



Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

16 July 2015*

(Action for annulment — Council decision authorising the opening of negotiations on linking the EU greenhouse gas emissions trading scheme with a greenhouse gas emissions trading system in Australia — Negotiating directives — Special committee — Articles 13(2) TEU, 218(2) to (4) TFEU and 295 TFEU — Institutional balance)

In Case C-425/13,

ACTION for annulment under Article 263 TFEU, brought on 24 July 2013,

European Commission, represented by G. Valero Jordana and F. Castillo de la Torre, 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, with an address for service in Luxembourg,

intervener,

v

Council of the European Union, represented by K. Michoel, M. Moore and J.-P. Hix, acting as Agents,

defendant,

supported by:

Czech Republic, represented by M. Smolek, J. Vlášil and E. Ruffer, acting as Agents,

Kingdom of Denmark, represented by C. Thorning, L. Volck Madsen and U. Melgaard, acting as Agents,

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

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

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

* Language of the case: English.

Republic of Poland, represented by B. Majczyna, acting as Agent,

Kingdom of Sweden, represented by A. Falk, C. Meyer-Seitz, U. Persson, E. Karlsson, L. Swedenborg and C. Hagerman, acting as Agents,

United Kingdom of Great Britain and Northern Ireland, represented by E. Jenkinson and M. Holt, acting as Agents, and J. Holmes and B. Kennelly, Barristers,

interveners,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano, R. Silva de Lapuerta (Rapporteur), M. Ilešič, A. Ó Caoimh, C. Vajda, S. Rodin, and K. Jürimäe, Presidents of Chambers, A. Rosas, E. Juhász, J. Malenovský, E. Levits, F. Biltgen and C. Lycourgos, Judges,

Advocate General: M. Wathelet,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 6 January 2015,

after hearing the Opinion of the Advocate General at the sitting on 17 March 2015,

gives the following

Judgment

- 1 By its application, the European Commission seeks the annulment of the second sentence of Article 2 of the Council Decision of 13 May 2013 authorising the opening of negotiations on linking the EU emissions trading scheme with an emissions trading system in Australia ('the contested decision') and of Section A of the Annex to that decision.

Legal context

Directive 2003/87/EC

- 2 Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ 2003 L 275, p. 32), as amended by Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 (OJ 2009 L 140, p. 63) ('the Directive'), was adopted on the basis of Article 175(1) EC. As stated in recital 5 of its preamble, the Directive has the aim of contributing to the more effective fulfilment of the commitments entered into by the European Community and its Member States to reduce anthropogenic greenhouse gas emissions under the Kyoto Protocol.
- 3 Article 1 of the Directive defines its subject-matter as follows:

'This Directive establishes a scheme for greenhouse gas emission allowance trading within the Community ... in order to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner.'

- 4 Article 25 of the Directive, entitled ‘Links with other greenhouse gas emissions trading schemes’, provides:

‘1. Agreements should be concluded with third countries listed in Annex B to the Kyoto Protocol which have ratified the Protocol to provide for the mutual recognition of allowances between the Community scheme and other greenhouse gas emissions trading schemes in accordance with the rules set out in Article 300 of the Treaty.

1a. Agreements may be made to provide for the recognition of allowances between the Community scheme and compatible mandatory greenhouse gas emissions trading systems with absolute emissions caps established in any other country or in sub-federal or regional entities.

1b. Non-binding arrangements may be made with third countries or with sub-federal or regional entities to provide for administrative and technical coordination in relation to allowances in the Community scheme or other mandatory greenhouse gas emissions trading systems with absolute emissions caps.

2. Where an agreement referred to in paragraph 1 has been concluded, the Commission shall adopt any necessary provisions relating to the mutual recognition of allowances under that agreement. ...’

