Reports of Cases

OPINION OF ADVOCATE GENERAL
Sharpston
delivered on 26 November 2015 [1]

Case C-660/13

Council of the European Union
v

European Commission

(Commission decision approving an addendum to a memorandum of understanding ('MoU') with a third State and authorising its signature — Articles 16 and 17 TEU — Respective powers of the Council of the European Union and the European Commission — Article 13(2) TEU — Principle of sincere cooperation — Article 263 TFEU — Admissibility)

1. The Council of the European Union applies for the annulment of a decision of the European Commission of 3 October 2013 ('the contested decision') on the signature of an addendum to the Memorandum of Understanding on a Swiss financial contribution to the new Member States of 27 February 2006 ('the 2006 MoU'). [2] The 2006 MoU is an agreement between the European Union and the Swiss Confederation ('Switzerland') reflecting the latter's political commitment to pay a financial contribution to the Member States which acceded to the European Union on 1 May 2004 in exchange for Swiss access to the enlarged internal market (the 'Swiss financial contribution' or 'the SFC'). It was part of an overall compromise resulting in the conclusion of negotiations of nine sectoral agreements.

2. A first addendum to the 2006 MoU reflecting a similar engagement as regards Bulgaria and Romania (which acceded on 1 January 2007) was signed in 2008 ('the 2008 addendum').

3. In 2013, another addendum was signed in the light of Croatia's accession that year ('the 2013 addendum'). Whereas both the 2006 MoU and the 2008 addendum were signed on behalf of the European Union by both the Presidency of the Council and by the Commission, the 2013 addendum was signed solely by the Commission.

4. The 2006 MoU and the 2008 and 2013 addenda all contain non-binding agreements between Switzerland and the European Union inasmuch as the parties to them, despite having legal capacity under international law, expressed their intention *not* to be bound by them as a matter of international law.

5. The Council's application in essence concerns the distribution of powers between the Council and the Commission as regards approving a non-binding agreement between the Union and a third State and authorising its signature, and the requirements stemming from the principle of sincere mutual cooperation ('sincere cooperation') that apply in that context. In particular, the Council complains

1 — Original language: English.
2 — C(2013) 6355 final.

that the Commission failed to seek its authorisation before signing the 2013 addendum, which the Council had merely authorised the Commission to negotiate. In doing so, the Commission took it upon itself to decide on the Union's policy and also disregarded the competence of the Member States.

EU law

Treaty on European Union

6. Article 4(1) TEU refers to the principle of conferral under Article 5 TEU. Article 5(2) provides that the Union is to act 'only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States'.

7. Pursuant to the principle of sincere cooperation laid down in Article 4(3) TEU, 'the Union and the Member States [must], in full mutual respect, assist each other in carrying out tasks which flow from the Treaties'; the Member States are to 'take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union' and to 'facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives'.

8. Article 13(2) TEU provides: 'Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation.'

9. According to Article 15(1) TEU, '[t]he European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof.'

10. Article 16(1) TEU states: 'The Council shall, jointly with the European Parliament, exercise legislative and budgetary functions. It shall carry out policy-making and coordinating functions as laid down in the Treaties.' According to Article 16(3) TEU, the Council is to act by a qualified majority except where the Treaties provide otherwise. The third subparagraph of Article 16(6) TEU provides: 'The Foreign Affairs Council shall elaborate the Union's external action on the basis of strategic guidelines laid down by the European Council and ensure that the Union's action is consistent.'

11. Pursuant to Article 17(1) TEU, the Commission is to 'promote the general interest of the Union and take appropriate initiatives to that end[, to] ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them[, to] oversee the application of Union law under the control of the Court [and to] exercise coordinating, executive and management functions, as laid down in the Treaties'. It is also to 'ensure the Union's external representation' except for the common foreign and security policy and other cases provided for in the Treaties.

12. Articles 21 and 22 TEU are the general provisions on the Union's external action (Chapter 1 of Title V of the TEU). Article 21(1) TEU sets out the principles which are to guide the Union's action on the international scene. The second subparagraph of Article 21(3) TEU provides that the Union is to ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission are to ensure that consistency and to cooperate to that effect. Article 22(1) TEU states that, on the basis of the principles and objectives set out in Article 21 TEU, the European Council is to identify the Union's strategic interests and objectives. Decisions which the European Council takes in that regard are to relate to the common foreign and security policy and to other areas of the Union's external action and are to be implemented in accordance with the procedures provided for in the Treaties.

Treaty on the Functioning of the European Union

13. Article 1(1) TFEU states that the TFEU 'organises the functioning of the Union and determines the areas of, delimitation of, and arrangements for exercising its competences'.

14. Article 2(1) TFEU sets out the consequences of the Union's exclusive competence in a specific area: '… only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts'.

15. Where competence in a specific area is shared, Article 2(2) TFEU provides that 'the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence [and] shall again exercise their competence to the extent that the Union has decided to cease exercising its competence'.

16. Article 2(6) TFEU states: 'The scope of and arrangements for exercising the Union's competences shall be determined by the provisions of the Treaties relating to each area.'

17. Article 7 TFEU (under Title II, 'Provisions having general application') provides: 'The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.'

18. Article 205 TFEU states: 'The Union's action on the international scene, pursuant to this Part, [3] shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the [TEU].'[4]

19. Article 216 TFEU, which is included in Title V of Part Five, on 'International Agreements', provides:

'1. The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.

2. Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.'

20. Article 218 TFEU sets out the procedure for negotiating and concluding such agreements.[5] The Council is to 'authorise the opening of negotiations, adopt negotiating directives, authorise the signing of agreements and conclude them' (Article 218(2) TFEU). In particular, the Council, acting on a proposal by the negotiator, is to adopt both 'a decision authorising the signing of the agreement and, if necessary, its provisional application before entry into force' (Article 218(5) TFEU) and 'a decision concluding the agreement' (Article 218(6) TFEU).

21. In accordance with the first paragraph of Article 263 TFEU, the Court is to review the legality in particular 'of legislative acts, of acts of … the Commission …, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties'. The second paragraph of that provision states that the Court, for

3 — Namely, Part Five of the TFEU on 'The Union's External Action'.

4 — See point 12 above.

5 — See also Article 207 TFEU on more specific procedures for negotiating and concluding international agreements in the area of the common commercial policy.

that purpose, is to have '… jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers'.

22. If such an action is well founded, the first paragraph of Article 264 TFEU requires the Court to declare the act concerned to be void. The second paragraph of that article provides: 'However, the Court shall, if it considers this necessary, state which of the effects of the act which it has declared void shall be considered as definitive.'

