



## Reports of Cases

### JUDGMENT OF THE COURT (Grand Chamber)

18 December 2014\*

(Actions for annulment — Coordination of social security systems — EEC-Turkey Association Agreement — Council decision on the position to be taken on behalf of the European Union within the Association Council — Choice of legal basis — Article 48 TFEU — Article 79(2)(b) TFEU — Article 217 TFEU)

In Case C-81/13,

ACTION for annulment under Article 263 TFEU, brought on 15 February 2013,

**United Kingdom of Great Britain and Northern Ireland**, represented by M. Holt, C. Murrell, E. Jenkinson and S. Behzadi Spencer, acting as Agents, and A. Dashwood QC,

applicant,

supported by:

**Ireland**, represented by L. Williams, acting as Agent, and N. Travers, BL, with an address for service in Luxembourg,

intervener,

v

**Council of the European Union**, represented by E. Finnegan and M. Chavrier, acting as Agents,

defendant,

supported by:

**European Commission**, represented by A. Aresu, J. Enegren and S. Pardo Quintillán, acting as Agents, with an address for service in Luxembourg,

intervener,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, M. Ilešič, L. Bay Larsen, T. von Danwitz, A. Ó Caoimh and J.-C. Bonichot, Presidents of Chambers, J. Malenovský, E. Levits, A. Arabadjiev, M. Berger, E. Jarašiūnas (Rapporteur) and C.G. Fernlund, Judges,

Advocate General: J. Kokott,

\* Language of the case: English.

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 13 May 2014,

after hearing the Opinion of the Advocate General at the sitting on 17 July 2014,

gives the following

### **Judgment**

- 1 By its application the United Kingdom of Great Britain and Northern Ireland asks the Court to annul Council Decision 2012/776/EU of 6 December 2012 on the position to be taken on behalf of the European Union within the Association Council set up by the Agreement establishing an association between the European Economic Community and Turkey, with regard to the adoption of provisions on the coordination of social security systems (OJ 2012 L 340, p. 19, ‘the contested decision’).

### **Legal context**

- 2 The Agreement establishing an Association between the European Economic Community and Turkey (‘the EEC-Turkey Agreement’) was signed at Ankara on 12 September 1963 by the Republic of Turkey, of the one part and by the Member States of the EEC and the Community of the other part. It was concluded, approved and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963 (OJ 1964 217, p. 3685), which was adopted on the basis of Article 238 of the EEC Treaty (now Article 217 TFEU).
- 3 In accordance with Article 2(1) of the agreement, its aim is to promote the continuous and balanced strengthening of trade and economic relations between the parties, while taking full account of the need to ensure an accelerated development of the Turkish economy and to improve the level of employment and the living conditions of the Turkish people.
- 4 Article 9 of the agreement provides that, within the scope of the agreement, ‘any discrimination on grounds of nationality shall be prohibited’.
- 5 Article 12 of the agreement provides:  
  
‘The Contracting Parties agree to be guided by Articles 48, 49 and 50 of the Treaty establishing the Community for the purpose of progressively securing freedom of movement for workers between them.’
- 6 Article 36 of the Additional Protocol, signed on 23 November 1970 at Brussels, annexed to the EEC-Turkey Agreement and concluded, approved and confirmed on behalf of the Community by Council Regulation (EEC) No 2760/72 of 19 December 1972 (OJ 1972 L 293, p. 1) (‘the Additional Protocol’), which, in accordance with Article 62, forms an integral part of that agreement, provides:  
  
‘Freedom of movement for workers between Member States of the Community and Turkey shall be secured by progressive stages in accordance with the principles set out in Article 12 of the [EEC-Turkey Agreement] between the end of the twelfth and the twenty-second year after the entry into force of that Agreement.  
  
...’

7 In accordance with Article 39 of the Additional Protocol:

‘1. Before the end of the first year after the entry into force of this Protocol the Council of Association shall adopt social security measures for workers of Turkish nationality moving within the Community and for their families residing in the Community.

2. These provisions must enable workers of Turkish nationality, in accordance with arrangements to be laid down, to aggregate periods of insurance or employment completed in individual Member States in respect of old-age pensions, death benefits and invalidity pensions, and also as regards the provision of health services for workers and their families residing in the Community. These measures shall create no obligation on Member States to take into account periods completed in Turkey.

