



Reports of Cases

ORDER OF THE GENERAL COURT (Fourth Chamber)

26 October 2023 *

(Action for annulment – Institutional law – Full application of the provisions of the Schengen *acquis* in Romania – Absence of a challengeable act – Required unanimity not achieved – Manifest inadmissibility in part – Request for a time limit capable of allowing the action to be resumed – Manifest lack of jurisdiction in part)

In Case T-48/23,

Eugen Tomac, residing in Brussels (Belgium), represented by R. Duta, lawyer,

applicant,

v

Council of the European Union,

defendant,

THE GENERAL COURT (Fourth Chamber),

composed of R. da Silva Passos (Rapporteur), President, S. Gervasoni and I. Reine, Judges,

Registrar: V. Di Bucci,

makes the following

Order

- 1 By his action under Article 263 TFEU, the applicant, Mr Eugen Tomac, seeks, first, annulment of the ‘decision’ of the Council of the European Union of 8 December 2022 leading to the non-adoption of Draft Council Decision No 15218/22 on the full application of the provisions of the Schengen *acquis* in Bulgaria and Romania (‘Draft No 15218/22’), and, secondly, in the event that he is not granted the status of privileged applicant, the granting of a time limit capable of allowing the action to be resumed, if necessary, by the European Parliament or another institution of the European Union or national institution acting in that capacity.

* Language of the case: French.

Background to the dispute

- 2 The Schengen *acquis*, as mentioned in Article 1, which refers to Annex A, of Council Decision 1999/435/EC of 20 May 1999 concerning the definition of the Schengen *acquis* for the purpose of determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the *acquis* (OJ 1999 L 176, p. 1), is a body of law aimed at the gradual abolition of checks at the common borders within the Member States of the Schengen area.
- 3 The Treaty of Amsterdam annexed to the EU Treaty and the EC Treaty the Protocol integrating the Schengen *acquis* into the framework of the European Union (OJ 1997 C 340, p. 93). Subsequently, the Protocol (No 19) on the Schengen *acquis* integrated into the framework of the European Union, annexed to the EU Treaty (OJ 2008 C 115, p. 290), was annexed to the Treaty of Lisbon (OJ 2010 C 83, p. 290).
- 4 In particular, as regards Romania, Article 4(1) and (2) of the Protocol concerning the conditions and arrangements for admission of the Republic of Bulgaria and Romania to the European Union (OJ 2005 L 157, p. 29; ‘the Protocol to the Act of Accession of Romania to the Union’), to the Act concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the Treaties on which the European Union is founded (OJ 2005 L 157, p. 203), provides:
 - ‘1. The provisions of the Schengen *acquis*, ... integrated into the framework of the European Union, and the acts building upon it or otherwise related to it, listed in Annex II, as well as any further such acts adopted before the date of accession, shall be binding on and applicable in [the Republic of] Bulgaria and Romania from the date of accession.
 2. Those provisions of the Schengen *acquis* as integrated into the framework of the European Union and the acts building upon it or otherwise related to it not referred to in paragraph 1, while binding on [the Republic of] Bulgaria and Romania from the date of accession, shall only apply in each of those States pursuant to a European decision of the Council to that effect after verification in accordance with the applicable Schengen evaluation procedures that the necessary conditions for the application of all parts of the *acquis* concerned have been met in that State.The Council shall take its decision, after consulting the European Parliament, acting with the unanimity of its members representing the Governments of the Member States in respect of which the provisions referred to in this paragraph have already been put into effect and of the representative of the Government of the Member State in respect of which those provisions are to be put into effect. ...’
- 5 Following its accession to the European Union on 1 January 2007, Romania undertook, between 2009 and 2011, a series of steps under the Schengen evaluation procedures, with the aim of meeting the criteria required for the full application of the provisions of the Schengen *acquis*.
- 6 On 29 September 2010 and 8 July 2011, the Presidency of the Council drew up, and subsequently amended, a first draft Council Decision on the full application of the provisions of the Schengen *acquis* in the Republic of Bulgaria and in Romania, namely Draft No 14142/10, now Draft No 14142/1/10 (‘Draft No 14142/10’).