23. Article 278 TFEU states that, whilst actions brought before the Court are not to have suspensory effect, the Court may, if it considers that circumstances so require, order that application of the contested act be suspended.

24. Pursuant to Article 279 TFEU, the Court 'may in any cases before it prescribe any necessary interim measures'.

Background and contested decision

The 2006 MoU

25. Switzerland has access to the internal market based on a series of bilateral agreements. The second round of negotiations on such agreements coincided with the 2004 enlargement of the Union.

26. At its meeting on 10 March 2003, the Working Party on European Free Trade Association ('the EFTA Working Party') — which is a Council preparatory body — examined, as regards negotiations envisaged with Switzerland, a Commission recommendation for a Council decision authorising the Commission to open negotiations for adapting several mixed agreements in view of enlargement. That recommendation related also to negotiating an agreement on a financial contribution to economic and social cohesion of the enlarged Union. That agreement became the 2006 MoU.

27. On 24 March 2003, the EFTA Working Party agreed to recommend to the Committee of the Permanent Representatives of the Governments of the Member States to the European Union ('Coreper') that the latter should invite the Council, and where appropriate the Representatives of the Governments of the Member States acting within the Council ('the Member States acting within the Council'),[6] to adopt a draft decision authorising the Commission to negotiate, on behalf of the (then) European Community and its Member States, inter alia, an agreement with Switzerland on a financial contribution to economic and social cohesion of the enlarged Union. That draft decision stated that the Commission 'will conduct these negotiations in accordance with the directives attached hereto and in consultation with the [EFTA Working Party]'. Those negotiating directives included the guidance that 'Switzerland, in exchange for free access to the enlarged Internal Market, should contribute financially to social and economic cohesion in the enlarged [Union] in a way comparable to Norway, Iceland and Liechtenstein' and that '[t]he specific situation of Switzerland shall be taken into account'. Neither the draft decision nor the negotiating directives determined who was to sign the text resulting from the negotiations. The negotiating directives stated, perhaps optimistically, that the agreement was to be negotiated in time for the 2004 enlargement.

28. In April 2003, the Council authorised the Commission to negotiate with Switzerland.

6 — Different English versions of documents relevant to the background of this case refer to the Representatives of the Governments of the Member States either 'acting' or 'meeting' within the Council. It is not clear whether the authors of these documents intended those terms to have different meanings.

29. At the EU-Switzerland summit of 19 May 2004, the European Union welcomed Switzerland's offer to contribute to economic and social cohesion in the enlarged Union. A Coreper document, filed as an annex to the Council's application in these proceedings, states that the Council accepted that contribution as a part of an overall compromise leading to the conclusion of a large negotiation round on nine sectoral agreements.

30. Between November 2004 and May 2005, the Union and Switzerland negotiated the 2006 MoU (the text of which is attached to the contested decision), which comprises eight 'guidelines'.

31. Under guideline 1, the Swiss Federal Council was to negotiate with relevant Member States agreements on the arrangements for an SFC of CHF 1 billion over a period of five years, starting from the Swiss Parliament's approval of the funds. Those funds are broken down, per Member State, in guideline 2 which also mentions that the SFC may finance regional and national projects and programmes and those involving several beneficiary Member States. Guideline 3 relates to review after two and four years. Guideline 4 lays down the funding guidelines and areas. Guideline 5, on 'Information and coordination', concerns the interaction between the Federal Council and the Commission as regards implementing the SFC. It also states that, where appropriate, projects and programmes may be carried out in cooperation with other Member States which may be financed by (what were then) Community instruments. In accordance with guideline 6, the Federal Council was to select projects and programmes in agreement with the beneficiary Member States. Guideline 7 concerns the implementation of projects and programmes. Guideline 7(b) stipulates that the SFC will be in the form of gifts or concessional financial facilities and will not be repayable to Switzerland. Finally, guideline 8 (entitled 'Implementation of the Swiss contribution') states that the Federal Council will propose that the Swiss Parliament approve funding amounting to CHF 1 billion for the SFC's implementation (to start in 2006) and that the agreements to be negotiated with the Member States must be in conformity with the guidelines laid down in the 2006 MoU. An annex[7] to the 2006 MoU sets out a general description of the content of those bilateral framework agreements.

32. In its application, the Council states that both parties agreed that the 2006 MoU would contain only political, non-binding commitments (due to Swiss internal constraints) and that that intention should be reflected in the form and text of the agreement. The Commission confirms that it was its position to sign a non-legally binding agreement.

33. On 20 October 2005, the Commission submitted a proposal for a Council Decision authorising the conclusion, on behalf of the (then) European Community, of the 2006 MoU on the basis of the third paragraph of Article 159 EC and Article 300(2) and (3) EC (concerning, respectively, economic and social cohesion and the conclusion of international agreements). On 8 February 2006, after negotiations with the EFTA Working Party, Coreper agreed by common accord on the form and substance of the text to be signed.

34. On 14 February 2006, Coreper called for the Council to adopt the text of Conclusions of the Council and of the Representatives of the Governments of the Member States meeting within the Council ('the Member States meeting within the Council'). Those conclusions referred to Switzerland's offer of 19 May 2004, invited the Member States concerned, in the light of certain guidelines, to conclude agreements with Switzerland on the 'modalities' of the SFC, charged the President of the Council to sign the 2006 MoU and mandated the Commission, within the context of the bilateral arrangements and the 2006 MoU, to manage information, coordination and follow-up tasks. Those conclusions stated that the Commission agreed with these tasks and wished to confirm that agreement by also signing the 2006 MoU. The Council submits that, at the time, the 2006 MoU was considered to fall within the shared competence of the Union and the Member States.

7 — Another annex contained a declaration by Portugal and Greece on the SFC.

35. On 27 February 2006, the 2006 MoU was duly signed 'For the Swiss Federal Council', 'For the Presidency of the Council of the European Union' and 'For the European Commission'. [8]

The 2008 addendum

36. On 20 December 2006, the Council and the Member States meeting within the Council adopted conclusions mandating the President of the Council and the Commission to negotiate the 2008 addendum. Paragraph 3 of these conclusions stated that the President of the Council, assisted by the Commission, was charged with the task of engaging in the necessary discussions with the Swiss Federal Council in order to have the 2006 MoU adapted as soon as possible.

37. On 14 May 2008, another set of conclusions mandated the President of the Council to sign the 2008 addendum and charged the Commission with similar management tasks to those mentioned in the 2006 MoU. The 2008 addendum was similarly not to be legally binding; it contained only political commitments. The Commission was also to sign the 2008 addendum, for the same reason that it signed the 2006 MoU.

38. On 25 June 2008, the 2008 addendum was signed 'For the Swiss Federal Council', 'For the Presidency of the Council of the European Union' and 'For the European Commission'.

