Reports of Cases

OPINION OF ADVOCATE GENERAL
PITRUZZELLA
delivered on 17 June 2021 [1]

Case C-180/20

European Commission
v

Council of the European Union

(Action for annulment – Decisions (EU) 2020/245 and 2020/246 – Position to be taken on behalf of the European Union within the Partnership Council established by the Comprehensive and Enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Armenia, of the other part, as regards the adoption of the Rules of Procedure of the Partnership Council and those of the Partnership Committee, subcommittees and other bodies set up by the Partnership Council, and the establishment of the list of Sub-Committees – Decisions establishing the positions to be adopted on the Union's behalf in a body set up by an international agreement – Choice of legal basis – Agreement, certain provisions of which may be linked with the common foreign and security policy (CFSP) – Adoption of two separate decisions)

I. Introduction

1. In the context of interinstitutional litigation concerning the legal basis of EU acts – a question of constitutional significance [2] – an increasingly significant place has been occupied, since the entry into force of the Treaty of Lisbon, by cases which call into question the dividing line between the Union's external action in fields falling within the FEU Treaty and the common foreign and security policy (CFSP), established in the EU Treaty. [3] The action which is the subject of this Opinion is one of those cases and constitutes, some three years after the judgment of 4 September 2018, *Commission* v *Council (Agreement with Kazakhstan)* [4] ('the *Kazakhstan* judgment'), a new stage in the dispute between the European Commission and the Council of the European Union concerning the appropriate legal bases for the conclusion and implementation of 'new generation' partnership agreements. In the *Kazakhstan* judgment, the Court was called upon for the first time to rule on the demarcation between the competences falling within the CFSP and the competences falling within the FEU Treaty in the context of the implementation of one of

1 Original language: French.

2 See, to that effect, inter alia, Opinion 2/00 (Cartagena Protocol on Biosafety) of 6 December 2001 (EU:C:2001:664, paragraph 5), and judgment of 14 June 2016, *Parliament* v *Council* (C-263/14, EU:C:2016:435, paragraph 42).

3 See, for example, judgments of 19 July 2012, *Parliament* v *Council* (C-130/10, EU:C:2012:472); of 24 June 2014, *Parliament* v *Council* (C-658/11, EU:C:2014:2025); and of 14 June 2016, *Parliament* v *Council* (C-263/14, EU:C:2016:435).

4 C-244/17, EU:C:2018:662.

those agreements, and, specifically, in respect of the adoption of a decision under Article 218(9) TFEU, by which the Council establishes the EU's position in a body set up pursuant to that agreement. [5]

2. In the present case, the Commission seeks the annulment of Council Decisions (EU) 2020/245 [6] and 2020/246 [7] (together, 'the contested decisions'), on a position to be taken on the EU's behalf within the Partnership Council established by the Comprehensive and Enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Armenia, of the other part [8] ('the CEPA').

II. Legal framework

A. Relevant provisions of the EU Treaty

3. Chapter 1 of Title V of the EU Treaty contains 'General provisions on the Union's external action'. Article 21(1) TEU, in that chapter, sets out the principles on which the EU's action on the international scene is based and states that the EU is to seek to develop relations and build partnerships, in particular, with countries which share those principles. Paragraph 2 of that article lists the objectives of the Union's external action and the first subparagraph of paragraph 3 of the same article provides that 'the Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action covered by this Title and by Part Five of the [FEU Treaty], and of the external aspects of its other policies'.

4. Chapter 2 of Title V of the EU Treaty contains specific provisions concerning the CFSP. Under the second subparagraph of Article 24(1) TEU, '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'. Under Article 37 TEU, which also appears in that chapter, 'the Union may conclude agreements with one or more States or international organisations in areas covered by this Chapter'.

[5] There are other precedents concerning the interpretation of Article 218(9) TFEU, in the context of a dispute over the appropriate legal basis of a decision establishing the position to be adopted on the EU's behalf in a body set up by an international agreement, which do not, however, concern the demarcation between CFSP and non-CFSP competences; see judgments of 26 September 2013, *United Kingdom* v *Council* (C-431/11, EU:C:2013:589); of 27 February 2014, *United Kingdom* v *Council* (C-656/11, EU:C:2014:97); and of 18 December 2014, *United Kingdom* v *Council* (C-81/13, EU:C:2014:2449).

[6] Decision 2020/245 of 17 February 2020 on the position to be taken on behalf of the European Union within the Partnership Council established by the Comprehensive and Enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Armenia, of the other part, as regards the adoption of the Rules of Procedure of the Partnership Council and those of the Partnership Committee, subcommittees and other bodies set up by the Partnership Council, and the establishment of the list of Sub-Committees, for the application of that Agreement with the exception of Title II thereof (OJ 2020 L 52, p. 3).

[7] Decision 2020/246 of 17 February 2020 on the position to be taken on behalf of the European Union within the Partnership Council established by the Comprehensive and Enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Armenia, of the other part, as regards the adoption of the Rules of Procedure of the Partnership Council and those of the Partnership Committee, subcommittees and other bodies set up by the Partnership Council, and the establishment of the list of Sub-Committees, for the application of Title II of that Agreement (OJ 2020 L 52, p. 5).

[8] OJ 2018 L 23, p. 4.

B. Relevant provisions of the FEU Treaty

5. In Part Five of the FEU Treaty, which concerns the Union's external action, Title V is devoted to the EU's international agreements. That title includes, inter alia, Article 218 TFEU, which lays down the procedure for negotiating and concluding agreements between the EU and third countries or international organisations. Paragraphs 8 and 9 of that article provide:

'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 …

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 …'

III. Background to the dispute

A. The CEPA

6. On 29 September 2015, the Council authorised the Commission and the High Representative of the Union for Foreign Affairs and Security Policy ('the High Representative') to open negotiations with the Republic of Armenia concerning a framework agreement.[9] Those negotiations were concluded successfully and the agreement was initialled on 21 March 2017.

7. On 20 November 2017, the Council adopted a decision authorising the signing of the CEPA on the EU's behalf and the provisional application of some parts of that agreement[10] ('the signing decision'). That decision was based on Article 37 TEU and on Article 91 and Article 100(2) as well as Articles 207 and 209 TFEU, in conjunction with Article 218(5) and (7) and the second subparagraph of Article 218(8) TFEU. The CEPA was signed on 24 November 2017 and has been applied provisionally since 1 June 2018.

8. Article 362 of the CEPA provides for the establishment of a Partnership Council to supervise and regularly review the implementation of that agreement, with the power to adopt decisions binding on the parties and to make recommendations[11] ('the Partnership Council'). The Partnership Council is to consist of representatives of the parties at ministerial level and meet at regular intervals, at least once a year, and when circumstances require. Article 362(4) of the CEPA provides that the Partnership Council is to establish its own rules of procedure. The Partnership Council is to be assisted in the performance of its duties by a Partnership Committee, established in accordance with Article 363 of the CEPA and composed of representatives of the parties at senior official level ('the Partnership Committee'). Under paragraph 4 of that article, the Partnership Council is to determine, in its rules of procedure, the

[9] That framework agreement was to replace the Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Armenia, of the other part (OJ 1999 L 239, p. 3).

[10] Council Decision (EU) 2018/104 of 20 November 2017 on the signing, on behalf of the Union, and provisional application of the Comprehensive and Enhanced Partnership Agreement (OJ 2018 L 23, p. 1).

[11] Under Article 362(6) of the CEPA, the Partnership Council is to adopt its decisions and recommendations by agreement between the parties, with due respect for the completion of the parties' respective internal procedures.

duties and functioning of that committee. Under Article 364 of the CEPA, the Partnership Council may decide to set up subcommittees and other bodies to assist it in specific areas, and it is to determine their composition, duties and functioning.

B. The contested decisions

9. The contested decisions concern the adoption of the rules of procedure of the Partnership Council and those of the Partnership Committee, subcommittees and other bodies set up by the Partnership Council, and the establishment of the list of subcommittees (together, 'the rules of procedure').

10. On 29 November 2018, the High Representative and the Commission adopted a joint proposal for a Council decision on the position to be adopted on the EU's behalf within the Partnership Council, as regards the adoption of decisions on the rules of procedure ('the joint proposal').[12] That proposal was based, inter alia, on Article 37 TEU as a substantive legal basis.

