convention is to protect *pre-broadcast programme-carrying signals*, though there appears to be no certainty about the scope of protection.¹⁰³ The Rome Convention does not protect such signals. None of the available documents defines the possible content of that right, though the 2008 Memorandum notes that the protection might be achieved by simply widening the definition of broadcasts. However, also according to the 2008 Memorandum, the result envisaged might be that Member States take adequate and effective measures against unauthorised distribution and other use of such signals. Whether those measures should be governed by private or public law is left open. The 2010 Meeting Report shows that whether that protection should extend to signals which, unlike transmitted signals, might carry raw material or material that might not be broadcast also remains unresolved.

136. The Convention might address, through legal protection and remedies, the problem of *circumvention of effective technological measures* used by broadcasting organisations in connection with the exercise of their neighbouring rights. It is suggested in the 2008 Memorandum that the provisions in the Convention might be ‘in line’ with the 1996 WIPO Treaties and Directive 2001/29.

137. The Convention might concern the problem of persons knowingly removing or altering electronic *rights-management information* (that is, information that identifies the content protected, rightholders, terms and conditions of use of that content). The 2008 Memorandum shows that the 1996 WIPO Treaties and Directive 2001/29 might be used as a basis for formulating these provisions.

138. As regards the *term of protection*, the 2002 Recommendation and the 2008 Memorandum show that there is support for the idea that the term of protection of rights of broadcasting organisations is to be a period of at least 50 years calculated from the end of the year in which the broadcast took place.¹⁰⁴ A different view emerges from the 2010 Meeting Report, namely that the term should not exceed that set by Article 14 of the Rome Convention which is a minimum term of 20 years calculated from the end of the year in which the broadcast took place.

139. Finally, the documents available suggest that the Convention will (not surprisingly) contain a clause on *limitations and exceptions*. However, the agreement reflected in the 2010 Meeting Report suggests that these should not be defined exhaustively.

– EU law

140. The European Union has exercised the shared competence in the area of the internal market¹⁰⁵ by adopting harmonising measures in the area of intellectual property rights protection of broadcasting organisations that is to be covered by the Convention. Other parts of EU law also apply to broadcasting organisations but they concern other areas, such as the provision of audiovisual media services,¹⁰⁶ and are therefore not relevant to the subject-matter at issue.

103 — The 1974 Brussels Satellite Convention protects programme-carrying signals transmitted by satellite but does not cover signals intended for direct public reception.

104 — This is the same term as that granted to other holders of neighbouring rights under the 1996 WIPO Performances and Phonograms Treaty and Article 14(5) of the TRIPS Agreement.

105 — See Article 4(2)(a) TFEU.

106 — See, for example, Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (OJ 2010 L 95, p. 1) or Article 167 TFEU.

141. As I understand it, the Commission itself accepts that the relevant directives do not regulate the entire area of protection of rights of broadcasting organisations and that complete harmonisation has therefore not yet been achieved. Indeed, the very scope of the proposed Convention shows that there are elements of the protection of the rights of broadcasting organisations that are not yet covered by current legislation. Moreover, this is an area where what needs to be regulated is often directly linked to technological innovations.¹⁰⁷ Any conclusion as to the state of harmonisation must take account of such developments.

142. I have already set out a description of EU law in this area at points 23 to 39 above.

– Effect(s) of Member States' conclusion of the Convention on EU law governing rights of broadcasting organisations

143. Different parts of the Convention may have different implications for EU law governing the rights of broadcasting organisations. The focus of the inquiry at this stage must be on whether or not the Commission has established that the European Union has exclusive competence to negotiate the entire Convention. After all, the Commission alleges that the Council was wrong to consider that this might not be the case. Because it puts its case in that way, if the analysis of the Convention and EU rules on the basis of the information presently available shows that *in at least one respect Member States retain competence*, the Commission's plea must be rejected. It is not necessary, for the purposes of the present proceedings, to decide on a clear definition of who is competent to negotiate precisely what. Nor does that seem possible.

