Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 31 May 2018 [1]

Case C-244/17

European Commission
v

Council of the European Union

(Action for annulment — Council Decision (EU) 2017/477 — Choice of the correct legal basis — Demarcation between the common foreign and security policy and the communitised policies — Agreement on Enhanced Partnership and Cooperation with the Republic of Kazakhstan — Adoption of the Rules of Procedure of the Cooperation Council and establishment of specialised subcommittees — Decision on the position to be adopted by the European Union within the Cooperation Council — Voting in the Council of the European Union with unanimity or by qualified majority (Article 218(8) and (9) TFEU, Article 16(3) TEU and Article 31(1) TEU))

I. Introduction

1. The legal debate surrounding the external competences of the European Union is extremely multi-faceted. The present dispute between the European Commission and the Council of the European Union involves the question of whether the position taken by the European Union with regard to decisions in an international body is to be determined by the Council unanimously or by a qualified majority in accordance with Article 218(9) of the Treaty on the Functioning of the European Union ('TFEU' or 'the FEU Treaty').

2. This question is being raised in the context of the Enhanced Partnership and Cooperation Agreement with the Republic of Kazakhstan ('the Partnership Agreement' or 'the Agreement'). [2] The Cooperation Council that was established on the basis of this Agreement intended to issue rules of procedure and to set up a number of specialised subcommittees in 2017. The Council unanimously determined the position of the European Union for decisions of the Cooperation Council in relation to these matters with reference to Article 218(9) TFEU in conjunction with the first sentence of Article 31(1) of the Treaty on European Union ('TEU'), as it was of the opinion that items of the common foreign and security policy ('the CFSP') were also concerned. By contrast, the Commission takes the view that solely Article 218(9) TFEU should have been applicable and the Council should have voted by a qualified majority, irrespective of whether or not matters relating to the CFSP were involved.

1 Original language: German.

2 The text of the Partnership Agreement was published in OJ 2016 L 29, p. 3.

3. In terms of substantive law, the demarcation between the CFSP, on the one hand, and the external action of the European Union in the remaining 'communitised' policy areas,[3] on the other, has thus once more become the focus of interest. From a formal perspective, it must be clarified whether the requirement for a qualified majority is always and without exception applicable in the establishment of positions of the European Union within the meaning of Article 218(9) TFEU or whether the majority requirements are to be determined depending on the individual case, on the basis of Article 16(3) TEU and the first sentence of Article 31(1) TEU and, if applicable, of Article 218(8) TFEU.

4. By contrast to the proceedings relating to the Antarctic marine protected areas (Joined Cases C-626/15 and C-659/16) in which I am also delivering my Opinion today, in the present case I will not discuss whether the European Union may act alone on the international scene or whether the Member States must participate alongside it ('mixed action' or 'mixed agreement').

II. Legal context

5. The legal context of this case is determined by the primary legislative provisions of the Treaty on European Union and the FEU Treaty. In addition, reference must be made to the provisions of the Partnership Agreement with Kazakhstan.

A. Primary legislation

1. Institutional provisions of the Treaty on European Union

6. Since the entry into force of the Treaty of Lisbon, Title III of the Treaty on European Union ('Provisions on the institutions') contains the following general rule, in Article 16(3) TEU, on the majority requirements for voting in the Council:

'The Council shall act by a qualified majority except where the Treaties provide otherwise.'

2. Provisions of the Treaty on European Union on external action

7. Chapter 1 of Title V of the Treaty on European Union contains 'general provisions on the Union's external action', in particular Article 21 TEU, paragraph 1 of which reads as follows:

'The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.'

8. Chapter 2 of Title V of the Treaty on European Union, which inter alia includes Articles 24, 31, 37 and 40 TEU, contains 'specific provisions on the common foreign and security policy'.

3 Here I use the adjective 'communitised' to refer to those matters of the Treaties that are dealt with on a supranational rather than intergovernmental basis; see also my Opinion in *Parliament* v *Council* (Tanzania, C-263/14, EU:C:2015:729, point 43).

9. The second subparagraph of Article 24(1) TEU provides:

'The common foreign and security policy is subject to specific rules and procedures. It shall be defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise. The adoption of legislative acts shall be excluded. The common foreign and security policy shall be put into effect by the High Representative of the Union for Foreign Affairs and Security Policy and by Member States, in accordance with the Treaties. The specific role of the European Parliament and of the Commission in this area is defined by the Treaties. The Court of Justice of the European Union shall not have jurisdiction with respect to these provisions, with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union.'

10. Building on this, Article 31 TEU lays down inter alia the following in respect of decisions in the Council in the area of the CFSP:

'1. Decisions under this Chapter shall be taken by the European Council and the Council acting unanimously, except where this Chapter provides otherwise. The adoption of legislative acts shall be excluded.

…

2. By derogation from the provisions of paragraph 1, the Council shall act by qualified majority:

…

– when adopting any decision implementing a decision defining a Union action or position,

…'

11. The power of the European Union to conclude international agreements in the area of the CFSP is set out in Article 37 TEU:

'The Union may conclude agreements with one or more States or international organisations in areas covered by this Chapter.'

12. Finally, Article 40 TEU regulates the relationship between the CFSP and the communitised policy areas as follows:

'The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union.

Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter.'

3. Provisions of the FEU Treaty on external action

13. In Part Five of the FEU Treaty ('The Union's external action'), Title V is dedicated to the international agreements of the European Union. This Title includes, inter alia, Article 218 TFEU, which, in extracts, reads as follows:

'1. Without prejudice to the specific provisions laid down in Article 207, agreements between the Union and third countries or international organisations shall be negotiated and concluded in accordance with the following procedure.