Background to the dispute

- 5 In 2011, the Commonwealth of Australia (‘Australia’) approached the Commission with a view to starting bilateral negotiations on linking the European Union’s scheme for emission allowance trading with Australia’s system.
- 6 The formal recommendation for authorising the opening of negotiations with Australia with a view to linking the trading schemes concerned was modelled on the earlier recommendation concerning the linking of the European Union’s scheme for emission allowance trading with the Swiss scheme. It was adopted by the Commission on 24 January 2013 and then forwarded to the Council of the European Union. During the discussions within the Council’s Working Party on the Environment, Member States requested greater involvement in the negotiations with Australia than was contemplated in the Commission’s recommendation. A compromise text was approved, with a few amendments, by the Working Party on the Environment on 22 April 2013.
- 7 On 2 May 2013, the Commission circulated a statement for inclusion in the minutes (document 8805/13, ADD1), in which it took issue with certain aspects of the draft decision relating to authorisation of the opening of the negotiations in question issue. The Council also made a statement, dated 8 May 2013 (document 8805/13, ADD2).
- 8 That draft decision was submitted to the Committee of Permanent Representatives (Coreper) and was finally adopted unchanged as an ‘A’ item on the Council’s agenda at the Agriculture and Fisheries Council of 13 May 2013.
- 9 By Article 1(1) of the contested decision, the Commission was authorised to open the negotiations in question on behalf of the European Union.
- 10 Article 1(2) of the contested decision provides that the ‘Commission shall conduct these negotiations ... in accordance with the negotiating directives set out in the [Annex] to this Decision’.
- 11 The second sentence of Article 2 of the contested decision provides that ‘the Commission shall report in writing to the Council on the outcome of the negotiations after each negotiating session and, in any event, at least quarterly’.

- 12 In the Annex to the contested decision, the negotiating directives (Document 8568/13, ADD1) addressed to the Commission are worded in Section A as follows:

‘A. Procedure for negotiations

1. The Commission shall conduct negotiations in accordance with relevant Union legislation in force. Where appropriate, detailed negotiating positions of the Union shall be established within the special committee referred to in Article 1(2) or within the Council. The Working Party on the Environment is designated as special committee to assist the Commission in this task. The meetings of the special committee shall be organised and chaired by the Member State holding the Presidency of the Council.
 2. The negotiations must be prepared for well in advance. To this end, the Commission shall inform the Council of the schedule anticipated and the issues to be negotiated and shall forward the relevant documents as early as possible, in order to allow the members of the special committee reasonable time to prepare themselves properly for the forthcoming negotiations.
 3. Each negotiating session shall be preceded by a meeting within the special committee in order to identify the key issues and establish negotiating positions or guidance, as appropriate. Where appropriate, guidance on specific technical aspects of the linking negotiations can be sought from the Climate Change Committee, subject to prior authorisation from the special committee.
 4. The Commission shall report to the Council on the outcome of the negotiations after each negotiating session, and, in any event, at least quarterly. The Commission shall inform the Council and consult the special committee on any major problem that may arise during the negotiations.’
- 13 The content and scope of the negotiations are set out in Section B of the negotiating directives.
- 14 The second paragraph of the statement by the Council of 8 May 2013 relating to the draft decision on the opening of the negotiations states:
- ‘The establishment of the special committee as provided for in Article 218(4) TFEU means that the committee ... has the mandate to follow the conduct of the negotiations and guide the negotiator, having regard to the negotiating directives adopted by the Council.’
- 15 The contested decision was notified to the Commission on 15 May 2013.

Procedure before the Court and forms of order sought

- 16 The Commission claims that the Court should:
- annul the second sentence of Article 2 of the contested decision and Section A of the Annex thereto;
 - in the alternative, annul the contested decision and maintain the effects thereof in the event that it is totally annulled;
 - order the Council to pay the costs.