144. In my opinion, the Commission has not established why, pursuant to Article 3(2) TFEU, the European Union has exclusive competence to negotiate the entire Convention.

145. It is undoubtedly true that EU law covers a considerable part of what falls to be negotiated in the Convention. However, that fact is insufficient by itself to conclude that the criterion in Article 3(2) TFEU is satisfied.¹⁰⁸

146. I start with the exclusive rights of broadcasting organisations.

147. It is true that the Convention rights of fixation, reproduction, retransmission by wireless means, making available to the public, communication in places accessible to the public against payment of an entrance fee and distribution are probably to be based on existing EU law which harmonises the protection of rights of broadcasting organisations.¹⁰⁹ In principle, that fact would suggest that the European Union therefore has exclusive competence to negotiate those parts of the Convention because Member States cannot undertake international commitments that may undermine the unity and uniform application of EU law. However, to the extent that EU law merely sets out minimum standards of protection and the Convention takes over those standards, Member States may remain competent to negotiate the Convention.

148. Does EU law set out minimum standards?

149. It clearly does so as regards the right of retransmission by wireless means and the right of communication to the public set out in Article 8(3) of Directive 2006/115.

107 — See, for example, recitals 5, 6 and 20 in the preamble to Directive 2001/29 and recitals 2 and 4 in the preamble to Directive 2006/115.

108 — See point 107 above.

109 — See points 27 to 32 above.

150. Thus, EU law does not yet regulate ‘at least’ the right of retransmission by wire or cable, whereas the Convention might do so and the Member States are currently authorised to provide for it in their own jurisdiction. Whether they do so on their own initiative or as a result of an international commitment makes no difference in that regard. Nor is it relevant whether that wider protection is characterised as a new right or a wider scope of application of an existing right. The fact is that EU law expressly states that Member States are competent to widen the protection to be given to rightholders with regard to retransmission as distinct from the other rights covered by the relevant EU directives. The same reasoning would apply to the right of communication to the public outside places accessible to the public against payment of an entrance fee (for example, in shops or restaurants), if the Convention were to cover that right. However, I have found nothing in the available documentation which indicates that the Convention may widen the scope of the right of communication in this manner. It should therefore not be considered for the purposes of the first plea.

151. What about the rights of fixation, reproduction, distribution and making available to the public?

152. In my opinion, EU law does more than set minimum standards of protection for those rights, taking into account the current state of technological developments that allow broadcasts to take place. In that regard, recitals 6 and 7 in the preamble to Directive 2001/29 (which covers, inter alia, the rights of reproduction and of making available to the public) make clear that those rights form part of a harmonised legislative framework that is aimed at avoiding legislative differences between Member States and legal uncertainties that may adversely affect the functioning of the internal market. Whilst Directive 2006/115 does not contain similar recitals, its general purpose is the same and it has the same legal basis as Directive 2001/29. Thus, under EU law, broadcasting organisations are given an exclusive right to authorise or prohibit the fixation of their broadcasts (which is the first recording of a signal) irrespective of whether the broadcasts are transmitted by wire or over the air, including by cable or satellite. That appears to cover any form of transmission. However, Member States are precluded from granting that fixation right to cable distributors who merely transmit by cable the broadcasts of broadcasting organisations. It is those fixations that are the subject of the exclusive right to authorise or prohibit the direct or indirect reproduction and the exclusive right of distribution to make available fixations of their broadcasts including copies thereof to the public by sale or otherwise. Thus, for those rights, EU law leaves the Member States no leeway to set a different level of protection. The *ERTA* principle therefore applies fully with respect to those parts of the negotiations. The European Union must have exclusive competence — even if the Convention will simply copy-paste those parts of EU law, that is, will simply take over EU law.

