



Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

28 July 2016*

(Action for annulment — The European Union's external relations — Access by the Swiss Confederation to the internal market — The Swiss Confederation's financial contribution to economic and social cohesion in an enlarged Union — Memorandum of Understanding on a financial contribution by the Swiss Confederation to the Member States which acceded to the Union as a result of the 2004 enlargement — Enlargement of the Union to include the Republic of Croatia — Addendum to the Memorandum of Understanding concerning a financial contribution by the Swiss Confederation for the Republic of Croatia — Addendum signed by the European Commission on behalf of the European Union without the prior approval of the Council of the European Union — Powers — Article 13(2), Article 16(1) and (6) and Article 17(1) TEU — Principles of allocation of powers, institutional balance and sincere cooperation)

In Case C-660/13,

ACTION for annulment under Article 263 TFEU, lodged on 13 December 2013,

Council of the European Union, represented by A. de Elera-San Miguel Hurtado, E. Finnegan and P. Mahnič, acting as Agents,

applicant,

supported by:

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

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

Hellenic Republic, represented by S. Chala and M. Tassopoulou, acting as Agents, with an address for service in Luxembourg,

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

Republic of Lithuania, represented by D. Kriauciūnas and J. Nasutavičienė, acting as Agents,

Hungary, represented by M. Z. Fehér and G. Szima, acting as Agents,

Kingdom of the Netherlands, represented by M. Bulterman, M. Gijzen and M. N. Noort, acting as Agents,

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

Republic of Finland, represented by J. Heliskoski and H. Leppo, acting as Agents,

* Language of the case: English.

United Kingdom of Great Britain and Northern Ireland, represented by J. Kraehling, C. Brodie and S. Behzadi-Spencer and E. Jenkinson, acting as Agents, and J. Holmes, Barrister,

interveners,

v

European Commission, represented by S. Pardo Quintillán and T. Scharf, acting as Agents, with an address for service in Luxembourg,

defendant,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, M. Ilešič, L. Bay Larsen, T. von Danwitz (Rapporteur), C. Toader and D. Šváby, Presidents of Chambers, A. Rosas, E. Juhász, M. Safjan, M. Berger, A. Prechal, E. Jarašiūnas and K. Jürimäe, Judges,

Advocate General: E. Sharpston,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 2 June 2015,

after hearing the Opinion of the Advocate General at the sitting on 26 November 2015,

gives the following

Judgment

- 1 By its application, the Council of the European Union asks the Court to annul Commission Decision C(2013) 6355 final of 3 October 2013 on the signature of the Addendum to the Memorandum of Understanding on a Swiss financial contribution ('the contested decision').

Background to the dispute

- 2 Following the rejection by the Swiss Confederation on 6 December 1992 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3), the latter concluded a series of bilateral agreements with the European Union and its Member States covering specific areas. In April 2003, the Council and the Representative of the Governments of the Member States adopted Conclusions mandating the European Commission to negotiate with the Swiss Confederation the necessary adaptations to 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 (OJ 2002 L 114, p. 6) with a view to the forthcoming enlargement of the Union in May 2004. In those Conclusions, the Council also authorised the Commission to negotiate an agreement on a financial contribution to economic and social cohesion in an enlarged Union in accordance with the negotiating directives annexed to the Conclusions and in consultation with the Working Party on European Free Trade Association ('the EFTA Working Party').