…

8. The Council shall act by a qualified majority throughout the procedure.

However, it shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of a Union act as well as for association agreements and the agreements referred to in Article 212 with the States which are candidates for accession. The Council shall also act unanimously for the agreement on accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms; the decision concluding this agreement shall enter into force after it has been approved by the Member States in accordance with their respective constitutional requirements.

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

10. …'

B. The Partnership Agreement with Kazakhstan

14. The Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part, was signed on 21 December 2015 in Astana (Kazakhstan) and has been provisionally applied since 1 May 2016. On behalf of the European Union, the Council had previously approved the signing of the Agreement and the provisional application thereof by Decision (EU) 2016/123,[4] for which purpose it took Article 37 and Article 31(1) TEU and Article 91, Article 100(2) and Articles 207 and 209 TFEU as the legal bases.

15. Pursuant to Article 268 of the Partnership Agreement, a Cooperation Council is established. In accordance with Article 269(1) of the Agreement, this Cooperation Council is assisted by a Cooperation Committee. On the basis of Article 269(6) of the Partnership Agreement, specialised subcommittees or any other bodies may furthermore be set up.

16. Under Article 268(7) of the Partnership Agreement, the Cooperation Council is to establish its rules of procedure, in which, pursuant to Article 269(7) of this Agreement, the duties and functioning of the Cooperation Committee and of any other subcommittees or bodies set up by the Cooperation Council are to be determined.

4 Council Decision of 26 October 2015 on the signing, on behalf of the European Union, and provisional application of the Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part (OJ 2016 L 29, p. 1).

III. Background to the dispute

17. In the context of the Partnership Agreement with Kazakhstan, it was intended that the rules of procedure of the Cooperation Council and those of the Cooperation Committee, the specialised subcommittees or any other bodies would be adopted in 2017. Furthermore, three specialised subcommittees were to be set up.

18. To that end, the Council determined, by means of Decision (EU) 2017/477 of 3 March 2017, the position to be adopted by the European Union within the Cooperation Council[5] ('the contested decision'), in which it took Article 218(9) TFEU and Article 31(1) TEU as legal bases in procedural law and Article 37 TEU and Article 91, Article 100(2) and Articles 207 and 209 TFEU as legal bases in substantive law. It therefore referred to the same provisions to which it had already had recourse on the occasion of the approval of the Partnership Agreement.

19. By contrast, the Commission and the High Representative of the Union for Foreign Affairs and Security Policy based their joint proposal to the Council for the establishment of the position of the European Union in this respect within the Cooperation Council solely on Article 218(9) TFEU as legal basis in procedural law and on Articles 207 and 209 TFEU as legal bases in substantive law.[6]

20. The Commission is now of the opinion that the Council committed an error in law as a result of the addition of Article 31(1) TEU as a further legal basis in procedural law. Moreover, the Commission also considers the reference to Articles 91 and 100 TFEU as additional legal bases in substantive law to be incorrect in law, but does not assign any practical effects to the latter circumstance for the purposes of the present proceedings.

IV. Forms of order sought and proceedings before the Court

21. By written pleading of 10 May 2017, the Commission brought the present action for annulment pursuant to the second paragraph of Article 263 TFEU. It requests the Court to:

– annul Decision 2017/477, and

– order the Council to pay the costs.

22. The Council for its part requests the Court to:

– dismiss the action, and

– order the Commission to pay the costs, and

– in the alternative, in the event that Decision 2017/477 is annulled, requests that its effects be maintained.

23. The Commission's action was examined before the Court on the basis of the written documents and at the hearing on 17 April 2018.

5 Council Decision of 3 March 2017 on the position to be adopted on behalf of the European Union within the Cooperation Council established under the Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part as regards the working arrangements of the Cooperation Council, the Cooperation Committee, specialised subcommittees or any other bodies (OJ 2017 L 73, p. 15).

6 Joint Proposal of 3 February 2017 for a decision of the Council on the position to be adopted on behalf of the European Union within the Cooperation Council established under the Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part as regards the working arrangements of the Cooperation Council, the Cooperation Committee, specialised subcommittees or any other bodies, JOIN(2017) 5 final.

V. Legal assessment

24. As is evident from the file, this case is to be considered in the context of a larger controversy between the European Commission and the Council of the European Union regarding the choice of the correct legal bases for the conclusion of 'new generation' partnership agreements and their implementation.

25. The actual subject matter of the present dispute is much more limited, however. The Commission's action for annulment solely addresses the majority requirements for internal EU decisions in the Council in advance of a session of the Cooperation Council. It should be clarified whether the Council had to vote by a qualified majority on the position to be adopted by the European Union within the Cooperation Council, in line with the view taken by the Commission, or whether a unanimous decision was required, as assumed, and also put into practice, by the Council.

26. Specifically, the dispute between the Commission and the Council hinges on the question of whether Article 218(9) TFEU was sufficient as a *legal basis in procedural law* in respect of decisions on the position of the European Union, as jointly proposed by the Commission and the High Representative, or whether the Council was correct additionally to have recourse to the first sentence of Article 31(1) TEU, which stipulates that as a general rule unanimity is required for decisions in the area of the CFSP.[7]

27. In contrast to the Council, I am of the view that the duty imposed on the institutions to have due regard to their powers and practice mutual sincere cooperation (Article 13(2) TEU), as referred to by the Commission in its reply, is not a separate, new plea in law that, in light of Article 127(1) of the Rules of Procedure, should be rejected as out of time. Rather, by means of its reference to Article 13(2) TEU, the Commission is merely illustrating its fundamental complaint, that in the present case the Council had referred to an incorrect legal basis in procedural law, namely the first sentence of Article 31(1) TEU, and in so doing disregarded the case-law of the Court.[8] Accordingly, I will discuss solely the question of whether the Council was correct or incorrect to have recourse to the unanimity rule of the first sentence of Article 31(1) TEU.

