Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 19 May 2022[1]

Case C-24/20

European Commission
v

Council of the European Union

(Action for annulment – Decision (EU) 2019/1754 – Accession of the European Union to the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications – Authorisation granted to the Member States to accede to that act alongside the European Union – Lack of any proposal from the Commission – Power of the Council to amend the Commission proposal – Exclusive external competence of the European Union – Article 13(2) and Article 17(2) TEU – Article 2(1), Article 218(6) and Article 293(1) TFEU)

I. Introduction

1. The Americans say that if something looks like a duck, swims like a duck and quacks like a duck, it's a duck. In reality, the proper classification of the things we see, as obvious as it may seem at first sight, is always open to debate. That is all the more true so far as concerns abstract concepts.

2. Thus, in the present case, the European Commission calls into question the competence of the Council of the European Union to amend, pursuant to Article 293(1) TFEU, its proposal for a legal act of the European Union, on the ground that the change made by the Council goes beyond an amendment. In essence, the Commission presents the Court with an amendment to the proposal made by the Council and, in the spirit of René Magritte, observes: '*Ceci n'est pas un amendement*'. It is that observation that the Court will need to consider in the present case.

II. Legal framework

3. The present case concerns two international treaties administered by the World Intellectual Property Organisation (WIPO).

[1] Original language: French.

A. The Lisbon Agreement

4. The Lisbon Agreement for the Protection of Appellations of Origin and their International Registration is a treaty signed on 31 October 1958, revised at Stockholm on 14 July 1967 and amended on 28 September 1979 [2] ('the Lisbon Agreement'). It constitutes a special agreement for the purposes of Article 19 of the Paris Convention for the Protection of Industrial Property of 20 March 1883 [3] ('the Paris Convention'), to which any State party to that convention may accede.

5. Seven Member States of the European Union are parties to the Lisbon Agreement, namely the Republic of Bulgaria, the Czech Republic, the French Republic, the Italian Republic, Hungary, the Portuguese Republic and the Slovak Republic. [4] On the other hand, the European Union is not a party to the agreement, to which only States can accede.

6. Article 1 of the Lisbon Agreement provides that the States to which that agreement applies constitute a Special Union ('the Special Union') within the framework of the Union for the Protection of Industrial Property established by the Paris Convention and undertake to protect on their territories, in accordance with the terms of that agreement, the appellations of origin of products of the other States of the Special Union, recognised and protected as such in the country of origin and registered at the International Bureau of WIPO.

B. The Geneva Act

7. On 20 May 2015, a diplomatic conference adopted the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications [5] ('the Geneva Act'), which revised the Lisbon Agreement. The Geneva Act differed from the Lisbon Agreement in that it provided, in Article 28(1)(iii), for intergovernmental organisations ('IGOs') to become parties to it. [6]

8. Article 22 of the Geneva Act makes provision as regards the Assembly of the Special Union ('the assembly'), which is made up of the contracting parties to that act and the States party to the Lisbon Agreement. Under Article 22(2) of the act, the tasks of the assembly include dealing with all matters concerning the maintenance and development of the Special Union and the implementation of the act, amending the common regulations, adopting the financial regulations of the Special Union and adopting amendments to Articles 22 to 24 and 27 of the act.

9. Article 22(4) of the Geneva Act, which is headed 'Taking Decisions in the Assembly', provides:

'(a) The Assembly shall endeavour to take its decisions by consensus.

2 *United Nations Treaties Series*, Vol. 923, No 13172, p. 215.

3 Most recently revised at Stockholm on 14 July 1967 and amended on 28 September 1979 (*United Nations Treaties Series*, Vol. 828, No 11851, p. 305).

4 As the Commission observes, the Lisbon Agreement was signed and concluded at a time when, as regards the French Republic and the Italian Republic, the competence of the European Union was not yet regarded as exclusive, and when the other States had not yet become members of the European Union. Three other Member States (the Hellenic Republic, the Kingdom of Spain and Romania) signed the agreement between 1958 and 1959, when they were not yet members of the European Union, but have not ratified it.

5 OJ 2019 L 271, p. 15.

6 Provided that at least one member State of the IGO is party to the Paris Convention and the IGO declares that it has been duly authorised, in accordance with its internal procedures, to become party to the Geneva Act and that, under the constituting treaty of the IGO, legislation applies under which regional titles of protection can be obtained in respect of geographical indications. Those conditions are met as regards the European Union.

(b) Where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. In such a case:

(i.) each Contracting Party that is a State shall have one vote and shall vote only in its own name; and

(ii.) any Contracting Party that is an [IGO] may vote, in place of its member States, with a number of votes equal to the number of its member States which are party to this Act. No such [IGO] shall participate in the vote if any one of its member States exercises its right to vote, and *vice versa*.

(c) On matters concerning only States that are bound by [the Lisbon Agreement], Contracting Parties that are not bound by [that agreement] shall not have the right to vote, whereas, on matters concerning only Contracting Parties, only the latter shall have the right to vote.'

10. Article 31 of the Geneva Act, which is headed 'Application of the [Lisbon Agreement]', provides:

'(1) [*Relations Between States Party to Both This Act and [the Lisbon Agreement]*] This Act alone shall be applicable as regards the mutual relations of States party to both this Act and [the Lisbon Agreement]. However, with regard to international registrations of appellations of origin effective under [the Lisbon Agreement], the States shall accord no lower protection than is required by [the Lisbon Agreement].

(2) *[Relations Between States Party to Both This Act and [the Lisbon Agreement] and States Party to [the Lisbon Agreement] Without Being Party to This Act*] Any State party to both this Act and [the Lisbon Agreement] shall continue to apply [the Lisbon Agreement], as the case may be, in its relations with States party to [the Lisbon Agreement] that are not party to this Act.'

11. The common regulations under the Lisbon Agreement and the Geneva Act,[7] adopted pursuant to Article 25 of the Geneva Act, contain, in rule 7, a mechanism for the protection, under the Geneva Act, of appellations of origin registered under the Lisbon Agreement, where a State party to the Lisbon Agreement has acceded to the Geneva Act.[8]

III. Background to the dispute

12. On 30 March 2015, in preparation for the diplomatic conference to be held in Geneva (Switzerland), from 11 to 21 May 2015, for the purposes of considering and adopting a draft revised Lisbon Agreement, the Commission adopted a recommendation for a Council decision authorising the opening of negotiations on a Revised Lisbon Agreement for the Protection of Appellations of Origin and Geographical Indications. In that recommendation, the Commission, amongst other things, invited the Council to base its decision on Article 207 and Article 218(3) and (4) TFEU, given the exclusive competence conferred on the European Union in the area of the common commercial policy by Article 3(1) TFEU.

[7] In the present case, the relevant text is the Common Regulations under the Lisbon Agreement and the Geneva Act, adopted on 2 October 2018, TRT/LISBON/013.

[8] Other versions of those regulations also contain that mechanism.

13. On 7 May 2015, the Council adopted Decision 8512/15 authorising the opening of negotiations on a revised Lisbon Agreement on Appellations of Origin and Geographical Indications, as regards matters falling within the competence of the European Union. In contrast to what the Commission recommended, that decision was based on Article 114 and Article 218(3) and (4) TFEU.

14. By its judgment of 25 October 2017, *Commission* v *Council (Revised Lisbon Agreement)*,[9] the Court annulled Council Decision 8512/15, holding that the negotiation of the Geneva Act fell within the exclusive competence which Article 3(1) TFEU confers on the European Union in the field of the common commercial policy envisaged in Article 207(1) TFEU.[10]

15. On 27 July 2018, the Commission made a proposal for a Council decision on the accession of the European Union to the Geneva Act[11] ('the proposal for a decision'), on the basis of Article 207 and Article 218(6)(a) TFEU. Given its exclusive competence, it was proposed that the European Union alone should accede to that act.