- 3 According to the negotiating directives, the objective was to negotiate 'a financial contribution to reducing economic and social disparities in the enlarged [Union]'. The negotiating directives also stated that 'in exchange for free access to the enlarged Internal Market, [the Swiss Confederation] should contribute financially to social and economic cohesion in the enlarged [Union] in a way comparable to Norway, Iceland and Liechtenstein'.
- 4 In the course of negotiations with the Swiss Confederation, the latter indicated that, owing to constraints that were specific to that country, it was not possible to conclude a binding agreement on such a financial contribution. It was therefore necessary, at the conclusion of the negotiations, to draw up a Memorandum of Understanding, to be followed by the conclusion of bilateral agreements with each beneficiary Member State.
- 5 On 27 February 2006, the Memorandum of Understanding was signed by the Swiss Federal Councilor, the President of the Council and the Commission ('the Memorandum of Understanding'). In accordance with paragraph 1 thereof, the President of the Council and the Swiss Federal Council drew up 'guidelines' on the basis of which the latter was to negotiate with the ten new Member States referred to in the Memorandum of Understanding agreements on a Swiss financial contribution for a period of five years from the approval by the Swiss Parliament of funding amounting to one billion Swiss francs (CHF) (approximately EUR 905422671.45).
- 6 Paragraph 8 of the Memorandum of Understanding states that the Swiss Federal Council will propose that the Swiss Parliament approve a financial contribution of CHF one billion (approximately EUR 905422671.45). Pursuant to paragraph 2 of the Memorandum of Understanding, that contribution may finance regional and national projects and programmes. Paragraph 5 of the Memorandum of Understanding provides that the Swiss Federal Council and the Commission are to undertake to communicate on a regular basis on the implementation of the Swiss financial contribution. Moreover, the Commission undertakes to assess whether the projects and programmes proposed are compatible with the objectives of the Union and to inform the Swiss Federal Council of its assessments.
- 7 On 25 June 2008, the Federal Councilor of the Swiss Federation, the President of the Council and the Commission signed an addendum to the Memorandum of Understanding, which was negotiated by the President of the Council with the assistance of the Commission and concerned the adaptation of the Swiss financial contribution to the accession of the Republic of Bulgaria and Romania to the European Union.
- 8 On 20 December 2012, the Council and the Representatives of the Governments of the Member States adopted conclusions in which, inter alia, they took note of the wish expressed by the Republic of Croatia to receive a financial contribution that was commensurate with the sums agreed in 2006 and 2008 for the other Member States. Moreover, they invited the Commission, acting in close cooperation with the Presidency of the Council, 'to engage in the necessary discussions' with the Swiss Federal Council with a view to obtaining a Swiss financial contribution for the Republic of Croatia and to consult the EFTA Working Party regularly as to the progress of those discussions ('the 2012 Conclusions').
- 9 The same day, the Commission formulated a statement, included in the minutes of the meeting of the Committee of the Permanent Representatives (Coreper), setting out its view that the 2012 Conclusions constituted a political decision under Article 16 TEU, which conferred EU policy-making powers on the Council, so that those Conclusions were to be understood as a political decision of the Council, not of the Member States.
- 10 On 25 July 2013, the Commission informed the EFTA Working Party that the negotiations with the Swiss Confederation had been concluded successfully.

- 11 On 3 October 2013, the Commission adopted, on the basis of Article 17 TEU, the contested decision, recital 8 of which states that ‘the proposed addendum does not, nor is it intended to, create any binding or legal obligations on either side under domestic or international law’. The sole article of that decision provides that the Commission approves the addendum (to the Memorandum of Understanding) concerning the Swiss financial contribution for the Republic of Croatia (‘the 2013 Addendum’) and that the Commission authorises its Vice-President responsible for external relations and the member of the Commission responsible for Regional Policy to sign the Addendum on behalf of the Union.
- 12 During meetings of the EFTA Working Party on 15 and 23 October 2013, the Member States and the Council contested the Commission’s decision to sign the 2013 Addendum without the Council’s prior approval. They maintained that the Commission had failed to have due regard for the role played by the Member States in that connection. At a meeting on 31 October 2013, the working party prepared a set of draft conclusions, to be submitted to the Council and the Representatives of the Governments of the Member States, indicating that the President of the Council was to sign the 2013 Addendum and confirming that the Commission was mandated to exercise coordinating and supervisory functions and to sign that Addendum. At that meeting, the European External Action Service stated that the Commission had indicated that it disagreed with the proposed conclusions.
- 13 On 7 November 2013, the Vice-President of the Commission responsible for external relations and the Commissioner for regional policy signed the 2013 Addendum on behalf of the Union.
- 14 According to that addendum, the Swiss Federal Council agrees to negotiate with the Republic of Croatia an agreement on a financial contribution of CHF 45 million (approximately EUR 40744020.22) for a period of five years, starting from when those funds are approved by the Swiss Parliament, and expresses its intention to commit to the contribution until 31 May 2017. Moreover, the Swiss Federal Council agreed to propose that the Swiss Parliament approve that contribution.
- 15 On 19 November 2013, the Council and the Representatives of the Governments of the Member States formally adopted the Council’s conclusions, under which the President of the Council was mandated to sign the 2013 Addendum and the Commission to assume coordinating and supervisory functions. On 9 December 2013, the Council adopted a position in which it expressed, *inter alia*, its disagreement with the manner in which the Commission had acted.
- 16 On 30 June 2015, the Swiss Confederation and the Republic of Croatia signed a bilateral framework agreement concerning the implementation of the Swiss-Croatian Cooperation Programme to Reduce Economic and Social Disparities within the Enlarged European Union.