11. On 19 July 2019, the Commission submitted an amended proposal for a Council Decision, in which references to the High Representative and to Article 37 TEU as a substantive legal basis had been deleted[13] ('the amended proposal'). That proposal was based on Article 218(9) TFEU, as a procedural legal basis, and on Article 91 and Article 100(2) as well as Articles 207 and 209 TFEU as substantive legal bases. In the reasons for that decision, it was explained that the removal of Article 37 TEU as a substantive legal basis was justified, in particular, in the light of the *Kazakhstan* judgment.

12. On 4 December 2019, the Permanent Representatives Committee (Coreper) decided to split the legal act to be adopted into two Council decisions, one based on Article 37 TEU and covering only Title II of the CEPA, which concerns cooperation in the field of foreign and security policy, and the other based on legal bases other than the CFSP and covering the whole CEPA with the exception of Title II thereof.

13. On 17 February 2020, the Council adopted the contested decisions together. Decision 2020/245 was adopted on the basis of Article 91 and Article 100(2) as well as Articles 207 and 209 TFEU, in conjunction with the first subparagraph of Article 218(8) and Article 218(9) TFEU. By contrast, Decision 2020/246 was adopted on the basis of Article 37 TEU, in conjunction with the second subparagraph of Article 218(8) and Article 218(9) TFEU. Article 1 of Decision 2020/245 provides that 'the position to be taken on the Union's behalf within the Partnership Council established by the [CEPA], as regards the adoption of the Rules of Procedure …, for the application of that Agreement with the exception of Title II thereof, shall be based on the draft Decision of the Partnership Council'. Article 1 of Decision 2020/246 provides that 'the position to be taken on the Union's behalf within the Partnership Council

[12] Joint Proposal for a Council Decision on the position to be adopted on behalf of the European Union in the Partnership Council established by the Comprehensive and Enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Armenia, of the other part, as regards the adoption of decisions on the rules of procedure of the Partnership Council, the Partnership Committee and those of specialised subcommittees or any other body (JOIN(2018) 29 final).

[13] Amended proposal for a Council Decision on the position to be adopted on behalf of the European Union in the Partnership Council established by the Comprehensive and Enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Armenia, of the other part, as regards the adoption of decisions on the rules of procedure of the Partnership Council, the Partnership Committee and those of specialised subcommittees or any other body (COM(2019) 345 final).

established by the [CEPA] as regards the adoption of the Rules of Procedure …, for the application of Title II of that Agreement, shall be based on the draft Decision of the Partnership Council'.

14. By two statements, entered in the minutes drawn up by the Council on 4 March 2020, the Commission and the Czech Republic stated that it had been legally incorrect to use Article 37 TEU as the legal basis for one of the two Council decisions.[14] By a statement, entered in the same minutes of the Council, Hungary also expressed 'its reservations with regard to the adoption of two separate decisions on the EU position', but did not challenge the legal basis of Article 37 TEU.[15] Those two Member States decided to abstain.

IV. Procedure before the Court and forms of order sought

15. By application lodged at the Court Registry on 24 April 2020, the Commission brought the action for annulment which is the subject of this Opinion. The Czech Republic and the French Republic were granted leave to intervene in support of the Commission and the Council respectively.

16. The Commission, supported by the Czech Republic, claims that the Court should annul the contested decisions, maintain their effects and order the Council to pay the costs.

17. The Council contends, primarily, that the Court should dismiss the action and order the Commission to pay the costs, and, in the alternative, should the contested decisions be annulled, that their effects be maintained. The French Republic contends that the Court should dismiss the Commission's action.

V. Assessment

18. The Commission raises two pleas in support of its action.

A. First plea

1. Brief summary of the parties' arguments

19. In its first plea, which is the main focus of the proceedings in the present case, the Commission takes issue with the Council for (i) excluding Title II of the CEPA from the scope of Decision 2020/245; (ii) choosing Article 37 TEU as the substantive legal basis for Decision 2020/246; and (iii) adding the second subparagraph of Article 218(8) TFEU as a procedural legal basis for that decision.

20. The Commission submits that, by choosing Article 37 TEU as the substantive legal basis for Decision 2020/246, the Council changed the voting rule which would otherwise have been applicable under the Treaties and disregarded the Court's settled case-law on the choice of legal basis for EU acts. According to the Commission, it is apparent from that case-law and, in

[14] See Council of the European Union, Summary Record of 4 March 2020 (6517/20; CRS CRP 9), Coreper of 12 and 14 February 2020, Coreper Annex of 12 February 2020, paragraph 38.

[15] See Council of the European Union, Summary Record of 4 March 2020 (6517/20; CRS CRP 9), Coreper of 12 and 14 February 2020, Coreper Annex of 12 February 2020, paragraph 38.

particular, the *Kazakhstan* judgment that a Council decision under Article 218(9) TFEU, by which the Council establishes the position to be adopted on the EU's behalf in a body set up by an international agreement, must be adopted by a qualified majority where the centre of gravity of that agreement concerns a field for which the substantive legal bases necessitate qualified majority. The Commission argues that the CEPA is predominantly concerned with trade, development cooperation and trade in transport services, to which the vast majority of the articles of the agreement are devoted. The nine articles in Title II of that agreement, relating to cooperation in the field of foreign and security policy, are, according to the Commission, purely incidental to the CEPA as a whole and are not sufficiently significant to warrant a CFSP legal basis for the entire agreement. In support of that finding, the Commission submits that, in the *Kazakhstan* judgment, the Court held that the provisions of Title II 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 [16] ('the agreement with Kazakhstan'), which were comparable in content and number to those of Title II of the CEPA, did not justify the Council's choice of Article 37 TEU as the substantive legal basis for a decision of the same type as the contested decisions.

21. The Council, supported by the French Republic, does not dispute that the field covered by the contested decisions must be determined in the light of the CEPA. However, it argues that the choice of legal basis for an EU measure, including a measure concerning an international agreement, must rest on objective factors that are amenable to judicial review; these include the content and also the aim of that measure. According to the Council, it is clear from the Court's case-law that it is crucial to examine the aims of the agreement in order to establish the relationship between provisions of the agreement with links to different areas of EU action, and it is only in a subsequent step that the extent of the obligations set out in those provisions, that is to say, their content, will be examined. However, in the Council's view, the Commission's arguments fail to give any consideration to the aims of the CEPA and its specific provisions, but focus exclusively on their content. In the present case, the Council submits that the analysis of the objectives of the provisions in Title II of the CEPA reveals that those provisions are not secondary and indirect in relation to the other provisions of that agreement. Moreover, contrary to the Commission's submission, the CEPA and the agreement with Kazakhstan differ fundamentally in the definition of their objectives and therefore in their legal nature. In that regard, the Council notes that Article 1 of the CEPA includes at least one additional substantive objective absent from the agreement with Kazakhstan, namely that of contributing to the enhancement of the comprehensive political partnership (subparagraph (a)) and promoting the development of close political relations between the parties (subparagraph (b)). Moreover, some of the general objectives laid down in Article 1 of the CEPA are translated by Article 3 of that agreement into a set of more precise objectives, pursued specifically by the provisions of Title II of the agreement. In particular, the objective of increasing the effectiveness of cooperation on foreign policy and security matters, which Article 3(1) of the CEPA sets out as a general objective of the political dialogue with Armenia, around which all the other objectives of that dialogue revolve, constitutes a distinct objective which cannot be considered as incidental to the other objectives of that agreement. In the Council's view, there is consequently little doubt that the main purpose of the provisions in Title II of that agreement is the implementation of a CFSP policy, which the EU pursues in the exercise of the competences conferred on it under Chapter 2 of Title V of the TEU. That conclusion, based on an analysis of the aims of the provisions of Title II of the CEPA, cannot be called into question by arguments relating merely to their content and, in particular, to their allegedly declaratory value. First, it is apparent from the provisions in question

[16] OJ 2016 L 29, p. 1.

that the conduct of a regular political dialogue is the manner in which the cooperation is to be implemented and, secondly, there is nothing in the Court's case-law to suggest that provisions on cooperation through a form of dialogue are per se incapable of constituting an independent component when they pursue security and foreign-policy objectives.