16. After debate, the Council sent the European Parliament a draft decision which, besides approving the accession of the European Union to the Geneva Act, also authorised Member States wishing to do so to accede to that act ('the contested authorisation'). On 16 April 2019, the Parliament approved the draft decision.

17. The Commission objected to the Council's draft. In a statement of 20 September 2019, it disputed that authorisation could be given for any Member State wishing to do so to ratify the Geneva Act or to accede to it alongside the European Union. On the other hand, it stated that it was prepared to accept that the seven Member States which were parties to the Lisbon Agreement and had already registered numerous intellectual property rights pursuant to that agreement should be authorised to accede to the Geneva Act in the interest of the European Union.

18. On 7 October 2019, pursuant to Article 293(1) TFEU, the Council unanimously adopted Decision (EU) 2019/1754[12] ('the contested decision').

19. In the words of recitals 6, 8, 9 and 10 of the contested decision:

'(6) In order for the Union to be able to properly exercise its exclusive competence for the areas covered by the Geneva Act and its functions in the context of its comprehensive protection systems for agricultural designations of origin and geographical indications, the Union should accede to the Geneva Act and become a contracting party thereto.

…

[9] C-389/15, EU:C:2017:798, paragraph 74.

[10] Decision 8512/15 was subsequently replaced by Council Decision (EU) 2018/416 of 5 March 2018 authorising the opening of negotiations for a revised Lisbon Agreement on Appellations of Origin and Geographical Indications (OJ 2018 L 75, p. 23).

[11] COM(2018) 350 final.

[12] Council Decision of 7 October 2019 on the accession of the European Union to the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications (OJ 2019 L 271, p. 12).

(8) The Union should endeavour to regularise the issue of its voting rights in the [assembly] in order to ensure its effective participation in the decision-making procedures, in view of point (b)(ii) of Article 22(4) of the Geneva Act. It is therefore appropriate that the Member States which wish to do so, should also be authorised to ratify or to accede to, as appropriate, alongside the Union the Geneva Act in the interest of the Union.

(9) At the same time, this will allow to ensure the continuity of rights resulting from the existing membership of seven Member States in the Special Union.

(10) The ratification or accession by the Member States should however fully respect the exclusive competence of the Union, and the Union should remain responsible for ensuring the exercise of the rights and fulfilment of the obligations of the Union and the Member States under the Geneva Act.'

20. The first paragraph of Article 1 of the decision states:

'The accession of the European Union to the Geneva Act … is hereby approved on behalf of the Union.'

21. Article 3 of the decision provides:

'Member States which wish to do so, are hereby authorised to ratify or accede to, as appropriate, alongside the Union, the Geneva Act in the interest of the Union and in full respect of its exclusive competence.'

22. Article 4 of the decision provides:

'1. In the Special Union, the Union and any [Member State] which ratifies or accedes to the Geneva Act pursuant to Article 3 of this Decision shall be represented by the Commission in accordance with Article 17(1) TEU. The Union shall be responsible for ensuring the exercise of the rights and fulfilment of the obligations of the Union and of the Member States which ratify or accede to the Geneva Act pursuant to Article 3 of this Decision.

The Commission shall make all the necessary notifications under the Geneva Act on behalf of the Union and those Member States.

In particular, the Commission shall be designated as the Competent Authority referred to in Article 3 of the Geneva Act, responsible for the administration of the Geneva Act in the territory of the Union and for communications with the International Bureau of the WIPO under the Geneva Act and the Common Regulations under the Lisbon Agreement and the Geneva Act …

2. The Union shall vote in the [assembly] and the Member States which have ratified or acceded to the Geneva Act shall not exercise their right to vote'.

23. On 17 January 2020, the Commission brought the present action for annulment.

24. The Geneva Act entered into force on 26 February 2020 and has bound the European Union since that date. In 2021, on the basis of the authorisation contained in Article 3 of the contested decision, the French Republic and Hungary signed and ratified that act.

IV. Forms of order sought and procedure before the Court of Justice

25. The Commission claims that the Court should:

– annul Article 3 of the contested decision;

– annul Article 4 of the contested decision to the extent that it contains references to the Member States, or, in the alternative, annul Article 4 entirely if references to the Member States cannot be severed from the rest of the article;

– maintain the effects of the parts of the contested decision which have been annulled, in particular any use of the authorisation granted under Article 3, implemented before the date of the judgment by the Member States which are currently parties to the Lisbon Agreement, until the entry into force, within a reasonable period which should not exceed six months from the date of delivery of the judgment, of a decision of the Council;

– order the Council to pay the costs.

26. By separate document lodged at the Court Registry on 15 April 2020, the Council raised an objection of inadmissibility under Article 151(1) of the Rules of Procedure of the Court of Justice. The Commission submitted its observations on that objection on 18 May 2020. By decision of the Court of 6 October 2020, the objection of inadmissibility was joined to the substantive action.

27. The Council contends that the Court should:

– dismiss the action as inadmissible in its entirety;

– in the alternative, dismiss the action as unfounded in its entirety;

– order the Commission to bear the costs.

28. The Kingdom of Belgium, the Czech Republic, the Hellenic Republic, the French Republic, the Republic of Croatia, the Italian Republic, Hungary, the Kingdom of the Netherlands, the Republic of Austria and the Portuguese Republic were granted leave to intervene in support of the form of order sought by the Council.

29. All the parties, with the exception of the Kingdom of Belgium and the Portuguese Republic, participated in the hearing which took place on 1 February 2022.

V. Analysis

30. In support of its action, the Commission puts forward two pleas in law. The first plea is based on infringement of several articles of the FEU Treaty, the principle of conferral of powers and the Commission's right of initiative, arising out of the fact that the Council adopted the contested decision without a proposal from the Commission. The second plea is based on infringement of Article 2(1) and Article 207 TFEU, it being alleged that the Council went beyond its powers in authorising Member States to take action in an area falling within the exclusive competence of the European Union, and on lack of an adequate statement of reasons.

31. I will examine the Council's objection of inadmissibility first, before turning to the substantive issues.

A. Admissibility

1. Arguments of the parties

32. The Council, supported in essence by the intervening Member States, submits that the Commission's action is inadmissible because it is directed solely against Article 3 and parts of Article 4 of the contested decision ('the contested provisions'), which are not severable from the decision. It argues that Article 3 is interconnected with the rest of the contested decision, and more specifically Article 1. In combination, those two provisions ensure that the European Union has the right to vote in the assembly,[13] and thus enable it to exercise its exclusive external competence in the areas covered by the Geneva Act. Furthermore, the Council submits, Article 3 of the contested decision guarantees the seniority and continuity of the protection of geographical indications[14] registered in the seven Member States which are parties to the Lisbon Agreement ('the seven Member States concerned').[15] The annulment of that provision would eliminate the benefit of the European Union being a full and effective party to the Geneva Act, and that of the geographical indications previously registered under the Lisbon Agreement retaining their seniority and protection. To annul that article would thus render the content of the contested decision incompatible with its stated aim and purpose, as set out in particular in recitals 6, 8 and 9 of that decision. As to Article 4 of the decision, the Council submits that it is not severable from Article 3 thereof.

33. The Council also submits that its objection of inadmissibility is strengthened by the Commission's request for the Court to maintain the effects of the contested decision. It submits that that approach does not correspond to the *raison d'être* of that type of request, and that what the Commission is really seeking to achieve is a revision of the substantive content of Article 3 of that decision.

