



Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

4 September 2014*

(Action for annulment — External action of the European Union — International agreements — Protection of neighbouring rights of broadcasting organisations — Negotiations for a Convention of the Council of Europe — Decision of the Council and the Representatives of the Governments of the Member States authorising the joint participation of the Union and its Member States in the negotiations — Article 3(2) TFEU — Exclusive external competence of the Union)

In Case C-114/12,

ACTION for annulment under Article 263 TFEU, brought on 1 March 2012,

European Commission, represented by F. Castillo de la Torre, P. Hetsch, L. Gussetti and J. Samnadda, acting as Agents, with an address for service in Luxembourg,

applicant,

supported by:

European Parliament, represented by R. Passos and D. Warin, acting as Agents,

intervener,

v

Council of the European Union, represented by H. Legal, J.-P. Hix, F. Florindo Gijón and M. Balta, acting as Agents,

defendant,

supported by:

Czech Republic, represented by M. Smolek, E. Ruffer, D. Hadroušek and J. Králová, acting as Agents,

Federal Republic of Germany, represented by T. Henze, B. Beutler and N. Graf Vitzthum, acting as Agents,

Kingdom of the Netherlands, represented by C. Wissels and J. Langer, acting as Agents,

Republic of Poland, represented initially by M. Szpunar, B. Majczyna, M. Drwięcki and E. Gromnicka, then by the latter three persons, acting as Agents,

* Language of the case: English.

United Kingdom of Great Britain and Northern Ireland, represented by C. Murrell, acting as Agent,
assisted by R. Palmer, Barrister,

interveners,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts (Rapporteur), Vice-President, R. Silva de Lapuerta, M. Ilešič, L. Bay Larsen, E. Juhász, A. Borg Barthet, C.G. Fernlund and J.L. da Cruz Vilaça, Presidents of Chambers, A. Rosas, J. Malenovský, A. Prechal, E. Jarašiūnas, C. Vajda and S. Rodin, Judges,

Advocate General: E. Sharpston,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 24 September 2013,

after hearing the Opinion of the Advocate General at the sitting on 3 April 2014,

gives the following

Judgment

- 1 By its application, the European Commission seeks the annulment of the Decision of the Council and the Representatives of the Governments of the Member States meeting within the Council on the participation of the European Union and its Member States in negotiations for a Convention of the Council of Europe on the protection of the rights of broadcasting organisations, of 19 December 2011 ('the contested decision').

Legal context

International law

- 2 The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, done at Rome on 26 October 1961 ('the Rome Convention'), established, in Article 13, for the first time on an international scale, rights related to copyright for broadcasting organisations as regards the fixation of their broadcasts. That convention, to which the European Union is not a party, also laid down, in Article 1, the principle, referred to in subsequent conventions on neighbouring rights, that the protection afforded to holders of such rights must not affect an author's right over works transmitted within the framework of a broadcast, registered by record producers or performed by performers.
- 3 The Agreement on Trade-Related Aspects of Intellectual Property Rights, constituting Annex 1C to the Agreement establishing the World Trade Organisation (WTO), signed at Marrakesh on 15 April 1994 and approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1), also regulates, in Article 14(3), (5) and (6), the neighbouring rights of broadcasting organisations. Like the Rome Convention, it concerns exclusively traditional broadcasting by wireless means.

- 4 For their part, the World Intellectual Property Organisation (WIPO) Copyright Treaty and the WIPO Performances and Phonograms Treaty, adopted in Geneva on 20 December 1996 and approved on behalf of the European Community by Council Decision 2000/278/EC of 16 March 2000 (OJ 2000 L 89, p. 6), strengthen the rights of authors, producers of phonograms and performers in the context of new digital technologies, but not the rights of broadcasting organisations.

EU law

Directive 92/100/EEC, codified by Directive 2006/115/EC

- 5 Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 1992 L 346, p. 61) governed, for the first time in EU law, the neighbouring rights of broadcasting organisations. That directive was codified and repealed by Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 2006 L 376, p. 28).

- 6 Under the heading ‘Fixation right’, Article 7 of Directive 2006/115 provides in paragraphs 2 and 3:

‘2. Member States shall provide for broadcasting organisations the exclusive right to authorise or prohibit the fixation of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

3. A cable distributor shall not have the right provided for in paragraph 2 where it merely retransmits by cable the broadcasts of broadcasting organisations.’

- 7 Under the heading ‘Broadcasting and communication to the public’, Article 8 of Directive 2006/115 provides in paragraph 3:

‘Member States shall provide for broadcasting organisations the exclusive right to authorise or prohibit the rebroadcasting of their broadcasts by wireless means, as well as the communication to the public of their broadcasts if such communication is made in places accessible to the public against payment of an entrance fee.’