2. Assessment

(a) State of the relevant case-law

22. In order to satisfy the requirements of clarity, consistency and rationalisation, Article 218 TFEU lays down a single procedure of general application concerning, in particular, the negotiation and conclusion of international agreements which the EU is competent to conclude in the fields of its activity, including the CFSP, except where the Treaties lay down special procedures.[17] In the framework of that procedure, Article 218(9) TFEU establishes a simplified procedure for the purpose, in particular, of deciding on the positions to be adopted on the EU's behalf in the context of its participation in the adoption, in a decision-making body set up by the international agreement concerned, of acts applying or implementing that agreement.[18] As that provision does not lay down any voting rule for the purpose of the adoption by the Council of that category of decisions, the Court has held that the applicable voting rule must be determined in each individual case by reference to Article 218(8) TFEU. On that point, it has stated that, where such a decision does not correspond to any of the cases in which the second subparagraph of Article 218(8) TFEU requires a unanimous vote, the Council must, in principle, in accordance with the provisions, read together, of the first subparagraph of Article 218(8) and Article 218(9) TFEU, act by qualified majority when adopting that decision.[19]

23. The first case in which the second subparagraph of Article 218(8) TFEU requires the Council to act unanimously concerns the situation where the agreement covers a field for which unanimity is required for the adoption of an EU act, thereby establishing a link between the substantive legal basis of a decision adopted under that article and the voting rule applicable to adopt the decision. That is so as regards the CFSP, since the first subparagraph of Article 31(1) TEU provides in particular that decisions under Chapter 2 of Title V of the EU Treaty are to be taken unanimously, except where that chapter provides otherwise.[20]

24. In order to determine whether a decision adopted within the framework defined in Article 218(9) TFEU does cover a field for which unanimity is required for the adoption of an EU act and must, therefore, in the light of the first case referred to in the second subparagraph of Article 218(8) TFEU, be adopted unanimously, it is necessary to refer to its substantive legal basis.[21]

[17] See, to that effect, judgment of 24 June 2014, *Parliament* v *Council* (C-658/11, EU:C:2014:2025, paragraph 52), and the *Kazakhstan* judgment (paragraph 21).

[18] See, to that effect, judgment of 6 October 2015, *Council* v *Commission* (C-73/14, EU:C:2015:663, paragraph 65), and the *Kazakhstan* judgment (paragraph 25).

[19] Judgment of 25 October 2017, *Commission* v *Council (WRC-15)* (C-687/15, EU:C:2017:803, paragraph 51), and the *Kazakhstan* judgment (paragraphs 25 and 27).

[20] See the *Kazakhstan* judgment (paragraph 29).

[21] See the *Kazakhstan* judgment (paragraph 35).

25. According to settled case-law, the choice of the legal basis for an EU measure must rest on objective factors amenable to judicial review, which include the aim and content of that measure.[22] If examination of an EU measure reveals that it pursues two purposes or that it comprises two components and if one of these is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely that required by the main or predominant purpose or component. Exceptionally, if it is established, however, that the measure simultaneously pursues a number of objectives, or has several components, which are inextricably linked without one being incidental to the other, so that various provisions of the Treaties are applicable, the measure must be founded on the various corresponding legal bases.[23] Recourse to a dual legal basis is, however, not possible where the procedures laid down for each legal basis are incompatible with each other.[24]

26. According to that case-law, it is therefore the 'centre of gravity' of the EU measure which must be examined in order to assess whether its legal basis or bases have been correctly determined. The Court has also stated that the same criteria apply when determining the legal basis for EU acts concerning the conclusion and implementation of an international agreement.[25]

27. The discussion between the parties to the present case reveals a difference of interpretation of various key elements of the 'centre of gravity test' devised by the Court and necessitates the clarifications that follow.

28. First, in the light of the exchanges on that subject between the Commission, the Council and the French Republic, it should be noted that the 'purpose' and 'content' of the EU measure at issue rank equally among the objective factors which are amenable to judicial review and on which the choice of its legal basis must rest. Since the determination of the centre of gravity of such a measure is a highly pragmatic exercise, the order in which the Court analyses those two factors and the importance which it ascribes to them in an examination of a specific case depend mainly on the circumstances of the case and do not allow speculation on whether one or the other factor is more or less 'essential', or whether a hierarchy might exist between them.

29. It is true that some applications of the centre of gravity test to acts related to the conclusion of international agreements seem to attach greater importance to the identification of the purpose of the act. Thus, in Opinion 1/78,[26] the Court stated that the description of an agreement 'must be assessed having regard to its essential objective rather than in terms of individual clauses', which, being subsidiary or ancillary in nature, remain subsumed by that essential objective. The same line of reasoning was followed by the Court in the judgments of 3 December 1996, *Portugal* v *Council*[27]

[22] See, to that effect, inter alia, judgments of 26 March 1987, *Commission* v *Council* (45/86, EU:C:1987:163, paragraph 11); of 11 June 1991, *Commission* v *Council* (C-300/89, EU:C:1991:244, paragraph 10); Opinion 2/00 (Cartagena Protocol on Biosafety) of 6 December 2001 (EU:C:2001:664, paragraph 22); judgment of 14 June 2016, *Parliament* v *Council* (C-263/14, EU:C:2016:435, paragraph 43); and the *Kazakhstan* judgment (paragraph 36).

[23] See, to that effect, inter alia, judgments of 10 January 2006, *Commission* v *Parliament and Council* (C-178/03, EU:C:2006:4, paragraphs 42 and 43); of 14 June 2016, *Parliament* v *Council* (C-263/14, EU:C:2016:435, paragraph 44); and the *Kazakhstan* judgment (paragraph 37).

[24] See, inter alia, judgment of 6 November 2008, *Parliament* v *Council* (C-155/07, EU:C:2008:605, paragraph 37 and the case-law cited). It must, however, be pointed out that the Court limits cases where dual (or multiple) legal bases are not possible to cases where procedures are incompatible, to the exclusion of cases in which only the voting rule differs; see judgment of 19 July 2012, *Parliament* v *Council* (C-130/10, EU:C:2012:472, paragraphs 45 to 48).

[25] See, inter alia, judgment of 14 June 2016, *Parliament* v *Council* (C-263/14, EU:C:2016:435, paragraph 42 and the case-law cited).

[26] Opinion 1/78 (International Agreement on Natural Rubber) of 4 October 1979 (EU:C:1979:224).

[27] C-268/94, EU:C:1996:461, paragraphs 37 to 39.

('the *Portugal* v *Council* judgment'), and of 11 June 2014, *Commission* v *Council*[28] ('the *Philippines* judgment'), to determine the objective of a development cooperation agreement and of a framework partnership and cooperation agreement respectively. However, first, such an approach does not render the examination of the content of the agreement entirely nugatory, since, in view of the extent of the obligations laid down by individual provisions of the agreement, that examination may even lead in practice to the identification of distinct components, requiring the addition of other legal bases.[29] Secondly, as Advocate General Mengozzi pointed out in his Opinion in the case that gave rise to the *Philippines* judgment,[30] the abovementioned line of case-law is merely a 'specific application' of the general rules, set out in point 25 above, to be followed in determining the legal basis of an EU measure, which does not deviate from those general rules.[31] In any event, that approach seems to have been counterbalanced by the Court's increasingly frequent recourse to reasoning more specifically focused on the examination of the content of the agreement,[32] without that, in turn, implying that the examination of the purposes of the act is omitted.

30. Secondly, apart from its purpose and content, other objective factors may be taken into account in order to determine the centre of gravity of an EU measure, as is clear from the language used by the Court and reproduced in point 25 above. In the particular case of acts concerning the conclusion and implementation of an international agreement, those factors include, inter alia, the context of that measure and that of its adoption.[33] While the importance of that factor necessarily varies according to the type of act and the category of agreement in question, consideration of the context may play a central role in the Court's assessment, as was the case, for example, in the judgment of 20 November 2018, *Commission* v *Council (Antarctic MPAs)*.[34] By contrast, the conviction of the author of the act[35] and the 'subjective assessment and the general political intentions of the parties involved'[36] have no bearing on the choice of legal basis, given their lack of objectivity.

31. Thirdly, it is apparent from the case-law referred to in point 25 above that the mere finding that an EU measure pursues a number of purposes or has several components is not in itself sufficient to found that measure on several legal bases. The Court has in fact based the centre of gravity test on highly precise rules which come into play where there are several purposes or components and which provide either that the legal basis required by the main or predominant purpose or component must be used, which means that the other purpose(s) or component(s) are classified as incidental, or, where there is no such distinction between main and incidental purposes or components, that the different legal bases corresponding to the various inextricably linked purposes or components of the measure are to be used.

