



Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 17 March 2015¹

Case C-425/13

European Commission

v

Council of the European Union

(Action for annulment — Law governing the institutions — Council Decision authorising the opening of negotiations on linking the European Union scheme for greenhouse gas emission allowance trading with a system in Australia for greenhouse gas emission allowance trading — Negotiating directives — Special committee — Infringement of Article 13(2) TEU, Article 218(2) to (4) TFEU and Article 295 TFEU — Institutional balance — Sincere cooperation)

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¹ — Original language: French.

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1. By the present action, the European Commission seeks the annulment of the second sentence of Article 2 of, and Section A of the Annex/Addendum (‘the Annex’) to, the Decision of the Council of the European Union of 13 May 2013 authorising the opening of negotiations on linking the EU emissions trading scheme with an emissions trading system in Australia (doc. 8568/13 LIMITE) (‘the contested decision’).

2. This case raises an important constitutional question, one that concerns the division of powers, responsibilities and competences between the Commission and the Council of the European Union in the negotiation of international agreements to which the European Union is a party. Scrupulous respect for the precise roles which the Treaties confer on those institutions, and on the European Parliament, in the process leading to the conclusion by the European Union of international agreements is essential to preserving the institutional balance in the exercise of the European Union’s

international powers.²

3. This is the first time that the Court has been called upon to rule on the scope of the Council's authority to lay down negotiating directives, in particular as regards the inclusion of procedural provisions, and on the role of the special committees designated by the Council in accordance with Article 218(4) TFEU, and it must do so in the context of the almost constant legal wrangle between the Council (and the Member States) and the Commission which has, since the outset, been a feature of the European Union's emergence as a global player.³

4. Moreover, the significance of the present case goes beyond the international negotiations at issue here, since the debate which the Court must settle could well arise in the context of other ongoing negotiations, and I am thinking in particular of the current negotiations between the European Union and the United States of America of a commercial agreement for the creation of a Transatlantic free trade area,⁴ referred to as the 'Great Transatlantic Market' or the 'Transatlantic Trade and Investment Partnership' ('TTIP') or the Transatlantic Free Trade Agreement ('TAFTA'),⁵ for which discussions began in July 2013.

I – Legal framework

A – *The FEU Treaty*

5. In this case, the Court is asked to rule on the interpretation of Article 218(2) to (4) TFEU, the provisions of which are as follows:

'The Council shall ... adopt negotiating directives ...

The Commission ... shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and ... nominating the Union negotiator or the head of the Union's negotiating team.

The Council may address directives to the negotiator and designate a special committee in consultation with which the negotiations must be conducted.'

2 — This principle of institutional balance, which implies a degree of autonomy for each of the institutions, must be reconciled with their duty of sincere cooperation (or, in other words, their duties of action and abstention), which 'requires the institutions to have regard to their respective powers and also provides a basis for establishing procedures to ensure the proper conduct of the decision-making process, provided that such procedures do not upset the institutional balance and that they comply with the Treaty' (see Jacqué, J.-P., *Droit institutionnel de l'UE*, Dalloz, 2004, p. 184).

3 — In addition to the cases I mention in this Opinion, see, for example, *Council v Commission* (C-73/14) (concerning the Commission's decision to submit a written statement on behalf of the European Union to the International Tribunal for the Law of the Sea without the Council's prior approval) or *Council v Commission* (C-660/13) (concerning the signing on behalf of the European Union of the Addendum to the Memorandum of Understanding on a Swiss financial contribution), both of which are currently pending before the Court. See also Anderson, D., who, in his foreword to the leading work on the subject (Eeckhout, P., *EU External Relations Law*, 2nd ed., Oxford, 2011), gives a perfect illustration of this particular battleground: 'This book functions ... as a definitive military history of that forty years' war, ranging from the dramatic early breakthroughs of *ERTA* and *Opinion 1/76* and the set-piece battles of *Opinion 1/94* and *Open Skies* to more recent skirmishes over such vitally important matters — to those involved — as whether it is open to a Member State to propose a pollutant for regulation in an international forum where the Commission is also represented.'

4 — Which would account for 45.5% of gross domestic product worldwide.

5 — See the section of the Commission's website addressing these negotiations at: http://ec.europa.eu/trade/policy/in-focus/ttip/index_en.htm. It is also worth noting that, on 9 October 2014, the Council decided to declassify the negotiating directives (of 17 June 2013) relating to the TTIP. The document may be found at: <http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf>.

B – *Directive 2003/87/EC*

6. Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC⁶ was adopted on the basis of Article 175(1) EC. According to recital 5 of its preamble, the aim of the directive is to contribute to more effective fulfilment of the commitments of the European Union and its Member States to reducing anthropogenic greenhouse gas emissions entered into under the Kyoto Protocol.

7. Article 1 of Directive 2003/87 defines the directive's subject-matter as follows:

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

8. Article 25 of Directive 2003/87, entitled 'Links with other greenhouse gas emissions trading schemes', as amended by Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009,⁷ is worded as follows:

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

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

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

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

II – **Background to the dispute**

9. In 2011, the Commonwealth of Australia ('Australia') approached the Commission with a view to starting bilateral negotiations on linking the European Union's scheme for greenhouse gas emission allowance trading with Australia's system.

10. The formal recommendation, as provided for by Article 218(3) TFEU, for authorising the opening of negotiations with Australia with a view to linking the trading schemes was modelled on the earlier recommendation concerning the link with the Swiss trading scheme. It was adopted by the Commission on 24 January 2013 and then forwarded to the Council. During the discussions within the Council's Working Party on the Environment, Member States requested greater involvement in the negotiations with Australia than was contemplated in the Commission's recommendation. A compromise text was approved, with only slight amendments, by the Council's Working Party on the Environment on 22 April 2013 and the negotiating directives were approved by the Council on 24 April 2013.

6 — OJ 2003 L 275, p. 32.

7 — OJ 2009 L 140, p. 63.

11. On 2 May 2013, the Commission circulated a statement for inclusion in the minutes in which it took issue with certain aspects of the approved text. The decision proposed by the working party was submitted to the Committee of Permanent Representatives ('Coreper') and finally adopted as an 'A item' on the Council's agenda at the Agriculture and Fisheries Council of 13 May 2013.

12. Article 1(2) of the contested decision provides that the 'Commission shall conduct these negotiations ... in accordance with the negotiating directives set out in the [Annex] to this Decision'.

13. The second sentence of Article 2 of the contested decision provides that 'the Commission shall report in writing to the Council on the outcome of the negotiations after each negotiating session and, in any event, at least quarterly'.

14. Section A of the Annex containing the negotiating directives (Document 8568/13) addressed to the Commission is worded as follows:

'A. Procedure for negotiations

1. The Commission shall conduct negotiations in accordance with relevant Union legislation in force. Where appropriate, detailed negotiating positions of the Union shall be established within the special committee referred to in Article 1(2) or within the Council. The Working Party on the Environment is designated as special committee to assist the Commission in this task. The meetings of the special committee shall be organised and chaired by the Member State holding the Presidency of the Council.
2. The negotiations must be prepared for well in advance. To this end, the Commission shall inform the Council of the schedule anticipated and the issues to be negotiated and shall forward the relevant documents as early as possible, in order to allow the members of the special committee reasonable time to prepare themselves properly for the forthcoming negotiations.
3. Each negotiating session shall be preceded by a meeting within the special committee in order to identify the key issues and establish negotiating positions or guidance, as appropriate. Where appropriate, guidance on specific technical aspects of the linking negotiations can be sought from the Climate Change Committee, subject to prior authorisation from the special committee.
4. The Commission shall report to the Council on the outcome of the negotiations after each negotiating session and, in any event, at least quarterly. The Commission shall inform the Council and consult the special committee on any major problem that may arise during the negotiations.'

15. Section B of the Annex to the contested decision is entitled 'Content and scope of the negotiations'. The second paragraph of the statement by the Council of 8 May 2013 relating to the draft decision on the opening of the negotiations in question reads as follows:

'The establishment of the special committee as provided for in Article 218(4) TFEU, means that the committee ... has the mandate to follow the conduct of the negotiations and guide the negotiator, having regard to the negotiating directives adopted by the Council.'

16. The contested decision was notified to the Commission on 15 May 2013.

III – Procedure before the Court

17. The Commission claims that the Court should:

- annul the second sentence of Article 2 of, and Section A of the Annex to, the contested decision or, in the alternative,
- annul the contested decision and maintain the effects thereof in the event that it is annulled in its entirety, and
- order the Council to pay the costs.

18. The Parliament, as intervener, claims that the Court should uphold the Commission's action.

19. The Council contends that the Court should dismiss the action as unfounded and order the Commission to pay the costs. In the alternative, in the event that the contested decision is annulled, it contends that the Court should not maintain the effects of that decision.

20. The Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the French Republic, the Republic of Poland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland ('the United Kingdom'), as interveners in support of the Council, contend that the Court should dismiss the action as unfounded.

21. The sensitive nature of the present case has also been demonstrated by the Council's request for the removal of certain documents from the case-file, including the contested decision and the negotiating directives. However, that request was rejected by the order in *Commission v Council* (C-425/13, EU:C:2014:91).

22. At the hearing on 6 January 2015, all the parties, with the exception of the Kingdom of Denmark and the Republic of Poland, made submissions.

IV – Assessment

A – Admissibility

23. In the Commission's view, there can be no doubt that the Council intended Section A of the negotiating directives annexed to the contested decision to produce legal effects. In its submission, the action is therefore admissible.

24. The Council submits that it would be inappropriate to treat the negotiating directives in the present case differently from other negotiating directives called in question in other institutional disputes, notably in the case which gave rise to the judgment in *Commission v Council* (C-114/12, EU:C:2014:2151). Consequently, should the Court take the view in that case that negotiating directives, by their nature, lack legal effect, the Council requests the Court to declare the present action inadmissible.

25. However, as the Court held in paragraph 39 of the judgment in the case referred to by the Council, 'it should be remembered that an action for annulment must be available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects (judgments in *Commission v Council* ('ERTA'), 22/70, EU:C:1971:32, paragraph 42, *Parliament v Council and Commission*, C-181/91 and C-248/91, EU:C:1993:271, paragraph 13; and *Commission v*

Council, C-27/04, EU:C:2004:436, paragraph 44)⁸ and, in order to ascertain whether a measure produces such effects, it is necessary to look to the actual substance of the measure and to the intention of its author (see the judgment in *Netherlands v Commission*, C-147/96, EU:C:2000:335, paragraph 27). In *Commission v Council* (C-114/12, EU:C:2014:2151), the Court held, at paragraph 40 of the judgment, that ‘the contested decision [adopted on the basis of Article 218(3) and (4) TFEU produced] legal effects as regards relations between the European Union and its Member States and between the EU institutions’.

26. Moreover, as is quite rightly observed in the *Commentaire Mégret*,⁹ ‘the Council’s authorisation to open negotiations is, in practice, often accompanied by negotiating directives. That practice is, once again, based on Article 133 [EC], which makes provision for it in the case of commercial negotiations. There is no obligation on the Council, however, and any omission to stipulate negotiating directives will in no way invalidate the negotiating process. *These directives are guidelines; they produce legal effects only as between the institutions*, not internationally’ (my emphasis).

27. Furthermore, it is fair to say that, in the contested decision, the Council did not restrict itself to giving the Commission guidelines for its negotiation with Australia, inasmuch as it gave those guidelines legal effect by attaching to them a complete procedure for the Commission to follow and by conferring on the special committee (and on itself) a far more significant role than is contemplated by Article 218 TFEU.

28. It is therefore clear, in my view, that in the present case, as in *Commission v Council* (C-114/12, EU:C:2014:2151), the contested decision produces legal effects as between the EU institutions¹⁰ and may therefore be the subject of an action for annulment.¹¹

29. The present action is, therefore, admissible.

B – Substance

30. The Commission puts forward two pleas in law in support of its action, each alleging infringement of Article 13(2) TEU, Article 218(2) to (4) TFEU and the principle of institutional balance. The first plea also alleges infringement of Article 295 TFEU. Given their similarity, which has led certain intervening Member States to refer to their arguments relating to the first plea also with regard to the second, I shall examine the two pleas together.

8 — Accordingly, the form of an act or decision is in principle irrelevant in regard to the admissibility of an action seeking the annulment of that act or decision (see the order in *Makhteshim-Agan Holding and Others v Commission* (C-69/09 P, EU:C:2010:37, paragraphs 37 and 38).

9 — *Commentaire Mégret, J., Le droit de la CE et de l’Union européenne — Relations extérieures*, Éditions de l’Université de Bruxelles, 2005, p. 84.