A. Jurisdiction of the Court

28. At first glance, it may appear as though legal matters relating to Article 31 TEU would be outside the jurisdiction of the Court in accordance with the first clause of the sixth sentence of the second subparagraph of Article 24(1) TEU in conjunction with the first paragraph of Article 275 TFEU.

29. However, on the basis of the second clause of the sixth sentence of the second subparagraph of Article 24(1) TEU and the first alternative of the second paragraph of Article 275 TFEU, the Court first has jurisdiction to monitor compliance with Article 40 TEU.[9] The latter provision relates to the interface between the CFSP and the communitised policy areas. It prohibits encroachments of the CFSP on the communitised policy areas as much as, conversely, encroachments of the communitised policy areas on the CFSP.

30. Secondly, the Court has already expressly recognised its jurisdiction in relation to the interpretation of Article 218 TFEU, including in cases relating precisely to the CFSP.[10]

7 In relation to the distinction between legal bases in procedural law and in substantive law, see my Opinion in *Commission* v *Council* (Vietnam, C-13/07, EU:C:2009:190, points 44 to 47).

8 Moreover, the Commission thereby also responds to certain arguments of the Council in its statement in defence.

9 Judgments of 14 June 2016, *Parliament* v *Council* (Tanzania, C-263/14, EU:C:2016:435, paragraph 42), and of 28 March 2017, *Rosneft* (C-72/15, EU:C:2017:236, paragraph 85).

10 Judgment of 24 June 2014, *Parliament* v *Council* (Mauritius, C-658/11, EU:C:2014:2025, paragraph 73); to the same effect judgment of 14 June 2016, *Parliament* v *Council* (Tanzania, C-263/14, EU:C:2016:435, paragraphs 68 to 85).

31. For both of these reasons, the Court is competent in the present case to give an opinion on the interpretation and scope of Article 31(1) TEU and of Article 218(9) TFEU by reason of the Commission's action.

B. The majority requirements in the context of Article 218(9) TFEU

32. The Commission's action is based on a single ground for annulment. The Council is accused of having erred in law by incorrectly applying the unanimity rule in accordance with the first sentence of Article 31(1) TEU in the establishment of the position of the European Union within the meaning of Article 218(9) TFEU, instead of acting by a qualified majority.

1. Preliminary remark on the scope of Article 218(9) TFEU

33. If an international body is called upon to adopt an act having legal effects, then the Council establishes the position to be adopted by the European Union in this body in advance by decision pursuant to Article 218(9) TFEU.

34. Not only are positions of the European Union that are to be attributed to the communitised policy areas established under Article 218(9) TFEU, but also those that may fall, in full or in part, within the scope of the CFSP. As Article 218 TFEU is one of the provisions on the external action of the European Union in Part Five of the FEU Treaty, it is therefore applicable across multiple specialised areas. In precisely this sense, the Court has already clarified that the entire provision of Article 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, including the CFSP, except where the Treaties lay down special procedures'. [11]

35. It is true that the procedure for the establishment of positions under Article 218(9) TFEU does not apply if a decision is to be made in an international body on the supplementation or amendment of the institutional framework of an international agreement. However, there is consensus among the parties involved in the proceedings that the present case did not involve such a matter. The institutional framework of the Partnership Agreement was not intended in this case to be either supplemented or amended but rather the intention was to breathe life into this institutional framework by adopting the rules of procedure of the Cooperation Council and by setting up specialised subcommittees, as expressly provided for in Articles 268 and 269 of the Partnership Agreement.

36. Consequently, Article 218(9) TFEU is applicable in the present case.

2. Qualified majority versus unanimity in decisions of the Council pursuant to Article 218(9) TFEU

37. It cannot be unambiguously inferred from the wording of Article 218(9) TFEU which majority requirements apply in the Council when voting on the position to be adopted by the European Union in an international body. The parties involved in the proceedings disagree as to whether the majority requirements in such cases result from the first subparagraph of Article 218(8) TFEU, which is the immediately adjacent provision, or from Article 16(3) and from the first sentence of Article 31(1) TEU.

11 Judgment of 24 June 2014, *Parliament* v *Council* (Mauritius, C-658/11, EU:C:2014:2025, paragraph 52).

(a) No recourse to the first subparagraph of Article 218(8) TFEU

38. The Commission would like to conclude from the first subparagraph of Article 218(8) TFEU that decisions of the Council for the establishment of positions in accordance with Article 218(9) TFEU are always to be taken by a qualified majority.

39. In actual fact, the Court once stated in a judgment from 2014 that a position of the European Union to be established in the context of the EEC-Turkey Association Agreement pursuant to Article 218(9) TFEU on the extension of provisions of social legislation to Turkey was to be adopted by the Council by a qualified majority. In this connection, the Court cited the first subparagraph of Article 218(8) TFEU, admittedly without explaining the citation of this provision in more detail.[12]

40. Contrary to the view taken by the Commission, I would consider it premature to conclude now, based on the rather passing mention of the first subparagraph of Article 218(8) TFEU in the judgment on the extension of provisions of social legislation to Turkey, that all positions of the European Union to be established in accordance with Article 218(9) TFEU would necessarily have to be adopted by the Council by a qualified majority. As the Court has already emphasised elsewhere, the procedure pursuant to Article 218 TFEU, precisely because of its general nature, must take account of the specific features which the Treaties lay down in respect of each field of EU activity, particularly as regards the powers of the institutions.[13] Moreover, nothing different follows from Article 40 TEU.

41. The specific features of the various fields of EU activity cannot be taken into account in the establishment of positions within the meaning of Article 218(9) TFEU by a general reference to Article 218(8) TFEU. A closer examination in fact reveals that Article 218(8) TFEU does not include any provision at all in relation to the majority requirements for decisions of the Council on positions in accordance with the adjacent Article 218(9) TFEU.