28 C-377/12, EU:C:2014:1903, paragraphs 35 to 39.

29 See, *a contrario*, the *Philippines* judgment (paragraphs 56 and 59).

30 C-377/12, EU:C:2014:29, points 25 to 28.

31 See points 25 to 27.

32 See, for example, judgments of 18 July 2013, *Daiichi Sankyo and Sanofi-Aventis Deutschland* (C-414/11, EU:C:2013:520, paragraphs 52 to 60); of 22 October 2013, *Commission* v *Council* (C-137/12, EU:C:2013:675, paragraphs 58 to 65); and the *Kazakhstan* judgment (paragraphs 42 to 45).

33 See, to that effect, inter alia, judgments of 26 September 2013, *United Kingdom* v *Council* (C-431/11, EU:C:2013:589, paragraph 48 et seq.); of 27 February 2014, *United Kingdom* v *Council* (C-656/11, EU:C:2014:97, paragraph 50); of 18 December 2014, *United Kingdom* v *Council* (C-81/13, EU:C:2014:2449, paragraph 38); and of 20 November 2018, *Commission* v *Council (Antarctic MPAs)* (C-626/15 and C-659/16, EU:C:2018:925, paragraphs 76 and 87).

34 C-626/15 and C-659/16, EU:C:2018:925, paragraphs 88 to 94; see also judgment of 14 June 2016, *Parliament* v *Council* (C-263/14, EU:C:2016:435, paragraph 51), in which the reference to the context was used in order to establish the objective of the measure at issue.

35 To that effect, see, inter alia, Opinion 2/00 (Cartagena Protocol on the Prevention of Biotechnological Risks) of 6 December 2001 (EU:C:2001:664, paragraph 22).

36 See Opinion of Advocate General Kokott in *Commission* v *Council (Agreement with Kazakhstan)* (C-244/17, EU:C:2018:364, point 53).

32. In that regard, it should be noted that, in the *Philippines* judgment, which followed in the wake of the *Portugal* v *Council* judgment, the Court stated, in respect of the decision to sign a framework partnership and cooperation agreement, that that test requires, first of all, a determination whether the provisions of the agreement which may relate to EU policies other than that identified as predominant may also fall within that policy or whether they go beyond the framework of that policy and therefore require that decision to be founded on such additional legal bases [37] and, next, a verification whether those provisions contain such extensive obligations that they constitute objectives distinct from those relating to the EU policy identified as predominant.

33. Fourthly, the Court has been careful to specify that several legal bases should be considered only in exceptional cases. It is true that, following the entry into force of the Treaty of Lisbon and of Article 40 TEU, both paragraphs of which provide that the respective procedures and powers of the institutions in the fields of the CFSP and policies falling within the FEU Treaty are not to affect each other, [38] a combination of legal bases falling within that Treaty and the CFSP does not seem, a priori, to be excluded, as was previously the case, under Article 47 EU, for legal bases falling within the EC Treaty and the CFSP. [39] Such a combination was, moreover, implicitly accepted by the Court in the *Kazakhstan* judgment. The fact remains, however, that the Court has very rarely endorsed a combination of legal bases. [40]

34. The *Kazakhstan* judgment provided significant clarifications of the case-law referred to in point 25 above.

35. In the first place, in that judgment, the Court confirmed once more that the centre of gravity test – used in its classic case-law on the choice of legal basis – also applies where that choice must be made, in the context of the Union's external action, between CFSP and non-CFSP legal bases. [41] Referring in particular to the unifying effect of the provisions of Article 218 TFEU, which themselves take into account the specific features of the CFSP while reflecting the institutional balance established by the Treaty in respect of each area of EU activity, [42] the Court implicitly states that there is no justification for affording special treatment to that type of dispute on legal basis, thus confirming a more general line of case-law aiming to give full effect to 'the integration of CFSP provisions into the general framework of EU law' intended by the Treaty of Lisbon. [43] While not citing Article 40 TEU, the Court appears, in the *Kazakhstan* judgment, implicitly to accept the reading of that provision suggested by Advocate General Kokott in her Opinion, [44] according to which the two 'non-affectation clauses' in the first and second paragraphs of that

37 See the *Philippines* judgment (paragraph 35).

38 Under the first paragraph of Article 40 TEU, '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'. The second paragraph of that article provides that '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'.

39 See judgment of 20 May 2008, *Commission* v *Council* (C-91/05, EU:C:2008:288, paragraphs 76 and 77).

40 See judgments of 10 January 2006, *Commission* v *Council (Rotterdam Convention)* (C-94/03, EU:C:2006:2, paragraph 51); of 10 January 2006, *Commission* v *Parliament and Council (Import of dangerous chemicals)* (C-178/03, EU:C:2006:4, paragraph 56); of 20 May 2008, *Commission* v *Council (Small arms and light weapons)* (C-91/05, EU:C:2008:288, paragraphs 99, 108 and 109); and of 6 November 2008, *Parliament* v *Council (Losses by the European Investment Bank)* (C-155/07, EU:C:2008:605, paragraph 84). See also Opinion of Advocate General Kokott in *Commission* v *Council (Agreement with Kazakhstan)* (C-244/17, EU:C:2018:364, point 63).

41 See, to that effect, following the entry into force of the Treaty of Lisbon, judgments of 24 June 2014, *Parliament* v *Council* (C-658/11, EU:C:2014:2025, paragraph 43), and of 14 June 2016, *Parliament* v *Council* (C-263/14, EU:C:2016:435, paragraphs 43 and 44).

42 See the *Kazakhstan* judgment (paragraph 24).

43 See, to that effect, most recently, judgment of 6 October 2020, *Bank Refah Kargaran* v *Council* (C-134/19 P, EU:C:2020:793, paragraph 47 et seq.).

44 See Opinion of Advocate General Kokott in *Commission* v *Council (Agreement with Kazakhstan)* (C-244/17, EU:C:2018:364, point 50).

article have been formulated symmetrically and therefore do not allow precedence to be granted either to competences falling within the CFSP or to those falling within the FEU Treaty. Such a reading necessarily requires, as regards the choice of legal basis, the application of a 'neutral' test, such as the centre of gravity test, which accords the same value to the CFSP – while taking into account the specific rules and procedures to which that policy is subject – as to other EU external action falling within the FEU Treaty.

36. Thus, in paragraph 38 of the *Kazakhstan* judgment, the Court explained that, just as in the case of the decision concerning the conclusion of an international agreement by the EU, a decision by which the Council establishes the position to be adopted on the EU's behalf in a body set up by an agreement, pursuant to Article 218(9) TFEU, and which concerns exclusively the CFSP must, in principle, be adopted unanimously, in accordance with the second subparagraph of Article 218(8) TFEU. By contrast, if such a decision comprises several components or pursues a number of objectives, some of which fall within the CFSP, the voting rule applicable for its adoption must be determined in the light of its main or predominant purpose or component. Thus, if the main or predominant purpose or component of the decision covers a field for which unanimity is not required for the adoption of an EU measure, that decision must, in accordance with the first subparagraph of Article 218(8) TFEU, be adopted by qualified majority. The classic criteria for determining the legal basis of an EU measure should therefore be applied in the present case, which is, moreover, not disputed by the parties to the proceedings.