- 8 Under the heading ‘Distribution right’, Article 9 of Directive 2006/115 provides:

‘1. Member States shall provide the exclusive right to make available to the public, by sale or otherwise, the objects indicated in points (a) to (d), including copies thereof, hereinafter “the distribution right”:

...

(d) for broadcasting organisations, in respect of fixations of their broadcasts as set out in Article 7(2).

2. The distribution right shall not be exhausted within the Community in respect of an object as referred to in paragraph 1, except where the first sale in the Community of that object is made by the rightholder or with his consent.

3. The distribution right shall be without prejudice to the specific provisions of Chapter I, in particular Article 1(2).

4. The distribution right may be transferred, assigned or subject to the granting of contractual licences.’

- 9 Article 10 of Directive 2006/115 defines the cases in which Member States may provide for limitations to those various rights.
- 10 Under Article 12 of that directive, '[p]rotection of copyright-related rights under this Directive shall leave intact and shall in no way affect the protection of copyright.'

Directive 93/83/EEC

- 11 The neighbouring rights of broadcasting organisations are also governed by Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ 1993 L 248, p. 15).
- 12 Under the heading 'Definitions', Article 1 of that directive provides in paragraph 2(a):
- 'For the purpose of this Directive, "communication to the public by satellite" means the act of introducing, under the control and responsibility of the broadcasting organization, the programme-carrying signals intended for reception by the public into an uninterrupted chain of communication leading to the satellite and down towards the earth.'
- 13 Article 4(1) of the same directive refers to the relevant provisions of Directive 92/100 (which was subsequently codified and repealed by Directive 2006/115) concerning the protection of neighbouring rights of broadcasting organisations for the purposes of communication to the public by satellite. Article 4(2) of Directive 93/83 states that, for the purposes of paragraph 1, 'broadcasting by wireless means' in Directive 92/100 is to be understood as including communication to the public by satellite.
- 14 Article 5 of Directive 93/83 provides that '[p]rotection of copyright-related rights under this Directive shall leave intact and shall in no way affect the protection of copyright.'

Directive 2001/29/EC

- 15 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10) also regulates the neighbouring rights of broadcasting organisations.
- 16 Under the heading 'Reproduction right', Article 2 of Directive 2001/29/EC states:
- 'Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:
- ...
- (e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.'
- 17 Under the heading 'Right of communication to the public of works and right of making available to the public other subject-matter', Article 3 of Directive 2001/29 provides:

'1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:

...

(d) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.

3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.'

18 Article 5 of the same directive specifies the cases in which Member States may provide for exceptions or limitations to the reproduction right.

19 Article 6 of Directive 2001/29 governs the '[o]bligations as to technological measures'.

20 Article 7 of that directive governs the '[o]bligations concerning rights-management information'.

21 Article 8 of the same directive, which is entitled 'Sanctions and remedies', provides:

'1. Member States shall provide appropriate sanctions and remedies in respect of infringements of the rights and obligations set out in this Directive and shall take all the measures necessary to ensure that those sanctions and remedies are applied. The sanctions thus provided for shall be effective, proportionate and dissuasive.

2. Each Member State shall take the measures necessary to ensure that rightholders whose interests are affected by an infringing activity carried out on its territory can bring an action for damages and/or apply for an injunction and, where appropriate, for the seizure of infringing material as well as of devices, products or components referred to in Article 6(2).

3. Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.'

Directive 2004/48/EC

22 Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ 2004 L 157, p. 45, and corrigendum OJ 2004 L 195, p. 16) states, in Article 1, that it 'concerns the measures, procedures and remedies necessary to ensure the enforcement of intellectual property rights'.

23 According to Article 2(3)(c) of that directive, the directive is not to affect 'any national provisions in Member States relating to criminal procedures or penalties in respect of infringement of intellectual property rights'.

Directive 2006/116/EC

- ²⁴ Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (OJ 2006 L 372, p. 12), which codified and repealed Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights (OJ 1993 L 290, p. 9), states, in Article 3(4):

‘The rights of broadcasting organisations shall expire 50 years after the first transmission of a broadcast, whether this broadcast is transmitted by wire or over the air, including by cable or satellite.’