153. However, an identical analysis cannot be applied to a possible Convention right of protection of pre-broadcast programme-carrying signals. At present, EU law offers protection only if it can be shown that theft of such signals has involved circumvention of any effective technological measures within the meaning of Article 6 of Directive 2001/29. That protection appears to require, however, that the measures in question were designed to prevent or restrict acts in respect of which there is a rightholder who has a right to authorise.¹¹⁰ However, EU law does not require Member States to give broadcasting organisations the right to prevent access or use of their pre-broadcast programme-carrying signals.

154. On the basis of the available documentation, it is difficult to assess in what form the Convention will protect such signals. One possibility is to widen the relevant definitions.¹¹¹ Other options include making such signals subject to the provisions on protection of technological measures (thereby eliminating some of the restrictions that apply under EU law which provides legal protection only as regards acts that require the rightholder’s authorisation) or arranging for broadcasting organisations

110 — See, in that regard, Case C-355/12 *Nintendo and Others* [2014] ECR, paragraph 25.

111 — See point 156 below.

also to have protection against acts covered by, for example, rights of fixation, reproduction, retransmission, making available to the public or communication to the public in relation to signals prior to broadcasting.¹¹² If one of those approaches were taken, the European Union would have exclusive competence.

155. However, if the negotiations focus instead on establishing a separate right as regards the protection of pre-broadcast programme-carrying signals and under a form different from those which I have just described, then it is not obvious to me why, based on the information available, the European Union should have exclusive competence. The fact that the signal may contain copyrighted material the protection of which is already subject to EU law does not mean that a separate right of broadcasting organisations will somehow affect that copyright other than to improve its effectiveness. Nor is it sufficient that such a right might improve the effectiveness of existing EU rights of broadcasting organisations which, at present, in principle ‘kick in’ only at the moment of the fixation of a signal and possibly irrespective of whether the broadcast contains copyright material or raw material. That is the case for rights under Directive 2001/29 and Directive 2006/115. As for Directive 93/83, the scope of that directive is determined by the definitions in Article 1 of which the first paragraph explains that satellites must operate on frequency bands which are reserved for the broadcast of signals for reception by the public or which are reserved for closed, point-to-point communication. As regards the second type of signal, the Court has accepted that it is none the less necessary for individual reception to take place in circumstances comparable to those that apply to the first type.¹¹³ However, as I understand it, the essential feature of pre-broadcast programme-carrying signals is that they (usually unlike the programmes they carry) are not destined for the public.

156. EU law does not define the term ‘broadcasting organisations’ though evidently these can be described as the rightholders with respect to protected broadcasts under Directive 93/83, Directive 2001/29 and Directive 2006/115. However, EU law does not take a position on whether organisations that webcast, simulcast or transmit signals in some other new format (as a result of technological developments) should be characterised as rightholders under those directives. Depending on their formulation, definitions of terms such as these may affect the entire area of EU law governing the rights of broadcasting organisations, including those rights with respect to which EU law expressly states that Member States can offer wider protection to rightholders (without suggesting that Member States can also widen the category of rightholders themselves). If the definition in the Convention creates an absolute category that is wider than broadcasting organisations that are rightholders under the said directives, the creation of that category might possibly limit the European Union’s freedom to decide on its own definition. That may not be the case if the definition in the Convention were non-exhaustive and did not offer protection to entities other than existing rightholders under EU law.

157. Limitations and exceptions are carefully circumscribed and apparently exhaustively listed in Article 5 of Directive 2001/29 and Article 10 of Directive 2006/115. As I read those provisions, they provide for a closed set of exceptions and limitations and any freedom of the Member States to act is constrained by that listing. Thus, Member States cannot undermine those EU rules by taking on autonomous international commitments.

