



Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

28 April 2015 *

(Action for annulment — Mixed international agreements — Decision authorising the signing of those agreements and providing for their provisional application — Decision of the Council and of the Representatives of the Governments of the Member States meeting within the Council — Autonomy of the EU legal order — Participation of the Member States in the procedure and decision provided for in Article 218 TFEU — Voting arrangements within the Council)

In Case C-28/12,

ACTION for annulment under Article 263 TFEU, brought on 17 January 2012,

European Commission, represented by G. Valero Jordana, K. Simonsson and S. Bartelt, acting as Agents,

applicant,

supported by:

European Parliament, represented by R. Passos and A. Auersperger Matić, acting as Agents,

intervener,

v

Council of the European Union, represented by M.-M. Joséphidès, E. Karlsson, F. Naert and R. Szostak, acting as Agents,

defendant,

supported by:

Czech Republic, represented by M. Smolek and E. Ruffer, acting as Agents,

Kingdom of Denmark, represented by U. Melgaard and L. Volck Madsen, acting as Agents,

Federal Republic of Germany, represented by T. Henze, N. Graf Vitzthum and B. Beutler, acting as Agents,

Hellenic Republic, represented by A. Samoni-Rantou and S. Khala, acting as Agents,

French Republic, represented by G. de Bergues, F. Fize, D. Colas and N. Rouam, acting as Agents,

* Language of the case: English.

Italian Republic, represented by G. Palmieri, acting as Agent, and P. Gentili, avvocato dello Stato,
Kingdom of the Netherlands, represented by C. Wissels and J. Langer, acting as Agents,
Republic of Poland, represented by B. Majczyna and M. Szpunar, acting as Agents,
Portuguese Republic, represented by L. Inez Fernandes and M.-L. Duarte, acting as Agents,
Republic of Finland, represented by J. Heliskoski, acting as Agent,
Kingdom of Sweden, represented by A. Falk, acting as Agent,
United Kingdom of Great Britain and Northern Ireland, represented by C. Murrell and L. Christie,
acting as Agents, and R. Palmer, Barrister,

interveners,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, R. Silva de Lapuerta, L. Bay Larsen and K. Jürimäe, Presidents of Chambers, A. Rosas, E. Juhász, A. Borg Barthet, J. Malenovský (Rapporteur), C. Toader, M. Safjan, D. Šváby and F. Biltgen, Judges,

Advocate General: P. Mengozzi,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 11 November 2014,

after hearing the Opinion of the Advocate General at the sitting on 29 January 2015,

gives the following

Judgment

- 1 By its application, the European Commission seeks the annulment of Decision 2011/708/EU of the Council and of the Representatives of the Governments of the Member States of the European Union, meeting within the Council, of 16 June 2011, on the signing, on behalf of the Union, and provisional application of the Air Transport Agreement between the United States of America, of the first part, the European Union and its Member States, of the second part, Iceland, of the third part, and the Kingdom of Norway, of the fourth part; and on the signing, on behalf of the Union, and provisional application of the Ancillary Agreement between the European Union and its Member States, of the first part, Iceland, of the second part, and the Kingdom of Norway, of the third part, on the application of the Air Transport Agreement between the United States of America, of the first part, the European Union and its Member States, of the second part, Iceland, of the third part, and the Kingdom of Norway, of the fourth part (OJ 2011 L 283 p. 1; ‘the contested decision’).

Background to the dispute and procedure before the Court

- 2 On 25 and 30 April 2007, the European Community and its Member States, of the one part, and the United States of America, of the other part, signed an air transport agreement (OJ 2007 L 134, p. 4), which was amended by a protocol signed in Luxembourg on 24 June 2010 (OJ 2010 L 223, p. 3).

