Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 17 July 2014 [1]

Case C-81/13

United Kingdom of Great Britain and Northern Ireland
v

Council of the European Union

(External relations — EEC-Turkey Association Agreement — Coordination of social security systems — Envisaged decision of the EEC-Turkey Association Council on the basis of the system under Regulation (EC) No 883/2004 — Council Decision 2012/776/EU on the position to be taken by the European Union within the Association Council — Choice of the correct substantive legal basis — Article 48 TFEU, Article 79(2)(b) TFEU, Article 216(1) TFEU or Article 217 TFEU)

I – **Introduction**

1. The present action signals a new round in the bitter dispute between the United Kingdom and the Council of the European Union over what legal basis is to be used when the European Union wishes to participate, within the framework of an association with a third country, in the adoption of social legislation intended to benefit the nationals of the third country, on the one hand, but also European Union citizens, on the other.

2. As in Cases C-431/11 and C-656/11, the Council, on a proposal from the European Commission, intends to introduce, in the relationship with Turkey, certain provisions on the coordination of social security systems which draw upon the rules applying within the European Union. To that end, by Decision 2012/776/EU, [2] the Council established in advance the position to be taken by the European Union within the EEC-Turkey Association Council and, in doing so, had regard to the rules on freedom of movement for workers within the European internal market, and more precisely Article 48 TFEU.

3. The United Kingdom is challenging that decision before the Court. Unlike the Council and the Commission, the United Kingdom, supported by Ireland, takes the view that recourse should be had, not to the rules on freedom of movement for workers in Article 48 TFEU, but to the provisions concerning the rights of third-country nationals in the area of freedom, security and justice, and more precisely Article 79(2)(b) TFEU.

1 — Original language: German.

2 — 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); also 'the contested decision'.

4. The distinction between Article 48 TFEU and Article 79(2)(b) TFEU, like the relationship between those two provisions and the general power to establish associations under Article 217 TFEU and Article 216(1) TFEU, is by no means merely technical in nature. In reality, these are issues of considerable practical importance, not least with regard to the United Kingdom and Ireland, which enjoy certain special rights under Article 79(2)(b) TFEU ('opt-in solution').

5. Recently, by judgments of 26 September 2013 [3] and 27 February 2014, [4] the Court has ruled that Article 48 TFEU was the correct legal basis for the extension of the social legislation applying within the European Union to the European Economic Area (EEA) (Case C-431/11) and to Switzerland (Case C-656/11). The parties to the present proceedings have expressed conflicting views both on those two judgments and on my Opinion in Case C-431/11. [5] Against the background of the arguments exchanged, it will be necessary to discuss whether the solution found in the case of the EEA and Switzerland can be transposed to the association with Turkey.

II – **Legal framework**

6. The legal framework for the present case is defined, first, by the Treaty on the Functioning of the European Union ('the FEU Treaty') and, second, by the EEC-Turkey Association Agreement ('the Association Agreement'), including their respective additional protocols.

A – *The FEU Treaty*

7. Among the provisions on international agreements of the European Union contained in Title V of Part Five of the FEU Treaty, reference should, first and foremost, be made to Article 218(9) TFEU:

'The Council, on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, shall adopt a decision suspending application of an agreement and establishing the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.'

8. The same title of the FEU Treaty also contains Article 216(1) TFEU, which reads as follows:

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

9. The legal bases for the Union's external action further include a power to establish associations, which is laid down in Article 217 TFEU (formerly Article 238 of the EEC Treaty):

'The Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure.'

3 — *United Kingdom* v *Council* (C-431/11, EU:C:2013:589).

4 — *United Kingdom* v *Council* (C-656/11, EU:C:2014:97).

5 — Opinion in *United Kingdom* v *Council* (C-431/11, EU:C:2013:187).

10. The provisions on free movement of persons in Title IV of Part Three of the FEU Treaty include Article 48 TFEU (formerly Article 51 of the EEC Treaty), the first paragraph of which reads as follows:

'The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, they shall make arrangements to secure for employed and self-employed migrant workers and their dependants:

(a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;

(b) payment of benefits to persons resident in the territories of Member States.'

11. Article 79 TFEU, which is one of the rules on the 'area of freedom, security and justice' in Title V of Part Three of the FEU Treaty, includes the following provisions:

'1. The Union shall develop a common immigration policy aimed at ensuring, at all stages, 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.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas:

…

(b) 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;

…'

Protocol No 21 to the EU Treaty and to the FEU Treaty

12. A Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice (Protocol No 21) is annexed to the EU Treaty and to the FEU Treaty. In the case of the United Kingdom, that Protocol applies to the entire area of freedom, security and justice, whilst in the case of Ireland Article 75 TFEU is excluded from its scope (see Article 9 of Protocol No 21).

13. According to the first sentence of the first paragraph of Article 1 and Article 3 of Protocol No 21, the United Kingdom and Ireland will 'not take part in the adoption by the Council of proposed measures' pursuant to Title V of Part Three of the TFEU unless they notify the President of the Council in writing, within three months after a proposal or initiative has been presented, that they wish to take part in the adoption and application of the measure concerned.

14. Moreover, as is clear from Article 2 of Protocol No 21, 'none of the provisions of Title V of Part Three [of the TFEU], no measure adopted pursuant to that Title, no provision of any international agreement concluded by the Union pursuant to that Title, and no decision of the Court of Justice interpreting any such provision or measure shall be binding upon or applicable in the United Kingdom or Ireland'; furthermore, 'no such provision, measure or decision shall in any way affect the competences, rights and obligations of those States'.

B – *The EEC-Turkey Association Agreement*

15. The Agreement establishing an Association between the European Economic Community and Turkey was signed on 12 September 1963 in Ankara between the Republic of Turkey, of the one part, and the then EEC and its Member States, of the other. That Association Agreement was 'concluded, approved and confirmed' on behalf of the EEC by the Council, for which purpose the power to establish associations under Article 238 of the EEC Treaty (now Article 217 TFEU) served as the legal basis at that time.[6] That Association Agreement entered into force on 1 December 1964. It is supplemented by an Additional Protocol,[7] which was signed in Brussels on 23 November 1970 and 'concluded, approved and confirmed' on behalf of the EEC by the Council on 19 December 1972, on the basis of Article 238 of the EEC Treaty.[8]

16. The preamble to the Association Agreement records the intention of the Contracting Parties 'to establish ever closer bonds between the Turkish people and the peoples brought together in the European Economic Community' (first recital); it further expresses the recognition by the Contracting Parties 'that the support given by the European Economic Community to the efforts of the Turkish people to improve their standard of living will facilitate the accession of Turkey to the Community at a later date' (fourth recital).

17. Pursuant to Article 9 of the Association Agreement, which refers to Article 7 of the EEC Treaty (now Article 18 TFEU), a prohibition of discrimination on grounds of nationality is to apply in the context of the Association:

'The Contracting Parties recognise that within the scope of this Agreement … any discrimination on grounds of nationality shall be prohibited in accordance with the principle laid down in Article 7 of the Treaty establishing the Community.'