Background to the dispute

The negotiations for a Convention of the Council of Europe on the neighbouring rights of broadcasting organisations

- ²⁵ On 11 September 2002, the Council of Europe adopted Recommendation Rec(2002)7 on enhancing the protection of neighbouring rights of broadcasting organisations (‘the 2002 Recommendation’).
- ²⁶ By decision of 20 February 2008, the Committee of Ministers of the Council of Europe instructed the Steering Committee on Media and New Communication Services to assess the feasibility of reinforcing such rights. On 25 September 2008, the Ad-Hoc Stocktaking Group on the protection of neighbouring rights of broadcasting organisations produced a memorandum on a possible Convention of the Council of Europe on that protection (‘the 2008 Memorandum’).
- ²⁷ That memorandum contains an Appendix entitled ‘List of possible issues to be considered in the preparation of a new legal instrument’, with the following content:

I. Introductory and framework provisions

- Relation to other conventions and treaties
 - Existing obligations
 - Future obligations
- Relation to protection of copyright or related rights in program material
- Definitions
- Points of attachment
- National treatment

II. Substance of protection

- Right of fixation
- Right of reproduction
- Right of retransmission

- Right of making available
- Right of communication to the public
- Right of distribution
- Protection in relation to pre-broadcast programme-carrying signals
- Limitations and exceptions
- Term of protection
- Obligations concerning technological measures
- Obligations concerning rights management information
- Enforcement of rights

III. Final provisions’.

- 28 In the light of the 2008 Memorandum, the Steering Committee on Media and New Communication Services decided, on 27 May 2009, to approve the Terms of Reference of the Ad-Hoc Advisory Group on the protection of neighbouring rights of broadcasting organisations, and then, at its meeting of 20 to 23 October 2009, it decided to work on drawing up a Convention of the Council of Europe relating to that protection.
- 29 Prior to the formation of the group, a consultation meeting took place on 28 and 29 January 2010 in order to prepare the future work of that same group. That meeting gave rise to the preparation of a report (‘the 2010 Report’).

The contested decision

- 30 On 9 February 2011, the Commission submitted to the Council of the European Union a recommendation for a Council decision authorising it to negotiate the future Convention of the Council of Europe on the protection of neighbouring rights of broadcasting organisations.
- 31 On 19 December 2011, the Council and the Representatives of the Governments of the Member States meeting in the Council adopted the contested decision, which was notified to the Commission on 21 December 2011.
- 32 The contested decision provides as follows:

‘The Council ... and the Representatives of the Governments of the Member States ... meeting within the Council,

Having regard to the [TFEU], and in particular Article 218(3) and (4) thereof,

Having regard to the recommendation from the ... Commission,

Whereas:

- (1) The Commission should be authorised to participate, on behalf of the Union, in the negotiations for a Convention of the Council of Europe on the protection of the rights of broadcasting organisations as regards matters falling within the Union's competence and in respect of which the Union has adopted rules.
- (2) The Member States should participate on their own behalf in those negotiations only in so far as matters that arise in the course of the negotiations fall within their competence. With a view to ensuring the unity of the external representation of the Union, the Member States and the Commission should cooperate closely during the negotiation process,

have adopted this decision:

Article 1

1. The Commission is hereby authorised to participate in the negotiations for a Convention of the Council of Europe on the protection of the rights of broadcasting organisations and to conduct these negotiations on behalf of the Union as regards matters falling within the Union's competence and in respect of which the Union has adopted rules, in consultation with the Intellectual Property Working Party (Copyright) (the "special committee").
2. The Commission shall conduct the negotiations in question in accordance with the negotiating directives set out in the Annex to this Decision and/or agreed positions of the Union established specifically for the purposes of these negotiations within the special committee.
3. Where the subject-matter of the negotiations falls within Member States' competence, the Presidency shall fully participate in the negotiations and shall conduct them on behalf of the Member States on the basis of a prior agreed common position. Where an agreed common position cannot be reached, the Member States shall be entitled to speak and vote on the matter in question independently, without prejudice to paragraph 4.
4. The Commission and the Member States shall cooperate closely during the negotiating process, with a view to aiming for unity in the international representation of the Union and its Member States.
5. The Commission and/or the Presidency shall make sure that documents relating to the negotiations are circulated to the Member States in due time. They shall report to the Council and/or to the special committee in an open and transparent way on the outcome of the negotiations before and after each negotiating session and, where appropriate, on any problems that may arise during the negotiations.

Article 2

This Decision is addressed to the Commission.'

³³ The Annex to the Decision sets out the negotiating directives as follows:

- '1. The Commission shall ensure that the draft agreement for the protection of the rights of broadcasting organisations proposed by the Council of Europe contains appropriate provisions enabling the ... Union to become a Contracting Party thereto.

2. The Commission will conduct the negotiations in such a way as to ensure that the planned provisions are compatible with Directive 2006/115 ..., Directive 2006/116 ..., Directive 93/83 ... and Directive 2001/29 ... and with the commitments assumed by the ... Union and its Member States within the framework of the [Agreement on Trade-Related Aspects of Intellectual Property Rights] under the auspices of the WTO.
3. These negotiating directives may be adapted in line with progress made in the course of negotiations.'