- 17 By separate document lodged at the Court Registry on 7 October 2013, the Council, in accordance with Article 151 of the Rules of Procedure of the Court, asked the Court to ‘remove ... from the case-file’ the contested decision and the negotiating directives, as well as the passages in the Commission’s application quoting from those directives. The Council also asked the Court to take such measures as it deemed appropriate in order to ensure that the content of the negotiating directives ‘[was] not made public’ and that the nature of those directives ‘[could] not be deduced from the Court’s public documents’.
- 18 That application by the Council was rejected by the order in *Commission v Council* (C-425/13, EU:C:2014:91).
- 19 The European Parliament, which was granted leave to intervene in support of the form of order sought by the Commission by decision of the President of the Court of 13 February 2014, contends that the Court should grant the form of order sought by the Commission.
- 20 The Council contends that the Court should dismiss the action or, if the contested decision is annulled, not maintain the effects of that decision, and order the Commission to pay the costs.
- 21 The Kingdom of Denmark, the Federal Republic of Germany, the Kingdom of the Netherlands, the Republic of Poland and the Kingdom of Sweden, which were granted leave to intervene in support of the form of order sought by the Council by decision of the President of the Court of 13 February 2014, contend that the Court should dismiss the action.
- 22 The Czech Republic and the French Republic, which were granted leave to intervene in support of the form of order sought by the Council by decision of the President of the Court of 13 February 2014, contend that the Court should dismiss the action and order the Commission to pay the costs.
- 23 The United Kingdom of Great Britain and Northern Ireland, which was granted leave to intervene in support of the form of order sought by the Council by decision of the President of the Court of 13 February 2014, contends that the Court should dismiss the action in its entirety and, if it were to be upheld in whole or in part, not maintain the effects of the contested decision.

The action

Admissibility

Arguments of the parties

- 24 The Council pleads that the Commission’s action is inadmissible, inasmuch as it is directed against Section A of the Annex to the contested decision, containing the negotiating directives at issue. It submits that in other institutional disputes the Commission took the view that such negotiating directives were not binding acts.
- 25 The Commission contends that the view that negotiating directives do not have binding effect does not mean that they do not produce legal effects. Since the Council has clearly stated that the negotiating directives at issue are binding on the Commission, the action that the latter has brought is admissible.

Findings of the Court

- 26 An action for annulment must be available in the case of all measures adopted by the EU institutions, irrespective of their nature or form, provided that they are intended to have legal effects (see judgment in *Commission v Council*, C-28/12, EU:C:2015:282, paragraph 14 and the case-law cited).
- 27 In order to ascertain whether such measures produce legal effects it is necessary to look to their substance (see, to this effect, judgment in *Netherlands v Commission*, C-147/96, EU:C:2000:335, paragraph 27).
- 28 In this regard, the Court has already held that a decision adopted on the basis of Article 218(3) and (4) TFEU produces legal effects as regards relations between the European Union and its Member States and between the EU institutions (see judgment in *Commission v Council*, C-114/12, EU:C:2014:2151, paragraph 40).
- 29 In the present case, Section A of the Annex to the contested decision, containing the negotiating directives at issue, sets out a precise and detailed procedure, concerning the negotiation of the contemplated agreement, which the Council was manifestly seeking to impose upon the Commission, as is also apparent from Article 1(2) of that decision.
- 30 The contested decision is therefore such as to produce legal effects.
- 31 Consequently, the action is admissible.

Substance

- 32 The Commission puts forward two pleas in law in support of its action. The first plea, relating to the detailed procedure set out in Section A of the negotiating directives, alleges breach of Article 13(2) TEU, Article 218(2) to (4) TFEU, Article 295 TFEU and the principle of institutional balance. The second plea, relating to the contested decision in so far as it provides that ‘detailed negotiating positions of the Union shall be established’ by the special committee or the Council, alleges breach of Article 13(2) TEU, Article 218 TFEU and the principle of institutional balance.
- 33 The Court considers it appropriate to examine the two pleas together.

Arguments of the parties

- 34 The Commission states that negotiations relating to an international agreement in areas which are not principally or exclusively related to the common foreign and security policy fall within its competence. Its role as negotiator in this field cannot be called into question by the other EU institutions. Whilst the FEU Treaty has granted to the Council the power to authorise the opening of such negotiations, it does not, however, have the power to extend the content of the negotiating directives by inserting in them provisions that are not directly linked to negotiation with the third State concerned.
- 35 The Commission takes the view that the power to adopt negotiating directives does not include the power to establish the conditions in which negotiation must take place, as those directives must solely define the substantive policy options and objectives to be defended during the negotiations.
- 36 The Commission contends that the detailed negotiation procedure laid down in Section A of the Annex to the contested decision results in new powers being conferred upon the Council, contrary to what is laid down by Article 218(2) to (4) TFEU. In imposing such a procedure unilaterally, the Council imposes obligations on the Commission which are not consistent with those provisions.