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

- 17 The Council claims that the Court should:
 - annul the contested decision;
 - order that the effects of the decision be maintained until it is replaced; and
 - order the Commission to pay the costs.
- 18 The Commission contends that the Court should:
 - dismiss the action; and
 - order the Council to pay the costs.

- 19 The Czech Republic, the Federal Republic of Germany, the Hellenic Republic, the French Republic, the Republic of Lithuania, Hungary, the Kingdom of the Netherlands, the Republic of Poland, the Republic of Finland and the United Kingdom of Great Britain and Northern Ireland were granted leave to intervene in support of the form of order sought by the Council. The Kingdom of the Netherlands has not, however, participated at any stage of the present proceedings.

The action

- 20 The Council relies on two pleas in law in support of its action. The first plea alleges breach of the principle of conferral of powers in Article 13(2) TEU and of the principle of institutional balance. The second plea alleges breach of the principle of sincere cooperation, also in Article 13(2) TEU.

The first plea in law

Arguments of the parties

- 21 According to the Council, supported by all the intervening Member States, the Commission's adoption of the contested decision and its signature of the 2013 Addendum without the Council's prior approval constitute a breach of the principle of conferral of powers in Article 13(2) TEU and, therefore, of the principle of institutional balance.
- 22 The Memorandum of Understanding that made provision for the Swiss financial contribution and the addenda to the memorandum are non-binding agreements reflecting a political commitment on the part of the parties. Article 218 TFEU is not therefore applicable and the FEU Treaty does not lay down any specific procedure as regards the negotiation and conclusion of such agreements. That provision is nonetheless relevant in so far as it reflects the general distribution of powers among the institutions, as established in Articles 16 and 17 TEU.
- 23 In reliance on the Court's case-law stemming from the judgment of 23 March 2004 in *France v Commission* (C-233/02, EU:C:2004:173, paragraph 40), the Council submits that the fact that a measure is not binding is not sufficient to confer on the Commission the power to adopt it. The Commission does not have the power under Article 17 TEU to sign a non-binding international agreement, such as the 2013 Addendum, on behalf of the Union without the Council's prior approval. Thus, the Commission has taken upon itself the power to decide on the policy of the Union and infringed the principle of conferral of powers set out in the second sentence of Article 13(2) TEU and, therefore, the principle of institutional balance.
- 24 Thus, the Commission determined the Union's policy by deciding unilaterally to authorise the signature of the 2013 Addendum and, as a consequence, to accept its content without the Council being given the opportunity to define its position in that regard. Moreover, the Commission determined the Union's policy by deciding to treat the 2013 Addendum as a matter falling under the Union's exclusive competence and to change the signatories to the addendum by signing it alone on behalf of the Union. By signing the 2013 Addendum, the Commission acted against the Council's expressly stated position.
- 25 The Commission shares the view expressed by the Council and the Member States that the Memorandum of Understanding and its addenda are non-binding instruments, a view that is also shared by the Swiss Confederation. Like the Council, the Commission maintains that the procedure laid down in Article 218 TFEU is not therefore applicable in the present case, so that the principle of conferral of powers established in Article 13(2), Article 16(1) and Article 17(1) TEU should be adhered to. The disagreement between those institutions relates only to the procedure to be followed as regards the approval and signature of such instruments.