The 2013 addendum and the contested decision

39. On 20 December 2012, the Council and the Member States meeting within the Council again adopted conclusions mandating the Commission, in close cooperation with the Presidency of the Council, to engage in the necessary negotiations on the adaptation of the SFC to Croatia's accession ('the 2012 conclusions'). They invited the Commission to consult the EFTA Working Party regularly on the progress of those discussions.

40. On 17 December 2012, the Commission formulated a statement to be included in the Coreper minutes, which read as follows:

'The Conclusions on [an SFC] for Croatia constitute a political decision under Article 16 [TEU]. Article 16 confers policy-making powers to the Council. As a consequence, the Conclusions are to be understood as the political decision of the Council, not of the Member States.

The Commission takes note of the political decision taken by the Council and will, on this basis, accept the invitation to engage in discussions with Switzerland on behalf of the [Union]. The Commission recalls in this regard its position in cases C-28/12 and C-114/12, [9] pending before the Court of Justice.' [10]

8 — On 20 December 2007, Switzerland concluded framework agreements with the 10 Member States which had acceded in 2004.

9 — These cases are no longer pending: see judgments in *Commission* v *Council*, C-28/12, EU:C:2015:282, and *Commission* v *Council*, C-114/12, EU:C:2014:2151. In its judgment in Case C-28/12, the Court held that a decision is not compatible with Article 218(2), (5) and (8) TFEU and, therefore, with Article 13(2) TEU, if it (i) merges, on the one hand, an act relating to the signing of the agreements at issue on behalf of the European Union and their provisional application by it and, on the other, an act relating to the provisional application of those agreements by the Member States, without it being possible to discern which act reflects the will of the Council and which the will of the Member States and (ii) was adopted under a procedure which involved without distinction elements falling within the decision-making process specific to the Council and elements of an intergovernmental nature (see paragraphs 49 and 51). In Case C-114/12 (which was decided before Case C-28/12), the Court held that the first plea was well founded, and considered it to be unnecessary to examine the other pleas (relating to similar forms of action involving the Council and the Member States) raised by the Commission in support of its action (see paragraph 104).

10 — In its defence in the present litigation, the Commission describes its position as follows: the Council cannot simultaneously defend its own autonomy and that of its procedures vis-à-vis the Member States and seems to confuse its role as an EU institution with that of the Member States.

41. After the European External Action Service ('the EEAS'), which assists the High Representative of the Union for Foreign Affairs and Security Policy, informed the EFTA Working Party that discussions with Switzerland had been completed successfully, the EFTA Working Party Members announced that they would transmit the results to their respective capitals for scrutiny. No Working Party meetings were held during August 2013. The Council states that, in informal email exchanges between the negotiators, the Swiss negotiators used a version of the addendum containing a reference to the President of the Council as one of the signatories.

42. On 3 October 2013, the Commission adopted the contested decision approving the 2013 addendum and authorising the Vice-President responsible for external relations (that is, the High Representative of the Union for Foreign Affairs and Security Policy) and the Commissioner responsible for Regional Policy to sign the 2013 addendum, on behalf of the Union. The Commission did not seek prior authorisation from the Council and the Member States meeting within the Council. The contested decision gives Article 17 TEU as its legal basis. On the day of its adoption, it was informally notified to the Council and was sent to the Swiss authorities.

43. The contested decision consists of eight recitals, a sole article and an annex containing the 2013 addendum.

44. So far as is here relevant, recital 2 refers to the Council's position (in the 2012 conclusions) to negotiate with Switzerland on the SFC for Croatia and to invite the Commission to start those negotiations. Recital 3 mentions the Commission's statement (for inclusion in the Coreper's minutes) in which it explained that the 2012 conclusions were to be understood as a political decision of the Council under Article 16 TEU and that it accepted, on that basis, the invitation to engage in discussions with Switzerland on behalf of the Union. According to recital 5, the proposed addendum is based on the Union's position reflected in the 2012 conclusions which, in turn, built on the 2006 MoU and the 2008 addendum. That position expresses support for Croatia's wish to benefit from an SFC. Recital 6 states that, in line with the Union's position, the proposed addendum reflects the Swiss political engagement to negotiate with Croatia an agreement on an SFC established on the same basis as for the previous beneficiaries and calculated in proportion to the original SFC. Recital 7 mentions that the proposed addendum has no financial implications for the EU budget. Recital 8 states that '[t]he proposed addendum does not, nor is it intended to, create any binding or legal obligations on either side under domestic or international law'.

45. The sole article of the contested decision states that the Commission approves the 2013 addendum and authorises the Vice-President responsible for external relations, in her capacity as Vice-President of the Commission, and the member of the Commission responsible for Regional Policy, to sign it on behalf of the Union.

46. The 2013 addendum provides for signature 'For the European Union' by those members of the Commission and 'For the Swiss Confederation' by the Swiss Federal Council. It comprises an introductory sentence and three paragraphs.

47. In paragraph 1, the Swiss Federal Council agrees to negotiate an agreement with Croatia on arrangements for an SFC of CHF 45 million (in addition to the contribution set out in guideline 1 of the 2006 MoU), calculated over a period of five years, starting from when those funds are approved by the Swiss Parliament. The Swiss Federal Council further intends to commit the contribution until 31 May 2017.[11] According to paragraph 2 (implementation of the additional SFC), the Swiss Federal Council agrees to propose that the Swiss Parliament approve that additional funding amounting to CHF 45 million, to start in 2014. Paragraph 3 states that the other guidelines set out in the 2006 MoU and its Annex apply *mutatis mutandis*.

11 — That is, until the expiry of the Swiss legal basis (the Federal Act of 24 March 2006 on Cooperation with the States of Eastern Europe).

48. During meetings of the EFTA Working Party on 15 and 23 October 2013, the Commission states that it provided further information and confirmed its position. The Council's Legal Service and the Member States objected to the Commission's course of action, in particular its failure to seek Council approval on the outcome of the discussions and its disregard for the Member States' competences. As a result, the Presidency sent to the Council and the Member States meeting within the Council draft conclusions by which they would formally approve the outcome of the discussions at the Council meeting of 19 November 2013 (a date allegedly known to the Commission). The Council states that, at the meeting of 23 October 2013, the EEAS indicated the Commission's disagreement with these conclusions.

49. During its meeting of 31 October 2013, the EFTA Working Party decided to prepare and submit to the Council a set of draft conclusions of the Council and the Member States meeting within the Council indicating that the 2013 addendum was to be signed by the Swiss Federal Council, the Presidency of the Council and the Commission and that the Commission's role was to be the same as under the 2006 MoU and the 2008 addendum. During a meeting the day before, EEAS representatives informed the Presidency of the Council that the Commission intended to reject the mandate set out in these conclusions.

