



Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

23 December 2015 *

(Actions for annulment — Replacement of the contested decision in the course of the proceedings — Purpose of the action — Police and judicial cooperation in criminal matters — New psychoactive substance subjected to control measures — Legal framework applicable after the entry into force of the Treaty of Lisbon — Transitional provisions — Consultation of the European Parliament)

In Case C-595/14,

ACTION for annulment under Article 263 TFEU, brought on 19 December 2014,

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

applicant,

v

Council of the European Union, represented by K. Pleśniak and K. Michoel, acting as Agents,

defendant,

THE COURT (Third Chamber),

composed of L. Bay Larsen (Rapporteur), President of the Chamber, D. Šváby, J. Malenovský, M. Safjan and M. Vilaras, Judges,

Advocate General: Y. Bot,

Registrar: A. Calot Escobar,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Order

- 1 By its application, the European Parliament seeks the annulment of Council Implementing Decision 2014/688/EU of 25 September 2014 on subjecting 4-iodo-2,5-dimethoxy-N-(2-methoxybenzyl)phenethylamine (25I-NBOMe), 3,4-dichloro-N-[[1-

* Language of the case: French.

(dimethylamino)cyclohexyl)methyl]benzamide (AH-7921), 3,4-methylenedioxypyrovalerone (MDPV) and 2-(3-methoxyphenyl)-2-(ethylamino)cyclohexanone (methoxetamine) to control measures (OJ 2014 L 287, p. 22) ('the contested decision').

The legal framework

Decision 2005/387/JHA

- 2 Article 1 of Council Decision 2005/387/JHA of 10 May 2005 on the information exchange, risk-assessment and control of new psychoactive substances (OJ 2005 L 127, p. 32) is worded as follows:

'This Decision establishes a mechanism for a rapid exchange of information on new psychoactive substances. ...

This Decision also provides for an assessment of the risks associated with these new psychoactive substances in order to permit the measures applicable in the Member States for control of narcotic and psychotropic substances to be applied also to new psychoactive substances.'

- 3 Article 6 of that decision provides that the Council of the European Union may request an assessment report on the risks associated with a new psychoactive substance.
- 4 Under the heading 'Procedure for bringing specific new psychoactive substances under control', Article 8 of Decision 2005/387 is worded as follows:

'1. Within six weeks from the date on which it received the Risk Assessment Report, the Commission shall present to the Council an initiative to have the new psychoactive substance subjected to control measures. ...

2. Should the Commission deem it not necessary to present an initiative on submitting the new psychoactive substance to control measures, such an initiative may be presented to the Council by one or more Member States, preferably not later than six weeks from the date on which the Commission presented its report to the Council.

3. The Council shall decide, by qualified majority and acting on an initiative presented pursuant to paragraph 1 or 2, on the basis of Article 34(2)(c) [EU], whether to submit the new psychoactive substance to control measures.'

Council Implementing Decision (EU) 2015/1875

- 5 Recitals 34 and 35 in the preamble to Council Implementing Decision (EU) 2015/1875 of 8 October 2015 on subjecting 4-iodo-2,5-dimethoxy-N-(2-methoxybenzyl)phenethylamine (25I-NBOMe), 3,4-dichloro-N-[[1-(dimethylamino)cyclohexyl)methyl]benzamide (AH-7921), 3,4-methylenedioxypyrovalerone (MDPV) and 2-(3-methoxyphenyl)-2-(ethylamino)cyclohexanone (methoxetamine) to control measures (OJ 2015 L 275, p. 38) are worded as follows:

'(34) In its judgment of 16 April 2015 in Joined Cases C-317/13 and C-679/13 [(EU:C:2015:223)], the Court of Justice of the European Union held that prior to adopting an implementing decision on the basis of Article 8(3) of Decision 2005/387/JHA, the Council should consult the European Parliament. [The contested] Decision was adopted without that prior consultation and, therefore, marred by a procedural defect. The [contested] Decision should therefore be replaced by this decision.

(35) In order to ensure the continuity of control measures across the Union ..., this Decision should be without prejudice to the obligations of the Member States relating to the time limit for subjecting that new psychoactive substance to control measures and criminal penalties in their national laws, as set out in Article 2 of [the contested] Decision.’

6 Article 1 of that decision provides:

‘The following new psychoactive substances shall be subjected to control measures across the Union:

- (a) 4-iodo-2,5-dimethoxy-N-(2-methoxybenzyl)phenethylamine (25I-NBOMe);
- (b) 3,4-dichloro-N-[[1-dimethylamino)cyclohexyl)methyl]benzamide (AH-7921);
- (c) 3,4-methylenedioxypyrovalerone (MDPV);
- (d) 2-(3-methoxyphenyl)-2-(ethylamino)cyclohexanone (methoxetamine).’

