Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 27 June 2013 [1]

Case C-137/12

European Commission
v

Council of the European Union

(Action for annulment — Council Decision 2011/853/EU — European Convention on the legal protection of services based on, or consisting of, conditional access — Choice of correct legal basis — Common commercial policy (Article 207(4) TFEU) — Internal market (Article 114 TFEU) — Exclusive external competence of the Union (Articles 2(1) TFEU and 3(1) and (2) TFEU))

I – Introduction

1. The question of the extent of the powers of the European Union institutions in the field of external action is not only of considerable practical importance, but has constitutional significance. [2] It is not surprising, therefore, that this problem often gives rise to legal disputes.

2. In the present case, the Court must decide whether the European Union is required to conclude an international agreement on the protection of providers of certain audiovisual services and certain information society services within the framework of its common commercial policy or as part of its internal market policies. In this regard, it is important to delimit correctly the scopes of Articles 207 TFEU and 114 TFEU. Furthermore, it must be decided whether the Union's competence to conclude that agreement was exclusive within the meaning of Article 2(1) TFEU in conjunction with Article 3 TFEU, i.e. whether the Union was permitted to conclude the agreement on its own or only alongside its Member States as a mixed agreement.

3. These questions arise in connection with the European Convention on the legal protection of services based on, or consisting of, conditional access [3] (also 'the Convention'), which is intended to protect audiovisual services and information society services offered against payment and based on conditional access (such an encrypted pay-TV broadcasts) against unlawful access.

1 — Original language: German.

2 — See Opinion 2/00 [2001] ECR I-9713, paragraph 5; Opinion 1/08 [2009] ECR I-11129, paragraph 110; and Case C-370/07 *Commission* v *Council* [2009] ECR I-8917, paragraph 47.

3 — OJ 2011 L 336, p. 2 (published by the Council of Europe in ETS No 178).

4. The Council authorised the signing of that Convention by Decision 2011/853/EU[4] (also 'the contested decision'). Whilst the Commission takes the view that the Convention should have been concluded by the Union on the basis of Article 207 TFEU and within its exclusive competence, the Council relied on Article 114 TFEU[5] and considered that it should be a mixed agreement to be signed by the Union and its Member States.[6]

5. The question of which of these views is preferable depends not least on whether and to what extent the Convention at issue overlaps with Directive 98/84/EC[7] (also 'the directive'), which contains rules applying within the Union on the legal protection of services based on, or consisting of, conditional access.

6. The Court's judgment in this case will lay the ground for delimiting the external competences of the Union and of its Member States following the entry into force of the Treaty of Lisbon. Moreover, it could make an important contribution to the further development of the 'ERTA doctrine'[8] in connection with the current Articles 3(2) TFEU and 216(1) TFEU.

II – Legislative framework

7. Part One of the FEU Treaty ('Principles'), Title I ('Categories and areas of Union competence') contains Article 3 TFEU, which includes the following provision:

'1. The Union shall have exclusive competence in the following areas:

…

(e) common commercial policy.

2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.'

8. Part Three of the FEU Treaty ('Union policies and internal actions'), Title I ('The internal market'), includes Article 26 TFEU as an introductory provision, the first paragraph of which reads as follows:

'The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties.'

4 — 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).

5 — It is common ground between the parties that Article 218(5) TFEU was the appropriate procedural legal basis, as was used in the contested decision.

6 — Recital 6 in the preamble to the contested decision.

7 — Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access (OJ 1998 L 320, p. 54).

8 — The ERTA doctrine dates back to Case 22/70 *Commission* v *Council* ('*ERTA*') [1971] ECR 263, paragraphs 15 to 19; a recent summary can be found, for example, in Opinion 1/03 [2006] ECR I-1145, paragraphs 114 to 133.

9. Part Three of the FEU Treaty also contains, in Title VII, Chapter 3 under the heading 'Approximation of laws'. Article 114 TFEU (formerly Article 100a of the EC Treaty), paragraph 1 of which is worded as follows:

'Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.'

10. Lastly, reference should be made to Article 216(1) TFEU, which can be found in Part Five of the FEU Treaty ('External action by the Union'), Title V ('International agreements'), and provides:

'The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.'

III – Background to the dispute

11. The 'services based on conditional access' whose protection is at issue in the present case are essentially television broadcasting, radio broadcasting and information society services which are not freely available or free-to-air. In order to protect such services against unlawful access, technical measures and arrangements are used, which allow 'conditional access', for example through encrypting broadcasts and providing decoding equipment or passwords, against payment, to receive them.

12. The European Convention on the legal protection of services based on, or consisting of, conditional access is an international agreement which was negotiated more than ten years ago within the Council of Europe with the participation of the then European Community.

13. The Convention was eventually approved by the Committee of Ministers of the Council of Europe on 6 October 2000. It was opened for signature on 24 January 2001 and entered into force on 1 July 2003.

14. At present, five Member States of the European Union are Parties to the Convention: the Republic of Bulgaria, the French Republic, the Republic of Cyprus, the Kingdom of the Netherlands and Romania. Croatia, which will be acceding to the Union shortly – on 1 July 2013 – has also already ratified the Convention. The Grand Duchy of Luxembourg has signed but not yet ratified the Convention.

15. In 2008, the Commission expressed the opinion that ratification of the Convention by the European Community was desirable because it 'would enable new impetus to be given to international action' among the members of the Council of Europe; the Convention had 'considerable potential to extend the protection of conditional access services internationally, beyond the territory of the European Union'. [9]

9 — Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - Second Report on the implementation of Directive 98/84/EC, COM(2008) 593 final, submitted on 30 September 2008 (see section 4.2.4).

16. On 15 December 2010, the Commission made proposals to the Council on the signing [10] and the conclusion [11] of the Convention, basing both proposals on Article 207(4) TFEU.

17. Thereupon, on 29 November 2011, the Council adopted the now contested Decision 2011/853 on the signing, on behalf of the Union, of the Convention. Departing from the Commission's proposal, however, the Council did not base the decision on Article 207(4) TFEU, but on Article 114 TFEU. Unlike the Commission, the Council also took the view that the Convention should be signed by both the Union and its Member States [12] and would thus have the character of a mixed agreement.

