Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 26 July 2017 [1]

Case C-389/15

European Commission
v

Council of the European Union

(Actions for annulment — Council decision authorising the opening of negotiations for a revised Lisbon agreement on appellations of origin and geographical indications — Exclusive competence of the European Union — Article 3(1) TFEU — Article 207 TFEU — Common commercial policy — Commercial aspects of intellectual property)

1. By its application, the European Commission requests the Court of Justice to annul the decision of the Council of the European Union of 7 May 2015 authorising the opening of negotiations for a revised Lisbon agreement on appellations of origin and geographical indications, as regards matters falling within the competence of the European Union. [2]

2. Further to its Opinions 3/15 [3] and 2/15, [4] the Court is thus once again called upon to clarify the precise scope of the common commercial policy, which, as Article 3(1)(e) TFEU provides, is an area in which the European Union has exclusive competence. More specifically, the Court is asked to decide whether the implementation of a system for the international registration and reciprocal protection of appellations of origin and geographical indications, such as that to which the contested decision relates, is a 'commercial aspect of intellectual property' within the meaning of Article 207(1) TFEU.

I. Legal context

A. International law

3. The Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, signed in Lisbon on 31 October 1958 ('the Lisbon Agreement'), is a treaty administered by the World Intellectual Property Organisation (WIPO) to which any State party to the Paris Convention for the Protection of Industrial Property, signed in Paris on 20 March 1883 ('the Paris Convention'), may accede. It entered into force on 25 September 1966 and was revised in 1967 and amended in 1979.

1 Original language: French.

2 'The contested decision.'

3 Opinion 3/15 (Marrakesh Treaty on access to published works), 14 February 2017 (EU:C:2017:114).

4 Opinion 2/15, 16 May 2017 ('Opinion 2/15', EU:C:2017:376).

4. Twenty eight States are currently parties to the Lisbon Agreement, of which seven are EU Member States, namely the Republic of Bulgaria, the Czech Republic, the French Republic, the Italian Republic, Hungary, the Portuguese Republic and the Slovak Republic. Three other Member States, namely the Hellenic Republic, the Kingdom of Spain and Romania, have signed the Lisbon Agreement but have not yet ratified it. The European Union, on the other hand, is not a party to the agreement, as only States may accede to it.

5. According to Article 1 of the Lisbon Agreement, the contracting States constitute a Special Union within the framework of the Union for the Protection of Industrial Property instituted by the Paris Convention, and undertake to protect on their territories, in accordance with the terms of the agreement, the appellations of origin of products of the other countries of the Special Union once they have been registered at the WIPO International Bureau of Intellectual Property.

6. Article 2(1) of the Lisbon Agreement defines 'appellation of origin' as the geographical name of a country, region, or locality, which serves to designate a product originating therein, the quality and characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors.

7. Articles 3 to 7 of the Lisbon Agreement specify the protection that is afforded to relevant appellations of origin and the procedures for their registration at the WIPO International Bureau of Intellectual Property.

8. Article 8 provides that legal action for ensuring the protection of appellations of origin may be taken in each of the countries of the Special Union under the provisions of its national legislation.

9. Article 13(2) of the Lisbon Agreement provides that the agreement may be revised by conferences held between the delegates of the countries of the Special Union referred to in Article 1.

B. EU law

10. Since 1970, the European Union has progressively adopted various acts governing the circumstances in which the appellations of origin and geographical indications of certain types of product, in particular wines, spirits, aromatised wines and other agricultural products and foodstuffs, are protected.

11. The European Union's legislation in this field currently consists of Regulation (EC) No 110/2008 of the European Parliament and of the Council of 15 January 2008 on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks and repealing Council Regulation (EEC) No 1576/89,[5] Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs,[6] Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007[7] and Regulation (EU) No 251/2014 of the European Parliament and of the Council of 26 February 2014 on the definition, description, presentation, labelling and the protection of geographical indications of aromatised wine products and repealing Council Regulation (EEC) No 1601/91.[8]

5 OJ 2008 L 39, p. 16, and corrigendum OJ 2009 L 228, p. 47.

6 OJ 2012 L 343, p. 1, and corrigendum OJ 2013 L 55, p. 27.

7 OJ 2013 L 347, p. 671, and corrigenda OJ 2014 L 189, p. 261, and OJ 2016 L 130, p. 32.

8 OJ 2014 L 84, p. 14, and corrigenda OJ 2014 L 105, p. 12, and L 283, p. 77, and OJ 2016 L 227, p. 5.

II. Background to the dispute and the contested decision

A. The revision of the Lisbon Agreement

12. In September 2008, the Assembly of the Special Union instituted by the Lisbon Agreement formed a working group to prepare a revised version so as to improve the agreement and render it more attractive, while preserving its principles and objectives.