3. The abovementioned measures must ensure that family allowances are paid if a worker’s family resides in the Community.

4. It must be possible to transfer to Turkey old-age pensions, death benefits and invalidity pensions obtained under the measures adopted pursuant to paragraph 2.

5. The measures provided for in this Article shall not affect the rights and obligations arising from bilateral agreements between Turkey and Member States of the Community, in so far as these agreements provide more favourable arrangements for Turkish nationals.’

8 On the basis of Article 39 of the Additional Protocol, Decision No 3/80 of the Association Council of 19 September 1980 on the application of the social security schemes of the Member States of the European Communities to Turkish workers and members of their families (OJ 1983 C 110, p. 60, ‘Decision No 3/80’) was adopted. That decision applies, as stated in Article 2, to workers who are or have been subject to the legislation of one or more Member States and who are Turkish nationals, to the members of the families of these workers resident in the territory of one of the Member States, and to the survivors of these workers. The material scope of the decision, as defined in Article 4, extends to legislation concerning the branches of social security relating to sickness and maternity benefits, invalidity benefits, old-age benefits, death grants, benefits in respect of accidents at work and occupational diseases, unemployment benefits and family benefits.

9 Article 3(1), headed ‘Equality of treatment’, of Decision No 3/80 provides:

‘Subject to the special provisions of this Decision, persons resident in the territory of one of the Member States to whom this Decision applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State.’

10 Title III of Decision No 3/80 contains special provisions relating to the various categories of benefits. Those provisions refer essentially to certain provisions of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971(II), p. 416) and to certain provisions of Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation No 1408/71 (OJ, English Special Edition 1972(I), p. 159).

### **The contested decision**

11 The contested decision was adopted, following the proposal from the European Commission, on the basis of Article 48 TFEU in conjunction with Article 218(9) TFEU. Recital 1 in its preamble recalls that the EEC-Turkey Agreement and the Additional Protocol provide that the freedom of movement for workers between the European Union and Turkey is to be secured by progressive stages, while

recitals 2 to 4 refer to the content of Article 9 of the agreement and Article 39 of the protocol, noting that Decision No 3/80 was a first step towards the implementation of those articles. Recitals 5 to 7 read as follows:

- '(5) It is necessary to ensure that in the field of social security, Article 9 of the [EEC-Turkey] Agreement and Article 39 of the Additional Protocol are fully implemented.
- (6) There is a need to update the implementing provisions currently contained in Decision No 3/80 so that they reflect developments in the field of European Union social security coordination.
- (7) Decision No 3/80 should therefore be repealed and replaced with a Decision of the Association Council that, in one single step, implements the relevant provisions of the [EEC-Turkey] Agreement and of the Additional Protocol regarding the coordination of social security systems.'

12 In accordance with the first paragraph of Article 1 of the contested decision:

'The position to be taken on behalf of the European Union within the Association Council set up by the [EEC-Turkey Agreement], with regard to the adoption of provisions on the coordination of social security systems, shall be based on the draft decision of the Association Council attached to this Decision.'

- 13 The draft decision of the Association Council annexed to the contested decision ('the draft decision of the Association Council') contains, inter alia, the same recitals as those cited in paragraph 11 above. Article 1 of the draft decision, 'Definitions', refers, in particular for the terms 'worker', 'member of the family', 'legislation' and 'benefits', to Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1), which repealed Regulation No 1408/71, and to Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation No 883/2004 (OJ 2009 L 284, p. 1), which repealed Regulation No 574/72.
- 14 Article 2, 'Persons covered', of the draft decision of the Association Council provides that that decision is to apply, first, to Turkish workers who are, or have been, legally employed in the territory of a Member State and who are, or have been, subject to the legislation of one or more Member States, their survivors, and their family members who are, or have been, legally resident with the worker concerned while the worker is employed in a Member State, and, secondly, to workers who are nationals of a Member State who are, or have been, legally employed in the territory of Turkey and who are, or have been, subject to the legislation of Turkey, their survivors, and their family members who are, or have been, legally resident with the worker concerned while the worker is employed in Turkey.
- 15 Article 3 of the draft decision requires equality of treatment with regard to benefits, and Article 4 provides for the waiver of residence clauses for certain benefits. In addition, the draft decision also establishes, in Articles 5 and 6, a system of cooperation between the Member States and Turkey, as well as rules on administrative and medical checks.