50. On 7 November 2013, the Commissioner for Regional Policy signed the 2013 addendum on behalf of the Union. He did so on the basis of the contested decision and without prior authorisation from the Council. The following day, he sent the signed 2013 addendum with a covering letter to the Swiss authorities.

51. On 19 November 2013, the Council and the Member States meeting within the Council adopted a position on the contested decision after receiving a written contribution from the Council Legal Service on the correct procedure to be followed for the conclusion with third countries and international organisations of instruments which are not intended to be legally binding but which contain policy commitments made by the Union. On 9 December 2013, the Council adopted a position expressing its disagreement with the way in which the Commission had acted in this and other similar cases.

52. On 30 June 2015, Switzerland and Croatia signed a bilateral framework agreement concerning the implementation of the Swiss-Croatian Cooperation Programme to Reduce Economic and Social Disparities within the Enlarged European Union.

Complaints and procedure

53. The Council's application for annulment of the contested decision is based on Article 263 TFEU and contains two pleas in law. The first plea is that, by adopting the contested decision, the Commission infringed the principle of distribution of powers in Article 13(2) TEU and therefore also the principle of institutional balance. The second plea is that the Commission's conduct leading to [12] the adoption of the contested decision and the signature of the 2013 addendum violates the principle of sincere cooperation in Article 13(2) TEU. Although the Council therefore seeks the annulment of the contested decision, it asks the Court to order that the effects of that decision be maintained until the decision is replaced. The Council also asks that the Commission be ordered to pay the costs.

54. The Commission requests the Court to dismiss the application. It argues that the contested decision was adopted in full respect of the limits of the powers conferred by the Treaties and that it has acted in full compliance with the principle of sincere cooperation. The Commission also asks the Court to order the Council to pay the costs.

12 — However, see also point 118 below.

55. The Council requested, pursuant to Article 60(1) of the Rules of Procedures, that the Court assign this case to the Grand Chamber.

56. In addition to the main pleadings by the Council and the Commission, the Czech, Finnish, French, German, Greek, Hungarian, Lithuanian, Polish and United Kingdom Governments have all been granted leave to intervene and have submitted written statements. At the hearing on 2 June 2015, the principal parties and the same interveners, with the exception of the Finnish, Hungarian, Lithuanian and Polish Governments, presented oral argument. All intervening parties support the Council's application.

Analysis

Admissibility

57. As I see it, a preliminary question arises as to what is an act which is open to review under Article 263 TFEU. It is clear that the contested decision is an act of the Commission, [13] even though it may no longer be clear precisely what that requirement under Article 263 TFEU entails. [14] However, whether that decision is an act intended to produce legal effects vis-à-vis third parties seems less immediately obvious.

58. No objection has been raised to the admissibility of the Council's action for annulment. The Court is none the less competent to examine of its own motion whether the contested decision is challengeable under Article 263 TFEU, because that is a matter pertaining to its jurisdiction; [15] but it cannot base its decision on a plea raised of its own motion without first inviting the parties to submit their observations on that plea. [16] Moreover, that examination of admissibility logically precedes the examination of the merits of each plea. [17]

13 — The contested decision falls within the scope of 'acts of general application, legislative or otherwise, and individual acts': see judgment in *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 56.

14 — In a recent judgment, the Court examined the substance of an action for annulment under Article 263 TFEU which was directed against what the Court described as the Commission's 'carr[ying] out the intentions [which] it expressed on 5 August 2013', namely, by presenting a written statement to the International Tribunal for the Law of the Sea on behalf of the Union (judgment in *Council* v *Commission*, C-73/14, EU:C:2015:663, paragraph 37). The Court described the object of the Council's action as the Commission's 'fail[ure] to submit the content of the written statement presented on behalf of the European Union … to the Council for prior approval' (paragraph 38 of the same judgment). Logically, the Court must have treated the Council's application in that case as admissible (see also footnote 17 below). However, if so, a series of questions regarding the scope of Article 263 TFEU arises. How is compliance with the time limits in the final paragraph of Article 263 TFEU to be verified where the measure challenged is the institution's 'carr[ying] out [of its] intentions'? If the action succeeds, what precisely is then annulled? Is it still necessary to establish whether the measure in which those intentions were expressed is an act open to review under Article 263 TFEU? How broad is the notion of 'carr[ying] out intentions'? Does it matter whether or not the intentions are those of the institution against which the application for annulment is brought? Indeed, can the procedure under Article 263 TFEU be used in order to seek annulment of the Commission's failure to act (for which Article 265 TFEU appears to be designed)?

15 — See, for example, judgment in *Planet* v *Commission*, C-564/13 P, EU:C:2015:124, paragraph 20 and the case-law cited.

16 — See, for example, judgments in *Commission* v *Ireland and Others*, C-89/08 P, EU:C:2009:742, paragraph 57, and *Planet* v *Commission*, C-564/13 P, EU:C:2015:124, paragraph 20 and the case-law cited.

17 — That was not, however, the Court's order of analysis in its judgment in *France* v *Commission*, C-233/02, EU:C:2004:173, paragraph 26. There, the Court did not first examine the Commission's objections that the 'Guidelines on Regulatory Cooperation and Transparency', which were concluded by the Commission with the United States of America, were neither binding nor produced legal effects and therefore there was no Commission measure that could be the subject of an action for annulment. The Court did not consider it necessary to rule on those objections because the form of order sought had to be dismissed on the substance. In other cases, the Court has deemed it necessary to consider the merits in order to decide on admissibility because of the inseparable connection between both issues: see, for example, judgment in *France* v *Parliament*, C-237/11 and C-238/11, EU:C:2012:796, paragraph 20 and the case-law cited. See also my Opinion in *Council* v *Commission*, C-73/14, EU:C:2015:490, point 36 and the case-law cited. In *Council* v *Commission*, C-73/14, EU:C:2015:663, the Court appears to have taken an altogether different approach which may have widened the scope of an action under Article 263 TFEU: see footnote 14 above. If the true position is now that the Court is prepared to be less rigorous on admissibility in interinstitutional disputes where an important issue of principle needs to be resolved, it would perhaps be preferable to say so explicitly.

59. Neither party set out in its written pleadings why it considers the contested decision to satisfy (or not to satisfy) the conditions of Article 263 TFEU. However, in response to questions put to them by the Court, both parties addressed at the hearing the extent to which the 2013 addendum, despite its non-binding character, might none the less have legal effects or consequences. Such questions are clearly relevant not only to the issue of whether or not to apply the arrangements laid down in Article 218 TFEU, but also to the fact that only acts intended to produce legal effects are open to review under Article 263 TFEU. Thus, I consider that the parties were given a satisfactory opportunity to be heard. The Court is therefore not barred from considering this jurisdictional issue of its own motion.