13. In October 2014, the working group agreed upon a draft revising act ('the draft revised agreement'). The amendments proposed in that draft, in the version which WIPO's Director-General sent out on 14 November 2014, concerned the scope of the protection afforded, which it was proposed should be extended to geographical indications (Articles 2 and 9), the content of and limits on the protection afforded (Articles 10 to 20) and the option for intergovernmental organisations to accede to the agreement and participate and vote in the Assembly (Articles 22 and 28).

14. A Diplomatic Conference was convened in Geneva, from 11 to 21 May 2015, for the purpose of considering and adopting the draft act. In accordance with the draft rules of procedure approved by the conference's Preparatory Committee, invitations to attend were extended not only to the delegations of the 28 States party to the Lisbon Agreement, but also to certain special delegations, including a delegation from the European Union, and to observer delegations representing the States that are members of WIPO but not parties to the Lisbon Agreement.

15. On 20 May 2015, the conference adopted the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications, which was opened for signature on 21 May 2015.

B. The Commission's Recommendation and the contested decision

16. In view of the abovementioned Diplomatic Conference, on 30 March 2015, the Commission had adopted a recommendation for a Council Decision authorising the opening of negotiations on a Revised Lisbon Agreement for the Protection of Appellations of Origin and their International Registration ('the Commission's Recommendation').

17. It that recommendation, the Commission first of all invited the Council to base its decision on Article 207 TFEU and Article 218(3) and (4) TFEU, given the exclusive competence conferred on the European Union by Article 3(1)(e) TFEU in the field of the common commercial policy and the aim and content of the Lisbon Agreement.

18. Secondly, the Commission proposed that the Council should authorise it to conduct the negotiations on behalf of the European Union, in accordance with negotiating directives set by the Council and in consultation with a special committee appointed by it.

19. On 7 May 2015, the Council adopted the contested decision, which departed from the Commission's Recommendation inasmuch as it was based on Article 114 TFEU and Article 218(3) and (4) TFEU. The reasons for its choice of legal basis, set out in recital 3 of the decision, were as follows:

'(3) The revised agreement establishes a system of protection for appellations of origin and geographical indications within the contracting parties through a single registration. This subject matter is harmonised by internal EU legislation as regards agricultural appellations and

indications and falls therefore within the shared competence of the Union (as regards agricultural appellations and indications) and of its Member States (as regards non-agricultural appellations and indications, and fees).'

20. In so far as concerned the conduct of the negotiations, recitals 4 to 7 of the contested decision, stated:

'(4) For the provisions of the [draft revised] agreement covering both matters falling within the competence of the Union and matters falling within the competence of the Member States, the seven Member States parties to the current Lisbon Agreement and the Commission shall all be authorised by the Council to participate together in the negotiations at the Diplomatic Conference on the basis of the negotiating directives as set out in the Annex.

(5) In order to preserve the principles and objectives of the Lisbon Agreement, it is necessary, in the interest of the Union, to discard any possibility of non-members to claim and exercise voting rights during the Diplomatic Conference. Therefore, the seven EU Member States parties to the agreement shall exercise their voting rights, including as regards matters falling within the competence of the Union, based on a common position.

(6) This decision is without prejudice to the participation in the Diplomatic Conference and the exercise of the voting rights therein of the Member States currently parties to the Lisbon Agreement as regards matters falling within their own competence.

(7) With a view to ensuring the unity of the external representation of the Union, the seven Member States parties to the Lisbon Agreement and the Commission should cooperate closely during the entire negotiation process, in accordance with Article 4(3) TEU.'

21. The operative part of the contested decision is worded as follows:

'Article 1

The Commission is hereby authorised to participate, together with the seven Member States parties to the Lisbon Agreement, in the Diplomatic Conference for the adoption of a revised Lisbon Agreement on Appellations of Origin and Geographical Indications, as regards matters falling within the competence of the Union.

Article 2

In the interest of the Union, the seven Member States parties to the Lisbon Agreement shall exercise the voting rights, based on a common position, as regards matters falling within the competence of the Union.

Article 3

The negotiations shall be carried out in accordance with the negotiating directives set out in the Annex.

Article 4

Appropriate coordination shall take place during the Diplomatic Conference, as regards matters falling within the competence of the Union. After the conference, the negotiators shall swiftly report to the Council Working Party on Intellectual Property.'

22. After the contested decision had been adopted, the Commission issued a statement in which, in substance, it expressed its disagreement both with the legal basis relied on by the Council and with the appointment of Member States as negotiators acting on behalf of the European Union.

III. Forms of order sought and procedure before the Court

23. The Commission claims that the Court of Justice should:

– annul the contested decision;

– maintain the effects of the contested decision until the entry into force of a new decision to be adopted by the Council within a reasonable period of time from the delivery of the Court's judgment; and

– order the Council to pay the costs.

24. The Council contends that the Court should:

– dismiss the action; and

– order the Commission to pay the costs.

25. By decisions of 27 November 2015, the President of the Court of Justice authorised the Czech Republic, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, Hungary, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic and the Slovak Republic to intervene in the proceedings, in support of the form of order sought by the Council.