34 As set out in a statement relating to the adoption of the contested decision, the Commission, throughout the procedure leading to its adoption, had maintained that the EU has exclusive competence in the matter and opposed the adoption of a 'hybrid act' by the Council and the Representatives of the Governments of the Member States.

Forms of order sought by the parties and the procedure before the Court

- 35 The Commission claims that the Court should annul the contested decision and order the Council to pay the costs.
- 36 The Council contends that the Court should dismiss the action and order the Commission to pay the costs.
- 37 By order of the President of the Court of 14 August 2012, the Czech Republic, the Federal Republic of Germany, the Kingdom of the Netherlands, the Republic of Poland and the United Kingdom of Great Britain and Northern Ireland were granted leave to intervene in support of the form of order sought by the Council, and the Parliament was granted leave to intervene in support of the form of order sought by the Commission.

The action

Admissibility

- 38 Without formally raising a plea of inadmissibility, the Council, supported by the Federal Republic of Germany and the Kingdom of the Netherlands, invites the Court to examine whether the action, in so far as it is partly directed against a decision adopted by the Representatives of the Member States in their capacity as Representatives of their Governments, and not as members of the Council, falls within the scope of the Court's review provided for in Article 263 TFEU.
- 39 In that regard, it should be remembered that an action for annulment must be available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects (judgments in *Commission v Council* ('ERTA'), 22/70, EU:C:1971:32, paragraph 42; *Parliament v Council and Commission*, C-181/91 and C-248/91, EU:C:1993:271, paragraph 13; and *Commission v Council*, C-27/04, EU:C:2004:436, paragraph 44).
- 40 In the present case, the contested decision, which produces legal effects as regards relations between the European Union and its Member States and between the EU institutions, was adopted on the basis of Article 218(3) and (4) TFEU.
- 41 In addition, since the contested decision combines the authorisations to negotiate issued (i) to the Commission and (ii) to the Member States and to the Presidency of the Council, it necessarily follows that the Council was involved in the grant of both of those authorisations. Therefore, the action is admissible with regard to the contested decision as a whole.

Substance

42 The Commission advances four pleas in law in support of its action.

43 The first plea alleges infringement of Article 2(2) TFEU and Article 3(2) TFEU. The other pleas, advanced irrespective of the exclusive or shared nature of the competences of the European Union in the present case, allege, secondly, breach of the procedure and the conditions to authorise negotiations of international agreements by the European Union; thirdly, violation of the voting rules in the Council provided for in Article 218(8) TFEU; and, fourthly, breach of the objectives set out in the TFEU and TEU and the principle of sincere cooperation laid down in Article 13 TEU.

The first plea

– Arguments of the parties

44 In the context of its first plea, the Commission, supported by the Parliament, states that, in accordance with the case-law developed as from the judgment in *ERTA* (EU:C:1971:32), now codified by Article 3(2) TFEU, the European Union has exclusive external competence where, as in the present case, the international commitments fall, at least to a large extent, within the scope of the common rules which it established.

45 First, the Commission and the Parliament submit that the negotiations within the Council of Europe on the protection of neighbouring rights of broadcasting organisations will be based, in particular, on the EU *acquis* in this area. Reviewing the various items identified in the Appendix to the 2008 Memorandum, the Commission and the Parliament explain why those negotiations are liable to affect the common EU rules in that area, including where they will concern elements for which it is envisaged, in the words of that memorandum, to go beyond that *acquis*.

46 The Commission concludes that, where a body of rights gradually introduced by EU law reaches, as in the present case, an advanced stage and the envisaged international agreement seeks to consolidate and, at most, to marginally improve the protection of the rightholders concerned on peripheral aspects not currently covered by EU law, the European Union must have exclusive competence.

47 Secondly, the Commission, supported by the Parliament on this point, states that the European Union has adopted a set of consistent rules, going beyond simple minimum requirements, which govern the neighbouring rights of broadcasting organisations in order to ensure the good functioning of the internal market. The fact that those rules do not constitute a complete harmonisation and leave it to the Member States to regulate certain aspects of the area concerned does not preclude the European Union's competence in that area from being exclusive.

48 Thirdly, the Commission submits that the neighbouring rights of broadcasting organisations, as governed by EU law, form part of a consistent and balanced body of intellectual property rules intended to ensure the unity of the legal order of the European Union in that area. In those circumstances, and having regard to the close link between the rights and activities of broadcasting organisations and those of other intellectual property rightholders, any change to the rights of one group or the other would be such as to influence the interpretation and application of the EU rules as a whole.