- 37 The Commission submits that the Council has also infringed Article 13(2) TEU and the principle of institutional balance because, by the negotiating directives at issue, it has expanded the powers conferred on it by the Treaties.
- 38 The Commission states that, while it may be appropriate for the institutions to make arrangements for their cooperation, such cooperation must, in accordance with Article 295 TFEU, be engaged in by means of interinstitutional agreements. In the present case, in the absence of the conclusion of such an agreement, the Council also infringed that article by adopting Section A of the Annex to the contested decision.
- 39 The Commission maintains that under Section A of the Annex the Council has a decisive role in the negotiations. Section A in fact provides that in certain circumstances it is for the special committee referred to in Article 218(4) TFEU or the Council to establish 'detailed negotiating positions of the Union', which are binding on the Commission. However, the Treaties do not confer any direct decision-making role during the negotiations on that committee or the Council, as the Commission has full competence in that regard. The special committee is only a consultative organ for the benefit of the negotiator.
- 40 According to the Commission, it falls to it to determine how the consultation of the special committee designated by the Council under Article 218(4) TFEU is to be implemented. That provision gives only a consultative role to the special committee, as the negotiations must be conducted only 'in consultation with' it. While the special committee may express its views on the various aspects of the negotiations, the Commission considers that, by permitting that committee or the Council to adopt 'detailed negotiating positions of the Union', which would accordingly be binding on the Commission, the negotiating directives fail to comply with Article 218 TFEU.
- 41 The Commission observes, finally, that the elements of the contested decision whose annulment is sought may be severed from the remainder of the decision and that, accordingly, partial annulment of the contested decision would be possible. In any event, the designation of the special committee would not be affected by a partial annulment.
- 42 The Parliament agrees with the Commission's arguments. It states that the FEU Treaty does not authorise the Council to adopt unilaterally new negotiation arrangements that would be imposed on the negotiator. If that were so, both the powers of the Commission, in its function as negotiator, and those of the Parliament would be affected.
- 43 The Parliament also observes that, under Article 13(2) TEU, each institution must act within the limits of its powers and in compliance with the principle of sincere cooperation.
- 44 The Parliament states that neither it nor the Council is entitled actively to play an independent and leading role in the negotiations, encroaching on the prerogatives of the negotiator. In particular, the Council cannot claim, for itself or for the special committee it has designated, a decision-making role during the negotiations.
- 45 The Council contends that the power, accorded to it in Article 218(4) TFEU, to adopt negotiating directives for the purpose of authorising the Commission to negotiate an international agreement on behalf of the European Union cannot be understood as denying it the possibility of also establishing the conditions in which negotiation must be conducted. Any other interpretation of Article 218(4) TFEU would deprive it of its effectiveness.