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

- 16 The United Kingdom asks the Court to annul the contested decision and to order the Council of the European Union to pay the costs.
- 17 The Council contends that the action should be dismissed and the United Kingdom ordered to pay the costs.

- 18 By decisions of the President of the Court of 2 July 2013 and 15 January 2014, the Commission was granted leave to intervene in support of the form of order sought by the Council, while Ireland was granted leave to intervene in support of the form of order sought by the United Kingdom so as to be able to submit observations at the hearing.

## **The action**

### *Arguments of the parties*

- 19 The United Kingdom, supported by Ireland, criticises the Council for using Article 48 TFEU as the substantive legal basis for the contested decision. It submits that the appropriate legal basis for adopting such a decision is not that provision but Article 79(2)(b) TFEU. By not using that provision as the legal basis for the contested decision, the Council denied the United Kingdom the right that it derives from Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the EU and FEU Treaties, not to take part in the adoption of that decision and not to be bound by it.
- 20 In support of this complaint, the United Kingdom submits that Article 48 TFEU is a provision ancillary to the principle of free movement within the European Union for employed and self-employed workers who are nationals of Member States. That article cannot therefore be the legal basis for a measure such as the contested decision which essentially concerns the coordination of social security systems for the benefit of Turkish nationals.
- 21 By contrast, Article 79(2)(b) TFEU would be the appropriate legal basis for such a measure, since it allows the adoption of measures relating to ‘the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States’. Recourse to that provision, which was used as the legal basis for Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation No 883/2004 and Regulation No 987/2009 to nationals of third countries who are not already covered by these regulations solely on the ground of their nationality (OJ 2010 L 344, p. 1) and for the adoption during 2010 and 2012 of nine decisions similar to the contested decision relating to association agreements with other third countries, would be compatible with Article 79(1) TFEU, which provides for the development of a common immigration policy aimed at ensuring not only the efficient management of migration flows but also ‘fair treatment of third-country nationals residing legally in Member States’. That recourse would also be consistent with the partial social security coordination system established by the draft decision of the Association Council, in particular Articles 2(a) and (b), 3 and 4 of that decision.
- 22 That assessment is not called in question by the provisions of the EEC-Turkey Agreement and the Additional Protocol. Article 12 of the agreement and Article 36 of the protocol do not mean that the right to freedom of movement within the European Union enjoyed by nationals of the Member States is extended to Turkish nationals. It remains the case that Turkish workers do not have the right to enter the European Union freely and do not have the right to move freely between the Member States.
- 23 The United Kingdom observes that the reasoning in the judgments in *United Kingdom v Council* (C-431/11, EU:C:2013:589) and *United Kingdom v Council* (C-656/11, EU:C:2014:97), in which the Court held that the contested decisions, which were adopted in the framework of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3, ‘the EEA Agreement’) and the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, signed on 21 June 1999 (OJ 2002

L 114, p. 6, ‘the EC-Switzerland Agreement on the Free Movement of Persons’) respectively, could be legitimately adopted on the basis of Article 48 TFEU, demonstrates that the contested decision could not give rise to an analogous finding.