49 The Council, supported by the Czech Republic, the Federal Republic of Germany, the Kingdom of the Netherlands, the Republic of Poland and the United Kingdom, maintains that the future Convention of the Council of Europe falls within an area of shared competences between the European Union and its Member States, namely that of the internal market, which encompasses protection of intellectual property. Consequently, both the European Union and the Member States should be involved in the

forthcoming negotiations by cooperating closely in all stages of the process in order to ensure the unity of the external representation of the European Union. That is precisely the objective of the contested decision.

- 50 The Council and those Member States maintain that the fact that a part, even a significant one, of the envisaged international agreement falls within an area covered by common EU rules is not sufficient to conclude that the competence of the European Union to negotiate that agreement is exclusive. Such a conclusion may be reached only after a precise and specific analysis of the nature and content of the EU rules concerned and of the relationship between those rules and the envisaged agreement which shows that that agreement is capable of affecting those rules or of altering their scope.
- 51 Those parties also argue that the last clause of Article 3(2) TFEU must be read in conjunction with Protocol (No 25) on the exercise of shared competence, which is annexed to the TEU and the TFEU.
- 52 The Council, the Kingdom of the Netherlands and the United Kingdom add that the signatories of the Treaty of Lisbon intended, in the last clause of Article 3(2) TFEU, to codify the case-law developed as from the judgment in *ERTA* (EU:C:1971:32) as clarified by Opinion 1/03 (EU:C:2006:81) by refusing to enshrine the test of ‘an area already largely covered by the EU rules’, applied by the Court, inter alia, in its Opinion 2/91 (EU:C:1993:106) and the judgment in *Commission v Denmark* (C-467/98, EU:C:2002:625).
- 53 In the light of those general considerations, the Council, the Czech Republic, the Federal Republic of Germany, the Kingdom of the Netherlands, the Republic of Poland and the United Kingdom dispute that the European Union has exclusive external competence in the present case.
- 54 In that regard, they argue, in the first place, that the future Convention of the Council of Europe might go beyond the existing EU rules in three ways.
- 55 First, the future convention might establish an exclusive right of broadcasting organisations as regards the communication of their broadcasts to the public in places accessible to the public without payment of an entrance fee; currently those organisations do not have such an exclusive right under EU law.
- 56 Secondly, the future convention might regulate the protection of signals before their transmission to the public (‘pre-broadcast signals’); currently that protection is not the subject of any provision of EU law. The rights which EU rules confer on authors over their works do not cover rights of broadcasting organisations over such signals.
- 57 Thirdly, the negotiations on the future Convention of the Council of Europe might cover the introduction of criminal law measures intended to enforce the rights in question; currently such measures are not covered by common EU rules.
- 58 The Republic of Poland adds that it is also possible that that future convention will include a broader definition of ‘broadcasting organisation’ than that under EU law in order to cover web or ‘simulcasting’ broadcasters.
- 59 Both the United Kingdom and the Republic of Poland also state that no common EU rule currently confers on broadcasting organisations an exclusive right of retransmission by wire.
- 60 The Council, the Czech Republic, the Federal Republic of Germany and the United Kingdom add that to accept an exclusive external competence of the European Union despite the absence of common EU rules, on the ground that the international agreement concerned would only marginally extend a body of rules gradually established at EU level, would result in an unlawful extension of the scope of Article 3(2) TFEU and would be contrary to the principle of conferral.

- 61 In the second place, the Council, the Czech Republic, the Federal Republic of Germany, the Kingdom of the Netherlands, the Republic of Poland and the United Kingdom state that harmonisation under EU law in favour of broadcasting organisations has been only minimum, fragmented and auxiliary to the protection of other intellectual property rights.
- 62 In the third place, the Council, the Republic of Poland and the United Kingdom state that the EU rules on copyright and neighbouring rights other than those of broadcasting organisations are irrelevant for the purposes of assessing the existence of common EU rules in the area concerned in the present case. They draw attention, in that regard, to the fundamental difference existing, from a historical point of view and in terms of the nature and subject-matter of the protection, between copyright and the rights of those organisations.
- 63 In those circumstances, a strengthening of the protection granted to those organisations would not be such as to affect the overall balance of the protection of other holders of intellectual property rights or the exercise of those rights by those other holders.