- 46 The Czech Republic, the Federal Republic of Germany, the French Republic, the Republic of Poland, the Kingdom of Sweden and the United Kingdom endorse this argument of the Council and state that the wording of Article 218(2) to (4) TFEU does not impose any restriction on the adoption of such directives or preclude such directives from laying down procedural rules, in particular so far as concerns the manner in which the special committee is consulted.
- 47 The Federal Republic of Germany, the French Republic and the United Kingdom also submit that the power to address negotiating directives to the Commission includes the power to specify the procedural requirements for negotiation in order to ensure sincere cooperation between the institutions, enshrined in Article 13(2) TEU, and compliance with the institutional balance.
- 48 The Council states that it is for it to assess, when it adopts a decision authorising the opening of negotiations and designating the negotiator, whether it is appropriate, or even necessary, to include in the negotiating directives particulars concerning the role allotted to each institution and the procedural arrangements under which negotiation must take place. This is a corollary of its right to decide whether or not such authorisation should be granted.
- 49 The Council explains that the procedural arrangements contained in the negotiating directives at issue relate exclusively to the relationship between the Commission, as negotiator, the Council, as institution granting the authorisation to negotiate an international agreement and to sign it, and the special committee, which the Council may designate to follow the negotiations.
- 50 The Council submits that those procedural arrangements, set out in the negotiating directives, do not fail to have regard to the respective role of each institution or to the balance between the latter as established by the Treaties. Indeed, such arrangements are nothing more than a specific expression of how the institutions should translate the principle of sincere cooperation in the context of international negotiations.
- 51 The Czech Republic, the Kingdom of Denmark and the Kingdom of Sweden concur with the Council's argument relating to its active role in the course of the negotiations for an international agreement. The Council's power to adopt negotiating directives and the fact that the Commission may be required to conduct the negotiations in consultation with a special committee, in accordance with Article 218(4) TFEU, presuppose continuous coordination and permanent dialogue between the Commission and the Council, without that process being limited to a particular stage of the negotiations.
- 52 In this connection, the Republic of Poland observes that only the achievement of an outcome to negotiations that is acceptable to the Council can lead to the signing and conclusion of an agreement on behalf of the European Union. It is accordingly necessary that, at the time when authorisation is granted to the negotiator, the Council also be able to establish the limits of the authorisation and to indicate the conditions in accordance with which the negotiations are to be conducted. A situation in which that outcome would be unacceptable to the Council and in which refusal to approve the final draft agreement would adversely affect relations with the other party is therefore to be avoided. Consequently, the Council's power to follow the negotiations actively is permanent in nature and is not limited solely to the adoption of negotiating directives annexed to the decision authorising the opening of negotiations.
- 53 The Council is of the view that the Commission must conduct the negotiations within the mandate given to it by the Council. The positions established in the special committee are intended to be a concrete expression of the negotiating directives of the Council and, as such, are designed to serve the negotiator by making clear which views have the backing of the Council. It is for the Commission to decide how to negotiate, while following the guidance of the special committee, be it in the form of oral guidance or position papers.

- 54 The Council explains that the aim of the establishment of negotiating positions in the special committee is to guide the negotiator, having regard to the negotiating directives. Those positions cannot be understood as implying an obligation for the Commission to achieve the recommended result for all the guidance defined in them.
- 55 In this connection, the Czech Republic, the French Republic and the United Kingdom stress the power of the Council to determine the manner in which the special committee is consulted. Furthermore, in providing, in Section A of the Annex to the contested decision, which contains the negotiating directives at issue, that the special committee or the Council itself may adopt ‘detailed negotiating positions’, those directives merely recall the Council’s right to flesh out the directives at any time and the role of the special committee.
- 56 In that regard, the Federal Republic of Germany adds that it would not be possible to harness sufficiently the ‘expert knowledge’ of the Member States in the field covered by the agreement in question if the Commission were to prevail in its wish to act in full autonomy and without regard to the observations of the special committee when conducting negotiations.
- 57 The Council also rejects the argument concerning the failure to conclude an interinstitutional agreement relating to the procedural arrangements, as referred to in Article 295 TFEU, because such an agreement would involve not only the Commission and the Council, but also the Parliament, which would run counter to the balance between the institutions that is established by Article 218 TFEU.
- 58 The Council, supported by the United Kingdom, states finally that partial annulment in respect of the second sentence of Article 2 of the contested decision and Section A of the Annex thereto cannot be contemplated, given that it would substantially alter the overall content of the authorisation to negotiate. It follows from the very structure of the contested decision and of the Annex thereto that each of those provisions forms part of a non-severable whole.

Findings of the Court

- 59 The present action relates to (i) the second sentence of Article 2 of the contested decision and (ii) Section A of the Annex to the contested decision. These two aspects of the action should be examined in turn.
- 60 First, the Commission submits that the obligation laid down in the second sentence of Article 2 of the contested decision, that ‘the Commission shall report in writing to the Council on the outcome of the negotiations after each negotiating session and, in any event, at least quarterly’, is contrary to Article 218(2) and (4) TFEU, Article 13(2) TEU and the principle of institutional balance, as well as to Article 295 TFEU.
- 61 As, in the present dispute, Article 218(4) TFEU constitutes the principal provision to be referred to for the purpose of demarcation of the powers conferred, respectively, on the Council and the special committee and on the Commission, the plea put forward should be assessed first of all in the light of that provision.
- 62 It is apparent from the Court’s case-law that Article 218 TFEU constitutes, as regards the conclusion of international treaties, an autonomous and general provision of constitutional scope, in that it confers specific powers on the EU institutions. With a view to establishing a balance between those institutions, it provides, in particular, that agreements between the European Union and one or more third States are to be negotiated by the Commission, in compliance with the negotiating directives drawn up by the Council, and then concluded by the Council, either after obtaining the consent of

the European Parliament or after consulting it. The power to conclude such agreements is, however, conferred on the Council subject to the powers vested in the Commission in this field (see, to this effect, judgment in *France v Commission*, C-327/91, EU:C:1994:305, paragraph 28).