42. It is true that the first subparagraph of Article 218(8) TFEU states that the Council is to 'act by a qualified majority throughout the procedure'. However, as emerges from the wording of the directly adjacent second subparagraph, this relates to the *conclusion* of international *agreements.* It also follows from the schematic position of paragraph 8 within the overall provision of Article 218 TFEU that the 'procedure' throughout which the Council is to act by a qualified majority means the procedure in accordance with the preceding paragraphs 1 to 7, that is to say all of the stages to be passed through up to the conclusion of an international agreement.

43. In contrast to this, paragraph 9, which within the scheme of Article 218 TFEU is, not without reason, *after* paragraph 8, is precisely not part of that procedure for concluding international agreements, but instead regulates an *aliud.*[14] Article 218(9) TFEU relates to aspects of the *implementation* of agreements that have already been concluded which are of practical importance, namely in particular the involvement of the European Union in decisions of the bodies set up as a result of these agreements. To that end, Article 218(9) TFEU provides a *separate, simplified procedure* that is subject to its own rules and differs from the conventional procedure for concluding international agreements. Only thus is it also possible to explain why Article 218(9) TFEU expressly and separately regulates the rights of the Commission and the High Representative to submit proposals.

12 Judgment of 18 December 2014, *United Kingdom* v *Council* (Extension of provisions of social legislation to Turkey, C-81/13, EU:C:2014:2449, paragraph 66).

13 Judgment of 24 June 2014, *Parliament* v *Council* (Mauritius, C-658/11, EU:C:2014:2025, paragraph 53).

14 See also my Opinion in *United Kingdom* v *Council* (Extension of provisions of social legislation to Turkey, C-81/13, EU:C:2014:2114, footnote 63); see, to the same effect, Opinion of Advocate General Cruz Villalón in *Germany* v *Council* (Vine and Wine, C-399/12, EU:C:2014:289, points 52 and 75), which refers to a *lex specialis*.

44. All in all, the Commission's argument based on the first subparagraph of Article 218(8) TFEU must therefore be rejected.

(b) Recourse to the general provisions in Article 16(3) TEU and in the first sentence of Article 31(1) TEU

45. As Article 218(9) TFEU therefore does not contain any clear provision in relation to the majority requirements applicable in the Council in the establishment of positions of the European Union and Article 218(8) TFEU — as has just been demonstrated — also does not provide any appropriate indications in this regard, recourse must be had to the general provisions on the adoption of decisions in the Council.[15] Depending on the subject area, these provisions are found either in Article 16(3) TEU or in Article 31 TEU.

46. In accordance with the general provision in Article 16(3) TEU, the Council is to act by a qualified majority except where the Treaties provide otherwise. By way of derogation from this, the first sentence of Article 31(1) TEU provides that decisions under the chapter of the Treaty on European Union on the CFSP are to be taken by the Council acting unanimously, again except where that chapter provides otherwise.

47. It is clear from an overall consideration of the two provisions that normally a qualified majority is sufficient for decisions to be taken by the Council in the context of the communitised policy areas, whereas with respect to the CFSP as a rule the unanimity principle continues to apply.

48. Merely as a side note I point out that a position of the European Union to be established pursuant to Article 218(9) TFEU cannot be regarded simply as an implementation measure in respect of which the requirement for a qualified majority would apply in accordance with the third indent of Article 31(2) TEU, even if the measure in question should be attributed to the CFSP.

(c) Decisiveness of the subject matter concerned in terms of centre of gravity

49. Contrary to what the Council appears to believe, not every aspect, however minor, of a legal act to be adopted by this body that relates to the CFSP has to trigger the application of the first sentence of Article 31(1) TEU, and thus require a unanimous decision.

50. As clarified in particular by the first paragraph of Article 40 TEU, the implementation of the CFSP does not affect the application of the procedures and the extent of the powers of the institutions in the communitised policy areas. Conversely, pursuant to the second paragraph of Article 40 TEU, the implementation of the communitised policies does not affect the application of the procedures and the extent of the powers of the institutions in the context of the CFSP. These two 'non-affection clauses' in the first and second paragraphs of Article 40 TEU have been formulated symmetrically since the Treaty of Lisbon. In order to comply with the spirit of Article 40 TEU, the unanimity principle of the CFSP must not be allowed to be undermined by the procedural rules of the communitised policies, nor must this unanimity principle of the CFSP be permitted to 'infect' the communitised policies.

15 See, to that effect, Opinion of Advocate General Saugmandsgaard Øe in *Commission* v *Council* (World Radiocommunication Conference 2015, C-687/15, EU:C:2017:645, point 81).

51. Thus, in order to rule whether, in the decision-making of the Council when adopting a specific legal act, the requirement for a qualified majority pursuant to Article 16(3) TEU is applicable or whether a need for unanimity prevails in accordance with the first sentence of Article 31(1) TEU, it must be ascertained whether the subject matter of this legal act concerns the CFSP or a communitised policy area. In so doing, the decisive factor is to which *legal basis* (or bases) *in substantive law* the relevant decision of the Council should be assigned. [16]

52. The choice of this legal basis must have regard to objective factors amenable to judicial review, which include in particular the aim and content of the contested decision, [17] but also the context of which that decision is part. [18]

53. On the other hand, the subjective assessment and the general political intentions of the parties involved have no significance for the choice of legal basis. [19] The legal bases which have been used for the adoption of other European Union measures which might, in certain cases, display similar characteristics or be closely related to the contested decision are equally irrelevant in that regard (for example Council Decision 2016/123 on the signing and provisional application of the Partnership Agreement). [20] In accordance with settled case-law, a mere practice on the part of the Council cannot derogate from the rules of the Treaties and cannot therefore create a precedent that is binding on the EU institutions. [21]

54. The contested decision establishes the European Union's position with regard to the adoption of the rules of procedure of the Cooperation Council and the setting up of a number of specialised subcommittees in the context of the Partnership Agreement. It is thus a legal act that quite generally concerns the functioning of the international bodies set up as a result of the Partnership Agreement and — in contrast to some other cases in which the Court has already given a ruling [22] — does not only relate to individual subject areas regulated within the framework of this comprehensive agreement. The Council correctly referred to this at the hearing.