– Findings of the Court

- 64 The first plea is based, in essence, on an infringement of Article 3(2) TFEU.
- 65 As a preliminary point, it should be noted that, among the various cases of exclusive external competence of the EU envisaged by that provision, only that which is referred to in the last clause of the provision, namely the situation in which the conclusion of an international agreement ‘may affect common rules or alter their scope’, is relevant in the present case.
- 66 In that regard, it must be stated that the words used in that last clause correspond to those by which the Court, in paragraph 22 of the judgment in *ERTA* (EU:C:1971:32), defined the nature of the international commitments which Member States cannot enter into outside the framework of the EU institutions, where common EU rules have been promulgated for the attainment of the objectives of the Treaty.
- 67 Those words must therefore be interpreted in the light of the Court’s explanation with regard to them in the judgment in *ERTA* (EU:C:1971:32) and in the case-law developed as from that judgment.
- 68 According to the Court’s case-law, there is a risk that common EU rules might be adversely affected by international commitments, or that the scope of those rules might be altered, which is such as to justify an exclusive external competence of the European Union, where those commitments fall within the scope of those rules (see, to that effect, the judgments in *ERTA*, EU:C:1971:32, paragraph 30; and in *Commission v Denmark*, EU:C:2002:625, paragraph 82).
- 69 A finding that there is such a risk does not presuppose that the areas covered by the international commitments and those covered by the EU rules coincide fully (see, to that effect, Opinion 1/03, EU:C:2006:81, paragraph 126).
- 70 As the Court has consistently held, the scope of common EU rules may be affected or altered by such commitments also where those commitments fall within an area which is already largely covered by such rules (Opinion 2/91, EU:C:1993:106, paragraph 25; judgment in *Commission v Denmark*, EU:C:2002:625, paragraph 82; and Opinion 1/03, EU:C:2006:81, paragraphs 120 and 126).
- 71 In addition, Member States may not enter into such commitments outside the framework of the EU institutions, even if there is no possible contradiction between those commitments and the common EU rules (see, to that effect, Opinion 2/91, EU:C:1993:106, paragraphs 25 and 26; and the judgment in *Commission v Denmark*, EU:C:2002:625, paragraph 82).

- 72 The above analysis is not affected by the argument of the Council, the Kingdom of the Netherlands and the United Kingdom that, since the entry into force of the Lisbon Treaty, the exclusive external competence of the European Union is viewed in a more restrictive manner.
- 73 Protocol (No 25) on the exercise of shared competence, invoked in support of that argument, the sole article of which states that, ‘when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area’, concerns, as is evident from its wording, only Article 2(2) TFEU and not Article 3(2) TFEU. It therefore seeks to define the scope of the exercise by the European Union of a shared competence with the Member States which was conferred on it by the Treaties, and not to limit the scope of the exclusive external competence of the European Union in the cases referred to in Article 3(2) TFEU, as clarified by the case-law of the Court referred to above.
- 74 That said, it is important to note that, since the European Union has only conferred powers, any competence, especially where it is exclusive, must have its basis in conclusions drawn from a specific analysis of the relationship between the envisaged international agreement and the EU law in force, from which it is clear that such an agreement is capable of affecting the common EU rules or of altering their scope (see, to that effect, Opinion 1/03, EU:C:2006:81, paragraph 124).
- 75 In accordance with the principle of conferral as laid down in Article 5(1) and (2) TEU, it is, for the purposes of such an analysis, for the party concerned to provide evidence to establish the exclusive nature of the external competence of the EU on which it seeks to rely.
- 76 In the present case, it must be observed at the outset that the contested decision gives no detail as to the content of the negotiations for the future Convention of the Council of Europe on the protection of the rights of broadcasting organisations. Nor does the contested decision identify the elements of those negotiations which, in the words of Article 1(1) thereof, fall within the Union’s competence and those which, in the words of Article 1(3) thereof, fall within Member States’ competence.
- 77 In those circumstances, as regards the content of the envisaged negotiations, it is appropriate to take into account, for the purposes of the present analysis, the 2002 Recommendation, the 2008 Memorandum and the 2010 Report, which were placed on the file by the Commission in support of its first plea and in respect of which none of the parties has disputed that they provided the most recent relevant information in that regard.
- 78 As for the area concerned in the present case, those documents of the Council of Europe indicate that the negotiations in question are aimed at the adoption of a Convention relating to the protection of neighbouring rights of broadcasting organisations.
- 79 As is clear from Directives 93/83, 2001/29, 2004/48, 2006/115 and 2006/116, those rights are the subject, in EU law, of a harmonised legal framework which seeks, in particular, to ensure the proper functioning of the internal market and which, having integrated a number of developments linked to technological challenges, the new digital environment and the development of the information society, established a regime with high and homogeneous protection for broadcasting organisations in connection with their broadcasts.
- 80 It follows that the protection of those organisations’ neighbouring rights — the subject-matter of the Council of Europe negotiations — must be understood as the relevant area for the purposes of the present analysis.
- 81 The fact that that harmonised legal framework has been established by various legal instruments which also govern other intellectual property rights is not such as to call into question the correctness of that approach.