60. Article 263 TFEU provides for the Court to review the legality of acts of the Commission (other than recommendations and opinions) intended to produce legal effects vis-à-vis third parties. Such review must be available for all acts adopted by EU institutions, irrespective of their nature or form, provided that they are intended to have legal effects. [18] Thus, characterising the act as 'political' does not necessarily place it outside the scope of Article 263 TFEU, provided that it has legal effects. Nor does the absence of specific rules in the Treaties on how a specific act is to be adopted. [19]

61. Where the legality of acts adopted in the exercise of Union competence in international matters is challenged, the Court appears to have used different methods for appraising an act's effects. Thus, a contested act may have legal effects because of, in particular, its content and the intention of its author. [20] Those effects can pertain to the relations between EU institutions and between Member States and EU institutions. [21] Or the objective of the act may be to enable the Union to participate in external action producing legal effects whose impact on the institutions, the Member States and EU law needs to be examined. [22] Thus, an application to annul an act purporting to conclude an international agreement has been found to be admissible because the agreement was intended to produce legal effects, [23] as was a decision through which the Council sought to impose upon the Commission a precise and detailed procedure for negotiating an international agreement. [24] Although the recommendations of the International Organisation of Vine and Wine are outside the scope of admissibility under Article 263 TFEU and not binding under international law, those recommendations have been found to be 'capable of decisively influencing the content of the legislation adopted by the EU legislature in the area of the common organisation of the wine markets' in particular by reason of their incorporation into EU law. [25]

62. Another method appears to be to consider the character of the contested act together with the plea made. Actions under Article 263 TFEU can be brought on grounds of, *inter alia*, lack of competence. Regardless of whether or not an act itself has legal effects, the fact that one institution has taken it whereas the Treaties give powers to do so to another institution means that the act of taking the decision has legal effects (by usurping the powers of the second institution). In the present case, applying that method would mean that where the Commission has taken a decision whereas, based on the substance of the pleas, the Treaties provide that this decision fell within the powers of the Council, the challenged act of the Commission has legal effects within the meaning of Article 263 TFEU.

18 — See judgment in *Commission* v *Council*, C-425/13, EU:C:2015:483, paragraph 26 and the case-law cited. The original test was laid down in the judgment in *Commission* v *Council*, 22/70, EU:C:1971:32 ('judgment in *ERTA*'), paragraph 42.

19 — That seems to underlie the judgment in *Commission* v *Council*, C-27/04, EU:C:2004:436.

20 — See judgments in *Commission* v *Council*, C-425/13, EU:C:2015:483, paragraph 27 and the case-law cited, and *Athinaïki Techniki* v *Commission*, C-521/06 P, EU:C:2008:422, paragraph 42.

21 — See, for example, judgment in *ERTA*, paragraph 55.

22 — See, for example, judgment in *ERTA*, paragraphs 47 and 53.

23 — Judgment in *France* v *Commission*, C-327/91, EU:C:1994:305, paragraph 15.

24 — See judgment in *Commission* v *Council*, C-425/13, EU:C:2015:483, paragraph 29. At paragraph 28, the Court also referred to its previous decision (in judgment in *Commission* v *Council*, C-114/12, EU:C:2014:2151, paragraph 40) that an act adopted on the basis of Article 218(3) and (4) TFEU produces legal effects. It seems that, despite the Court's emphasis on the substance of the act, legal effects were established based on a formal test, namely that of the provisions cited as legal basis.

25 — Judgment in *Germany* v *Council*, C-399/12, EU:C:2014:2258, paragraphs 63 and 64.

63. The same conclusion can be reached here by considering the effects of the contested decision itself, including its object.

64. The contested decision is an act through which the Commission approved external action by the Union in the form of a non-binding international agreement with a third State and authorised signature of that agreement. The Union (acting through the signatories so authorised by the contested decision) subsequently acted externally by signing that agreement, thus giving its consent thereto.

65. If the 2013 addendum had been an international agreement within the meaning of Article 218 TFEU (that is, 'any undertaking entered into by entities subject to international law which has binding force, whatever its formal designation'),[26] the Council's application would clearly have been directed against an act having legal effects. The contested decision would have expressed the Union's consent on the international plane to be bound by that agreement as a matter of international law.[27] Such an act results in obligations and thus produces legal effects.[28] Conversely, as the Court said in *France* v *Commission*, because an international agreement is intended to produce legal effects, the act whereby its conclusion is sought must be open to challenge.[29] Moreover, it would then also have been clear that, under Article 218(2) and (6) TFEU, it was for the Council, not the Commission, to agree on its content and authorise its signature.

66. However, it is common ground that the 2013 addendum is not such an agreement. Under both international law and EU law, the binding effect of an agreement depends in particular on the parties' intention to be bound by it as a matter of international law.[30] That intention is to be established on the basis of, in particular, the actual terms of the agreement and also the circumstances in which it was drawn up.[31] By contrast, the name and form of the agreement are not of decisive relevance for establishing whether an international agreement is binding or non-binding.[32]

67. In the present case, the 2006 MoU and the 2013 addendum reflect the concurrence of wills, as a result of negotiations between the Union and Switzerland, with regard to the latter's political undertaking to negotiate with Croatia an agreement on arrangements for an SFC. Whether that undertaking was unilateral or reciprocal does not, as such, alter its non-binding character as a matter of law. According to the text of the 2013 addendum, Switzerland 'intends to commit the contribution until 31 May 2017'. It also 'accepts to negotiate' with Croatia and 'accepts to propose that the Swiss Parliament approves additional funding'. The other guidelines set out in the 2006 MoU and its annex

26 — Judgment in *Parliament and Commission* v *Council*, C-103/12 and C-165/12, EU:C:2014:2400, paragraph 83 and the case-law cited. Article 218 TFEU applies to treaties within the meaning of Article 2(1)(a)(i) of the 1986 Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations, A/CONF.129/15 ('the 1986 Vienna Convention'): see judgment in *France* v *Commission*, C-327/91, EU:C:1994:305, paragraph 25. See also Opinion 1/13, EU:C:2014:2303, paragraph 37.

27 — Under international law, approval and signature are among the means of expressing consent to be bound by a treaty: see Article 11 of the 1986 Vienna Convention and the 1969 Vienna Convention on the Law of Treaties, *United Nations Treaty Series*, Vol. 1155, p. 331 ('the 1969 Vienna Convention').

28 — See Article 18 of both the 1969 Vienna Convention and the 1986 Vienna Convention.

