



Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

16 April 2015 *

(Action for annulment — Police and judicial cooperation in criminal matters — Setting of the date on which an earlier decision is to take effect — Determination of the legal basis — Legal framework applicable following the entry into force of the Treaty of Lisbon — Transitional provisions — Secondary legal basis — Consultation of Parliament)

In Case C-540/13,

ACTION FOR ANNULMENT under Article 263 TFEU, brought on 15 October 2013,

European Parliament, represented by F. Drexler, A. Caiola and M. Pencheva, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Council of the European Union, represented by K. Pleśniak and A.F. Jensen, acting as Agents,

defendant,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen (Rapporteur), President of the Chamber, K. Jürimäe, J. Malenovský, M. Safjan and A. Prechal, Judges,

Advocate General: N. Wahl,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 5 November 2014,

after hearing the Opinion of the Advocate General at the sitting on 22 January 2015,

gives the following

* Language of the case: French.

Judgment

- 1 By its action, the European Parliament seeks the annulment of Council Decision 2013/392/EU of 22 July 2013 fixing the date of effect of Decision 2008/633/JHA concerning access for consultation of the Visa Information System (VIS) by designated authorities of Member States and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences (OJ 2013 L 198, p. 45) ('the contested decision').

Legal context

- 2 Council Decision 2008/633/JHA of 23 June 2008 concerning access for the consultation of the Visa Information System (VIS) by designated authorities of Member States and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences (OJ 2008 L 218, p. 129) provides in Article 18(2) thereof as follows:

'This Decision shall take effect from a date to be determined by the Council once the Commission has informed the Council that Regulation (EC) No 767/2008 [of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation) (OJ 2008 L 218, p. 60)] has entered into force and is fully applicable.

The General Secretariat of the Council shall publish that date in the *Official Journal of the European Union*.'

The contested decision

- 3 Decision 2013/392, which refers to the FEU Treaty and to Decision 2008/633, in particular Article 18(2) of that decision, provides in Article 1 thereof that the latter decision is to take effect from 1 September 2013.

Forms of order sought by the parties

- 4 The Parliament claims that the Court should:
- annul the contested decision;
 - maintain the effects of that decision until it is replaced by a new act, and
 - order the Council to pay the costs.
- 5 The Council claims that the Court should:
- dismiss the action as inadmissible or, in any event, as unfounded;
 - in the alternative, in the event that the Court annuls the contested decision, maintain its effects until it is replaced by a new act, and
 - order the Parliament to pay the costs.

The action

- 6 The Parliament relies on two pleas in law in support of its action, alleging, respectively, breach of an essential procedural requirement, on the ground that the Parliament did not participate in the procedure for the adoption of the contested decision, and that a repealed or invalid legal basis was chosen.

Admissibility of certain pleas or arguments relied on by the Parliament

Arguments of the parties

- 7 The Council is of the view that some of the pleas or arguments relied on by the Parliament must be rejected as inadmissible as they lack clarity and precision. That applies in so far as concerns the pleas or arguments relating to breach of an essential procedural requirement, the application of Article 39(1) EU, the choice of a repealed legal basis and breach of the principles of legal certainty and institutional balance.
- 8 The Parliament submits that the application initiating proceedings is sufficiently clear and precise.

Findings of the Court

- 9 It should be noted that, under Article 120(c) of the Court's Rules of Procedure and the case-law relating thereto, an application initiating proceedings must state the subject-matter of the dispute, the pleas in law and arguments relied on and a summary of the pleas in law on which the application is based. That statement must be sufficiently clear and precise to enable the defendant to prepare his defence and the Court to rule on the application. It is therefore necessary for the essential points of law and of fact on which a case is based to be indicated coherently and intelligibly in the application itself and for the heads of claim to be set out unambiguously so that the Court does not rule *ultra petita* or fail to rule on a claim (see, to that effect, judgment in *United Kingdom v Council*, C-209/13, EU:C:2014:283, paragraph 30 and the case-law cited).
- 10 In the present case, the presentation of the pleas in law or arguments in the application, which, according to the Council, are not sufficiently clear and precise, fulfils those criteria. It has, in particular, enabled the Council to formulate a defence in response to those pleas or arguments and places the Court in a position in which it can exercise judicial review of the contested decision.
- 11 It follows that the plea of inadmissibility alleging that the application is insufficiently clear and precise must be rejected.
- 12 Accordingly, since it is the legal basis of a measure that determines the procedure to be followed in adopting that measure (judgments in *Parliament v Council*, C-130/10, EU:C:2012:472, paragraph 80, and *Parliament v Council*, C-658/11, EU:C:2014:2025, paragraph 57), it is appropriate to examine in the first place the second plea in law.

