



Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

22 October 2013*

(Action for annulment — Council Decision 2011/853/EU — European Convention on the legal protection of services based on, or consisting of, conditional access — Directive 98/84/EC — Legal basis — Article 207 TFEU — Common commercial policy — Article 114 TFEU — Internal market)

In Case C-137/12,

ACTION for annulment under Article 263 TFEU, brought on 12 March 2012,

European Commission, represented by E. Cujo and by I. Rogalski, R. Vidal Puig and D. Stefanov, acting as Agents, with an address for service in Luxembourg,

applicant,

supported by:

European Parliament, represented by D. Warin and J. Rodrigues, acting as Agents,

intervener,

v

Council of the European Union, represented by H. Legal and J.-P. Hix and by R. Liudvinaviciute-Cordeiro, acting as Agents,

defendant,

supported by:

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

Kingdom of the Netherlands, represented by C. Wissels, M. Bulterman and M. de Ree, acting as Agents,

Republic of Poland, represented by M. Szpunar and B. Majczyna, acting as Agents,

Kingdom of Sweden, represented by A. Falk and C. Stege, acting as Agents,

* Language of the case: French.

United Kingdom of Great Britain and Northern Ireland, represented by A. Robinson, acting as Agent, assisted by G. Facenna, Barrister,

interveners,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts (Rapporteur), Vice-President, A. Tizzano, L. Bay Larsen, T. von Danwitz, E. Juhász, A. Borg Barthet, C.G. Fernlund and J.L. da Cruz Vilaça, Presidents of Chambers, A. Rosas, G. Arestis, A. Arabadjiev, C. Toader, E. Jarašiūnas and C. Vajda, Judges,

Advocate General: J. Kokott,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 30 April 2013,

after hearing the Opinion of the Advocate General at the sitting on 27 June 2013,

gives the following

Judgment

- 1 By its application, the European Commission seeks the annulment of Council Decision 2011/853/EU of 29 November 2011 on the signing, on behalf of the Union, of the European Convention on the legal protection of services based on, or consisting of, conditional access (OJ 2011 L 336, p. 1; ‘the contested decision’).

Legal context

Directive 98/84/EC

- 2 On 20 November 1998, the European Parliament and the Council of the European Union adopted Directive 98/84/EC on the legal protection of services based on, or consisting of, conditional access (OJ 1998 L 320, p. 54).
- 3 Article 1 of Directive 98/84, entitled ‘Scope’, states that the objective of that directive is to approximate provisions in the Member States concerning measures against illicit devices which give unauthorised access to protected services.
- 4 Article 2 of the directive, entitled ‘Definitions’, provides:

‘For the purposes of this Directive:

- (a) *protected service* shall mean any of the following services, where provided against remuneration and on the basis of conditional access:
 - television broadcasting, as defined in Article 1(a) of [Council] Directive 89/552/EEC [of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23)],

- radio broadcasting, meaning any transmission by wire or over the air, including by satellite, of radio programmes intended for reception by the public,
- information society services within the meaning of Article 1(2) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on information society services [(OJ 1998 L 204, p. 37)]

or the provision of conditional access to the above services considered as a service in its own right;

- (b) *conditional access* shall mean any technical measure and/or arrangement whereby access to the protected service in an intelligible form is made conditional upon prior individual authorisation;
- (c) *conditional access device* shall mean any equipment or software designed or adapted to give access to a protected service in an intelligible form;

...

- (e) *illicit device* shall mean any equipment or software designed or adapted to give access to a protected service in an intelligible form without the authorisation of the service provider;

...'

5 Under Article 3(1) of Directive 98/84, entitled 'Internal market principles':

'Each Member State shall take the measures necessary to prohibit on its territory the activities listed in Article 4, and to provide for the sanctions and remedies laid down in Article 5.'

6 Article 4 of Directive 98/84, relating to 'infringing activities', provides:

'Member States shall prohibit on their territory all of the following activities:

- (a) the manufacture, import, distribution, sale, rental or possession for commercial purposes of illicit devices;
- (b) the installation, maintenance or replacement for commercial purposes of an illicit device;
- (c) the use of commercial communications to promote illicit devices.'