18. Article 12 of the Association Agreement makes reference as follows to Articles 48 to 50 of the EEC Treaty (now Articles 45 TFEU to 47 TFEU):

'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.'

19. Article 36 of the Additional Protocol states:

'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 Agreement of Association between the end of the twelfth and the twenty-second year after the entry into force of that Agreement.'

20. With regard to social security, Article 39 of the Additional Protocol provides:

'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.

6 — Council Decision 64/732/EEC of 23 December 1963 on the conclusion of the Agreement establishing an Association between the European Economic Community and Turkey (OJ 1973 C 113, p. 1).

7 — OJ 1972 L 293, p. 4.

8 — Council Regulation (EEC) No 2760/72 of 19 December 1972 concluding the additional protocol and the financial protocol signed on 23 November 1970 and annexed to the Agreement establishing an Association between the European Economic Community and Turkey and relating to the measures to be taken for their implementation (OJ 1972 L 293, p. 1).

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.'

21. Pursuant to Article 6 of the Association Agreement, the Contracting Parties are to meet in a Council of Association.[9] Pursuant to Article 22(1) of the Association Agreement, that Council of Association is empowered to take decisions in order to attain the objectives of the Agreement and in the cases provided for therein.

22. On the basis of Article 39 of the Additional Protocol, the Association Council drew up Decision No 3/80,[10] by which social security schemes are coordinated in order to provide Turkish workers and members of their families with access to certain social security benefits within the EEC. In substance, Decision No 3/80 essentially incorporated certain provisions of Regulation (EEC) No 1408/71[11] and also — in a few instances — certain provisions of Regulation (EEC) No 574/72.[12]

23. On 8 February 1983, the Commission submitted to the Council its Proposal for a Regulation implementing Decision No 3/80.[13] However, that proposal, which was again based on Article 238 of the EEC Treaty (now Article 217 TFEU), never led to the adoption of a corresponding regulation by the Council and was eventually withdrawn as 'obsolete' by the Commission in 2013.[14]

III – **Background to the dispute**

24. For a long time, the rules on the coordination of social security systems which applied within the Union were contained in Regulation No 1408/71 and in Regulation No 574/72 which supplemented it. With effect from 1 May 2010, Regulation No 1408/71 was replaced by Regulation No 883/2004,[15] and Regulation No 574/72 was substituted by Regulation No 987/2009.[16]

9 — Hereinafter also referred to as 'the Association Council' or 'the EEC-Turkey Association Council'.

10 — 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).

11 — Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (first published in OJ, English Special Edition 1971 (II), p. 416, and subsequently amended several times).

12 — Council Regulation (EEC) No 574/72 of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community (first published in OJ, English Special Edition 1972 (I), p. 160, and subsequently amended several times).

13 — Proposal for a Council Regulation (EEC) implementing within the European Economic Community Decision No 3/80 of the EEC-Turkey Association Council on the application of the social security schemes of the Member States of the European Communities to Turkish workers and members of their families, COM(83) 13 final (OJ 1983 C 110, p. 1).

14 — OJ 2013 C 109, p. 7.

15 — 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).

16 — Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (OJ 2009 L 284, p. 1).

25. At the level of the association with Turkey, the intention is to adapt the rules on the application of social security systems applying pursuant to Decision No 3/80 to the changed legal situation within the Union. For that purpose, Decision No 3/80 is to be repealed and, while retaining the main features of the previous system, replaced by a new Association Council decision in which, inter alia, references to Regulations No 883/2004 and No 987/2009 are substituted for the previous references to Regulations No 1408/71 and No 574/72. However, there remains no intention of fully extending the system under Regulation No 883/2004 to Turkey. [17]

26. On 6 December 2012, the Council adopted Decision 2012/776, by which it established the position to be taken by the Union within the Association Council (also 'the contested decision'). As proposed by the Commission, [18] that decision is based on Article 48 TFEU in conjunction with 218(9) TFEU. The draft of the envisaged new Association Council decision is annexed to it.

27. By way of reasoning, the preamble to Decision 2012/776 states the following in recitals 5 to 7:

'(5) It is necessary to ensure that in the field of social security, Article 9 of the 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 Agreement and of the Additional Protocol regarding the coordination of social security systems.'

28. The same reasons are also to be found in the preamble to the draft version of the new Association Council decision, and in particular in recitals 6, 7 and 9.

29. It also follows in essence from Article 2 of the draft new Association Council decision ('Persons covered') that that decision is intended to apply not only to Turkish workers who are or have been legally employed in the territory of a Member State, but, conversely, also to workers who are nationals of a Member State of the European Union and are or have been legally employed in the territory of Turkey. In addition, the new decision is intended to apply to members of the family of the worker concerned, provided that these family members are or have been legally resident with the worker concerned during that worker's employment in the host State in question.

30. In substance, Article 3 of the draft provides for a principle of equal treatment with regard to benefits and Article 4 requires the waiving of residence clauses in relation to certain benefits. Finally, pursuant to Articles 5 and 6 of the draft, a system of cooperation between the Contracting Parties and also certain rules concerning administrative checks and medical examinations are to be introduced.

31. In a joint statement for the Council minutes, [19] the United Kingdom and Ireland set out their objections to the choice of Article 48 TFEU as the substantive legal basis for Decision 2012/776 and reserved the right to take legal action. For its part, the Council noted in the same minutes that the European Union would participate in a decision by the Association Council only after the judgments of the Court of Justice in Cases C-431/11 and C-656/11 had been delivered. According to its own account, the United Kingdom did not take part in the vote on Decision 2012/776.

17 — Unlike in the system of Regulation No 883/2004, benefits in the event of unemployment, sickness, maternity and paternity, for example, will not be exportable. Furthermore, in line with Article 39(2) of the Additional Protocol to the Association Agreement, there will continue to be no provision for any obligation on the Member States of the Union to take into account periods of insurance or employment completed in Turkey in respect of old-age pensions, death benefits and invalidity pensions, and also as regards the provision of health services, in the Union.

18 — Commission Proposal of 30 March 2012, COM(2012) 152 final.

19 — Minutes of the meeting of the Council of the European Union of 6 December 2012.

IV – **Procedure before the Court and forms of order sought by the parties**

32. By application of 15 February 2013, the United Kingdom brought an action seeking annulment of Decision 2012/776. It is of the view that the contested decision should have been based, not on Article 48 TFEU, but on Article 79(2)(b) TFEU.

33. The Commission was granted leave to intervene in support of the Council on 2 July 2013, while Ireland was granted leave to intervene in support of the United Kingdom on 15 January 2014. In view of its late application, however, Ireland was limited, under Article 129(4) of the Courts' Rules of Procedure, to submitting oral observations.

34. The United Kingdom, supported by Ireland, claims that the Court should:

— annul Decision 2012/776, and

— order the Council to pay the costs.

35. The Council, supported by the Commission, claims that the Court should:

— dismiss the action, and

— order the applicant to pay the costs.