- 26 In that regard, the Commission argues that, in accordance with Article 16(1) TEU, it falls to the Council to decide on the Union's policy and to ensure consistency in the external action of the Union. As regards the Commission, it is required to execute that policy and to ensure the Union's external representation. The role entrusted to the Commission by Article 17(1) TEU in that regard requires that it should enjoy a degree of autonomy. That provision gives it direct authority to execute a Union policy and to sign non-binding instruments of a political nature on behalf of the Union, in so far as they reflect a position established by the Council, without any need for that institution's prior approval. Furthermore, the signature of a non-binding instrument, such as the 2013 Addendum, is an act of external representation, for the purpose of Article 17(1) TEU, of a political position previously fixed by the Council. Thus, it follows from the Court's case-law stemming from the judgment of 20 April 2010 in *Commission v Sweden* (C-246/07, EU:C:2010:203, paragraph 77) that it is not indispensable that a common position should take a specific form for it to exist.
- 27 In the present case, the 2012 Conclusions constitute a political decision of the Union, for the purposes of Article 16(1) TEU, by which the Council determined, in the context of the policy established by the Union, that the Swiss financial contribution for the Republic of Croatia was to be based on the same calculations as those used and agreed on in the Memorandum of Understanding and the Addendum signed on 25 June 2008. The contested decision did not depart from that position and nor did the Council make any such claim. Moreover, the Council does not raise any objection with regard to either the outcome of the negotiations with the Swiss Confederation or the substance of the contested decision, its objections being merely of a procedural nature.
- 28 Furthermore, the signature of the 2013 Addendum forms part of the executive and management functions which the Commission undertook to perform under the Memorandum of Understanding and the related addenda. Those executive and management functions are also conferred on the Commission by Article 17(1) TEU.
- 29 Lastly, the Commission contends that the Council's argument concerning the content of the 2013 Addendum and the fact that it is not in line with the 2012 Conclusions is inadmissible as it was raised for the first time in the reply. In any event, those arguments relate to the nature of the 2013 Addendum rather than to the Council's powers and thus have no basis in Article 16 TEU.

Findings of the Court

- 30 By its first plea in law, the Council, supported by all the intervening Member States, submits, in essence, that the Commission did not have competence, in the absence of the Council's prior approval, to adopt the contested decision authorising the signature of the 2013 Addendum on behalf of the Union and that, as a result, it infringed the principle of conferral of powers in Article 13(2) TEU and the principle of institutional balance by adopting that decision.
- 31 It must be borne in mind in that regard that the Treaties set up a system allocating powers among the EU institutions, assigning to each institution its own role in the institutional structure of the Union and the accomplishment of the tasks entrusted to the Union (see, to that effect, judgment of 22 May 1990 in *Parliament v Council*, C-70/88, EU:C:1990:217, paragraph 21).
- 32 Accordingly, Article 13(2) TEU provides that each institution is to act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out therein. That provision reflects the principle of institutional balance, characteristic of the institutional structure of the Union, a principle which requires that each of the institutions exercise its powers with due regard for the powers of the other institutions (judgments of 14 April 2015 in *Council v Commission*, C-409/13, EU:C:2015:217, paragraph 64, and 6 October 2015 in *Council v Commission*, C-73/14, EU:C:2015:663, paragraph 61).