- 82 The assessment of the existence of a risk that common EU rules will be adversely affected, or that their scope will be altered, by international commitments cannot be dependent on an artificial distinction based on the presence or absence of such rules in one and the same instrument of EU law.
- 83 Thus, in particular, the Court, in paragraphs 27 and 29 of the judgment in *Commission v France* (C-239/03, EU:C:2004:598), considered the protection of waters against pollution — the subject-matter of the international agreement in question in the case which gave rise to that judgment — as an area, notwithstanding the fact that the relevant EU rules were contained in different legal instruments.
- 84 Having thus defined the area concerned, the Court notes that, as provided in various passages of the 2008 Memorandum, namely paragraphs 49, 52, 57 and 78 thereof, the Convention of the Council of Europe in question should be based on the EU *acquis*, which broadly covers the substantive law on intellectual property, particularly that relating to broadcasting organisations.
- 85 As the Council and the Member States intervening in its support admit, many elements of the envisaged negotiations, which are mentioned in the list set out in the Appendix to the 2008 Memorandum, are in fact already covered by common EU rules.
- 86 As regards, first, the elements identified in Section I of that list, the Republic of Poland indeed states that the term ‘broadcasting organisation’ might, for the purposes of the future convention in question, be defined in a broad sense so as to extend to web or ‘simulcasting’ broadcasters.
- 87 However, regardless of whether, in the context of new digital technologies, the reference to broadcasts transmitted by wire or over the air, contained in Articles 2 and 3(2)(d) of Directive 2001/29, Articles 7(2) and 9(1)(d) of Directive 2006/115 and Article 3(4) of Directive 2006/116, permits the inclusion of such broadcasters in the scope of the common EU rules in the area concerned, it is, on any view, undeniable, as the Commission submits, that a negotiation which seeks, in one way or another, to include those broadcasters in the scope of the future Convention of the Council of Europe, in particular by means of the adoption, for the purposes of that convention, of a definition of ‘broadcasting organisation’ in ‘technologically neutral’ terms, as suggested in paragraph 13 of the 2010 Report, would have a horizontal effect on the scope of the body of common EU rules relating to the protection of neighbouring rights of such organisations.
- 88 As regards, secondly, the elements identified in Section II of the list set out in the Appendix to the 2008 Memorandum, the parties agree that the elements relating to the right of fixation, the right of reproduction, the right of making available to the public, the right of distribution, the limitations and exceptions to those rights, the term of protection of those rights, the obligations concerning technical measures and those concerning rights management information are covered by common EU rules and that the negotiations on those elements are capable of affecting or altering the scope of those common rules.
- 89 On the other hand, there is disagreement between the parties regarding four elements mentioned in that Section II, namely the right of retransmission, the right of communication to the public, the protection of pre-broadcast signals and the enforcement of neighbouring rights of broadcasting organisations.
- 90 So far as concerns, first, the right of retransmission, the Republic of Poland and the United Kingdom state that EU law has carried out only a minimum harmonisation inasmuch as it refers only, in the words of Article 8(3) of Directive 2006/115, to rebroadcasting by wireless means. However, the negotiations in question might also result in establishing for broadcasting organisations an exclusive right of retransmission by wire, in particular through the internet.