36. The action brought by the United Kingdom was examined before the Court of Justice on the basis of the written documents and, on 13 May 2014, at a hearing. At the request of the United Kingdom, pursuant to the third paragraph of Article 16 of the Statute of the Court, the Court is sitting in a Grand Chamber.

V – **Assessment**

37. The action brought by the United Kingdom, like those previously brought in Cases C-431/11 and C-656/11, is based on a single plea for annulment: in establishing the position to be taken by the Union within the EEC-Turkey Association Council, the Council has, it contends, cited the incorrect legal basis.

38. From a *procedural point of view*, all the parties agree that the Union's position was correctly established by the Council in the form of a decision pursuant to Article 218(9) TFEU. The Association Council is a body set up by the Association Agreement which takes decisions having legal effects in order to attain the objectives of that agreement (see, in this regard, the provisions of Article 6 and Article 22(1) of the Association Agreement).

39. It is also common ground that, in accordance with the principle of conferral (first sentence of Article 5(1) TEU), in addition to Article 218(9) TFEU, such a Council decision establishing the Union's position also requires a *substantive legal basis* determining the extent of the Union's powers and hence ultimately the scope given it by the Treaties. [20]

20 — Judgment in *United Kingdom* v *Council* (EU:C:2013:589, paragraphs 42 and 43); to the same effect, *Kramer and Others* (3/76, 4/76 and 6/76, EU:C:1976:114, paragraph 19), according to which 'regard must be had to the whole scheme of Community law no less than to its substantive provisions'; see also Opinion 2/94 (EU:C:1996:140, paragraph 23 et seq.).

40. However, it is a subject of fierce debate whether in the present case that legal basis is to be found in the rules on the internal market, in the provisions on the area of freedom, security and justice, or in the power to establish associations under Article 217 TFEU. The role played by Article 216(1) TFEU is also the subject of dispute.

A – *The choice of the correct substantive legal basis*

41. It is particularly clear in a case such as the present that the choice of the correct legal basis is of considerable practical and institutional, indeed constitutional importance.[21] The choice of legal basis paves the way for determining whether the United Kingdom and Ireland are able to exercise the special rights conferred on them by the 'opt-in' under Protocol No 21 to the EU Treaty and the FEU Treaty.[22]

42. However, Protocol No 21 as such is not capable of having any effect whatsoever on the question of the correct legal basis for the adoption of the contested decision.[23] Rather, according to settled case-law, the choice of the legal basis for a Union measure must rest on objective factors which are amenable to judicial review, including the aim and content of the measure.[24]

43. The purpose of the contested Council decision is to prepare a new Association Council decision designed to update and moderately extend the currently applicable rules on the coordination of social security systems between the Union and Turkey[25] within the framework of the existing association.

1. Article 79 TFEU is not an appropriate legal basis

44. The envisaged new Association Council decision, the preparation of which is served by the contested decision, contains, inter alia, a number of rules on the coordination of social security systems which — subject to the conditions set out therein — are intended to benefit Turkish workers who are legally employed in the European Union and certain members of the families of those workers.[26]

45. At first glance, Article 79(2)(b) TFEU might therefore be the *sedes materiae*, given that this provision expressly permits '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'. These may also include rules on social security for third-country nationals.[27]

21 — See Opinion 2/00 (EU:C:2001:664, paragraph 5), Opinion 1/08 (EU:C:2009:739, paragraph 110) and *Commission* v *Council* (C-370/07, EU:C:2009:590, paragraph 47).

22 — Similar problems may also arise with regard to Denmark in connection with Protocol No 22 to the EU Treaty and the FEU Treaty.

23 — *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).

24 — *Commission* v *Council* (C-300/89, EU:C:1991:244, paragraph 10); *Parliament* v *Council* (C-130/10, EU:C:2012:472, paragraph 42); *Commission* v *Council* (EU:C:2013:675, paragraph 52); and *Commission* v *Parliament and Council* (C-43/12, EU:C:2014:298, paragraph 29).

25 — Decision No 3/80 of the Association Council is currently applicable.

26 — See, fundamentally, Article 2(a) and (b) of the envisaged new Association Council decision.

27 — This follows not least from the Declaration on Articles 48 and 79 of the Treaty on the Functioning of the European Union (Declaration No 22 annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 (OJ 2008 C 115, p. 346, and OJ 2012 C 326, p. 348).

46. It is undisputed that several measures which were intended, in the context of agreements with third countries, to bring the nationals of those countries within the scope of European Union social legislation have been based on that provision; [28] this has been emphasised by the United Kingdom.

47. However, such a practice of the institutions cannot be the sole decisive factor in determining the correct legal basis for the Council decision under challenge here. [29]

48. In the present case, there are two reasons why Article 79(2)(b) TFEU should not be relied on. First, the envisaged new Association Council decision goes beyond merely defining the rights of third-country nationals (see (a) below). Second, that decision serves the further development of the existing association between the Union and Turkey (see (b) below).

a) The measure at issue goes beyond the mere definition of the rights of third-country nationals

49. The first point to note is that Article 79(2)(a) TFEU could ever be considered as a possible substantive legal basis only if the envisaged new Association Council decision did not go beyond merely defining the rights of third-country nationals or was at least concerned with that subject as its main focus. As is well known, the choice of the legal basis for a Union measure must be based on the main focus of its regulatory content. [30]

50. However, as the Council and the Commission correctly point out, the contested decision by no means seeks merely to regulate unilaterally the social rights of *third-country nationals* — to be more precise, of Turkish workers and their family members — in the Union, but, in addition to that, is also designed to regulate certain social rights of *Union citizens* and members of their families in Turkey. [31]

51. Article 79(2)(b) TFEU does not, in any event, afford any legal basis for this second component. The latter could at most be included in a measure under Article 79(2)(b) TFEU if it was of secondary importance and did not constitute the main focus of the measure.

52. At the hearing before the Court, the United Kingdom and Ireland therefore tried to play down the importance of this second component of the envisaged provisions — adoption of rules for Union citizens and members of their families in Turkey. In their view, that component is not the main focus of what is to be decided within the Association Council. They maintain that the main focus lies in the first component, that is, in the rules envisaged for Turkish workers employed in the Union together with members of their families.

53. However, the opposite is the case.

28 — They are, on the one hand, the six Council Decisions 2010/697/EU (OJ 2010 L 306, p. 1), 2010/698/EU (OJ 2010 L 306, p. 8), 2010/699/EU (OJ 2010 L 306, p. 14), 2010/700/EU (OJ 2010 L 306, p. 21), 2010/701/EU (OJ 2010 L 306, p. 28) and 2010/702/EU (OJ 2010 L 306, p. 35) of 21 October 2010 on the positions to be taken by the Union within the Association Councils with Morocco, Tunisia, Algeria and Israel and within the Stability und Association Councils with Macedonia and Croatia and, on the other, the three Council Decisions 2012/773/EU (OJ 2012 L 340, p. 1), 2012/774/EU (OJ 2012 L 340, p. 7) and 2012/775/EU (OJ 2012 L 340, p. 13) of 6 December 2012 on the positions to be taken by the Union within the Stability and Association Councils with Albania and Montenegro and within the Cooperation Committee with San Marino. Furthermore, within the European Union, Article 79(2)(b) TFEU (formerly Article 63(4) EC) served as the legal basis for the adoption of Council Regulation (EC) No 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality (OJ 2003 L 124, p. 1) and Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) 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).