7 Under Article 5 of that directive, entitled 'Sanctions and remedies':

'1. The sanctions shall be effective, dissuasive and proportionate to the potential impact of the infringing activity.

2. Member States shall take the necessary measures to ensure that providers of protected services whose interests are affected by an infringing activity as specified in Article 4, carried out on their territory, have access to appropriate remedies, including bringing an action for damages and obtaining an injunction or other preventive measure, and where appropriate, applying for disposal outside commercial channels of illicit devices.'

The European Convention on the legal protection of services based on, or consisting of, conditional access

- 8 In 1999, the Council of Europe began work on the drafting of a convention concerning the legal protection of services based on, or consisting of, conditional access. On 16 July 1999, the Council of the European Union authorised the Commission to participate, on behalf of the European Community, in the negotiations relating to that convention. The negotiation directives adopted by the Council on the same day stated that the Commission would be negotiating to ensure that that convention was compatible with Directive 98/84, especially with regard to sanctions.
- 9 The European Convention on the legal protection of services based on, or consisting of, conditional access (OJ 2011 L 336, p. 2; ‘the Convention’) was adopted by the Council of Europe on 24 January 2001 and entered into force on 1 July 2003.
- 10 Paragraphs 10, 11 and 13 of the Explanatory Report on the Convention give the following information:
- ‘10. Among non-European Union countries, the legislative approach to the problem of illicit reception of encrypted services is varied: in certain countries specific legislation to counter this problem is in place, in others there are incomplete regulations that only protect certain services (namely broadcasting services) or only penalise certain activities, and finally, in some countries there is no legal protection against the piracy of conditional access services.
11. In view of the above, and with the aim of ensuring a similar minimum level of protection of conditional access services across Europe, it was decided that a Council of Europe binding legal instrument on this matter would be desirable. In addition, a [c]onvention at the wider European level on the legal protection of services based on, or consisting of, conditional access would be a valuable complement to [Directive 98/84].

...

Preamble

13. The preamble succinctly sets out the main reasons which led the member States of the Council of Europe to elaborate a [c]onvention on this matter ... It underlines that providers of radio, television and information society services based on conditional access against remuneration are threatened by the existence of a parallel “industry” that manufactures, markets and distributes devices which enable unauthorised access to their services, and therefore highlights the need to pursue a common policy in Europe aimed at the protection of these services. It also stresses the value of criminal and administrative sanctions against unlawful activities, in particular to prevent future offences.’
- 11 In Section I of the Convention, which sets out the general provisions, Article 1, entitled ‘Object and purpose’, provides:
- ‘This Convention is concerned with broadcasting and information society services offered against payment and based on, or which consist of, conditional access. The purpose of this Convention is to make illegal on the territory of the Parties a number of activities which give unauthorised access to protected services, and to approximate the legislation of Parties in this area.’

12 In the same section of the Convention, Article 2, entitled ‘Definitions’, provides:

‘For the purposes of this Convention:

- (a) “protected service” means any of the following services, when provided against remuneration and on the basis of conditional access:
 - television programme services, as defined in Article 2 of the amended European Convention on Transfrontier Television,
 - radio broadcasting services, meaning radio programmes intended for reception by the public, transmitted by wire or over the air, including by satellite,
 - information society services, understood as those offered by electronic means, at a distance and at the individual request of a recipient of services,or the provision of conditional access to the above services, considered as a service in its own right;
- (b) “conditional access” means any technical measure and/or arrangement permitting access in an intelligible form, and subject to prior individual authorisation, to one of the services mentioned in point (a) of this Article;
- (c) “conditional access device” means any equipment, software and/or arrangement designed or adapted to give access in an intelligible form to one of the services mentioned in point (a) of this Article;
- (d) “illicit device” means any equipment, software and/or arrangement designed or adapted to give access in an intelligible form to one of the services mentioned in point (a) of this Article, without the authorisation of the service provider.’

