INSIGHT

NAVIGATING ART. 218 TFEU: THIRD STATES' ACCESSION TO INTERNATIONAL CONVENTIONS AND THE POSITION OF THE EU IN THIS RESPECT

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ABSTRACT: Setting the general procedure to be followed for the conclusion of international agreements, art. 218 TFEU allocates the powers of the different institutions involved and – compared to the pre-Lisbon legal framework – strengthens the role of the European Parliament. It is therefore with respect to this provision that the status and prerogatives of the EU *vis-à-vis* third States must be analysed, as it frames the lifecycle of the international agreements and the rules the EU institutions are bound to follow in this regard. However, while its pattern seems suitable whenever the EU must conclude an international agreement which entails a positive expression of position, doubts arise as regards those conventions which foresee an accession, based on a non-objection mechanism. This *Insight* explores, in the light of the duty to practice mutual sincere cooperation stemming from art. 13 TEU, some practical disadvantages of its application and the controversial issue of the Council's internal voting rules.

KEYWORDS: art. 218 TFEU – EU external relations – interinstitutional agreements – third State accession – informal procedures – voting rules.

I. INTRODUCTION

The recent practice of the Council of the European Union concerning the establishment of the EU position *vis-à-vis* third States asking for accession to international conventions to which the EU is part offer a valid occasion for an analysis – from an empirical and practical point of view – of art. 218 TFEU.

As it emerges from publicly accessible documents, in the case that an international convention provides that accession of a new contracting State follows a given period of time during which other contracting States may oppose to such accession (thus enacting a silence/no-objection mechanism), the Council seems to have established an informal procedure which starts with a notification by the depositary that a new acces-

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sion to a convention is required and a certain deadline for raising an objection is set out, followed by a discussion within the competent Council's working party and a subsequent recommendation by the Committee of Permanent Representatives to the Council that the line to be taken is not to object. Therefore, in regard of a request of accession, neither a recommendation ex art. 218(3) TFEU is put forward by the Commission, nor is a subsequent Council decision adopted.[1]

This procedure, which steers undoubtedly towards more efficiency and efficacy of the EU institution's action at international level, should nevertheless be scrutinized in the light of the architecture of art. 218 TFEU and of the Court of Justice's case-law in matter of external representation of the EU and allocation of powers among EU institutions.

II. The scope of art. 218 TFEU

The Lisbon Treaty has deeply modified the European Union architecture, opting for a new design of the interinstitutional relations, which in turn entails different prerogatives of all the actors involved.

Previously, the power to enter international agreements was set out in art. 300 TEC,[2] which foresaw a decision on the signing, the eventual provisional application, and the conclusion by the Council, acting by a qualified majority (or unanimity, depending on the matter) on a proposal from the Commission. The decision-making power was therefore firmly in the hands of the Commission and the Council, with the European Parliament merely informed of any decision made in this regard. Moreover, under art. 300 TEC, the European Parliament was required to give its assent only when the Council intended to amend an act adopted under the procedure referred to in art. 251 TEC.[3]

[1] *Inter alia*, see doc. 15034/19 concerning the accession by Barbados to the 1996 Hague Convention, and doc. 12284/21 concerning the accession by Georgia to the 1965 Hague Convention, available, respectively, at data.consilium.europa.eu and at data.consilium.europa.eu. According to these documents, which were made public after the Council decision, the working party in civil law matters (i.e. the special committee established *ex* art. 218(4) TFEU) discussed the proposed accession and did not identify any fundamental issues which could lead to the need for the EU to object. Consequently, Coreper was invited to recommend to the Council that the line to be taken by the EU was not to object to the accession. Both decisions of the Coreper and the Council were made without discussion, based on a so called "I/A note" (which, differently from the "II/B notes", do not entail a public debate and are approved in bulk at the beginning of each Council meeting).