29 — Opinion 1/94 (EU:C:1994:384, paragraph 52); Opinion 1/08 (EU:C:2009:739, point 172); *Parliament* v *Council* (C-155/07, EU:C:2008:605, paragraph 34); and *United Kingdom* v *Council* (EU:C:2014:97, paragraph 48).

30 — If examination of a measure reveals that it pursues two aims or that it has two components, and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely that required by the main or predominant aim or component (*Parliament* v *Council*, EU:C:2008:605, paragraph 35; *Parliament* v *Council*, EU:C:2012:472, paragraph 43; and *Commission* v *Parliament and Council*, EU:C:2014:298, paragraph 30; earlier, to the same effect, *Commission* v *Council*, C-155/91, EU:C:1993:98, paragraphs 19 and 21).

31 — See, in this regard, Article 2(c) and (d) of the envisaged new Association Council decision.

54. It must be borne in mind that, at present, within the framework of the association between the Union and Turkey, there is still no provision for arrangements of any kind for the coordination of social security systems which could benefit Union citizens employed in Turkey and members of their families. [32] Such arrangements are to be created for the first time by means of the envisaged new Association Council decision, which would also remove the imbalance which exists in the currently applicable Association Council Decision No 3/80 in favour of Turkish workers.

55. Against that background, the rules for Union citizens and members of their families which are under consideration here are by no means merely a peripheral area of subsidiary importance. On the contrary, those rules are the actual innovation which is to be decided on within the Association Council. By contrast, the envisaged new rules concerning Turkish workers employed in the Union and members of their families serve merely to update a Union *acquis* [33] which in essence has existed since Decision No 3/80 was adopted. [34]

56. The United Kingdom objects that the envisaged rules for Union citizens employed in Turkey and members of their families would give rise first and foremost to obligations for the Turkish authorities and would affect the authorities of the Member States of the Union only marginally, as it were through administrative assistance. [35]

57. However, this argument too does not hold water. The choice of the legal basis for a Union act cannot be made to depend on who is subsequently required to implement that act: institutions of the European Union, national authorities of the Member States, or third countries.

58. By focusing on the measures necessary internally within the Union for implementation of the envisaged new Association Council decision, it seems to me that the United Kingdom fails to have regard to the system established by the Treaties, which draws a clear distinction between the Union's internal and external powers. Since the entry into force of the Treaty of Lisbon, the Union's external powers are more clearly defined and systematised in the Treaties, as can be seen from, inter alia, the newly inserted provisions of Article 216(1) TFEU and Article 3(2) TFEU. [36]

59. If the mere existence of Union powers in internal affairs, which enable it to take, for example, any implementing measures required for compliance by it with its obligations at international level, were to suffice for the Union's external action, that would result in a considerable widening of its external powers and render its powers in the external sphere virtually indeterminate. That would be contrary to the principle of conferral (first sentence of Article 5(1) TEU).

60. Against that background, the arguments of the United Kingdom and Ireland concerning the main focus of the envisaged new arrangements are not convincing.

b) The measure at issue serves the further development of the Association between the Union and Turkey

61. As a second point, it must be borne in mind that Article 79 TFEU is one of the rules on the area of freedom, security and justice and forms part of the chapter concerning policies on border checks, asylum and immigration.

32 — Decision No 3/80 contains solely provisions for the coordination of social security schemes which benefit Turkish workers employed in the Union and certain members of their families (see above, point 22 of this Opinion).

33 — Recital 6 in the preamble to the contested decision and recitals 7 and 8 in the preamble to the envisaged new Association Council decision.

34 — This is also conceded by the United Kingdom in its application, where it submits that the envisaged new rules are 'a modest measure updating the limited rights presently enjoyed by Turkish migrant workers under Decision 3/80'.

35 — As an example, the United Kingdom cites in this regard the duty of national authorities to carry out certain administrative checks and medical examinations pursuant to Article 6 of the planned new Association Council decision.

36 — See, in this regard, my Opinion in *Commission* v *Council* (C-137/12, EU:C:2013:441, point 42).

62. According to paragraph 1 thereof, Article 79 TFEU has a specific purpose. That provision seeks to develop a common immigration policy aimed at ensuring 'the efficient management of migration flows, fair treatment of third-country nationals … and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings'. All measures based on Article 79(2)(b) TFEU must be seen in this context and must also be adopted expressly only 'for the purposes of paragraph 1'.

63. That purpose and that regulatory context of Article 79(2)(b) TFEU are not commensurate with a measure such as that which is the subject-matter of the present case.

64. The measure at issue here does not by any means merely provide, in the context of a common immigration policy, certain third-country nationals residing legally within the European Union with certain social rights in order to afford them 'fair treatment' within the meaning of Article 79(1) TFEU. The measure goes much further. It develops further the existing association between the Union and Turkey and in particular fulfils a regulatory function which is contained in Article 39 of the Additional Protocol to the Association Agreement.

65. The fact that the provisions to be adopted by the Association Council are set in the context of the existing association with Turkey and serve the further development of that association is of decisive importance for the choice of substantive legal basis. For it is precisely that context and objective that confer on the contested decision an additional dimension — a dimension which goes far beyond what Article 79 TFEU aims to achieve and allows by way of measures.

66. On the whole, the claim made by the United Kingdom and Ireland that Article 79(2)(b) TFEU is the correct legal basis for the contested decision must therefore be rejected.

2. Article 48 TFEU is also not an appropriate legal basis

67. However, in my view, the contested decision also cannot be based on Article 48 TFEU, which is cited by the Council and the Commission.

68. The United Kingdom and Ireland are in fact entirely correct in pointing out that Article 48 TFEU can essentially serve as a basis only for the adoption of measures within the European Union and, in addition, concerns only social security for Union citizens, but not for third-country nationals.

69. Article 48 TFEU permits only the adoption of 'such measures in the field of social security as are necessary to provide freedom of movement for workers'. It is part of the same chapter of the Treaty as Article 45(1) TFEU, which provides that freedom of movement for workers is to be secured 'within the Union'. In addition, the Court has already found that Article 45 TFEU (formerly Article 48 of the EEC Treaty) guarantees free movement 'only to workers of the Member States',[37] that is, citizens of the Union.[38]

70. Accordingly, third-country nationals cannot rely on the right to free movement under Article 45 TFEU within the European Union and the Union legislature does not have the power to adopt specific measures for the coordination of social security systems between the EU and third countries solely on the basis of Article 48 TFEU. Such measures are not appropriate or even necessary to provide (intra-Union) freedom of movement for workers within the meaning of Articles 45 TFEU and 48 TFEU.