- 24 Unlike the EEA Agreement and the EC-Switzerland Agreement on the Free Movement of Persons, the purpose of the EEC-Turkey Agreement and the Additional Protocol is not to extend the internal market to Turkey or to secure the free movement of persons between the Union and that non-Member State and Decision No 3/80 did not extend to Turkey the application of Regulations Nos 1408/71 and 574/72.
- 25 Similarly, unlike the decisions at issue in the judgments in *United Kingdom v Council* (EU:C:2013:589) and *United Kingdom v Council* (EU:C:2014:97), the contested decision is not aimed at extending to Turkey the new regime coordinating social security systems established by Regulation No 883/2004, but is a measure limited to updating the limited rights presently enjoyed by Turkish workers under Decision No 3/80.
- 26 Moreover, it is not possible to rely on Article 217 TFEU as a basis for a decision such as the contested decision, since a distinction must be drawn, according to the United Kingdom, between the decision to conclude all the measures constituting an association agreement, which must be taken on the basis of that article, and decisions adopted under such an agreement, which must be taken on the legal bases appropriate to their subject-matter.
- 27 On the issue of the voting rules for decisions under Article 218(9) TFEU, the United Kingdom submits that it is not the default rule of qualified majority, provided for by Article 16(3) TEU, that should apply, but that of Article 218(8) TFEU.
- 28 Ireland states that the existence of Protocol No 21 should have no influence on the choice of the legal basis for a European Union measure. It also observes that, although the Court accepted, in the judgments in *United Kingdom v Council* (EU:C:2013:589) and *United Kingdom v Council* (EU:C:2014:97), that the European Union was able, on the basis of Article 48 TFEU, to extend to third-country nationals provisions relating to the coordination of social security systems applicable within the European Union, that related to the specific nature of the EEA Agreement and the EC-Switzerland Agreement on the Free Movement of Persons. For their part, the EEC-Turkey Agreement and its Additional Protocol do not permit Turkish workers and European Union workers to be placed on the same footing.
- 29 The Council, supported by the Commission, contests that analysis and maintains that Article 48 TFEU is the appropriate substantive legal basis for adopting the contested decision.
- 30 Since the choice of the legal basis for a European Union measure must be based, inter alia, on the aim and content of the measure, it should, according to the Council, be observed that the aim of the draft decision of the Association Council is to implement the provisions of the EEC-Turkey Agreement and the Additional Protocol relating to the coordination of social security systems in accordance with the purpose of those measures, namely to secure freedom of movement for workers between the contracting parties by progressive stages. The fact that the rules envisaged are less extensive in scope than those applicable to European Union nationals does not detract from that objective, but stems from the fact that the EEC-Turkey Agreement and the Additional Protocol provide that freedom of movement for workers is to be secured by progressive stages. In that regard, it is apparent from the Court’s case-law that Turkish workers are no longer in the same situation as that of nationals of other non-member countries.
- 31 In the context of the EEC-Turkey Agreement, the envisaged amendment of the applicable provisions in the field of the coordination of social security systems is not a measure which pertains to the development of the common immigration policy. The contested decision is aimed not at ensuring the

efficient management of migration flows, but at securing freedom of movement for workers by progressive stages, by providing for partial coordination of the social security systems between the contracting parties to replace the scheme established by Decision No 3/80.

- 32 Moreover, the Council shares the United Kingdom's view that Article 217 TFEU cannot be the legal basis for the contested decision. According to the Council, in accordance with the principle of conferral, a European Union measure adopted in the context of an association agreement must be grounded not on the general legal basis used to conclude that agreement, but on the specific legal basis corresponding to the sphere of action to which that measure pertains. The voting rule applicable to a decision establishing the position to be taken on behalf of the European Union within a body set up by an association agreement is determined by that specific legal basis. If Article 217 TFEU were the appropriate legal basis, the applicable voting rule would, in its view, be unanimity.
- 33 The Commission states that the contested decision is aimed at establishing the position of the European Union as regards the extension to Turkish workers of new European Union *acquis* on coordination of social security schemes and that that extension is essential in order to secure progressively freedom of movement for workers, which is one of the main aims of the EEC-Turkey Agreement. That aim distinguishes this agreement from agreements with other non-Member States and is unrelated to the aims of immigration policy, which is not an area covered by the EEC-Turkey Agreement.
- 34 Moreover, the Commission shares the view of the United Kingdom and the Council that Article 217 TFEU cannot be the appropriate legal basis for the contested decision, but contends that, if it were, the applicable voting rule would, in accordance with Article 218(9) TFEU, be qualified majority.