34. The Commission responds that the contested provisions are severable from the rest of the contested decision. It submits that the contested authorisation is not necessary in order for the European Union properly to exercise its exclusive external competence in the areas covered by the act. The applicable rules could be interpreted such that the seniority of the geographical indications already registered by the seven Member States concerned is not affected by the European Union becoming a party to the act. Furthermore, in reality the assembly does not vote, and the core of the European Union's participation does not materialise in the assembly. Thus, entirely relinquishing any influence over the number of votes of the European Union can hardly be regarded as an essential element of the contested decision. The Commission observes that the judgments in which the Court has held that partial annulment of an act was not possible have

[13] In that regard, Article 22(4)(b)(ii) of the Geneva Act provides that an IGO may vote at the assembly with a number of votes equal to the number of its Member States which are parties to the act.

[14] In the pleadings, the parties use the expression 'geographical indications' to include appellations of origin. It should be noted however that the scope of the Lisbon Agreement was restricted to appellations of origin.

[15] As the Council observes in the introductory section of its defence, a new registration of a geographical indication under the Geneva Act made by the European Union (and not one of the seven Member States concerned), as a new contracting party to the Special Union, would be regarded as an *ex novo* registration vis-à-vis the third contracting parties, and not as a registration capable of providing continuity of the initial registration under the Lisbon Agreement. The Council submits that in legal terms, this would mean that the seniority afforded to the geographical indication under the Lisbon Agreement would be disrupted under the Geneva Act. The consequence of that disruption would be that the holders of the corresponding intellectual property rights might suffer an unjustified loss of an essential feature of their acquired rights.

concerned substantive provisions. The contested provisions are not substantive in nature. The Commission submits that the present case is more similar to those concerning 'institutional provisions', which the Court has always regarded as severable.

35. As to the argument advanced by the Council in relation to the Commission's request for the effects of the contested decision to be maintained, the Commission disputes its relevance. It submits that there is no basis for asserting that the claim for annulment of Article 3 of that decision is inadmissible just because there is also a request for the effects of the decision to be maintained.

36. The Italian Republic submits that the action is inadmissible because it has been brought against the Council alone, when it should also have been brought against the Parliament, which approved the contested decision in accordance with Article 218(6)(a)(iii) TFEU.

37. In that regard, the Commission responds that the fact that the Parliament took part in the procedure for adoption of the contested decision does not make it the author of the act, or in other words a party against which an action for annulment can be brought.

2. Assessment

(a) The Council's arguments

38. It is clear from the settled case-law of the Court that the partial annulment of an EU act is possible only if the elements whose annulment is sought may be severed from the remainder of the act. The Court has repeatedly held that that requirement is not satisfied where the partial annulment of an act would have the effect of altering its substance.[16] Consequently, review of whether elements of an EU act are severable requires consideration of the scope of those elements in order to assess whether their annulment would alter the spirit and substance of the act.[17] Further, the question whether partial annulment would alter the substance of the EU act is an objective criterion, and not a subjective criterion linked to the political intention of the institution which adopted the act at issue.[18]

39. In that regard, it is not possible to identify the substance of a legal act without having regard to the legal context in which it was adopted. In the present case, the contested decision is a decision concluding an international agreement for the purposes of Article 218(6) TFEU. It is an act expressing the consent of the European Union to be bound by a treaty, as referred to in Articles 11 and 15 of the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations,[19] corresponding to an act of a State as referred to in Articles 11 and 15 of the Vienna Convention on the Law of Treaties, concluded on 23 May 1969.[20] The substance of the contested decision is thus necessarily determined by the constitutive elements of an act expressing the consent of the European Union to be bound by the Geneva Act.

16 Judgment of 8 December 2020, *Poland* v *Parliament and Council* (C-626/18, EU:C:2020:1000, paragraph 28 and the case-law cited).

17 Judgment of 8 December 2020, *Poland* v *Parliament and Council* (C-626/18, EU:C:2020:1000, paragraph 29 and the case-law cited).

18 Judgment of 8 December 2020, *Poland* v *Parliament and Council* (C-626/18, EU:C:2020:1000, paragraph 30 and the case-law cited).

19 Done at Vienna, on 21 March 1986. Not yet in force.

20 *United Nations Treaties Series*, Vol. 1155, p. 331.

40. In that context, as regards the unchallenged provisions of the contested decision, Article 1 approves the accession of the European Union to the Geneva Act, Articles 2 and 5 make practical arrangements for its accession, and Article 6 fixes the date of entry into force of the decision. Furthermore, the third subparagraph of Article 4(1) of the decision contains provisions which do not relate to Member States acceding to the Geneva Act. Those provisions correspond, essentially, to those set out in the proposal for a decision, and relate to the powers of the Commission as regards the implementation of the Geneva Act, the Commission being designated as the competent authority for the purposes of Article 3 of that act.

41. As to the contested provisions, first, Article 3 of the contested decision authorises Member States wishing to do so to ratify or accede to the Geneva Act.[21] Next, the first and second subparagraphs of Article 4(1) of the decision define the scope of the respective powers of the European Union and of Member States acceding to that act, as well as laying down rules for the representation of the European Union and those Member States. Lastly, Article 4(2) of the decision provides that the European Union is to vote in the assembly, and that Member States which have ratified or acceded to the Geneva Act will not exercise their right to vote.

42. It is apparent from that summary that the contested provisions do not contain elements constitutive of an expression of the consent of the European Union to be bound by the Geneva Act. The effect which is supposed to be produced by a decision adopted on the basis of Article 218(6) TFEU is already produced by Article 1 of the contested decision. The other provisions of the decision, including the contested provisions, do not affect either the scope, or content or the unconditional nature of the consent expressed in Article 1, and thus have no effect on the substance of the contested decision. The contested provisions are therefore severable from the rest of that decision. For those reasons, I consider that the objection of inadmissibility should be dismissed.

43. This conclusion is supported by the fact that there is nothing to require a decision authorising the Member States to accede to the Geneva Act to be adopted at the same time as a decision relating to the accession of the European Union to that act. Authorisation for accession of the Member States could be granted in a separate decision.[22] From the point of view of the Geneva Act, the fact that the European Union accedes alone does not prevent the Member States from acceding subsequently. Nor does it affect the level of protection given to appellations of origin registered under the Lisbon Agreement.

44. As regards the argument advanced by the Council in relation to the request for the effects of an annulled act to be maintained, I agree with the Commission that this is an ancillary claim, as contrasted with the principal claim for annulment of the contested decision, and does not constitute a request for the Court to revise Article 3 of that decision, which could not be done in the present action. It is therefore irrelevant to the analysis of whether the action is admissible, or whether it is well founded.

45. In those circumstances, I consider that the contested provisions are severable from the rest of the contested decision, and consequently that the action is admissible.

[21] For the sake of simplicity, where I refer in the remainder of this Opinion to what is authorised by Article 3 of the contested decision, I will use the term 'accede' to cover both accession to the Geneva Act and ratification of that act.

[22] It is apparent from the Commission's observations on the statements in intervention that it does not rule out the possibility of such a decision being adopted.

(b) The argument advanced by the Italian Republic

46. It is apparent from Article 263 TFEU that an action for annulment is brought against the author of the contested act, or in other words the institution which adopted that act.[23] The contested act must be imputable to that institution.[24]

47. The first paragraph of Article 218(6) TFEU provides that it is the Council which, on a proposal from the negotiator, adopts a decision concluding the agreement. That decision is imputable to the Council and the Council is its author.

48. The fact that the Parliament consents, in accordance with Article 218(6)(a) TFEU, to a decision concluding an international agreement, that decision being a matter within the competence of the Council, does not make the Parliament the author of that decision. Its approval relates to an act of another institution, namely the Council.

49. In the present case, as the contested decision was adopted by the Council, on the basis of Article 218(6) TFEU, an action for annulment of that decision must be brought against that institution alone. An action against the Parliament would be held to be inadmissible. The Italian Republic's argument must therefore be rejected.