13 In Section II of the Convention, which is entitled ‘Illicit activities’, Article 4, entitled ‘Offences’, provides:

‘It shall be unlawful to carry out one of the following activities on the territory of a Party:

- (a) the manufacture or production of illicit devices for commercial purposes;
- (b) the importation of illicit devices for commercial purposes;
- (c) the distribution of illicit devices for commercial purposes;
- (d) the sale or rental of illicit devices for commercial purposes;
- (e) the possession of illicit devices for commercial purposes;
- (f) the installation, maintenance or replacement of illicit devices for commercial purposes;
- (g) the commercial promotion, marketing or advertising of illicit devices.

Each Party may, at any time, in a declaration addressed to the Secretary-General of the Council of Europe, declare that it will also make unlawful other activities than those referred to in the first paragraph of this Article.’

14 Articles 5 to 7 of the Convention are set out in Section III thereof, which is entitled ‘Sanctions and remedies’.

15 Under Article 5 of the Convention, entitled ‘Sanctions for unlawful activities’:

‘The Parties shall adopt measures to make the unlawful activities established in Article 4 above punishable by criminal, administrative or other sanctions. Such measures shall be effective, dissuasive and proportionate to the potential impact of the unlawful activity.’

16 Article 6 of the Convention, which is entitled ‘Confiscation measures’, is worded as follows:

‘The Parties shall adopt such appropriate measures as may be necessary to enable [them] to seize and confiscate illicit devices or the promotional, marketing or advertising material used in the commission of an offence, as well as the forfeiture of any profits or financial gains resulting from the unlawful activity.’

17 Article 7 of the Convention, entitled ‘Civil proceedings’, states:

‘The Parties shall adopt the necessary measures to ensure that providers of protected services whose interests are affected by an unlawful activity established in Article 4 above have access to appropriate remedies, including bringing an action for damages and obtaining an injunction or other preventive measure, and where appropriate, applying for the elimination of illicit devices from commercial channels.’

18 Article 8 of the Convention, entitled ‘International cooperation’, provides:

‘The Parties undertake to render each other mutual assistance in order to implement this Convention. The Parties shall afford each other, in accordance with the provisions of relevant international instruments on international cooperation in criminal or administrative matters and with their domestic law, the widest measure of cooperation in investigations and judicial proceedings relating to criminal or administrative offences established in accordance with this Convention.’

19 Paragraph 4 of Article 11 of the Convention, entitled ‘Relationship with other conventions or agreements’, provides:

‘In their mutual relations, Parties which are members of the European Community shall apply Community rules and shall not therefore apply the rules arising from this Convention except in so far as there is no Community rule governing the particular subject concerned.’

20 Seven Member States of the European Union – the Republic of Bulgaria, the French Republic, the Republic of Croatia, the Republic of Cyprus, the Kingdom of the Netherlands, Romania and the Republic of Finland – are party to the Convention.

Background to the dispute

The second report on Directive 98/84

21 On 30 September 2008, the Commission adopted its second report on the implementation of Directive 98/84 (COM(2008) 593 final; ‘the second report on Directive 98/84’).

22 The second report on Directive 98/84 states the following information:

‘ ...

2.4. The international dimension

Various rounds of enlargement of the European Union have changed the geographical landscape in terms of piracy, which formerly flourished in certain Eastern European countries. These countries are now EU Member States and transposition of [Directive 98/84] governs the fight against piracy.

In addition, accession candidates ..., those involved in accession negotiations ... and potential candidates ... are all bringing their legislation into line with the Community *acquis*. ...

Apart from enlargement of the European Union, Decision of the EEA Joint Committee No 17/2001 of 28 February 2001 incorporated [Directive 98/84] into the EEA agreement ...

Beyond this, the Commission has little scope for action. However, the [Convention] establishes protection similar to that of [Directive 98/84] and is due to be ratified by the 47 countries that are members of the Council of Europe as well as Belarus and the Vatican.