#### *Findings of the Court*

- 35 According to settled case-law, the choice of the legal basis for a European Union measure must rest on objective factors amenable to judicial review, which include in particular the aim and content of the measure (judgments in *Commission v Council*, C-338/01, EU:C:2004:253, paragraph 54 and case-law cited, and *Parliament v Council*, C-130/10, EU:C:2012:472, paragraph 42).
- 36 The legal basis which has been used for the adoption of other European Union measures which might, in certain cases, display similar characteristics is irrelevant in that regard, as the legal basis for a measure must be determined having regard to the measure's own aim and content (see, to that effect, judgments in *United Kingdom v Council*, EU:C:2013:589, paragraph 67 and case-law cited, and *United Kingdom v Council*, EU:C:2014:97, paragraph 48). It is therefore necessary to reject from the outset the argument that the United Kingdom derives from the fact that Article 79(2)(b) TFEU served as the legal basis for Regulation No 1231/2010 and other decisions similar to the contested decision which were adopted in the context of association agreements with other third countries.
- 37 Similarly, Protocol No 21 is not capable of having any effect whatsoever on the question of the correct legal basis for the adoption of the contested decision (see, to that effect, judgments in *Commission v Council*, C-137/12, EU:C:2013:675, paragraphs 73 and 74, and *United Kingdom v Council*, EU:C:2014:97, paragraph 49).
- 38 On the other hand, the context of the measure in question may be relevant to the choice of its legal basis. Thus, where the measure seeks to amend the rules adopted in the context of an existing agreement, it is necessary also to take account of that context and, in particular, of the objective and content of the agreement (see, to that effect, judgments in *United Kingdom v Council*, EU:C:2013:589, paragraph 48, and *United Kingdom v Council*, EU:C:2014:97, paragraph 50).

- 39 In this instance, since the contested decision was intended to settle the position to be taken by the European Union within the Association Council set up by the EEC-Turkey Agreement with regard to the adoption of provisions on the coordination of social security systems, it is necessary, in order to determine the appropriate legal basis for adopting that decision, to examine both that agreement's objective and content as far as concerns social security and the objective and content of the contested decision.
- 40 In that regard, it must be noted at the outset, that, contrary to the submissions of the United Kingdom and Ireland, Article 79(2)(b) TFEU could not have been the appropriate substantive legal basis for adopting that decision.
- 41 It is true that Article 79(2)(b) TFEU empowers the European Union to adopt measures defining the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States.
- 42 However, as set out in Article 79(2)(b) TFEU, it is for the purposes of Article 79(1) TFEU that such measures may be adopted, that is to say for the purposes of the common immigration policy aimed at ensuring the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.
- 43 On the one hand, the EEC-Turkey Agreement is characterised, as is apparent from Article 12 thereof and Article 36 of the Additional Protocol, by the desire of the contracting parties to secure by progressive stages freedom of movement for workers between them. It is for that purpose that, in Article 39 of the Additional Protocol, those parties entrusted the Council of Association with the adoption of social security measures for Turkish workers moving within the European Union and for their families residing there.
- 44 On the other hand, the contested decision and the draft decision of the Association Council seek *inter alia* to fully implement Article 9 of the EEC-Turkey Agreement and Article 39 of the Additional Protocol and to update the provisions of Decision No 3/80 so that they reflect developments in the field of European Union social security coordination. Moreover, whereas the sole object of Decision No 3/80 was the application of the social security schemes of the Member States to Turkish workers and members of their families, the object of the draft decision of the Association Council is the adoption of a regime coordinating social security systems which includes among the persons covered, as defined in its Article 2, workers who are nationals of a Member State who are, or have been, legally employed in the territory of Turkey and who are, or have been, subject to the legislation of Turkey, their survivors, and family members of those workers, on condition that those family members are, or have been, legally resident with the worker concerned during his employment in Turkey.
- 45 Thus, the contested decision constitutes a further stage in progressively securing freedom of movement for workers between the European Union and Turkey and in developing the links created by their association agreement.
- 46 It is apparent from all those findings that the contested decision pursues a purpose other than that of the common immigration policy referred to in paragraph 42 of this judgment. Accordingly, to accept that the predominant purpose of that decision is to ensure the efficient management of migration flows and fair treatment of third country nationals residing legally in Member States would amount to denying the specific context of which that decision forms part.
- 47 Thus, it is necessary, subsequently, to examine whether Article 48 TFEU, which was chosen by the Council, may solely constitute the appropriate legal basis for adopting the contested decision.