55. Under these circumstances, in the present case the Partnership Agreement in its entirety must be taken into consideration when choosing the correct legal basis for the contested decision. [23]

16 Judgments of 19 July 2012, *Parliament* v *Council* (Legal basis for restrictive measures, C-130/10, EU:C:2012:472, paragraph 80); of 24 June 2014, *Parliament* v *Council* (Mauritius, C-658/11, EU:C:2014:2025, paragraph 57); and of 6 September 2017, *Slovakia and Hungary* v *Council* (Provisional measures in the area of international protection, C-643/15 and C-647/15, EU:C:2017:631, paragraph 46).

17 Judgments of 11 June 1991, *Commission* v *Council* (Titanium dioxide, C-300/89, EU:C:1991:244, paragraph 10), and of 14 June 2016, *Parliament* v *Council* (Tanzania, C-263/14, EU:C:2016:435, paragraph 43); and Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017 (EU:C:2017:592, point 76).

18 Judgments of 26 September 2013, *United Kingdom* v *Council* (Extension of provisions of social legislation to the EEA, C-431/11, EU:C:2013:589, paragraph 48); of 27 February 2014, *United Kingdom* v *Council* (Extension of provisions of social legislation to Switzerland, C-656/11, EU:C:2014:97, paragraph 50); and of 18 December 2014, *United Kingdom* v *Council* (Extension of provisions of social legislation to Turkey, C-81/13, EU:C:2014:2449, paragraph 38).

19 See, to that effect, for example, Opinion 2/00 (Cartagena Protocol on Biosafety) of 6 December 2001 (EU:C:2001:664, point 22).

20 Judgments of 10 January 2006, *Commission* v *Council* (Rotterdam Convention, C-94/03, EU:C:2006:2, paragraph 50); of 24 June 2014, *Parliament* v *Council* (Mauritius, C-658/11, EU:C:2014:2025, paragraph 48); and of 18 December 2014 *United Kingdom* v *Council* (Extension of provisions of social legislation to Turkey, C-81/13, EU:C:2014:2449, paragraph 36).

21 Judgment of 23 February 1988, *United Kingdom* v *Council* (Substances having a hormonal action, 68/86, EU:C:1988:85, paragraph 24); Opinion 1/94 (Agreements annexed to the WTO Agreement) of 15 November 1994 (EU:C:1994:384, point 52); and judgment of 25 October 2017, *Commission* v *Council* (World Radiocommunication Conference 2015, C-687/15, EU:C:2017:803, paragraph 42).

22 See, for example, judgments of 26 September 2013, *United Kingdom* v *Council* (Extension of provisions of social legislation to the EEA, C-431/11, EU:C:2013:589, in particular paragraph 61); of 27 February 2014, *United Kingdom* v *Council* (Extension of provisions of social legislation to Switzerland, C-656/11, EU:C:2014:97, in particular paragraph 64); and of 18 December 2014, *United Kingdom* v *Council* (Extension of provisions of social legislation to Turkey, C-81/13, EU:C:2014:2449, in particular paragraph 63).

23 A very similar notion is expressed in the judgment of 25 October 2017, *Commission* v *Council* (Revised Lisbon Agreement, C-389/15, EU:C:2017:798, paragraph 64), whereby the detailed rules which an international agreement lays down for its future performance and administration must be viewed in the light of the objectives which led the parties to conclude that agreement, and not vice versa. To the same effect, in Opinion 2/15 (EU-Singapore Free Trade Agreement) of 16 May 2017 (EU:C:2017:376, point 276), it is stated that the organisational provisions in an international agreement are auxiliary in nature and thus fall under the same jurisdiction as the substantive provisions to which they relate.

56. In addition to provisions relating to political dialogue and cooperation in the area of foreign and security policy, the Partnership Agreement contains a number of provisions relating to the subjects of trade and business and a wide variety of forms of cooperation, not least in the areas of business and sustainable development (including transport and environment) and in the area of freedom, security and justice.

57. Accordingly, for the contested decision, as was previously the case for the signing of the Partnership Agreement by the European Union, in principle a very broad spectrum of legal bases in substantive law can be taken into consideration. This includes the competence of the EU to conclude agreements in the area of the CFSP (Article 37 TEU) and the common commercial policy (Article 207 TFEU), development cooperation (Article 209(2) TFEU), transport policy (Article 91 in conjunction with Article 100(2) and the second part of Article 216(1) TFEU), environmental policy (Article 192 in conjunction with the fourth indent of Article 191(1) TFEU) or the area of freedom, security and justice (Article 67 et seq. in conjunction with the second part of Article 216(1) TFEU), to mention only the most important potentially relevant external powers of the European Union.

58. In such a situation, in which a number of legal bases in substantive law could be applicable, according to settled case-law a centre of gravity approach must be carried out. In this case the following guidelines apply: if an act pursues more than one purpose or has more than one component, and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the act must have a single legal basis, namely that required by the main or predominant purpose or component. It is only very rarely, by way of exception, if it is established that the measure simultaneously pursues several objectives or simultaneously has several components which are inseparably linked without one being incidental to the other, that the measure may be founded on several legal bases.[24]

59. As I have already stated elsewhere,[25] that centre of gravity approach may not result *vertically* in an extension of the Union's competences compared with the Member States; otherwise the principle of conferral would be undermined (Article 5(1), first sentence, and (2) TEU, in conjunction with Article 4(1) TEU). However, that centre of gravity approach is readily applicable *horizontally*, that is to say, where it is clear that the Union has competences for all the components of its envisaged act and it is merely necessary to make the correct choice between those powers. In the present case, the dispute between the Commission and the Council involves only the latter aspect.