158. As regards the enforcement of rights, I agree with the Commission that there is nothing in the available documentation to suggest that the Convention will contain provisions on criminal sanctions. In that regard, I am not prepared to treat an informal paper by the Chairman of the relevant committee for the parallel ongoing WIPO negotiations as proof of the potential scope of negotiations

112 — See, for example, Article 10 in the 2001 WIPO Proposal, cited in footnote 14 above.

113 — Case C-192/04 *Lagardère Active Broadcast* [2005] ECR I-7199, paragraphs 24 and 34 to 36.

on the Convention. Whilst Member States enjoy considerable discretion in setting remedies (not only criminal sanctions, even where measures have been taken on the basis of Article 83(2) TFEU) in case of infringement of related rights of broadcasting organisations, the exercise of that discretion is subject to EU law.

159. As regards the term of protection, EU law sets the duration of protection and Member States have no freedom to depart from that requirement.

160. The remaining two areas concern the protection of technological measures and rights-management information. It is not yet known whether the Convention might go beyond the EU *acquis* or otherwise set a minimum standard and how it might define ‘technological measures’ and ‘rights-management information’. Whilst Member States appear to retain some competence under EU law to decide on the form of ‘adequate’ legal protection, Articles 6 and 7 of Directive 2001/29 are none the less intended to provide harmonised legal protection. It follows that even if the Convention were to copy-paste the content of those provisions of EU law, the European Union would have exclusive competence.

161. These considerations lead me to conclude that the Commission has not established that, as matters stand, the European Union has exclusive competence for the *entire* Convention.

162. Does that conclusion change because of the possible impact of the Convention on other parts of EU intellectual property law?

163. The Court interprets EU intellectual property law on the understanding that concepts therein have an autonomous EU meaning,¹¹⁴ are often used in different contexts and must be read against the background of relevant rules of international law,¹¹⁵ whether they derive from international agreements to which the European Union is a party (and are therefore an integral part of the EU legal order) or affect the EU legal order indirectly (as in the case of the Rome Convention). Thus, the Commission is right to argue that the Court is concerned with ensuring coherence in the interpretation of intellectual property law, and in particular copyright law and related rights.¹¹⁶ In that context and unless it is provided otherwise, terms not defined in one directive may need to be interpreted in the light of another directive, particularly where two directives concern separate aspects of the same subject-matter such as, for example, Directive 93/83 and Directive 2001/29.

164. However, that does not mean that the Court blindly transposes the meaning of a concept from one context to another.¹¹⁷ Thus, if the Convention were to extend the scope of the right of communication to the public so that it also applied to communication in places other than those accessible against an entrance fee, that would not automatically change the scope of the concept of ‘communication to the public’ in other parts of EU intellectual property law where the concept, in any event, might be circumscribed by separate conditions.

165. It is also relevant that, pursuant to the Rome Convention as well as EU law governing rights of broadcasting organisations, the protection of broadcasting organisations cannot prejudice or otherwise affect copyright. The Commission has not established how widening the scope of protection or the establishment of new rights for broadcasting organisations would affect copyright whereas existing rights (which would appear to be intended to be ‘copy-pasted’ into the Convention) cannot.

114 — See, for example, Case C-5/08 *Infopaq International* [2009] ECR I-6569 (*‘Infopaq’*), paragraphs 27 to 29.

115 — See, for example, Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others* [2011] ECR I-9083, paragraph 189, and *Infopaq*, cited in footnote 114 above, paragraph 32.

116 — See my Opinion in Case C-351/12 *OSA* [2014] ECR, point 25. See also, in that regard, *SCF*, cited in footnote 45 above, paragraphs 75 to 77.

117 — See, for example, *OSA*, cited in footnote 116 above, paragraphs 35 to 41.

166. I therefore remain of the view that the Commission has not established, as matters stand, that the European Union has exclusive competence to negotiate each and every part of the Convention. I should like to make it clear that this conclusion may need to be revisited as further elements of the content of the Convention become known, should it become clear that the conclusion of the entire Convention ‘may affect common rules or alter their scope’ within the meaning of Article 3(2) TFEU.