10 — In this context, see also Eeckhout, P., *External relations of the European Union*, Oxford, 2005, p. 173: ‘[i]t is thus not clear at this stage whether Commission observance of the Council’s negotiating directives is subject to judicial review. In principle, any Commission act producing legal effects can be challenged on grounds of violation of the Treaty in an action for annulment. In so far as the Commission adopts such an act in the framework of an international negotiation, it would seem possible to argue a violation of the provisions of Article 300(1) EC. The case is unlikely to arise, however, as the Commission’s actions are subject to political review by the Council. If the latter is unhappy with the outcome of a negotiation, it may simply refuse to conclude the agreement. Where it does conclude [it], it obviously agrees with the Commission’s approach, and a challenge to particular Commission conduct in the course of negotiations would then in any event be unable to affect the outcome, namely conclusion of the agreement, as this is a separate Council act.’

11 — It is interesting to note in this connection that, in paragraph 22 of its defence in that case, the Council clearly confirmed that, in its view, the negotiating directives had binding legal effect on the Commission: ‘[f]urthermore, negotiating directives, as in the present case, are part of the decision adopted by the Council and addressed to the Commission. As such, they are binding on the Commission.’ That is a very different position from the view previously taken by the Council. In Opinion 3/94 (EU:C:1995:436), the Court summarised the Council’s observations on the compatibility with the negotiating directives of the agreement reached by the Commission, which were as follows: ‘In practice, the Commission is often led to go beyond the scope of its directives when negotiating an international agreement; in such circumstances, rather than modify those directives during the course of the procedure, the Council merely accepts the final outcome by signing the agreement.’

1. Arguments of the parties

31. The Commission argues that the detailed procedure laid down in Section A of the negotiating directives creates powers for the Council that go beyond what is provided for in Article 218(2) to (4) TFEU. By unilaterally imposing that procedure, the Council sought to create *ex novo* powers for itself and obligations for the Commission which have no basis in those provisions of the FEU Treaty.

32. The Commission explains that Article 218(4) TFEU confers only a consultative role on the special committee, since it provides that negotiations are to be conducted in consultation with that committee. Admittedly, the special committee may express its point of view on the various aspects of the negotiation. Nevertheless, the contested decision goes much further than that, providing for the adoption of ‘detailed negotiating positions’ of the European Union, which are accordingly intended to be binding.

33. The Commission observes that the principle of institutional balance requires each of the institutions to exercise its powers with due regard for the powers of the other institutions.

34. The Parliament points out that the Council has the right to draw up negotiating directives, which can be used as a tool for achieving general objectives. In negotiations, these directives serve to guide the negotiator toward achieving a result that is likely to meet the Council’s expectations. Similarly, the corollary of the Parliament’s right of consent is that it is entitled to express its views to the Council and to the negotiator on the substance of the future agreement.

35. The Parliament observes that the fact that, in accordance with Article 218(5) TFEU, the Council alone is responsible for the decision authorising signature of the agreement does not make a substantial difference to the issue of how the negotiations are followed. Neither the Parliament nor the Council is entitled to play an active leading role in the negotiations, encroaching on the prerogatives of the negotiator. In particular, the Council cannot claim, either directly for itself or for the special committee which it has designated, a decision-making role during the negotiations. The special committee is vested only with a consultative role in the conduct of the negotiations by the negotiator.

36. The Parliament explains that, in the negotiation of international agreements, the Commission has an autonomous and important role up to the stage where it proposes to the Council the conclusion of an agreement. The system provided for by Article 218 TFEU is thus coherent, since the Commission begins by recommending the opening of negotiations and then conducts them. It is only when the negotiations have been completed that the Commission takes the responsibility of proposing to the Council the signature and conclusion of the agreement.

37. The Council submits that there is nothing in the wording of Article 218 TFEU to support the view that it is not entitled to include certain procedural elements in the negotiating directives when it grants the Commission authorisation to negotiate. The term ‘negotiating directives’ is a general one and, if directives of a procedural nature could not be included, then Article 218(4) would lose its effectiveness.

38. The Council maintains that it is for it to assess, when granting the Commission authorisation to negotiate, whether it is necessary to include in the authorisation negotiating directives, some procedural elements and special requirements for the negotiator.

39. The Council explains that the procedural elements contained in the negotiating directives at issue relate exclusively to the relationship between the Commission as negotiator and the special committee designated to follow the negotiations. The Council submits that there is nothing in the Treaty to prevent it from including such procedural rules in negotiating directives.

40. According to the Council, the positions established within the special committee are intended to be a practical translation of the negotiating directives and, as such, are intended to assist the negotiator. That does not imply any obligation on the Commission to achieve the result recommended by the guidelines laid down in them.

41. The Council observes that the provisions at issue in this case form the essential foundation for the procedure to be followed and that it is therefore not possible to envisage their partial annulment. If the second sentence of Article 2 and Section A of the negotiating directives were to be annulled, the overall content of the authorisation would be substantially altered, in that the very structure of the contested decision and of the Annex thereto are such that those provisions form part of an indivisible whole.

42. The Czech Republic emphasises that the active involvement of the Council in the course of the negotiation of an international agreement follows from the wording of Article 218(2) to (4) TFEU. The Council's entitlement to adopt negotiating directives and the Commission's obligation to consult the special committee about the negotiations imply that what is intended is continued coordination between the Commission and the Council throughout the negotiations.

43. As regards the content and scope of negotiating directives, the Czech Republic submits that the wording of Article 218 TFEU discloses no special restrictions for the Council when adopting them. Nor does that wording exclude the inclusion of procedural provisions in negotiating directives.

44. The Czech Republic also argues that the power to adopt detailed negotiating directives necessarily follows from the position and role of the special committee, whose instructions are to serve as guidelines for the purposes of effective negotiation. It is in the interests of the Commission, as negotiator, to take account of the guidelines laid down by the special committee and thus avoid the situation where the Council refuses to approve the outcome of the negotiations, with all the negative consequences that that would entail.

45. The Kingdom of Denmark submits that, given the Council's role and its powers in relation to the opening of negotiations and authorisation, adoption and conclusion of international agreements, it must also have a role to play during negotiations.

46. It is of the opinion that Article 218 TFEU supposes that there is an ongoing dialogue between the Council and the negotiator, which may take the form of the Council issuing negotiating directives and appointing a special committee in consultation with which the negotiations must be conducted. Moreover, the option of providing the negotiator with directives is not limited to a specific phase of the negotiating process.

47. The Federal Republic of Germany argues that the Commission is not free to deviate substantially from the 'requirements' set out in negotiating directives without the prior authorisation of the Council. That is why it must also fulfil the reporting duties imposed on it by those directives. That also follows from the principle of sincere cooperation, as laid down in Article 13(2) TEU.

48. It maintains that it would not be possible adequately to harness the expert knowledge of the Member States in the field in question if the Commission were to prevail in its wish to act in full autonomy and without regard to the Council and the Member States when conducting negotiations.

49. The Federal Republic of Germany also emphasises that there is nothing in Article 218(4) TFEU to support the contention that that provision allows only substantive negotiating requirements to be set, but not requirements relating to procedure. Such an interpretation of the provision would deprive it of its effectiveness.

50. The French Republic submits that negotiating directives may, without infringing Article 13(2) TEU, Article 218 TFEU or the principle of institutional balance, provide that the detailed negotiating positions of the European Union are to be established within the special committee or by the Council.

51. It submits that negotiating directives are not necessarily restricted to the definition of the strategic choices and substantive objectives to be defended during negotiations, but may also include certain procedural requirements. The term ‘negotiating directives’ is general in scope and there is nothing in the wording of Article 218 TFEU which allows its scope to be narrowed.

52. The French Republic also submits that Section A of the negotiating directives does not create any power for the Council or the special committee or any obligation for the Commission other than those which already flow from Article 218(2) to (4) TFEU and from the principle of sincere cooperation. On the contrary, Section A of the negotiating directives is a more specific expression of the powers conferred on the Council by those provisions of the FEU Treaty.

53. As regards the detailed rules laid down in the negotiating directives at issue for consultation of the special committee, the French Republic submits that it is not for the Commission to establish those rules. Given that, in accordance with Article 218(4) TFEU, the Council may decide that negotiations are to be conducted in consultation with a special committee, it may also lay down the detailed rules governing consultation of that committee. Furthermore, in so far as they provide that the Council may adopt detailed negotiating positions, the negotiating directives in question merely reiterate the Council’s right to supplement those directives at any time.

54. The Republic of Poland submits that the link between the granting of authorisation and the adoption of negotiating directives is particularly close, since only the achievement of a negotiation outcome that is acceptable to the Council can ultimately lead to the signature and conclusion of an agreement on behalf of the European Union. It is therefore necessary that, when authorisation is granted to the negotiator, the Council should be able to establish the bounds thereof and indicate the conditions under which the negotiations must be conducted.

55. It maintains that, in order for the Council effectively to exercise its policy-making function, including the formulation of external policy, decisions authorising the opening of negotiations and the negotiating directives that accompany them must be able to contain instructions of a procedural nature.

56. The Republic of Poland further observes that the Council’s power is permanent and not limited to a one-off formulation of negotiating directives attached to the decision authorising the opening of negotiations.

57. The Kingdom of Sweden submits that the Council must be able initially to specify the negotiating directives in a more detailed manner, so as to provide the Commission with the guidance it may draw from them. The special committee thus functions as an extension of the Council during the negotiations and constitutes a platform for cooperation between the Commission and the Council.

58. It observes that there is nothing in the wording of Article 218 TFEU to prevent the Council from including procedural provisions in negotiating directives when the Commission is authorised to open negotiations on behalf of the European Union. Had the intention been to restrict the Council’s power to issue negotiating directives to a certain type of question, an express provision to that effect would appear in the wording of that article. The general nature of the term ‘negotiating directives’ suggests that the intention of Article 218 TFEU was not to limit the Council’s right to issue negotiating directives to substantive questions.

59. The Kingdom of Sweden emphasises that, in the present case, the procedural provisions in the negotiating directives are intended to put into place an effective exchange of information between the Council and the Commission, which is a prerequisite for the Council to exercise its power to make changes or additions to the negotiating directives during the course of the negotiations. A flow of information of that kind is also a prerequisite if the consultation within the special committee is to work and if the European Union is to be able to adjust its positions during the course of the negotiations.

60. The United Kingdom argues that Article 218(4) TFEU permits the Council to include procedural provisions in negotiating directives. There is nothing in the wording of that provision to prevent those directives from including procedural arrangements relating, for example, to consultation with the special committee. Moreover, it would be contrary to the purpose and effective operation of Article 218(4) TFEU if negotiating directives could not cover procedural matters.

61. The United Kingdom adds that the Council may need to be kept informed of developments so that it can properly and effectively exercise its powers under Article 218(4) TFEU. That is particularly so in the case of negotiations, where there is a heightened risk that agreement with the other party will be difficult to achieve.

62. It submits that the special committee plainly has a role to play in the negotiating process. It is designated by the Council to that end and the Commission is required to consult it. The special committee must therefore be entitled to express its views on the positions to be taken in the negotiations. Furthermore, the Council may adopt or amend existing negotiating directives at any stage of the process.

63. The United Kingdom submits that the contested decision correctly reflects the institutional balance enshrined in Article 218 TFEU and that there is therefore no lack of sincere cooperation within the meaning of Article 13(2) TEU. Indeed, both the Council and the special committee which it designates have a role to play under the Treaty.

64. If the application or any part of it is upheld, the United Kingdom endorses the Council's submissions regarding the effects of possible annulment. Nor, in the United Kingdom's view, is there any justification for maintaining the effects of the contested decision if it is annulled.

2. Analysis

a) Principles

i) What is meant by 'negotiating directives'?

65. Under the FEU Treaty, '[t]he Council *may* address directives [¹²] to the negotiator [in this case the Commission ¹³]' (my emphasis).¹⁴

66. First of all, in general parlance (and in administrative law) a directive is a legal rule by which an authority invested with a discretionary power *lays down* for itself or *for another authority a line of conduct in the exercise of that power*.¹⁵

12 — See, in this case, the second sentence of Article 2 of the contested decision and Section A of the Annex, against which the Commission's action is directed.

13 — Since the agreement envisaged does not relate exclusively or principally to the common foreign and security policy, there is no need to speak of the High Representative of the Union for Foreign Affairs and Security Policy.

14 — See Article 218(4) TFEU.

15 — See, for example, Cornu, G., *Vocabulaire juridique*, PUF, 2007, p. 312.

67. The term used in Article 218(4) TFEU fits that definition, which clearly differs from the definition given to the same word by Article 288 TFEU, in accordance with which '[a] directive shall be binding, as to the result to be achieved, on each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods'. In the context of international negotiations, the directives of the Council are not addressed to the Member States but to the Commission. Unlike directives within the meaning of Article 288 TFEU, negotiating directives need not be published, the reason clearly being that publication would disclose the European Union's hand to the other party and could thus undermine the Commission's negotiating position.¹⁶

68. At most, the only parallel that might be drawn between the two types of directive is that negotiating directives also leave to the Commission 'the choice of form and methods', inasmuch as they can only *guide* the Commission, as negotiator, in its conduct of the negotiations. It might be argued that, were it otherwise, it would no longer be a negotiating 'directive' but a negotiating 'diktat',¹⁷ something that would in no way reflect the institutional balance which the Treaties seek to achieve¹⁸ and which, in its case-law, the Court has sought to achieve since as early as 1958.¹⁹ Indeed, '[a] negotiation calls for flexibility and adaptability and it would appear problematic to restrict prematurely the executive's room for manoeuvre'.²⁰

69. The institutional balance in the field of international agreements which Article 218 TFEU seeks to achieve is similar to that pursued by the Treaties in the matter of the adoption of regulations, directives and decisions, inasmuch as, under Article 218(3) TFEU, '[t]he Commission ... [must] submit recommendations to the Council'. It is, therefore, the Commission which, as elsewhere in the Treaty, has power to initiate European Union action. It is the Commission, not the Council, that must first assess whether it is appropriate for the European Union to conclude with one or more third States an international agreement in a given field.