3. Conclusion on the objection of inadmissibility

50. In the light of the foregoing, I consider that the objection of inadmissibility should be dismissed.

B. Substance

1. The first plea

(a) Arguments of the parties

51. The Commission's first plea is based on infringement of Article 218(6) and Article 293(1) TFEU, of the principle of conferral of powers laid down in Article 13(2) TEU, and of the principle of institutional balance and the Commission's right of initiative.

52. The Commission submits that, in amending the proposal for a decision by adding authorisation for any Member State to accede to the Geneva Act, the Council acted in the absence of any Commission initiative, thus infringing Article 293(1) TFEU and distorting the institutional balance established by Article 13(2) TEU.

53. It maintains that, in reality, the Council adopted two decisions: not only the decision concerning the accession of the European Union to the Geneva Act, but also that concerning the accession of Member States to that act. Article 293(1) TFEU permits the Council, acting unanimously, to amend a proposal for a decision. However, in the present case, given that the

[23] Judgment of 11 September 2003, *Austria* v *Council* (C-445/00, EU:C:2003:445, paragraph 32 and the case-law cited).

[24] See Lenaerts, K., Maselis, I. and Gutman, K, *EU Procedural Law*, Oxford University Press, Oxford, 2014, p. 306, and Molinier, J. and Lotarski, J., *Droit du contentieux de l'Union européenne*, 4th ed., LGDJ Lextenso, Paris, 2012, p. 203.

Commission had not proposed that Member States should be authorised to accede to the Geneva Act, to regard the insertion of such authorisation as a mere 'amendment' of the proposal for a decision would, the Commission submits, seriously undermine its right of initiative. The Commission states that it had not made any proposal to empower the Member States to adopt a legally binding act in an area in which the European Union has exclusive competence under Article 2(1) TFEU. It considers that an act whereby the European Union acts and regulates a topic, and one whereby it simply authorises Member States to act, if they wish, do not have the same subject matter or purpose. The authorisation in this case will create a great deal of room for autonomous decision-making by Member States, it argues, and will render the Member States jointly liable, under international law, for the implementation of the Geneva Act. The Commission submits that the Council added to the 'objective' of the proposal.

54. The Council, supported by the interveners, responds that, when it amended the proposal for a decision, it complied with one procedural and one substantive condition, as required for an amendment under Article 293(1) TFEU. First, it acted unanimously. Second, it did not alter the subject matter of the proposal for a decision or its objective. The amendments were designed simply to ensure that the European Union became a party to the Geneva Act and was in a position to exercise its exclusive competence properly within the framework of that act, while preserving the seniority and continuity of the geographical indications which had already been registered under the Lisbon Agreement. As regards the purpose of the proposal for a decision, the Council submits that this concerned the proper exercise of the exclusive competence of the European Union.

55. The Council submits that, if the argument that the adoption of a Council Decision amending the Commission's proposal is tantamount to the absence of a proposal were accepted, this would render the right of amendment given to the Council by Article 293(1) TFEU nugatory, depriving it of any useful effect. It rejects, as arbitrary and artificial, the Commission's argument that in reality the Council adopted two decisions.

56. The Italian Republic submits that Article 293 TFEU is not applicable to the procedure under Article 218 TFEU. The decision concluding an agreement is governed by Article 218(6) TFEU, it argues, and that provision states that the Council is to adopt such a decision 'on a proposal by the negotiator'. No provision is made for a Commission proposal, that institution not acting *qua* Commission in this procedure, but *qua* negotiator. The Italian Republic thus submits that, in the context of the procedure in question, a proposal from the Commission cannot be regarded as the type referred to generally in Article 293(1) TFEU, which relates to deliberations of the Council 'on a proposal from the Commission'.

57. The argument advanced by the Italian Republic should be examined before those raised by the Council.

(b) Assessment

(1) Applicability of Article 293(1) TFEU

58. The Italian Republic submits that Article 293(1) TFEU does not apply to decisions on the conclusion of international agreements, Article 218 TFEU being solely applicable to such decisions.

59. Articles 218 and 293 TFEU are in different parts of the FEU Treaty. While Article 218 is in Title V, entitled 'International Agreements', of Part 5 of the FEU Treaty, Article 293 is in Chapter 2, entitled 'Legal Acts of the Union, Adoption Procedures and Other Provisions' of Title I of Part 6 of the FEU Treaty.

60. Part 6 of the FEU Treaty contains general provisions concerning the organisation and functioning of the institutions, as well as the different types of EU legal acts and the procedures for their adoption. Those provisions apply alongside the provisions of other parts of the FEU Treaty in so far as those other provisions refer to institutions or legal acts of the European Union, without prejudice to any exceptions to the rules laid down by the general provisions of Part 6 of the FEU Treaty which may be created by specific provisions in other parts of the Treaty. It follows that, in principle, Article 293 TFEU is applicable to decisions adopted on the basis of the provisions of Title V of Part 5 of the FEU Treaty.

61. Besides the argument just set out, based on the general scheme of the treaty, I would observe that the wording of Article 293 TFEU does not leave any room for doubt as to its scope. The first part of that provision expressly indicates that it is always applicable where the Treaties (not just the provisions of Part 6 of the FEU Treaty) provide for the Council to act on a proposal from the Commission. The sole condition of applicability of that provision is thus that a provision of the Treaties provides for the Council to act on a proposal from the Commission. Its scope is thus not limited, in particular, to legislative procedures. Consequently, where it follows from the provisions of Part 5 of the FEU Treaty that the Council acts on a proposal from the Commission, Article 293 TFEU is applicable.

62. I would observe that every external action of the European Union has an internal aspect. Title V of Part 5 of the FEU Treaty contains provisions governing the division of powers between the institutions and making practical arrangements for the steps to be taken by them in the context of negotiating and concluding international agreements. This relates to the external aspect of an EU action. Nevertheless, that external action of the European Union is reflected internally, particularly in decisions on the conclusion of agreements.

63. The rules on the adoption of the legal acts necessary to conclude international agreements are specific rules, in contradistinction to the general rules which govern the adoption of EU legal acts. The effect of specific rules is not that the general rules do not apply, but that they apply in so far as the specific rules do not derogate from them. In that regard, there is nothing in Article 218 TFEU to indicate that the rule in Article 293(1) TFEU is not applicable to a decision adopted on the basis of Article 218(6) TFEU.

64. The present case relates to the common commercial policy. It is apparent from Article 207(3) TFEU that, in that area, it is the Commission that is competent to negotiate international agreements. Where the Council adopts a decision in that area, pursuant to Article 218(6) TFEU, on a proposal by the negotiator, it is therefore acting on a proposal from the Commission.

65. It follows from the foregoing that Article 293(1) TFEU is applicable to a decision on accession to an international agreement, where the Council adopts that decision on a proposal from the Commission. I therefore consider that the argument advanced by the Italian Republic should be dismissed as unfounded.

(2) The Commission's arguments

66. By its first plea, the Commission contends that the Council infringed fundamental principles of the EU legal order, namely the principle of conferral of powers and the principle of institutional balance. It submits that the Council interfered with the Commission's right of initiative in adopting the contested authorisation in the absence of a proposal from the Commission envisaging such authorisation.

67. In that regard, under Article 13(2) TEU, which sets out the principle of institutional balance, each institution is to 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.

68. Furthermore, Article 17(2) TEU provides that EU legislative acts may be adopted only 'on the basis of a Commission proposal', except where the Treaties provide otherwise, whereas other acts can be adopted on the basis of a Commission proposal where the Treaties so provide. That provision constitutionalises the Commission prerogative by virtue of which it is the institution that, in principle, has the right of initiative in relation to the adoption of EU legal acts.