- 33 As regard the Council's powers, the second sentence of Article 16(1) TEU provides that the Council is to carry out policy-making and coordinating functions as laid down in the Treaties. With regard, in particular, to the Union's external action, the third subparagraph of Article 16(6) TEU provides that the Foreign Affairs Council is to plan the Union's external action on the basis of strategic guidelines laid down by the European Council and to ensure that the Union's action is consistent.
- 34 In so far as concerns the Commission's powers, the first, fifth and sixth sentences of Article 17(1) TEU provide that the Commission is to promote the general interest of the Union and take appropriate initiatives to that end, exercise coordinating, executive and management functions, as laid down in the Treaties, and ensure the Union's external representation, with the exception of the common foreign and security policy and other cases provided for in the Treaties.
- 35 The Commission contends that the signature of a non-binding agreement constitutes an act of external representation of the Union for the purpose of Article 17(1) TEU if such a non-binding agreement reflects a Union position or policy already established by the Council. In those circumstances, the signature of such a non-binding instrument does not call for the Council's prior approval. In the present case, the Council established the 'Union's position' in the 2012 Conclusions. The 2013 Addendum was in line with that position, so that the Commission was entitled, in its view, to sign that addendum without first obtaining the Council's approval.
- 36 It should be noted in that regard that the mere fact that the Commission enjoys a power of external representation of the Union under Article 17(1) TEU is not sufficient to address the issue, raised by the Council's first plea in law, of whether the principle of conferral of powers laid down in Article 13(2) TEU required the Commission to obtain the Council's approval before signing the 2013 Addendum on behalf of the Union (see, by analogy with regard to Article 335 TFEU, judgment of 6 October 2015 in *Council v Commission*, C-73/14, EU:C:2015:663, paragraphs 59 and 60).
- 37 As regards the 2012 Conclusions, while they authorise the Commission to 'engage in the necessary discussions' with the Swiss Federal Council for a financial contribution for the Republic of Croatia, they do not contain, as observed by the Advocate General in point 115 of her Opinion, any authorisation empowering the Commission to sign the resulting addendum on behalf of the Union. Nor has the Commission put forward any evidence in that regard to suggest that the Council gave it authorisation in the 2012 Conclusions to sign the 2013 Addendum.
- 38 Accordingly, the Commission cannot be regarded as having the right, by virtue of its power of external representation under Article 17(1) TEU, to sign a non-binding agreement resulting from negotiations conducted with a third country.
- 39 The decision concerning the signing of an agreement with a third country covering an area for which the Union is competent — irrespective of whether or not that agreement is binding — requires an assessment to be made, in compliance with strategic guidelines laid down by the European Council and the principles and objectives of the Union's external action laid down in Article 21(1) and (2) TEU, of the Union's interests in the context of its relations with the third country concerned, and the divergent interests arising in those relations to be reconciled.
- 40 Therefore, a decision concerning the signature of a non-binding agreement such as the agreement at issue in the present case is one of the measures by which the Union's policy is made and its external action planned for the purpose of the second sentence of Article 16(1) and the third subparagraph of Article 16(6) TEU.
- 41 The fact that the Council had already carried out an assessment of the Union's interests at the time of the adoption of the decision to open the negotiations which culminated in the drawing up of a non-binding agreement does not alter that analysis.