- 7 By resolution of 8 June 2011 on Draft No 14142/10 (OJ 2012 C 380E, p. 160), the Parliament adopted a position in favour of that draft.
- 8 In its conclusions of 9 June 2011 on the completion of the process of the state of preparedness of Romania to implement all provisions of the Schengen *acquis* (9166/3/11 REV 3), the ‘Schengen Evaluation’ formation of the Council’s Working Party for Schengen Matters took note of the completion of the Schengen evaluation procedures concerning Romania. Observing that the conditions in all areas of the Schengen *acquis* had been fulfilled in Romania, it concluded that the Council could take the decision referred to in Article 4(2) of the Protocol to the Act of Accession of Romania to the Union.
- 9 Although it had been agreed on 24 June 2011 that the decision on Romania’s accession to the Schengen area should be taken by September 2011 at the latest, the Council nevertheless postponed the vote on the adoption of that decision at a meeting on 22 September 2011.
- 10 By resolution of 13 October 2011 on the Accession of Bulgaria and Romania to Schengen (OJ 2013 C 94E, p. 13), the Parliament reiterated its support for Romania’s accession to the Schengen area. It invited the Council to take the necessary measures for that purpose.
- 11 Draft Council Decision No 14302/3/11 of 7 December 2011, drawn up by the Presidency of the Council, did not lead to a vote of the Council, at a meeting on 9 December 2011.
- 12 By resolution of 11 December 2018 on the full application of the provisions of the Schengen *acquis* in Bulgaria and Romania: abolition of checks at internal land, sea and air borders (OJ 2020 C 388, p. 18), the Parliament called on the Council, first, to present as soon as possible a new draft decision on the full application of the provisions of the Schengen *acquis* in Romania, on the basis of Draft No 14142/10 and, secondly, by means of a single legal act, to take an immediate decision for the purpose of abolishing checks at internal borders.
- 13 Subsequently, the European Commission confirmed that Romania satisfied the necessary conditions for the provisions of the Schengen *acquis* to be recognised as applicable in that State and invited the Council to take the necessary measures for that purpose in a first Communication to the European Parliament and the Council of 2 June 2021, ‘A strategy towards a fully functioning and resilient Schengen area’ (COM(2021) 277 final), and then in a second Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions of 24 May 2022 entitled ‘State of Schengen Report 2022’ (COM(2022) 301 final).
- 14 By resolution of 18 October 2022 on the accession of Romania and Bulgaria to the Schengen area (OJ 2023 C 149, p. 11), the Parliament again called on the Council to do everything necessary to adopt a decision on the full application of the provisions of the Schengen *acquis* in Romania by the end of 2022.
- 15 An expert report of 21 October 2022, drawn up, under the authority of the Commission, in the context of a voluntary based fact-finding mission to Bulgaria and Romania on the application of the Schengen *acquis* and its developments since 2011 (13906/22), confirmed the conclusions of the evaluation procedures completed in 2011. That report also stated that Romania had implemented the *acquis* and its tools and had even strengthened their application in all areas. In a Communication to the European Parliament and the Council of 16 November 2022 entitled

‘Making Schengen stronger with the full participation of Bulgaria, Romania and Croatia in the area without internal border controls’ (COM(2022) 636 final), the Commission renewed its invitation to the Council to admit Romania to the Schengen area.

- 16 On 29 November 2022, on the basis of Article 4(2) of the Protocol to the Act of Accession of Romania to the Union, the Presidency of the Council drew up Draft No 15218/22.
- 17 On 8 December 2022, the Justice and Home Affairs (JHA) configuration of the Council sat in order to rule, in respect of the political governance of the Schengen area (namely, the Schengen Council) and non-legislative activities, on Draft No 15218/22 included under point 3(a) of the meeting’s agenda, which provided that a vote could be requested with a view to possible adoption. At that meeting, in the absence of unanimity of the representatives of the Governments of the Member States in respect of Draft No 15218/22, that draft was not adopted.
- 18 The applicant is a Member of the European Parliament of Romanian nationality.
- 19 By email of 15 December 2022, the applicant asked the Director-General for JHA of the General Secretariat of the Council whether it would be possible for her to communicate to him the results of the vote on the full application of the Schengen *acquis* in Romania, which was on the agenda for the Council meeting of 8 December 2022, and the minutes of that meeting or the report relating thereto.
- 20 By email of 16 December 2022, the Director-General for JHA of the General Secretariat of the Council replied to the applicant that, during that meeting, Draft No 15218/22 had not in fact been adopted and that, in accordance with Articles 8 and 9 of the Council’s Rules of Procedure, in so far as those were deliberations on a non-legislative act not open to the public, the results of the votes were not subject to any publicity. She added that the minutes of that procedure were not made public either.

Forms of order sought by the applicant

- 21 The applicant claims that the Court should:
 - annul the ‘decision’ of the Council of 8 December 2022 leading to the non-adoption of Draft No 15218/22;
 - in a situation where he is not granted the status of privileged applicant, grant a time limit capable of allowing the action to be resumed, where appropriate, on behalf of the Parliament or another institution of the Union or national institution acting in that capacity;
 - order the Council to pay the costs.