- 63 In addition, Article 17(1) TEU provides that, with the exception of the common foreign and security policy, and other cases provided for in the Treaties, the Commission is to ensure the European Union's external representation.
- 64 In the context of those functions, the Council and the Commission are nevertheless required to comply with the second sentence of Article 13(2) TEU, which states that '[t]he institutions shall practice mutual sincere cooperation'. That cooperation is of particular importance for EU action at international level, as such action triggers a closely circumscribed process of concerted action and consultation between the EU institutions.
- 65 Furthermore, Article 218(4) TFEU provides that, when the Council has designated a special committee, the negotiations must be conducted in consultation with that committee.
- 66 In those circumstances, which correspond to the present case, the Commission must provide the special committee with all the information necessary for it to monitor the progress of the negotiations, such as, in particular, the general aims announced and the positions taken by the other parties throughout the negotiations. It is only in this way that the special committee is in a position to formulate opinions and advice relating to the negotiations.
- 67 Having regard to the various functions of the institutions in the negotiation and conclusion of the agreements referred to in Article 218 TFEU, the Commission can be required to provide that information to the Council as well. It is expedient for the Council to possess that information in order to have clear knowledge of the course of the negotiations concerning the preparation of a draft agreement that will be submitted to it for approval.
- 68 Consequently, the obligation set out in the second sentence of Article 2 of the contested decision, which provides that 'the Commission shall report in writing to the Council on the outcome of the negotiations after each negotiating session and, in any event, at least quarterly', must be regarded as in conformity with Article 218(2) and (4) TFEU.
- 69 As regards, next, the alleged breach of Article 13(2) TEU, it should be recalled that under that provision each EU institution is to act within the limits of the powers conferred on it by the Treaties, and in conformity with the procedures, conditions and objectives set out in them. That provision reflects the principle of institutional balance, characteristic of the institutional structure of the European Union, a principle which requires that each of the institutions must exercise its powers with due regard for the powers of the other institutions (see judgment in *Council v Commission*, C-409/13, EU:C:2015:217, paragraph 64 and the case-law cited).
- 70 For the reasons stated in paragraphs 66 and 67 of the present judgment, the second sentence of Article 2 of the contested decision also complies with the obligation laid down in Article 13(2) TEU that each EU institution is to act within the limits of the powers conferred on it by the Treaties.
- 71 Likewise, that provision of the contested decision does not in any way infringe the principle of institutional balance.
- 72 Finally, as to the alleged breach of Article 295 TFEU, that provision does not prevent the Council from being able to set out, in a decision authorising negotiation, the arrangements relating to the information which the Commission must provide to it periodically throughout the negotiating process for the conclusion of an international agreement by the European Union.