18. The Commission maintained its view that under Article 3(2) TFEU the Union had exclusive competence for the conclusion of the Convention and that Article 207 TFEU was the correct legal basis. It expressed its legal opinion in this regard in a statement entered in the Council minutes and reserved all rights. [13]

IV – Forms of order sought and procedure before the Court

19. By written pleading of 12 March 2012, lodged at the Registry of the Court of Justice on 14 March 2012, the Commission brought the present action for annulment pursuant to Article 263(2) TFEU.

20. By order of 6 August 2012, the President of the Court granted the European Parliament leave to intervene in support of the Commission and granted 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 leave to intervene in support of the Council.

21. The Commission, supported by the Parliament, claims that the Court should

— annul Council Decision 2011/853/EU of 29 November 2011 and

— order the Council of the European Union to pay the costs.

22. The Council, likewise supported by its interveners, contends that the Court should

— dismiss the application as unfounded

— order the Commission to pay the costs. [14]

23. The action was examined before the Court on the basis of the written documents and at the hearing on 30 April 2013. [15]

V – The relevant provisions of Directive 98/84 and of the Convention

24. In order to understand the present case, the following provisions of Directive 98/84 and of the Convention are of importance.

10 — Proposal for a Council Decision concerning the signing of the European Convention on the legal protection of services based on, or consisting of, conditional access, COM(2010) 753 final.

11 — Proposal for a Council Decision concerning the conclusion of the European Convention on the legal protection of services based on, or consisting of, conditional access, COM(2010) 755 final.

12 — Recital 6 in the preamble to the contested decision.

13 — Minutes of the 3128th meeting of the Council of the European Union held in Brussels on 28 and 29 November 2011 (Agenda item 11 with addenda).

14 — Poland and Sweden have made no claim for costs.

15 — The Netherlands and Poland did not participate in the hearing.

A – *Provisions of Directive 98/84*

25. Article 1 of Directive 98/84, which has the heading 'Scope', defines the objective of that directive as 'to approximate provisions in the Member States concerning measures against illicit devices which give unauthorised access to protected services'.

26. Article 2 of Directive 98/84 contains numerous definitions. For the purposes of the 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 Directive 89/552/EEC,

— 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 …

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;

…

(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;

…'

27. Under Article 4 of Directive 98/84 ('Infringing activities')

'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.'

28. Lastly, under the heading 'Sanctions and remedies', Article 5 of Directive 98/84 provides as follows:

'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.'

B – *European Convention on the legal protection of services based on, or consisting of, conditional access*

29. Article 1 of the Convention, which comes under the 'General provisions' in Section I, makes the following provision under the heading 'Object and purpose':

'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.'

30. As part of its Section II 'Illicit activities', Article 4 of the Convention contains a number of definitions of 'offences', which are, in essence, the same as the infringing activities in Article 4 of Directive 98/84.

31. In addition, Section III of the Convention, which has the heading 'Sanctions and remedies', contains the following provisions:

'Article 5

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.

Article 6

Confiscation measures

The Parties shall adopt such appropriate measures as may be necessary to enable it 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.

Article 7

Civil proceedings

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.'

32. Section IV of the Convention, which has the heading 'Implementation and amendments', includes the following Article 8 on 'International cooperation':

'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.'

33. Lastly, reference should be made to Article 11(4) of the Convention, which is likewise part of Section IV 'Implementation and amendments' and makes the following provision regarding 'Relationship with other conventions or agreements':

'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.'

VI – Legal assessment

34. The Commission considers the contested decision to be unlawful in two respects. First, in its view, the Council founded the decision on the wrong legal basis (first plea in law, see immediately below, section A). Second, it argues that the Union has exclusive competence for the conclusion of the Convention, regardless which of the two legal bases under discussion is correct (second plea in law, see below section B). It presumes that through its action the Council had intended artificially to create a mixed agreement in order to allow the Member States an international presence alongside the European Union.

A – *Choice of correct legal basis for the contested decision (first plea in law)*

35. By the first plea in law, it is alleged that the Council erred in law in the choice of legal basis for the contested decision. In the view of the Commission and of the Parliament, competence for the signing of the Convention by the European Union stems from Article 207 TFEU and not from Article 114 TFEU, as is claimed by the Council and the Member States supporting it.

36. The parties are in dispute only as to the choice of *substantive legal basis* for the signing of the Convention by the Union. There is common ground between them, on the other hand, that *from a procedural point of view* Article 218(5) TFEU is applicable, as is clearly expressed in the contested decision. [16]

37. According to settled case-law, the choice of the legal basis for a Community measure must rest on objective factors amenable to judicial review, which include the aim and content of that measure. [17]

38. The contested decision essentially pursues two aims: first, the rules applicable within the European internal market on the legal protection of services based on, or consisting of, conditional access, as established by Directive 98/84, are to be extended beyond the borders of the Union. [18] Second, the Parties to the Convention are intended, within the framework of their respective sanctions and remedies for unlawful activities, also to make provision for the seizure and the confiscation of certain items (Article 6 of the Convention). [19]

16 — See the first citation in the preamble to the contested decision.

17 — Case C-300/89 *Commission* v *Council* [1991] ECR I-2867, paragraph 10; Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation* v *Council and Commission* [2008] ECR I-6351, paragraph 182; and Case C-130/10 *Parliament* v *Council* [2012] ECR, paragraph 42.

18 — Recital 5 in the preamble to the contested decision.

19 — See also recital 6 in the preamble to the contested decision.

39. It is clear that, in order to achieve those objectives, among other things the legislation of Parties is to be approximated (Article 1 of the Convention). The parties to the present case are in dispute, however, whether this means – from the perspective of the Union – primarily harmonisation with a view to the establishment and functioning of the European internal market, which can thus be based on Article 114 TFEU (see immediately below, section 1), or harmonisation which essentially concerns the Union's external trade relations with third countries and which should therefore be based on Article 207 TFEU (see below, section 2).

1. The inappropriateness of Article 114 TFEU as the substantive legal basis

40. It must be examined, first of all, whether the signing of the Convention, as a measure for the establishment of the internal market, may be based on Article 114 TFEU, as the Council assumed in the contested decision.