26. By decision of the same day, the President of the Court authorised the European Parliament to intervene in the proceedings, in support of the form of order sought by the Commission.

27. By decision of 12 January 2016, the President of the Court authorised the United Kingdom of Great Britain and Northern Ireland to intervene in the proceedings in support of the form of order sought by the Council, in the event that a hearing was to take place.

28. The hearing in the present case was held on 12 June 2017.

IV. The action

29. In support of its action, the Commission, supported by the Parliament, puts forward two pleas in law. By its first plea, it alleges that the contested decision acknowledged the competence of the Member States in breach of Article 3 TFEU, since the negotiation concerned an agreement which fell within the exclusive competence of the European Union. By its second plea, it alleges infringement of Articles 207(3) TFEU and 218(3), (4) and (8) TFEU, in that the Council appointed Member States as 'negotiators' in a matter of EU competence and did not adopt the contested decision in accordance with the applicable majority.

30. The Commission's first plea in law is divided into two parts. By the first of these, which is the Commission's main argument and is supported by the Parliament, it alleges that the draft revised agreement concerns commercial aspects of intellectual property, which, pursuant to Article 207(1) TFEU, fall within the scope of the common commercial policy. That policy is one of the areas in which, pursuant to Article 3(1) TFEU, the Union has exclusive competence, a fact which the contested decision disregarded.

31. By the second part of its first plea, which it puts forward in the alternative, the Commission, again supported by the Parliament, maintains that the revised draft agreement may affect the scope of common rules laid down by the European Union in relation to the protection of appellations of origin and geographical indications, and that the contested decision thus disregarded the exclusive competence of the European Union in that area, pursuant to Article 3(2) TFEU.

32. I would state at the outset that, to my mind, the first part of the first plea is well founded, which in my view should be enough to result in the annulment of the contested decision. On that basis, I think it unnecessary to consider the second part of the first plea or the second plea in order to settle this dispute.

A. The parties' principal arguments relating to the first part of the first plea

33. As I have already stated, the Commission, supported by the Parliament, argues that, since it concerns 'commercial aspects of intellectual property', within the meaning of Article 207(1) TFEU, and therefore falls within the sphere of the common commercial policy, the contested agreement falls within the exclusive competence of the European Union.

34. In this connection, I would observe that the European Union has sole competence to negotiate international agreements relating to intellectual property once it is established, having regard to their aim and content, that they have a specific link to international trade, for example, by facilitating international trade by means of uniform rules.[9] Consequently, that exclusive competence, far from being restricted to agreements for the harmonisation of the protection of intellectual property rights negotiated in the institutional and procedural context of the World Trade Organisation (WTO), also extends to other agreements which, assessed individually, clearly have the principal objective of facilitating, on a reciprocal basis, trade in goods or services with third countries by affording such goods and services a similar degree of protection as that which they now enjoy within the internal market.[10] That may be the case, in particular, with certain agreements administered by WIPO.

35. In the present case, the Commission and the Parliament claim that, like the Lisbon Agreement, the draft revised agreement has a specific link with international trade. They acknowledge that the draft revised agreement has no preamble expressly stating its aim. However, it is clear from an analysis of its provisions and of the context in which it arose that its aim and effect is to provide for the appellations of origin of each contracting party a system of international registration which ensures their legal protection, on the territory of all the other contracting parties, against the risk that they might be appropriated or used in such a way as to undermine their integrity and thus jeopardise the foreign marketing of those appellations of origin. By so doing, the draft improves the protection of European Union exports to third countries, which would otherwise be reliant on country-by-country registration and thus enjoy only variable guarantees. Consequently, a draft of that nature falls entirely within the exclusive competence of the European Union, despite the fact that the system of protection which it proposes to institute is intended to be implemented by the authorities of the Member States,

9 Judgment of 18 July 2013, *Daiichi Sankyo and Sanofi-Aventis Deutschland* (C-414/11, EU:C:2013:520, paragraphs 50 to 60 and the case-law cited).

10 Judgments of 12 May 2005, *Regione autonoma Friuli-Venezia Giulia and ERSA* (C-347/03, EU:C:2005:285, paragraphs 71 to 83), and of 22 October 2013, *Commission* v *Council* (C-137/12, EU:C:2013:675, paragraphs 56 to 67).

in accordance with Article 291 TFEU.[11] Furthermore, the European Union has already concluded, by itself and on the basis of Article 207 TFEU, a certain number of international agreements relating to the protection of geographical indications, such as its agreements with the Swiss Confederation and the People's Republic of China, and the Council, which has not disputed that practice, has given no reasons to explain its departure from that practice in the present case.