Law

- 22 Under Article 126 of the Rules of Procedure of the General Court, where it is clear that the Court has no jurisdiction to hear and determine an action or where the action is manifestly inadmissible, it may at any time decide to give judgment by reasoned order without taking further steps in the proceedings.

- 23 In the present case, the Court considers that it has been sufficiently informed by the documents in the file and decides, pursuant to that article, to give judgment without taking further steps in the proceedings.
- 24 As a preliminary point, it should be noted that, since the admissibility of the action is a matter of public policy which must be raised by the Court of its own motion, the adoption of an order under Article 126 of the Rules of Procedure is not subject to the defendant contesting the admissibility of the action. Accordingly, in the present case, it is immaterial, for the purposes of assessing the manifest nature of the inadmissibility, that the defendant was not served with the application and was therefore unable to plead that the action was manifestly inadmissible (see, to that effect, judgment of 5 March 2020, *Credito Fondiario v SRB*, C-69/19 P, EU:C:2020:178, paragraph 54 and the case-law cited).
- 25 It follows from well-established case-law concerning the admissibility of actions for annulment that it is necessary to look to the substance of the contested acts, as well as the intention of those who drafted them, to classify those acts. In that regard, challengeable acts within the meaning of Article 263 TFEU constitute, in principle, all acts adopted by the institutions, whatever their nature or form, which definitively determine the position of an institution upon the conclusion of an administrative procedure, and which are intended to have binding legal effects (see, to that effect, judgments of 17 July 2008, *Athinaiki Techniki v Commission*, C-521/06 P, EU:C:2008:422, paragraph 42; of 26 January 2010, *Internationaler Hilfsfonds v Commission*, C-362/08 P, EU:C:2010:40, paragraph 52; and of 19 November 2013, *Commission v Council*, C-63/12, EU:C:2013:752, paragraph 28 and the case-law cited).
- 26 It is in the light of those principles that it is necessary to determine whether, in the present case, the Council's failure to adopt Draft No 15218/22 constitutes a challengeable act within the meaning of Article 263 TFEU.
- 27 It is true, as the applicant points out, that it is apparent from Article 4(2) of the Protocol to the Act of Accession of Romania to the Union that the adoption of a Council decision on the full application of the provisions of the Schengen *acquis* in Romania can take place only after inspection, in accordance with the Schengen evaluation procedures, that the conditions necessary for the application of all the relevant parts of the *acquis* have been met in that Member State (see paragraph 4 above). It is also true that, in the present case, that inspection was completed by the adoption on 9 June 2011 of the conclusions of the 'Schengen Evaluation' formation of the Council's Working Party for Schengen Matters (see paragraph 8 above).
- 28 However, it is appropriate to point out that, according to those same provisions, the completion of the Schengen evaluation procedures and of the aforementioned inspection is only one stage in the procedure, which must be accompanied by consultation of the Parliament, itself followed by the adoption of a Council decision on the full application of the provisions of the Schengen *acquis* in Romania.
- 29 Above all, it is apparent from the second subparagraph of Article 4(2) of the Protocol to the Act of Accession of Romania to the Union that such a decision may be adopted by the Council only with the unanimity of its members representing the Governments of the Member States in respect of which the provisions of the Schengen *acquis* have already taken effect and of the representative of the Government of Romania in respect of which those provisions are to take effect.