– No strict parallelism between internal and external competence

41. It should be noted, first of all, that Article 114 TFEU cannot be the correct rule defining competence for the signing of the Convention solely because the Union has already adopted a directive, namely Directive 98/84, internally on that legal basis. Contrary to the view seemingly taken by Poland, the conclusion of an international agreement does not necessarily have to have exactly the same substantive basis as the adoption of a legislative act containing the Union's internal rules on essentially the same subject. Such rigid parallelism between legal bases for internal and external action cannot be seen in the Treaties.

42. Rather, in the system established by the Treaties a distinction is drawn between the Union's internal and external competence. Since the entry into force of the Treaty of Lisbon, the Union's external competence is more clearly defined and systematised in the Treaties, as can be seen, inter alia, from the newly inserted provisions in Article 216(1) TFEU and Article 3(2) TFEU.

– Article 114 TFEU is not a legal basis for external action

43. Fundamental doubts arise specifically over the appropriateness of Article 114 TFEU as the legal basis for the conclusion of an international agreement by the Union. It is true that the wording of Article 114(1) TFEU is broad and, in its second sentence, permits in general terms the adoption of 'measures', which could theoretically include the conclusion of international agreements. However, such a reading would run counter to the purpose of Article 114 TFEU. The provision contributes to the achievement of the objectives set out in Article 26 TFEU and thus has the aim of establishing and ensuring the functioning of the internal market. It is intended to allow action by the Parliament and the Council *within* the Union.[20] This is confirmed if we consider the schematic position of Article 114 TFEU: the provision is in Part Three of the FEU Treaty, which deals with 'Union policies and internal actions', whilst 'External action by the Union' is the subject of special provisions in Part Five of the FEU Treaty.

20 — See, to the same effect, with regard to Article 48 TFEU, my Opinion of 21 March 2013 in Case C-431/11 *United Kingdom* v *Council*, pending before the Court, in particular points 47 and 48.

44. Of course, the Union can also have external competence in connection with certain of its internal policies, including where this is necessary to achieve one of the objectives set out in the Treaties, such as, here, establishing and ensuring the functioning of the internal market within the meaning of Article 26(1) TFEU. However, such external competence does not stem from Article 114 TFEU, as the Council and its interveners seem to believe, but from Article 216(1) TFEU, which has codified earlier case-law [21] since the entry into force of the Treaty of Lisbon.

45. Accordingly, it must be stated that in any event the Council erred in law when it used Article 114 TFEU as the substantive legal basis for the signing of the Convention, rather than – at least additionally – relying on Article 216(1) TFEU.

46. However, that error in law might, in itself, be regarded as a purely formal error which would not, as such, justify the annulment of the contested decision. [22] It must therefore still be examined whether the signing of the Convention can be regarded *substantively* as a measure for the establishment of the internal market within the meaning of Article 114(1) TFEU in conjunction with Article 26(1) TFEU, as the Council and the Member States supporting it insist.

– The Convention does not contribute to internal, but external harmonisation

47. At first sight, the impression might in fact be created that the Convention contributes to the internal approximation of laws in the internal market. According to Article 1, the purpose of the Convention is inter alia 'to approximate the legislation of Parties'. The Convention therefore seems to be targeted at measures which are also taken very often internally within the Union to establish and ensure the functioning of the internal market.

48. On closer inspection, however, the Union concludes the Convention not so much because it wishes to establish or strengthen its own internal market in the field of the legal protection of services based on, or consisting of, conditional access, but because it wishes to extend the legislation already existing in that field within the EU beyond the borders of the internal market to third countries in which the legal protection of services based on, or consisting of, conditional access is still partially incomplete. [23] The signing of the Convention is expressly intended to 'help to extend the application of provisions similar to those in Directive 98/84/EC beyond the borders of the Union and establish a law on services based on conditional access which would be applicable throughout the European continent'. [24]

49. The focus is thus less on establishing uniform rules in the European internal market than on attempting 'to export' the Union's internal *acquis* to third countries. In other words, the signing of the Convention does not appear to be a measure of 'internal harmonisation' within the Union, but rather a contribution to 'external harmonisation' in relation to third countries.

– The disconnection clause in Article 11(4) of the Convention

50. That impression is strengthened if we look at the disconnection clause contained in Article 11(4) of the Convention. According to that clause, in their mutual relations, Parties which are members of the European Union must not apply the Convention, but 'Community rules'.

21 — See in particular Opinion 1/76 [1977] ECR 741, especially paragraphs 3 to 7; Opinion 1/94 [1994] ECR I-5267, paragraphs 85, 88 and 89; Case C-467/98 *Commission* v *Denmark* [2002] ECR I-9519, paragraph 57; and Opinion 1/03, cited in footnote 8, paragraph 115.

22 — Case 165/87 *Commission* v *Council* [1988] ECR 5545, paragraphs 18 to 21; Joined Cases C-184/02 and C-223/02 *Spain and Finland* v *Parliament and Council* [2004] ECR I-7789, paragraphs 42 to 44; Case C-210/03 *Swedish Match* [2004] ECR I-11893, paragraph 44; see also my Opinion in Case C-94/03 *Commission* v *Council* [2006] ECR I-1, point 53; and my Opinion in Case C-431/11 *United Kingdom* v *Council*, pending before the Court, points 79 to 81.

23 — Explanatory Report on the Convention (available in French and English on the website of the Council of Europe's Treaty Office at http://www.conventions.coe.int, under heading ETS No 178), paragraphs 9 to 11.

24 — Recital 5 in the preamble to the contested decision.

51. Contrary to the view taken by the Council, such a disconnection clause may well be relevant in assessing competence to conclude an international agreement. [25]

52. In the present case, the effect of the disconnection clause in Article 11(4) of the Convention is that the majority of the rules of the Convention will not be applicable internally within the Union, because there are already 'Community rules' under Directive 98/84 which are substantively similar to those in the Convention. [26] This is acknowledged by France in particular.

53. Under those circumstances, the conclusion of the Convention by the Union cannot be regarded, first and foremost, as a measure for the approximation of the laws of its Member States in the context of the European internal market.