- 48 In that regard, it should, in the first place, be recalled that Article 12 of the EEC-Turkey Agreement provides that freedom of movement for workers between Member States of the Community and Turkey will be secured by progressive stages, guided by Articles 48 to 50 of the EEC Treaty (now Articles 45 TFEU to 47 TFEU).
- 49 So far as concerns freedom of movement for persons between Turkey and the European Union, as the Court has already held in paragraph 53 of the judgment in *Demirkan* (C-221/11, EU:C:2013:583), that no such general principle is established by the agreement and the Additional Protocol.
- 50 It must also be observed that neither the EEC-Turkey Agreement nor the Additional Protocol extend to Turkey the freedom of movement for workers which is established in the European Union.
- 51 First, in providing that guidance should be drawn from Articles 48 to 50 of the EEC Treaty for the purpose of progressively securing freedom of movement for workers, Article 12 of the EEC-Turkey Agreement does not oblige the contracting parties to apply as such the EU rules on freedom of movement for workers (see, by analogy, judgment in *Demirkan*, EU:C:2013:583, paragraph 45), although Articles 48 to 50 of the EEC Treaty must none the less be extended, so far as possible, to Turkish workers who enjoy the rights conferred on them in the context of that agreement (see, by analogy, judgments in *Bozkurt*, C-434/93, EU:C:1995:168, paragraph 20; *Ayaz*, C-275/02, EU:C:2004:570, paragraph 44, and *Dülger*, C-451/11, EU:C:2012:504, paragraph 48).
- 52 Second, as the Advocate General observed in point 79 of her Opinion, the progressive establishment of freedom of movement for workers provided for in Article 12 of the EEC-Turkey Agreement has not been completed. In that regard, the Court has repeatedly held that, unlike workers from the European Union, Turkish nationals are not currently entitled to freedom of movement within the European Union; that agreement guarantees the enjoyment of certain rights only within the territory of the host Member State (see, to that effect, judgments in *Derin*, C-325/05, EU:C:2007:442, paragraph 66, and *Demirkan*, EU:C:2013:583, paragraph 53).
- 53 As regards the content of the EEC-Turkey Agreement as far as concerns social security, it should be observed that Article 39(1) and (2) of the Additional Protocol provides that the Council of Association is to adopt social security measures for Turkish workers moving within the European Union and for their families residing in the European Union, and that those provisions must, inter alia, enable those workers to aggregate periods of insurance or employment completed in individual Member States in respect of entitlement to certain benefits. By contrast, Article 39 of the Additional Protocol does not provide for the adoption of measures for European Union workers moving in Turkey and states, in paragraph 2 thereof, that the measures to be adopted cannot require Member States to take into account periods completed by Turkish workers in Turkey.
- 54 Consequently, the EEC-Turkey Agreement does not establish between the contracting parties a regime coordinating social security systems such as that established by Regulation No 1408/71.
- 55 Moreover, Decision No 3/80, which was adopted in accordance with Article 39 of the Additional Protocol, refers, as the Court has already held in paragraphs 29 and 30 of the judgment in *Taşlan-Met and Others* (C-277/94, EU:C:1996:315), only to certain provisions of Regulation No 1408/71 and Regulation No 574/72.
- 56 As regards, in the second place, the content and aim of the contested decision, it must be stated that that decision seeks, as is apparent from recitals 5 to 7 in the preamble thereto and from recitals 6, 7 and 9 in the preamble to the draft decision of the Association Council, which are worded in the same terms, to ensure that Article 9 of the EEC-Turkey Agreement and Article 39 of the Additional Protocol are fully implemented and to update the implementing provisions contained in Decision No 3/80, by

replacing that decision, so that those provisions reflect developments in the field of European Union social security coordination, namely those stemming from the adoption of Regulations Nos 883/2004, 987/2009 and 1231/2010.