70. Furthermore, the draft negotiating directives are themselves proposed by the Commission to the Council and are annexed to the recommendation for opening negotiations.²¹

71. Consequently, negotiating directives are, in my opinion, guidelines which serve to convey to the negotiator (in this case the Commission) the general objectives which the latter must endeavour to achieve in the negotiations.

16 — However, in practice, the press frequently reports on negotiating directives.

17 — A decision that is unilaterally imposed and binding and which leaves the addressees of the decision no margin of discretion (*décision imposée unilatéralement, contre laquelle on ne peut rien et qui ne laisse à ceux auxquels elle est adressée aucune marge d'appréciation*). See *Le Petit Robert, Dictionnaire de la langue française*, VUEF, 2003, p. 750.

18 — I would repeat that it is on the Commission that the FEU Treaty confers the role of negotiator (see footnote 11 to this Opinion).

19 — See judgment in *Meroni v High Authority* (9/56, EU:C:1958:7). It is interesting to note that the Treaties do not expressly mention the principle of institutional balance, with the exception of Protocol No 7 annexed to the Treaty of Amsterdam on the application of the principles of subsidiarity and proportionality, which states that '[t]he application of the principles of subsidiarity and proportionality shall respect the general provisions and objectives of the Treaty, particularly as regards ... the institutional balance'.

20 — See Blumann, C., and Dubouis, L., *Droit institutionnel de l'Union européenne*, 5th ed., LexisNexis, 2013, p. 401 ('[the field of the common commercial policy] has always aroused controversy, both for the Commission, which regards itself as being overly restricted and unable to take the slightest real initiative, and for the Council and the Member States, which, on the contrary, consider that the Commission too readily steps beyond the boundaries circumscribed for it. The important GATT-WTO international commercial negotiations provide a hallowed battleground for this type of encounter and the crux of the problem lies with the negotiating directives and their degree of precision').

21 — As noted by H. Paemen, who was the 'Commission's Chief Negotiator' in the 'Uruguay Round negotiations', it is not easy in practice to obtain negotiating directives that reflect the Community's interest, since '[the] uppermost concern [of the Member States] is to look after their national interests, in the narrow sense of the term [and,] [i]nvariably, [the Commission's] proposals [for negotiating directives] intended to reflect the collective position — i.e. the Community interest — are amended to take account of disparate national views until, in many cases, all that is left is the "lowest common denominator"' (see Devuyst, Y., 'EU law and practice in the negotiation and conclusion of international trade agreements', *Journal of International Business and Law*, 2014, Vol. 12, Iss. 2, Article 13, p. 290).

72. Moreover, as the General Court has rightly held already,²² ‘any failure to comply with the directives which the Council may address to the Commission in connection with negotiations which the latter is conducting pursuant to Article 300(1) EC [now Article 218 TFEU] may normally be censured by the decision, which falls to the Council, as to whether or not to conclude the agreement. Accordingly, such directives are not, in principle, among the rules by reference to which the lawfulness of actions taken by the Commission in the context of international negotiations are to be assessed, in so far as those actions are amenable to legal challenge.’

73. That said, as will be seen below, the role of the special committee which the Council may designate is similar to that of the negotiating directives: it is meant to guide the Commission in the performance of its tasks, no more and no less, Article 218(4) TFEU providing that ‘the negotiations must be *conducted*’ ‘in consultation with [that committee]’ (my emphasis).

ii) May negotiating directives such as those at issue in the present case contain procedural provisions?

74. Section A contains four paragraphs that describe the procedures – which are to be observed throughout the course of the negotiations in question – for establishing negotiating positions, for the provision of information and for consultation. The ‘players’ identified are the Commission, the Council and the special committee established for the purpose of following the negotiations, namely the Working Party on the Environment. It is apparent from Section A that the Commission is to keep the Council informed about the negotiating schedule and the issues to be negotiated, to report to the Council on the outcome of the negotiations after each session and to inform the Council and consult the special committee on any major problem that may arise during the negotiations. Section A also provides that, where appropriate, *detailed* negotiating positions are to be *established* within the special committee or within the Council and that each negotiating session is to be preceded by a meeting with the special committee, inter alia, in order to *establish* negotiating positions or guidance for the negotiations.

– Introduction

75. I would begin by noting that, contrary to the misrepresentation thereof by certain Member States, the Commission’s position is not that no role should be conferred on the special committee or the Council or that the Commission itself is under no obligation of any kind. It is clear that at no point did the Commission propose to act ‘in isolation’.²³

76. Similarly, several of the statements in intervention mention the quite reasonable nature of some of the procedural provisions contained in the negotiating directives whilst neglecting the fact that the Commission’s complaint in no way concerns the particular rules laid down in Section A, but disputes, on the basis of Article 218(2) to (4) TFEU, the very competence of the Council to adopt such procedural rules, reasonable or otherwise.

77. The judgment in *Commission v Council* (C-114/12, EU:C:2014:2151), which I mentioned earlier when considering the admissibility of the present action, offers no guidance on the interpretation of Article 218(4) TFEU for the purposes of the present case. That said, the negotiating directives adopted by the Council for the negotiation which led to that case were significantly less detailed than those at issue here (see paragraphs 32 and 33 of the judgment), which, in turn, are less detailed than those adopted in the negotiations relating to the TTIP, which run to some 18 pages, as opposed to four in the present case.²⁴

22 — See judgment in *Italy v Commission* (T-226/04, EU:T:2006:85, paragraphs 76 and 78) and footnote 10 to this Opinion.

23 — See, for example, paragraph 11 of the statement in intervention of the Czech Government.

24 — See footnote 5 to this Opinion.

– The answer to the question

78. I am of the opinion that the Council cannot, on the basis of Article 218(2) to (4) TFEU, unilaterally impose on the Commission a detailed procedure for the conduct of negotiations relating to an international agreement.²⁵

79. There may, of course, be justification for agreeing upon arrangements for cooperation between the institutions, especially in the context of international negotiations. However, in such a case those arrangements should be agreed by means of an interinstitutional agreement,²⁶ not by way of a unilateral decision imposed by one institution on another institution or institutions. Indeed, '[t]he practice of forming interinstitutional agreements gives specific expression to the complementarity between [the principles of institutional balance and sincere cooperation²⁷]. In areas where competence is shared between the three political institutions, an interinstitutional agreement is a means of establishing good practices, preventing disputes and, above all, preserving the institutional balance'.²⁸

80. That practice is, moreover, expressly provided for by Article 295 TFEU, according to which '[t]he European Parliament, the Council and the Commission shall consult each other and by common agreement make arrangements for their cooperation. To that end, they may, in compliance with the Treaties, conclude interinstitutional agreements which may be of a binding nature'.

81. When, for example, the Commission wished to clarify its obligation to keep the Parliament informed, as provided for in Article 218(10) TFEU, it concluded a framework agreement with it. According to that agreement, concluded in 2010, 'when the Commission proposes draft negotiating directives with a view to their adoption by the Council, it shall at the same time present them to Parliament'.²⁹ The framework agreement also provides that the Commission 'shall keep Parliament regularly and promptly informed about the conduct of negotiations until the agreement is initialled, and explain whether and how Parliament's comments were incorporated in the texts under negotiation and if not why'.³⁰

82. Thus, by contrast with the Council's manner of proceeding in this case, the Parliament was particularly conscious, when concluding the framework agreement, of the absolute necessity of respecting the Commission's role as negotiator and of the freedom of action that is needed in any negotiation.

25 — That conclusion will be substantiated below by a *de lege lata* analysis, as the argument of the Federal Republic of Germany (statement in intervention, paragraph 27) that it would be 'detrimental to the European Union's interests' is of a political nature.

26 — See, on this subject, Guerassimoff, C., *La coopération interinstitutionnelle dans l'Union européenne*, RAE, Paris, 1997, p. 472; Huiban, O., 'Les accords interinstitutionnels dans l'Union européenne', *Problèmes actuels du droit communautaire*, LGDJ, 1998, p. 93; Gautron, J.-C., 'Les accords interinstitutionnels dans l'ordre juridique communautaire', *Les règles et principes non écrits en droit public*, LGDJ, 2000, p. 195; Godet, R., *Accords interinstitutionnels et équilibre institutionnel dans la Communauté européenne*, Université Panthéon-Sorbonne, Paris, 2001.

27 — See Tournepiche, M.-A., *Les accords interinstitutionnels dans l'Union européenne*, vol. 18, Bruylant, 2011, and Blumann, C., *Les accords interinstitutionnels*, JCl. Europe, vol. 1, fasc. 193 (see also, by the same author, 'Équilibre institutionnel et séparation des pouvoirs en droit communautaire', *Clés pour le siècle*, Dalloz, 2000, p. 1639).

28 — See Blumann, C., and Dubouis, L., *op. cit.*, p. 199 (see also the section on the principle of institutional balance, p. 194 et seq.)

29 — See the Framework Agreement on Relations between the European Parliament and the Commission, Annex III, paragraph 2 (OJ 2010 L 304, p. 47), which has been incorporated into the Internal Rules of the Parliament as Annex XIII. For a critique of this framework agreement, see Weiler, J., 'Dispatch from the Euro Titanic: And the Orchestra Played On', *European Journal of International Law*, available at the following address: <http://www.ejiltalk.org/dispatch-from-the-euro-titanic-and-the-orchestra-played-on-ejil-editorial/>.

30 — *Ibid.* (Annex III, paragraph 4).

83. A framework agreement of that kind could have been concluded by the Commission and the Council, or even by all three institutions,³¹ since Article 295 TFEU leaves open the possibility for the three institutions mentioned therein to make arrangements ‘by common agreement ... for their cooperation’. Indeed, I fail to see how the involvement of the three institutions (or, *a fortiori*, of two of them) in an agreement of that kind could, as the Council maintains, upset the balance between them that is established by Article 218 TFEU.

84. As the Court has pointed out, a provision such as that laid down in Article 218 TFEU (and, before it, Article 288 EEC, which, following the Treaty of Amsterdam, became Article 300 EC) constitutes, as regards the conclusion of treaties, an autonomous general provision of constitutional import, in that it confers specific powers on the EU institutions *with a view to establishing a balance between those institutions*.³²

85. The Court added that ‘the power to conclude agreements is conferred on the Council “subject to the powers vested in the Commission in this field”’.³³

86. It is thus imperative that this institutional balance be scrupulously observed by the institutions, so as to avoid any encroachment by one institution on the powers of another.

87. I am of the opinion that, by laying down in the negotiating directives a procedure which deprives the Commission of the freedom of action which it needs in order to negotiate the international agreement in question, and by imposing that procedure on the Commission in a decision addressed to it, the Council encroached upon the Commission’s powers.

88. In so doing, and by contrast with the situation between the Parliament and the Commission described above, the Council is *unilaterally* determining³⁴ the form and frequency of both the circulation of information and the communication of positions or guidelines to be adopted in the course of the negotiations, to the point of transforming itself into a true negotiator.

89. I actually consider that negotiating directives are meant to relate to the strategic choices and substantive objectives to be defended during negotiations, in other words, the content of the text being negotiated.

90. They cannot, on the other hand, impose specific procedures on the negotiator,³⁵ in this case the Commission, which, moreover, itself has power to determine the manner in which the special committee, designated by the Council under Article 218(4) TFEU, is to be consulted.

31 — Certain commentators believe that such framework agreements should always involve *all three* institutions. See Weiler, J., op. cit. (‘What is rather astonishing in this respect is the fact that this [Framework] Agreement [between the Parliament and the Commission] was negotiated in its entirety without Council involvement — arguably contrary to the very Treaty stipulations on interinstitutional agreements [i.e. Article 295 TFEU]’).

32 — See, concerning the agreement between the Commission and the United States on competition law, judgment in *France v Commission* (C-327/91, EU:C:1994:305, paragraph 28).

33 — Ibid.

34 — Despite the Commission’s opposition (see point 11 of this Opinion).