At present, it has been signed by 11 countries ... and ratified by eight. Ratification of the Convention is open to the European Community. EC ratification may help give new impetus to ratification by other countries and thus extend the protection of relevant service providers outside the EU.

...

4.2.4. *Ratification of the [Convention]*

[The Convention] has considerable potential to extend the protection of conditional access services internationally, beyond the territory of the European Union. The European Community's ratification of the Convention would enable new impetus to be given to international action among the 47 members of the Council of Europe.

The Commission will therefore shortly propose to the Council that it ratify the Convention on behalf of the European Community.'

The proposal for a Council decision

23 On 15 December 2010, the Commission submitted a proposal to the Council for a decision to be adopted on the basis of Article 207(4) TFEU, together with Article 218(5) TFEU, concerning the signing of the European Convention on the legal protection of services based on, or consisting of, conditional access (COM(2010) 753 final; 'the proposal for a decision').

24 According to the explanatory memorandum to that proposal for a decision:

‘ ...

9. Extensive, effective protection for services based on, or consisting of, conditional access appeared to be particularly necessary. In fact, many European states which are not members of the European Union may provide havens for the development or distribution of devices for hacking into conditional access services if their legal system does not provide for sanctions against this

very specific hacking activity. It was therefore necessary to extend the provisions of [Directive 98/84] and to create a common and effective framework at European level for the protection of these services.

...

14. The wording of the two texts differs slightly in places. For instance, the Convention not only defines as a criminal offence the manufacture of illicit devices but also their production. It also gives a clearer definition of the sanctions established for activities defined as unlawful, since it describes them as penal, administrative or other. However, as in [Directive 98/84], the sanctions must be proportionate, dissuasive and effective. In short, the different wording of the Convention ... by no means differs in terms of content or scope from [Directive 98/84].

...

16. In its second [report on Directive 98/84], the Commission indicated that the signing of the Convention by the European Union should encourage broader ratification by the Member States of the Council of Europe and thus make it possible to extend legal protection for services based on conditional access beyond the borders of the [Union].

...'

The contested decision

- 25 In addition to Article 218(5) TFEU, the legal basis cited for the contested decision is Article 114 TFEU, not Article 207(4) TFEU, as proposed by the Commission.

- 26 According to recitals 3 and 5 to that decision:

'(3) The Convention establishes a regulatory framework which is almost identical to that set out in [Directive 98/84].

...

- (5) The signing of the Convention would help to extend the application of provisions similar to those in [Directive 98/84] beyond the borders of the Union and establish a law on services based on conditional access which would be applicable throughout the European continent.'

- 27 Unlike the proposal for a decision, the contested decision includes a recital 6, which is worded as follows:

'By adopting [Directive 98/84], the Union has exercised its internal competence in the fields covered by the Convention except as regards Articles 6 and 8 thereof, insofar as Article 8 relates to the measures under Article 6. The Convention should be therefore signed both by the Union and its Member States.'

- 28 Article 1 of the contested decision provides:

'The signing of the [Convention] is hereby authorised on behalf of the Union, subject to the conclusion of the Convention.

The text of the Convention is attached to this Decision.'

29 Under Article 2 of that decision:

‘The President of the Council is hereby authorised to designate the person(s) empowered to sign, on behalf of the Union, the Convention.’

30 Pursuant to Article 3 thereof, the contested decision entered into force on the day of its adoption.

31 Owing to the differences between its proposal for a decision and the contested decision, as pointed out in paragraphs 25 and 27 above, the Commission reserved its position by means of a declaration which was annexed to the minutes of the Council meeting at which the decision was adopted.

Forms of order sought and procedure before the Court

32 The Commission claims that the Court should annul the contested decision and order the Council to pay the costs.

33 The Council contends that the Court should dismiss the action as unfounded and order the Commission to pay the costs.

34 By order of the President of the Court of 6 August 2012, the French Republic, the Kingdom of the Netherlands, the Republic of Poland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland were granted leave to intervene in support of the form of order sought by the Council, while the Parliament was granted leave to intervene in support of the form of order sought by the Commission.