37. In the second place, in the *Kazakhstan* judgment, the Court applied the centre of gravity test by adopting a dual 'quantitative' and 'qualitative' criterion to analyse the content of the international agreement to which the EU measure concerned relates. Thus, first, in paragraph 44 of that judgment, the Court noted that 'most of the provisions of [the agreement with Kazakhstan], which contains 287 articles, fall within the common commercial policy of the European Union or its development cooperation policy' and, secondly, in paragraph 45 of that judgment, it observed that 'the provisions of [the agreement with Kazakhstan] displaying a link with the CFSP …, apart from being few in number in comparison with the agreement's provisions as a whole, are limited to declarations of the contracting parties on the aims that their cooperation must pursue and the subjects to which that cooperation will have to relate, and do not determine in concrete terms the manner in which the cooperation will be implemented', referring, by analogy, to paragraph 56 of the *Philippines* judgment.[45] Admittedly, one may question, as the French Republic does, the relevance, in absolute terms, of those criteria, in particular the quantitative criterion, in the light of the difference between the Union's external action in the field of development cooperation and trade, which requires, as a rule, the establishment of detailed rules and the adoption of a significant number of technical provisions, and the CFSP, the implementation of which may not require such a level of detail. Nevertheless, such a criterion – where it is not limited to a mere finding of a numerical prevalence of non-CFSP provisions and where it is applied in conjunction with a 'qualitative' assessment of the provisions of the agreement displaying a link with the CFSP which takes into account their varying level of operational detail – may prove useful, in the case of framework agreements such as those at issue in the case that gave rise to the *Kazakhstan* judgment and in the present case, in isolating (or excluding) a possible autonomous CFSP component. This is all the more so because, as the Commission rightly argues, following the unification, in Article 21(2) TEU, of the objectives of the Union's external action by the Treaty of Lisbon and in view of the EU's obligation, under Article 21(3) TEU, to pursue those objectives in all its external policies, including the external

[45] I note that a criterion based on the ability of the provisions examined to be immediately put into effect, by prescribing in concrete terms the manner in which the cooperation envisaged is to be implemented, had already been adopted by the Court in the *Portugal* v *Council* judgment (paragraph 40).

aspects of its internal policies, an application of the centre of gravity test based solely or principally on the purposes of the act may not be sufficiently conclusive. Given the horizontal nature of the objectives of the Union's external action listed in Article 21(2) TEU and the reference in Article 23 TEU to those objectives in relation to the CFSP, it may be difficult to identify the specific objectives of that policy. [46]

38. Thirdly, in the *Kazakhstan* judgment, the Court clarified that a decision, like the contested decisions, which establishes the position to be taken on the EU's behalf as regards the adoption of rules of procedure of bodies set up pursuant to a partnership agreement concerns, in general, the functioning of those bodies. Since such a decision is transversal in scope and does not only relate to individual subject areas regulated within the framework of that agreement, for the purposes of the application of the centre of gravity test, the field covered by the contested decision must be determined in the light of the agreement as a whole. [47]

39. Fourthly, it is clear from the *Kazakhstan* judgment that the legal basis of the decision on the signing of an agreement, to which an act adopted for the implementation of that agreement relates, has no bearing on the determination of the centre of gravity of that act, at least where there is evidence to suggest that that legal basis has not been correctly determined. [48]

40. It is on the basis of the principles set out above that the first plea must be examined.

(b) Application in the present case

41. As observed in point 38 above, it is clear from the *Kazakhstan* judgment that the field covered by a decision establishing the position to be adopted on the EU's behalf as regards the establishment of rules of procedure for bodies set up by a partnership agreement such as that at issue in the present case must be assessed in the light of the agreement as a whole.

42. However, in the present case, as seen above, the Council adopted two separate decisions with essentially the same content but a different scope. The first one relates to the entire agreement with the exception of Title II. The second one refers to that title alone. Despite that split, the Council seems to agree with the Commission that the centre of gravity of the contested decisions, including Decision 2020/246, must be assessed on the basis of the agreement as a whole.

43. I too consider that that is the only correct approach. The adoption of two separate Council decisions, based on two (or more) different legal bases, in order to determine the position to be adopted on the EU's behalf on a matter that concerns *the whole of an agreement transversally*, as is the case with the approval of acts concerning, in general, the functioning of the bodies of that agreement can, in any event, be warranted only if the agreement, considered as a whole, comprises two (or more) distinct components corresponding to the different legal bases used for the adoption of those acts.

44. It is therefore necessary to assess the fields covered by the contested decisions, taken together, in the light of the CEPA as a whole. The following three observations should be made at the outset.

[46] For an attempt to do so, see the Opinion of Advocate General Bot in *Parliament* v *Council* (C-658/11, EU:C:2014:41, point 85 et seq.).

[47] See the *Kazakhstan* judgment (paragraph 40) and Opinion of Advocate General Kokott in *Commission* v *Council (Agreement with Kazakhstan)* (C-244/17, EU:C:2018:364, points 54 and 55).

[48] See the *Kazakhstan* judgment (paragraph 43).

45. First, I note that the Commission's arguments in support of its action are very largely based on the alleged similarities between the CEPA and the agreement with Kazakhstan and on the approach adopted by the Court in the judgment concerning the latter agreement. As seen above, that judgment constitutes the very reason why the joint proposal was withdrawn and, ultimately, the action was brought. In turn, the Council's arguments seek to emphasise the differences between the CEPA and the agreement with Kazakhstan. I would point out, however, that the Court has consistently held that the legal basis used for the adoption of other EU measures which might, in certain cases, display similar characteristics or be closely related to the measure at issue is irrelevant to the choice of legal basis for that measure.[49] While acknowledging that the *Kazakhstan* judgment is undeniably an important precedent for the analysis of the present case, that rule must nevertheless be borne in mind when analysing the content and purpose of the CEPA.

46. Secondly, I note that it is clear from the *Kazakhstan* judgment (point 39 above) that, contrary to what the Council appears to submit, the fact that the signing decision is based, inter alia, on Article 37 TEU, without the Commission having challenged the use of such a substantive legal basis, cannot on its own justify the Council's decision to base Decision 2020/246 on that article. The same is true of the fact that the Council decision authorising the Commission and the High Representative to negotiate the CEPA was also based on Article 37 TEU.

47. That said, I note that the CEPA is a framework agreement which seeks to establish 'wide-ranging cooperation in a broad spectrum of areas of common interest'.[50] An examination of the preamble indicates the parties' intention to strengthen links established in the past and to promote close and intensive cooperation based on equal partnership (first paragraph of the preamble to the CEPA), and to further promote the political, socio-economic and institutional development of the Republic of Armenia while further strengthening respect for democratic principles and human rights (third and fifth paragraphs of the preamble). Two fundamental themes are outlined. First, the will of the parties to further develop regular political dialogue on bilateral issues of mutual interest is affirmed, as is their commitment to promoting international peace and security, fighting against the proliferation of weapons of mass destruction (WMDs), preventing and fighting corruption, stepping up the fight against organised crime and terrorism, stepping up their cooperation on migration, asylum and border management, and opening a visa dialogue in the future (in particular, third to fifth, seventh, eighth, tenth, twelfth and fourteenth paragraphs of the preamble). Secondly, the determination of the parties to deepen economic cooperation, including in trade-related areas, with a view to the future development of trade and investment, while respecting the principles of sustainable development and ensuring the protection of the environment and human health, is affirmed. In the same vein, the parties undertake to cooperate in other socio-economic areas of common interest, such as science and technology, education and culture, youth and sport (in particular, fifteenth, nineteenth, twenty-third and twenty-fourth paragraphs of the preamble).

48. The CEPA consists of 386 articles and is divided into eight titles, dealing respectively with its objectives and general principles (Title I, Articles 1 and 2), political dialogue and reform and cooperation in the field of foreign and security policy (Title II, Articles 3 to 11), justice, freedom and security (Title III, Articles 12 to 21), economic cooperation (Title IV, Articles 22 to 35), other

[49] See, inter alia, judgments of 10 January 2006, *Commission* v *Council (Rotterdam Convention)* (C-94/03, EU:C:2006:2, paragraph 50), and of 18 December 2014, *United Kingdom* v *Council (Extension of rules of social law to Turkey)* (C-81/13, EU:C:2014:2449, paragraph 36). As stated by Advocate General Kokott in her Opinion in *Commission* v *Council (Agreement with Kazakhstan)* (C-244/17, EU:C:2018:364, point 53), that is also the case with regard to the decision to sign the agreement, for the implementation of which the decision concerned was adopted.

[50] See the fifth paragraph of the preamble to the CEPA.

cooperation policies (Title V, Articles 36 to 112), trade (Title VI, Articles 113 to 342), financial assistance and anti-fraud and control provisions (Title VII, Articles 343 to 361) and institutional, general and final provisions (Title VIII, Articles 362 to 386).

49. The objectives of the CEPA, as set out in Article 1 thereof, are to enhance the comprehensive political and economic partnership and cooperation between the parties; to strengthen the framework for political dialogue on all areas of mutual interest, promoting the development of close political relations between the parties; to contribute to the strengthening of democracy and political, economic and institutional stability in Armenia; to promote, to preserve and to strengthen peace and stability at both regional and international level; to enhance cooperation in the field of freedom, security and justice; to enhance mobility and people-to-people contacts; to support Armenia's efforts to develop its economic potential via international cooperation; to establish enhanced trade cooperation; and to establish conditions for increasingly close cooperation in other areas of mutual interest. Article 2 of the CEPA sets out the general principles which the parties undertake to respect, namely the democratic principles, the rule of law, human rights, the free-market economy, sustainable development, regional cooperation and effective multilateralism. The parties also undertake to fight corruption, the different forms of transnational organised crime, terrorism and the proliferation of WMDs, in order to contribute to regional peace and stability.