60. Moreover, the present case is by no means the first in which the Court is called upon to give a ruling, using a centre of gravity approach, on disputes in relation to the correct legal basis with regard to comprehensive cooperation or partnership agreements between the European Union and specific developing or emerging countries.[26] The Court has already applied such a centre of gravity approach also in terms of the relationship between the CFSP and the communitised policy areas, with the scales sometimes tipping in favour of the CFSP and sometimes against it.[27] Against this background, the

24 Opinion 2/00 (Cartagena Protocol on Biosafety) of 6 December 2001 (EU:C:2001:664, point 23); and judgments of 11 June 2014, *Commission* v *Council* (Framework Agreement with the Philippines, C-377/12, EU:C:2014:1903, paragraph 34) and of 14 June 2016, *Parliament* v *Council* (Tanzania, C-263/14, EU:C:2016:435, paragraph 44).

25 See, to that effect, my Opinion in *Commission* v *Council* (Vietnam, C-13/07, EU:C:2009:190, point 113).

26 See, to that effect, judgments of 3 December 1996, *Portugal* v *Council* (Cooperation Agreement with India, C-268/94, EU:C:1996:461), and of 11 June 2014, *Commission* v *Council* (Framework Agreement with the Philippines, C-377/12, EU:C:2014:1903); similarly, the judgment of 20 May 2008, *Commission* v *Council* (Small arms, C-91/05, EU:C:2008:288), involved the references of a measure by the Council to the area of the CFSP in relation to a partnership agreement.

27 Judgments of 20 May 2008, *Commission* v *Council* (Small arms, C-91/05, EU:C:2008:288, in particular paragraphs 73 and 74), and of 14 June 2016, *Parliament* v *Council* (Tanzania, C-263/14, EU:C:2016:435, paragraphs 44 to 55).

Council's fear that the CFSP would necessarily fall by the wayside in a centre of gravity approach is unfounded. A fortiori, in view of the existing case-law,[28] the oral arguments of the Council, to the effect that a centre of gravity approach must not be applied from the outset where there are references to the CFSP, must be rejected.

(d) Centre of gravity approach in the specific case

61. In the written procedure, the parties to the proceedings made almost no observations on their view as to the centre of gravity of the Partnership Agreement and thus ultimately also the centre of gravity of the position at issue of the European Union within the Cooperation Council. However, the Court used the hearing to discuss, with the parties to the proceedings, the aims, content and context of the partnership with Kazakhstan.

62. In contrast to the Commission, the Council in this case has adopted the position that references to the CFSP in the Agreement are in any case of sufficient weight to justify a recourse to Article 37 TEU as legal basis in substantive law and to the first sentence of Article 31(1) TEU as legal basis in procedural law *in addition to* the other relevant legal bases.

63. In this respect, I would like to say at once that such a cumulation of legal bases — sometimes simplistically also referred to as 'dual legal basis' — according to the case-law of the Court constitutes the absolute exception[29] and has hitherto very rarely been accepted.[30] The prerequisite for the cumulation of legal bases is, as mentioned above, that a measure simultaneously pursues a number of objectives or simultaneously has several components, which are inseparably linked without one being incidental to the other.[31]

– *The references of the Partnership Agreement to the CFSP*

64. If one looks at the aims and content of the Partnership Agreement, it must certainly be conceded to the Council that in this case a number of subjects that play an important role in the context of the CFSP are in evidence.

65. For example, in the preamble to the Partnership Agreement, right from the outset emphasis is placed on the principles and provisions of the Charter of the United Nations, of the Universal Declaration of Human Rights, and of the Organisation for Security and Cooperation in Europe (OSCE), in particular of the Helsinki Final Act, as well as other generally recognised norms of international law.[32]

66. The Parties to the Agreement moreover state their intention to promote international peace and security and the peaceful settlement of disputes, notably by cooperating in an effective manner to that end within the framework of the United Nations and the OSCE.[33] They declare their willingness to further develop regular political dialogue on bilateral and international issues of mutual interest.[34] In

28 See again the judgments cited in footnotes 26 and 27.

29 Judgment of 20 May 2008, *Commission* v *Council* (Small arms, C-91/05, EU:C:2008:288, paragraphs 75); see furthermore the case-law cited above in footnote 24.

30 Judgments of 10 January 2006, *Commission* v *Council* (Rotterdam Convention, C-94/03, EU:C:2006:2, paragraph 51), and *Commission* v *Parliament and Council* (Import of Dangerous Chemicals, C-178/03, EU:C:2006:4, paragraph 56); and of 20 May 2008, *Commission* v *Council* (Small arms, C-91/05, EU:C:2008:288, paragraphs 99, 108 and 109); and of 6 November 2008, *Parliament* v *Council* (Losses of the European Investment Bank, C-155/07, EU:C:2008:605, paragraph 84).

31 See again Opinion 2/00 (Cartagena Protocol on Biosafety) of 6 December 2001 (EU:C:2001:664, point 23) and judgments of 11 June 2014, *Commission* v *Council* (Framework Agreement with the Philippines, C-377/12, EU:C:2014:1903, paragraph 34), and of 14 June 2016, *Parliament* v *Council* (Tanzania, C-263/14, EU:C:2016:435, paragraph 44).