7 Article 2 of the decision provides:

‘[The contested] decision is replaced, without prejudice to the obligations of the Member States relating to the time limit for subjecting 4-iodo-2,5-dimethoxy-N-(2-methoxybenzyl)phenethylamine (25I-NBOMe), 3,4-dichloro-N-[[1-(dimethylamino)cyclohexyl)methyl]benzamide (AH-7921), 3,4-methylenedioxypyrovalerone (MDPV) and 2-(3-methoxyphenyl)-2-(ethylamino)cyclohexanone (methoxetamine) to control measures and criminal penalties in their national laws, as set out in Article 2 of [the contested] decision.’

8 According to Article 3 of the decision, it entered into force on the day following its publication in the *Official Journal of the European Union*.

The contested decision

9 The contested decision concerning the Treaty on the Functioning of the European Union (‘TFEU’) and Decision 2005/387, in particular Article 8(3) thereof, provides in Article 1:

‘The following new psychoactive substances shall be subjected to control measures across the Union:

- (a) 4-iodo-2,5-dimethoxy-N-(2-methoxybenzyl)phenethylamine (25I-NBOMe);
- (b) 3,4-dichloro-N-[[1-dimethylamino)cyclohexyl)methyl]benzamide (AH-7921);
- (c) 3,4-methylenedioxypyrovalerone (MDPV);
- (d) 2-(3-methoxyphenyl)-2-(ethylamino)cyclohexanone (methoxetamine).’

10 Article 2 of that decision provides that, by 2 October 2015 at the latest, Member States are to take the necessary measures to subject the psychoactive substances referred to in Article 1 to the control measures and criminal penalties provided for by their legislation.

Forms of order sought by the parties

11 The Parliament claims that the Court should:

- annul the contested decision;
- maintain the effects of that decision until it is replaced by a new act, and
- order the Council to pay the costs.

12 The Council contends that the Court should:

- declare that there is no need to adjudicate in this case;
- in the alternative, dismiss the Parliament's first plea in law as unfounded, and
- in the event that the Court annuls the contested decision, maintain its effects until it is replaced by a new measure.

The action

Subject-matter of the action

Arguments of the parties

- 13 The Council claims that, since the contested decision has been replaced and repealed by Implementing Decision 2015/1875, adopted following consultation of the Parliament and providing that the same psychoactive substances as those covered by the contested decision must be subject to control measures, the Court must find there is no need to adjudicate in this case.
- 14 Indeed, according to settled case-law of the Court, the subject-matter of the dispute and the interest in bringing proceedings must continue to exist until the court's final decision, which presupposes that the action must be able, if successful, to procure an advantage to the party bringing it.
- 15 Furthermore, the Council submits that, although the Court has accepted that the interest in bringing proceedings can continue to exist when the alleged unlawfulness is liable to recur in the future independently of the circumstances of the case in question, this is not the case here, since the Council has already taken the measures necessary to comply with the judgments in *Parliament v Council* (C-317/13 and C-679/13, EU:C:2015:223) and also *Parliament v Council* (C-540/13, EU:C:2015:224), and that it removed the unlawfulness of the contested decision from the European Union's legal order.

Findings of the Court

- 16 In so far as the Council relies on the repeal and replacement of the contested decision by Implementing Decision 2015/1875, it should be noted that the repeal of the contested act, effected after the bringing of the action, does not in itself mean that the Courts of the European Union must declare that there is no need to adjudicate for lack of purpose or for lack of interest in bringing proceedings at the date of the delivery of the judgment (judgment in *Xeda International and Pace International v Commission* C-149/12 P, EU:C:2013:433, paragraph 32 and the case-law cited).