29 — Judgment in *France* v *Commission*, C-327/91, EU:C:1994:305, paragraph 15.

30 — See, for example, judgment in *France* v *Commission*, C-233/02, EU:C:2004:173, paragraph 42.

31 — See judgment in *France* v *Commission*, C-233/02, EU:C:2004:173, paragraphs 43 and 44, and also ICJ, *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994, p. 112, at pp. 120-121, paragraph 23. Where those terms are clear, parties cannot subsequently pretend to have intended otherwise (paragraph 27 in the same judgment of the ICJ).

32 — See Opinion 1/75, EU:C:1975:145, section A, second paragraph, and also ICJ, *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, cited in footnote 31 above, at pp. 120-121, paragraph 23. Thus, the use of 'memorandum of understanding' ('MoU') or 'addendum' thereto is of no decisive consequence. See also ICJ, *South West Africa cases*, Preliminary Objections, I.C.J. Reports 1962, p. 331. In fact, these terms may be used for both types of international agreement. The Treaty Section of the Office of Legal Affairs of the United Nations comments that the term MoU 'is often used to denote a less formal international instrument than a typical treaty or international agreement. It often sets out operational arrangements under a framework international agreement. It is also used for the regulation of technical or detailed matters. … For example, the United Nations usually concludes [MoUs] with Member States in order to organise its peacekeeping operations or to arrange United Nations conferences. The United Nations considers such [MoUs] concluded by the United Nations to be binding and registers them ex officio.' United Nations, *Treaty Handbook* (2012), p. 68. See also, for example, Aust, A., *Modern Treaty Law and Practice*, 2nd edition (Cambridge University Press, 2007), at p. 26, and Gautier, P., 'Non-binding Agreements', in *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2006).

apply also to the agreement on the SFC for Croatia.[33] Thus, the agreement between Switzerland and the Union consists of 'guidelines' and Switzerland's commitments are expressed using terms that express intent rather than mandatory terminology (such as 'shall', 'must' or 'undertake') expressing obligations. Moreover, neither the 2013 addendum nor the 2006 MoU contains clauses regarding, for example, their entry into force, ratification, registration or deposition elsewhere, or the settlement of disputes regarding them. Those considerations, when taken together, strongly suggest the lack of intent to be bound by the 2013 addendum.

68. The circumstances surrounding the agreement on the 2013 addendum point to the same conclusion. Recital 8 of the contested decision states that the 2013 addendum 'does not, nor is it intended to, create any binding or legal obligations on either side under domestic and international law'. Swiss Federal Council Reports prepared for the Swiss Parliament substantiate that position. That also means that neither party accepted that it assumed any obligation for breach of which it could be held responsible under international law.

69. However, the fact that the 2013 addendum is not an international agreement within the meaning of Article 218 TFEU does not automatically imply that the contested decision is not intended to produce legal effects. Indeed, the effects of an agreement (binding or otherwise) under international law are distinct from the effects, as a matter of EU law, of the act through which the (competent) Union institution expresses agreement with its content and authorises signature.[34]

70. The 2013 addendum formed part of a compromise leading to the conclusion of binding sectoral agreements between the Union and Switzerland and set the parameters for legally binding bilateral agreements between Switzerland and each beneficiary Member State. On the basis of the 2013 addendum, a third State initiated a parliamentary process in order to start negotiations with a new EU Member State on a binding agreement. As a result of the signature which the Commission authorised, the Union thus became bound by any consequences which international law may attach to that signature and to the relations between parties to a non-binding agreement.

71. The contested decision and the signed 2013 addendum also produce legal effects vis-à-vis other EU institutions and the Member States. In so far as the Union was competent to sign such an agreement with a third State (irrespective of which institution had the power to approve and sign it and whether the competence to do so was exclusive or shared with the Member States), the need to guarantee the unity of the Union's external representation, and the related principle of sincere cooperation as it applies to the relationship between the Member States and the Union and between Union institutions, resulted in obligations for the EU institutions and the Member States to cooperate in achieving the Union's objectives, to abstain from undermining such action and to ensure consistency between the Union's different policies.[35]

72. For these reasons, I consider that the Council's action was indeed brought against an act open to review under Article 263 TFEU.

33 — Paragraph 3 of the 2013 addendum.

34 — There are many different instruments under international law that are not binding but none the less can cause subjects of international law to change their conduct, such as treaty interpretations by international courts and tribunals with jurisdiction to do so or non-binding decisions of organs of an international organisation.

35 — See, for example, Article 21(3) TEU and Articles 7 and 205 TFEU.

Substance

Preliminary remarks

73. The Court is asked yet again to consider the distribution of powers between EU institutions as regards a form of Union external action for which the Treaties do not appear to lay down separate procedural rules.[36] The Council's application invites the Court to decide what rules of EU law must be respected in order for the Union to become a party to a non-binding agreement with a third State.

74. If Article 17 TEU does not confer on the Commission the power to approve and authorise the Union's signature of an agreement such as the 2013 addendum, the Commission failed to respect the principle articulated in the first sentence of Article 13(2) TEU and the contested decision must be annulled. That would also imply that Article 17 TEU was not a correct legal basis for the contested decision.

75. By contrast, if the Court dismisses the first plea, the legality of the decision may none the less still be questioned. That is so because an act such as the contested decision must be based on substantive competence of the Union and state the appropriate legal basis. Logically, indeed, the question whether the Union has substantive competence must precede the question of the distribution of powers between the Union institutions as regards matters for which the Union is competent. It also precedes that of the division of competences between the Union and the Member States (a question on which the parties did take a position in their pleadings[37]) and of the need to state a legal basis. Moreover, the parties' dispute about the scope of Articles 16 and 17 TEU might become moot in the light of the content of the provisions conferring substantive competence. In so far as those provisions set out an explicit procedure as to the form of action to be taken for exercising the competence at issue, neither Article 16 TEU nor Article 17 TEU alone could govern the question as to which institution was competent to act.

76. Thus, it seems to me that the Court is being asked to decide a question of principle ('who has power to act: the Council or the Commission?') in circumstances in which that question may not need to be addressed. That is because the Court has *not* been asked to review the legality of the contested decision on grounds relating to the Union's substantive competence or the decision's lack of any statement of that competence. Whilst I accept that neither party might have had an interest in raising these issues, the Council's application none the less triggers a series of preliminary questions regarding the Union's competence.