The action

35 The Commission raises two pleas in law in support of its action: (i) error in law in the choice of legal basis for the contested decision; and (ii) infringement of the European Union’s exclusive external competence as provided for in Articles 2(1) TFEU and 3 TFEU.

Arguments of the parties

36 By its first plea, the Commission, supported by the Parliament, submits that the contested decision comes under the common commercial policy and should therefore have been adopted on the basis of Article 207(4) TFEU.

37 First, the Commission argues that the Convention is primarily intended, from an EU perspective, to ensure adequate protection of the services concerned on the markets of those contracting parties which do not belong to the European Union in order to facilitate and promote the supply of those services by EU service providers in those markets under viable economic conditions.

38 In that context, the approximation of legislation referred to in the second sentence of Article 1 of the Convention and the prohibition of the activities listed in Article 4 thereof are not aims in themselves, but a means of achieving the objectives pursued by that convention.

39 Moreover, the fact that the ultimate goal of certain measures provided for under the Convention – such as the ban on exporting illicit devices and services relating thereto to the European Union – is to protect the internal market and service providers established in the European Union does not sever the link between the Convention and the common commercial policy.

- 40 According to the Commission, Article 11(4) of the Convention confirms that the primary aim of the contracting parties is not to improve the functioning of the internal market of the European Union but to promote and facilitate trade between those parties.
- 41 As regards Articles 6 and 8 of the Convention, the Commission argues that those provisions are incidental and cannot therefore be cited as grounds for using Article 114 TFEU as a legal basis for the contested decision.
- 42 Secondly, the Commission argues that the Convention is primarily concerned with the supply of conditional access services between the European Union and other European countries. It is intended to complement Directive 98/84 by extending to those other countries the protection against acts of piracy introduced by that directive.
- 43 Thirdly, the Commission argues that the Convention has a direct and immediate effect on the capacity of service providers to supply conditional access services and on the trade in illicit devices and services relating to those devices. It is directly aimed at eliminating obstacles to the trade in protected services by prohibiting all commercial activity which makes ‘hacking’ or other forms of electronic piracy possible. The Convention thus contributes, directly and immediately, to facilitating and promoting the supply of protected services between the European Union and other European countries where there is currently no adequate protection in place.
- 44 The Council, supported by the French Republic, the Kingdom of the Netherlands, the Republic of Poland, the Kingdom of Sweden and the United Kingdom, contends that the correct legal basis for the contested decision is Article 114 TFEU.
- 45 Those parties argue, first, that the Convention is intended to approximate the legislation of the contracting parties, including the legislation of the Member States of the European Union, so as to combat more effectively unlawful access to the services involved – which is a threat to the economic viability of the related service providers and, in consequence, to the diversity of the programmes and services offered to the public – by requiring the adoption of common definitions for unlawful activities and by introducing a common system of sanctions and remedies.
- 46 Like Directive 98/84, which it complements, the primary aim of the Convention is to eliminate or prevent any obstacles to trade in the services concerned that arise because of differences between national laws, in order to protect the proper functioning of markets and to improve the functioning of the internal market. More specifically, the Convention is designed to eliminate the risk of non-member countries being used as a base for exporting illicit devices, or supplying services relating to those devices, to the European Union, which would undermine the functioning of the internal market and the effectiveness of the protection established in that market by the directive.
- 47 In that context, the approximation of the legislation of the contracting parties and the ban on the activities listed in Article 4 of the Convention are not simply means or methods of achieving the Convention’s objectives, but are themselves the objectives pursued by that instrument.
- 48 The French Republic also remarks that, unlike Directive 98/84, the Convention includes certain provisions – Articles 6 and 8 – which relate to seizure and confiscation measures and to international cooperation. For their part, the Republic of Poland and the Kingdom of Sweden submit that, in any event, the European Union has no power to conclude, on the basis of Article 207 TFEU, an international agreement involving seizure and confiscation measures of a criminal-law nature.
- 49 Secondly, the Council, supported by the French Republic and the United Kingdom, argues that the fact that the Convention also covers the supply of conditional access services between the European Union and non-member countries in no way means that it is intended to apply more to those services than to those supplied within the European Union.