37 — *Meade* (238/83, EU:C:1984:250, paragraph 7).

38 — Opinion of Advocate General Mancini in *Meade* (EU:C:1984:209) and Opinion of Advocate General Jacobs in *Khalil and Others* (C-95/99 to C-98/99 und C-180/99, EU:C:2000:657, point 19).

71. I certainly do not consider that, when rules governing Union citizens and undertakings are adopted, the Union institutions are prevented from relying on the powers conferred on them for the creation of the internal market in order also to regulate the situation of third-country nationals, if that is necessary, for example, in order to bring about equal conditions of competition within the internal market. [39]

72. In the present case, however, it is not only a question of the situation of third-country nationals being regulated for the territory of the European Union by reason of the adoption of social legislation. Rather, the contested decision relates primarily to the creation of rules for the coordination of social security systems in the European Union's relationship with a third country.

73. Article 48 TFEU does not grant the Union institutions any powers for that purpose.

74. Admittedly, the Court recently held in Cases C-431/11 and C-656/11 that Article 48 TFEU sufficed as the legal basis for the extension of provisions of Union social legislation to the EEA and Switzerland. [40] However, it cannot be inferred from this that Article 48 TFEU would in general permit the adoption of social legislation in the Union's relationship with third countries. The application of Article 48 TFEU in the relationship with the EFTA States participating in the EEA and with Switzerland, approved by the Court, must be viewed against the background of the special features which distinguish the EEA Agreement and the Agreement with Switzerland on the Free Movement of Persons. The Court drew attention to those special features in its judgments in Cases C-431/11 and C-656/11.

75. Thus, in Case C-431/11, the Court pointed out that the EEA Agreement establishes a close association between the European Union and the EFTA States based on special, privileged links between the parties concerned and that one of its aims is to provide for the fullest possible realisation of the free movement of persons. [41] The Council decision at issue in Case C-431/11 was one of the measures by which the law governing the EU internal market is to be extended as far as possible to the EEA, in order that nationals of the EEA States concerned benefit from the free movement of persons under the same social conditions as EU citizens. [42]

76. Similarly, a short time later, the Court pointed out, in Case C-656/11, that the bilateral agreements between the Union and Switzerland cover vast fields and prescribe specific rights and obligations, analogous, in some respects, to those laid down by the FEU Treaty. [43] Specifically with regard to the legislation on the coordination of social security systems, Switzerland is 'to be equated with a Member State of the European Union.' [44]

77. The application of Article 48 TFEU was thus decisively supported, in Cases C-431/11 and C-656/11, by the finding that, as regards the social conditions for the exercise of the free movement of persons, Switzerland and the EFTA States Norway, Iceland and Liechtenstein are so far assimilated to the Member States of the European Union that they can be regarded as being part of the internal market.

39 — See, to that effect, *Khalil and Others* (C-95/99 to C-98/99 and C-180/99, EU:C:2001:532, paragraph 56) and Opinion 1/94 (EU:C:1994:384, in particular points 81, 86 and 90); see also my Opinion in *Commission* v *Council* (C-13/07, EU:C:2009:190, point 149).

40 — See, with regard to the EEA, *United Kingdom* v *Council* (EU:C:2013:589, paragraph 68) and, with regard to Switzerland, *United Kingdom* v *Council* (EU:C:2014:97, paragraph 64).

41 — *United Kingdom* v *Council* (EU:C:2013:589, paragraphs 49 and 50).

42 — *United Kingdom* v *Council* (EU:C:2013:589, paragraphs 58 and 59).

43 — *United Kingdom* v *Council* (EU:C:2014:97, paragraph 53).

44 — *United Kingdom* v *Council* (EU:C:2014:97, paragraph 58).

78. Nothing comparable can be seen in the Union's relationship with Turkey. Unlike the EEA Agreement and the Agreement with Switzerland on the Free Movement of Persons, the Association Agreement concerned in the present case does not provide for any general extension of the internal market provisions to Turkey. While the Association Agreement may be aimed at establishing ever closer bonds with Turkey,[45] even going as far as the long-term goal of Turkey's accession to the European Union,[46] in its present state it nevertheless remains far short of a full assimilation of Turkey to the States belonging to the European internal market.[47]

79. In particular, the Association Agreement still does not create freedom of movement for workers between the Union and Turkey, but merely provides for the progressive establishment of that freedom of movement.[48] Some fundamental aspects of that ambition have not yet been realised.[49] Only in particular instances is the case-law relating to the rights of Turkish nationals employed in the European Union and members of their families therefore based, 'so far as possible', on the principles applying to freedom of movement for workers within the European Union.[50]

80. Unlike the position under the EEA Agreement and the Agreement with Switzerland on the Free Movement of Persons, however, in the context of the association with Turkey it is not intended that Turkish nationals in the Union or Union citizens in Turkey should be allowed to pursue their employment under the same social conditions as the respective resident workers. Rather, the Union and Turkey wish 'to be guided' in substance by Articles 48 to 50 of the EEC Treaty (now Articles 45 TFEU to 47 TFEU)[51] and apply the principle of the prohibition of discrimination on grounds of nationality,[52] whereas, significantly, the Association Agreement does *not* refer to Article 51 of the EEC Treaty, which corresponds to the present-day Article 48 TFEU.

81. This appreciably lesser depth of association is also reflected in the coordination of social security systems between the Union and Turkey which is of interest here. Thus, while both the currently applicable Decision No 3/80 and the envisaged new Association Council decision borrow selectively from Regulation No 1408/71 or its successor, Regulation No 883/2004, the complete system of social legislation applying within the European Union is not transposed to Turkey. Furthermore, under the Association Agreement, full transposition of the coordination of social security systems applying within the Union is even expressly excluded, as the Member States of the Union are *not* obliged to take into account certain periods of insurance or employment completed in Turkey.[53]

82. Contrary to the view take by the Council and the Commission, the solution found in Cases C-431/11 and C-656/11 cannot therefore be transposed to the present case.

45 — First recital in the preamble to the Association Agreement.

46 — Fourth recital in the preamble to the Association Agreement.

47 — See, to this effect, *Demirkan* (C-221/11, EU:C:2013:583, in particular paragraphs 49 and 56), in relation to freedom to provide services; similarly, the Opinion of Advocate General Darmon in *Demirel* (12/86, EU:C:1987:232, point 21). The explanatory memorandum to the Commission's proposal for the contested decision (cited above in footnote 18) states on page 6 'that it is … not possible to describe the current legal situation as an extension of the internal market with respect to free movement of persons'.

48 — Article 12 of the Association Agreement and Article 36 of the Additional Protocol.

49 — Turkish nationals are still not entitled to freedom of movement within the European Union (*Derin*, C-325/05, EU:C:2007:442, paragraph 66 and the case-law cited; see also Opinion of Advocate General Léger in *Eddline El-Yassini*, C-416/96, EU:C:1998:243, point 40); in particular, they have no individual right of initial entry into and employment in the European Union; rather, it lies within the discretion of the Member State concerned whether or not to grant the person concerned access to its labour market.