32 Second recital of the Partnership Agreement.

33 Ninth recital of the Partnership Agreement.

34 Tenth recital of the Partnership Agreement.

addition, the Parties to the Agreement are committed to fight against the proliferation of weapons of mass destruction and their means of delivery and to cooperate in the areas of non-proliferation, and nuclear safety and security,[35] and furthermore to combat the illicit trade and the accumulation of small arms and light weapons.[36]

67. Finally, the strong commitment of the Parties to the Agreement to strengthen the promotion, protection and implementation of fundamental freedoms and human rights, and the respect for democratic principles, the rule of law, and good governance, also exhibit a certain link to the CFSP.[37] In the area of human rights and democracy, the Parties declare their strong adherence to the principles of the promotion of shared goals, open and constructive political dialogue, transparency, and respect for international human rights standards.[38]

68. It is consistent with all of these statements in the preamble that a separate Title II is dedicated to political dialogue and cooperation in the area of the foreign and security policy at an extremely prominent location in the Partnership Agreement; the provisions of Title II span a total of 10 articles. In addition to political dialogue (Article 4 of the Agreement) and foreign and security policy in the narrower sense (Article 6 of the Agreement), these provisions also involve subjects such as democracy and the rule of law (Article 5 of the Agreement), conflict prevention and crisis management (Article 9 of the Agreement) and regional stability (Article 10 of the Agreement).

69. In spite of these references to the CFSP that certainly exist in the preamble and some provisions of the Partnership Agreement, it must however be held that the subjects of the CFSP are far from being the centre of gravity of that Agreement. Within the Agreement, much greater weight is attached to those subjects that are clearly beyond the scope of the CFSP and correspond to the communitised policies in the FEU Treaty. I will now turn to these subjects.

– The references of the Partnership Agreement to the communitised policies in the FEU Treaty

70. If one considers the aims and content of the Partnership Agreement as a whole, then in particular the subjects of trade and business stand out, but also various forms of cooperation, none of which can be attributed to the CFSP.

71. First, it is particularly striking that the lion's share of the provisions of the Partnership Agreement is dedicated to the trade relationships between the European Union and Kazakhstan: out of a total of 287 articles in the Agreement, 185 articles (Articles 14 to 198), that is to say the overwhelming majority, belong to Title III ('Trade and business'). In addition to conventional provisions that today are part of the standard repertoire for a great many trade agreements (for example regulations on most-favoured-nation treatment, national treatment, and anti-dumping and countervailing measures), Title III also includes comparatively modern provisions, which are customary in trade agreements of more recent date (for example from the areas of competition law and public procurement and provisions for enforcement of intellectual property rights).[39]

35 Eleventh recital of the Partnership Agreement.

36 Twelfth recital of the Partnership Agreement.

37 Third recital of the Partnership Agreement.

38 Fourth recital of the Partnership Agreement.

39 See also to that effect for example Opinion 2/15 (EU-Singapore Free Trade Agreement) of 16 May 2017 (EU:C:2017:376, point 276).

72. Also in the preamble to the Agreement, first the principles of a free market economy[40] and secondly the growing importance of trade and investment relations between both parties are emphasised;[41] the close economic relationship between the Parties is intended to be further strengthened and conditions for trade and investment are intended to be further developed;[42] trade and investment are intended to be promoted on the basis of the WTO Agreement;[43] and it is intended to ensure balanced conditions in the bilateral trade relations.[44]

73. Secondly — apart from the traditional commercial policy — the principle of sustainable development plays an important role in the Partnership Agreement, and the Parties of the Agreement declare their commitment to improve the level of public health safety and protection of human health as a precondition for sustainable development and economic growth.[45] Accordingly, in Titles IV ('Cooperation in the area of economic and sustainable development') and VI ('Other cooperation policies') of the Agreement, numerous chapters deal with subjects that are clearly to be classed outside the CFSP and are connected to development cooperation and possibly to a range of communitised policies of the FEU Treaty (for example, environment, transport, culture and consumer protection).

74. Thirdly, it must lastly be noted that the Partnership Agreement has devoted a separate Title V to 'Cooperation in the area of freedom, security and justice'. The significance of this subject, which, from the perspective of EU law, has references not only to the area of freedom, security and justice (Title V of Part Three of the FEU Treaty) but also to development cooperation (Articles 208 and 209 TFEU),[46] is likewise clearly reflected in the preamble of the Partnership Agreement. Therein, the Parties of the Agreement state their commitment to combat organised crime and trafficking in human beings and to step up cooperation on counter-terrorism,[47] and also their intention to step up their dialogue and cooperation on migration-related issues.[48]

– Conclusions on the centre of gravity approach in the specific case

75. All in all, it can therefore be held that the aims and content of the Partnership Agreement do exhibit references to the CFSP. However, contrary to the view taken by the Council, these references are nowhere near strong enough to place the centre of gravity of the agreement within the CFSP.

76. In my estimation, the aforementioned references of the Partnership Agreement to the CFSP are also not of sufficient weight to justify the assumption that the foreign and security policy component is one of several components of the Agreement which 'are inseparably linked without one being incidental to the other'.[49] Quite the opposite — here it must be found that there is a clear preponderance of subjects that lie outside the CFSP and should be attributed to various policies

40 Fifth recital of the Partnership Agreement.

41 Sixth recital of the Partnership Agreement.

42 Seventh recital of the Partnership Agreement.

43 Eighth recital of the Partnership Agreement; see also the 17th recital thereof.

44 Sixteenth recital of the Partnership Agreement.

45 Eighteenth, 22nd and 24th recital of the Partnership Agreement.

46 The references to development cooperation are illustrated for example by the judgments of 20 May 2008, *Commission* v *Council* (Small arms, C-91/05, EU:C:2008:288), and of 11 June 2014, *Commission* v *Council* (Framework Agreement with the Philippines, C-377/12, EU:C:2014:1903, in particular paragraphs 55 and 60).