- 73 Accordingly, the Commission's application for annulment must be dismissed in so far as it relates to the second sentence of Article 2 of the contested decision.
- 74 Secondly, the Commission contends that Section A of the Annex to the contested decision, which contains the negotiating directives at issue, fails to comply with the demarcation laid down in Article 218(4) TFEU of the powers conferred, respectively, on the Council and the special committee and on the Commission, as negotiator, and also infringes Article 13(2) TEU and the institutional balance.
- 75 In the light of the written and oral submissions made to the Court, and noting that in this instance the Council has designated a special committee, it must be determined, first of all, whether the Council is entitled to set out in the negotiating directives rules of a procedural nature such as those at issue in this instance and, if so, whether the rules set out in Section A of the Annex to the contested decision observe the allocation of powers laid down in Article 218(4) TFEU between the institutions and the special committee.
- 76 It follows from the third sentence of paragraph 1 of Section A of the Annex to the contested decision, read in conjunction with the second paragraph of the statement by the Council of 8 May 2013, that the special committee designated by the Council has 'the mandate to follow the conduct of the negotiations and guide the negotiator, having regard to the negotiating directives adopted by the Council'. In addition, the fourth sentence of paragraph 1 of Section A of the Annex provides that the meetings of that committee must be organised and chaired by the Member State holding the Presidency of the Council.
- 77 Since the Council is empowered to designate a special committee and the Commission is required to conduct the negotiations 'in consultation with' that committee under Article 218(4) TFEU, the Commission must inform the committee of all aspects of the negotiations in order that it may be properly consulted. It is only in this way that the special committee is in a position to formulate opinions and advice relating to the positions that the Commission must adopt in the negotiations.
- 78 That being so, Article 218(4) TFEU must be interpreted as empowering the Council to set out, in the negotiating directives, procedural arrangements governing the process for the provision of information, for communication and for consultation between the special committee and the Commission, as such rules meet the objective of ensuring proper cooperation at the internal level.
- 79 It must, however, be determined whether Section A of the Annex to the contested decision contains other provisions which, while being procedural in nature, are liable to deny the negotiator the power which it is granted in Article 17(1) TEU.
- 80 As regards the first sentence of paragraph 1 of Section A of the Annex to the contested decision, according to which '[t]he Commission shall conduct negotiations in accordance with relevant Union legislation in force', this is a reminder of a general nature, which defines the Commission's field of action in the matter. For that purpose, it is, in addition, usefully stated in the first sentence of paragraph 2 of Section A that '[t]he negotiations must be prepared for well in advance'.
- 81 As for the second sentence of paragraph 2, according to which, for the purpose of preparing for the negotiations, 'the Commission shall inform the Council of the schedule anticipated and the issues to be negotiated and shall forward the relevant documents as early as possible, in order to allow the members of the special committee reasonable time to prepare themselves properly for the forthcoming negotiations', it must be stated, first, that that element clarifies the obligation laid down in the second sentence of Article 2 of the contested decision, an obligation which, as is apparent from paragraph 68 of the present judgment, is consistent with Article 218(4) TFEU. Secondly, that element establishes the arrangements for consultation of the special committee designated by the Council in accordance with Article 218(4) TFEU.

- 82 The same is true of paragraph 4 of Section A of the Annex to the contested decision, which provides that '[t]he Commission shall report to the Council on the outcome of the negotiations after each negotiating session, and, in any event, at least quarterly' and that '[t]he Commission shall inform the Council and consult the special committee on any major problem that may arise during the negotiations'.
- 83 Finally, the second sentence of paragraph 3 of Section A of the Annex to the contested decision, under which guidance on specific technical aspects of the negotiations can be sought from the Climate Change Committee, 'subject to prior authorisation from the special committee', must also be regarded as falling within the arrangements for consultation of the special committee.
- 84 It follows that the elements of Section A of the Annex that are examined in paragraphs 80 to 83 of the present judgment do not infringe Article 218(4) TFEU, Article 13(2) TEU, the principle of institutional balance or Article 295 TFEU.
- 85 It remains therefore, finally, to assess two elements in Section A of the Annex to the contested decision, namely the second sentence of paragraph 1, which provides that '[w]here appropriate, detailed negotiating positions of the Union shall be established within the special committee referred to in Article 1(2) or within the Council', and the specific element of the first sentence of paragraph 3 which permits the special committee, before each negotiating session, to 'establish negotiating positions'.
- 86 Those stipulations constitute provisions seeking to bind the negotiator.
- 87 Even though the Council limits itself to asserting that the negotiating positions have the objective of assisting the negotiator and cannot be understood as implying an obligation for the Commission to achieve the 'recommended result', it is apparent from those provisions, construed in the light of their wording and placed in their context, that their intention is that the negotiating positions have binding effects on the negotiator.
- 88 It is contrary to Article 218(4) TFEU for the positions established by the special committee or, as the case may be, the Council itself to be binding in this way.
- 89 First, the two elements referred to in paragraph 85 of the present judgment confer upon the special committee the task of establishing detailed negotiating positions of the European Union, a task which goes beyond the consultative function assigned to it by that provision.
- 90 Secondly, whilst it is true that Article 218(4) TFEU authorises the Council to draw up negotiating directives, it does not, on the other hand, contrary to what Section A of the Annex to the contested decision provides in the second sentence of paragraph 1, invest that institution with the power to impose 'detailed negotiating positions' on the negotiator.
- 91 It follows that, by including those elements in the negotiating directives, the Council infringed the obligation laid down by Article 13(2) TEU to act within the limits of the powers conferred on it by Article 218(2) to (4) TFEU.
- 92 In so doing, the Council also infringed the principle of institutional balance.
- 93 Accordingly, the second sentence of paragraph 1 of Section A of the Annex to the contested decision and the words 'and establish negotiating positions' in the first sentence of paragraph 3 of Section A must be annulled.