Second plea: Article 218(2) TFEU together with Article 13(2) TEU

Arguments

167. The Commission submits that the Decision violates both Article 218(2) TFEU, according to which it is for the Council alone to authorise the opening of negotiations concerning an international agreement and to adopt negotiating directives, and Article 13(2) TEU, which has been interpreted by the Court in Case C-27/04 to mean that the Council cannot have recourse to alternative procedures.¹¹⁸ The Council may not unilaterally derogate from the procedure in Article 218(2) TFEU by including the Member States, acting collectively in the Council, in its decision-making process. The Parliament supports the Commission’s plea.

168. The Council, supported by the intervening Member States, argues that it makes no difference whether the opening of the negotiations was authorised by a single ‘hybrid’ decision or by two separate decisions adopted, respectively, by the Council and by the Member States. It adds that in this context Member States’ decision to enter into treaty negotiations is based on public international law, in particular the principle of consent, and not on Article 218 TFEU or any other provision of the Treaties. Indeed, the use of a hybrid decision in these circumstances is consistent with the requirement of uniformity in the European Union’s international representation and the principle of sincere cooperation.

169. The United Kingdom further argues that the Commission ignores the fact that, where Member States exercise a shared competence, they must also agree to participate in the negotiations to conclude a mixed agreement. The Commission is thus wrong that the Decision should have been taken solely by the Council. It adds that, had there been two separate decisions, of the Council and of the Member States respectively, there would have been no greater clarity as regards which were the areas of Member State competence. Moreover, Article 218(2) TFEU does not prevent Member States from cooperating with the European Union in the negotiation of an international agreement as regards matters where they exercise shared competences.

Assessment

170. In my opinion, the Treaties did not authorise the adoption of the Decision by the method used.¹¹⁹

171. It follows from the division of external competences that the European Union and the Member States must cooperate in the negotiation, conclusion and implementation of the international agreement. That obligation flows from the requirement of unity in the international representation of the European Union.¹²⁰ However, each must apply its own constitutional procedures for the negotiation, signature, conclusion and ratification of international agreements. The obligation to cooperate does not alter that fact. If an international agreement falls within the exclusive competence of the European Union, only EU constitutional procedures can apply. If the Member States also retain

118 — *Commission v Council*, cited in footnote 31 above, paragraph 81.

119 — The Decision is not the sole example of such a hybrid act. See, for example, the decision at issue in the pending proceedings in Case C-28/12 *Commission v Council* (in that case, the international agreement underlying the decision is mixed).

120 — See, for example, *Commission v Sweden*, cited in footnote 3 above, paragraph 73 and the case-law cited.

competence, their national law applies to their participation in the international agreement (and its negotiations) and EU law applies to the European Union's involvement. The fact that an international agreement is mixed does not alter the fact that only EU law can govern the European Union's participation in that agreement (and its negotiation).

172. As I see it, Article 218(2) TFEU makes it clear that only the Council is competent to authorise the European Union to negotiate, to adopt negotiating directives and to authorise the signature and the conclusion of an international agreement between the European Union and third countries or international organisations. Article 218 applies to all international agreements, irrespective of whether their content falls within the European Union's exclusive competence or within a competence that is shared with the Member States. It sets the conditions under which the Treaties authorise the European Union to undertake international agreements.

173. The specific instrument through which such authorisation is given is a decision within the meaning of the fourth paragraph of Article 288 TFEU: it is thus binding in its entirety and, in so far as it is addressed to the Commission, binds only the Commission. The adoption of such a decision in the context of Article 218 TFEU is the prerogative of the Council. The Member States cannot determine any part of its content or be involved in its adoption. Nor can the Council decide how the Member States organise their involvement in the negotiation of a mixed agreement.