- 91 In that regard, it should be noted that Article 8(3) of Directive 2006/115 does not concern a situation comparable to that stated in paragraphs 18 and 21 of Opinion 2/91 (EU:C:1993:106), in which the Court held that the European Union did not have exclusive competence because both the provisions of EU law and those of the international convention in question laid down minimum requirements. Article 8(3) assigns a precise material scope to the right of retransmission in EU law by confining it to rebroadcasting by wireless means.
- 92 As the Commission maintains, Council of Europe negotiations which, as suggested in paragraph 54 of the 2008 Memorandum, seek to extend that right to retransmission by wire or through the internet would therefore be capable of altering the scope of the common EU rules on the right of retransmission.
- 93 Moreover, as the Commission also states, the right of broadcasting organisations concerning retransmission by wire is already partially covered, as such, by common EU rules owing to the interaction between the various intellectual property rights of those organisations which are governed by EU law. As the Court held in the judgment in *ITV Broadcasting and Others* (C-607/11, EU:C:2013:147), the exclusive right of communication to the public enjoyed, pursuant to Article 3(1) of Directive 2001/29, by terrestrial television broadcasting organisations over their broadcasts protected by copyright includes the exclusive right to authorise or prohibit the rebroadcasting of such works by another organisation by means of the internet.
- 94 So far as concerns, secondly, the right of communication to the public, the Council and several Member States intervening in its support state that the negotiations in question might go beyond the EU *acquis* by extending, contrary to Article 8(3) of Directive 2006/115, the scope of that right so as to include places accessible to the public without payment of an entrance fee.
- 95 In that regard, it must, however, be observed, as the Commission has stated, that neither the 2008 Memorandum nor the 2010 Report contain any indication to that effect and that the Council and the intervening Member States have not provided any evidence in support of their claims.
- 96 On the contrary, as set out in the 2002 Recommendation and, in particular, in point (f) of the section ‘Rights to be granted’ contained in the Appendix to that recommendation, and paragraph 24 of the Explanatory Memorandum of that recommendation, the scope of the right of communication to the public would be modelled on the right provided for in Article 13(d) of the Rome Convention, which restricts it to places accessible to the public against payment of an entrance fee.
- 97 So far as concerns, thirdly, the protection of pre-broadcast signals, the Council and several Member States intervening in its support rightly observe that broadcasting organisations do not enjoy, under existing EU law, protection for those signals as such, although, as set out in paragraphs 41 to 43 and 54 of the 2008 Memorandum and in paragraph 14 of the 2010 Report, the negotiations in question might result in the introduction of such a protection because of the vulnerability of those signals with regard to unauthorised acts of appropriation or exploitation.
- 98 However, one of the approaches, noted by the Commission, which according to paragraph 43 of the 2008 Memorandum is worthy of consideration, namely the extension of the term ‘broadcasts’ to pre-broadcast signals in such a way as to include those signals in the scope of protection of the various rights conferred on broadcasting organisations, would undeniably be capable of altering, in a horizontal manner, the scope of the common EU rules in the area concerned.
- 99 As for the other possible approaches put before the Court, such as the introduction of *sui generis* legal protection of pre-broadcast signals or the application to those signals of provisions relating to the protection of technical measures, it must be stated that, in the absence of any reference to them in the 2008 Memorandum or in the 2010 Report, and with the Council and the intervening Member

States having failed to support their claims with any evidence, those approaches seem, at this stage, to be hypothetical and cannot therefore be relevant to determining the exclusive or shared nature of the competence of the European Union in the present case.

¹⁰⁰ So far as concerns, fourthly, the enforcement of neighbouring rights of broadcasting organisations, the Council and several Member States intervening in its support, without disputing that the sanctions and legal remedies in the event of an infringement of those rights are governed, in EU law, by Article 8 of Directive 2001/29 and by a body of common rules contained in Directive 2004/48, state, however, that the negotiations in question might result in the introduction, contrary to EU rules, of the obligation for contracting parties to adopt criminal sanctions in the event of such infringements.

¹⁰¹ However, it must be stated, as the Commission has observed, that neither the 2008 Memorandum nor the 2010 Report contains any indication to that effect and that the claims set out in the previous paragraph have not been substantiated by any evidence relating to the forthcoming negotiations within the Council of Europe.

¹⁰² It is apparent from the above analysis that the content of the negotiations for a Convention of the Council of Europe on the protection of neighbouring rights of broadcasting organisations, as is defined by the 2002 Recommendation, the 2008 Memorandum and the 2010 Report, falls within an area covered to a large extent by common EU rules and that those negotiations may affect common EU rules or alter their scope. Therefore, those negotiations fall within the exclusive competence of the European Union.

¹⁰³ It follows that the contested decision was adopted in breach of Article 3(2) TFEU.

The second to fourth pleas

¹⁰⁴ Since the first plea is well founded, the contested decision must be annulled and it is unnecessary to examine the other pleas raised by the Commission in support of its action.

Costs

¹⁰⁵ Under Article 138(1) of the Rules of Procedure of the Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Council has been unsuccessful and the Commission has applied for costs, the Council must be ordered to pay the costs. In accordance with Article 140(1) of the Rules of Procedure, pursuant to which the Member States and institutions which have intervened in the proceedings are to bear their own costs, the Czech Republic, the Federal Republic of Germany, the Kingdom of the Netherlands, the Republic of Poland, the United Kingdom and the Parliament are to bear their own costs.

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

- 1. Annuls the Decision of the Council and the Representatives of the Governments of the Member States meeting within the Council on the participation of the European Union and its Member States in negotiations for a Convention of the Council of Europe on the protection of the rights of broadcasting organisations, of 19 December 2011;**
- 2. Orders the Council of the European Union to pay the costs;**
- 3. Orders the Czech Republic, the Federal Republic of Germany, the Kingdom of the Netherlands, the Republic of Poland, the United Kingdom of Great Britain and Northern Ireland and the European Parliament to bear their own costs.**

[Signatures]