- 3 That air transport agreement provided for the possibility of third States acceding to it, and so in 2007 the Republic of Iceland and the Kingdom of Norway submitted requests for accession. For the purpose of their accession, those two States, together with the contracting parties to that agreement, therefore concluded the Air Transport Agreement between the United States of America, of the first part, the European Union and its Member States, of the second part, Iceland, of the third part, and the Kingdom of Norway, of the fourth part (OJ 2011 L 283, p. 3; ‘the Accession Agreement’). The Accession Agreement extends the scope of the initial air transport agreement, *mutatis mutandis*, to each of the contracting parties.
- 4 The Commission also negotiated an ancillary agreement between the European Union and its Member States, of the first part, Iceland, of the second part, and the Kingdom of Norway, of the third part, on the application of the Air Transport Agreement between the United States of America, of the first part, the European Union and its Member States, of the second part, Iceland, of the third part, and the Kingdom of Norway, of the fourth part (OJ 2011 L 283, p. 16; ‘the Ancillary Agreement’). The Ancillary Agreement supplements the Accession Agreement in that it is intended in particular to maintain the bilateral nature of the procedures for adopting measures implementing the initial air transport agreement, by providing that the Commission as a rule represents the Republic of Iceland and the Republic of Norway in those procedures.
- 5 On 2 May 2011, the Commission adopted a proposal for a decision on the signature and provisional application of the Accession Agreement and the Ancillary Agreement. The proposal, which was based on Article 100(2) TFEU, read in conjunction with Article 218(5) TFEU, envisaged that the Council of the European Union alone had competence to adopt that decision.
- 6 Departing from the Commission proposal, the Council adopted the contested decision in the form of a hybrid decision, by both the Council and the Representatives of the Governments of the Member States meeting within the Council.
- 7 Articles 1 to 3 of the contested decision state:

‘Article 1

The signing of the [Accession Agreement] and the [Ancillary Agreement] is hereby authorised on behalf of the Union, subject to the conclusion of the said Agreements.

The texts of the Accession Agreement and of the Ancillary Agreement are attached to this Decision.

Article 2

The President of the Council is hereby authorised to designate the person(s) empowered to sign the Accession Agreement and the Ancillary Agreement on behalf of the Union.

Article 3

The Accession Agreement and the Ancillary Agreement shall be applied on a provisional basis as from the date of signature by the Union and, to the extent permitted under applicable national law, by its Member States and by the relevant Parties, pending the completion of the procedures for their conclusion.’

- 8 The Accession Agreement was signed in Luxembourg and Oslo on 16 and 21 June 2011 respectively. The Ancillary Agreement was signed in the same places and on the same dates.

- 9 By order of the President of the Court of 18 June 2012, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the French Republic, the Italian Republic, the Kingdom of the Netherlands, the Republic of Poland, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom, on the one hand, and the European Parliament, on the other, were granted leave to intervene in support of the forms of order sought by the Council and the Commission respectively.

Admissibility

Arguments of the parties

- 10 The Council pleads that the Commission's action is inadmissible on three grounds. First, that action should have been brought against the Member States, and not against the Council, because the Commission is contesting the Member States' participation in the decision-making process that led to the adoption of the contested decision. Accordingly, the Commission is in fact alleging an irregularity attributable not to the Council but to the Member States.
- 11 It follows that the Commission's action is, secondly, inadmissible on the ground that an act adopted by the representatives of the Member States cannot be subject to judicial review by the Court in an action for annulment.
- 12 Third, the Commission does not have a genuine interest in bringing proceedings, because the annulment which it seeks would not have any legal consequence. The Council contends that, given the need for the European Union and the Member States to act in close coordination in areas where they share competence, annulment of the contested decision will merely lead to an artificial split of that decision into two separate decisions which will in any event have to be adopted simultaneously. Accordingly, the Commission's action is not liable to procure any advantage either to the European Union or to the Commission.
- 13 The Commission and the Parliament submit that the action is admissible.

Findings of the Court

- 14 In accordance with settled case-law, an action for annulment must be available in the case of all measures adopted by the EU institutions, irrespective of their nature or form, provided that they are intended to have legal effects (see, to this effect, judgments in *Parliament v Council and Commission*, C-181/91 and C-248/91, EU:C:1993:271, paragraph 13, and *Commission v Council*, C-27/04, EU:C:2004:436, paragraph 44).
- 15 In this instance, since the contested decision relates to the signing of the Accession Agreement and the Ancillary Agreement on behalf of the European Union and to the provisional application of those agreements by, first, the European Union and, second, the Member States, it follows that the Council participated in the decisions made in respect of all of those matters (see, by analogy, judgment in *Commission v Council*, C-114/12, EU:C:2014:2151, paragraph 41).
- 16 Furthermore, it is not in dispute that the contested decision has legal effects.
- 17 In those circumstances, the contested decision must be regarded as an act of the Council against which an action for annulment may be brought under Article 263 TFEU, and therefore the first and second grounds of inadmissibility must be rejected.

- 18 As regards the third ground of inadmissibility, it is clear from settled case-law of the Court that the admissibility of actions for annulment brought by the Commission cannot be subject to the condition that an interest in its bringing proceedings must be demonstrated (see judgments in *Commission v Council*, 45/86, EU:C:1987:163, paragraph 3, and *Commission v Council*, C-370/07, EU:C:2009:590, paragraph 16).
- 19 Since the third ground of inadmissibility must also be rejected, the Commission's action is admissible.