54. Admittedly, Article 11(4) of the Convention provides that the Member States of the European Union may not apply the rules arising from this Convention except in so far as there is 'no Community rule' governing the particular subject concerned. However, as the Council has conceded, this applies only to 'confiscation measures' within the meaning of Article 6 of the Convention (i.e. to the seizure and confiscation of certain items) and to international cooperation under Article 8 of the Convention in so far as it concerns such confiscation measures within the meaning of Article 6. It is only on these aspects that Directive 98/84 does not contain specific rules.

55. Consequently, as far as confiscation measures and the related cooperation among the Member States is concerned, the conclusion of the Convention by the Union will undoubtedly also have certain repercussions on the European internal market and supplement or at least clarify the 'Community rules' already applicable there under Directive 98/84.

56. However, it would be difficult to claim that the confiscation measures and the international cooperation to that end form the primary object of the Convention. Consequently, the fact that the Convention contains the additional provisions in Articles 6 and 8 cannot make its signing by the Union a measure for the establishment of the internal market to be based on Article 114 TFEU in conjunction with Article 216(1) TFEU. The choice of legal basis for a Union measure must be based on the main focus of its regulatory content. [27] As has already been mentioned, [28] the focus here is *not* on establishing or ensuring the functioning of the European internal market.

– The alleged effects of the Convention on the internal market

57. Irrespective of Articles 6 and 8 of the Convention, it may be that the establishment, by virtue of the Convention, of a uniform law on services based on conditional access which would be applicable throughout the European continent also has positive effects on the provision of such services within the Union, i.e. on the European internal market. If unlawful activities in respect of services based on conditional access are prevented throughout Europe, the legal and economic conditions for the provision of such services could also be improved within the Union.

25 — Opinion 1/03, cited in footnote 8, paragraph 130; see also *Commission* v *Denmark*, cited in footnote 21, paragraph 101.

26 — With regard to the similarity between the provisions of the Convention and those of the directive, see recitals 3 and 5 in the preamble to the contested decision.

27 — If examination of a measure reveals that it pursues two aims or that it has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely that required by the main or predominant aim or component (Case C-155/07 *Parliament* v *Council* [2008] ECR I-8103, paragraph 35, and Case C-130/10 *Parliament* v *Council*, cited in footnote 17, paragraph 43; see also Case C-155/91 *Commission* v *Council* [1993] ECR I-939, paragraphs 19 and 21).

28 — See above, point 49 of this Opinion.

58. These general positive effects of the Convention on the internal market are only indirect, however. They are merely knock-on effects of the Convention. Such effects are not sufficient to classify the signing of the Convention by the Union as a measure for establishing or ensuring the functioning of the internal market within the meaning of Article 114 TFEU (in conjunction with Article 216(1) TFEU). The object of such measures must genuinely be to improve the conditions for the establishment and functioning of the internal market [29] and they must have a direct effect on the functioning of the internal market. [30] That is not the case here.

– The alleged creation of uniform legal conditions ('level playing field')

59. The Council's argument that the Convention contributes to the establishment of the internal market because, by reducing disparities between the national legal orders, it helps to create uniform legal conditions ('level playing field') must also be rejected.

60. Under Article 114 TFEU, harmonisation measures with the aim of reducing legal disparities between the Member States may be taken if those disparities are such as to obstruct the fundamental freedoms and thus have a direct effect on the functioning of the internal market. [31] However, the purpose must always be to reduce legal disparities *between the Member States* of the European Union, and not to reduce legal disparities between the Member States of the European Union and third countries. In the present case, as has already been mentioned, the Convention does not contribute, first and foremost, to internal harmonisation, but primarily to external harmonisation. [32]

– Interim conclusion

61. All in all, the establishment and functioning of the European internal market are *not* therefore the focus in the signing of the Convention by the Union. Accordingly, in Article 114 TFEU the Council did not choose the correct legal basis for the contested decision.

2. The appropriateness of Article 207 TFEU as the substantive legal basis

62. As it is clear, on the basis of the statements made above, [33] that Article 114 TFEU did not constitute the appropriate legal basis for the contested decision, it must be examined, second, whether that decision, as part of the common commercial policy, should have been based on Article 207 TFEU, as the Commission and the Parliament claim.

63. Article 207(1) TFEU makes clear that the common commercial policy is not restricted to trade in goods, but also includes trade in services. Article 207(4) TFEU authorises the Council to conclude trade agreements, which may concern not least trade in audiovisual services.

29 — Case C-58/08 *Vodafone and Others* [2010] ECR I-4999, paragraph 32; see also Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, paragraph 60; and Case C-217/04 *United Kingdom* v *Parliament and Council* [2006] ECR I-3771, paragraph 42.

30 — *Vodafone and Others*, cited in footnote 29, end of paragraph 32; see also Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health and Others* [2005] ECR I-6451, paragraph 28; and Case C-380/03 *Germany* v *Parliament and Council* [2006] ECR I-11573, paragraph 37.

31 — See again the case-law cited above in footnote 30.

32 — See above, point 49 of this Opinion.

33 — See points 40 to 61 of this Opinion.

– Article 207 TFEU does not generally preclude harmonisation measures

64. As an argument against the application of Article 207 TFEU, the Council and its interveners claim, first and foremost, that the subject-matter and objective of the Convention is not to regulate the Union's external trade relations, but – as is clear from Article 1 of the Convention – merely to approximate national legislation in the field of services based on, or consisting of, conditional access.

65. This objection is not convincing.

66. Measures to approximate national legislation are certainly not precluded within the framework of the common commercial policy. Article 207(6) TFEU does prohibit, in the field of the common commercial policy, harmonisation of legislative provisions of the Member States 'in so far as the Treaties exclude such harmonisation'. However, it follows, conversely, that in all other cases the exercise of the Union's competence in the field of the common commercial policy may well lead to harmonisation of legislative provisions. This also had to be acknowledged by the Council in the procedure before the Court.