50. The Council submits, in essence, that the CEPA pursues objectives which fall within the CFSP and which are neither secondary nor incidental to the other objectives of that agreement. Title II of that agreement contains provisions which are not such as to fall within the strategic framework of development-cooperation policy or common commercial policy. For its part, the Commission, while conceding that the CEPA has some links with the CFSP, submits that those links are not sufficiently significant to warrant a substantive legal basis falling within the CFSP.

51. Title II of the CEPA, entitled 'Political dialogue and reform; cooperation in the field of foreign and security policy', comprises nine articles. Article 3 of the CEPA lists the aims of the political dialogue which the parties undertake to intensify in all areas of mutual interest, including foreign policy and security matters and domestic reform. Those objectives include enhancing political partnership (Article 3(2)(b)); promoting international peace, stability and security (Article 3(2)(c)); strengthening cooperation on crisis management (Article 3(2)(d)) and in the fight against the proliferation of WMDs (Article 3(2)(e)); strengthening respect for the democratic principles, the rule of law, human rights and fundamental freedoms (Article 3(2)(g)); deepening cooperation in the field of security and defence (Article 3(2)(h)); and developing good neighbourly relations (Article 3(2)(k)). Article 4 of the CEPA focuses on domestic reform, for the purposes of which the parties undertake to cooperate, with a view to consolidating, inter alia, the stability and effectiveness of democratic institutions, the independence and efficiency of the judiciary, the reform of the public administration and the fight against corruption. Article 5 specifically concentrates on foreign and security policy. Paragraph 1 of that article states that 'the Parties shall intensify their dialogue and cooperation in the area of foreign and security policy, including the common security and defence policy, recognising the importance that the Republic of Armenia attaches to its participation in international organisations and cooperation formats and its existing obligations arising therefrom, and shall address in particular issues of conflict prevention and crisis management, risk reduction, cybersecurity, security-sector reform, regional stability, disarmament, non-proliferation, arms control and export control'. It adds that 'cooperation shall be based on common values and mutual interests, and shall aim at increasing its effectiveness, making use of bilateral, international and regional fora, in particular the [Organization for Security and Co-operation in Europe (OSCE)]'. Article 6 of the CEPA reaffirms

the need for the prosecution of serious crimes of concern to the international community, including at the level of the International Criminal Court, and for cooperation between the parties to prevent such crimes. Article 7 of the CEPA covers cooperation in conflict prevention and crisis management, 'in particular with a view to the possible participation of the Republic of Armenia in EU-led civilian and military crisis-management operations as well as relevant exercises and training, on a case-by-case basis'. Article 8 of the CEPA provides that 'the Parties shall intensify their joint efforts to improve conditions for further regional cooperation by promoting open borders with cross-border movement, good neighbourly relations and democratic development, thereby contributing to stability and security, and shall work towards the peaceful settlement of conflicts'. Lastly, Articles 9 to 11 of the CEPA deal respectively with cooperation to combat the proliferation of WMDs and their means of delivery, the fight against trafficking in small arms and light weapons, and the fight against terrorism.

52. The parties do not dispute, and it is undeniable, that the CEPA displays certain links with the CFSP. Thus, in addition to the explicit references to that policy in the preamble and Articles 1 and 3 of the CEPA, Articles 5 and 7 to 11 of that agreement, as is apparent from the discussion in the preceding point, may all be linked with the CFSP. [51]

53. However, it is clear, in particular, from the *Kazakhstan* judgment that the fact that a framework agreement such as the one at issue in the present case displays, in its preamble and in the statement of its objectives, links with the CFSP and that some of its provisions – even where they are set out in a self-standing title in the initial part of the agreement – may be linked with that EU policy may not be sufficient for the view to be taken that the substantive legal basis of any act that is adopted for its implementation, and having a transversal scope, must necessarily include Article 37 TEU. Such an addition is justified, according to the Court, only if those provisions are of a scope enabling them to be regarded as a distinct component of the agreement in question and are not incidental to the other components of that agreement. [52]

54. In the *Kazakhstan* judgment, the Court did not use the two-step test applied in the *Philippines* judgment, referred to in point 32 above, as the basis for its finding that such was not the case for the CFSP-related provisions of the partnership agreement with Kazakhstan, but applied the dual 'quantitative' and 'qualitative' criterion referred to in point 37 above.

55. For the reasons which I shall set out below, I consider that, whatever the applicable test, the CFSP does not constitute, in the scheme of the CEPA, a component distinct from the other components thereof justifying the addition of Article 37 TEU to the substantive legal basis of acts of transversal scope adopted for its implementation.

56. As regards, in the first place, the test applied by the Court in the *Philippines* judgment, I would point out that the first part of that test seeks to determine whether the provisions of the agreement which may relate to EU policies other than that identified as predominant may also fall within that policy or whether they go beyond the framework of that policy.

57. In that regard, it should be noted that development cooperation, which is unquestionably one of the components of the CEPA, is multidimensional. It is not confined to measures directly aimed at the eradication of poverty, specified as the primary objective of that policy in the second subparagraph of Article 208(1) TFEU, but also pursues the objectives referred to in Article 21(2)

[51] To the same effect, see the *Kazakhstan* judgment (paragraph 42).

[52] See the *Kazakhstan* judgment (paragraph 46).

TEU,[53] to which the first subparagraph of Article 208(1) TFEU expressly refers. Article 209(2) TFEU provides, moreover, that the EU may conclude with third countries any agreement helping to achieve the objectives referred to in Article 21 TEU and Article 208 TFEU, thereby emphasising the interrelationships between the general objectives of the Union's external action and the objectives specific to development cooperation.

58. In its case-law prior to the Treaty of Lisbon, which remains relevant in the light, in particular, of the interpretation of Article 208 TFEU adopted in the *Philippines* judgment,[54] the Court recognised that the objectives of development cooperation are broad, since such cooperation covers not only the sustainable economic and social development of the third countries concerned, their smooth and gradual integration into the world economy and the campaign against poverty, but also the development and consolidation of democracy and the rule of law as well as respect for human rights and fundamental freedoms.[55] The Court has also already ruled that the campaign against the proliferation of small arms and light weapons may be regarded as serving the objectives of development cooperation policy.[56]

59. That broad understanding of the objectives of development cooperation reflects the EU's vision in that area, set out in the new European consensus on development, signed on 7 June 2017[57] ('the Consensus'), which constitutes the 'cornerstone of the EU's development policy',[58] as part of the 2030 Agenda for Sustainable Development adopted by the United Nations in September 2015.[59] According to the Consensus, development cooperation also contributes, inter alia, to 'supporting democracy, the rule of law and human rights, preserving peace and preventing conflict, improving the quality of the environment and the sustainable management of global natural resources, assisting populations, countries and regions confronting natural or man-made disasters, and promoting an international system based on stronger multilateral cooperation and good global governance'.[60] Moreover, paragraph 14 of the Consensus states that 'political dialogue is an important way to advance development principles and also has a preventive dimension, aiming to ensure that EU values are upheld' and that 'this dialogue will be conducted with … partner governments and will be a major platform for action, where a shared understanding will be promoted, progress will be regularly reviewed and appropriate supporting measures identified'.

60. Lastly, it is important to underline that it was within the strategic framework of development cooperation and economic, financial and technical cooperation with third countries, as referred to in Article 212 TFEU, that the instruments supporting the Union's external action for the period 2014-2020 in the areas of, inter alia, human rights protection[61] and crisis response, conflict

53 See the *Philippines* judgment (paragraph 37).

54 See the *Philippines* judgment (paragraph 37).

55 See judgments of 23 October 2007, *Parliament* v *Commission* (C-403/05, EU:C:2007:624, paragraph 56), and of 20 May 2008, *Commission* v *Council* (C-91/05, EU:C:2008:288, paragraph 65).