50 Thirdly, those parties, together with the Kingdom of the Netherlands and the Kingdom of Sweden, argue that any effects that the Convention may have on trade in services between the European Union and the other contracting parties are only indirect and secondary.

Findings of the Court

51 As a preliminary point, it should be noted that the parties to the dispute agree that the contested decision is correctly based on Article 218(5) TFEU. They disagree, however, as to whether the other legal basis cited was appropriate for the adoption of that decision.

52 According to settled case-law, the choice of legal basis for an EU measure must rest on objective factors that are amenable to judicial review; these include the aim and content of that measure (see, to that effect, Case C-411/06 *Commission v Parliament and Council* [2009] ECR I-7585, paragraph 45 and the case-law cited, and Case C-130/10 *Parliament v Council* [2012] ECR, paragraph 42 and the case-law cited).

53 If examination of that measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, that measure must be based on a single legal basis, namely that required by the main or predominant purpose or component (see, to that effect, *Commission v Parliament and Council*, paragraph 46 and the case-law cited, and Case C-490/10 *Parliament v Council* [2012] ECR, paragraph 45 and the case-law cited).

54 In the present case, as the contested decision was adopted in order to authorise the signing of the Convention on behalf of the European Union, it must be examined in conjunction with the Convention.

55 The Commission, supported by the Parliament, submits in essence that, in the light of the aim and content of the Convention, the contested decision comes primarily under the common commercial policy and only incidentally under the internal market policy. By contrast, the Council and the Member States intervening in its support contend that the Convention – in view of both its aim and its content – and, by extension, the contested decision are essentially linked to the internal market policy and only incidentally linked to the common commercial policy.

56 In that regard, it follows from Article 207(1) TFEU – and, in particular, from the second sentence of that provision, in the words of which the common commercial policy belongs within the context of ‘the Union’s external action’ – that the common commercial policy relates to trade with non-member countries, not to trade in the internal market (see Case C-414/11 *Daiichi Sankyo and Sanofi-Aventis Deutschland* [2013] ECR, paragraph 50).

57 Moreover, it is settled-case law that the mere fact that an act of the European Union is liable to have implications for international trade is not enough for it to be concluded that the act must be classified as falling within the common commercial policy. On the other hand, an EU act falls within that policy if it relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade (see, inter alia, *Daiichi Sankyo and Sanofi-Aventis Deutschland*, paragraph 51 and the case-law cited).

58 It follows that only those acts of the European Union with a specific link to international trade are capable of falling within the field of the common commercial policy (see, to that effect, *Daiichi Sankyo and Sanofi-Aventis Deutschland*, paragraph 52).