35 — The mere fact, mentioned by the Council and certain Member States, including the United Kingdom (statement in intervention, paragraph 13) and the Kingdom of Sweden (statement in intervention, paragraphs 24 and 25), that Article 218(2) to (4) TFEU does not expressly prohibit them, is not sufficient to justify them.

iii) The ‘negotiating directives’ and the capacity of negotiator

91. As the Commission has rightly pointed out, Article 13(2) TEU, as redrafted by the Lisbon Treaty (see point 188 of this Opinion),³⁶ codifies the case-law of the Court of Justice, which has held, in relation to the Council, that ‘it follows from the wording and the broad logic of the system established by the Treaty that the Council cannot break free from the rules laid down by [the Treaty]’ and that, therefore, ‘it cannot have recourse to an alternative procedure, for example in order to adopt a measure which would not be the very decision envisaged at a given stage or which would be adopted in conditions different from those required by the applicable provisions’.³⁷

92. However, Section A of the negotiating directives refers to the Council several times as a genuine participant in the negotiations,³⁸ and this upsets the institutional balance that Article 218 TFEU is intended to achieve. Indeed, once the Council has authorised the Commission to commence negotiations, it can have no direct decision-making role in those negotiations. The same applies, *a fortiori*, to the special committee,³⁹ which is no more than a consultative body.

93. While consultation of the special committee may assist the Commission in deciding whether certain provisions of the future agreement are likely to gain the Council’s political approval, it is for the Commission to decide how such questions must be dealt with in the course of ongoing negotiations.

94. It is true that, as Mr Eeckhout⁴⁰ has noted, ‘[t]he Commission conducts the negotiations in accordance with directives ... That does not mean that the Commission has a free hand in the negotiations. Through the “special committees”, consisting of national governments’ representatives, the Council machinery keeps a close eye on how the negotiations are evolving. The Commission is therefore often a double negotiator: both with the other party to the negotiations and with Member States’ representatives or the Council itself.’

95. Nevertheless, the fact remains that, as Messrs MacLeod, Hendry and Hyett⁴¹ have rightly pointed out, the words of the EC Treaty ‘in consultation with special committees appointed by the Council to assist it in [its] task [as negotiator]’ underline ‘*the pre-eminent role of the Commission in any negotiation: the committee does not give the Commission direct instructions, and the Treaty does not imply that the committee, or its representatives, may be present during the face to face negotiations, at least when the agreement relates only to matters within the competence of the Community under the Treaty.*’ But the Commission is under an obligation to consult the committee. It would be unlikely to ignore its views: the results of any negotiation have to be acceptable to the Council, so there would be little point in the Commission side-stepping any committee set up to assist in the negotiations’ (my emphasis).

36 — In this connection, see, for example, Krajewski, M., ‘External Trade Law and the Constitution Treaty: Towards a Federal and More Democratic Common Commercial Policy?’, *Common Market Law Review*, Kluwer Law, 2005, and Müller-Graff, P.-C., ‘The Common Commercial Policy Enhanced by the Reform Treaty of Lisbon?’, Dashwood, A., and Maresceau, M., *Law and Practice of EU External Relations*, Cambridge University Press, 2008, p. 188.

37 — Judgment in *Commission v Council* (C-27/04, EU:C:2004:436, paragraph 81).

38 — According to Section A, the Council may establish ‘detailed negotiating positions’ (paragraph 1); it must be informed of the ‘schedule anticipated and the issues to be negotiated’ (paragraph 2); the Commission must ‘report to the Council’ on the outcome of each negotiating session (paragraph 4 of Section A and the second sentence of Article 2 of the contested decision) and ‘inform’ the Council of ‘any major problem’ (paragraph 4).

39 — The special committee is also referred to in Section A in connection with establishing ‘detailed negotiating positions’ (paragraph 1), identifying ‘the key issues’ and establishing ‘negotiating positions or guidance, as appropriate’ (paragraph 3).

40 — See Eeckhout, P., *External relations of the European Union*, Oxford, 2005, p. 171.

41 — See MacLeod, I., Hendry, I.D., and Hyett, S., *The external relations of the European Communities*, Oxford University Press, 1998, p. 88, with regard to Article 228 EEC (which has now become Article 218 TFEU). On this point, the two provisions are the same, except that Article 228 EEC provided that ‘[t]he Commission shall conduct [the] negotiations in consultation with special committees appointed by the Council to assist it in this task’, whereas Article 218 TFEU provides that ‘[t]he Council may ... designate a special committee in consultation with which the negotiations must be conducted’.

96. In so far as concerns the words ‘within the framework of [such directives as the Council may issue]’,⁴² those authors rightly add that ‘[a]lthough the Commission’s negotiating discretion is limited by the directives of the Council, *the Commission’s basic discretion as negotiator remains*: the Council may issue “directives”, *but it may not seek to regulate the conduct of the negotiations on a line-by-line basis*’ (my emphasis).⁴³

97. I also agree with Mr Eeckhout⁴⁴ that ‘[n]otwithstanding such supervision by the Council, the negotiation of international agreements does amount to a significant Commission prerogative. The Commission is generally in a position to try to find a common denominator of the, often varying, interests of the Member States. Moreover, in some cases the Commission can be quite deft in the use of its authority to negotiate. Two examples, both from the Uruguay Round negotiations leading to the establishment of the WTO, illustrate this.’

98. If negotiating directives cannot make of the Council a true negotiator, that is *a fortiori* the case of the special committee provided for in Article 218(4) TFEU.

99. As Article 218 TFEU provides, the special committee has a merely consultative role: ‘the negotiations must be conducted’ ‘in consultation with [it]’.

100. That seems to me to stand in clear opposition to Section A of the Annex to the contested decision, which confers on the special committee decision-making powers in the conduct of the negotiations: paragraph 1 allows it to establish ‘detailed negotiating positions of the Union’ and paragraph 3 states that ‘each negotiating session shall be preceded by a meeting with the special committee in order to identify the key issues and establish negotiating positions or guidance, as appropriate’.

101. At the hearing, the United Kingdom insisted on the fact that the special committee was merely to be ‘consulted’ by the Commission, rather than ‘obeyed’. I find it difficult to reconcile that view with the committee’s power to establish detailed negotiating positions. Also at the hearing, the Council agreed that the committee could not issue negotiating directives (that being within the Council’s exclusive competence) and all parties were agreed that the committee did not vote and was not subject to any voting rules. However, in my opinion, the views thus expressed are at variance with the very wording of the contested decision, according to which the special committee may establish detailed negotiating positions.

42 — Which became ‘The Council may address directives to the negotiator’ in Article 218 TFEU.

43 — See MacLeod, I., Hendry, I.D., and Hyett, S., *op. cit.* As the authors rightly point out, for example, ‘Article 228 [EEC] does not preclude the possibility of involvement of experts from Member States in such negotiations if the Commission is agreeable, but the “conduct” of the negotiations is the responsibility of the Commission’ (p. 87) and negotiating directives ‘could not authorise — or require — the Commission to begin a completely new set of negotiations with other parties. Such a change of tack would require a new Commission recommendation. On the other hand, it would seem to be possible for the Council to call a halt to negotiations by a directive under Article 228 [EEC]’ (p. 89).

44 — Eeckhout, P., *op. cit.*, p. 171. For further details of the two examples referred to (the Blair House Agreement negotiations and the negotiations relating to the Framework Agreement on Bananas), see p. 172 *et seq.*

iv) Article 218 TFEU in the light of the principle of institutional balance

102. This strict delimitation of the respective competences of the Council and the Commission in the implementation of Article 218 TFEU is perfectly consistent with the case-law of the Court which has emphasised the importance of the ‘balance of powers’,⁴⁵ the ‘division of powers between the ... institutions’,⁴⁶ and ‘the system of division of powers and the institutional balance’,⁴⁷ as well as the importance of the ‘status as an institution’⁴⁸ and the ‘organisation of the institutions’⁴⁹ and has pointed out that the institutional balance is ‘characteristic of the institutional structure of the Community’.⁵⁰

103. Indeed, according to the case-law, ‘the principle of institutional balance ... requires that each of the institutions must exercise its powers with due regard for the powers of the other institutions’.⁵¹ The institutional balance is nothing other than the expression of the time-honoured principle of (regard for) conferred powers and the principle of sincere cooperation may be seen as an instrument for the fine-tuning of judicial review of regard for the institutional balance.⁵² As Mr Jacqué⁵³ has rightly observed, the institutional balance ‘arises ... from the fact that the institutional structure of the Community is based on a division of powers among the various institutions’.

104. As I have already noted,⁵⁴ the Court too has mentioned the institutional balance, in connection with the former Article 228 EEC (which became Article 300 EC and is now Article 218 TFEU),⁵⁵ which it considered to ‘constitute, as regards the conclusion of treaties, an autonomous general provision [of constitutional import], in that it confers specific powers on the Community institutions. With a view to establishing a balance between those institutions, it provides that agreements between the Community and one or more States are to be negotiated by the Commission and then concluded by the Council, after consulting the European Parliament where required by the Treaty. However, the power to conclude agreements is conferred on the Council “subject to the powers vested in the Commission in this field”’.

105. The same rule applies (*a fortiori*) to the special committee. The possibility afforded to it (as to the Council) of establishing ‘detailed negotiating positions’ of binding effect during the course of the negotiations alters the balance of powers among the institutions and turns the Council — or the special committee — into the European Union’s leading participant in the negotiating process, depriving the Commission of its status as a negotiator exercising political responsibility and relegating it to the secondary role of spokesperson or agent of the Council or of the special committee. It is also important to note the difference between ‘detailed negotiating positions’ and ‘negotiating directives’, and the former cannot be interpreted as mere ‘alterations’ to the latter. The point should be made that, while the Council may establish and amend negotiating directives, the Treaty makes no such provision with regard to special committees and it would be all the more surprising therefore if they were entitled to establish ‘detailed negotiating positions’.

45 — See judgment in *Wybot* (149/85, EU:C:1986:310, paragraph 23).

46 — See judgments in *Commission v Council*, (‘ERTA’, 22/70, EU:C:1971:32, paragraph 73) and *Massey-Ferguson* (8/73, EU:C:1973:90, paragraph 4).

47 — Judgment in *Roquette Frères v Commission* (T-322/01, EU:T:2006:267, paragraph 327).

48 — Judgment in *Parliament v Council* (13/83, EU:C:1985:220, paragraph 17).

49 — Opinion 1/78 (EU:C:1979:224, paragraph 30).

50 — Judgment in *Meroni v High Authority* (9/56, EU:C:1958:7, p. 152).

51 — Judgment in *Parliament v Council* (C-133/06, EU:C:2008:257, paragraph 57 and the case-law cited). See, in this context, Etienne, J., ‘Le principe de l’équilibre institutionnel, manifestation et condition de l’État de droit’, *L’état de droit en droit international*, Pedone, 2009, p. 249.

52 — As noted by Delcourt, C., in ‘Le principe de coopération loyale entre les institutions dans le traité établissant une Constitution pour l’Europe’, *Le droit de l’Union européenne en principes: liber amicorum en l’honneur de Jean Raux*, Apogée, 2006, p. 464.

53 — Jacqué, J.-P., *Droit institutionnel de l’Union européenne*, 4th ed., Dalloz, Paris, 2006, p. 217.

54 — See above, point 84 of this Opinion.

55 — See, concerning the agreement between the Commission and the United States on competition law, judgment in *France v Commission* (C-327/91, EU:C:1994:305, paragraph 28).

106. In its judgment in *Parliament v Council*⁵⁶ (in which the Parliament's prerogatives were at issue), the Court held that 'those prerogatives [were] one of the elements of the institutional balance created by the Treaties. The Treaties set up a system for distributing powers among the different Community institutions, assigning to each institution its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community'.

b) The counter-arguments of the Council and the Member States

107. Several of the arguments put forward by the Council and the Member States are deserving of discussion.

i) First argument

108. The Council and certain Member States⁵⁷ defend Section A of the negotiating directives on the basis of Article 16 TEU, which provides that the Council is to carry out 'policy-making' functions.

109. That argument is not persuasive.

110. According to Article 16(1) TEU, that 'policy-making' role is to be exercised 'as laid down in the Treaties'.

111. Moreover, Article 16 TEU clearly cannot be interpreted as meaning that the Council alone has a political role in this context and that the role of the other institutions is not a political one. Nor may the Council regard Article 16 TEU as giving it *carte blanche* to make good the 'deficiencies' which it perceives whenever it considers that another provision of the Treaty fails to confer on it a sufficiently preponderant role.

112. The Council is authorised to exercise its political role with regard to international agreements only at the stages and in the manner expressly provided for in Article 218 TFEU, which is an 'autonomous general provision' (to use the Court's own words). That role is not insignificant, since it comes into play (exclusively)⁵⁸ in the decision whether or not to authorise the opening of negotiations, in the issuing to the negotiator of negotiating directives (in the strict sense of guidelines on the strategic choices and policy objectives of the negotiation) and, of course, in the decision whether or not to conclude the agreement.

113. At the hearing, the Czech Republic argued that it would be unacceptable for the Council to reject the position negotiated by the Commission, since that would be damaging to the EU's international image. I would merely observe in that regard that it is common for the negotiated text of an international agreement to have to be submitted for ratification by an authority (generally a parliamentary assembly) that has not participated in the negotiations and does not even have the power to issue negotiating directives.

⁵⁶ — C-70/88, EU:C:1990:217, paragraph 21.