47 Fourteenth recital of the Partnership Agreement.

48 Fifteenth recital of the Partnership Agreement.

49 See again Opinion 2/00 (Cartagena Protocol on Biosafety) of 6 December 2001 (EU:C:2001:664, point 23), and judgments of 11 June 2014, *Commission* v *Council* (Framework Agreement with the Philippines, C-377/12, EU:C:2014:1903, paragraph 34), and of 14 June 2016, *Parliament* v *Council* (Tanzania, C-263/14, EU:C:2016:435, paragraph 44).

within the communitised section of the Treaties. The simultaneous recourse to legal bases resulting from the area of the CFSP and to those from the area of the communitised policies of the FEU Treaty (cumulation of legal bases) therefore does not appear to me to be in any way justified in the present case.

77. A waiver of the reference to legal bases resulting from the area of the CFSP moreover does not lead to any weakening of the foreign and security policy component of the Partnership Agreement. This is because the aims and content of the Partnership Agreement with references to the foreign and security policy, as identified above, may not only be implemented by the conventional means of the CFSP. Rather, the commitment to democracy and the rule of law, respect for human rights, peaceful settlement of disputes and observance of international law belong to the fundamental values of the European Union, guiding it in all of its action on the international scene in accordance with the cross-cutting clause of Article 21(1) TEU, that is to say not only in the context of the CFSP, but also for example in the context of the common commercial policy (Article 207 TFEU) and development cooperation (Article 208(1) and Article 209(2) TFEU).

78. In precisely this sense, the Court has already ruled that the competences of the European Union in the field of development cooperation must not be understood narrowly and that the measures required for the pursuit of the objectives of the development cooperation may concern a variety of specific matters.[50] Not least, it follows from this that the competences of the European Union in the area of development cooperation may also include clauses in a cooperation or partnership agreement that are dedicated to political dialogue and respect for human rights.[51]

C. Annulment of the contested decision with interim maintenance of its effects

79. In the context of the statements above, the Council has incorrectly been guided by the requirements of the first sentence of Article 31(1) TEU in the adoption of the contested decision. Consequently, the first ground for annulment raised by the Commission is successful.

80. Due to the reference to the first sentence of Article 31(1) TEU, the Council incorrectly proceeded on the assumption of a requirement for unanimity in decisions on the position to be adopted by the European Union within the Cooperation Council, instead of a vote by a qualified majority. It cannot be ruled out that its decision may have had a different content, had the rule of qualified majority been taken as a basis instead of unanimity.[52]

81. Consequently, in accordance with the first paragraph of Article 264 TFEU, the contested decision must be annulled. In this case, for reasons of legal certainty, it is advisable, as requested by the Council in the alternative, to maintain the effects of the annulled decision pursuant to the second paragraph of Article 264 TFEU, until a new decision is to be taken in the Council with reference to the correct voting rule — namely, qualified majority. This is because the European Union has already played a part in decisions of the Cooperation Council on the basis of the position established in the contested decision. Even though a careful distinction must be made between the international validity

50 Judgments of 3 December 1996, *Portugal* v *Council* (Cooperation Agreement with India, C-268/94, EU:C:1996:461, paragraphs 37 to 39), and of 11 June 2014, *Commission* v *Council* (Framework Agreement with the Philippines, C-377/12, EU:C:2014:1903, paragraphs 38, 42 and 43); similarly, judgment of 20 May 2008, *Commission* v *Council* (Small arms, C-91/05, EU:C:2008:288, paragraph 92).

51 Judgments of 3 December 1996, *Portugal* v *Council* (Cooperation Agreement with India, C-268/94, EU:C:1996:461, in particular paragraphs 24 and 39), and of 20 May 2008, *Commission* v *Council* (Small arms, C-91/05, EU:C:2008:288, paragraph 65).

52 To that effect judgments of 23 February 1988, *United Kingdom* v *Council* (Laying hens, 131/86, EU:C:1988:86, paragraph 11), and of 29 March 1990, *Greece* v *Council* (Chernobyl, C-62/88, EU:C:1990:153, paragraph 12); see furthermore judgment of 27 September 1988, *Commission* v *Council* (Harmonised system, 165/87, EU:C:1988:458, paragraph 19).

of such decisions of the Cooperation Council and the validity of a position of the European Union as established by the Council in advance, any doubts with regard to the nature and extent to which the European Union is bound to the act adopted by the Cooperation Council should be dispelled from the outset.

82. In line with its recent practice,[53] the Court should however only maintain the effects of the contested decision until such time as a new decision can reasonably be adopted in the Council. To that end, in the present case it appears advisable to establish an appropriate period of time, which should not exceed six months.

VI. Costs

83. In application of Article 138(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since, according to my proposed solution, the Council has been unsuccessful and the Commission has applied for costs, the Council must be ordered to pay the costs.

VII. Conclusion

84. On the basis of the above considerations, I propose that the Court should:

(1) Annul Council Decision (EU) 2017/477 of 3 March 2017 on the position to be adopted on behalf of the European Union within the Cooperation Council established under the Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part as regards the working arrangements of the Cooperation Council, the Cooperation Committee, specialised subcommittees or any other bodies;

(2) Maintain the effects of the annulled decision until the Council adopts a new decision by a qualified majority within an appropriate period of time, which must not exceed six months;

(3) Orders the Council to bear the costs of the proceedings.

53 Judgments of 22 October 2013, *Commission* v *Council* (Services based on conditional access, C-137/12, EU:C:2013:675, paragraph 81); of 6 May 2014, *Commission* v *Parliament and Council* (Exchange of information on road safety related traffic offences, C-43/12, EU:C:2014:298, paragraph 56); and of 25 October 2017, *Commission* v *Council* (Revised Lisbon Agreement, C-389/15, EU:C:2017:798, paragraph 84); see furthermore judgment of 5 September 2012, *Parliament* v *Council* (Surveillance of the sea external borders, C-355/10, EU:C:2012:516, paragraph 90).