[2] Literature on this topic is very broad. See, *inter alia*, A Mignolli, 'Art. 218' in A Tizzano (ed.), *Trattati dell'Unione Europea* (2nd edn, Giuffré 2014); S Sanna, 'Art. 218' in F Pocar and MC Baruffi (eds), *Commentario breve ai Trattati dell'Unione Europea* (CEDAM 2014); A Ianniello Saliceti, 'Art. 218' in C Curti Gialdino (ed.) *Codice dell'Unione Europea operativo* (Simone 2012); A Rosas, 'EU External Relations: Exclusive Competence Revisited' (2015) Fordham Int'l LJ 1073; AP Van Der Mei, 'EU External Relations and Inter-Institutional Conflicts: The Battlefield of Article 218 TFEU' (2016) Maastricht Journal of European and Comparative Law; P Koutrakos (ed.), 'The European Union's External Relations a Year After Lisbon' (CLEER Working Papers n. 3/2011).

[3] A situation which rightly appeared as a lack of a "compelling logic", for P Eeckhout, *EU External Relations Law*, (2nd edn, Oxford University Press 2011) 203.

Under the Lisbon Treaty, things have greatly changed. Art. 218 TFEU has promoted an unprecedented strengthening of the co-legislator's position,[4] whose consent is now required for all the agreements covering fields governed by the ordinary (or special) legislative procedure. Against this backdrop, art. 216 TFEU draws the perimeter of the external competence of the European Union and codifies the Court of Justice's previous case-law, while it is for art. 218 TFEU to set out the procedural rules to be followed for the negotiation and conclusion of international agreements with third States and international organisations.

Put in other words, except for agreements concluded in the field of common commercial policy, procedurally regulated by art. 207 TFEU, and for other agreements governed by art. 219 TFEU, art. 218 TFEU designs a general and uniform procedure for the lifecycle of international agreements with third States. At the same time this provision includes a reference to the internal voting rules of the Council, which may take a decision by qualified majority or unanimity, depending on the field covered by the agreement.

Art. 218 TFEU is of a complex structure, as it impinges on different aspects of the negotiation and conclusion of international agreements: amongst other things, the issue of the external representation of the EU, the choice of the appropriate legal base of an agreement, the possible mixed nature thereof and the subsequent level of engagement of Member States, the envisaged parallelism between internal and external procedures.

Thus, it is little wonder that the practical implications of this provision still need to be fully understood.

III. The internal procedure for the conclusion of international agreements by the CJEU

Under art. 2(1)(a) of the 1969 Vienna Convention on the law of the Treaties, an international agreement may be embodied in a single instrument or in two or more related instruments:[5] those instruments may thus be the expression of the convergence of intent on the part of two or more subjects of international law, which they formally establish.[6] Therefore, "when an international Convention provides for two related instruments, namely the instrument of accession and the declaration of acceptance of accession, the act of accession and the declaration of acceptance of such an accession, although each is effected by means of a separate instrument, give expression, overall, to the 'convergence of intent' of the States concerned and thus amount to an international agreement".[7]

[4] See, *inter alia*, E Baroncini, 'L'Unione Europea e la procedura di conclusione degli accordi internazionali dopo il Trattato di Lisbona' (2013) Cuadernos de Derecho Transnacional 5.

[5] Arts 11 to 17 of the Vienna Convention on the Law of the Treaties [1969].

[6] See opinion 1/13 Adhésion d'États tiers à la convention de La Haye ECLI:EU:C:2014:2303 para. 37

[7] Opinion 1/13 cit. para. 41.

That being said, from the perspective of international law rules, when it comes to the way the consent to the agreement is reached within a party, the latter – and the EU does not constitute an exception in this regard – should follow clear procedural rules, with an aim to clarify its position. Those rules are for the EU set out in art. 218 TFEU, which lay down the internal decision-making procedure for the conclusion of such agreements. The basic architecture of this provision provides that – upon proposal by the Commission – the Council adopts a decision authorising the signing of the agreement and, if necessary, its provisional application before entry into force, as well as a decision concluding the agreement. The latter should be adopted, according to the matters involved, either after obtaining the consent of the European Parliament or after consulting it (art. 218(6)(a) and (b) TFEU respectively).

The CJEU emphasized in this regard that art. 218 TFEU lays down "a single procedure of general application concerning the negotiation and conclusion of international agreements" which the European Union is competent to conclude in the fields of its activity, except where the Treaties lay down special procedures.[8] In addition to the clear opinion of the Court, it's undisputed among scholars that art. 218 TFEU must be read as applying to all forms of consent to be expressed at international level.[9] Along the same lines, official documents of the EU institutions show that the procedure to be followed (internally) "for all this kind of international agreements"[10] is laid down in the provision in the provision we are analysing.