56 See judgment of 20 May 2008, *Commission* v *Council* (C-91/05, EU:C:2008:288, inter alia paragraphs 68 to 70 and 98 to 99).

57 The new European consensus on Development 'our World, our Dignity, our Future', joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission, 8 June 2017. On the relevance of that type of document for determining the field in which an international agreement falls, see, inter alia, the *Philippines* judgment (paragraph 42).

58 See Consensus, paragraph 10.

59 Adopted by the General Assembly of the United Nations on 25 September 2015.

60 See Consensus, paragraph 11.

61 Regulation (EU) No 235/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for democracy and human rights worldwide (OJ 2014 L 77, p. 85).

prevention and peace-building in partner countries [62] were adopted. It is in that same framework that the Neighbourhood, Development and International Cooperation Instrument will be adopted for the next multi-annual financial framework (2021-2027), [63] the compromise text of which was approved on 13 March 2021, [64] which also covers the EU's action in the field of crisis response, conflict prevention, peace-building and the fight against global and trans-regional threats.

61. The Court has however ruled that a measure does not fall within development cooperation, even if it contributes towards the objectives thereof, if it has as its main purpose the implementation of another policy, for example, the CFSP. [65]

62. However, in my view, that is not the case here. The CEPA is above all an instrument designed to strengthen economic and trade cooperation between the parties, with a view to promoting sustainable development, [66] which incorporates environmental [67] and social constraints, respect for human rights and fundamental freedoms [68] as well as human health [69] into the economy. In addition to the provisions concerning trade in Title VI, a wide range of areas of cooperation is covered by the CEPA, relating to highly diverse socio-economic sectors, from energy (Chapter 2 of Title V) to the environment and climate action (Chapters 3 and 4 of Title V), industrial policy (Chapter 5 of Title V), cooperation in financial services (Chapter 7 of Title V), tourism (Chapter 9 of Title V), agriculture and fisheries (Chapters 10 and 11 of Title V), research (Chapter 14 of Title V), social policy (Chapter 15 of Title V), education and culture (Chapters 17 and 18 of Title V), sport (Chapter 20 of Title V) and civil protection (Chapter 23 of Title V).

63. It follows from all of the foregoing that the provisions in Title II of the CEPA may, as a whole, be linked with development cooperation also, which is one of the components of that agreement, and do not require a decision which lays down the position to be taken on the EU's behalf within the Partnership Council of the CEPA as regards the detailed rules for the functioning of the institutions set up by that agreement, to be based on Article 37 TEU also, as an additional substantive legal basis. That finding is not, in my view, affected if the CEPA is examined in the light of its context. First, as regards a partnership agreement such as the CEPA, the context in which the negotiations were conducted and the agreement concluded is hardly likely to play a significant, let alone decisive, role as a factor to be assessed in determining the appropriate legal basis. Secondly, in the present case, the reference in the eleventh paragraph of the preamble to the CEPA to the Nagorno-Karabakh dispute, to which the French Republic refers in its observations, is not sufficient to place the conclusion of the CEPA in a CFSP-specific context.

[62] See Regulation (EU) No 230/2014 of the European Parliament and of the Council of 11 March 2014 establishing an instrument contributing to stability and peace (OJ 2014 L 77, p. 1).

[63] See Proposal for a Regulation of the European Parliament and of the Council establishing the Neighbourhood, Development and International Cooperation Instrument (COM (2018) 460 final), amended (COM (2020) 459 final) following the COVID-19 crisis.

[64] See press release at https://www.consilium.europa.eu/en/press/press-releases/2021/03/17/neighbourhood-development-and-international-cooperation-instrument-global-europe-eu-ambassadors-greenlight-final-compromise-text-with-a-view-to-an-agreement-with-the-ep/.

[65] See, to that effect, judgment of 20 May 2008, *Commission* v *Council* (C-91/05, EU:C:2008:288, paragraphs 71 and 72). To the same effect, but in the context of a conflict between legal bases all falling within the FEU Treaty, see the *Philippines* judgment (paragraph 44).

[66] Eighteenth and twenty-third paragraphs of the preamble to the CEPA.

[67] Nineteenth and twenty-third paragraphs of the preamble to the CEPA and Chapters 3 and 4 of Title V of the CEPA.

[68] Third and sixth paragraphs of the preamble to the CEPA.

[69] Twenty-ninth paragraph of the preamble to the CEPA and Chapter 16 of Title V of the CEPA.

64. It is appropriate, therefore, to move on to the second part of the two-step test applied by the Court in the *Philippines* judgment, which requires, in the present case, a determination whether the provisions of the CEPA which may relate to the CFSP contain such extensive obligations that they constitute objectives distinct from those related to the other components of the agreement and, in particular, development cooperation.

65. It is clear, in my view, from reading the provisions of Title II of the CEPA, that those provisions are declaratory in nature and do not prescribe in concrete terms the manner in which cooperation in the field of foreign and security policy will be implemented or impose specific obligations on the parties going beyond a mere general commitment to cooperate.

66. This applies to the statement of the objectives of the political dialogue in Article 3(2) of the CEPA, on which the Council places particular emphasis. First, it is apparent from paragraph 1 of that article that the dialogue which the parties intend to strengthen concerns all the areas of mutual interest covered by the CEPA. This is consistent with the view expressed in the Consensus, also endorsed by the Council, reflected in point 59 above, that political dialogue is an instrument that also serves the objectives of development cooperation. Secondly, the list of the objectives of that dialogue is not followed, in the provisions of Title II of the CEPA which may be more specifically linked with the CFSP, by tangible measures designed to achieve those objectives and falling within that policy.

67. Thus, Article 5 of the CEPA merely paraphrases Article 3(2)(b), (c), (e), (f), (h) and (i) while placing particular emphasis on the pursuit of cooperation between the parties in international fora such as the United Nations and the OSCE. The same applies to Article 8 of the CEPA concerning regional stability and peaceful resolution of conflicts, which merely reproduces the objectives set out in Article 3(2)(i), (j) and (k) of the same agreement and reminds the parties of the principles laid down in the Charter of the United Nations, the OSCE Helsinki Final Act and other relevant multilateral instruments. The same is also true of Article 9 of the CEPA relating to WMDs, which essentially merely reminds the parties of their international commitments (paragraph 1) and encourages them to enter into other commitments (paragraph 2(a)). As for Article 9(2)(b) of the CEPA, which refers to 'further developing' an effective system of national export controls for WMDs, this is an obligation which, in addition to being worded in very general and forward-looking terms, intersects with commitments already laid down at the international level.[70] Lastly, the same considerations apply to Article 10 of the CEPA on small arms and light weapons,[71] and Article 11 on combating terrorism.

68. With regard to Article 7 of the CEPA, on which particular emphasis is laid by the French Republic and which calls for possible participation by the Republic of Armenia 'in EU-led civilian and military crisis-management operations, as well as relevant exercises and training', it should be noted, first, that such participation is only mentioned as a 'prospect' towards which practical cooperation between the parties in the field of conflict prevention and crisis management should aim and is described only as 'possible', and, secondly, that any participation in exercises and training relating to EU-led crisis-management operations can only be decided 'on a case-by-case basis'. It follows that, like the other provisions in Title II of the CEPA, that article does not set out any specific obligations and cannot be implemented immediately.

[70] See, in particular, United Nations Security Council Resolution 1504 (2004) of 28 April 2004 and the Action Plan of Armenia for the implementation thereof, available at https://www.un.org/en/sc/1540/national-implementation/national-implementation-plans.shtml.

[71] Article 10(4) of the CEPA also refers to cooperation in the light of Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment and relevant national legislation of the Republic of Armenia.

69. It follows from all the foregoing that, in the light of the test applied by the Court in the *Philippines* judgment, the adoption of a decision establishing the position to be taken on the EU's behalf within the CEPA Partnership Council as regards the detailed rules for the functioning of the institutions set up by that agreement did not require Article 37 TEU to be added to the legal basis of that decision.