The second plea in law, alleging that a repealed or invalid legal basis was chosen

The first part of the second plea in law, alleging that a repealed legal basis was chosen

– Arguments of the parties

- 13 The Parliament maintains that the reference to the FEU Treaty in the contested decision is too general for it to be able to serve as a legal basis for the decision and that Article 18(2) of Decision 2008/633 cannot be regarded as a genuine legal basis.
- 14 That provision simply refers, by implication, to Article 34(2)(c) EU, which would have constituted the only possible legal basis for the adoption of a measure such as the contested decision under the former ‘third pillar’.
- 15 As a consequence, the legal basis used by the Council is, according to the Parliament, Article 34(2)(c) EU. As Article 34 EU was repealed by the Treaty of Lisbon, it may no longer be used as the legal basis for the adoption of new acts. The fact that a measure of secondary law refers, by implication, to Article 34 EU is irrelevant in that regard, since that provision must be regarded as having been rendered inapplicable as a result of the entry into force of that treaty.
- 16 The Council states that it adopted the contested decision on the basis of Article 18(2) of Decision 2008/633, read in conjunction with Article 9 of Protocol (No 36) on Transitional Provisions (‘the Protocol on Transitional Provisions’). It observes in that regard that the contested decision refers neither to the EU Treaty in general nor to Article 34(2)(c) EU in particular.

– Findings of the Court

- 17 For the purpose of determining whether the first part of the second plea is well founded, it is necessary to establish the legal basis on which the contested decision was adopted.
- 18 It must be noted that that decision does not refer to Article 34 EU and that, in its recitals, it refers expressly to the FEU Treaty and to Article 18(2) of Decision 2008/633 as the legal bases.
- 19 It cannot therefore be concluded, having regard to the wording of the contested decision, which must, in principle, if it is to satisfy the obligation to state reasons, indicate the legal basis on which the decision is founded (see, to that effect, judgment in *Commission v Council*, C-370/07, EU:C:2009:590, paragraphs 39 and 55), that the decision is based on Article 34 EU.
- 20 Moreover, it should be noted that there is nothing else in the contested decision to indicate that the Council intended to use Article 34 EU as the legal basis for that decision.
- 21 In particular, the claim that Article 34(2)(c) EU constituted the only possible legal basis for the adoption of a measure such as the contested decision, even if it were established, is, in that regard, irrelevant, in so far as the Council’s explicit choice to refer in the contested decision, not to that provision but to the FEU Treaty and to Article 18(2) of Decision 2008/633, clearly indicates that the contested decision is based on the latter provision itself.
- 22 It follows that the repeal of Article 34 EU by the Treaty of Lisbon does not have the effect of depriving the contested decision of a legal basis.
- 23 In the light of the foregoing, the first part of the second plea must be rejected as unfounded.

The second part of the second plea in law, alleging that the legal basis chosen was invalid

– Arguments of the parties

- 24 The Parliament considers that, if the Court were to conclude that Article 18(2) of Decision 2008/633 was the legal basis of the contested decision, that provision would constitute an invalid secondary legal basis and cannot form a proper basis for that decision.
- 25 It is apparent from the Court's case law that the creation of a secondary legal basis which eases the detailed rules for the adoption of an act is incompatible with the Treaties. That applies to Article 18(2) of Decision 2008/633, since it does not provide that the Parliament is to be consulted, whereas that requirement would have been imposed by Article 39 EU for the adoption of a measure such as the contested decision.
- 26 Moreover, Article 18(2) of Decision 2008/633 became inapplicable following the entry into force of the Treaty of Lisbon and introduces an unlawful exception to the procedure established by that treaty for the adoption of new acts. Such an exception is not permitted under Article 9 of the Protocol on Transitional Provisions, which merely provides that acts under the former 'third pillar' are not automatically repealed by the entry into force of that treaty.
- 27 The Council contends, as its principle argument, that the Parliament's plea that Article 18(2) of Decision 2008/633 is unlawful should be rejected as inadmissible. It submits that, under Article 10(1) of the Protocol on Transitional Provisions, the powers enjoyed by the Court in relation to that decision remained, until 1 December 2014, the same as those which existed before the entry into force of the Treaty of Lisbon. Article 35(6) EU, which was applicable at that time, did not confer power on the Parliament to bring an action for annulment of an act adopted under the former 'third pillar', such as that decision. It follows from the fact that the Court did not have jurisdiction in that regard that the Parliament's plea of illegality must be rejected as inadmissible.
- 28 The Council submits, in the alternative, that Article 18(2) of Decision 2008/633 complied with the EU Treaty when it was adopted. That provision merely provides for the application of the procedure laid down in Article 34(2)(c) EU and did not, therefore, introduce a *sui generis* procedure under which there is no requirement to consult the Parliament.
- 29 With regard to the effects of the entry into force of the Treaty of Lisbon, the Council maintains that the interpretation of Article 9 of the Protocol on Transitional Provisions advocated by the Parliament would create an insuperable barrier to the adoption of implementing measures provided for in acts under the former 'third pillar', which is precisely the situation which the authors of the Treaties wished to avoid.