One question which arose in practice – giving the CJEU the opportunity to explore the scope of this provision – is precisely whether the EU institutions are obliged to always follow the rules set out by the Treaty, or if they can deviate from them and (if any) what their room for manoeuvre is, while remaining compliant with the Treaty itself.

In particular, as the procedure set out in art. 218(5) and (6) TFEU is quite cumbersome, it ought to be clarified whether such procedure should also be followed, where no positive decision by the Council is required, because a silence/no-objection procedure is set out by the international agreement.

Despite the lack of instruction in the Treaties (which leave this issue open to interpretation) it seems difficult to conclude that an implicit decision – such as one resulting from the expiry of a deadline – is not a 'decision' within the meaning of art. 218 TFEU. When the EU decides not to raise an objection to a requested accession, it is nonetheless taking a position towards the requesting third State, and this position should, firstly, result from an internal decision-making process and, secondly, be externally conveyed.

[8] See case C-180/20 European Commission v Council of the European Union ECLI:EU:C:2021:658 para. 27.

[9] See P Eeckhout, *EU External Relations Law* cit. 201.

[10] It is worth noting that the word "all" is emphasised in bold in European Commission, *Vademecum on The External Action of the European Union* SEC(2011) 881/3, para. 3, thus stressing that no exception may be made to this general principle.

Although the informal procedure quoted above has the merit of streamlining the Council's decisional process, nonetheless the Court of Justice clarified on several occasions that the rules regarding the way the EU institutions arrive at their decisions are laid down in the Treaties and "are not at the disposal of the Member States or of the institutions themselves". Member States and institutions are therefore bound by all the provisions of art. 218 TFEU[11] and do not have the option of choosing the way in which they exercise their powers, since they may act only within the limits of the powers conferred upon them by the Treaties, which alone determine the procedures for the adoption of legislative acts.

As rigid as it may seem, this principle should not be derogated even if the underlying intention of the institutions involved is to streamline the accession procedure.

IV. The different role of the institutions involved

The procedure set out in art. 218 TFEU identifies the European Commission as the institution empowered with the prerogative of proposal, which reflects its general right of initiative (to be shared, on matters of Common Foreign and Security Policy (CFSP), with the High Representative of the Union for Foreign Affairs and Security Policy).

The Commission shall submit recommendations to the Council, which in turn shall adopt a decision authorising the opening of negotiations and, depending on the subject of the envisaged agreement, nominating the Union negotiator or the head of the Union's negotiating team.[12]

Furthermore, together with the Council, the Commission ensures consistency between the different areas of the Union's external action and between these and other policies (arts 21(3) and 22 TEU).[13] Consequently, it is for the Commission to submit a recommendation, without which the Council is not entitled to act, normally including an explanatory memorandum and a set of directives for the negotiation (whose content is not public, to avoid an early disclosure of the negotiator's objectives and of its room for manoeuvre).

As for the Council, the decision-making power is almost entirely in its own hands. The Council is indeed entitled to adopt the decision on the signing and on the (eventual) provisional application of the agreement, along with the decision on its conclusion and

[11] Case C-28/12 *European Commission v European Parliament* ECLI:EU:C:2015:282 paras 42 and 43. This principle was already established by case C-68/86 *United Kingdom v Council* ECLI:EU:C:1988:85 para. 38, and in case C-133/06 *Parliament v Council (Minimum Standards of Procedure)* ECLI:EU:C:2008:257 para. 54.

[12] This is a novelty, compared to art. 300 TCE where the Commission was clearly defined as negotiator on behalf of the (then) European Community, as para.1 stated that "the Commission shall conduct these negotiations in consultation with special committees appointed by the Council", although a comparative analysis of art. 218 TFEU and art. 17 TEU leaves no doubt on the proper identification of the negotiator, which should be the institution that "ensure the Union's external representation" and also the application of the Treaties.

[13] See the *Vademecum* cit. para. 1.5.4.

– where necessary – on the suspension of the application and on the common position to be adopted on the Union's behalf in a body set up by an agreement.