67. Article 207 TFEU can serve *a fortiori* as the legal basis for measures which do not lead to harmonisation of legislative provisions of the Member States within the Union (internal harmonisation) but, as in this case, contribute, in respect of external relations, to the approximation of the legislative provisions in the Union and in third countries (external harmonisation). The object of many modern trade agreements is precisely this kind of harmonisation: those agreements provide for the creation of uniform legal standards – if appropriate in the form of minimum standards – for certain products, activities or sectors with a view to facilitating cross-border trade. [34]

– Uniform conditions facilitate trade in services

68. The Council and the Member States supporting it nevertheless dispute that the approximation of national law sought by Article 1 of the Convention has the character of commercial policy within the meaning of Article 207 TFEU.

69. In fact, it is settled case-law that an action falls within the scope of the common commercial policy under Article 207 TFEU only if it relates specifically to international trade in goods or services 'in that it is essentially intended to promote, facilitate or govern trade and has *direct and immediate* effects on trade in the products concerned'. [35]

70. The Council and its interveners are correct in their view that the Convention contains only one provision which relates expressly to trade, namely Article 4(b), which prohibits the importation of illicit devices for commercial purposes.

71. Contrary to the view taken by the Council and by the Member States supporting it, however, this does not mean that the Convention would otherwise not affect trade between the Union and third countries. As the Commission has rightly stated, the Convention as a whole serves the purpose of facilitating the provision of services based on, or consisting of, conditional access, including and specifically in relations between the Union and third countries.

34 — That is the case, for example, with the Agreement on Trade Related Aspects of Intellectual Property Rights, which applies within the framework of the World Trade Organisation (WTO) ('TRIPS Agreement', OJ 1994 L 336, p. 214); see in particular Part II of that Agreement.

35 — Case C-281/01 *Commission* v *Council* [2002] ECR I-12049, end of paragraph 40 and end of paragraph 41; Case C-347/03 *Regione autonoma Friuli-Venezia Giulia and ERSA* [2005] ECR I-3785, paragraph 75; and Case C-411/06 *Commission* v *Parliament and Council* [2009] ECR I-7585, paragraph 71.

72. The Convention appears to be part of a common policy of all its Parties aimed at the protection of services based on, or consisting of, conditional access. [36] As has already been mentioned, the Convention is intended to extend to third countries the standards for the legal protection of those services which already apply in any case within the Union, so that a law on services based on conditional access which would be applicable throughout the European continent can be established. [37]

73. In this way, uniform legal conditions ('level playing field') for the provision of those services are created throughout Europe, both within and outside the European internal market.

74. First, it is thus made easier for an undertaking established in the European Union to provide its services in the field of services based on, or consisting of, conditional access outside the European internal market, in other Member States of the Council of Europe. Second, it is made more difficult for undertakings and persons established in Member States of the Council of Europe to disrupt or render less attractive the provision of such services outside the European Union through unauthorised access. If action is taken against offences according to uniform legal standards throughout the European continent, it will be more difficult than previously for the perpetrators of such activities still to find 'havens' in Europe, which seem to have existed thus far in some Member States of the Council of Europe outside the European Union. [38]

75. The Convention therefore not only makes it easier for undertakings domiciled in the European internal market lawfully to provide services in third countries, but also means that the unlawful practices directed against those services ('hacking') which originate in third countries can be combated more effectively than before.

76. This will remove barriers to trade in relations between the Union and third countries based on discrepancies in the national legal orders of the Parties. The fact that this concerns barriers to trade which bear no relation to the provision of the services concerned as such, but are connected with the (previously inadequate) legal protection of those services in many third countries does not – contrary to the opinion taken by Sweden – militate against the application of Article 207 TFEU. Barriers to trade which result from deficient legal protection of goods or services in third countries also fall within the scope of a modern commercial policy and can thus be the subject of measures under Article 207 TFEU. [39]

77. Contrary to the view taken by the Council and its interveners, an improvement in the legal protection of those services is certainly not merely secondary and indirect for international trade. Rather, conditions which are as uniform and reliable as possible are now of considerable importance to external trade in many areas, especially, where complex or expensive goods or services are concerned, the production or distribution of which depends largely on intellectual property or creative efforts.

78. This is precisely the case with the audiovisual services and information society services at issue here. As is expressly recognised in the Preamble to the Convention, unlawful access threatens the economic viability of the organisations providing broadcasting and information society services and may affect the diversity of programmes and services offered to the public. [40]

36 — Seventh recital in the preamble to the Convention.

37 — Recital 5 in the preamble to the contested decision.

38 — As the Commission states in paragraph 9 of each of its two Proposals for Council Decisions (cited above in footnotes 10 and 11), 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, given that their legal system does not provide for sanctions against this very specific hacking activity.

39 — See again the TRIPS Agreement, in particular Part II.

40 — Sixth recital in the preamble to the Convention; see also paragraphs 2 and 3 of the Explanatory Report on the Convention.

79. Accordingly, it cannot be denied that the exportation, through the Convention, to European third countries of legal standards applying within the European internal market genuinely appears to be a commercial policy measure from the perspective of the Union.

– Recourse may be had to Article 207 TFEU even where judicial cooperation in civil and criminal matters is affected only marginally

80. The Council and some of its interveners – namely Sweden and Poland – argue that the provisions in Articles 6 and 8 of the Convention on confiscation measures and the related international cooperation should not be classified, thematically, under common commercial policy, but under judicial cooperation and thus the area of freedom, security and justice, with the result that the signing of the Convention cannot be based on Article 207 TFEU.

81. That objection is not convincing.

82. In isolation, confiscation measures and the related international cooperation may indeed be classified under the policy area of judicial cooperation in civil and criminal matters. However, as has already been mentioned,[41] the confiscation measures and the related international cooperation here are not the primary object of the Convention. Because the focus of the Convention is in the area of commercial policy, the signing of the Convention as a whole must be based solely on Article 207 TFEU.[42] Recourse to other legal bases, such as Article 83(2) TFEU, is not permitted.

83. This finding is also not called into question by Protocols No 21[43] and No 22[44] to the EU Treaty and to the FEU Treaty. These two Protocols contain rules on the position of the United Kingdom, Ireland and Denmark in respect of the area of freedom, security and justice which confer certain special rights on those three Member States.