69. That right of initiative of the Commission, which is also acknowledged in Article 289 TFEU in relation to legislative acts, means that it is for the Commission to decide whether or not to submit a proposal for a legislative act, except in the situation where it has an obligation under EU law to do so. By virtue of that power, if a proposal for a legislative act is submitted it is also for the Commission, which, in accordance with Article 17(1) TEU, is to promote the general interest of the European Union and take appropriate initiatives to that end, to determine the subject matter, objective and content of that proposal.[25] The same applies to proposals for non-legislative acts.[26]

70. The other provisions referred to by the Commission, namely Article 218(6) and Article 293(1) TFEU, give concrete effect to the Commission's prerogative. Article 293(1) provides that where, pursuant to the Treaties, the Council acts on a proposal from the Commission, it may amend that proposal only by acting unanimously. It should be noted that while Article 289 TFEU, in particular, uses the word 'legislative', Article 293 TFEU does not. It follows that the scope of that provision cannot be regarded as limited to acts adopted under a legislative procedure, whether ordinary or special.

71. As a whole, the Treaty provisions mentioned above serve to ensure, within the European Union, 'a balance between, on the one hand, the European organ, the role of which is to express the general interest of the European Union, and, on the other, the Governments, within the Council, conscious of their authority and the attributes of their sovereignty, and the [Parliament], an emanation of the European peoples'.[27] In particular, it follows from those provisions that the Council cannot adopt a legislative act if there is no proposal before it.[28] When it amends such a proposal, even unanimously, it may not distort it – or in other words fundamentally alter its substance – as the Commission's sole right of initiative would otherwise be undermined.[29] The same applies to other legal acts of the European Union.

[25] Judgment of 14 April 2015, *Council* v *Commission* (C-409/13, EU:C:2015:217, paragraph 70).

[26] Judgment of 6 September 2017, *Slovakia and Hungary* v *Council* (C-643/15 and C-647/15, EU:C:2017:631, paragraph 147).

[27] See Van Raepenbusch, S., *Droit institutionnel de l'Union européenne*, 2nd ed., Larcier, Brussels, 2016, p. 275.

[28] See Van Raepenbusch, S., op. cit., p. 276.

[29] See Van Raepenbusch, S., op. cit., pp. 276 and 277.

72. Against that background, the Commission's first plea can only succeed if the Council's amendment goes beyond the limits determined by the Commission as regards the subject matter, purpose and content of the act it proposed.

73. The subject matter, purpose and content of a legal act the adoption of which is proposed by the Commission are necessarily determined by the legal context of the proposed act. As I stated in the course of my analysis of the objection of inadmissibility, the Commission proposed the adoption of a decision concluding an international agreement as referred to in Article 218(6) TFEU. The subject matter, purpose and content of that proposal are thus determined by the effect envisaged by the Commission, which, in the present case, was the accession of the European Union to the Geneva Act.

74. In that regard, first, I would note that the possibility of accession to the Geneva Act offered to Member States is not a constitutive element of the expression of the consent of the European Union to be bound by that act. It is thus not indispensable for that possibility to be offered in order for the effect of accession to the Geneva Act to be achieved. It would be different if the European Union could not be party to an international agreement because accession was only open to States.[30] That is not the case here. It is entirely possible for the European Union to accede, in its own name, to the Geneva Act, pursuant to the provisions of that act.

75. Second, it must be acknowledged that the contested authorisation remains closely connected to the accession of the European Union to the Geneva Act, in that it resolves the difficulties – or at least the potential difficulties – which arise in connection, first, with the practical application of that act as regards the right exercisable by the European Union to vote in the assembly, and, second, with the seniority and continuity of protection of rights acquired under the Lisbon Agreement. Furthermore, the contested provisions do not alter or undermine the consent of the European Union to be bound by the Geneva Act. The contested provisions are thus connected with the subject matter, the purpose and the content of the act to which the proposal for a decision relates.

76. Even against that background, it is necessary to determine whether the contested authorisation, while not affecting the consent of the European Union to be bound by the Geneva Act and being connected with the accession of the European Union to that act, produces effects which are so far removed and so distinct from those envisaged by the decision proposal that the adoption of an act producing them would have required a separate initiative from the Commission.

77. That seems to me to be the position in the present case, given that, as the Commission states, the contested authorisation effectively creates a situation in which the Member States can act alongside the European Union as independent subjects of international public law, in an area within the exclusive external competence of the European Union.

[30] In such a situation, the consent of the European Union to be bound by a treaty would not have produced any legal effects as regards the contracting parties. Such consent could only be expressed by the Member States acting in their own names but in the interest of the European Union. In that situation, in lieu of consent on the part of the European Union, the Council decision could authorise the Member States to give their consent.

78. In my view, that effect of the contested authorisation infringes one of the constitutional principles of the legal order of the European Union, set out in Article 2(1) TFEU. That provision lays down the principle that, in areas in which the European Union has *exclusive competence*,[31] the Member States may not act[32] unless the European Union decides otherwise and empowers the Member States to do so.

79. Whatever conditions are attached to it – this being the substantive issue raised by the second plea in the action – I consider that such empowerment, which is by definition a significant exception to a constitutional rule, requires a Commission proposal, except where it is necessary because the European Union is prevented from acting by rules of international law restricting the action that can be taken by IGOs.

80. Any other interpretation would threaten the balance between the institution whose role is to express the general interest of the European Union and the governments, which is at the heart of the legal structure of the European Union.[33] Indeed, no more would be required, in order to defeat the restrictions inherent in the European Union having exclusive competence in certain areas, than for the Council, acting on its own initiative, to empower the Member States to act pursuant to Article 2(1) TFEU, when adopting an act proposed by the Commission which did not envisage any such empowerment. In the context of external relations, that could mean that, even in an area in which the European Union has exclusive competence, the Council was able to authorise the Member States to act alongside the European Union, which could undermine its exclusive competence.[34]

81. Having regard to the fact that it is only by way of exception that Article 2(1) TFEU provides for the Member States to be empowered to act, and to the fact that the contested authorisation was not necessary in order to achieve the objectives set out by the Commission in the proposal for a decision, the contested authorisation has to be regarded as a distinct measure, lying beyond the limits determined by the Commission in the proposal for a decision. Accordingly, it is entirely justified to take the view that, as the Commission submits, the contested authorisation must be regarded as a distinct decision, the adoption of which requires a proposal from the Commission. This means that the contested authorisation goes beyond the limits set by the objective, purpose and content of the proposal for a decision.

82. Accordingly, having regard to the fact that the contested authorisation was granted by the Council without a proposal from the Commission, it must be concluded that, in amending the proposal for a decision by adding the contested provisions so as to grant the contested authorisation, the Council infringed Article 17(2) TEU, Article 293(1) TFEU and the principle of conferral of powers contained in Article 13(2) TEU, as well as the principle of institutional balance and the Commission's right of initiative.

(3) Interim conclusion

83. Having regard to the foregoing, I suggest that the Court should uphold the first plea raised in the action.

[31] My italics.

[32] This principle is referred to as *Sperrwirkung* (blocking effect) in the German commentary; see Obwexer, W., 'AEUV Art. 2', in von der Groeben, H., Schwarze, J., Hatje, A., *Europäisches Unionsrecht*, 7th ed., Nomos, Baden-Baden, 2015, paragraph 16).

[33] See point 71 of this Opinion.

[34] See also, in this regard, Opinion of Advocate General Kokott in *Commission* v *Council* (C-137/12, EU:C:2013:441, point 96).

2. The second plea

84. The outcome of my analysis of the first plea makes it unnecessary to examine the second. I will nevertheless go on to consider the second plea, in case the Court does not agree with my analysis of the first plea, and considers that the Council was entitled to make amendments to the proposal for a decision despite the absence of a Commission proposal.