As outlined above, although the presentation of the proposal is the Commission's prerogative, the content of the final decision is nonetheless fully shaped by the Council; the former is a *conditio sine qua non* for the Council to act, but the latter is a "product" delivered by an institution that remains master of the outcome of the entire proceeding.

The position of the European Parliament is peculiar insofar as in the post-Lisbon Treaty era this institution has gained importance and visibility also in the context of the negotiation of international agreements.[14] It is no longer a passive by-stander but rather an active part of the procedure, which is not only to be immediately and fully informed at all stages of the procedure (as per art. 218(10) TFEU) but also to be asked for its consent in several cases outlined in art. 218(6) TFEU, among which the "agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required". Furthermore, even when its consent is not required, the European Parliament is to be consulted in all the other cases and shall deliver its opinion within a time-limit, in the absence of which the Council may act.

Against this backdrop it is fair to notice that a precondition for the smooth management of the entire proceeding is the respect of the duty of loyal cooperation (art. 4 TEU) of all the EU institutions involved, which – as the CJEU stated – is a horizontal principle of general application in the EU's external action area, "and does not depend either on whether the Community competence concerned is exclusive or on any right of the Member States to enter into obligations towards non-member countries".[15] The principle of loyal cooperation has been applied to the different facets of the EU action, and loyalty duties have been established to ensure the internal functioning of the Union, as well as its external action[16]. It is in this direction that go both the Framework Agreement[17] concluded between the Commission and the Parliament in 2010 (whose Annex III lays down detailed arrangements in this regard) and the subsequent Interinstitutional Agreement[18] concluded by the three EU institutions in 2016. Moreover, a well-established case-law of the CJEU clarifies that "as provided in Article 13(2) TEU, each in-

[14] For an overview of its role, see B Kleizen, 'Mapping the Involvement of The European Parliament in EU External Relations – a Legal and Empirical Analysis' (CLEER working papers n. 4/2016).

[15] Case C-266/03 *Commission v Luxembourg* ECLI:EU:C:2005:341 para. 58.

[16] See *verbatim* F Casolari, 'The Principle of Loyal Co-Operation: a "Master Key" for EU External Representation?' (CLEER Working Papers n. 5/2015).

[17] Framework Agreement of 20 November 2010 on relations between the European Parliament and the European Commission.

[18] Interinstitutional Agreement of 12 May 2016 between the European Parliament, the Council of the European Union and the European Commission on better law-making.

stitution must act within the limits of the powers conferred on it by the Treaties, and in conformity with the procedures, conditions and objectives set out in them".[19]

In light of the foregoing, the informal procedure described in the first chapter does not seem to be fully respectful of all the EU institutions' prerogatives: on the one hand it deprives the Council from the possibility to scrutinize a recommendation by the Commission; on the other hand it takes an agreement by the European Parliament for granted (which, however, lacking a formal decision by the Council does not have any legal act to oppose or agree with).

V. The peculiarity of some Hague Conventions on private international law

As anticipated above, when describing the Council's informal procedure, among the international agreements of which the EU is part, an outstanding role is played by those concluded in the framework of the Hague Conference on Private International Law, which can be divided into three main groups in view of the different accession mechanism they envisage: conventions providing unrestricted access to new contracting parties;[20] conventions requiring express acceptance of new contracting parties' accession;[21] conventions allowing new contracting parties to accede in the absence of objection.[22] Apart from the second group, to which mostly belong the oldest conventions, the *ratio* behind the implementation of an easier accession mechanism in the most recent conventions is to be found in the aim to widen the participation of the States as much as possible.

Against this background, the EU – both when it is already part of a convention via a REIO clause, and when it acts through the Member States in absence of such a clause – must first of all internally decide the position to be held in regard to the proposed accession by a third State, before conveying such a position externally.

While the first two categories of conventions above do not raise problems in terms of how the consent of the EU is internally reached (in the very first, no consent is required; whereas in the second it should be clearly expressed with a positive action), the third category is characterised by the fact that – in case no objection is raised – the elapse of time determines the acceptance of the new accession.

[19] *European Commission v European Parliament* cit. para. 41.

[20] Namely, without an approval or objection procedure, as the Hague Convention on Choice of Court Agreements [2005].