– Findings of the Court

- 30 According to settled case-law of the Court, the choice of legal basis for a European Union measure must rest on objective factors that are amenable to judicial review; these include the aim and content of that measure (judgment in *Commission v Parliament and Council*, C-43/12, EU:C:2014:298, paragraph 29 and the case-law cited).
- 31 It should be noted in that regard that there is no dispute between the parties as to the relationship between Article 18(2) of Decision 2008/633 and the aim or content of the contested decision. On the other hand, the Parliament contends that that provision is unlawful, on the ground that it eases the detailed rules for the adoption of a measure such as the contested decision by comparison with the procedure laid down in the Treaties for the purpose.

- 32 According to the Court's case law, as the rules regarding the manner in which the EU institutions arrive at their decisions are laid down in the Treaties and are not within the discretion of the Member States or of the institutions themselves, the Treaties alone may, in particular cases, empower an institution to amend a decision-making procedure established by the Treaties. Accordingly, to acknowledge that an institution can establish secondary legal bases, whether for the purpose of strengthening or easing the detailed rules for the adoption of an act, is tantamount to according that institution a legislative power which exceeds that provided for by the Treaties (see judgment in *Parliament v Council*, C-133/06, EU:C:2008:257, paragraphs 54 to 56).
- 33 That approach, which was adopted by the Court in the judgment in *Parliament v Council* (C-133/06, EU:C:2008:257) in relation to a secondary legal basis for the adoption of legislative acts, must also be applied to the legal bases provided for in secondary legislation which make it possible to adopt measures for the implementation of that legislation by strengthening or easing the detailed rules for the adoption of such measures laid down in the Treaties.
- 34 While it is true that the Treaties provide that the Parliament and the Council lay down some of the rules relating to the exercise by the Commission of its powers of implementation, the fact nevertheless remains that the specific rules relating to the adoption of implementing measures laid down in the Treaties are binding on the institutions in the same way as the rules relating to the adoption of legislative acts and cannot therefore be negated by acts of secondary legislation.
- 35 In that context, given that the legality of an EU measure must be assessed on the basis of the facts and the law as they stood at the time when the measure was adopted (see, by analogy, judgments in *Gualtieri v Commission*, C-485/08 P, EU:C:2010:188, paragraph 26; *Schindler Holding and Others v Commission*, C-501/11 P, EU:C:2013:522, paragraph 31; and *Schaible*, C-101/12, EU:C:2013:661, paragraph 50), the legality of Article 18(2) of Decision 2008/633 must be assessed in the light of the provisions that governed, at the time that decision was adopted, the adoption of a measure such as the contested decision, namely Article 34(2)(c) EU and Article 39(1) EU.
- 36 It follows from those provisions that the Council, acting, as the case may be, unanimously or by qualified majority, and after consulting the Parliament, adopts decisions for the purposes consistent with the objectives of Title VI of the EU Treaty, other than those referred to in Article 34(2)(a) and (b) EU, and the measures necessary for the implementation of those decisions.
- 37 In that regard, it should be pointed out that the literal wording of Article 18(2) of Decision 2008/633 does not impose an obligation on the Council to consult the Parliament before adopting the measure referred to in that provision.
- 38 None the less, it is established case law that the wording of secondary EU legislation must be interpreted, in so far as possible, in a manner consistent with the provisions of the Treaties (judgment in *Efir*, C-19/12, EU:C:2013:148, paragraph 34 and the case-law cited).
- 39 Accordingly, given, first, that the requirement to interpret secondary legislation in such a way that it complies with primary law follows from the general principle of interpretation that a provision must be interpreted, as far as possible, in such a way as not to affect its validity (see, to that effect, judgments in *Sturgeon and Others*, C-402/07 and C-432/07, EU:C:2009:716, paragraphs 47 and 48, and review of *Commission v Strack*, C-579/12 RX-II, EU:C:2013:570, paragraph 40), and, second, that the legality of Article 18(2) of Decision 2008/633 must be assessed, for the reasons set out in paragraph 35 above, in particular in the light of Article 39(1) EU, the former provision must be interpreted in a manner consistent with the latter.
- 40 As a consequence, Article 18(2) of Decision 2008/633 must be interpreted, in accordance with Article 39(1) EU, as permitting the Council to adopt an act for the purpose of setting the date on which that decision is to take effect only after it has consulted the Parliament. It follows that the