77. It is for the Court to raise of its own motion whether a particular Union institution has the power to act.[38] *A fortiori*, the same must apply with regard to the competence of the Union itself. That is a matter of such constitutional significance that it concerns public policy. At the hearing, the Court put questions to the parties on exactly this matter. However, neither party answered the question as to what was, in accordance with the principle of conferral, the Treaty provisions conferring competence on the Union to approve an MoU and authorise its signature in the area concerned by the decision (and irrespective of whether or not those provisions needed to be stated in the contested decision). Instead, both addressed only the requirement to state a legal basis. The Commission argued that the contested decision was not legally binding and therefore did not need to state a (material) legal basis; mentioning Article 17 TEU was sufficient. If that was its position, the Commission should logically have asked the Court to dismiss the Council's action as inadmissible, since there was no reviewable

36 — See also, for example, judgments in *Parliament and Commission* v *Council*, C-103/12 and C-165/12, EU:C:2014:2400, and *Council* v *Commission*, C-73/14, EU:C:2015:663.

37 — See points 82 to 84 below.

38 — See, for example, judgment in *Salzgitter* v *Commission*, C-210/98 P, EU:C:2000:397, paragraph 56 and the case-law cited.

act under Article 263 TFEU.[39] The Council presumably considered that the contested decision did have legal effects (otherwise it should not have lodged the application) — at the hearing, it agreed that that was its position — and yet it did not argue that the contested decision should be annulled because it failed to state a (material) legal base. As a result, the Court cannot — it seems to me — actually deal either with Union competence or with the need to state a legal base.

78. No issue is raised as to whether, under international law and EU law, the Union can become a party to a non-binding agreement. Nor is it contested that it is for the Commission, which is charged with the external representation of the Union,[40] to negotiate such agreements and that, in principle, it may sign them. Moreover, the Council itself appears to accept that a distinction can be made between, on the one hand, memoranda of understanding or other such instruments in which the Union undertakes policy commitments and, on the other hand, administrative arrangements which an EU institution or body may conclude on its own behalf by virtue of the principle of administrative autonomy in Article 335 TFEU. As regards the preliminary issues of capacity and competence under international law and EU law, I refer to the principles set out in my Opinion in Joined Cases C-103/12 and C-165/12 *Parliament and Commission* v *Council*.[41]

79. The Council's position on both pleas corresponds to that set out in a Council document concerning the conclusion by the European Union of Memoranda of Understanding, Joint Statements and other texts containing policy commitments, with third countries and international organisations.[42] That document was prepared against the background of what the Council perceived to be the Commission's increasing tendency to sign non-binding instruments containing EU policy commitments. In its pleadings, the Commission referred to its statement in response to that document, expressing its view that '… [the Council's position] is not in line with the institutional balance set up by the Treaties' and affirming that '[w]hen representing the Union externally, the Commission will apply the relevant Treaty provisions'.

80. Whether the initial measure (that is, the 2012 conclusions) through which the Council and the Member States meeting within the Council authorised the negotiations of the 2013 addendum is an act covered by Article 263 TFEU and is otherwise authorised under the Treaties are questions that are (logically) not before the Court. Indeed, it would be surprising if the Council sought annulment of its own conclusions. Nor, presumably, does the Commission have an interest in their annulment. I therefore consider it unnecessary to address the Commission's opposition to the use of hybrid acts and whether the Court's ruling in C-28/12 *Commission* v *Council*[43] casts doubt on the validity of the 2012 conclusions.

81. Finally, there is some disagreement as to whether the question of the division of competences between the Union and the Member States as regards the 2013 addendum is (or is not) before the Court and is the subject of a plea on the basis of which annulment of the contested decision is sought. I shall consider that issue first.

39 — The obligation to state reasons applies to all acts which may be the subject of an action for annulment: see judgment in *Commission* v *Council*, C-370/07, EU:C:2009:590, paragraph 42.

40 — See Article 17(1) TEU.

41 — EU:C:2014:334, points 86 and 94 to 101.

42 — Document 12498/13 (an annex to the Commission's defence). That document does not concern instruments containing only administrative arrangements for practical cooperation between an EU institution or body and a third State or international organisation.

43 — EU:C:2015:282. See footnote 9 above.

Competences of the Union and of the Member States

– Arguments

82. In the context of its first plea, the Council states that it understands the Commission's statement of 17 December 2012 as expressing the latter's disagreement with the involvement of the Member States and its agreement to receiving a mandate from the Council acting under Article 16 TEU. It adds that, by signing the 2013 addendum on its own and on behalf of the Union, the Commission disregarded the competence of the Member States and thus breached the principle of conferral under Article 4(1) TEU. That argument is also put forward in support of the Council's second plea.

83. The Council concedes that it has not made a separate plea as regards the shared or exclusive nature of the Union's competence. However, it argues that its submission in this regard was explicit and sufficient, and forms an essential part of the factual and legal context demonstrating that the Commission infringed the principles of distribution of powers and sincere cooperation. The features indicating the existence of shared competence are that: (i) the SFC concerns contributions from Switzerland to the beneficiary Member States; (ii) while the SFC reflects political commitments, the contributions themselves are legally structured by means of binding bilateral agreements between Switzerland and each beneficiary Member State; (iii) not all Member States are eligible; and (iv) as a result, the amounts are channelled directly from Switzerland to the beneficiary Member State and not through the Union's budget. In any event, the Council submits that the shared or exclusive nature of the Union's competence to sign the 2013 addendum is not liable to affect the procedure to be followed as regards that signature and that the Treaties do not limit the Council's actions to those protecting its own prerogatives.

84. The Commission submits that the Council has neither supported its allegation that the 2006 MoU and the two addenda fall within the shared competence of the Union and the Member States, nor formulated a plea as regards the latter's competence. In any event, it was for the Member States to defend their competence and prerogatives, not the Council.

– Assessment

85. My understanding of both pleas is that the Council seeks annulment of the contested decision because the Commission failed to respect the distribution of powers between the Council and the Commission and the principle of sincere cooperation that applies, in exercising its powers, in relation to other institutions. The Council has conceded that it has not raised any plea in law alleging that the Commission failed to respect either the division of competence between the Union and the Member States or the duty of sincere cooperation applicable between the EU institutions and the Member States. Thus, the Court is not asked to annul the contested decision on either of those grounds.

86. In submitting that arguments regarding shared competence support the plea(s) on which its application is based, the Council ignores the distinction between an argument and a plea. A plea is an assertion that, if upheld, leads to the granting of the form of order sought.[44] By contrast, an argument explains or indicates *why* a plea should be upheld and thus should be capable of producing that result. The argument must therefore support the plea. In the present case, the Council's explicit arguments about shared competence do not explain *why* the contested decision does not respect either the distribution of powers between the Council and the Commission (the first plea) or the principle of sincere cooperation to be respected in the exercise of their powers (the second plea). In fact, the Council itself accepts that those arguments will not affect the procedure. As I see it, the Council's arguments about shared competence are therefore inoperative.