(a) Arguments of the parties

85. By its second plea, the Commission asserts that the Council infringed Article 2(1) and Article 207 TFEU, as well as the obligation to state reasons. It submits that in authorising the Member States to act in an area in which the European Union has exclusive competence, the Council exceeded its powers and failed to give adequate reasons for its decision. While, in the past, the Council has given such authorisations in relation to international agreements in areas in which the European Union has exclusive competence, these have been exceptional cases. Authorisation has been given, first, in situations where the European Union was unable to act in its own name,[35] and, second, in situations concerning bilateral agreements where it had decided not to act itself.[36] In the decisions granting such authorisation, the Council has often emphasised the exceptional nature of that authorisation. However, the contested authorisation is general in nature and is not conditional or temporary. The Commission does not consider that the 'internal guarantee' of proper regard for the exclusive competence of the European Union, contained in Article 4 of the contested decision, is enough to ensure that that decision is compatible with the Treaties or to avoid 'blurring' the international standing of the European Union.

86. As regards the problem of the European Union's right to vote in the assembly, the Commission does not consider that Article 3 of the contested decision is an adequate solution, given that Member States are free to use or not to use the contested authorisation. On the other hand, the accession of Member States to the Geneva Act will, the Commission submits, hinder its efforts to modify clauses concerning the voting rules of the IGOs in question and to give the European Union, when it acts in an area of exclusive competence, a status in international law similar to that of the Member States. Furthermore, the Commission emphasises that the importance of the right to vote should not be overestimated in this case, bearing in mind that the assembly, which mainly deals with administrative issues, generally acts by consensus and only rarely by vote.

87. As to the problem of seniority of registrations made under the Lisbon Agreement and continuity of protection, the Commission considers that the Court cannot take it as a certainty that seniority would be affected if the Member States which are parties to that agreement were not to accede to the Geneva Act.

[35] See, for example, Council Decision 2003/93/EC of 19 December 2002 authorising the Member States, in the interest of the Community, to sign the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children (OJ 2003 L 48, p. 1).

[36] See, for example, Regulation (EC) No 662/2009 of the European Parliament and of the Council of 13 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries on particular matters concerning the law applicable to contractual and non-contractual obligations (OJ 2009 L 200, p. 25).

88. As to the reasoning of the contested decision, the Commission submits that recital 8 of that decision is internally contradictory. It states that while the first sentence appears to 'give a chance' to the assembly to tackle the issue of the right of the European Union to vote, the second sentence nevertheless indicates that it is 'appropriate' to authorise Member States to accede, regardless of what the future assembly may decide.

89. The Council, supported by the intervening Member States, submits that the restrictive interpretation of Article 2(1) TFEU advocated by the Commission is not supported either on a literal or on a purposive interpretation. The Council submits that that provision aims to reconcile the European Union's own constitutional development through the conferral of often exclusive powers with an international legal order having States as its primary subjects. In order to achieve its objectives on the international scene, the European Union should take full advantage of the position of Member States, as international actors in their own right, to increase its efficacy and to ensure the proper exercise of its rights at international level. The Council maintains that it should be able to authorise Member States to act in the interest of the European Union, in full respect of its exclusive competence and of the system of allocation of powers among the EU institutions, which assigns to each institution its own role in the institutional structure of the European Union and in the accomplishment of the tasks entrusted to it.

90. As regards the Commission's argument that the statement of reasons is inadequate, the Council submits that the contested decision contains a sufficient explanation of the circumstances justifying the contested authorisation, given in a context which was known to the Commission. It therefore submits that the Commission's argument should be rejected.

(b) Assessment

(1) Article 2(1) TFEU

91. As I have already stated, the analysis which follows will only be relevant if the Court does not share my opinion on the first plea and considers, on the contrary, that the Council was entitled, pursuant to Article 293 TFEU, to make the contested amendment to the proposal for a decision without the Commission having made any proposal in that regard.

92. In reality the second plea is intrinsically linked to the first in that they both relate to the same difficulty; that of the power to authorise the Member States to act in an area in which the European Union has exclusive competence in the context of external relations. However, while the first plea concerns the relationship between the rules contained in Article 2(1) TFEU and the Commission's right of initiative, the second relates to the interpretation of Article 2(1) TFEU.

93. In order to analyse the second plea, it is therefore necessary to decide what is the proper interpretation of Article 2(1) TFEU, that being the provision which enables the European Union to empower Member States to legislate and adopt legally binding acts in an area in which it has exclusive competence. In the present case, it is not disputed that the European Union has exclusive competence and none of the parties doubts that the contested authorisation falls within the scope of Article 2(1) TFEU.

94. As I have already stated,[37] Article 2(1) TFEU lays down a constitutional principle of EU law embodying the principle of conferral of powers. Its importance is emphasised by the fact that it is among the first provisions of the FEU Treaty, which lay down principles.

95. Article 2(1) TFEU, in so far as it relates to the empowerment of Member States, is a codification of the case-law of the Court, in particular the judgments in *Donckerwolcke and Schou*,[38] *Bulk Oil (Zug)*[39] and *Werner*.[40] The Commission also sees it as a codification of the case-law of the Court on external action of the European Union in situations where it is prevented from acting in its own name by rules of international law or where, though not prevented, it decides not to act while Member States intend to do so. It should be observed that the academic commentary seems to regard the Member States acting as 'trustees' of the European Union[41] as an exception which has not been codified in the Treaties and is not directly envisaged by Article 2(1) TFEU.[42]

96. Whatever the authors of the Treaties may have intended, the wording of Article 2(1) TFEU, in referring to the Member States being empowered to act, militates in favour of a broad interpretation of its scope. It is thus not possible to regard that rule as being applicable only in the situations referred to by the Commission. The Commission itself does not seem to rule out the possibility of the Member States being empowered to act in other situations.

97. Thus, the question at the heart of the second plea is what conditions, if any, must be met before the Member States can be empowered to act under Article 2(1) TFEU. In the context of an action for annulment, it is not for the Court to determine the best way of ensuring that the European Union has sufficient standing as against the other parties to an international agreement, and in any event, it is not in a position to do so. On the other hand, it is for the Court to determine whether the conditions for empowering the Member States to act, pursuant to Article 2(1) TFEU, are satisfied.

98. In that regard, I note that the parties do not seem to doubt that the ability to empower the Member States to act in an area in which the European Union has exclusive competence cannot be regarded as unlimited or unconditional.[43] It follows from the principle of conferral of powers that when the Member States transfer their competence in a given area to the European Union, on an exclusive basis, the exercise of that competence by the Member States has to be regarded as running counter to that principle. This appears to be reflected in the wording of Article 2(1) TFEU, which makes clear that the possibility of empowering the Member States to act for which

37 See point 78 of this Opinion.

38 Judgment of 15 December 1976 (41/76, EU:C:1976:182).

39 Judgment of 18 February 1986 (174/84, EU:C:1986:60).

40 Judgment of 17 October 1995 (C-70/94, EU:C:1995:328).

41 See judgment of 5 May 1981, *Commission* v *United Kingdom* (804/79, EU:C:1981:93, paragraph 30). See also, in that regard, Cremona, M., 'Member States as Trustees of the Union Interests: Participating in International Agreements on Behalf of the European Union', in Arnull, A., Barnard, C., Dougan, M., and Spaventa, E. (eds), *A Constitutional Order of States*? *Essays in EU Law in Honour of Alan Dashwood*, Hart Publishing, London, 2011, pp. 435 to 458.

42 See, in that regard, Obwexer, W, 'AEUV Art. 2', in von der Groeben, H., op. cit., and Pelka, S.C., 'AEUV Art. 2. [Arten von Zuständigkeiten].' in. Schwarze, J., Becker, U., Hatje, A., Schoo, J., (eds), *EU-Kommentar*, 4th ed., Nomos, Baden-Baden, 2019, paragraph 12.