- 57 Against this background, it is apparent from the findings made in paragraphs 48 to 52 of this judgment, on the one hand, that the aim of the EEC-Turkey Agreement, unlike what was found by the Court in paragraph 50 of the judgment in *United Kingdom v Council* (EU:C:2013:589) in relation to the EEA Agreement, is not to provide for the fullest possible realisation of the free movement of goods, persons, services and capital between the contracting parties, so that the internal market established within the European Union is extended to Turkey, or even, unlike what was found in paragraph 55 of the judgment in *United Kingdom v Council* (EU:C:2014:97) regarding the EC-Switzerland Agreement on the Free Movement of Persons, to bring about between those parties the free movement of persons and, on the other hand, that the freedom of movement for workers provided for by the EEC-Turkey Agreement has not been fully realised.
- 58 Moreover, it is apparent from the findings made in paragraphs 53 to 55 of this judgment that, unlike what was found in paragraph 56 of the judgment in *United Kingdom v Council* (EU:C:2013:589) regarding the EEA Agreement, Regulation No 1408/71 was not incorporated into the EEC-Turkey Agreement or its Additional Protocol so as to extend to Turkey the rules on the coordination of social security systems contained in it. Similarly, contrary to what was found in paragraphs 57 and 58 of the judgment in *United Kingdom v Council* (EU:C:2014:97) concerning the EC-Switzerland Agreement on the Free Movement of Persons, it is apparent that the contracting parties to the EEC-Turkey Agreement did not intend to apply amongst themselves Regulations Nos 1408/71 and 574/72 in their entirety and that Turkey cannot be equated with a Member State for the purposes of the application of those regulations.
- 59 In the absence of any extension of the internal market or of the free movement of persons to Turkey, and in the absence of any extension which has already been realised of freedom of movement for workers to Turkey or, at the very least, of the European Union social security rules, and given that that non-Member State has not been placed on the same footing as a Member State for the purposes of those rules, the contested decision could not legitimately be adopted solely on the basis of Article 48 TFEU. As a rule, it is only in the sphere of the internal policies and actions of the European Union or of the external actions relating to third countries which can be placed on the same footing as Member State of the European Union, according to the case-law cited in paragraph 58 of this judgment, that Article 48 TFEU empowers the European Union to adopt measures in this area.
- 60 As regards a decision adopted in the context of an association agreement, it is necessary to examine whether the contested decision could have been legitimately based on Article 217 TFEU, which empowers the European Union to conclude with a third country an agreement establishing an association involving reciprocal rights and obligations, common action and special procedure.
- 61 That general power does not allow the European Union, in the light of the principle of conferral enshrined in Article 5(2) TEU, to adopt, in the framework of an association agreement, measures exceeding the limits of the powers that the Member States have conferred on it in the Treaties to attain the objectives set out therein (see, to that effect, judgment in *Commission v Council*, C-370/07, EU:C:2009:590, paragraph 46). By contrast, Article 217 TFEU necessarily empowers the European Union to guarantee commitments towards third countries in all the fields covered by the FEU Treaty (see, to that effect, judgment in *Demirel*, 12/86, EU:C:1987:400, paragraph 9).
- 62 It follows that the Council is entitled, on the basis of Article 217 TFEU, to adopt a measure in the framework of an association agreement on condition that that measure relates to a specific area of EU competence and is also founded, in accordance with the case-law recalled in paragraph 35 of this judgment, on the legal basis corresponding, in the light in particular of its aim and content, to that area.

- 63 Thus, in the present case, although the contested decision could not legitimately be adopted solely on the basis of Article 217 TFEU or solely on the basis of Article 48 TFEU, it ought by contrast to have been adopted on the basis of those articles in conjunction with one another, since it has been adopted in the framework of an association agreement and is aimed at the adoption of measures coordinating social security systems.
- 64 It follows that the legal basis for the contested decision is incorrect inasmuch as Article 217 TFEU was omitted from that legal basis.
- 65 As regards the consequences of that omission, it must be held that the omission has no effect on the content of the contested decision or the procedure by which it was adopted.
- 66 As the Advocate General observed in points 97 and 123 of her Opinion, since the contested decision does not relate to the conclusion of an association agreement or is not aimed at supplementing or amending the institutional framework of such an agreement, but is aimed solely at ensuring its implementation, it is, in accordance with the combined measures of the first paragraph of Article 218(8) TFEU and Article 218(9) TFEU, by a qualified majority and without the approval of the European Parliament, that the Council should have, in any event, adopted the contested decision. Moreover, the omission of Article 217 TFEU in the legal basis for the contested decision is irrelevant with regard to Protocol No 21.
- 67 Accordingly, the error in the citations of the contested decision is a purely formal defect (see, *inter alia*, judgment in *Swedish Match*, C-210/03, EU:C:2004:802, paragraph 44 and case-law cited) which does not entail its annulment.
- 68 The action must therefore be dismissed.

### **Costs**

- 69 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 Council has applied for costs and the United Kingdom has been unsuccessful, the latter must be ordered to pay the costs.
- 70 In accordance with Article 140(1) of the Rules of Procedure, Ireland and the Commission must bear their own costs.

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

- 1. Dismisses the action;**
- 2. Orders the United Kingdom of Great Britain and Northern Ireland to pay the costs;**
- 3. Orders Ireland and the European Commission to bear their own costs.**

[Signatures]