36. According to the Commission, the Council has drawn a false parallel, in the contested decision and in its pleadings before the Court, between the external and internal competences of the European Union. The European Union's competence to negotiate the revised draft agreement could indeed arise from the common commercial policy, given the aim and content of the draft, even though the common rules for the protection of appellations of origin within the European Union are, for their part, based on the common agricultural policy and the harmonisation of the laws of the Member States and even though the competences of the European Union have to date been exercised only in relation to appellations of origin for agricultural products, rather than non-agricultural products, as is confirmed in Opinion 1/94,[12] and the judgments of 18 July 2013, *Daiichi Sankyo and Sanofi-Aventis Deutschland*,[13] and of 22 October 2013, *Commission* v *Council*.[14]

37. Lastly, the Commission disputes that the indication of the wrong legal basis in the contested decision is merely a procedural defect, as the Council maintains. That error in the legal basis had both a legal and a practical effect on the participation of the European Union and of the seven Member States party to the Lisbon Agreement in the negotiations concerning the draft revised agreement. In any event, it is the infringement of the European Union's exclusive competence, not the mere indication of the wrong legal basis, that the Commission argues by the present plea.

38. The Council, supported by the Member States that have intervened, on the other hand, submit that the draft revised agreement does not fall within the sphere of the common commercial policy and that the European Union therefore did not have exclusive competence under that policy to negotiate it.

39. In this regard, the Council emphasises that, in order for an international agreement which is meant to be negotiated in a context other than the WTO and which relates to intellectual property matters other than those covered by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)[15] to be regarded as addressing 'commercial aspects of intellectual property', within the meaning of Article 207(1) TFEU, it is necessary for the agreement to have a specific link with international trade.

40. First of all, by contrast with the TRIPS Agreement, which was examined in the judgment of 18 July 2013, *Daiichi Sankyo and Sanofi-Aventis Deutschland*,[16] the institutional and procedural context of the draft revised agreement does not, the Council contends, support the conclusion that there is such a specific link. Next, it is apparent from Articles 3 and 4 of the Convention establishing the World Intellectual Property Organisation, signed at Stockholm on 14 July 1967, that the first objective of WIPO is to promote the development of measures to facilitate the protection of intellectual property and to harmonise national legislation in that field, and that the convention makes no reference to any trade-related objective. In addition, by contrast with the agreements at issue in the judgments of 22 October 2013, *Council* v *Commission*,[17] which, moreover, concerned trade in services rather than

11 Opinion 2/91 (Convention No 170 of the ILO), of 19 March 1993 (EU:C:1993:106, paragraph 34).

12 Opinion 1/94 (Agreements annexed to the WTO Agreement) of 15 November 1994 (EU:C:1994:384, paragraph 29).

13 C-414/11, EU:C:2013:520.

14 C-137/12, EU:C:2013:675.

15 This agreement is set out at Annex 1C to the Agreement establishing the World Trade Organisation, signed in Marrakesh on 15 April 1994 and approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1).

16 C-414/11, EU:C:2013:520, paragraphs 52 to 55.

17 C-137/12, EU:C:2013:675.

the protection of intellectual property rights relating to goods, and of 12 May 2005, *Regione autonoma Friuli-Venezia Giulia and ERSA*,[18] the objective of the draft revised agreement is not to facilitate trade by extending the reach of EU rules to third countries, but (as is the case with common rules adopted by the Union on the basis of Article 114 TFEU) to establish a mechanism for protecting traditional products and providing information to consumers that applies to all contracting parties, including the European Union, if it should choose to accede to the agreement.

41. Furthermore, an analysis of the content of the draft revised agreement confirms that its purpose is to establish a uniform procedural framework for the protection of appellations of origin. According to the Council, that objective falls primarily within the scope of Article 114 TFEU, since the revised agreement will have implications for the current legislation of all the contracting parties, which will be required to establish procedures to comply with the system contemplated by the agreement. The Council maintains that, in any event, should the establishment of such procedures entail effects on trade in goods between all the contracting parties, those effects would be of a secondary and indirect nature, rather than constituting a principal objective of the agreement.

42. Lastly, the Council states that, should the Court consider Article 207 TFEU to be the correct substantive legal basis for the contested decision, rather than Article 114 TFEU, the mistaken reference to the latter provision should be regarded as a formal defect that does not warrant the annulment of the contested decision.[19] Indeed, in either event, the Council was right to refer to Article 218(3) and (4) TFEU as the procedural legal basis for the contested decision, in accordance with which the decision had to be adopted by the Council by a qualified majority and without the participation of the Parliament.

43. I would also point out that, at the hearing, the Commission and the Parliament, for their part, and the Council and the Member States which have intervened, for theirs, maintained their respective arguments, supplementing them with references to Opinions 3/15[20] and 2/15 of the Court of Justice.

B. My assessment

44. Like the Commission and the Parliament, I take the view that the draft revised agreement falls within the scope of the common commercial policy. It follows that, since it was not adopted on the basis of Article 207 TFEU, the contested decision disregarded the exclusive competence which Article 3(1) TFEU confers on the European Union in this area.