43 As Advocate General Pitruzzella observed in his Opinion in Joined Cases *Hessischer Rundfunk* (C-422/19 and C-423/19, EU:C:2020:756, point 43), in order to be compatible with the constitutional configuration of the exclusive competences of the European Union, such authorisation can only be limited in nature and cannot lead to a permanent change in the division of competences between the Union and the Member States resulting from that configuration.

it provides is in the nature of an exception. Not only is empowering the Member States presented as an exception to the rule set out in the first part of Article 2 TFEU, but it requires a decision not of the Member States, but of the European Union. [44]

99. Where an action is only permitted by way of exception, objective justifications must exist if it is to be taken. Such an action must pursue a justified objective, must be capable of achieving that objective, and must not go further than is necessary to do so, or else the conferral of a power on the European Union, in the Treaties, on an exclusive basis, could easily be undermined.

100. It is settled case-law of the Court that it is for the party concerned to provide evidence to establish the exclusive nature of the external competence of the European Union on which it seeks to rely. [45] By analogy, it must in my view be accepted that it is for the party relying on the exception provided for in Article 2(1) TFEU to provide evidence justifying the use of the possibility of empowering Member States made available by that provision. In the present case, therefore, it is for the Council to demonstrate that there is an objective justification for granting the contested authorisation to the Member States, that the objectives pursued can be achieved by granting that authorisation, and that the authorisation does not go further than is necessary to achieve those objectives.

101. In that regard, the Council puts forward two justifications, the first based on the need to ensure that the European Union has the right to vote in the assembly, and the second on the need to ensure that rights acquired pursuant to registrations made under the Lisbon Agreement are protected.

102. I consider that those justifications point in favour of the use by the European Union of the possibility provided for in Article 2(1) TFEU.

103. In the first place, the Council's argument on the issue of the right of IGOs to vote in the assembly is irrefutable. It follows from the literal interpretation of Article 22 of the Geneva Act that, in the event of a vote in the assembly, the European Union would be unable to cast any votes if none of its Member States were party to that act. The assembly is not a powerless organ. Under the Geneva Act, it has specific powers which may have an impact on the rights and obligations of parties and of economic operators. While voting on decisions is provided for only as a secondary mechanism, it is not excluded. Against that background, an authorisation granted pursuant to Article 2(1) TFEU, which ensures that the European Union has the right to vote in the assembly, cannot be regarded as unjustified. [46]

104. The same applies, in the second place, to the Council's argument as to the need to ensure continuity in the protection of appellations of origin registered under the Lisbon Agreement. While Article 31 of the Geneva Act appears to guarantee such continuity, even if the seven

[44] See, to that effect, judgments of 15 December 1976, *Donckerwolcke and Schou* (41/76, EU:C:1976:182, paragraph 32); of 17 October 1995, *Werner* (C-70/94, EU:C:1995:328, paragraph 12); and of 17 October 1995, *Leifer and Others* (C-83/94, EU:C:1995:329, paragraph 12).

[45] See, to that effect, judgments of 4 September 2014, *Commission* v *Council* (C-114/12, EU:C:2014:2151, paragraph 75), and of 20 November 2018, *Commission* v *Council (Antarctic MPAs)* (C-626/15 and C-659/16, EU:C:2018:925, paragraph 115).

[46] The Commission observes that no such authorisation was granted following the conclusion of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, adopted by WIPO on 27 June 2013, which contains the same provisions on the right of IGOs to vote (see Article 13(3) of that treaty). In my view, this argument is irrelevant. The fact that no action was taken to address certain difficulties in the implementation of one agreement does not mean that no action can be taken to address those same difficulties in relation to another agreement.

Member States concerned do not accede, the possibility cannot be ruled out of the level of protection being lower than would be the case if appellations of origin registered under the Lisbon Agreement were included in the system established by the Geneva Act.

105. In that regard, first, it does not seem to me that Article 31 of the Geneva Act guarantees that appellations of origin would be protected in relations between the seven Member States concerned (in a scenario where they did not accede to that act) and States which are party to the Geneva Act alone (in other words, third States which are not parties to the Lisbon Agreement). In the event that any one of the seven Member States concerned did not accede to the Geneva Act, appellations of origin registered by that Member State before the entry into force of that act would not be protected in States which were party to that act but not to the Lisbon Agreement, for lack of a new registration. It is true that a new registration could be effected by the European Union, but none of the provisions of the Geneva Act indicate unequivocally that the seniority of an appellation of origin re-registered in that way would be determined on the basis of the registration effected under the Lisbon Agreement by the Member State concerned.

106. Second, the seven Member States concerned would be deprived of the ability to include appellations of origin they had already registered under the Lisbon Agreement in the system of protection established by the Geneva Act. In that situation, even in the absence of a risk of 'loss' of the rights acquired, the operators concerned might be shut out of certain benefits of participating in a system which is intended, according to its designers, to be more attractive than the previous system and, it seems, to replace that system.

107. It is true that these difficulties could be overcome by interpreting the Geneva Act such that upon accession of the European Union, it is substituted for the Member States which are party to the Lisbon Agreement. However, the Geneva Act does not make express provision to that effect. As a contracting party, the European Union is not in a position to impose such an interpretation on the other contracting parties or on the WIPO secretariat. This uncertainty as to the legal consequences dictates a cautious approach. It is appropriate to take the steps necessary to ensure that legal situation of operators which have already made registrations under the Lisbon Agreement is not endangered.

108. In my view, the contested authorisation is a measure which makes it possible to eliminate the risks surrounding the right of the European Union to vote in the assembly and the continuity of protection of appellations of origin registered under the Lisbon Agreement. While the authorisation may not eliminate those risks in itself, it enables the Member States to do so following their accession to the Geneva Act.

109. Nevertheless, in order to eliminate the risks in question, it is not necessary to require the seven Member States concerned to accede to the Geneva Act. It is sufficient to give them the option to do so. Given that accession gives rise to certain obligations, it should be left to the Member States concerned to decide whether their accession to the Geneva Act is necessary, having regard to the number of registrations made under the Lisbon Agreement and the interests of the holders of the resulting rights.

110. It is undoubtedly true that, if none of the Member States concerned had made use of the option made available by the contested authorisation, the problem of the right of the European Union to vote in the assembly would not have been resolved. However, the Council had reason to believe that certain Member States would take advantage of that option, and two Member States have in fact acceded to the Geneva Act.

111. Inasmuch as the contested authorisation thus constitutes a measure enabling the risks linked to the European Union's right to vote in the assembly and the continuity of the protection of appellations of origin registered under the Lisbon Agreement to be eliminated, it is appropriate to ascertain whether it goes beyond what is necessary to attain the objective referred to above.

112. I do not see any other means of attaining that objective. It would undoubtedly be possible to try to convince other contracting parties, as well as the WIPO secretariat, to interpret the Geneva Act such that IGOs have at least one vote in the assembly and the European Union is substituted for the seven Member States concerned in so far as the protection of appellations of origin registered under the Lisbon Agreement is concerned. However, it is impossible to know whether that approach would be successful. This would depend on the other contracting parties and the WIPO secretariat and is therefore uncertain. In contrast, the accession of the Member States to the Geneva Act would eliminate the risks in question by virtue of its automatic legal effect.

113. The only question arising is whether it is necessary that not only the seven Member States concerned but all the Member States be authorised to accede to the Geneva Act. Such authorisation could be justified by the need to ensure that the European Union is able to cast as many votes as possible in the assembly.

114. In that regard, it does not appear from the recitals of the contested decision that the need to ensure that the European Union had the highest number of votes possible in the assembly was the reason for granting the contested authorisation.[47] The recitals simply mention the need to regularise the issue of the voting rights of the European Union, and it is left to Member States to decide whether they wish to make use of the contested authorisation. The accession of one Member State would be sufficient to eliminate the risk of the European Union being unable to vote in the assembly.