- 59 In the present case, as recital 3 to the contested decision explains, the Convention – signature of which on behalf of the European Union is authorised by the contested decision – established a regulatory framework which is almost identical to that provided for in Directive 98/84. Confirmation of this is to be found, inter alia, in the similarity of the definitions given in Article 2 of the Convention and Article 2 of Directive 98/84 respectively for ‘protected service’, ‘conditional access’, ‘conditional access device’ and ‘illicit device’, and in the fact that the list of prohibited ‘illicit activities’ under Article 4 of the Convention is similar to the list of ‘infringing activities’ under Article 4 of the directive.
- 60 Paragraph 11 of the Explanatory Report on the Convention states that the aim of the Convention is to ensure a similar minimum level of protection of the services concerned across Europe and thus to provide a valuable complement to Directive 98/84.
- 61 According to paragraphs 10 and 13 of the Explanatory Report and paragraph 9 of the explanatory memorandum accompanying the proposal for a decision, it is necessary, by means of the Convention, to extend beyond the European Union the legal protection introduced by Directive 98/84, because many European non-member countries may be bases for the manufacture, marketing and distribution, by a parallel ‘industry’, of devices which make it possible to gain unauthorised access to conditional access services, since legal protection in those countries against such acts of piracy is either ineffective or non-existent.
- 62 In that situation, the signing of the Convention on behalf of the European Union, which the contested decision is intended to authorise, is undertaken with a view to encouraging broader ratification of the Convention by Member States of the Council of Europe, as stated in points 2.4 and 4.2.4 of the second report on Directive 98/84 and in paragraph 16 of the explanatory memorandum to the proposal for a decision.
- 63 The signing of the Convention is thus supposed to help extend the application of provisions similar to those of Directive 98/84 beyond the borders of the European Union and to establish a law on conditional access services which is applicable throughout the European continent, as stated in recital 5 to the contested decision.
- 64 While Directive 98/84 is intended to ensure adequate legal protection at EU level for the services concerned in order to promote trade in those services within the internal market, the contested decision, by authorising the signing of the Convention on behalf of the European Union, is intended to introduce similar protection in European non-member countries, in order to promote the supply of such services to those States by EU service providers.
- 65 That objective, which can be seen from the recitals to the contested decision, read in conjunction with the Convention, to be the primary objective of that decision, therefore has a specific connection with international trade in those services, by dint of which it can legitimately be linked to the common commercial policy (see, by analogy, *Daiichi Sankyo and Sanofi-Aventis Deutschland*, paragraphs 58 and 60).
- 66 The above analysis is not affected by the argument raised by the Council and the intervening Member States that the aim, referred to in the second sentence of Article 1 of the Convention, of approximating the legislation of the contracting parties shows that the contested decision is linked to the internal market policy.
- 67 In fact, it follows from Article 11(4) of the Convention that, in their mutual relations, the Member States of the European Union are to apply EU rules and are not therefore to apply the rules established by the Convention except where there is no EU rule governing the particular subject area concerned. Article 11(4) of the Convention confirms that, since the approximation of the legislation of Member States in the field concerned has already been largely achieved by Directive 98/84, the primary objective of the Convention is not to improve the functioning of the internal market, but to extend

legal protection of the relevant services beyond the territory of the European Union and thereby to promote international trade in those services. The reference made in Article 1 of the Convention to approximation of the legislation of the contracting parties appears therefore to be a reference to a means of achieving the objectives of the Convention, rather than to one of its actual aims.

- 68 As regards the argument by the Council and the intervening Member States that the Convention is specifically designed to prohibit the export of illicit devices to the European Union from European non-member countries in order to ensure the proper functioning of the internal market, it must be emphasised that that specific aim – to which the prohibition, laid down in point (a) of the first paragraph of Article 4 of Directive 98/84, on the import of illicit devices for commercial purposes to the European Union from non-member countries (including European non-member countries) already contributes – is not capable of calling in question the existence of a specific link between the contested decision and the common commercial policy.
- 69 On the contrary, a ban on the export of illicit devices to the European Union concerns the defence of the European Union's global interests and falls, by its very nature, within the ambit of the common commercial policy (see, to that effect, Opinion 1/75 of 11 November 1975 ECR 1335 and 1364; Opinion 1/94 of 15 November 1994 ECR I-5267, paragraphs 55, 63 and 71; and Case C-94/03 *Commission v Council* [2006] ECR I-1, paragraphs 46, 47 and 49).
- 70 As regards the argument of the French Republic, the Republic of Poland and the Kingdom of Sweden that, unlike Directive 98/84, the Convention includes certain provisions – Articles 6 and 8 – which relate to seizure and confiscation measures and to international cooperation between the contracting parties, it should be noted that those provisions are intended generally to ensure effective legal protection for conditional access services throughout the territories of those parties. Accordingly, they help to achieve the primary objective of the contested decision, read in conjunction with the Convention, as established in paragraphs 62 to 64 above.
- 71 It is true that Articles 6 and 8 of the Convention are also supposed to improve the conditions for the functioning of the internal market by clarifying the definition of the sanctions provided for under Article 5 of Directive 98/84, as mentioned in paragraph 14 of the explanatory memorandum to the proposal for a decision. However, as the Advocate General observed in points 56 and 82 of her Opinion, that objective is purely incidental to the primary objective of the contested decision.
- 72 As regards the argument of the Republic of Poland and the Kingdom of Sweden that, as a legal basis, Article 207 TFEU is incompatible with the supposedly criminal-law nature of the seizure and confiscation measures provided for under the Convention, it should be noted that – quite apart from the fact that the Convention provisions dedicated to such measures do not reflect the Convention's primary objective and that Articles 5 and 6 of the Convention do not require the sanctions and measures referred to therein to be exclusively of a criminal-law nature – that argument does not explain why Article 114 TFEU would be the correct legal basis in the circumstances.
- 73 Lastly, contrary to the assertions made by the Council during the hearing, Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice and Protocol (No 22) on the position of Denmark, which are annexed to the EU Treaty and the FEU Treaty, are not capable of having any effect whatsoever on the question of the correct legal basis for the adoption of the contested decision.
- 74 Indeed, it is the legal basis for a measure – the appropriateness or otherwise of which falls to be assessed, by virtue of the case-law recalled in paragraphs 52 and 53 above, on the basis of objective factors such as main or predominant purpose of the measure and its content – which determines the protocols to be applied, and not vice versa.