- 17 Nevertheless, as the Council points out, it is apparent from the Court's settled case-law that an applicant's interest in bringing proceedings must, in the light of the purpose of the action, exist at the stage of bringing the action, failing which the action will be inadmissible. That purpose of the action must continue to exist, like the interest in bringing proceedings, until the final decision, failing which there will be no need to adjudicate; this presupposes that the action must be liable, if successful, to procure an advantage to the party bringing it (see judgment in *Abdulrahim v Council and Commission*, C-239/12 P, EU:C:2013:331, paragraph 61 and the case-law cited).
- 18 The Court concluded that, where the contested measure has ceased to have effect in the course of proceedings, its task is to assess in the light of the specific circumstances the applicant's interest in bringing proceedings, taking account, in particular, of the consequences of the alleged unlawfulness and of the nature of the damage claimed to have been sustained (see, to that effect, judgment in *Abdulrahim v Council and Commission*, C-239/12 P, EU:C:2013:331, paragraphs 62 and 65).
- 19 However, it is important to note that this outcome was upheld in cases concerning actions the admissibility of which was conditional on proof of an interest in bringing proceedings, since they were commenced by natural or moral persons as envisaged by the fourth paragraph of Article 263 TFEU.
- 20 The European Parliament's right of action, laid down in the second paragraph of Article 263 TFEU, like the right of action of the Member States laid down in the same provision, is not conditional on proof of an interest in bringing proceedings (see, to that effect, judgment in *Parliament v Council*, C-355/10, EU:C:2012:516, paragraph 37).
- 21 Therefore, the Court's decision to give judgment or, on the contrary, to rule that there is no need to adjudicate in this case cannot logically be dependent on the assessment of the Parliament's continuing interest in bringing proceedings after the adoption of Implementing Decision 2015/1875.
- 22 That said, the Court was able to determine that there was no need to adjudicate in cases initiated by Member States when, following the annulment or withdrawal of the contested act, those States obtained the result their action was intended to achieve (see, to that effect, order in *Germany v Commission*, C-46/96, EU:C:1997:103, paragraph 6, as well as judgments in *Italy v Commission*, C-372/97, EU:C:2004:234, paragraph 37, and *Italy v Commission*, C-138/03, C-324/03 and C-431/03, EU:C:2005:714, paragraph 25).
- 23 In the present case, it should be noted that, in any event, the replacement of the contested decision by Implementing Decision 2015/1875 allowed the past effects of the contested decision to remain and has therefore not resulted in effects equivalent to those which the annulment of the decision would, in principle, have had.
- 24 Consequently, it follows from reading Articles 1 and 3 of the implementing decision together that the obligation it lays down to subject the psychoactive substances concerned to control measures did not take effect until the day after its publication in the *Official Journal of the European Union*. This obligation therefore is not of a kind that can replace the equivalent obligation laid down by the contested decision, as far as concerns the period preceding the entry into force of the contested decision.
- 25 Likewise, although it is apparent from recital 34 and Article 2 of Implementing Decision 2015/1875 that the latter replaced the contested decision, nothing in that implementing decision indicates that that replacement was retroactive in nature.
- 26 On the contrary, it is apparent from recital 35 and Article 2 of the implementing decision that the latter applies 'without prejudice' to the obligations stemming from the contested decision as regards the period set for submitting the psychoactive substances concerned to control measures and to criminal penalties, that is, by 2 October 2015 at the latest. It follows that the Council neither sought

to question the validity of those obligations, such as they stem from the contested decision, nor established retroactively the validity of those obligations on the basis of Implementing Decision 2015/1875.

- 27 Moreover, it should be noted that the Council relied only upon the repeal and replacement of the contested decision by Implementing Decision 2015/1875 before the Court, without holding that that replacement had an effect equivalent to the annulment of the contested decision from that date.
- 28 Therefore, it is apparent that the entry into force of that implementing decision did not put an end to the body of effects of the contested decision and, consequently, did not entirely deprive of its purpose the action brought by the Parliament in this case.
- 29 That conclusion cannot be called in question by the fact that the Parliament requests the Court, should it annul the contested decision, to retain the effects of the latter until it is replaced by a new decision, since it is for the Court to rule on the consequences of an annulment without being bound by the proposals formulated to that end by the parties and that, in any event, an institution may legitimately seek to obtain a declaration of illegality even where the effects of the act annulled remain unaffected in their entirety (see, to that effect, judgment in *Council v Parliament*, C-284/90, EU:C:1992:154, paragraph 36).
- 30 It emerges from the foregoing is that it is necessary to adjudicate the action brought by the Parliament.

Substance

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

The second plea in law, alleging infringement of an essential procedural requirement

– Arguments of the parties

- 32 The Parliament claims that the fact that it did not take part in the adoption of the contested decision amounts to infringement of an essential procedural requirement.
- 33 It points out that that decision should have been adopted by means of the ordinary legislative procedure on the basis of Article 83(1) TFEU, and not within the framework of a procedure with which the Parliament was not associated.
- 34 The Council acknowledges that, because the Parliament was not consulted, the procedure followed in order to adopt the contested decision did not satisfy the requirements of Article 34(2)(c) EU.