45. It must be remembered that, under Article 3(1) TFEU, the Union has exclusive competence in the area of the common commercial policy.

46. According to Article 207(1) TFEU, that policy must 'be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy [must] be conducted in the context of the principles and objectives of the Union's external action.'

18 C-347/03, EU:C:2005:285.

19 In this connection, the Council cites, inter alia, the judgment of 10 September 2015, *Parliament* v *Council* (C-363/14, EU:C:2015:579, paragraph 27 and the case-law cited).

20 Opinion 3/15 (Marrakesh Treaty on access to published works), 14 February 2017 (EU:C:2017:114).

47. As the Court of Justice has recently pointed out, it follows from that provision, in particular from its second sentence, according to which the common commercial policy belongs within the context of 'the Union's external action', that that policy relates to trade with third States. [21]

48. It is settled case-law that the mere fact that an EU act, such as an agreement concluded by it, is liable to have implications for trade with one or more third States is not enough for it to be concluded that the act must be classified as falling within the common commercial policy. On the other hand, an EU act falls within that policy if it relates specifically to such trade in that it is essentially intended to promote, facilitate or govern such trade and has direct and immediate effects on it. [22]

49. In other words, international commitments concerning intellectual property entered into by the European Union fit the description 'commercial aspects of intellectual property', within the meaning of Article 207(1) TFEU, when they display a specific link with international trade in that they are essentially intended to promote, facilitate or govern such trade and have direct and immediate effects on it. [23]

50. It follows that only the components of the draft revised agreement which display a specific link, in the sense used above, with international trade between the European Union and third countries fall within the sphere of the common commercial policy.

51. It is therefore necessary to verify whether the provisions of the draft revised agreement are intended to promote, facilitate or govern such trade and have direct and immediate effects on it.

52. That verification amounts to checking whether or not the substantive legal basis chosen by the Council when it adopted the contested decision was correct, that is to say, Article 114 TFEU as opposed to Article 207 TFEU, which was the substantive legal basis given in the Commission's Recommendation. In this connection, I share the Council's view that establishing the correct legal basis for an EU measure is a necessary prerequisite for establishing the division of competence between the European Union and its Member States.

53. According to settled case-law, the choice of legal basis for an EU measure must rest on objective factors that are amenable to judicial review; these include the aim and content of the measure. [24]

54. In the present case, the purpose of the contested decision was to authorise the opening of negotiations for a draft revised Lisbon agreement on appellations of origin and geographical indications. It is therefore necessary to consider the contested decision in conjunction with both the Lisbon Agreement and the draft revised agreement.

55. I would reiterate in this connection that, according to Article 1 of the Lisbon Agreement, the contracting States constitute a Special Union within the framework of the Union for the Protection of Industrial Property instituted by the Paris Convention, and undertake to protect on their territories, in accordance with the terms of the agreement, the appellations of origin of products of the other countries of the Special Union once they have been registered at the WIPO International Bureau of Intellectual Property.

56. Articles 3 to 7 of the Lisbon Agreement specify the protection that is afforded to relevant appellations of origin and the procedures for their registration at the WIPO International Bureau of Intellectual Property.

21 See, in particular, Opinion 2/15 (paragraph 35 and the case-law cited).

22 See, in particular, Opinion 2/15 (paragraph 36 and the case-law cited).

23 See, in particular, Opinion 2/15 (paragraph 112 and the case-law cited).

24 See, inter alia, the judgment of 22 October 2013, *Commission* v *Council* (C-137/12, EU:C:2013:675, paragraph 52 and the case-law cited).

57. Article 8 provides that legal action for ensuring the protection of appellations of origin may be taken in each of the countries of the Special Union under the provisions of its national legislation.

58. It is clear upon examining the draft revised agreement and the negotiating directives annexed to the contested decision that the principal aim of the revised agreement is to improve and modernise the legal framework of the Lisbon system, in order to make it more attractive to future new members, while at the same time preserving the principles and objectives of the Lisbon Agreement. In particular, the revised draft agreement is intended to preserve the level of protection afforded to appellations of origin under the Lisbon Agreement and to extend it to geographical indications. The draft also seeks to specify and clarify the rules of the Lisbon system relating to applications for international registration and their validity, the substantive and procedural aspects of the protection which registered appellations of origin and geographical indications are to enjoy in the territory of each contracting party and the refusal of the effects of the international registration. Lastly, the draft revised agreement allows for the participation of intergovernmental organisations in the Lisbon system.

59. It follows that, given its content, the draft revised agreement seeks principally to extend to geographical indications the protection afforded to appellations of origin and to reinforce the system for international registration and reciprocal protection put in place by the Lisbon Agreement.

60. A parallel may be drawn with certain provisions of the envisaged free trade agreement between the European Union and the Republic of Singapore that was the subject of Opinion 2/15. Indeed, that agreement contained commitments concerning intellectual property, which were set out in Chapter 11 of the agreement. More specifically, with regard to geographical indications, the agreement contained a number of provisions, as follows.