115. In that context, the parties refer to the principle of equality of Member States. They argue that this prevents authorisation to accede to the Geneva Act being granted to some but not all Member States. In that regard, I share the view expressed by Advocate General Kokott in her Opinion in *Commission* v *Sweden (Waste water treatment plants)*,[48] where she observed that, although the Court has not yet specified precisely how equality of Member States is to be interpreted, it can be assumed that the case-law on the principle of equal treatment also applies in favour of Member States. Under that principle, comparable situations are not to be treated differently and different situations are not to be treated alike unless such treatment is objectively justified.[49]

116. The seven Member States concerned are in a different situation from the other Member States. The non-accession of those other Member States to the Geneva Act does not create any risk with respect to the protection of appellations of origin already registered under the Lisbon Agreement. It is that risk that dictates that the seven Member States concerned must be permitted to accede to the Geneva Act. No such justification arises out of the interests of the Member States as regards the right to vote, given that the contested decision expressly provides

[47] For the same reason, the argument advanced by some of the intervening Member States, concerning the need for Member States to be able to ensure protection for non-agricultural geographical indications which have not been harmonised within the EU, is irrelevant. It does not appear from the reasoning of the contested decision that such a need was among the reasons for granting the contested authorisation. Furthermore, that argument runs counter to the observation of the Court in the judgment of 25 October 2017, *Commission* v *Council (Revised Lisbon Agreement)*, that the European Union has exclusive competence in the area governed by the Geneva Act (see point 14 of this Opinion).

[48] C-22/20, EU:C:2021:250.

[49] Opinion of Advocate General Kokott *Commission* v *Sweden (Waste water treatment plants)* (C-22/20, EU:C:2021:250, point 35).

that votes in the assembly are to be cast not by the Member States, but by the European Union. The difference of treatment between the seven Member States concerned and the other Member States that would arise if the scope of the contested authorisation were restricted to those seven Member States would thus not constitute an infringement of the principle of equality.

117. Furthermore, as I have already stated in point 43 of this Opinion, the Member States could be authorised to accede to the Geneva Act in future, by separate decision. Thus, if the situation changes, it will always be possible to adopt a new decision authorising Member States to accede, notably with a view to strengthening the European Union's position within the assembly, if that should prove necessary.

118. In the light of the foregoing, I take the view that, for the time being, authorising all the Member States to accede to the Geneva Act goes beyond what is necessary to eliminate the risks arising from non-accession of Member States to that act.

119. The Commission submits that the contested authorisation is not conditional or temporary. However, certain provisions of Article 4 of the contested decision impose significant restrictions on Member States which have acceded to the Geneva Act. First, the European Union and the Member States are represented within the Special Union by the Commission. Second, the European Union is responsible for ensuring the exercise of the rights and fulfilment of the obligations of the European Union and of the Member States which accede to the Geneva Act. Third, it is the Commission which makes all the necessary notifications under the Geneva Act on behalf of the European Union and the Member States concerned. Lastly, fourth, it is the European Union which votes in the assembly, the Member States not exercising their right to vote. To my mind, those provisions minimise the risk of divergence between the European Union and the Member States within the assembly and in the implementation of the Geneva Act. In the present case, therefore, the authorisation of the Member States is limited in nature and does not give rise to a permanent change in the allocation of competences between the European Union and the Member States.

120. In the light of the foregoing, I take the view that the contested decision infringes Article 2(1) TFEU in so far as the contested provisions authorise not only the seven Member States concerned, but all the Member States, to accede to the Geneva Act.

(2) The statement of reasons

121. The Commission argues that two sentences in recital 8 of the contested decision contradict each other. However, this contradiction exists only when recital 8 is read from a particular subjective viewpoint, based on the Commission's approach to the issue of the right to vote. I differ from the Commission in considering that the first sentence of recital 8 should be read not as 'giving a chance' to the assembly to tackle the issue of the right of the European Union to vote, but as describing a problem to which a solution is proposed in the second sentence of that recital.

122. It is clear from the Court's case-law that the statement of reasons must be adapted to the nature of the legal act at issue and to the context in which it was adopted. In that regard, it is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons is sufficient must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question and, in particular, in the light of the interest which the addressees of the measure may have in obtaining

explanations.[50]

123. It is also well settled that the obligation to state reasons laid down in the second paragraph of Article 296 TFEU is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested measure.[51]

124. In that regard, recital 8 of the contested decision makes the link between the contested authorisation and the issue of the right of the European Union to vote in the assembly. The arguments raised by the Commission then relate, in reality, not to the statement of reasons for the contested decision, but to the appropriateness of the chosen solution to the problem of voting rights, which I have already considered in my analysis relating to Article 2(1) TFEU.

125. In the light of the foregoing, I consider that the argument based on inadequate reasoning should be rejected.

(3) Interim conclusion

126. Having regard to the foregoing, I consider that the second plea should be upheld and that the contested provisions of the contested decision should be annulled.

VI. Maintenance of the effects of the contested decision

127. In the event that the Court decides to annul the contested decision, it will need to determine whether it is appropriate to maintain its effects pending the adoption of the Council's new decision.

128. The French Republic and Hungary have already signed and ratified the Geneva Act, pursuant to Article 3 of the contested decision. It is not inconceivable that, after the Court gives judgment, the Commission will submit a proposal to the Council for a decision authorising Member States to accede to the Geneva Act in accordance with the guidance given in the Court's judgment.[52] In the meantime, it would be appropriate in my view to maintain the effects of Articles 3 and 4 of the contested decision, inasmuch as they constitute the legal basis for actions which may well be capable of being regarded as lawful in the light of the future decision.

129. For those reasons, and taking account of the different situation of the seven Member States concerned, I suggest that the Court should maintain the effects of Articles 3 and 4 of the contested decision in relation to accessions to the Geneva Act, on the part of the seven Member States concerned, which are effected prior to the date of the Court's judgment, until the entry into force, within a reasonable time not exceeding six months from the date on which judgment is delivered, of a Council decision.

[50] Judgment of 15 July 2021, *Commission* v *Landesbank Baden-Württemberg and SRB* (C-584/20 P and C-621/20 P, EU:C:2021:601, paragraph 104 and the case-law cited).

[51] Judgment of 30 April 2019, *Italy* v *Council (Fishing Quota for Mediterranean swordfish)* (C-611/17, EU:C:2019:332, paragraph 48 and the case-law cited).

[52] Such a proposal would be necessary in the event that the Court upheld the first plea.

VII. Costs

130. Under Article 138(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since I have suggested that the action should succeed and the Commission has applied for costs, I consider that the Council should be ordered to pay the costs.

131. In accordance with Article 140(1) of the Rules of Procedure, the Kingdom of Belgium, the Czech Republic, the Hellenic Republic, the French Republic, the Republic of Croatia, the Italian Republic, Hungary, the Kingdom of the Netherlands, the Republic of Austria and the Portuguese Republic must bear their own costs as interveners in the proceedings.

VIII. Conclusion

132. In the light of all the foregoing considerations, I suggest that the Court should:

– annul Article 3 of Council Decision (EU) 2019/1754 of 7 October 2019 on the accession of the European Union to the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications;

– annul Article 4 of Decision 2019/1754 in so far as it refers to the Member States;

– maintain the effects of the annulled parts of Decision 2019/1754 in relation to the ratifications of the Geneva Act effected pursuant to that decision by the French Republic and Hungary, and in relation to such ratifications of or accessions to that act as may be effected, prior to the date of the Court's judgment, by the Republic of Bulgaria, the Czech Republic, the Italian Republic, the Portuguese Republic and the Slovak Republic, until the entry into force, within a reasonable time not exceeding six months from the date on which judgment is delivered, of a decision of the Council of the European Union;

– order the Council, in addition to bearing its own costs, to pay those incurred by the European Commission;

– order the Kingdom of Belgium, the Czech Republic, the Hellenic Republic, the French Republic, the Republic of Croatia, the Italian Republic, Hungary, the Kingdom of the Netherlands, the Republic of Austria and the Portuguese Republic to bear their own costs.