Parliament's argument that the fact that the former provision does not specify that it must be consulted implies that it introduces rules for the adoption of a measure such as the contested decision that are slacker by comparison with the rules under the procedure laid down for that purpose in the EU Treaty must be rejected.

- 41 With regard to the Parliament's arguments to the effect that Article 18(2) of Decision 2008/633 is incompatible with the rules of procedure applicable after the entry into force of the Treaty of Lisbon, it should be noted, in any event, that the Protocol on Transitional Provisions includes provisions dealing specifically with the legal rules applicable, following the entry into force of that treaty, to acts adopted on the basis of the EU Treaty before that date.
- 42 Accordingly, Article 9 of that protocol provides that the legal effects of such acts are to be preserved until those acts are repealed, annulled or amended in implementation of the Treaties.
- 43 That article must be interpreted in the light of the first recital in the preamble to that protocol, which states that it is necessary to lay down transitional provisions in order to organise the transition from the institutional provisions of the Treaties applicable prior to the entry into force of the Treaty of Lisbon to the provisions contained in that Treaty.
- 44 Accordingly, given that the Treaty of Lisbon substantially altered the institutional framework for police and judicial cooperation in criminal matters, Article 9 of the Protocol on Transitional Provisions must be understood as being intended, *inter alia*, to ensure that acts adopted in the context of that cooperation may continue to be applied effectively, notwithstanding the change to the institutional framework for such cooperation.
- 45 If the Parliament's argument were accepted that the repeal by the Treaty of Lisbon of specific procedures for the adoption of measures in the field of police and judicial cooperation in criminal matters would make it impossible to adopt such measures in accordance with the conditions laid down by general acts adopted under that cooperation before those acts had been amended so as to adapt them to the Treaty of Lisbon, that would have the effect of complicating or even preventing the effective application of such acts, thus jeopardising the attainment of the objectives pursued by the authors of the Treaty.
- 46 Furthermore, the interpretation of Article 9 of the Protocol on Transitional Provisions advocated by the Parliament, to the effect that that article merely implies that acts in the field of police and judicial cooperation in criminal matters are not automatically repealed following the entry into force of the Treaty of Lisbon, would deprive that article of any practical effect.
- 47 It follows from the foregoing that a provision of an act duly adopted on the basis of the EU Treaty before the entry into force of the Treaty of Lisbon which lays down detailed rules for the adoption of other measures continues to produce its legal effects until it is repealed, annulled or amended, and permits the adoption of such measures in accordance with the procedure established by that provision.
- 48 In those circumstances, the fact that Article 18(2) of Decision 2008/633 might lay down detailed rules for the adoption of a measure such as the contested decision that are strengthened or eased by comparison with the procedure laid down for that purpose in the FEU Treaty cannot mean that that provision constitutes an invalid secondary legal basis which should be regarded as inapplicable by way of exception.

- 49 As a consequence and in those circumstances, without there being any need to rule on the admissibility of the second part of the second plea, that part of the plea must be rejected as unfounded (see, by analogy, judgments in *France v Commission*, C-233/02, EU:C:2004:173, paragraph 26, and *Komninou and Others v Commission*, C-167/06 P, EU:C:2007:633, paragraph 32), and the second plea must therefore be rejected in its entirety.