- 94 As regards the conditions for partial annulment of an EU act, it is clear from settled case-law that such annulment is possible only in so far as the elements whose annulment is sought may be severed from the remainder of the act (see judgments in *Commission v Council*, C-29/99, EU:C:2002:734, paragraph 45, and *Germany v Commission*, C-239/01, EU:C:2003:514, paragraph 33). The Court has repeatedly ruled that that requirement of severability is not satisfied where the partial annulment of an act would have the effect of altering its substance (see judgments in *Commission v Poland*, C-504/09 P, EU:C:2012:178, paragraph 98, and *Commission v Parliament and Council*, C-427/12, EU:C:2014:170, paragraph 16). Review of whether the contested provisions are severable requires consideration of their scope, in order to be able to assess whether their annulment would alter the spirit and substance of the decision challenged (see judgment in *Commission v Estonia*, C-505/09 P, EU:C:2012:179, paragraph 112 and the case-law cited).
- 95 In the present case, the second sentence of paragraph 1 of Section A of the Annex to the contested decision and the words ‘and establish negotiating positions’ in the first sentence of paragraph 3 of Section A, set out in paragraph 85 of the present judgment, are severable from the remainder of that decision. Those two heads of annulment do not alter the substance of the contested decision and, in particular, do not affect the Commission’s obligations relating to the conduct of the negotiations, as resulting from the negotiating directives set out in the Annex to that decision, and to the provision of information to the Council, flowing from the second sentence of Article 2 of the decision.
- 96 Nor can that annulment alter the substance of the other elements of Section A of the Annex to the contested decision.
- 97 It follows from all the foregoing considerations that it is necessary to annul, in Section A, entitled ‘Procedure for negotiations’, of the Annex to the contested decision:
- the second sentence of paragraph 1 of that section, according to which, ‘[w]here appropriate, detailed negotiating positions of the Union shall be established within the special committee referred to in Article 1(2) or within the Council’, and
 - the words ‘and establish negotiating positions’ in paragraph 3 of that section.

Costs

- 98 Under Article 138(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings. Since the Commission’s action has been upheld in part, the Commission and Council, in accordance with Article 138(3) of those Rules, are to bear their own costs, including those relating to the procedure that gave rise to the order in *Commission v Council* (C-425/13, EU:C:2014:91).
- 99 In accordance with Article 140(1) of the Rules of Procedure, the Parliament and the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the French Republic, the Kingdom of the Netherlands, the Republic of Poland, the Kingdom of Sweden and the United Kingdom are to bear their own costs.

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

1. **Annuls, in Section A, entitled ‘Procedure for negotiations’, of the Annex to the Council Decision of 13 May 2013 authorising the opening of negotiations on linking the EU emissions trading scheme with an emissions trading system in Australia:**
 - the second sentence of paragraph 1 of that section, according to which, ‘[w]here appropriate, detailed negotiating positions of the Union shall be established within the special committee referred to in Article 1(2) or within the Council’, and
 - the words ‘and establish negotiating positions’ in paragraph 3 of that section;
2. **Dismisses the action as to the remainder;**
3. **Orders the European Commission and the Council of the European Union to bear their own costs, including those relating to the procedure that gave rise to the order in *Commission v Council* (C-425/13, EU:C:2014:91);**
4. **Orders the European Parliament and the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the French Republic, the Kingdom of the Netherlands, the Republic of Poland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland to bear their own costs.**

[Signatures]