50 — See, for example, *Bozkurt* (C-434/93, EU:C:1995:168, paragraph 20); *Birden* (C-1/97, EU:C:1998:568, paragraph 24); *Ayaz* (C-275/02, EU:C:2004:570, paragraph 44); *Genc* (C-14/09, EU:C:2010:57, paragraph 17); and *Dülger* (C-451/11, EU:C:2012:504, paragraph 48).

51 — Article 12 of the Association Agreement.

52 — Article 9 of the Association Agreement.

53 — Second sentence of Article 39(2) of the Additional Protocol.

83. It is true that, according to that case-law, Article 48 TFEU may *exceptionally* be considered as a possible basis for the adoption of rules in the context of an association which is already so deeply and so broadly developed that the associated third countries participate in the internal market in virtually the same way as the Member States of the Union. For it is then — and only then — that the coordination of social security systems can be placed on the same footing as an internal matter of the single market in the relationship with those third countries and based on Article 48 TFEU.

84. By contrast, Article 48 TFEU — contrary to the view of the Council and the Commission — is and remains an *unsuitable* legal basis for cases in which internal market-like conditions are lacking because the relations between the Union and the third country concerned are still at the stage of gradual preparation for accession to the internal market.

85. The latter is the case in the relationship with Turkey at issue here.

86. All in all, therefore, like Article 79 TFEU, Article 48 TFEU cannot serve as the legal basis for the contested decision.

3. Article 217 TFEU would have been the correct substantive legal basis

87. The crucial factor in determining the correct legal basis for the contested decision is that that decision constitutes the necessary first step, within the Union, on the way to further development of the association with Turkey. The *substantive* empowerment for this should be the same as that originally cited for the adoption of the Association Agreement and the Additional Protocol by the then European Economic Community, namely the power to establish associations under Article 217 TFEU (formerly Article 238 of the EEC Treaty).

88. In my view, the case-law contains no support for the view taken by the Council and the Commission that Article 217 TFEU may be used as the legal basis only for the establishment of an association and for any supplements or amendments to its institutional framework, whereas all measures serving to implement the association programme defined in the association agreement should be excluded from its scope.

89. On the contrary: if Article 217 TFEU permits the very far-reaching step of establishing an association between the Union and a third country, that provision must, *a fortiori*, also be capable of serving as the legal basis for ad hoc measures to modify, extend or further develop an already existing association (*argumentum a maiore ad minus*). This applies not least to measures for the implementation of the association programme defined in the Association Agreement,[54] which is aimed at, inter alia, progressively securing freedom of movement for workers.[55]

90. It may be that the Union can and, where appropriate, must base *unilateral measures* which it takes to implement its obligations under an association agreement on legal bases other than Article 217 TFEU.[56] However, where — as here — it is the *Association Council* that adopts such measures, that is an action on the part of an institution of the association between the Union and Turkey. From the point of view of EU law, the Association Council's action derives its legitimacy solely from the power to establish associations under Article 217 TFEU. The rules to be adopted by the Association Council

54 — The Commission was therefore logically correct, in 1983, in basing its Proposal for a Regulation implementing Association Council Decision No 3/80 on Article 238 of the EEC Treaty (now Article 217 TFEU) (see above, point 23 of and footnote 13 to this Opinion). It is certainly surprising that the Commission should now, in the present proceedings, declare itself against the suitability of precisely that power to establish associations as the substantive legal basis for the contested decision.

55 — Article 12 of the Association Agreement and Article 36 of the Additional Protocol.

56 — In the proceedings before the Court, the Council cited, by way of example, changes in the customs tariffs which the Union imposes on an associate third country; outside the activity of an association committee, Article 207 TFEU may indeed serve as the authority for that purpose.

can hardly be based on Article 79 TFEU or Article 48 TFEU. The same must apply to the contested decision, by which our Council establishes the Union's position in advance of any action by the Association Council and thus, in the final analysis, prepares the Union's action at international level and the intended adjustments to the rules applying at association level. Its substantive legal basis must also be Article 217 TFEU.

91. Even if it were to be assumed that some of the envisaged rules on the coordination of social security systems — namely those concerning third-country nationals and their families — could also be adopted on the basis of Article 79(2)(b) TFEU,[57] Article 217 TFEU would nevertheless have to be regarded as a *lex specialis* in the context of an association agreement with a third country such as Turkey.[58]

92. Unlike Article 48 TFEU, moreover, there is no doubt that Article 217 TFEU permits rules to be laid down governing the relationship between the Union and third countries and also allows the benefit of those rules to be extended both to Union citizens and to third-country nationals, including economically non-active persons. It is precisely such rules, which concern the Union's relationship with third countries and the legal status of nationals of those third countries, that distinguish an association agreement. In this regard, the Court established some time ago that Article 217 TFEU (formerly Article 238 of the EEC Treaty) necessarily empowers the Union to guarantee its commitments towards non-member countries in all fields covered by the Treaties — including in respect of the legal status of migrant workers and members of their families.[59]

93. By recognising Article 217 TFEU as the substantive legal basis for all measures implementing the association programme defined in an association agreement, the Court could make a considerable contribution to legal certainty in the field of associations and to the standardisation of the Union institutions' disparate practices in that field. Furthermore, the emergence of a series of legal disputes, such as those which have flared up in Cases C-431/11, C-656/11 and the present case over the issue of legal basis, could thus be prevented.

94. Contrary to the view of the Council and the Commission, the Court's case-law on CITES[60] also does not preclude recourse to Article 217 TFEU as the substantive legal basis for the decision at issue. The judgment in *CITES* shows only that, in its decisions within the meaning of Article 218(9) TFEU establishing the Union's position in international bodies, the Council must use a specific substantive legal basis and must also cite it.[61] However, the inference that Article 217 TFEU would not be an appropriate or sufficiently specific substantive legal basis for such decisions cannot be drawn from any part of that judgment.

95. It also cannot be objected to the use of Article 217 TFEU as the authority for a decision such as the one contested here that this would render the procedure for producing decisions of the Association Council excessively difficult.

96. First of all, it is not procedures that define the legal basis of a measure but the legal basis of a measure that determines the procedures to be followed in adopting that measure.[62]

57 — See above, point 45 of this Opinion.

58 — To that effect, see also *Parliament* v *Council* (EU:C:2008:605, paragraph 34 *in fine*), according to which a measure must always be founded on the more specific of two possible legal bases.

59 — *Demirel* (12/86, EU:C:1987:400, paragraph 9); it should be mentioned in passing that that judgment concerns precisely the Association Agreement with Turkey which is at issue here.

60 — *Commission* v *Council* (EU:C:2009:590).

61 — *Commission* v *Council* (EU:C:2009:590, in particular paragraph 55).

62 — *Parliament* v *Council* (EU:C:2012:472, paragraph 80).