61. Article 11.17.1 of the envisaged agreement obliged each party to establish 'systems for the registration and protection of geographical indications in its territory, for such categories of wines and spirits and agricultural products and foodstuffs as it deems appropriate'. Those systems had to include certain procedural routes, described in Article 11.17.2, which in particular enabled the legitimate interests of third parties to be taken into account. Article 11.17.3 added that the geographical indications protected by each party would be entered on a list maintained by the Trade Committee established by the envisaged agreement. Under Article 11.19 of the agreement, the geographical indications on that list were to be protected by each party in such a way that the entrepreneurs concerned could prevent third parties from misleading the public or carrying out other acts of unfair competition. [25]

62. In its Opinion, the Court stated that the set of provisions relating to copyright and related rights, trade marks, geographical indications, designs, patents, test data and plant varieties, set out in Chapter 11 of the envisaged agreement, consisting of, first, a summary of existing multilateral international obligations and, secondly, bilateral commitments, had as its basic aim, as stated in Article 11.1.1(b) of the envisaged agreement, to guarantee entrepreneurs of the European Union and Singapore an 'adequate … level' of protection of their intellectual property rights. [26]

25 See paragraph 116 of Opinion 2/15.

26 See paragraph 121 of Opinion 2/15.

63. In the Court's view, the provisions of Chapter 11 of the envisaged agreement enabled entrepreneurs of the European Union and Singapore to enjoy, in the territory of the other party, standards of protection of intellectual property rights displaying a degree of homogeneity and thus contributed to their participation on an equal footing in the free trade of goods and services between the European Union and the Republic of Singapore. [27]

64. From the above, the Court concluded in its Opinion, first, that the provisions of Chapter 11 of the envisaged agreement did seek, as Article 11.1 of the agreement stated, to 'facilitate the production and commercialisation of innovative and creative products and the provision of services between the Parties' and to 'increase the benefits from trade and investment'. [28]

65. The Court also concluded that Chapter 11 of the envisaged agreement in no way fell within the scope of harmonisation of the laws of the Member States of the European Union, but was intended to govern the liberalisation of trade between the European Union and the Republic of Singapore. [29]

66. Lastly, the Court pointed out that, in the light of the key role that the protection of intellectual property rights played in trade in goods and services in general, and in combating unlawful trade in particular, the provisions of Chapter 11 of the envisaged agreement were such as to have direct and immediate effects on trade between the European Union and the Republic of Singapore. [30]

67. It followed, according to the Court, that, in accordance with the criteria explained in paragraphs 36 and 112 of its Opinion, Chapter 11 of the envisaged agreement concerned 'commercial aspects of intellectual property' within the meaning of Article 207(1) TFEU. [31] Chapter 11 was essentially intended to facilitate and govern trade between the European Union and the Republic of Singapore, and its provisions were such as to have direct and immediate effects thereon, within the meaning of the case-law mentioned in paragraphs 36 and 112 of the Opinion. The Court concluded that Chapter 11 fell within the exclusive competence of the European Union pursuant to Article 3(1)(e) TFEU. [32]

68. It seems to me that the reasoning followed by the Court in Opinion 2/15 may largely be applied in the present case.

69. Indeed, it is clear from the rules contained in the draft revised agreement that appellations of origin and the geographical indications that have been registered at the WIPO International Bureau of Intellectual Property are to be protected by each contracting party in such a way that the entrepreneurs concerned can prevent third parties from misleading the public or carrying out other acts of unfair competition.

70. As the Commission and the Parliament rightly argue, it is clear upon examining the content of the draft revised agreement and the context in which it arose that, although it has no preamble expressly stating its aim, its purpose and effect is to provide for the appellations of origin and geographical indications of each contracting party a system of international registration which ensures their legal

27 See paragraph 122 of Opinion 2/15. The Court stated that 'the same is true of Articles 11.36 to 11.47 of the envisaged agreement, which oblige each Party to provide for certain categories of procedures and of civil judicial measures enabling the persons concerned to rely on and enforce their intellectual property rights' (paragraph 123) and 'of Articles 11.48 to 11.50 of the agreement, which oblige each Party to establish methods for identification of counterfeit or pirated goods by the customs authorities and to provide for the possibility for holders of intellectual property rights to obtain suspension of the release of such goods if infringement or piracy is suspected' (paragraph 124). Respectively, those provisions ensured 'a degree of homogeneity between the levels of judicial protection available to holders of intellectual property rights in the European Union and Singapore respectively' (paragraph 123) and 'a degree of homogeneity between the tools available to protect holders of intellectual property rights against the entry of counterfeit or pirated goods into the European Union and Singapore respectively' (paragraph 124).