Substance

Arguments of the parties

First plea

- 20 The Commission, supported by the Parliament, submits that, by adopting the contested decision, the Council infringed Article 13(2) TEU, read in conjunction with Article 218(2) and (5) TFEU.
- 21 First, it is apparent from the latter article that the Council alone is designated as being the institution with the power to authorise the signing of an international agreement by the European Union. Therefore, the contested decision should have been adopted solely by the Council, and not also by the Member States meeting within the Council. The Council cannot in fact unilaterally derogate from the procedure set out in Article 218 TFEU by involving the Member States in the adoption of that decision.
- 22 The areas of activity of the European Union should be clearly distinguished from the areas in which the Member States can still exercise their competence. It is therefore not possible to merge an intergovernmental act with an act of the European Union, as such a merger distorts the EU procedures laid down in Article 218 TFEU, rendering them devoid of purpose.
- 23 Second, the Council infringed Article 13(2) TEU, read in conjunction with Article 218(2) and (5) TFEU, on the ground that the EU institutions cannot break free from the rules laid down by the Treaties and have recourse to alternative procedures. That was so here, as the procedure for adopting the contested decision was carried out in conditions different from those required by Article 218 TFEU. The adoption of a joint decision is not provided for by that article.
- 24 According to the Council and the intervening governments, the contested decision is compatible with both Article 13(2) TEU and Article 218(2) and (5) TFEU.
- 25 First, that decision contains two different acts. The first was adopted by the Council alone on the basis of Article 218 TFEU. By this act, the Council authorised the signing of the agreements at issue on behalf of the European Union and their provisional application by it. The Representatives of the Governments of the Member States meeting within the Council adopted only the act envisaged in Article 3 of the contested decision. By that act, the Member States authorised the provisional application of those agreements in the areas falling within their competence.
- 26 It follows that the Member States did not participate in the procedure for adopting the act the author of which is the Council on the basis of Article 218(2) and (5) TFEU.

- 27 Second, the Treaties do not contain express provisions that lay down detailed arrangements relating to the negotiation and conclusion of mixed agreements. The Council and the Member States are thus free to determine their precise form. The fact that the authorisation for signing an international agreement is transmitted in a single decision or in two separate acts does not prejudice in any way the requirements of the procedure laid down in Article 218 TFEU.
- 28 Third, it is incumbent upon the Member States and the European Union to cooperate closely with regard to mixed agreements and to adopt a common approach in order to ensure unified representation of the European Union in international relations. The adoption of a joint decision is the expression of the cooperation thereby imposed.

Second plea

- 29 The Commission, supported by the Parliament, submits that the contested decision is contrary to the rule laid down in the first subparagraph of Article 218(8) TFEU, read in conjunction with Article 100(2) TFEU, that the Council is to act by a qualified majority. As the contested decision is also a decision of the Representatives of the Governments of the Member States meeting within the Council, it was adopted unanimously. Such unanimous adoption divested the voting procedure set out in Article 218(8) TFEU of its very nature.
- 30 The procedure for adopting the contested decision is also contrary to the requirement of legal certainty, under which any legal act must refer to the provision which has served as its legal basis. Such a reference determines the procedure for adopting the act concerned and, therefore, the voting arrangements within the Council. However, the legal basis stated in the contested decision, namely Article 100(2) TFEU, read in conjunction with Article 218(5) and (8) TFEU, does not enable the voting rules applicable within the Council to be determined, as the voting rule laid down in those provisions, namely a qualified majority, was in fact replaced by the rule requiring unanimity.
- 31 The Council, supported by the intervening governments, submits that it complied with the voting rules laid down in the Treaties. The fact that no member of the Council opposed the contested decision cannot mean that qualified majority voting was not observed in this instance, since every decision adopted unanimously necessarily meets the requirement of a qualified majority.
- 32 Furthermore, it is not at all unusual to have a number of voting rules in the case of international agreements. Such a practice reflects the need for the Member States to reach a consensus, which may either be reflected by a joint decision or result from decisions taken by each Member State individually.

Third plea

- 33 The Commission, supported by the Parliament, claims that the Council acted in breach of the objectives of the Treaties and of the principle of sincere cooperation which is set out in Article 13(2) TEU.
- 34 By permitting involvement of the Member States in the competences of the European Union, the Council, first, fostered confusion as to the personality of the European Union in international relations and the powers which it has to adopt a decision by itself in that field. Second, it failed to comply with the duty of sincere cooperation between institutions, pursuant to which it should have performed its functions in such a way as not to weaken the institutional framework of the European Union, by permitting the Member States to be involved in the carrying out of a procedure concerning exclusively the Council.