⁵⁷ — Statements in intervention of the United Kingdom (paragraph 8), the Kingdom of Denmark (paragraphs 9 to 12), the Federal Republic of Germany (paragraphs 29 and 32), the French Republic (paragraph 6) and the Republic of Poland (paragraph 7).

⁵⁸ — See, concerning the agreement between the Commission and the United States on competition law, *France v Commission* (C-327/91, EU:C:1994:305, paragraph 28) and point 84 of this Opinion.

114. The Council itself appears to accept the fact that its powers do not extend to being able to compel the Commission to submit to it the proposal it hopes for: according to paragraph 25 of its rejoinder, it ‘does not contest that the Commission remains fully responsible for the negotiations within this framework. Any decision taken by the Commission during the negotiations will normally only be sanctioned by the decision which the Council takes to approve [or reject] the outcome of the negotiations ... if the Commission decides at the end of the process to submit a proposal’.

115. In this connection, Messrs Cloos, Reinesch, Vignes and Weyland⁵⁹ write that, in the context of the negotiations leading to the adoption of the Treaty of Maastricht, ‘the Commission made a more significant proposal relating to the timing of the 113 [60] committee’s involvement. The Commission in fact suggested that the words “in consultation with” [61] should be replaced with “after consultation of” ... That amendment would have increased the Commission’s freedom of action, as it would only have needed to consult the 113 committee once, at the beginning of any negotiations. The Member States did not want to go in that direction, believing it indispensable that negotiations should be monitored regularly by the 113 committee, so as to avoid any unpleasant surprises at the end ... Another amendment, or rather refinement, of Article 113, suggested by the Luxembourg Presidency, also failed to meet with the delegates’ approval. The suggestion was for it to be explicitly stated that in the areas covered by Article 113, without prejudice to Article 228 [EEC], the Community’s position was, in dealings with third countries, within international organisations and at international conferences, to be expressed by the Commission. That provision, which is self-evident in the areas of exclusive Community competence, did not appear in the final text ... submitted to the Maastricht European Council, the argument for its withdrawal being precisely that it was unnecessary to state explicitly that which was self-evident. The real reason, however, lies in the climate of suspicion that surrounds the Commission in commercial matters. Indeed, some Member States feared that the Commission, backed by the Court of Justice, would miss no opportunity to further its own ambitious agenda in the field.’

116. The present case in general and the observations made by the Council and 7 of the Member States in particular demonstrate that, 20 years on, that climate of suspicion still surrounds the Commission.⁶²

117. Indeed, the Council maintains in this case that the *raison d’être* of negotiating directives (and thus of the special committee) is to avoid a ‘politically unacceptable *fait accompli*, since such an outcome could jeopardise the very approval of the agreement itself’.⁶³

59 — Cloos, J., Reinesch, G., Vignes, D., and Weyland, J., *Le traité de Maastricht Genèse, analyse, commentaires*, 2nd ed., Bruylant, 1994, p. 343. See also, Krenzler, H.G., and Pitschas, C., ‘Progress or Stagnation?: The Common Commercial Policy After Nice’, *European Foreign Affairs Review*, 2001, vol. 6, p. 291.

60 — A reference to Article 113 EEC, the present equivalent of which is Article 207 TFEU. See also, MacLeod and others, op. cit., p. 88: ‘Article 113 ... established a committee ... to assist the Commission in the negotiation of agreements ... This committee developed a general monitoring role across the whole field of the common commercial policy, but there was no similar arrangement in the original Treaty for the systematic scrutiny of the conduct of negotiations in other areas. In practice, this caused no great problem: the Commission’s progress in negotiation of agreements for the Community was kept under review in the Council’s regular working groups and in COREPER ... Article 228 [EEC] codifies the existing arrangements, and develops them. The Council is now specifically given a right to establish special committees and the Commission is required to negotiate “in consultation with” these committees.’

61 — This was in the sentence ‘The Commission shall conduct these negotiations *in consultation with* a special committee appointed by the Council’ (Article 113(3) EEC, which became Article 133(3) EC, which has now become Article 207(3) TFEU).

62 — The tension between the two institutions is again apparent in the pending case *Council v Commission* (C-73/14, see footnote 3 of this Opinion) in which the Council seeks the annulment of the Commission’s ‘decision’ to submit a written statement on behalf of the European Union to the International Tribunal for the Law of the Sea — without the Council’s prior approval. The *Commentaire Mégret*, op. cit., states on p. 87 that ‘[t]he spectre of the Blair House Agreement (on agriculture) and the Marrakesh Agreement (on bananas) again aroused a certain mistrust of the Commission a few years later, at the 1996 intergovernmental conference. However, *in practice*, the collaboration between the delegations from the Member States and the Commission in the conduct of those negotiations did not give rise to any difficulties. On the contrary, their cooperation appears to have contributed to the success of the negotiations, allowing both the Commission and the Member States to interpret the Council’s negotiating directives in a pragmatic, flexible manner ...’ (my emphasis).

63 — See paragraph 13 of the defence. See also the reference to the wish to avoid ‘unpleasant surprises’ in point 115 of this Opinion.

118. That is, moreover, a general theme of the arguments put forward by most of the Member States that have submitted statements in intervention in support of the Council.⁶⁴ Similarly, those Member States emphasise that the close collaboration demanded by the negotiating directives ensures the smooth progress of the negotiating process, having regard to the subject-matter of the negotiation.

119. As the Council itself states, this argument is a political one. Even if the possibility of adopting negotiating directives is intended to diminish the risk of conflict between the Commission and the Council during the course of the negotiating process, the fact remains that the power to do so cannot be interpreted as eliminating the Commission's task of leading the negotiations and its right of initiative once those negotiations are concluded.

120. Should the Council decide not to approve the agreement, it will be exercising the power conferred on it by the Treaties, which does not include power to compel the Commission to make a proposal *which will obtain the necessary majority within the Council*.

121. In other words, the policy-making power does not extend to the formulation of the proposal at the end of the negotiations, which is a matter for the Commission.

ii) Second argument

122. Along the same lines as the Council's argument above, some Member States⁶⁵ argue that Section A and the Council's involvement in the negotiations are necessary in order to ensure the effectiveness of its role when adopting the final decision, at the stage of the signature and conclusion of the agreement. This argument is also expressed in terms of the need to preserve the European Union's credibility as a serious negotiating partner.

123. Although that argument may be defended (and contested) from a political standpoint, it in fact disregards the institutional balance sought, *inter alia*, by Article 218 TFEU, which establishes a procedure⁶⁶ in which the three institutions, the Commission, the Council and the Parliament, each have a specific role to play.

124. As the Parliament rightly emphasises, 'the system of Article 218 TFEU has ... to be considered as a whole, in order to [ensure] its global consistency'⁶⁷ and the argument which justifies the Council's having a role in the negotiations themselves by reference to its power finally to conclude or reject the agreement is a serious distortion of the general scheme of Article 218 TFEU.

125. The argument has also been used in the past by the Council's Legal Service, which took the view that the Council's prior authorisation was needed before the Commission could enter into any 'pre-legal commitments' during the negotiations, if the Council was not to be deprived of any real influence in the actual decision-making process. As Mr Devuyst⁶⁸ rightly points out, this notion of a 'pre-legal commitment' as invented by the Council's Legal Service is not contained in the EU Treaties'. 'Its introduction 'would add a new procedural step ... which is not foreseen by the EU Treaties. It would shift the inter-institutional balance in favour of the Council', since 'all negotiating

64 — The Czech Republic (paragraph 6), Kingdom of Denmark (paragraph 17), French Republic (paragraph 21) and Republic of Poland (paragraph 5).

65 — Kingdom of Denmark, paragraphs 14 and 17 of the statement in intervention, and United Kingdom, paragraph 15(c) of the statement in intervention.

66 — Characteristic of the Community method, rather than the intergovernmental method.

67 — Parliament (paragraph 34).

68 — Devuyst, Y., *op. cit.*, p. 295 et seq.

steps between the launching of the negotiations and the signing of an agreement are logically the responsibility of the Commission'. 'If the Council itself had to approve any significant "pre-legal commitment" ... the specific procedures of Articles 207(3) and 218 TFEU would become largely redundant', which would turn the European Union into 'an impossible negotiating partner'.

126. It is also important to emphasise that the Commission's objective cannot simply be to produce an agreement which obtains the Council's approval; it must negotiate an agreement *which best serves the interests of the European Union*⁶⁹ before submitting it to the Parliament for approval, where that is required, and then submitting it to the Council.

127. I would note in this connection that the Council itself acknowledges that the Commission is free to decide not to propose the conclusion of the agreement,⁷⁰ which, paradoxically, would be likely to occur more often if the Council (or indeed the special committee, inasmuch as most Member States do not distinguish between them) were entitled to establish the negotiating position regardless of any contrary views the Commission might have.

iii) Third argument

128. According to the Czech Republic, it is important to avoid the situation where the outcome of the negotiations is unacceptable for the Council and where a refusal to approve the final draft of the agreement would have an adverse effect on relations with the other party. The Czech Government attempts here to draw a 'useful analogy' with the aim of the procedure for obtaining an opinion of the Court provided for by Article 218(11) TFEU, which is also to eliminate the risk of the incompatibility with EU law of the international agreement negotiated and to avert the associated problems in the field of international relations. In its view, the Court has expressed its position unambiguously on the point, ruling that 'a possible decision of the Court to the effect that such an agreement is, by reason either of its content or of the procedure adopted for its conclusion, incompatible with the provisions of the Treaty could not fail to provoke, not only in a Community context *but also in that of international relations, serious difficulties and might give rise to adverse consequences for all interested parties, including third countries*'.⁷¹

129. I am of the view that this reference to Article 218(11) TFEU and to Opinion 2/94 is not relevant in the present case.⁷²

130. As the Commission has rightly pointed out, a failure to conclude an international agreement cannot in any way be compared to the annulment of a decision concluding an agreement after the agreement has entered into force. A refusal by the Council to approve an agreement may at most have political consequences which will also arise if the Commission does not propose the conclusion of the agreement or if the Parliament does not give its consent, where that is required. From the perspective of international relations, the origins of the non-approval of an agreement are irrelevant and do not warrant giving one institution pre-eminence over the others.

69 — See, for example, Cremona, M., 'Defending the Community Interest: the Duties of Cooperation and Compliance' in *EU Foreign Relations Law: Constitutional Fundamentals*, Eds Cremona, M., de Witte, B., Hart Publishing, 2008.

70 — Paragraph 5 of the rejoinder.

71 — Opinion 2/94, EU:C:1996:140, paragraph 4 (emphasis added by the Czech Government).

72 — See also, to that effect, judgment in *Council v in 't Veld* (C-350/12 P, EU:C:2014:2039, paragraph 58), in which the Court found, in a comparable context, the same argument to be irrelevant.

iv) Fourth argument

131. Contrary to what is maintained by the Kingdom of Sweden,⁷³ the Commission has at no point argued that the Council can have ‘no influence over the content of the agreement which is being negotiated’.

132. Moreover, the Commission itself recognises⁷⁴ that, since the Council has the final say on whether to conclude the agreement or not, a factor that will undoubtedly influence the content of the negotiations, it is unlikely⁷⁵ to devote its resources to negotiating an international agreement that has little chance of becoming law because it will meet with opposition in the Council (or in the Parliament). That concern of the Commission’s may be viewed as the application of the principle of sincere cooperation.

133. It is also necessary to acknowledge that the Council is entitled to ask for full and regular reports on the progress of the negotiations, the body responsible for conveying that information being the special committee, which will also give its opinion (and that of the Council) to the negotiator throughout the consultation process. The Commission also observes that, contrary to what is implied in the Council’s defence (paragraph 32), it does not claim that the Council may not make its point of view known during the negotiations. It in fact emphasised in its application that it must take into account the positions expressed by the Council (and by the Parliament).

134. Similarly, the Commission does not dispute its obligation to consult the special committee and to keep in regular contact with it. That obligation flows logically from Article 218 TFEU and it is stated even more clearly with regard to commercial agreements.⁷⁶

135. Therefore, I do not propose that the Court should annul the second sentence of Article 2 of the contested decision.

136. The question remains of whether the Council may *amend* negotiating directives *during the course of the negotiation*.

137. The Commission maintains that the existence of a recommendation is not a simple procedural requirement to trigger the process, which would be fully in the hands of the Council thereafter. If the Council contends that its power during the negotiations is based on its power to authorise their commencement and to approve the agreement, both of which are dependent on proposals (or recommendations) from the Commission, it must also accept that any review or amendment must also be preceded by a proposal or a recommendation. Otherwise, the Council would enjoy more powers during the negotiation (that is to say, at a stage in relation to which the Treaties confer no powers on it) than at the stages of authorisation to negotiate and of conclusion of the international agreement (that is to say, the two stages where the Council’s role is provided for in the Treaties).

138. That argument of the Commission’s cannot succeed. It may also be noted that the Commission does not seek the annulment of the first sentence of Article 2 of the contested decision, according to which ‘[t]he Council may review the content of the negotiating directives at any time’.