28 See paragraph 125 of Opinion 2/15.

29 See paragraph 126 of Opinion 2/15.

30 See paragraph 127 of Opinion 2/15.

31 See paragraph 128 of Opinion 2/15.

32 See paragraph 130 of Opinion 2/15.

protection, on the territory of all the other contracting parties, against the risk that they might be appropriated or used in such a way as to undermine their integrity and thus jeopardise the foreign marketing of those appellations of origin. By so doing, the draft revised agreement is capable of improving the protection of European Union exports to third countries, which would otherwise be reliant on country-by-country registration and thus enjoy only variable guarantees.

71. Thus, the provisions of the draft revised agreement enable entrepreneurs in each of the States party to the Lisbon Agreement to enjoy, in the territory of the other parties, standards of protection of appellations of origin and geographical indications that have a degree of homogeneity. Those provisions thus contribute to their participation on an equal footing in the free trade of goods between the States party to the Lisbon Agreement. Therefore, by means of the implementation of a system for the international registration and reciprocal protection of appellations of origin and geographical indications, the draft revised agreement is thus capable of directly affecting the goods protected by such intellectual property rights. [33]

72. Furthermore, the provisions of the draft revised agreement in no way fall within the scope of harmonisation of the laws of the Member States of the European Union.

73. I would add that the existence of an international agreement such as the Lisbon Agreement is an integral part of the existence of trade between the States party to that agreement. In other words, there would be no point in any such agreement if there were no trade between the States party to it.

74. It follows from the foregoing that, in light of the key role that the protection of intellectual property rights plays in trade in goods and services in general, and in combating unlawful trade in particular, the provisions of the draft revised agreement are essentially intended to facilitate and govern trade between the States party to the Lisbon Agreement and are therefore such as to have direct and immediate effects on that trade.

75. By contrast with the draft revised agreement to which the contested decision relates, the envisaged free trade agreement between the European Union and the Republic of Singapore that was the subject of Opinion 2/15 was an agreement the subject matter and objectives of which were to 'establish a free trade area' and to 'liberalise and facilitate trade and investment between the parties'. [34] However, that fact does not, in my view, preclude the application of the Court's reasoning regarding the provisions of that agreement concerning geographical indications from being applied, by analogy, in the present case.

76. First of all, it seems to me that, in the parts of its reasoning which I have mentioned, the Court did not accord decisive importance to the fact that the provisions relating to geographical indications were part of a free trade agreement. Secondly, and in any event, the inclusion in that type of agreement of provisions intended to ensure the reciprocal protection of geographical indications clearly demonstrates, in and of itself and whatever the nature of the international agreement in question or title given to it, the existence of a fundamental link between such protection and the development of international trade.

77. Moreover, I do not dispute that it is the role of intellectual property to encourage creativity by protecting skill and expertise. More specifically, as the Council rightly explains in its observations, the purpose of geographical indications is to preserve traditional knowledge, cultural expressions and specific manufacturing skills, and to ensure that consumers are given reliable information about the quality of the goods in question.

33 See in particular, by analogy, the judgment of 12 May 2005, *Regione autonoma Friuli-Venezia Giulia and ERSA* (C-347/03, EU:C:2005:285, paragraph 81).

34 See paragraph 32 of Opinion 2/15.

78. However, where the protection of such intellectual property rights is put into effect by means of the revision of an international agreement such as the Lisbon Agreement, the *raison d'être* of that protection is closely linked to the existence of trading relations between the parties to the agreement and their desire to develop those relations.

79. Accordingly, I believe that, from the point of view of each of the parties to the Lisbon Agreement, the implementation of a system for the protection of appellations of origin and geographical indications is first and foremost motivated by the desire to export skill and expertise and to ensure that the rights protected will not be abused. The primary aim of the protection which results from an international agreement such as the Lisbon Agreement or the draft revised agreement is therefore the development of trade between the contracting parties in a spirit of cooperation. The protection of skill and expertise is a prerequisite for such trade development, not an end in itself.

80. In my view, the Council is confusing the objective pursued by the substantive rules of EU law which govern the grant of appellations of origin and geographical indications with the objective pursued by the international system of reciprocal protection of appellations of origin and geographical indications put in place by the draft revised agreement.

81. The grant to a product of a geographical indication, linked to the product's origin and method of manufacture, is a recognition of the particular qualities of that product. A geographical indication will increase the market value of a product by providing a guarantee that its particular characteristics distinguish it from other similar products. Such characteristics give products strong export potential. Putting in place an international system for the reciprocal protection of appellations of origin and geographical indications is a means of ensuring that the products which enjoy such protection can be marketed internationally without fear of their reputation being usurped. By ensuring that international trade does not undermine quality marks, the implementation of such a system is thus likely to promote trade in such products. Moreover, the protection afforded is likely to heighten the reputation of such products and thereby increase consumer demand for them and encourage the undertakings which produce them to export to the States party to the Lisbon Agreement.

82. Given that, the draft revised agreement may legitimately be regarded as relating specifically to trade, in that it is essentially intended to facilitate or govern trade and is such as to have direct and immediate effects on trade.