- 35 The Council, supported by the intervening governments, submits that it is not the source of any confusion for third States as to the personality of the European Union. In the case of mixed agreements, such confusion would be caused, on the contrary, by the Council adopting a decision concerning such agreements without also including therein the corresponding decision of the Member States.
- 36 The contested decision is, moreover, not only consistent with the objective of unity in the international representation of the European Union, but guarantees, promotes and strengthens that objective, by setting out the common position of the European Union and its Member States. The adoption of such a decision is the very embodiment of the obligation of close cooperation as required by the Treaties.
- 37 It is true that the act of the European Union for the purpose of adopting a mixed agreement and the corresponding act of the Member States could be adopted under two different procedures. However, pursuit of parallel procedures would give rise to risks of divergence between Member States and could result in delays, so that it would not enable adequate close cooperation between the European Union and the Member States to be ensured.

Findings of the Court

- 38 By its first and second pleas, the Commission contends that the contested decision is not compatible with Article 13(2) TEU, read in conjunction with Article 218(2), (5) and (8) TFEU, on the ground that it was not adopted by the Council alone and in accordance with the procedure and voting arrangements laid down in Article 218 TFEU.
- 39 It should be borne in mind that the founding treaties of the European Union, unlike ordinary international treaties, established a new legal order, possessing its own institutions, for the benefit of which the Member States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only those States but also their nationals (see, in particular, Opinion 1/09, EU:C:2011:123, paragraph 65, and Opinion 2/13, EU:C:2014:2454, paragraph 157).
- 40 Furthermore, the Member States have, by reason of their membership of the European Union, accepted that relations between them as regards the matters covered by the transfer of powers from the Member States to the European Union are governed by EU law, to the exclusion, if EU law so requires, of any other law (Opinion 2/13, EU:C:2014:2454, paragraph 193).
- 41 As provided in Article 13(2) TEU, each institution must act within the limits of the powers conferred on it by the Treaties, and in conformity with the procedures, conditions and objectives set out in them.
- 42 It should be recalled, in this regard, that the rules regarding the manner in which the EU institutions arrive at their decisions are laid down in the Treaties and are not at the disposal of the Member States or of the institutions themselves (judgments in *United Kingdom v Council*, 68/86, EU:C:1988:85, paragraph 38, and *Parliament v Council*, C-133/06, EU:C:2008:257, paragraph 54).
- 43 So far as concerns the present case, Article 218(1) TFEU requires agreements between the European Union and third States or international organisations to be negotiated and concluded in accordance with the procedure laid down in paragraphs 2 to 11 of that article. The Member States, being subject to EU law, are bound by all the provisions of that article.
- 44 In addition, under Article 218(5) TFEU, the decision authorising the signing of such agreements and, if necessary, their provisional application by the European Union is adopted by the Council. No competence is granted to the Member States for the adoption of such a decision.

- 45 Furthermore, it is apparent from Article 218(8) TFEU that the Council acts by a qualified majority in respect of a decision such as that referred to in the previous paragraph.
- 46 In the present case, it is not in dispute that the Accession Agreement and the Ancillary Agreement are mixed agreements.
- 47 The contracting parties to a mixed agreement concluded with third countries are, first, the European Union and, second, the Member States. When such an agreement is negotiated and concluded, each of those parties must act within the framework of the competences which it has while respecting the competences of any other contracting party.
- 48 As is clear from its wording, the contested decision authorises the signing of the agreements at issue on behalf of the European Union and provides for their provisional application.
- 49 First, that decision in fact merges two different acts, namely, on the one hand, an act relating to the signing of the agreements at issue on behalf of the European Union and their provisional application by it and, on the other, an act relating to the provisional application of those agreements by the Member States, without it being possible to discern which act reflects the will of the Council and which the will of the Member States.
- 50 It follows that the Member States participated in the adoption of the act relating to the signing of the agreements at issue on behalf of the European Union and their provisional application by it although, under Article 218(5) TFEU, such an act must be adopted by the Council alone. Moreover, the Council was involved, as an EU institution, in the adoption of the act concerning the provisional application of those agreements by the Member States although such an act falls within the scope of, first of all, the internal law of each of those States and, then, international law.
- 51 Second, the contested decision was adopted under a procedure which involved without distinction elements falling within the decision-making process specific to the Council and elements of an intergovernmental nature.
- 52 As the Council confirmed at the hearing, the contested decision was adopted by means of a single procedure applied to the two acts referred to in paragraph 49 of the present judgment. However, the act concerning the provisional application of the agreements at issue by the Member States entails consensus of the representatives of those States, and therefore their unanimous agreement, whereas Article 218(8) TFEU provides that the Council must act, on behalf of the European Union, by a qualified majority. The two different acts, brought together in the contested decision, cannot therefore be validly adopted under a single procedure (see, by analogy, judgment in *Commission v Council*, C-338/01, EU:C:2004:253).
- 53 Accordingly, the contested decision is not compatible with Article 218(2), (5) and (8) TFEU and, therefore, with Article 13(2) TEU.
- 54 As to the Council's argument that the contested decision reflects the duty of cooperation which is imposed on the European Union and the Member States in the field of mixed agreements, it is true that the Court has acknowledged that, where it is apparent that the subject-matter of an agreement falls partly within the competence of the European Union and partly within that of the Member States, it is essential to ensure close cooperation between the Member States and the EU institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into (Opinion 1/94, EU:C:1994:384, paragraph 108, and judgment in *Commission v Sweden*, C-246/07, EU:C:2010:203, paragraph 73).
- 55 However, that principle cannot justify the Council setting itself free from compliance with the procedural rules and voting arrangements laid down in Article 218 TFEU.