97. Second, the use of Article 217 TFEU as a substantive legal basis in the present case does not result in any modification of the procedure. From a procedural point of view, the relevant provision is still Article 218(9) TFEU, within the scope of which the Council acts by a qualified majority (Article 16(3) TEU). According to its meaning and purpose, and also according to the scheme of Article 218 TFEU, [63] the unanimity requirement within the Council (second subparagraph of Article 218(8) TFEU), like the requirement of consent of the European Parliament (Article 218(6)(a)(i) TFEU), concerns only the initial conclusion of an association agreement or structural amendments to such an agreement, to which, however, Article 218(9) TFEU does not apply in any event, according to its last clause ('with the exception of …').

98. All in all — as previously in Case C-431/11 [64] –, I thus conclude that Article 217 TFEU would have been the correct substantive legal basis for the contested decision, in which case Article 218(9) TFEU would have still been relevant from a procedural point of view, with the Council acting by a qualified majority (Article (16(3) TEU).

99. Moreover, as a matter of procedural law, the Court is not prevented, in the present case, from identifying Article 217 TFEU as the correct legal basis for the contested decision. The complaint of the incorrect legal basis was expressly raised by the United Kingdom, supported by Ireland, and was thus made an issue in the proceedings. Furthermore, the possibility of using Article 217 TFEU as the substantive legal basis was specifically the subject of discussion both in the written procedure and at the hearing. There are thus no doubts in relation to the right to be heard and the requirements of an adversarial process. [65]

100. It may be that some parties to the proceedings — as they did at the time in Case C-431/11 — have reservations about Article 217 TFEU as the substantive legal basis for the contested decision. However, those reservations may well stem essentially from the interests pursued by those parties and are not capable of restricting the Court's adjudicative deliberations to a mere choice between Article 79 TFEU, on the one hand, and Article 48 TFEU, on the other. The Court is not the 'mouthpiece of the parties'. [66] Accordingly, it cannot be obliged to confine itself to the arguments put forward by the parties in support of their claims, or else it might be forced, in some circumstances, to base its decision on erroneous legal considerations. [67]

4. In the alternative: recourse to Article 216(1) TFEU

101. Only in the event that the Court should not concur with my arguments concerning Article 217 TFEU, I would add that recourse to Article 216(1) TFEU is also conceivable in the present case.

102. Article 216(1) TFEU must not be confused with a general conferral of powers on the Union institutions for external action. On the contrary, an external competence can only ever be inferred from that rule in conjunction with the provisions of the Treaties, objectives of the Union, legal acts and rules of Union law mentioned in it.

63 — The schematic position of Article 218(9) TFEU *after* Article 218(6) and (8) TFEU shows that it is a separate, *simplified* procedure by which the suspension of international agreements and the establishment of the Union's positions for the purpose of adopting decisions in international bodies are regulated *differently from the conventional* procedure for the conclusion of international agreements. Only thus is it also possible to explain why Article 218(9) TFEU expressly regulates the rights of the Commission or the High Representative to submit proposals for the decisions referred to in that provision.

64 — Opinion in *United Kingdom* v *Council* (EU:C:2013:187, points 52 to 63).

65 — *Commission* v *Ireland and Others* (C-89/08 P, EU:C:2009:742, in particular paragraphs 50 and 51) and Review *M* v *EMEA* (C-197/09 RX-II, EU:C:2009:804, paragraphs 39 to 42).

66 — As already observed by Advocate General Léger in his Opinion in *Parliament* v *Gutiérrez de Quijano y Lloréns* (C-252/96 P, EU:C:1998:157, point 36).

67 — See, to that effect, order in *UER* v *M6 and Others* (C-470/02 P, EU:C:2004:565, paragraph 69) and judgment in *Sweden* v *API and Commission* (C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraph 65).

103. Some observations on Article 216(1) TFEU appear to me to be called for in the present case, not least because, in the written and oral procedures before the Court, the Council sought to defend the use of Article 48 TFEU as the substantive legal basis for the contested decision in part by relying on the 'ERTA doctrine'. [68]

104. It should be noted in this regard that the ERTA doctrine has essentially been codified in Article 216(1) TFEU since the entry into force of the Treaty of Lisbon on 1 December 2009. [69] Thus, had the Council wished to rely on any kind of 'ERTA effects' when adopting the contested decision, it should not have contented itself with a mere reference to Article 48 TFEU in the preamble to that decision, but should, *additionally*, also have cited Article 216(1) TFEU as a substantive legal basis. The fact that it dispensed with the addition of Article 216(1) TFEU must at least be regarded as a failure to state the reasons on which an act is based, within the meaning of the second paragraph of Article 296 TFEU.

105. That said, it appears perfectly conceivable in the present case that support could be derived from Article 216(1) TFEU for the existence of a competence for the Union's external action. Contrary to the view expressed by some parties to the proceedings, this is precisely the function of that provision.

106. It is true that the adoption of a measure along the lines of the envisaged new Association Council decision is not contemplated anywhere in the primary law of the European Union — that is, in the EU Treaty or the FEU Treaty —, with the result that recourse to the first variant in Article 216(1) TFEU ('the Treaties … provide') is out of the question. Moreover, the adoption of a decision within the Association Council now under consideration does not serve 'to achieve … one of the objectives referred to in the Treaties' within the framework of 'the Union's policies', and so the second variant in Article 216(1) TFEU must likewise be ruled out as a point of reference. [70]

107. Nor is it apparent how 'common rules' — that is, provisions of Union law — could be 'affected' or 'altered in their scope' by the adoption of provisions on the coordination of Member States' social security systems with those of Turkey, as the fourth variant in Article 216(1) TFEU would require. In this context, it must be borne in mind that the social legislation of the European Union, as expressed in Regulations No 883/2004 and No 987/2009, applies, as such, only to the internal market and not to relations with third countries. That social legislation is not affected where — as in this case —, *outside its scope*, third-country nationals in the Union and Union nationals in third countries, together with members of their respective families, are to be granted certain rights of a social nature.

108. By contrast, recourse to the third variant in Article 216(1) TFEU, according to which the Union is authorised, 'within the framework of [its] policies', to conclude an international agreement with a third country, where the conclusion of such an agreement 'is provided for in a legally binding Union act', is conceivable.

68 — The ERTA doctrine goes back to the judgment in *Commission* v *Council* (22/70, EU:C:1971:32, paragraphs 15 to 19); a more recent summary is to be found in, for example, Opinion 1/03 (EU:C:2006:81, paragraphs 114 to 133).

69 — To the same effect, see my Opinion in *Commission* v *Council* (EU:C:2013:441) and Opinion of Advocate General Sharpston in *Commission* v *Council* (C-114/12, EU:C:2014:224), referring to Article 3(2) TFEU, a provision related to Article 216(1) TFEU.

70 — In the Treaties, the Union has set itself the aim of establishing or ensuring the functioning of the internal market (first sentence of Article 3(3) TEU and Article 26(1) TFEU). Only for that purpose does the Union legislature have competence under the Treaties for coordinating social security systems *within the European Union* (first paragraph of Article 48 TFEU); see also above, points 67 to 86 of this Opinion).