[21] *Inter alia*: the Hague Convention on the Civil Aspects of International Child Abduction [1980].

[22] In particular, the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance [2007]; The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters [1965]; The Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters [2019]; The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children [1996].

In regard to this peculiar type of convention, three issues may be raised and somehow overlap. Firstly, whether the elapse of time, which allows the third State to establish international relations with the EU, amounts to a decision; secondly, what are the EU internal rules needed to reach consent in relation to the decision not to object; thirdly, whether such decision, once internally reached, needs to be transposed in a formal act. These issues are not theoretical. Publicly accessible documents show that on several occasions the Council of the EU derogated from the rules of art. 218 TFEU and put in place a different procedure, whereby the internal consent was reached without a formal verification. Moreover, as we will try to investigate in the following chapter, the Council's internal voting rules in these cases are not so clear-cut. The solution to the questions above is therefore not of an easy nature, and while from a legal perspective a reasonable answer can be given, from a political point of view other issues arise which pertain to the efficiency and effectiveness of European legislature.

In regard to the first issue, we have already anticipated the view that a non-objection should be regarded as a decision, since the practical effect of not objecting is that bilateral relations between the EU and the third State concerned are established (irrespective of the fact that these relations are determined by a positive action or by an inaction).

Leaving aside for a moment the second question, which is dealt with in the next chapter, the third issue – concerning whether such a decision, once internally reached, needs to be transposed into a formal act – appears of particular complexity. One could possibly argue that the Council should take such a decision tacitly, *i.e.* without a decision being formally taken, because the internal formation of the EU's consent should mirror the peculiar accession mechanism contemplated in the text of an international convention. However, while the two aspects are certainly two sides of the same coin, they act on different levels: one concerns the internal decision-making mechanism, the other is related to the shape given to the Council's decision (apparent or not). Put differently, whereas it is evident that a contracting State or a REIO which wants to establish international relations with an acceding State must do so through the accession mechanism foreseen in the convention, it seems difficult to understand why the same mechanism should internally be replicated by the parties.

In our opinion, once the delegations within the Council have reached the common understanding that there are no reasons for raising an objection, that intent should be transposed into a formal decision (even if this is not externally conveyed, as is normally the case for a decision to accept an accession when express acceptance is required).

Stating the opposite – in the name of the spirit of the Hague Conventions and their favour for the widest participation of States – would contrast the word of the TFEU and the conclusions reached in literature and by the Court of Justice on the very nature of this proceeding. Finally, assuming that the rules on the basis of which the consent of the EU is reached (set out by the Treaties) are influenced by the peculiar accession mechanism (set

out in an international agreement) this would mean that the Treaties can be modified by an external source of law, not to mention that the latter is even lower in ranking.

VI. Council's internal voting rules

An intertwined issue concerns the determination of the Council's internal voting rules, which are set out in art. 218(8) TFEU according to which – except for the case when the agreement covers a field where unanimity is required for the adoption of an EU act – it shall act "by a qualified majority throughout the procedure".

The rule, which was undoubtedly carved keeping in mind situations where a positive decision is to be taken (thus supporting the explicit manifestation of consent of the international organization), lends itself to a possible different interpretation when a decision is to be taken by means of a non-opposition to a request of accession.

Against this backdrop, it should be clarified whether the qualified majority (or unanimity) is internally required for accepting or objecting to the proposed accession. Lacking any concrete element in the Treaty provisions, two opposite approaches can be taken legitimately. On the one hand, one emphasizing the very nature of the international conventions negotiated in the framework of the Hague Conference, as such open to new accessions and therefore not to be understood as part of a close circle. On the other hand, one looking at the proposed accession as a specific request made by a third State, to which a positive answer is expected from the EU.

In the first case, there should be no need to assume that the EU must take a positive stance on the request, as it could rely on the presumption that a request for accession is to be accepted by default, unless there are serious grounds for objecting; in the second case, a positive reaction by the EU is always needed.