The first plea in law, alleging breach of an essential procedural requirement

Arguments of the parties

- 50 The Parliament submits that, in the event that it is found that the rules in force prior to the Treaty of Lisbon remain applicable in the present case, it should have been consulted pursuant to Article 39(1) EU.
- 51 On the other hand, the Council takes the view that Article 18(2) of Decision 2008/633 does not require any participation by the Parliament in the adoption of the contested decision and that, following the repeal of Article 39 EU by the Treaty of Lisbon, there is no longer any need to consult the Parliament for the purpose of adopting measures for the implementation of that decision.
- 52 Article 10(1) of the Protocol on Transitional Provisions would appear to confirm that analysis, in so far as it does not cite Article 39 EU as one of the provisions whose effects are to be maintained after the entry into force of the Treaty of Lisbon. Moreover, if a requirement to consult the Parliament were included as part of the adoption procedure, that would in effect add to the procedure laid down in Article 291 TFEU an element not provided for in that article and would thus jeopardise the institutional balance established by the Treaty of Lisbon.

Findings of the Court

- 53 It should be noted that due consultation of the Parliament in the cases provided for by the applicable rules of EU law constitutes an essential procedural requirement, disregard of which renders the measure concerned void (see, to that effect, judgments in *Parliament v Council*, C-65/93, EU:C:1995:91, paragraph 21, and *Parliament v Council*, C-417/93, EU:C:1995:127, paragraph 9).
- 54 As a consequence, since it follows from the response given to the second plea in law that the Council was entitled to base the contested decision on Article 18(2) of Decision 2008/633, it is necessary to determine whether the Parliament must be consulted before an act based on that provision is adopted.
- 55 It is apparent from the considerations set out at paragraphs 40 to 47 above that Article 18(2) of Decision 2008/633, interpreted in accordance with Article 39(1) EU, continues to produce its legal effects until it is repealed, annulled or amended, and permits the adoption of a measure such as the contested decision in accordance with the procedure established by that provision. Therefore, the Council is required to consult the Parliament before setting the date on which that decision is to take effect.
- 56 Contrary to the Council's submissions, the repeal of Article 39(1) EU by the Treaty of Lisbon cannot alter that requirement to consult the Parliament.
- 57 In the light of the considerations set out at paragraph 39 above, the repeal of Article 39(1) EU after the adoption of Article 18(2) of Decision 2008/633 cannot remove the requirement to interpret that provision in accordance with Article 39(1) EU.

58 Similarly, the fact that Article 291 TFEU does not lay down any obligation to consult the Parliament is irrelevant, as the requirement to consult the Parliament is one of the legal effects of Decision 2008/633 which is maintained after the entry into force of the Treaty of Lisbon, pursuant to Article 9 of the Protocol on Transitional Provisions, as interpreted at paragraph 47 above.

59 It is common ground that the contested decision was adopted by the Council without prior consultation of the Parliament.

60 It follows that the first plea in law, alleging breach of an essential procedural requirement, is well founded and that the contested decision must, in consequence, be annulled.

The request to maintain the effects of the contested decision

61 Both the Parliament and the Council have requested the Court to maintain, in the event that it should annul the contested decision, the effects of that decision until it is replaced by a new act.

62 In that regard, it must be borne in mind that, under the second paragraph of Article 264 TFEU, the Court may, if it considers it necessary to do so, state which of the effects of an act that it has declared void are to be considered as definitive.

63 In the present case, to declare the contested decision void without providing that its effects are to be maintained is liable to hinder access to the Visa Information System (VIS) by national authorities and by Europol for the purposes of the prevention, detection and investigation of terrorism and serious crime, and thus jeopardise the maintenance of public order. While the Parliament seeks the annulment of that decision on the ground of breach of an essential procedural requirement, it does not contest the purpose or content of the decision.

64 It is therefore necessary to maintain the effects of the contested decision until the entry into force of a new act intended to replace it.

Costs

65 Under Article 138(1) of the Rules of Procedure, the unsuccessful party must be ordered to pay the costs if they have been applied for in the other party's pleadings. Since the Parliament has applied for the Council to be ordered to pay the costs and the Council has been unsuccessful, the Council must be ordered to pay the costs. .

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

1. **Annuls Council Decision 2013/392/EU of 22 July 2013 fixing the date of effect of Decision 2008/633/JHA concerning access for consultation of the Visa Information System (VIS) by designated authorities of Member States and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences;**
2. **Declares that the effects of Decision 2013/392 are to be maintained until the entry into force of a new act intended to replace it;**
3. **Orders the Council of the European Union to pay the costs.**

[Signatures]