84. The material scope of these special rules is expressly limited to the area of freedom, security and justice. Furthermore, as exceptions, they must be given a strict interpretation. It is not the spirit and purpose of Protocols No 21 and No 22 to give the United Kingdom, Ireland and Denmark free discretion as regards participation in measures adopted by the Union institutions and the binding effect on them in other areas of EU law, in particular in the common commercial policy (or in the internal market).[45]

85. The effect of Protocols No 21 and No 22 cannot be to allow a departure from the generally recognised rules on the choice of the correct legal basis for a Union measure. Those rules, which are ultimately based on the system of the Treaties as a whole, include in particular the principle that the choice of legal basis for a Union measure must be based on the main focus of its regulatory content, even though it may also include, marginally, provisions which may affect the area of freedom, security and justice.[46]

41 — See above, point 56 of this Opinion.

42 — See the case-law cited above in footnote 27.

43 — Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice.

44 — Protocol on the position of Denmark.

45 — See my Opinion in Case C-431/11 *United Kingdom* v *Council*, cited in footnote 22, points 73 and 74.

46 — See the case-law cited above in footnote 27.

86. Nor can the procedural peculiarities under Protocols No 21 and No 22 [47] be applied to areas of EU law other than the area of freedom, security and justice. It is not procedures that define the legal basis of a measure but the legal basis of a measure that determines the procedures to be followed in adopting that measure. [48]

87. Consequently, the United Kingdom, Ireland and Denmark may not, in respect of a measure whose focus is in the area of the common commercial policy, rely on their special rights under Protocols No 21 and No 22, and the Council is not required, in adopting such a measure, to have regard to those special rights, including in respect of individual aspects or elements of that measure.

3. Interim conclusion

88. All in all, the correct legal basis for the contested decision would not therefore have been Article 114 TFEU, but Article 207 TFEU. The signing of the Convention as a whole by the Union can be based on Article 207 TFEU. Consequently, the first plea in law raised by the Commission must be upheld.

B – *The Union's exclusive competence for the conclusion of the Convention (second plea in law)*

89. By its second plea in law, the Commission objects to the Council's legal opinion according to which the Convention 'should be … signed both by the Union and its Member States', [49] i.e. as a mixed agreement. In the view of the Commission and the Parliament, such an approach infringes the Union's exclusive competence to conclude the Convention. The Council and the Member States supporting it take the opposite point of view.

1. Preliminary question: Is the second plea in law ineffective ('*inopérant*')?

90. At the hearing before the Court, the Council claimed that the Commission's second plea in law is ineffective (French: '*inopérant*'). In the Council's view, the contested decision regulates only the signing of the Convention by the Union and does not make any binding provision as to whether, in addition to the Union, the Member States must or may also be Parties to the Convention. The Council infers that the Commission's second plea in law, even if it should be well-founded, could not result in the annulment of the contested decision.

91. This objection is unfounded.

92. It is true that the operative part of the contested decision does in fact confine itself to authorising the signing of the Convention on behalf of the Union (cf. Article 1 of the decision). The legal and practical scope of such authorisation is completely different, however, depending on whether the Convention is to be signed solely by the Union or, as a mixed agreement, by both the Union and its Member States.

47 — Protocol No 21 concerns the need for an express 'opt-in' for the United Kingdom and Ireland, whilst Protocol No 22 relates to the need for a declaration by Denmark that it wishes to implement a measure in national law.

48 — Case C-130/10 *Parliament* v *Council*, cited in footnote 17, paragraph 80.

49 — Recital 6 in the preamble to the contested decision.

93. In the present case, the Council clearly expressed, in the preamble to the contested decision, its legal opinion that Article 6 of the Convention and parts of Article 8 of the Convention are not covered by the Union's external competence and that, consequently, the Convention should be concluded as a mixed agreement.[50] This means that the internal Union authorisation to sign the Convention, as laid down by the Council in Article 1 of the contested decision, does not extend to Articles 6 and 8 of the Convention with the result that, in addition to the signing of the Convention on behalf of the Union, it must also be signed by all its Member States.[51]

94. The second plea in law therefore essentially raises the question whether the contested decision is unlawful because in that decision the authorisation granted by the Council did not extend far enough. This is a legal question which the Court is entitled to examine in the context of an action for annulment. If it transpires that the Convention falls within the Union's exclusive competence, the contested decision must be annulled because the extent and scope of the authorisation granted by the Council was less than required by law.

2. Substantive assessment of the second plea in law

95. The second plea in law is well founded if the Union has exclusive competence for the conclusion of the Convention.

96. Such exclusive competence may stem, first, from Article 3(1)(e) TFEU (see immediately below, section a) and, second, from Article 3(2) TFEU (see below, section b). The existence of such competence excludes any concurrent competence on the part of Member States.[52] Rather, the Union's exclusive competence implies a general prohibition on action by the Member States (second half of Article 2(1) TFEU). Consequently, any voluntary participation by the Member States alongside the Union as contracting parties to an international agreement is also precluded.[53] At international level, the presence of Member States on their own behalf alongside the Union may influence the outcome of negotiations and also call into question the Union's exclusive external competence to conclude the convention in question.

(a) Exclusive competence under Article 3(1)(e) TFEU

97. As was shown above,[54] the Convention in its entirety should be based on Article 207 TFEU and therefore falls within the scope of the common commercial policy. Consequently, the Union has exclusive external competence for the conclusion of the Convention (Article 3(1)(e) TFEU).

98. For this reason the second plea in law raised by the Commission must be upheld.

50 — Recital 6 in the preamble to the contested decision.

51 — Nevertheless, it may follow, from the perspective of international law, that the Union and its Member States are each bound by the Convention in its entirety, including those elements which do not fall within their respective internal Union competence.

52 — Opinion 1/75 [1975] ECR 1355, 1363 et seq., and Opinion 2/91 [1993] ECR I-1061, paragraph 8.

53 — See also my Opinion of 26 March 2009 in Case C-13/07 *Commission* v *Council* ('*Vietnam*'), point 53.

54 — See my statements on the first plea in law in points 35 to 88 of this Opinion.