The first approach, however, seems to run literally counter to the text of art. 218 TFEU which always requires the adoption of a "decision". Therefore, the most reasonable answer to the question of the voting rules seems that qualified majority or unanimity are required to ascertain the EU's position *vis-à-vis* the requested accession, irrespective of the peculiar accession mechanism. The justification for this approach stems not only from the need for consistency with the TFEU which explicitly requires a "decision" taken by qualified majority or unanimity (depending on the matter) but also from reasons of effective acknowledgement of the Council's intention. Not to mention grounds of opportunity, when the request is made – for instance – by a third State that engaged at international level in acts contrary to public international law or with which judicial cooperation became difficult as a result of a different stance taken for geopolitical reasons. In such cases, a scrutiny of the Council's position is needed even more, and the voice of all the EU institutions should be heard.

There is also another legal aspect to be considered. According to a well-established case-law of the CJEU, art. 218 TFEU creates a link between the substantive legal basis of a decision and the voting rule applicable to the adoption of the decision.[23] This principle was reaffirmed in a recent judgment, with the Court stating that "the link thereby ensured between the substantive legal basis of decisions adopted in the context of an agreement and the applicable voting rule for adopting those decisions helps to preserve symmetry between procedures relating to internal activity of the European Union and procedures relating to its external activity, in compliance with the institutional balance established by the framers of the Treaties".[24] The aforementioned link is so strict that the Court ruled out the possibility for the Council to adopt a Decision by unanimity that should have been adopted by qualified majority, as the right at issue did not fall within a field for which the former was required.[25]

It should also be emphasised that the Court even refused to consider that a different legal basis (in that case, a secondary legal basis establishing a special procedure) could be justified by the sensitive nature of the matter concerned. Which leads us, in the context of this essay, to doubt that similar concerns relating to the rigidity of the procedure set out in art. 218 TFEU could grant the Council the liberty to deviate from that established by the Treaty.

Acting differently would mean not only that a special committee appointed to assist the Commission in the negotiations can decide to derogate in practice from the rules set out by the Treaty, but also that it can go against the principle – established by the Court – that "nowhere does the Treaty provide for the Council to be able to establish new legal bases for the purposes of the adoption of secondary legislation outside the existing procedures for the adoption of legislative acts and implementing measures" irrespective of "the possible existence of a Council practice" and of the fact that the latter goes in the direction of a simplification thereof.[26]

VII. Conclusions

The procedure established by the TFEU as regards the conclusion of international agreements is of a rigid nature and is based on the need for the EU to reach an internal

[23] Case C-244/17 *Commission v Council* ECLI:EU:C:2018:662 para. 29.

[24] Case C-275/20 *Commission v Council* ECLI:EU:C:2022:142 para. 47.

[25] In the case at hand, the EU Commission sought the annulment of a Council Decision adopted by virtue of a procedure (set out in a previous Council Decision) requiring a vote by unanimity for the mere modification of an international agreement. The Court, considering it as a simplified procedure within the meaning of art. 218(7) TFEU, which in turn links the voting rule to the nature of the matter involved, upheld the Commission's request and dismissed the Council's argument that - since the contested decision was adopted by unanimity it would necessarily have obtained a qualified majority in the Council and should therefore be regarded as having been validly adopted.

[26] *Parliament v Council (Minimum Standards of Procedure)* cit. paras 24, 25 and 56.

consent that will constitute a solid base for expressing its position externally, also *vis-à-vis* requests for accession by third States. Beside this aim, the need to ensure uniformity and the necessary parallelism between internal and external activity of the EU speak against the adoption of different procedures, that can result in a dismantling of the principle of institutional balance which requires that each institution exercise its powers with due regard to the powers of the others.

A practice that *de facto* overcomes the internal verification of the EU's consent seems able to create a different legal basis for the action of the EU at international level, and to affect the rights of all the institutions involved.

In the short and medium term, a modification of the Treaties in this regard seems unrealistic, and in the light of the clear position of the Court of Justice, to safeguard the legitimacy of the Union's acts, there seems to be little room for pursuing different practices than the strict observance of the procedure set out in art. 218 TFEU. After all, as the Court has repeatedly stressed, it is only the substantive legal basis of a measure that determines the procedures to be followed in adopting that measure,[27] and certainly not the different opinion of some of the institutions involved.

[27] Case C-658/11 *Parliament v Council* ECLI:EU:C:2014:2025 para. 57.