174. That interpretation is confirmed by other parts of Article 218 TFEU, which applies to both mixed and exclusive agreements. For example, paragraph 3 requires the Commission to submit recommendations as regards the authorisation to the Council (and not to the Member States). Except for Article 218(11) TFEU (requesting an Opinion from the Court), the other paragraphs of Article 218 contain no mention of (a role for) the Member States.

175. The Court has held that rules in the Treaties regarding EU institutions' decision-making are 'not at the disposal of the Member States or of the institutions themselves'.¹²¹ Thus, in accordance with the principle of conferral in Article 13(2) TEU,¹²² the Council must act within the limits of the competence conferred upon it and cannot of its own motion involve the Member States in a decision-making procedure where the Treaties provide otherwise. Nor can it rely on the principle of organisational autonomy to achieve that result. That principle (like the principle of sincere cooperation) can be relied upon only by an institution acting within the limits of its competences. The decision under Article 218(2) TFEU can thus emanate only from the Council.

176. I am not convinced by the argument that the Decision is nothing more than the sum of a decision by the Council and an intergovernmental act of the Member States. That argument presupposes that the procedural rules in Article 218 TFEU are satisfied by any formal instrument that the Council calls a 'decision' as long as it contains an element of a decision that fell to be adopted under that article. However, the Treaties assume that the institution taking a decision is responsible for its entire content.

177. As regards the content of the Decision, Article 218(2) TFEU does not preclude the Council from authorising the Commission to negotiate an international agreement in accordance with the division of competence as regards a particular area and from foreseeing that that agreement might be mixed. But nor does it authorise the Council to decide how the Member States shall negotiate the international agreement if it is mixed.¹²³ That is, however, exactly what paragraph 3 of the Decision purports to do.

121 — Case 68/86 *United Kingdom v Council* [1988] ECR 855, paragraph 38, and Case C-133/06 *Parliament v Council* [2008] ECR I-3189, paragraph 54. See also Case C-27/04, cited in footnote 31 above, paragraph 81.

122 — As regards the principle of conferral, see, for example, *Parliament v Council*, cited in footnote 121 above, paragraph 44 and the case-law cited.

123 — I should like to make clear, in this context, that the present proceedings are not concerned with the situation where Member States have entrusted tasks to the institutions outside the framework of the Union (see, in that regard, Case C-370/12 *Pringle* [2012] ECR, paragraphs 158 to 169).

178. I therefore conclude that the second plea should be upheld.

Third plea: first subparagraph of Article 218(8) TFEU and Article 16(3) TEU

Arguments

179. The Commission, supported by the Parliament, submits that, by adopting the Decision by common agreement, the Council violated Article 218(8) TFEU, because the Decision had to be adopted by qualified majority. That is also the general rule stated in Article 16(3) TEU. By merging an EU decision and an intergovernmental decision into a hybrid act, the Council in effect deprived the procedure in Article 218(8) TFEU of its substance, undermined the effectiveness of the decision-making process, may possibly have affected the content of the Decision and made the adoption of the Decision subject to the stricter majority required for adopting an intergovernmental act. Harmonising measures in intellectual property law that improve the protection of rights of broadcasting organisations must be adopted in accordance with the ordinary legislative procedure (qualified majority voting). It is paradoxical to take the position, as the Council does, that the same result can be achieved through the negotiation of an international agreement in which all Member States participate and to which unanimity thus applies.

180. The Parliament adds that a hybrid act is not a mere combination of two decisions. Member States might adopt different positions when acting as members of the Council as regards the European Union's competence and when acting as individual States as regards their own competences. Such a practice also risks undermining the institutional balance reflected in Article 218 TFEU (in particular paragraphs 6 and 10) and the Framework Agreement on relations between the European Parliament and the European Commission,¹²⁴ according to which the Parliament must be immediately and fully informed at all stages of the negotiation and conclusion of international agreements in sufficient time for it to be able to express a view and for that view to be taken into account by the Commission.