(b) In the alternative: exclusive competence under Article 3(2) TFEU

99. In the event that, contrary to my suggestion, the Court did not classify the Convention as coming under the common commercial policy (Article 207 TFEU), but regarded it as a harmonisation measure for the establishment of the European internal market (Article 114 TFEU), it must be examined, in the alternative, whether or not the Union nevertheless has exclusive external competence to conclude the Convention. The Commission and the Parliament argue that such exclusive competence stems from Article 3(2) TFEU, whilst the Council and the Member States supporting it vehemently deny that the conditions governing the application of that provision are satisfied.

– (i) Preliminary remark

100. Consideration needs to be given here only to the third variant of Article 3(2) TFEU, according to which the Union has exclusive competence for the conclusion of an international agreement 'in so far as its conclusion may affect common rules or alter their scope'. The word 'may' in Article 3(2) TFEU emphasises the fact that the scope of common rules does not actually have to be affected or altered, rather it is sufficient that an international agreement *is capable* of producing such effects, i.e. the agreement must entail the *specific risk* of the scope of common rules being affected or altered.

101. In this regard, it should be noted, first of all, that the risk of common rules being affected cannot be ruled out solely because – as is the case here[55] – the substance of the rules of an international agreement is largely similar to that of the provisions existing within the Union.[56] Even where they are substantively similar, the discretion enjoyed by the Union legislature is reduced where commitments are entered into vis-à-vis third countries under international law. This situation is also not affected, incidentally, by a disconnection clause like Article 11(4) of the Convention, but such a clause may even be regarded as an indicator of the risk of common rules being affected.[57]

102. Accordingly, in the present case the Council also concedes that a risk of common rules being affected within the meaning of Article 3(2) TFEU – and therefore the Union's exclusive competence – exists wherever the Convention and Directive 98/84 are essentially similar. This is the case above all with the definitions of the meanings of 'protected service', 'conditional access', 'conditional access device' and 'illicit device'.[58] The same holds for the definition of the activities which are to be prohibited as 'offences'.[59]

103. It is fiercely disputed between the parties, however, whether the Union also has such exclusive competence for the conclusion of agreements within the meaning of Article 3(2) TFEU in respect of the confiscation measures under Article 6 of the Convention, and in respect of international cooperation under Article 8 of the Convention in so far as it concerns confiscation measures within the meaning of Article 6. In the view of the Council, these two points in particular make it necessary to regard the Convention as a mixed agreement.[60]

104. In this connection, it must be considered, first, whether Articles 6 and 8 of the Convention entail a specific risk of Article 5(1) of Directive 98/84 being affected (see immediately below, section ii), and, second, whether the Convention as a whole concerns an area which is already covered to a large extent by Community rules (see below, section iii).

55 — In the preamble to the contested decision the Council states that the provisions of the Convention and of the directive are 'almost identical' (recital 3) or at least 'similar' (recital 5).

56 — Opinion 2/91, cited in footnote 52, paragraph 26, and *Commission* v *Denmark*, cited in footnote 21, paragraph 82.

57 — *Commission* v *Denmark*, cited in footnote 21, paragraph 130.

58 — See, on the one hand, Article 2 of the directive and, on the other, Article 2 of the Convention.

59 — See, on the one hand, Article 4 of the directive and, on the other, Article 4 of the Convention.

60 — To this effect, recital 6 in the preamble to the contested decision.

– (ii) No risk of Article 5(1) of the directive being affected by Articles 6 and 8 of the Convention

105. The Commission and the Parliament take the view that the confiscation measures mentioned in Article 6 of the Convention are already regulated as sanctions in Article 5(1) of Directive 98/84. The Union therefore also has exclusive competence within the meaning of Article 3(2) TFEU for this part of the Convention.

106. This claim is unfounded.

107. As the Council and the Member States supporting it have convincingly argued, Article 5(1) of Directive 98/84 contains only a very general and rudimentary obligation for the Member States to provide for sanctions which must 'be effective, dissuasive and proportionate to the potential impact of the infringing activity.' The Member States enjoy a broad discretion in laying down appropriate sanctions in their national legal orders. These *may* include the seizure and confiscation of items,[61] but this is *not mandatory* under the directive.[62]

108. Ultimately, the Member States only take a joint measure to fulfil their duty under Article 5(1) of Directive 98/84 to provide for effective, dissuasive and proportionate sanctions where they – on their own or with the participation of third countries – conclude an international agreement which prescribes mandatory confiscation measures, as is the case with Article 6 of the Convention. The Member States then simply exercise the discretion which they enjoy as EU law stands at present and, moreover, contribute to the attainment of the objectives of Directive 98/84.

109. Against that background, it is not clear to what extent Article 6 and Article 8 of the Convention might specifically be capable of affecting the provision on sanctions in Article 5(1) of Directive 98/84 or of altering its scope.

– (iii) An area which is already covered to a large extent by Community rules

110. Nevertheless, even if Articles 6 and 8 of the Convention do not per se entail a risk of Article 5(1) of Directive 98/84 being affected, the Convention as a whole may still fall within the Union's exclusive competence. The Union must be considered to have exclusive competence to conclude an agreement, according to settled case-law,[63] wherever it concerns an area which is already covered to a large extent by Community rules.

– Relevance of previous case-law in connection with Article 3(2) TFEU

111. The Council and some of its interveners raise the general objection that this case-law is no longer relevant following the entry into force of the Treaty of Lisbon because in Article 3(2) TFEU there is a narrower framing of the Union's exclusive competence in the area of the external action. This objection must be rejected, however. There is absolutely nothing to suggest that the authors of the Treaty of Lisbon wished to make such a restriction. In addition, in response to my enquiry at the hearing before the Court, the Council failed to provide any specific evidence in support of its view, for example from the preparatory work for the European Convention on the Treaty establishing a Constitution for Europe or from the preparatory work for the Treaty of Lisbon.

61 — Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019, paragraph 31; similarly, Case C-177/95 *Ebony Maritime and Loten Navigation* [1997] ECR I-1111, paragraphs 32 and 33.

62 — See also recital 23 in the preamble to Directive 98/84, in which the seizure of illicit devices is even categorised under 'other sanctions' to which the directive is 'without prejudice'.

63 — Opinion 2/91, cited in footnote 52, paragraphs 25 and 26; *Commission* v *Denmark*, cited in footnote 21, paragraphs 81 and 82; and Opinion 1/03, cited in footnote 8, paragraph 126.