- 75 In the present case, it can be seen from the above analysis that the appropriate legal basis is the one relating to the common commercial policy, which is not covered by Protocols Nos 21 and 22.
- 76 It follows from all of the foregoing that the contested decision primarily pursues an objective that has a specific connection to the common commercial policy, which means that, for the purposes of the adoption of that decision, Article 207(4) TFEU, together with Article 218(5) TFEU, must be cited as the legal basis and which also means that the signing of the Convention on behalf of the European Union falls within the exclusive competence of the European Union, pursuant to Article 3(1)(e) TFEU. By contrast, the improvement of the conditions for the functioning of the internal market is an ancillary objective of that decision that provides no justification for its adoption on the basis of Article 114 TFEU.
- 77 Since the first plea in law is well founded, the contested decision must be annulled, it being unnecessary to examine the second plea raised by the Commission in support of its action.

Limitation of the effects of the annulment

- 78 Under the second paragraph of Article 264 TFEU, the Court may, if it considers it necessary, state which of the effects of the act which it has declared void are to be considered as definitive.
- 79 In the present case, pursuant to Article 3 thereof, the contested decision entered into force on 29 November 2011, the day of its adoption.
- 80 The annulment of the contested decision without its effects being maintained would call in question the signing of the Convention by the European Union, which took place on 21 December 2011, even though the competence of the European Union to sign that convention has never been called in question.
- 81 In the interests of legal certainty, therefore, it is appropriate for the Court to maintain the effects of that decision until the adoption, within a reasonable period which must not exceed six months, of a new decision based on the appropriate legal bases, namely Article 207(4) TFEU, together with Article 218(5) TFEU.

Costs

- 82 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 the Council has been unsuccessful and the Commission has applied for costs, the Council must be ordered to pay the costs. Pursuant to Article 140(1) of the Rules of Procedure, the French Republic, the Kingdom of the Netherlands, the Republic of Poland, the Kingdom of Sweden and the United Kingdom must bear their own costs.

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

- 1. Annuls Council Decision 2011/853/EU of 29 November 2011 on the signing, on behalf of the Union, of the European Convention on the legal protection of services based on, or consisting of, conditional access;**
- 2. Maintains the effects of Decision 2011/853 until the entry into force, within a reasonable period which is not to exceed six months, of a new decision based on the appropriate legal bases;**

3. **Orders the Council of the European Union to pay the costs;**
4. **Orders the French Republic, the Kingdom of the Netherlands, the Republic of Poland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland to bear their own costs.**

[Signatures]