- 42 Indeed, the signature of a non-binding agreement entails the assessment by the Union of whether the agreement still reflects its interest, as defined by the Council in particular in the decision to open negotiations on the conclusion of the agreement.
- 43 That assessment requires, inter alia, verification of the actual content of the non-binding agreement resulting from negotiations with a third country, such as the 2013 Addendum, and that content cannot be determined in advance or predicted when the decision to start such negotiations is made. Thus, the mere fact that the content of a non-binding agreement negotiated by the Commission with a third country corresponds to the negotiating mandate given by the Council is not sufficient to confer on the Commission the power to sign such a non-binding measure without the Council's prior approval, on the basis that the approval is already covered by a position previously established by the Council.
- 44 In the present case, it should be added that it is true, as submitted by the Commission, that the additional contribution of the Swiss Confederation referred to in the 2013 Addendum requires the approval by the Swiss Parliament of the corresponding funding. Moreover, the arrangements for that contribution were to be the subject of further negotiations between the Swiss Confederation and the Republic of Croatia.
- 45 However, in addition to the matters referred to in paragraphs 39 to 43 above, the information set out in paragraph 1 of the 2013 Addendum concerning the amount of that contribution, namely CHF 45 million (approximately EUR 40744020.22), and the duration of the contribution are essential aspects of the Union's policy making as regards the adaptation of the Swiss financial contribution consequent upon the Swiss Confederation's gaining access to an enlarged internal market following the accession of the Republic of Croatia to the European Union.
- 46 It follows from the foregoing considerations that, in order to sign the 2013 Addendum on behalf of the Union, the Commission needed the Council's prior approval. Thus, by signing the 2013 Addendum on behalf of the Union without the Council's prior approval, the Commission infringed the principle of distribution of powers in Article 13(2) TEU and the principle of institutional balance.
- 47 Consequently, the first plea is well founded.
- 48 The contested decision must therefore be annulled and there is no need to examine the second plea relied upon by the Council in support of its action.

The request to maintain the effects of the contested decision

- 49 The Council, supported by the Czech Republic, the French Republic, Hungary and the Republic of Finland, ask the Court, in the event that it annuls the contested decision, to maintain its effects until a new decision is adopted.
- 50 Under the second paragraph of Article 264 TFEU, the Court may, if it considers this necessary, state which of the effects of the act which it has declared void are to be considered as definitive.
- 51 The Court has held in this regard that, on grounds of legal certainty, the effects of such an act may be maintained, in particular where the immediate effects of its annulment would give rise to serious negative consequences for the persons concerned and where the lawfulness of the act in question is contested, not because of its aim or content, but on grounds of lack of competence or infringement of an essential procedural requirement (judgment of 26 November 2014 in *Parliament and Commission v Council*, C-103/12 and C-165/12, EU:C:2014:2400, paragraph 90 and the case-law cited).

- 52 In the present case, it should be noted that the contested decision made possible the signature of the 2013 Addendum, by which the Commission approved, on behalf of the Union, the conclusion of its negotiations with the Swiss Confederation and the latter's political commitment as set out in that addendum.
- 53 If the contested decision were annulled without its effects being maintained, that may give rise to serious negative consequences for the Union's relationship with the Swiss Confederation.
- 54 As a consequence, the Court must exercise the power conferred on it by the second paragraph of Article 264 TFEU and maintain the effects of the contested decision until the entry into force, within a reasonable period of time, of a new decision to replace it.

Costs

- 55 Under Article 138(1) of the Court's Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Council has applied for costs to be awarded against the Commission and the latter has been unsuccessful, the Commission must be ordered to pay the costs.
- 56 In accordance with Article 140(1) of the Rules of Procedure, the Czech Republic, the Federal Republic of Germany, the Hellenic Republic, the French Republic, the Republic of Lithuania, Hungary, the Kingdom of the Netherlands, the Republic of Poland, the Republic of Finland and the United Kingdom of Great Britain and Northern Ireland, which have intervened in these proceedings, are to bear their own costs.

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

- 1. Annuls Commission Decision C(2013) 6355 final of 3 October 2013 on the signature of the Addendum to the Memorandum of Understanding on a Swiss financial contribution;**
- 2. Maintains the effects of Commission Decision C(2013) 6355 final until the entry into force, within a reasonable period of time, of a new decision to replace it;**
- 3. Orders the European Commission to pay the costs;**
- 4. Orders the Czech Republic, the Federal Republic of Germany, the Hellenic Republic, the French Republic, the Republic of Lithuania, Hungary, the Kingdom of the Netherlands, the Republic of Poland, the Republic of Finland and the United Kingdom of Great Britain and Northern Ireland to bear their own costs.**

[Signatures]