- 56 Consequently, it must be held that the first and second pleas are well founded.
- 57 Therefore, the contested decision must be annulled and there is no need to examine the third plea relied upon by the Commission in support of its action.

Request that the effects of the contested decision be maintained

- 58 The Council and the Commission, supported by the Parliament and the Czech, German, French, Portuguese and Finnish Governments, request the Court, should it annul the contested decision, to maintain its effects until a new decision is adopted.
- 59 As provided in the second paragraph of Article 264 TFEU, the Court may, if it considers this necessary, state which of the effects of the act which it has declared void are to be considered as definitive.
- 60 In that regard, it is clear from the Court's case-law that the effects of a contested act may be maintained on grounds of legal certainty, in particular where the immediate effects of its annulment would give rise to serious negative consequences and the lawfulness of such an act is contested not because of its aim or subject-matter, but on grounds of lack of competence or infringement of an essential procedural requirement (see judgment in *Parliament and Commission v Council*, C-103/12 and C-165/12, EU:C:2014:2400, paragraph 90 and the case-law cited).
- 61 In this instance, it should be noted in particular that the contested decision enabled provisional application of the Accession Agreement and the Ancillary Agreement by the European Union. Annulment of that decision with immediate effect would be liable to give rise to serious consequences for the relations of the European Union with the third States concerned and for the businesses which operate on the air transport market and have been able to benefit from the provisional application of those agreements.
- 62 In those circumstances, there are important grounds of legal certainty justifying the grant by the Court of the request that the effects of the contested decision, whose aim and content are not challenged, be maintained.
- 63 Accordingly, the effects of the contested decision should be maintained until the entry into force, within a reasonable period from the date of delivery of the present judgment, of a new decision that is to be adopted by the Council pursuant to Article 218(5) and (8) TFEU.

Costs

- 64 Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Council has been unsuccessful, the Council must be ordered to pay the costs.
- 65 In accordance with Article 140(1) of the Rules of Procedure, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the French Republic, the Italian Republic, the Kingdom of the Netherlands, the Republic of Poland, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom and the Parliament, which have intervened in these proceedings, are to bear their own costs.

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

- 1. Annuls Decision 2011/708/EU of the Council and of the Representatives of the Governments of the Member States of the European Union, meeting within the Council, of 16 June 2011, on the signing, on behalf of the Union, and provisional application of the Air Transport Agreement between the United States of America, of the first part, the European Union and its Member States, of the second part, Iceland, of the third part, and the Kingdom of Norway, of the fourth part; and on the signing, on behalf of the Union, and provisional application of the Ancillary Agreement between the European Union and its Member States, of the first part, Iceland, of the second part, and the Kingdom of Norway, of the third part, on the application of the Air Transport Agreement between the United States of America, of the first part, the European Union and its Member States, of the second part, Iceland, of the third part, and the Kingdom of Norway, of the fourth part;**
- 2. Maintains the effects of Decision 2011/708 until the entry into force, within a reasonable period from the delivery of the present judgment, of a new decision that is to be adopted by the Council of the European Union pursuant to Article 218(5) and (8) TFEU;**
- 3. Orders the Council of the European Union to pay the costs;**
- 4. Orders the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the French Republic, the Italian Republic, the Kingdom of the Netherlands, the Republic of Poland, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland and the European Parliament to bear their own costs.**

[Signatures]