181. The Council, supported by the intervening Member States, responds that the Decision was adopted by qualified majority as regards the European Union's exclusive competence and by common agreement between the representatives of the Member States as regards their competences. It does not follow that unanimity replaced qualified majority thus distorting the voting rule applicable under Article 218 TFEU. Moreover, the fact that no delegation in the Council opposed the Decision does not imply that the voting rules were not respected. Even if the Decision had been adopted only by the Council, negotiations on the Convention could not have proceeded without a separate decision or authorisation by the Member States.

Assessment

182. Decisions authorising the opening of negotiations of an international agreement between the European Union and third parties are to be adopted by the Council by a qualified majority. That voting rule is defined by reference to the content of the decision. It makes no distinction on the basis of whether the European Union's competence is shared or exclusive. The voting rule cannot however apply to the adoption of a decision whose content does not fall within the European Union's competence.

¹²⁴ — OJ 2010 L 304, p. 47.

183. There is nothing in the file to suggest that the vote in the Council did not pertain to the entire content of the Decision. Put differently, the Council applied the voting rule to a set of indissociable provisions. In that sense, this type of hybrid act is not comparable to an act which, due to its content, has a dual legal basis one of which requires unanimity and the other qualified majority. The Treaties provide for a single voting rule to be applied to the Council's decision to authorise the opening of negotiations.

184. In principle, there are three options as to how the Decision was adopted. Did the Council and the Member States vote on the Decision separately according to separate voting rules? Was only unanimity applied, as the Commission alleges? Or was the entire Decision adopted only by qualified majority?

185. In my opinion, whatever the answer, the Decision cannot have been adopted in accordance with the voting rule in Article 218(8) TFEU.

186. The third option may be ruled out: the Decision cannot contain an intergovernmental act and yet be adopted by qualified majority.

187. The Council is not competent to authorise the Member States to negotiate a mixed agreement and set the details of the method to be used for those negotiations. Thus, the Treaties do not authorise the application of the voting rule in Article 218(8) TFEU to such a decision and separate voting (the first option) may therefore also be ruled out.

188. Since the Decision does indeed contain both an intergovernmental act and an EU act and was nevertheless adopted by a single vote, it cannot have been adopted by qualified majority. It must have been approved unanimously (the second option).

189. Of course, it is true that unanimity includes qualified majority. However, that does not mean that unanimity makes no difference to the content of a decision. A decision on which all can agree or to which no one is opposed is not necessarily the same as a decision on which a qualified majority can agree. For example, 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.

190. I therefore conclude that the third plea should also be upheld.

Fourth plea: Treaty objectives and the duty of sincere cooperation in Article 13(2) TEU in conjunction with Article 218(2) TFEU

Arguments

191. The Commission, supported by the Parliament, submits that, by adopting the Decision, the Council violated Article 13(2) TEU, in conjunction with Article 218(2) TFEU, because the Council did not act in conformity with the objectives set out in the Treaties and took a decision in breach of the principle of sincere cooperation. Those objectives include the need to specify how and by whom EU competences were to be exercised in external relations and to provide for the unified representation of the European Union. The Commission alleges that the mere adoption of a hybrid decision implies *per se* a violation of the Treaties' objectives. By acting as it did, the Council blurred the personality of the European Union and its presence and standing in international relations. Moreover, in accordance with the duty of cooperation between institutions, the Council should have exercised its powers so as not to circumvent the procedures set out in Article 218 TFEU and should not have given a role to the Member States that is not foreseen by the Treaties.

192. The Council, supported by the intervening Member States, denies that the Decision might confuse the international community and submits that any confusion arises rather from the fact that the Commission is the sole negotiating party even for matters falling within the Member States' competences. The Council further argues that Article 218(2) TFEU cannot be applied to international agreements falling within the competence of the Member States and denies that it acted contrary to the principle of sincere cooperation. On the contrary, the duty of cooperation required joint action by the Council and the Member States. The Council also makes the more general argument that the Commission's fourth plea is based to a large extent on speculation or presumptions.