73 — Kingdom of Sweden, paragraph 16 of the statement in intervention.

74 — See paragraph 28 of the Commission’s observations on the statements in intervention.

75 — See point 95 of this Opinion.

76 — Article 207(3) TFEU provides that ‘[[t]he Commission shall report regularly to the special committee and to the European Parliament on the progress of negotiations’.

139. In my opinion, given that it is the Council that will ultimately be called on to approve the agreement negotiated, it would be illogical if it were able to make its point of view known only at the opening of negotiations and not while they are in progress.⁷⁷ Obviously, when negotiations begin, neither the Council nor the Commission knows in detail the positions of third countries. Furthermore, negotiations are often complex and prolonged, governments change as do circumstances, and this also pleads in favour of the possibility of amending the negotiating directives during the negotiation, since their purpose of averting, as far as possible, differences in the approaches taken by the institutions would be ill served if the Council were informed only once the negotiations had ended. That said, it is not correct to say, as do the Council and certain Member States, that the Commission refuses to keep the Council informed during negotiations. It should also be noted that Article 218(10) TFEU expressly provides that the Parliament must be informed ‘at all stages of the procedure’ (meaning, also by the Commission). It therefore seems quite clear to me that the Commission must also keep the Council regularly informed.

140. I therefore agree with the Council and the Member States that the Council may, without the Commission having to submit a revised recommendation, review and, where appropriate, amend or supplement the negotiating directives during the course of the negotiations in response to the information provided to it by the Commission.

141. The fact that the Council may also guide the Commission during the negotiations seems evident to me from the wording of Article 218(4) TFEU, which is drafted in fairly general terms. Indeed, paragraph 4 of Article 218, which provides that ‘[t]he Council may address directives to the negotiator and designate a special committee in consultation with which the negotiations must be conducted’, differs from paragraphs 5 and 6, in that the decisions mentioned therein are conditional upon a ‘proposal by the negotiator’. Furthermore, paragraph 4 is silent regarding the time when the Council must (or may) address negotiating directives to the negotiator.

142. The Commission is somewhat vague on this point, inasmuch as it does not dispute, in principal, that negotiating directives may be amended.⁷⁸

143. The fact that the Council may amend negotiating directives without a prior proposal from the Commission appears to find confirmation in practice (inasmuch as, according to the Council, the Commission frequently asks for the directives to be updated, without, however, submitting any proposals) and has also been stated in academic legal writing. As MacLeod and others rightly point out,⁷⁹ ‘the Council may issue further directives unilaterally, without a Commission proposal, during the negotiations’ and ‘[i]t is for the Council to decide whether further directives are necessary: it does not need a Commission proposal before acting’.⁸⁰ However, it appears that, in practice, the Council rarely issues supplemental negotiating directives.

77 — That also appears to be the prevailing view among legal theoreticians. See, for example, Lenaerts, K., and Van Nuffel, P., *Constitutional law of the European Union*, Thomson/Sweet & Maxwell, 2005, p. 883 (since the Council must approve the agreement arising out of the negotiations, it is reasonable for it to make its opinion known at the beginning of and during the negotiations).

78 — See paragraph 36 of the Commission’s observations on the statements in intervention.

79 — See, in particular, MacLeod, J., Hendry, I.D., and Hyett, S., *The External Relations of the European Communities: a Manual of Law and Practice*, Oxford University Press, 1996, p. 89.

80 — Ibid.

144. Similarly, according to the *Commentaire Mégret*,⁸¹ '[t]he Council has the option of intervening at the stage of the opening of negotiations, *but also during the negotiations, in order to amend, replace or supplement directives already addressed to the Commission*. Those directives are often the result of prolonged debate within the Council and rarely remain secret. Their unofficial "publication" clearly makes the Commission's task vis-à-vis its negotiating partner more difficult, reducing its freedom of action to the point of rendering it illusory ...' (my emphasis).

145. However, that cannot not lead the Council, after authorising the opening of negotiations and communicating, and possibly amending, its guidelines, to claim a leading role in the negotiations, such as would reduce the necessary freedom of action which the negotiator must have in order to obtain a satisfactory outcome. Similarly, the special committee designated by the Council cannot play a leading role either, since its function is purely consultative.

146. It is the Commission, in fact, that must negotiate, as representative of the European Union, in the name of and on behalf of the Union (and not on behalf of the Council).

v) Fifth argument

147. The Council also argues that its interpretation of Article 218(4) TFEU, according to which it is entitled to include procedural provisions in negotiating directives, rather than just vague aspirational language, fully preserves the European Union's ability to speak with a single voice on the international stage.

148. I remain unconvinced by that argument because, in any event, this unity is ensured by the fact that *the negotiator alone is authorised to negotiate on behalf of the Union* within the framework defined by the directives communicated by the Council and, where appropriate, after consulting the special committee.

149. Moreover, this 'single voice' is already provided for by the Treaties given that, pursuant to Article 17(1) TEU, '[the Commission] shall ensure the Union's external representation'.

150. The Court has already emphasised, in Opinion 1/94 (EU:C:1994:384, paragraph 106 et seq.), the importance of the '[Union's] unity of action vis-à-vis the rest of the world', so that the Union may have greater negotiating power.

vi) Sixth argument

151. The Council and the Member States also point to the (allegedly) established practice, in the field of transport, of including procedural rules in negotiating directives.

81 — Op. cit., p. 85. See also Devuyt, Y., op. cit., p. 294: '[t]he Council may adopt negotiating directives at the time of launching the negotiations or at a later point in time; they may be updated and supplemented at any time during the negotiations', with reference to the Commission's document of 26 April 2005: *Commission Services Working Paper: Legal issues relating to the negotiations within the framework of the WTO's Doha Development Agenda* SEC(2005) 566 final.

152. The Commission's reply is that the two documents mentioned by the Council⁸² concern agreements to be negotiated as mixed agreements. In the documents mentioned there was a first annex with the 'negotiating directives' and a second (separate) annex entitled '*ad hoc* procedures for negotiations concerning an agreement between the European Community and its Member States and Algeria [or Georgia] in the field of transport'.⁸³ The main purpose of the second annex, which was not part of the negotiating directives, was simply to set out a procedure for coordinating with Member States.

153. Consequently, those matters are irrelevant in the context of an agreement to be concluded by the European Union alone, as in the present case.

154. Also, according to some Member States, negotiating directives *often* include procedural provisions.⁸⁴

155. Even if that is true (and the point is hotly disputed by the Commission), according to case-law, 'a mere practice cannot override the provisions of the Treaty'.⁸⁵ By way of example, the Court held, in paragraph 23 of its judgment in *Wybot* (149/85, EU:C:1986:310), that '[i]t [must be] determined whether the practice followed by the European Parliament does not render nugatory the [provisions of the ECSC, EEC and EAEC Treaties in question in that case], under which not only a majority of its members but also other institutions, namely the Council and the Commission, have the right to request that an extraordinary session should be convened. *In accordance with the balance of powers between the institutions provided for by the Treaties, the practice [in question] of the European Parliament cannot deprive the other institutions of a prerogative granted to them by the Treaties themselves*' (my emphasis).

vii) Seventh argument

156. According to the Council, the inclusion of certain procedural provisions and special requirements in the negotiating directives is a corollary of its right to decide whether an authorisation should be granted or not.

157. However, as I have already pointed out, once the Council has authorised the Commission to commence negotiations, it can have no direct decision-making role during those negotiations. Indeed, it should be emphasised that, even though the Council's authorisation and negotiating directives are commonly referred to as 'the negotiating mandate', the Commission is in no way 'mandated' by the Council; it is 'authorised' by it.⁸⁶

158. The Council's decision to use the word 'mandate' (in paragraph 42 of its defence) rather than using the precise wording of the Treaties is not ingenuous.⁸⁷ A mandate is not merely a deliberate act. It implies that the mandated body must act on behalf of another party, within the bounds of and in accordance with the binding instructions given by the mandating body.

82 — Namely documents SEC(2008) 2721 and SEC(2009) 83.

83 — The agreement with Georgia has been signed (OJ 2012 L 321, p. 1).

84 — 'Regularly', the United Kingdom maintains in paragraph 15(d) of its statement in intervention.

85 — Judgment in *France v Commission*, (C-327/91, EU:C:1994:305, paragraph 36). See also Opinion 1/94 (EU:C:1994:384, paragraph 52.)

86 — That interpretation is confirmed by, inter alia, MacLeod and others, *op. cit.*, p. 87: 'Strictly, the Commission is not "mandated" by the Council, but "authorised".'

87 — According to the Council, 'the Commission must conduct the negotiations within the mandate given to it by the Council' (paragraph 42 of the defence).

159. As Waelbroeck and others⁸⁸ have correctly observed, use of the expression ‘negotiating mandate’ ‘misrepresents the legal situation: the Council cannot, in fact, choose to mandate anyone it sees fit to negotiate on behalf of the Community, since the Commission has the monopoly in that regard. Its role is to initiate the procedure enabling the Commission, and only the Commission, to conduct the negotiations’.

160. The word ‘mandate’ is only meaningful where the Commission negotiates on behalf of the Member States.⁸⁹

161. Be that as it may, the Treaties do not mention any ‘mandate’ in the context of Article 218 TFEU, even though the word is used in other provisions, for example, in Article 18(2) TEU, where it is used in connection with the High Representative of the Union for Foreign Affairs and Security Policy.

162. In my opinion, if the authors of the Treaties had intended the Commission to act in accordance with a ‘mandate’, they would have used that term.

163. The fact that the Council may decide whether or not to give its authorisation does not, therefore, imply that it is entitled to include whatever it likes in any annex to that authorisation. The content must also comply with the provisions of the Treaties. Moreover, if the Council’s argument were that it could purely and simply refuse to give its authorisation if procedural provisions were not accepted, that could entail a misuse of powers.

viii) Eighth argument

164. According to the Council, ‘[t]he positions established in the special committee are intended to be a practical translation of the negotiating directives of the Council and, as such, aim at serving the negotiator by making clear which views have the backing of the political authority that will eventually have to decide whether or not to approve the negotiated text’ (paragraph 42 of its defence). If that view is taken, then what would there be left to negotiate beside the presentation of a package for the other party to accept or refuse?

165. In addition to what I have already said⁹⁰ on the subject of the notion of a ‘mandate’, I think that, even though consulting the special committee can help the Commission to determine whether or not certain provisions of the future agreement are likely to get the ‘political backing’ of the Council, it is for the Commission (and the Commission alone) to decide how to use that knowledge in the negotiations. Any other interpretation would reduce its right of initiative to nothing, since it would imply an obligation to propose a text for the simple reason that it reflected the positions which had the backing of the Council. There is clearly no obligation of any such kind in EU law.⁹¹

166. I would also observe that the use of the definite article in ‘the political authority’ might suggest that political authority belongs to the Council alone. However, the Commission (and the Parliament) are also institutions which have an important political role in international negotiations.

88 — See Waelbroeck, M., Louis, J.V, Vignes, D., and Dewost, J.L., ‘Le droit de la Communauté économique européenne’, *Relations extérieures*, vol. 12, Éditions de l’Université, Bruxelles, 1981, p. 30.

89 — That is not the case here, contrary to what the Kingdom of Sweden maintains (in paragraph 4 of its statement in intervention), stating that environmental policy is an area of shared competence. The negotiations were authorised and are conducted on the basis that the agreement is to be concluded by the European Union alone. Under Article 3(2) TFEU, the European Union has exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union (in this case, Article 25(1) of Directive 2003/87).

90 — See point 157 of this Opinion.

91 — Articles 225 TFEU and 241 TFEU.

167. Finally, Article 218(4) TFEU confers a merely consultative role on the special committee, since it provides that negotiations are to be conducted ‘in consultation with’ it. That admittedly implies that the special committee may express its point of view on various aspects of the negotiation, but the contested decision goes much further than that. It in fact provides⁹² for the establishment by the special committee (and, under paragraph 1 of Section A of the negotiating directives, by the Council) of ‘detailed negotiating positions *of the Union*’ (my emphasis), which are accordingly intended to be binding on the Commission, since, if the latter were to depart from them, it would be departing from positions defined as those of the Union and not merely of the special committee (or the Council).

168. A comparison may be drawn here between the present case and the case which led to the judgment in *Commission v Council*, (*CITES*⁹³) (C-370/07, EU:C:2009:590, paragraphs 43 and 44), in which the Court held — admittedly, in the context of the provision which is now Article 218(9) TFEU — that the definition of the ‘Union’s’ position produced binding legal effects on the institutions. It may also be added that paragraph 3 of Section A of the negotiating directives draws a distinction between ‘positions’ and ‘guidance’.

169. In the Council’s view, it is incorrect to state that the Commission is ‘not free to deviate from them’. The Council objects to the ‘false parallel’ drawn with positions adopted by it pursuant to Article 218(9) TFEU, which have a different character and which the Court has found to produce ‘binding legal effects’ and which is ‘binding in nature’ with respect to the institutions.⁹⁴ According to the Council, it is indeed for the Commission to decide how to negotiate,⁹⁵ but it must always follow the guidance which it receives in the special committee, whether it is in the form of oral guidance or agreed position papers.