109. The Association Agreement and its Additional Protocol are two agreements concluded by the European Economic Community as the legal predecessor of the Union, which have since had to be regarded as constituting an integral part of the legal order of the European Union [71] and, pursuant to Article 216(2) TFEU, are binding both on the institutions and on the Member States of the Union. Both are therefore to be regarded as 'legally binding Union acts' within the meaning of the third variant in Article 216(1) TFEU.

110. Article 39 of the Additional Protocol provides that the Association Council is to adopt 'social security measures' for migrant workers of Turkish nationality and for their families residing in the Union; those provisions are to enable certain periods of insurance and employment completed in the Member States to be aggregated 'in accordance with arrangements to be laid down'.

111. It is true that there is no express, special provision comparable to Article 39 of the Additional Protocol for the adoption of equivalent measures for Union citizens employed in Turkey and members of their families. However, under Article 12 of the Association Agreement and Article 36 of the Additional Protocol, the aim of progressively securing freedom of movement for workers applies in general between the Member States and Turkey and, pursuant to Article 9 of the Association Agreement, any discrimination on grounds of nationality is prohibited. It may be inferred from this that the coordination of social security systems between the Union and Turkey, as provided for in the Association Agreement, is also intended to benefit Union citizens employed in Turkey and members of their families.

112. Against that background, the contested decision could also be founded on the third variant in Article 216(1) TFEU as its substantive legal basis. The contested decision prepares an international agreement within the framework of the Association Council, which is provided for in two legally binding Union acts — the Association Agreement and its Additional Protocol.

113. Since, however, as already observed, in Article 217 TFEU there is another, more specific substantive legal basis for the contested decision, [72] I stand by my view that recourse here should be had, in the final analysis, not to the third variant in Article 216(1) TFEU, but to Article 217 TFEU. [73]

B – *The effet utile of Protocol No 21 to the EU Treaty and to the FEU Treaty*

114. I would also like to note — as already in Case C-431/11 — that the application of Article 217 TFEU, like the application of Article 48 TFEU or of the third variant in Article 216(1) TFEU, in a case such as the present does not deprive Protocol No 21 of its *effet utile*.

115. Protocol No 21 contains special rules for the United Kingdom and Ireland with regard to the area of freedom, security and justice. Under that Protocol, proposed measures pursuant to Title V of Part Three of the TFEU apply to the United Kingdom and to Ireland only if those two Member States give express notification in writing that they wish to take part in such measures ('opt-in', see the first sentence of the first paragraph of Article 1, in conjunction with Article 3, of Protocol No 21).

116. The material scope of this special rule is expressly limited to the area of freedom, security and justice. Furthermore, as an exception, it must be given a strict interpretation. [74]

71 — *Haegeman* (181/73, EU:C:1974:41, paragraph 5); *IATA and ELFAA* (C-344/04, EU:C:2006:10, paragraph 36); and *Air Transport Association of America and Others* (C-366/10, EU:C:2011:864, paragraph 73).

72 — See above, points 87 to 98 of this Opinion.

73 — See again, in this regard, *Parliament* v *Council* (EU:C:2008:605, paragraph 34), according to which a measure must always be founded on the more specific of two possible legal bases.

74 — In the present proceedings the United Kingdom and Ireland have expressly objected to such a strict interpretation of Protocol 21, but without putting forward any specific arguments to support their view.

117. It is not the spirit and purpose of Protocol No 21 to give the United Kingdom and Ireland free discretion as regards participation in measures adopted by the Union institutions and the binding effect on them in other areas of EU law, in particular in the context of the internal market or the association of third countries.

118. Consequently, the opt-in cannot be applicable to the adoption of measures which — like the Council decision here at issue — concern the further development of the existing association between the Union and a third country.

119. Moreover, it would significantly affect, in an adverse way, the functioning of an association agreement and the implementation of the association programme laid down in that agreement [75] if individual European Union Member States were to apply, vis-à-vis the associated third country or its nationals, the Union *acquis* only in part or with modifications and could thus insist on special treatment.

120. Within the scope of an association agreement there is no room for opt-ins or opt-outs and thus ultimately for an *à la carte* Europe. Otherwise there would be a danger of fragmentation of the association, with negative repercussions for the equal treatment of all persons and undertakings active within the scope of the association agreement and for the uniformity of the conditions of competition applicable to them. [76]

C – *Effects of the choice of the incorrect legal basis on the validity of the contested decision*

121. As has been established above, the Council chose the incorrect legal basis for the contested decision. It would have been correct for that decision to have been based on the power to establish associations under Article 217 TFEU as the substantive legal basis or, alternatively, on the third variant in Article 216(1) TFEU, in each case in conjunction with the procedural legal basis of Article 218(9) TFEU.

122. However, the choice of the incorrect legal basis for a Union measure does not necessarily mean that the Union measure would have to be annulled. According to case-law, the measure is not to be annulled where the recourse to the incorrect legal basis could not affect the substance of the measure or the procedure for its adoption and was thus a purely formal error. [77]

123. That is the situation in the present case. Under Article 218(9) TFEU, the contested decision had to be taken within the Council by a qualified majority and without the participation of the European Parliament, [78] irrespective of whether Article 217 TFEU, Article 216(1) TFEU or Article 48 TFEU, which was used by the Council, is regarded as the correct legal basis. Furthermore, none of the abovementioned substantive legal bases permits the United Kingdom and Ireland to avail themselves of the special rule provided for in Protocol No 21.

124. The choice of the incorrect legal basis in the present case cannot therefore justify annulment of the contested decision.

75 — In the case of the association between the Union and Turkey, the association programme expressly provides for the progressive securing of freedom of movement for workers through the adoption of social security measures for migrant workers (see, in that regard, Article 12 of the Association Agreement and Articles 36 and 39 of the Additional Protocol).

76 — See again, in this regard, the principle of the prohibition of discrimination on grounds of nationality laid down in Article 9 of the Association Agreement.

77 — With regard to the concept of the purely formal error, see *Commission* v *Council* (165/87, EU:C:1988:458, paragraphs 18 to 21); *Spain and Finland* v *Parliament and Council* (C-184/02 and C-223/02, EU:C:2004:497, paragraphs 42 to 44); *Swedish Match* (C-210/03, EU:C:2004:802, paragraph 44); and *Commission* v *Council* (EU:C:2009:590, paragraphs 61 and 62); see also my Opinion in *Commission* v *Council* (C-94/03, EU:C:2005:308, point 53).

78 — See above, point 97 of this Opinion.

VI – **Costs**

125. 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, according to my proposed solution, the United Kingdom has been unsuccessful and the Council has applied for costs, the United Kingdom must be ordered to pay the costs. On the other hand, Ireland and the Commission, as interveners, must each bear their own costs in accordance with Article 140(1) of the Rules of Procedure.

VII – **Conclusion**

126. In the light of the foregoing observations, I propose that the Court should:

(1) Dismiss the action.

(2) Order Ireland and the European Commission each to bear their own costs.

(3) Order that the United Kingdom of Great Britain and Northern Ireland pay the remainder of the costs.