Assessment

193. The Court has recognised the connection between, on the one hand, the need for unity and consistency in the European Union's external relations and, on the other hand, the principle of sincere cooperation. The principle according to which the Member States and the EU institutions must ensure close cooperation in negotiating, concluding and implementing international agreements 'flows from the requirement of unity in the international representation of the Community'.¹²⁵ The principle of sincere cooperation applies to internal and external action alike and also to inter-institutional relations.¹²⁶ It applies irrespective of whether the European Union's external competence is shared or exclusive,¹²⁷ although clearly the need to cooperate is all the more pressing where a mixed agreement needs to be negotiated and concluded.¹²⁸ Thus, at the early stage of negotiations, the EU institutions and the Member States need to be vigilant about the applicable division of competences. The need to guarantee the unity and consistency in the European Union's external relations underlies the entire field of external relations (and was indeed the rationale behind the *ERTA* principle). It concerns in particular external relations but may none the less have consequences for the European Union's internal actions.

194. If the European Union has exclusive competence to negotiate the Convention under Article 3(2) TFEU, any decision providing for Member States also to negotiate (part) of that agreement would necessarily compromise Article 218 TFEU and undermine the competences and actions of the EU institutions. It would thus be also contrary to the Treaties' objectives. The duty to respect the division of competences (including that found in Article 2(1) TFEU) and the principle of conferral are expressions of the principle of sincere cooperation and therefore no separate finding under Article 13(2) TEU is required.¹²⁹

195. If the European Union does not have exclusive competence for negotiating the entire Convention, cooperation between the EU institutions and the Member States is undoubtedly an essential condition for making the conclusion of a mixed agreement possible. Whilst I accept that a joint decision is an expression of perhaps the closest form of cooperation, procedural rules cannot be set aside in the name of the principle of sincere cooperation. In that regard, I have already explained why, in my view, the Treaties do not authorise the adoption of a hybrid act. I therefore consider it unnecessary to make a separate finding as regards the fourth plea.

125 — *Commission v Sweden*, cited in footnote 3 above, paragraph 73 and the case-law cited.

126 — See, for example, Case C-29/99 *Commission v Council* [2002] ECR I-11221, paragraph 69 and the case-law cited.

127 — *Commission v Sweden*, cited in footnote 3 above, paragraph 71 and the case-law cited.

128 — *Commission v Sweden*, cited in footnote 3 above, paragraph 73 and the case-law cited, and Opinion 1/94, cited in footnote 62 above, paragraph 108 and the case-law cited.

129 — See also, for example, Case C-459/03 *Commission v Ireland* [2006] ECR I-4635 (*MOX Plant*), paragraphs 169 to 171; Case C-195/90 *Commission v Germany* [1992] ECR I-3141, paragraphs 36 to 38; and Joined Cases C-78/90 to C-83/90 *Compagnie Commerciale de l'Ouest and Others* [1992] ECR I-1847, paragraph 19.

Costs

196. The Commission has been successful. In its pleadings it has requested that the Council pays its costs. In accordance with Article 138(1) of the Rules of Procedure, the unsuccessful party must be ordered to pay the costs if they have been applied for in the successful party's pleadings. Article 140(1) of the Rules of Procedure provides that Member States and institutions which have intervened shall bear their own costs.

Conclusion

197. In the light of the foregoing considerations, I conclude that the Court should:

- annul the Decision of 19 December 2011 of the Council and of the Representatives of Governments of the Member States meeting within the Council on the participation of the European Union and its Member States in negotiations for a Convention of the Council of Europe on the protection of the rights of broadcasting organisations;
- order the Council of the European Union to pay its own costs and those incurred by the European Commission; and
- order the Czech, German, Netherlands, Polish and United Kingdom Governments and the European Parliament to bear their own costs.