170. I would say on this point that, even though the adoption of negotiating directives is indeed a different procedure from that referred to in Article 218(9) TFEU, the wording of the negotiating directives at issue refers to the ‘positions of the Union’ in a very similar way to Article 218(9) TFEU: the Council gives the special committee (or reserves to itself) power to establish the Union’s positions, entailing a corresponding obligation for the negotiator not to depart from them.

171. The Council states that, as is indicated in the procedural provisions of the contested decision, ‘if it proves to be impossible to obtain what is set out in the position, the Commission is under an obligation to report back to the special committee and seek further guidance’ (paragraph 44 of the defence). By that the Council confirms that the positions adopted by the special committee (and those which it establishes itself) are binding on the Commission, whose only freedom of action is in ‘how’ it negotiates.

172. The French Republic is not saying anything different when it explains (in paragraph 11 of its statement in intervention) that, whilst the Commission enjoys some discretion as regards the negotiating strategy, it should revert to the Council or the special committee if it intends to diverge from their positions.

173. To add to the confusion, the Council uses the term ‘recommendation’ to characterise the effect of the special committee’s positions (paragraphs 46 and 53 of the defence speak of a ‘recommended result’). The Council also refers to the obligation to ‘[take] into account the positions’ and to ‘practical translations’ (paragraphs 23 and 25 of the rejoinder). The United Kingdom, for its part, considers that the special committee is simply entitled to express its views (paragraphs 23 and 24 of its statement in intervention). It is difficult to reconcile all of that with the clear terms of Section A of the negotiating

92 — In both paragraph 1 of Section A of the negotiating directives (in connection with the commencement of negotiations) and in paragraph 3 of Section A (prior to each negotiating session).

93 — ‘CITES’ is the Convention on International Trade in Endangered Species of Wild Fauna and Flora.

94 — See judgment in *Commission v Council* (*CITES*) (C-370/07, EU:C:2009:590, paragraphs 43 and 44).

95 — The Council states that ‘it is for the Commission to judge *how* to negotiate’ (paragraph 43 of the defence; Council’s emphasis).

directives, which refer to the establishment of ‘negotiating positions of the Union’, and not merely to ‘recommendations to the Commission’ or even ‘positions of the Council (and/or of the special committee)’. Equally, the Council’s defence is directly contradicted by the terms of the contested decision, which uses the words ‘shall be established’ and ‘establish’ in the sentences ‘[w]here appropriate, detailed negotiating positions of the Union *shall be established* within the special committee ... or within the Council’ and ‘[e]ach negotiating session shall be preceded by a meeting within the special committee in order to identify the key issues and *establish* negotiating positions or guidance, as appropriate’; my emphasis).⁹⁶ However, in the negotiations, the Commission does not represent the Council; it represents the European Union.

174. The binding nature of the positions adopted by the special committee cannot be reconciled with the wording of Article 218(4) TFEU, which uses the term ‘consultation’. Had the authors of the Treaty wanted the Commission to be bound by the guidance and positions of the special committee they would have used stronger terms to describe that committee’s role (and that of the Council).

175. Indeed, I agree with the Commission that, if these positions are aimed at ‘serving the negotiator’, then it should be left to the negotiator to decide what use to make of them. Making clear which views have the backing of the political authority cannot be equated with an obligation to adhere to the positions of the special committee.

176. That does not imply that the Commission is not under a legal duty to *take into account* the positions established in the negotiating directives by the Council or the special committee,⁹⁷ but it is important to distinguish between that duty and an obligation *not to deviate* from those positions, which, as the Parliament points out, would place the Commission in the position of simple executor of the decisions of the special committee (or the Council).

177. It is interesting to note that the Court has already addressed, in a different context, the difference in scope and nature between these two types of obligation.

178. In *Mediaset* (C-69/13, EU:C:2014:71), the Court examined this difference. The case concerned a Commission decision declaring an aid scheme unlawful and incompatible with the internal market and, in particular, the role of the national courts and whether those courts must take account of the Commission’s statements of position in the execution of its decisions.

179. The Court held, in paragraph 31 of *Mediaset*, that, ‘although the statements of position by the Commission cannot bind the national court, it must be noted that, to the extent that those statements of position, as well as the Commission opinions which may be sought by the national court in the circumstances set out in the paragraph above, are intended to facilitate the accomplishment of the task of the national authorities in the immediate and effective execution of the recovery decision and, having regard to the principle of cooperation in good faith, the national court must take them into account as a factor in the assessment of the dispute before it and must state reasons having regard to all the documents in the file submitted to it’.

⁹⁶ — It should be noted that the original version of the negotiating directives is in English.

⁹⁷ — As the Czech Republic states, doing so averts problems at the stage of the approval of the agreement by the Council (paragraph 16 of its statement in intervention).

180. Therefore, whilst, ‘in order to ensure that a Commission decision declaring an aid scheme unlawful and incompatible with the internal market and ordering the recovery of the aid in question, but not identifying the individual recipients of that aid and not determining the precise amounts to be recovered[,] is executed, the national court is bound by that decision, it is not, however, bound by the positions adopted by that institution in the execution of that decision. Nevertheless, under the principle of cooperation in good faith laid down in Article 4(3) TEU, [⁹⁸] the national court must take the statements of position into account as a factor in the assessment of the dispute before it’.

181. Therefore, it may be concluded, so far as the present case is concerned, that ‘[having to] take into account the guidance provided by the Council’ (which the Commission has acknowledged in this case⁹⁹) is not the same thing as ‘being legally bound to follow it’ (which appears to be the argument of the Council and the intervening Member States).

182. I would add that the Commission must be free to decide that it is not in the general interest of the European Union wholly to follow the opinion of the special committee, which could be dictated purely by national interests.

183. As I have already emphasised, in point 126 of this Opinion, the Commission’s task is not, and cannot be, simply to produce an agreement which obtains the Council’s approval (whether or not the other institutions are in agreement); it must negotiate an agreement which best serves the interests of the European Union *and* is acceptable to the three institutions. Clearly, that may require compromises to be made between the various institutions.

ix) Ninth argument

184. According to the Council, the content of the procedural section of the negotiating directives is nothing more than a specific expression of how the institutions should translate the principle of sincere cooperation in the context of international negotiations.

185. Some of the intervening Member States also refer to the principle of sincere cooperation as the more or less indirect basis of the procedural provisions at issue.¹⁰⁰

98 — Which provides that, ‘[p]ursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties’.

99 — See paragraphs 20 and 27 of the application and paragraphs 7 and 35 of the reply.

100 — See, for example, paragraph 17 of the Federal Republic of Germany’s statement in intervention. The French Republic acknowledges that the Council cannot impose new procedural requirements, but maintains that Section A is merely a practical expression of the duty of sincere cooperation (see paragraphs 27, 28, 32 and 33 of its statement in intervention).

186. The principle of sincere cooperation (cooperation in good faith¹⁰¹ in a Community context) is, of course, at the heart of the European Union's legal system¹⁰² and is a vitally important aspect of the institutional balance which the Treaty seeks to achieve. It is regarded as a 'fundamental principle of the Community's constitutional structure'.¹⁰³

187. As has been pointed out in the case-law of the Court, 'in accordance with the second subparagraph of Article 7(1) EC (now Article 13(2) TEU), the Community institutions may act only within the limits of the powers conferred upon them by the Treaty'.¹⁰⁴

188. That is unambiguously confirmed by Article 13(2) TEU,¹⁰⁵ which provides that '[e]ach institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation'.¹⁰⁶

189. It is important to bear in mind that '[t]he distribution of the powers between the institutions reflects the place that the authors of the Treaties wanted to grant to each one of them in the exercise of the missions that they entrusted to the Community. In this context, the task of the Court is to ensure that this system is maintained, in order to prevent the compromises made at the time of the drafting of the Treaties being called into question again. The balance to which the Court refers is therefore that established by the Treaty. It is therefore not acceptable for one institution to extend its powers unilaterally to the detriment of another institution'.¹⁰⁷

101 — 'This rather mysterious notion, which might be moral, political or legal' (see Verhoeven, J., introduction to *La loyauté, Mélanges offerts à Etienne Cerexhe*, Larcier, 1997, p. 1).

102 — '[I]n all its various forms: mutual cooperation in good faith between the Community and its Member States, horizontal solidarity between Member States, cooperation in good faith between the Community institutions, the principle of good faith within the Community is at the heart of the Community's legal system' (see Simon, D., *Le système juridique communautaire*, 3rd ed., PUF, Paris, 2001, p. 151). The Court has referred to a 'principle of cooperation in good faith' (*Wells*, C-201/02, EU:C:2004:12, paragraph 64), a 'duty of genuine cooperation' (*Commission v Italy*, C-33/90, EU:C:1991:476, paragraph 20), 'mutual duties of sincere cooperation' (*Luxembourg v Parliament*, 230/81, EU:C:1983:32, paragraph 37), a 'duty to cooperate in good faith' (*Athanasopoulos and Others*, C-251/89, EU:C:1991:242, paragraph 57), 'the obligation of genuine cooperation' (*Commission v Germany*, C-105/02, EU:C:2006:637, paragraph 87), a 'duty of loyalty' (*Commission v Ireland*, C-459/03, EU:C:2006:345, paragraph 169), a 'principle of cooperation' (*EU-Wood-Trading*, C-277/02, EU:C:2004:810, paragraph 48) and a 'spirit of genuine cooperation' (*Commission v Ireland*, C-494/01, EU:C:2005:250, paragraph 45) (see Magnon, X., 'La loyauté dans le droit institutionnel de l'Union européenne', in *Revue des Affaires Européennes*, 2011/2, p. 245). See also, for example, the 'generalised tariff preferences' judgment in *Parliament v Council*, (C-65/93, EU:C:1995:91, paragraphs 21 to 28), in which the Court weighed the protection of the institutional balance against the requirement for sincere cooperation between the institutions (see also the contrary view of Advocate General Tesouro in his Opinion in that case (C-65/93, EU:C:1994:405)).

103 — See Simon, D., *Le système juridique communautaire*, op. cit., p. 149. See also, in this context, Burgorgue-Larsen, L., 'La coopération interinstitutionnelle — Approche comparative et tentative de systématisation', Auvret-Finck, J., *L'Union européenne carrefour de coopérations*, LGDJ, 2002, p. 13 et seq.; Neframi, E., 'The duty of loyalty: rethinking its scope through its application in the field of EU external relations', *Common Market Law Review*, No 47, 2010, p. 323; Le Barbier-Le Bris, M., 'Les principes d'autonomie institutionnelle et procédurale et de coopération loyale', *Le droit de l'Union européenne en principes*, op. cit., p. 419; Potvin-Solis, L., 'Le principe de coopération loyale', in *Annuaire du droit européen*, vol. VI/2008 (2011), p. 165; Thies, A., 'Le devoir de coopération loyale dans l'exercice des compétences externes de l'Union européenne des États membres', *Objectifs et compétences dans l'Union européenne*, Bruylant, 2013, p. 315.

104 — See judgments in *Parliament v Commission* (C-403/05, EU:C:2007:624, paragraph 49) and *Parliament and Denmark v Commission* (C-14/06 and C-295/06, EU:C:2008:176, paragraph 50).

105 — Previously the second subparagraph of Article 7(1) EC.

106 — The principle of sincere cooperation, in accordance with the case-law codified in the second sentence of Article 13(2) TEU, applies equally to the EU institutions (see, to that effect, judgment in *Greece v Council*, 204/86, EU:C:1988:450, paragraph 16, and the 'generalised tariff preferences' judgment *Parliament v Council* (C-65/93, EU:C:1995:91, paragraphs 23 and 27)).

107 — See Jacqué, J.-P., 'The Principle of Institutional Balance', *Common Market Law Review*, No 41, 2004, p. 384. Jacqué regards the institutional balance as one of the structural principles, alongside institutional autonomy and 'faithful cooperation' between the institutions, and describes the institutional balance as a constitutional principle. See also Van Raepenbusch, S., *Droit institutionnel de l'Union européenne*, 4th ed., Larcier, 2005, p. 451 (who regards the principle as basic to the institutional scheme of the Community), Tridimas, T., *The General Principles of EU Law*, 2nd ed., Oxford European Union Law Library, 2006, p. 4 (who ranks the principle among the 'systemic principles which underlie the constitutional structure of the Community and define the Community legal edifice'); Guillermin, G., *Le principe de l'équilibre institutionnel dans la jurisprudence de la Cour de justice des Communautés européennes*, JDI, 1992, p. 319 (who regards it as a structural principle), Papadopoulou, R.E., *Principes généraux du droit et droit communautaire, origins et concrétisation*, Bruylant, 1996, p. 118 (a general principle of a constitutional nature, fundamental or structural), De Witte, B., 'Institutional Principles: A Special Category of General Principles of EC Law', Bernitz, U. and Nergelius, J., *General Principles of EC Law*, Kluwer, 2000, p. 143 (the institutional balance is one of the general principles of institutional law and falls into the category of horizontal principles).