83. It matters little that neither the contested decision nor the draft revised agreement, nor indeed the Lisbon Agreement, expressly states that its purpose is to promote, facilitate or govern international trade. The absence of any such indication does not gainsay the existence of a specific relationship to trade, which is clear from an analysis of the draft revised agreement and of the context in which it arose, which included the implementation of an international system for the reciprocal protection of appellations of origin and geographical indications among the parties to the Lisbon Agreement and the development of international trade between those same contracting parties.

84. Contrary to what is implied by the substantive legal basis on which the contested decision was adopted, the purpose of implementing an international system for the reciprocal protection of appellations of origin and geographical indications within a group of States, such as that to which the contested decision relates, is not to harmonise the laws of the Member States with a view to the establishment and functioning of the internal market, as provided for in Article 114(1) TFEU. The focus is different, and it is the legal basis which governs the external aspects of the European Union's action which is relevant, that being Article 207 TFEU.

85. It should also be mentioned that, in determining whether an international agreement concerns 'commercial aspects of intellectual property' within the meaning of Article 207(1) TFEU, and thus whether it falls within the sphere of the European Union's common commercial policy, the institutional context in which the agreement is negotiated is not, it seems to me, decisive. In

particular, and as is already clear from the case-law of the Court of Justice,[35] it is not necessary, in order for it to fall under that policy, for an agreement to be negotiated under the aegis of the WTO or, more generally, in any particular institutional context. Accordingly, alongside bilateral trade agreements negotiated by the European Union and multilateral agreements negotiated in the context of the WTO or under the aegis of other international organisations, the negotiation by the European Union of 'commercial aspects of intellectual property', within the meaning of Article 207(1) TFEU, such as those relating to the protection of appellations of origin and geographical indications, may be conducted in the context of WIPO.

86. I would also add that I disagree with the Council's argument that the reference to Article 114 TFEU as the substantive legal basis would, if it were incorrect, be a purely formal defect incapable of resulting in the annulment of the contested decision. Indeed, the choice of Article 207 TFEU as the legal basis for a European Union measure has specific procedural consequences for the negotiation and conclusion of an agreement with one or more third countries or international organisations. Article 207(3) TFEU in fact specifies that, in such a situation, Article 218 TFEU applies, 'subject to the special provisions' of Article 207 TFEU. By way of example, the negotiations must be conducted by the Commission in consultation with a special committee as referred to in Article 207(3) TFEU, as indeed was expressly stipulated in Article 3 of the Commission's Recommendation. The existence of such special provisions, which distinguish the procedure for the negotiation and conclusion of agreements falling within the sphere of the common commercial policy from that which applies, under Article 218 TFEU, to other types of international agreement, in itself renders the reference to the correct legal basis, in this case Article 207 TFEU, decisive.

87. It follows, in my view, from all the foregoing considerations that the contested decision pursues an objective which specifically relates to the common commercial policy, which calls, for the purpose of its adoption, for recourse to the legal basis that is Article 207 TFEU. That also means that, in accordance with Article 3(1)(e) TFEU, the contested decision falls within a field in which the European Union has exclusive competence.

88. Accordingly, the first part of the first plea put forward by the Commission is in my view well founded and the contested decision must consequently be annulled. As I have mentioned, it does not therefore appear necessary to me to examine the second part of the first plea or the second plea which the Commission puts forward in support of its application.

89. As regards that second plea, it seems all the more unnecessary for it to be examined since the procedural rules set out in the contested decision for the negotiation of the draft revised agreement must, in any event, be regarded as vitiated from the start, since the decision was not adopted on the basis of Article 207 TFEU and therefore does not follow the particular procedural rules provided for in that provision.

90. Lastly, I propose that the Court should maintain the effects of the contested decision until the entry into force of a new European Union measure intended to replace it.

V. Costs

91. Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Council has been unsuccessful, the latter must be ordered to pay the costs.

35 See the judgments of 12 May 2005, *Regione autonoma Friuli-Venezia Giulia and ERSA* (C-347/03, EU:C:2005:285), and of 22 October 2013, *Commission* v *Council* (C-137/12, EU:C:2013:675).

92. In accordance with Article 140(1) of the Rules of Procedure, the Czech Republic, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, Hungary, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Slovak Republic, the United Kingdom and the Parliament are to bear their own costs.

VI. Conclusion

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

1. annul the decision of the Council of the European Union of 7 May 2015 authorising the opening of negotiations for a revised Lisbon agreement on appellations of origin and geographical indications, as regards matters falling within the competence of the European Union;

2. declare that the effects of that decision are to be maintained until the entry into force of a new European Union measure intended to replace it;

3. order the Council to pay the costs;

4. order the Czech Republic, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, Hungary, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Slovak Republic, the United Kingdom of Great Britain and Northern Ireland and the European Parliament to bear their own costs.