– Findings of the Court

- 35 It should be noted, as a preliminary point, that proper consultation of the Parliament in the cases provided for by the applicable rules of EU law constitutes an essential procedural requirement, disregard of which renders the act concerned void (judgments in *Parliament v Council*, C-317/13 and C-679/13, EU:C:2015:223, paragraph 63, and *Parliament v Council*, C-540/13, EU:C:2015:224, paragraph 53 and the case-law cited).

- 36 It is therefore necessary, in order to give a ruling on the Parliament's second plea in support of its action, to establish whether consultation of the Parliament was required before the adoption of the contested decision.
- 37 It is apparent from settled case-law of the Court that the legal basis of a measure determines the procedure to be followed in adopting that measure (see, to that effect, judgments in *Parliament v Council*, C-130/10, EU:C:2012:472, paragraph 80, and *Parliament v Council*, C-658/11, EU:C:2014:2025, paragraph 57).
- 38 In the present case, while if there is disagreement between the parties over the legal basis actually used by the Council to adopt the contested decision, it is clearly apparent from the wording of that decision that it is based on Article 8(3) of Decision 2005/387 (see by analogy, judgment in *Parliament v Council*, C-317/13 and C-679/13, EU:C:2015:223, paragraphs 28 to 31).
- 39 It follows from the case-law of the Court that, for as long as it is not repealed, annulled or amended, Article 8(3) of Decision 2005/387 continues, by virtue of Article 9 of Protocol (No 36) on transitional provisions, to produce its legal effects, after the entry into force of the Treaty of Lisbon, and that, consequently, it permits the adoption of implementing measures in accordance with the procedure it establishes (see, to that effect, judgment in *Parliament v Council*, C-317/13 and C-679/13, EU:C:2015:223, paragraph 57 and 65).
- 40 As a consequence, Article 8(3) of Decision 2005/387 must be interpreted, in accordance with Article 39(1) EU, as permitting the Council to adopt an act for the purpose of submitting a new psychoactive substance to control measures only after it has consulted the Parliament (judgment in *Parliament v Council*, C-317/13 and C-679/13, EU:C:2015:223, paragraph 50).
- 41 The repeal of Article 39(1) EU by the Treaty of Lisbon cannot call in question that obligation to consult the Parliament since, firstly, the requirement to interpret secondary legislation in compliance with primary law follows from the general principle of interpretation that a provision must be interpreted, as far as possible, in such a way as not to affect its validity and, secondly, that the legality of an EU measure must be assessed on the basis of the facts and the law as they stood at the time when the measure was adopted (see, to that effect, judgment in *Parliament v Council*, C-317/13 and C-679/13, EU:C:2015:223, paragraphs 45, 49 and 67).
- 42 It is common ground that the contested decision was adopted by the Council without prior consultation of the Parliament.
- 43 It follows that the second plea in law is well founded and that the contested decision must, accordingly, be annulled.

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

- 44 Since the Parliament's second plea was upheld and the contested decision must be annulled as a result, it is not necessary to assess the Parliament's first plea in support of its action.

The request for the effects of the contested decision to be maintained

- 45 Both the Parliament and the Council have requested the Court to maintain, if it should annul the contested decision, the effects of that decision until it is replaced by a new act.
- 46 In that regard, under Article 264(2) TFEU, the Court may, if it considers it necessary to do so, state what effects of an act that it has declared void are to be considered definitive.

- 47 In the present case, it must be noted that the Council adopted, in order to remedy the procedural defect that marred the contested decision, Implementing Decision 2015/1875 and that it replaced, from the date of its entry into force, the contested decision.
- 48 Nevertheless, to declare the annulment of the contested decision without providing for the maintenance of its effects could, by creating in particular uncertainty regarding the date from which the Member States must submit psychoactive substances to control measures and to criminal penalties, compromise the effectiveness of the control of the psychoactive substances concerned by that decision and, therefore, the protection of public health. While the Parliament seeks the annulment of that decision on the ground of breach of an essential procedural requirement, it does not contest the purpose or content of the decision.
- 49 The effects of the contested decision must therefore be maintained.

Costs

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

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

1. **Annuls Council Implementing Decision 2014/688/EU of 25 September 2014 on subjecting 4-iodo-2,5-dimethoxy-N-(2-methoxybenzyl)phenethylamine (25I-NBOMe), 3,4-dichloro-N-[[1-(dimethylamino)cyclohexyl)methyl]benzamide (AH-7921), 3,4-methylenedioxypyrovalerone (MDPV) and 2-(3-methoxyphenyl)-2-(ethylamino)cyclohexanone (methoxetamine) to control measures;**
2. **Orders that the effects of Implementing Decision 2014/688 be maintained in force;**
3. **Orders the Council of the European Union to pay the costs.**

[Signatures]