190. Moreover, as Advocate General Jääskinen has pointed out,¹⁰⁸ ‘on the one hand, ... the principle of sincere cooperation makes it possible to resolve the uncertainties arising from “grey areas” of the Treaties, such as the uncertainty surrounding the manner in which the power to withdraw [a legislative proposal] may be exercised [which was at issue in that case]. On the other hand, although it is applicable to informal cooperation between the EU institutions, its content cannot be precisely defined’.¹⁰⁹

191. As regards the Council’s argument set out in point 184 of this Opinion, it is indisputable that ‘how the institutions should translate’ this principle of sincere cooperation must be agreed between the two (or three) institutions concerned, rather than imposed unilaterally by any one of them on the other institution (or institutions).

192. It is interesting to note in this context that, in the past, on the basis of the principle of institutional balance, the Council itself has protested (again, against *faits accomplis*) when the Parliament unilaterally imposed in its Rules of Procedure its vision of relations with the other institutions.¹¹⁰

193. It follows from the foregoing that the imposition of procedural rules on an institution without its consent clearly runs counter to the principle of sincere cooperation, in particular, when the consequence of the rules imposed is that the political role conferred on the Commission by the Treaty becomes more akin to a purely technical, subordinate role, like that of a Secretariat¹¹¹ (albeit a Secretariat-General!).¹¹² Such a role is incompatible with the Commission’s standing as an institution politically responsible to the Parliament (Article 17(8) TEU¹¹³) whose specific role in the negotiation of international agreements perfectly accords with the task conferred on it by Article 17 TEU to ensure the Union’s external representation (with the exception of the common foreign and security policy). The negotiation of international agreements is one of the forms of external representation of the Union.¹¹⁴

194. On the subject of Article 17(1) TEU, which makes the Commission the guardian of the Treaties, a question was raised at the hearing by the German Government, which asked who would guard the guardians themselves¹¹⁵ if the Commission could negotiate ‘without supervision’. Suffice it to recall that that role falls to the Parliament by virtue of the political responsibility of the Commission and to the Court of Justice by virtue of the judicial review of the legality of the acts of the institutions, including the Commission.

108 — See the Opinion in *Council v Commission* (C-409/13, EU:C:2014:2470, paragraph 98).

109 — For a more extensive analysis, Advocate General Jääskinen refers to Blumann, C., ‘Caractéristiques générales de la coopération interinstitutionnelle’, Auvret-Finck, J., *L’Union européenne carrefour de coopérations*, LGD, 2000, pp. 29 to 61.

110 — See Jacqué, J.-P., *op. cit.*, p. 386, who adds that ‘the principle has [also] provided useful support for the Commission when it tried to oppose claims of the Parliament to obtain the withdrawal of its proposals’.

111 — As Advocate General Tizzano rightly emphasised (see his View in *Commission v Council*, C-27/04, EU:C:2004:313, point 140), it would be at odds with the balance between the institutions to interpret the Treaties as limiting the role of an institution to ‘rubber-stamping’ the recommendations of another institution and reducing it to a notarial role. That observation, made with regard to the Council in that case, clearly applies also to the other institutions (in this case the Commission).

112 — In the sense that the Council leaves it to the Commission only ‘how to negotiate’ and not ‘what to negotiate’. At the hearing, the Council asserted that it had ‘the right to steer the negotiations’, which, in my view, is clearly contrary to the FEU Treaty.

113 — Also, pursuant to Article 10(1) TEU, ‘[t]he functioning of the Union shall be founded on representative democracy’.

114 — As rightly observed by Eeckhout, P., *op. cit.*, p. 196, ‘there is clearly a need for the Commission, which ensures the application of the Treaties and of EU legislation (again with the exception of the CFSP), to be the negotiator for agreements covering matters of internal policy-making under the TFEU. The negotiated agreement will need to fit into the broader framework of EU law, and the Commission has the institutional capacity and memory to ensure this’.

115 — Citing Juvenal: ‘sed quis custodiet ipsos custodes?’

x) Tenth argument

195. The Council also seeks to justify the contested decision by claiming, in substance, that the Commission has failed to fulfil its obligations to consult the special committee in other comparable negotiations with the Swiss Confederation. Certain Member States¹¹⁶ also mention the experience gained from the negotiations with the Swiss Confederation. The Council adds that, even today, the Commission refers to the website of the Swiss Federal Office for the Environment for an overview of those negotiations. According to the Commission, that website is the only publicly available source of information.

196. Be that as it may, for the purposes of the present case, it is not apparent from the documents submitted to the Court that the Commission has failed to fulfil its obligations under the Treaty to consult the special committee.

197. Indeed, it is clear from Table 1, entitled ‘Dates of High Level Meetings (“HLMs”) and updates in the Working Party on the Environment on [the] state of negotiations on linking’, which the Commission has placed before the Court, that four formal rounds of negotiation on linking with the Swiss Confederation had been held by the time the reply was lodged.¹¹⁷ Two further rounds had been planned, but were postponed or cancelled. The Working Party on the Environment was informed by the Commission of each HLM. Generally, the Commission provided an update shortly before and/or after each HLM and shared relevant documents with the Working Party on the Environment, where necessary. At times, it has proven difficult for the Commission to get the Working Party on the Environment to allocate time to it in its programme.

198. The Commission explains that, for example, on 9 November 2012, it requested the Council for time to be allocated to it by the Working Party on the Environment and that it was offered a slot only in January 2013. On other occasions it has been given a slot that has then been postponed by the Presidency without the Commission being formally informed. For example, the Working Party on the Environment allocated time to the Commission in March 2013 and then postponed the meeting to 18 April 2013. Whilst it is true that, in 2012, the Commission gave only one update to the Working Party on the Environment on linking with the Swiss Confederation, this was because of the very limited progress on linking that it had been possible to achieve over the year, due to significant disagreements between the Swiss Confederation and the European Union, in particular regarding the coverage of international aviation. Very few technical exchanges had taken place in ordinary working meetings over that year.

199. However, even if the Council were entirely correct in its assessment of the Commission’s conduct in the negotiations between the European Union and the Swiss Confederation (*quod non*), that would not entitle it to take the law into its own hands in subsequent negotiations and disregard the Treaties.

200. The Council also observes that the Commission lent its full cooperation in the development of the procedural section of the Annex when it was discussed within the Working Party on the Environment and that it did not object to the text when it was circulated for informal approval: ‘[h]ence the surprise of all when the Commission introduced its statement at the time of the adoption of the [contested] decision’ (paragraph 29 of the defence).

201. The Commission disputes that argument, explaining that its proposal had not included that section and that it had made it clear that it objected to that section several weeks before the adoption of the contested decision.

116 — For example, the Federal Republic of Germany (paragraphs 6 to 10 of its statement in intervention).

117 — That is to say, by November 2013.

202. In any event, the fact that it may have taken some time for the Commission to react (between 22 April and 2 May 2013) after the first draft was circulated cannot justify the unlawful act and certainly does not imply that it fully collaborated in or informally approved the text.

xi) Eleventh argument

203. Although the FEU Treaty makes no provision for consultation ‘with the Council’, the Kingdom of Sweden and the Kingdom of Denmark counter that objection by stating that ‘the special committee works as an extension of the Council’ and ‘constitutes a platform for cooperation between the Commission and the Council’.¹¹⁸ Those Member States assert, in substance, that it matters little whether the Treaty refers to the special committee or to the Council, since, in practice, they are one and the same thing.¹¹⁹ The positions of the other Member States also appear to be based on the absence of any distinction between the special committee and the Council.

204. However, as the Commission has pointed out, this view is not supported either by the Treaties or by the case-law. Furthermore, if inspiration is to be drawn from other areas of EU law, the comitology committees, which play an important role in EU law, are a means for the Member States, not the Council, to review the Commission’s powers (Article 291(3) TFUE).

205. It is indisputable that, if Article 218 TFEU refers to a ‘special committee’ it is designating something other than ‘the Council’. Moreover, had it been intended for the Treaty to invest the Council with a negotiating role of the kind suggested by some Member States, it would have stated that clearly.

206. The fact that the Council has the last word in the conclusion of the agreement does not authorise it to play a decisive role in the distinct stage of the agreement’s negotiation and does not, therefore, justify its encroaching on the Commission’s role as negotiator. In the same vein, the fact, for example, that the Council and Parliament are co-legislators does not justify their intervention in the process of drafting the Commission’s proposal.¹²⁰

207. In order to ‘protect [the] institutional balance by ensuring the full application of the Treaty provisions concerning the distribution of powers’,¹²¹ I propose, on the basis of the foregoing, that the Court should uphold the Commission’s action in so far as it concerns Section A of the Annex to the contested decision.

208. Should the Court decide accordingly, the scope and effects of annulment would remain to be determined.

C – Scope and effects of annulment

209. According to case-law, partial annulment of a decision is possible only if the elements whose annulment is sought may be severed from the remainder of the decision.¹²²

118 — Paragraph 38 of the Kingdom of Sweden’s statement in intervention; paragraph 31 of the Kingdom of Denmark’s statement in intervention.

119 — Paragraph 42 of the Kingdom of Sweden’s statement in intervention.

120 — Moreover, as is noted in the *Commentaire Mégret*, op. cit., p. 436, ‘[t]he Commission embodies the general interest of the [Union] and it is thus important to exploit its role as international representative beyond the bounds of the [Union’s] exclusive or preponderant competences. In a Europe comprising an increasing number of Member States it is, for a number of reasons, the natural choice of negotiator in international fora to express the voice of the [Union] and its Member States: it possesses undeniable expertise and it offers stability amid a whirlwind of Presidencies that change every six months and whose staff have only varying degrees of knowledge of certain international dossiers. Take the case of an international negotiation lasting for three years. Leaving aside the areas of exclusive competence, there would be six different interlocutors in the various Presidencies, known to some, unknown and lacking in aura to others ...’.

121 — See judgment in *Parliament v Council*, regarding the Lomé Convention (C-316/91, EU:C:1994:76, paragraphs 11 and 12).

122 — See, by way of example, judgment in *Commission v Council* (C-29/99, EU:C:2002:734, paragraph 45 and the case-law cited).

210. I am of the opinion that that is manifestly so in the present case, since Section A of the Annex to the contested decision may be severed from the remainder of the contested decision. As the Commission has pointed out, in fact, detailed procedural provisions of this sort do not normally appear in this type of decision.

211. The Council emphasises that Section A of the Annex to the contested decision refers to Article 1(2) of the contested decision and that Section A is therefore not severable from the remainder of the contested decision.

212. The reference to Article 1(2) of the contested decision poses no problem.¹²³ Even if Section A is annulled, that will not affect the designation of the special committee. Moreover, since large numbers of decisions authorising the negotiation of international agreements do not contain wording such as that set out in Section A of the Annex, the severable nature of that wording is self-evident. It is clear from the documents before the Court that the decision concerning the negotiations with the Swiss Confederation contained no such provisions. The result would not, therefore, be ‘entirely incoherent’ (paragraph 57 of the defence).

213. Furthermore, the question whether partial annulment would alter the substance of a contested measure is not a subjective criterion linked to the political intention of the authority which adopted the measure at issue, but rather an objective criterion.¹²⁴ Furthermore, when the conditions for partial annulment are fulfilled, the decision cannot be annulled in its entirety.¹²⁵

214. In my opinion, it follows that, in the present case, the Court is perfectly entitled to annul just Section A of the Annex to the contested decision.

215. If, alternatively, the Court should decide to annul the contested decision in its entirety, it would be necessary and justified to maintain the effects of the contested decision, pursuant to the second paragraph of Article 264 TFEU, in order to avert the suspension of the negotiations with Australia.

V – Conclusion

216. In light of all the foregoing, I propose that the Court should:

- annul Section A of the Annex to the Decision of the Council of 13 May 2013 authorising the opening of negotiations on linking the EU emissions trading scheme with an emissions trading system in Australia.

In the alternative, I propose that the Court should:

- annul the Decision of the Council of 13 May 2013 authorising the opening of negotiations on linking the EU emissions trading scheme with an emissions trading system in Australia and maintain the effects of that decision in the event that it is annulled in its entirety.

In any event, I propose that the Court should:

- order the Council of the European Union to bear its own costs and to pay the costs of the European Commission, and

¹²³ — A problem may arise when a provision to which reference is made disappears, but normally does not do so when it is the provision that makes the reference which disappears.

¹²⁴ — This is settled case-law. See, for example, judgments in *Germany v Commission* (C-239/01, EU:C:2003:514, paragraph 37) and *France v Parliament and Council*, (C-244/03, EU:C:2005:178, paragraph 12).

¹²⁵ — Judgments in *Commission v Département du Loiret* (C-295/07 P, EU:C:2008:707, paragraph 104) and *Commission v Verhuizigen Coppens* (C-441/11 P, EU:C:2012:778, paragraph 54).

- order the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the French Republic, the Republic of Poland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland and the European Parliament to bear their own costs.