- 30 Thus, the Council decision, referred to in Article 4(2) of the Protocol to the Act of Accession of Romania to the Union can exist, despite the completion of the Schengen evaluation procedures, and then produce legally binding effects for the applicant, only if it is adopted unanimously under the conditions referred to in paragraph 29 above (see, to that effect and by analogy, judgment of 13 July 2004, *Commission v Council*, C-27/04, EU:C:2004:436, paragraph 30).
- 31 In the present case, it should be noted that, despite the completion of the Schengen evaluation procedures and the adoption of the Parliament's resolutions of 8 June and 13 October 2011, 11 December 2018 and 18 October 2022, the required unanimity of the representatives of the Governments of the Member States concerned was not achieved within the Council in respect of the vote on Draft No 15218/22 (see paragraph 17 above).
- 32 In addition, it should be noted that Article 4 of the Protocol to the Act of Accession of Romania to the Union does not set any time limit, on the expiry of which the Council decision referred to in paragraph 2 of the same article must or is deemed to have been taken.
- 33 It would therefore be in conflict with the wording of that article, which expressly provides for a procedure in several stages and without setting any time limit for that purpose, to make it a condition of the successful completion of the prior stages that the Council's power to adopt, by unanimity of the representatives of the Governments of the Member States concerned, a decision within the meaning of that article, should lapse. Thus, the outcome of those stages, or any other position adopted by an institution of the Union, cannot bind those representatives, or presume that they have adopted a position, before the formal adoption of such a decision under the conditions referred to in paragraph 29 above.
- 34 Therefore, it remains open to the Council to put Draft No 15218/22 back on the agenda for a further meeting or to the Presidency of the Council to draw up a new draft Council decision on the full application of the provisions of the Schengen *acquis* in Romania. In doing so, the vote on Draft No 15218/22 does not imply any reversal of the completion of the stages prior to the adoption of a Council decision within the meaning of Article 4(2) of the Protocol to the Act of Accession of Romania to the Union, that is to say, in other words, a complete recommencement of the procedure provided for in that article.
- 35 In the light of the above considerations, it must be concluded that, in the absence of the required unanimity, no decision of the Council was taken within the meaning of Article 4(2) of the Protocol to the Act of Accession of Romania to the Union and that the vote leading to the non-adoption of Draft No 15218/22 does not, as such, amount to a refusal by the Council to take such a decision at a later stage.
- 36 Thus, the non-adoption of Draft No 15218/22 cannot be regarded as giving rise to a challengeable act within the meaning of Article 263 TFEU (see, by analogy, judgment of 13 July 2004, *Commission v Council*, C-27/04, EU:C:2004:436, paragraph 34).
- 37 In addition, such a conclusion is not contrary to the right to an effective remedy set out in Article 47 of the Charter of Fundamental Rights of the European Union, since it follows from settled case-law that Article 47 of the Charter of Fundamental Rights is not intended to change the system of judicial review laid down by the Treaties, particularly the rules relating to the admissibility of direct actions brought before the Courts of the European Union (see judgment of 30 April 2020, *Izba Gospodarcza Producentów i Operatorów Urządzeń Rozrywkowych v Commission*, C-560/18 P, EU:C:2020:330, paragraph 62 and the case-law cited, and order of

20 May 2021, *LG and Others v Commission*, T-482/20, not published, EU:T:2021:290, paragraph 64 and the case-law cited; see also, to that effect and by analogy, order of 27 April 2021, *Macías Chávez and Others v Spain and Parliament*, T-719/20, EU:T:2021:216, paragraph 37 (not published)). Since, as explained above, the vote leading to the non-adoption of Draft No 15218/22 is not a decision taken by the Council within the meaning of Article 4(2) of the Protocol to the Act of Accession of Romania to the Union and does not constitute a challengeable act, the applicant's right to an effective remedy cannot be relied on to frustrate the application of the rules of admissibility to the present action (see, to that effect, order of 20 May 2021, *LG and Others v Commission*, T-482/20, not published, EU:T:2021:290, paragraph 64).

- 38 Therefore, the first head of claim, seeking annulment of the Council's 'decision' of 8 December 2022 leading to the non-adoption of Draft No 15218/22, must be dismissed as manifestly inadmissible, without it being necessary to examine the applicant's substantive arguments submitted in that regard.
- 39 In addition, in respect of the second head of claim, which asks the Court, if it does not grant the applicant the status of privileged applicant, to grant a time limit in order to allow the action to be resumed by the Parliament or another institution of the Union or national institution acting in that capacity, first, it should be noted that, under the second paragraph of Article 263 TFEU, the status of privileged applicant is recognised exhaustively in respect of a Member State, the Parliament, the Council or the Commission. In those circumstances, the applicant cannot be granted that status in the present case.
- 40 Secondly, it should be observed that the Court has no jurisdiction to 'grant a time limit' to the Parliament, to another institution of the Union or to Romania in order to bring an action against the Council's 'decision' of 8 December 2022 leading to the non-adoption of Draft No 15218/22. In that regard, it should be recalled that the time limits for actions, which were established in order to ensure that legal positions are clear and certain and to avoid any discrimination, are matters of public policy and are not at the discretion of the parties or the Court (see order of 25 October 2007, *Estaser El Mareny v Commission*, T-274/06, not published, EU:T:2007:323, paragraph 40 and the case-law cited).
- 41 Accordingly, that request and, therefore, the second head of claim should be dismissed as manifestly lacking in jurisdiction.
- 42 It follows that the action must be dismissed in part as manifestly inadmissible and in part on the ground of manifest lack of jurisdiction, without it being necessary to serve notice on the Council.

Costs

- 43 Since the order was adopted before service of the application on the Council and before the latter could have incurred any costs, it is sufficient to decide that the applicant must bear his own costs, in accordance with Article 133 of the Rules of Procedure.

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby orders:

- 1. The action is dismissed in part as manifestly inadmissible and in part on the ground of manifest lack of jurisdiction.**
- 2. Mr Eugen Tomac shall bear his own costs.**

Luxembourg, 26 October 2023.

V. Di Bucci
Registrar

R. da Silva Passos
President