112. In my view, the third variant of Article 3(2) TFEU constitutes a codification of the Court's previous case-law of the Courts on the Union's exclusive competence for the conclusion of agreements according to the 'ERTA doctrine'.[64] This was also expressly acknowledged by France at the hearing before the Court.

113. Consequently, the interpretation and application of the third variant of Article 3(2) TFEU should have regard to previous case-law. It is therefore still sufficient, in order to accept that the Union has exclusive competence for the conclusion of an international agreement within the meaning of the third variant of Article 3(2) TFEU, that it concerns an area which is already covered to a large extent by Community rules.

– Protocol No 25 does not preclude the application of previous case-law

114. No different conclusion can be drawn from Protocol No 25 to the EU Treaty and to the FEU Treaty,[65] which provides that the scope of the exercise of a shared competence by the Union 'only covers those elements governed by the Union act in question and therefore does not cover the whole area'.

115. According to its wording, Protocol No 25 relates only to the exercise of the Union's *shared competence* within the meaning of Article 2(2) TFEU and not to the scope of its *exclusive competence* within the meaning of Article 2(1) TFEU. There is *a fortiori* no evidence to suggest that with that Protocol the authors of the Treaty of Lisbon specifically intended to restrict, whether directly or indirectly, the scope of the Union's exclusive competence to conclude agreements under the third variant of Article 3(2) TFEU. An argument against such a restriction is not least the fact that there is no reference to Article 3(2) TFEU in Protocol No 25.

116. It should also be stressed that exclusive competence under the third variant of Article 3(2) TFEU is not linked primarily to the mere existence or non-existence of common rules on a certain subject, but to the risk of those common rules being affected or their scope being altered. Such a risk can arise where an international agreement contains provisions whose substance is closely connected with Community rules which already to a large extent govern the subject in question in EU law. Such Community rules can be adversely affected by an international agreement even if the Community rules and the international agreement do not regulate precisely the same 'elements' (within the meaning of the Protocols No 25).

117. Accordingly, the criterion, which has been developed in case-law, of an area which is already covered to a large extent by Community rules has not lost any of its importance, following the entry into force of the Treaty of Lisbon, for establishing the Union's exclusive competence for the conclusion of agreements under the third variant of Article 3(2) TFEU.

– Existence of an area which is already covered to a large extent by Community rules

118. It must still be examined in particular whether in the present case the area covered by the Convention is an area which is already covered to a large extent by Community rules. The assessment must be based not only on the scope of the rules in question but also on their nature and content. It is also necessary to take into account not only the current state of EU law in the area in question but also its future development, insofar as that is foreseeable at the time of that analysis.[66]

64 — See the case-law cited above in footnote 8.

65 — Protocol on the exercise of shared competence.

66 — Opinion 1/03, cited in footnote 8, paragraph 126.

119. The area to which the Convention relates is the legal protection of services based on, or consisting of, conditional access.

120. The Union legislature has already harmonised that area to a large extent within the Union by adopting Directive 98/84. It certainly did not merely adopted minimum standards, but made many aspects of that area subject to full harmonisation. In particular, it introduced uniform definitions throughout the European Union (Article 2 of the directive) and laid down uniform rules throughout the European Union governing the activities which are to be prohibited within the internal market (Article 4 of the directive). There is also a – certainly very general – Community rule on sanctions and remedies (Article 5 of the directive).

121. The fact that in Article 5(1) of Directive 98/84 the Union legislature allowed the Member States broad discretion in the choice of sanctions does not militate against the assumption that the area of the legal protection of services based on, or consisting of, conditional access, *when seen as a whole*, is already governed to a large extent by EU law.

122. From this perspective, the conditions laid down in the third variant of Article 3(2) TFEU, as clarified in case-law,[67] are thus satisfied

123. Consequently, the Union enjoys exclusive competence for the conclusion of the Convention under the third variant of Article 3(2) TFEU because the Convention concerns an area which is already covered to a large extent by Community rules. For that reason too, the second plea in law raised by the Commission must be upheld.

C – *Summary*

124. Both pleas in law raised by the Commission are therefore successful and each of them in itself justifies the annulment of the contested decision (Article 263(1) and (2) TFEU in conjunction with the first paragraph of Article 264 TFEU).

D – *Maintenance of the effects of the contested decision*

125. If the Court annuls the contested decision, it should maintain its effects pursuant to the second paragraph of Article 264 TFEU pending the adoption of a new decision on the correct legal basis. In this way any doubt at international level regarding the mandate of the Union's authorised representatives to sign the Convention will be avoided, the legal effects of any previous signing cannot be called into question, and there will be no delays in the ratification process.

126. Moreover, on the basis of their duty of sincere cooperation with the Union (Article 4(3) TEU), the Member States must refrain from taking any measure which could undermine the Union's exclusive competence.[68] This means that Member States which have not yet signed the Convention must continue to refrain from doing so and that Member States which have already signed the Convention must not ratify it.

67 — See the references above in footnote 63.

68 — See Case C-266/03 *Commission* v *Luxembourg* [2005] ECR I-4805, paragraphs 57 to 67, also paragraphs 41 to 43; and Case C-433/03 *Commission* v *Germany* [2005] ECR I-6985, paragraphs 60 to 73, also paragraphs 43 to 45.

VII – Costs

127. Under Article 138(1) of the Rules of Procedure of 25 September 2012, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since, according to my proposed solution, the Council has been unsuccessful and the Commission has applied for costs, the Council must be ordered to pay the costs. On the other hand, France, the Netherlands, Poland, Sweden, the United Kingdom and the European Parliament, as interveners, must each bear their own costs in accordance with Article 140(1) of the Rules of Procedure.

VIII – Conclusion

128. In the light of the foregoing considerations, I propose that the Court should:

(1) annul Council Decision 2011/853/EU of 29 November 2011;

(2) order that the effects of the annulled decision be maintained pending the adoption of a new decision on the correct legal basis;

(3) order the Council of the European Union to pay its own costs and the costs incurred by the European Commission;

(4) order the French Republic, the Kingdom of the Netherlands, the Republic of Poland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland and the European Parliament to bear their own costs.