70. If, in the second place, the test adopted by the Court in the *Kazakhstan* judgment is applied, the result does not, in my view, change. It must be noted, first, that the overwhelming majority of the CEPA's 386 articles fall within the common commercial policy or the development cooperation policy. Secondly, the provisions of the CEPA displaying a link with the CFSP and set out in point 51 above, apart from being few in number in comparison with the agreement's provisions as a whole, are, as is clear from the considerations set out in points 64 to 67 above, limited to declarations of the contracting parties concerning the aims that their cooperation must pursue and the subjects to which that cooperation will have to relate, without determining in concrete terms the manner in which the cooperation will be implemented. More generally, and without that argument being of decisive importance, as I have already stated in point 45 above, I take the view, like the Commission and the Czech Republic, and unlike the Council and the French Republic, that the provisions of Title II of the CEPA do not go further than the similar provisions in the agreement with Kazakhstan and that they form part of the EU's multidimensional strategy for development cooperation.

(c) Conclusions concerning the first plea

71. On the basis of all the foregoing considerations, the first plea must, in my view, be upheld.

B. Second plea

72. By its second plea, the Commission takes issue with the Council having split a single act into different parts in order artificially to create acts with different centres of gravity and to manipulate the applicable voting rules. The Commission submits that by so doing, the Council (i) disregarded the case-law of the Court referred to in point 25 above; (ii) infringed the Commission's prerogatives under Article 17(2) TEU by distorting the amended proposal, which envisaged the adoption of a single act; (iii) rendered the decision-making procedure needlessly more burdensome; and (iv) infringed the duty of loyal cooperation among the institutions as provided for in Article 13(1) TEU.[72] The Commission states in its application that the second plea is to be understood as merely providing additional reasons to consider the contested decisions unlawful, since its first plea alone suffices, in its view, for the action to succeed. In its reply, however, the Commission asserts that, even if its first plea is rejected, its second plea remains entirely autonomous, since the Council's decision to adopt two different decisions, instead of one, based, inter alia, on Article 37 TEU, is nevertheless unlawful.

73. Like the Commission, I am of the opinion that, if the first plea is upheld, it should, on its own, lead to the annulment of both contested decisions; the first one in that it excludes from its scope Title II of the CEPA for the reasons set out in the tenth paragraph of the preamble thereto and the second one in that it adopts Article 37 TEU as a legal basis. It follows that if, as I propose, the

[72] It is important to point out, despite the difference in context, that a similar question arises in Opinion procedure 1/19, in which Advocate General Hogan presented his Opinion on 11 March 2021 (EU:C:2021:198, points 167 to 194), concerning the division into two separate decisions of the act authorising the signature of the Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention).

Court were to uphold the first plea, it would not need to examine the second plea. If, however, the Court decides to address the second plea, it should, in my view, declare that plea well founded. By adopting two separate but related decisions, the second of which is based on an incorrect legal basis, requiring the adoption of a voting rule other than that laid down for the adoption of the first, the Council has attempted to circumvent the rules which apply to the choice of legal basis for an EU act.[73]

74. It is therefore in the alternative, and in case the Court should reject the first plea and consider that the second plea retains its own autonomy, that I shall formulate the following brief considerations.

75. It is common ground that a single position is to be adopted on the EU's behalf for the purpose of adopting the rules of procedure of the bodies established by the CEPA. It is equally undisputed that those rules of procedure are indivisible. It is also a fact that the contested decisions are essentially identical in content albeit different in scope, and refer to the same document drawn up by the Partnership Council.[74] In those circumstances, the reasons that prompted the Council to adopt two separate decisions remain unclear, if it was not an attempt to justify the use of the legal basis of Article 37 TEU for the second of those decisions.

76. That said, if the Court were to consider that the act establishing the single position to be adopted by the Council required the addition of such a legal basis, the Commission, it seems to me, still fails to demonstrate that the Council's choice to split the decision was unlawful. Admittedly, the adoption of a single act would have avoided rendering the decision-making procedure more burdensome. However, in such a scenario, the Council could not be criticised for having circumvented the rules for determining the legal basis or the applicable voting rules. Like the Czech Republic, I also doubt that, in such circumstances, the Council could be said to have breached the duty of loyal cooperation or the Commission's power of initiative conferred by Article 17(2) TEU.[75] The 'denaturalisation' alleged by the Commission does not seem to me to have been proved, in so far as the objective pursued by the amended proposal – namely to enable the position to be adopted on the EU's behalf within the Partnership Council as regards the adoption of the rules of procedure to be established – has been achieved, and the content of that position has been determined, with the exception of a few minor amendments, in a manner that complies with what was proposed.[76] Admittedly, it could be argued that, since the amended proposal provided for the adoption of a single decision, Decision 2020/246 was adopted in the absence of any proposal from the Commission, in violation of Article 17(2) TEU read in conjunction with Article 218(9) TFEU. However, such an argument seems to me overly pedantic, at least in the circumstances of the present case, where Decisions 2020/245 and 2020/246 were essentially identical in content.[77]

[73] It is important to clarify, however, that it is not the division into two separate decisions as such that causes the Court's case-law on the choice of legal basis to be circumvented, but that division in conjunction with the provision of an incorrect legal basis for one of those two decisions.

[74] That document is the draft decision of the EU-Republic of Armenia Partnership Council adopting its Rules of Procedure and those of the Partnership Committee and the subcommittees and other bodies set up by the Partnership Council, and establishing the list of subcommittees, ST 15226/19, at the website http://register.consilium.europa.eu.

[75] Article 17(2) TEU, *in fine*, provides that non-legislative acts are to be adopted on the basis of a Commission proposal where the Treaties so provide. Under Article 218(9) TFEU, the Council is to adopt decisions establishing the positions to be adopted on the EU's behalf within a body set up by an agreement on a proposal from the Commission (or the High Representative).

[76] I would point out that the Court has already stated, as regards the procedure for the adoption of legislative acts, that 'where an amendment planned by the Parliament and the Council distorts the proposal for a legislative act in a manner which prevents achievement of the objectives pursued by the proposal and which, therefore, deprives it of its *raison d'être*, the Commission is entitled to withdraw it'; see judgment of 14 April 2015, *Council* v *Commission* (C-409/13, EU:C:2015:217, paragraph 83).

[77] At most, it might be considered, in an equally pedantic line of argument, that the Council infringed Article 293(1) TFEU, in that Decision 2020/245, although departing from the amended proposal as regards its scope, was adopted by a qualified majority and not unanimously.

C. Maintenance of the effects of the contested decisions

77. The Commission, the Council and the intervening States request the Court, should it annul the contested decisions, to maintain their effects.

78. Under the second paragraph of Article 264 TFEU, the Court may, if it considers this necessary, state which of the effects of an act which it has declared void are to be considered as definitive. Since annulment of the contested decisions without their effects being maintained is liable to disrupt the functioning of the bodies established by the CEPA, to cast doubt on the EU's commitment to the legal acts adopted by those bodies and thus to hinder the proper implementation of that agreement,[78] I consider that, should the Court decide to annul the contested decisions, it would be appropriate to maintain their effects.

D. Costs

79. 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 I propose that the action be upheld and the Commission has applied for costs, I consider that the Council should be ordered to pay the costs. Under Article 140(1) of the Rules of Procedure, Member States which intervene in proceedings are to bear their own costs. The French Republic and the Czech Republic should therefore be ordered to bear their own costs.

VI. Conclusion

80. On the basis of all the foregoing considerations, I propose that the Court should:

(1) Annul Council Decision (EU) 2020/245 of 17 February 2020 on the position to be taken on behalf of the European Union within the Partnership Council established by the Comprehensive and Enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Armenia, of the other part, as regards the adoption of the Rules of Procedure of the Partnership Council and those of the Partnership Committee, subcommittees and other bodies set up by the Partnership Council, and the establishment of the list of Sub-Committees, for the application of that Agreement with the exception of Title II thereof and Council Decision (EU) 2020/246 of 17 February 2020 on the position to be taken on behalf of the European Union within the Partnership Council established by the Comprehensive and Enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Armenia, of the other part, as regards the adoption of the Rules of Procedure of the Partnership Council and those of the Partnership Committee, subcommittees and other bodies set up by the Partnership Council, and the establishment of the list of Sub-Committees, for the application of Title II of that Agreement;

(2) Order that the effects of Decisions 2020/245 and 2020/246 be maintained;

(3) Order the Council of the European Union to pay the costs;

[78] See, by analogy, the *Kazakhstan* judgment (paragraph 51). Unless I am mistaken, the rules of procedure to which the contested decisions relate seem to have been adopted in the meantime, see https://data.consilium.europa.eu/doc/document/ST-4555-2020-INIT/en/pdf.

(4) Order the French Republic and the Czech Republic to bear their own costs.