44 — That follows *a contrario* from, for example, the judgment in *EFMA* v *Council*, C-46/98 P, EU:C:2000:474, paragraph 38.

87. In any event, neither the Council nor the intervening Member State have substantiated their arguments regarding shared competence by identifying the Treaty provisions which, in their view, establish (i) the Union's competence and (ii) the shared nature of that competence.

88. That is not to say that the Treaties precluded the Council from basing a plea on another institution's failure to respect the division of competences between the Union and the Member States. It is settled case-law that the right of action available to the Member States, the Parliament, the Council and the Commission, provided for in the second paragraph of Article 263 TFEU, is not conditional on proof of an interest in bringing proceedings.[45] Each of these applicants may seek annulment of an act covered by Article 263 TFEU without needing to show an interest.[46] As I see it, that implies that each of those parties may base its application on a plea regarding the prerogatives of another party.

Powers of the Council and the Commission (first plea)

– Arguments

89. The Council's first plea is that, by signing the 2013 addendum on behalf of the Union alone and without the Council's prior authorisation, the Commission decided on Union policy. It thus breached the principle of the distribution of powers in the first sentence of Article 13(2) TEU and also the principle of institutional balance. Nor could the Commission authorise that signature, without prior Council approval, on the basis of its own powers under Article 17 TEU. Pursuant to Article 16 TEU, it is for the Council to define Union policy in, inter alia, external relations. Thus, the Council authorises negotiations and approves the political commitments that the Union enters into with third States or international organisations. Although the Commission represents the Union's position (except with regard to the common foreign and security policy and other cases provided for in the Treaties), it cannot determine its content. The Council argues that policy-making and elaborating the Union's external action are wider than establishing a Union position. Moreover, initiating negotiations with a third State or another international organisation is itself an act of policy-making. That is all the more true of the decision to sign; signature reflects the Union's acceptance of the instrument's content. Because that content cannot be predicted ex ante, it cannot be said to be covered by any 'established position'.

90. In particular, the Council alleges that the Commission set the Union's position by deciding unilaterally: (i) to treat the matter as falling under the Union's exclusive competence; (ii) to change the signatories of the 2013 addendum so that the Commission signed alone on behalf of the Union; and (iii) to authorise signature of the 2013 addendum and thus to accept its content. As regards the first two points, the Commission acted against the explicit will of the Council.

91. The fact that Article 218 TFEU does not apply does not preclude the Council's involvement in the procedure for negotiating and concluding such instruments: Article 218 TFEU reflects the general distribution of powers under Articles 16 and 17 TEU.

45 — See judgments in *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 53, and *Parliament* v *Council*, C-355/10, EU:C:2012:516, paragraph 37 and the case-law cited.

46 — See, for example, judgment in *Commission* v *Council*, C-28/12, EU:C:2015:282, paragraph 18 and the case-law cited. The requirement that an application must be made for the purpose of protecting the applicant's prerogatives applies only with respect to actions under the third paragraph of Article 263 TFEU, namely those brought by the Court of Auditors, the European Central Bank or the Committee of the Regions.

92. The Council further argues that the signed text sent to the Swiss authorities on 7 November 2013 is not the same as the text which had been discussed within the Council's preparatory bodies inasmuch as the signatories and the capacity in which they signed differed. The Commission in effect precluded the Council from signing and sending its own version of the 2013 addendum. Had it done so, the Swiss authorities would have had two different versions. That would have been contrary to the principle of unity in the Union's external representation (and explains why the Council did not and could not seek renegotiation of the 2013 addendum).

93. Finally, as regards the Commission's reliance on its executive and management functions under Article 17(1) TEU, the Council fails to see, and the Commission did not explain, why, if Article 17(1) TEU confers the power to sign, it would not also confer the power to initiate negotiations.

94. The Commission takes the view that it is competent to sign non-binding instruments of a political nature on behalf of the Union in so far as they reflect an existing Union position. Signature is no more than an act of external representation on a political position previously fixed by the Council. Authorisation is thus not always required for the Commission to enter into negotiations about it and to sign its final version. The Council wrongly advocates the de facto application of Article 218(3) and (5) TFEU.

95. The Commission recalls that it is not indispensable that a common position take a specific form for it to exist.[47] Thus, a Union position can be established on the basis of Council conclusions. In the present case, the contested decision did not depart from the Union's position on the SFC for Croatia set out in the 2012 conclusions. Nor does the Council dispute that the content of the 2013 addendum corresponds to that position, or seek its renegotiation. The 2012 conclusions very precisely set out the factual framework and the method. There was no margin left for any negotiation by the Commission on either element. The Council has not submitted details, let alone evidence, showing that the Commission deviated from that framework.

96. Signature of the 2013 addendum was a form of external representation of the Union, which Article 17(1) TEU entrusts to the Commission. It can also be linked to the Commission's executive and management functions under Article 17(1) TEU as reflected in the 2006 MoU and the 2008 and 2013 addenda. The Commission argues that the Council's position is confusing. On the one hand, the Council claims that the notion of policy-making is wider than setting a Union position. If that were the case, the Commission could act on a wider basis, within an established Union policy. On the other hand, the Council also maintains that Article 16(1) TEU required the Commission to seek Council approval prior to signature. The Commission further notes that Article 17(1) TEU reflects Article I-26 of the Treaty establishing a Constitution for Europe: in the context of the debate on that provision by the European Convention in 2003,[48] the Commission, supported by several Member States' representatives, sought and obtained recognition of its role and responsibilities in external representation.

97. The Commission states that it is not disputed that it kept the Council well informed. In its reply, the Council refers for the first time to the information which it received on the amount of the contribution under discussion. However, the Commission points out that Switzerland consistently took the position that the determination of the amount of the Swiss contribution was a matter for Switzerland alone unilateral decision. The Commission was not made aware of any objection from the Council to the results of the contacts with Switzerland. In its application, the Council did not — and could not — raise any objections as to substance.

47 — Judgment in *Commission* v *Sweden*, C-246/07, EU:C:2010:203, paragraph 77.

48 — OJ 2004 C 310, p. 1.

98. In any event, the Council cannot raise concerns about the content of the 2013 addendum and its relation to the 2012 conclusions for the first time in its reply. They should have been mentioned during the meetings held in the Council or, at the latest, in the Council's application. Even if those allegations are admissible, they are unfounded. They have nothing to do with Article 16 TEU; they relate to the nature of the 2013 addendum rather than to the Council's powers. If, as the Commission assumes, the Council is referring to the allegedly hybrid (Union and intergovernmental) nature of the conclusions, there is no Treaty basis for such hybrid acts. Nor is there a role in the Treaties for the rotating Presidency of the Council to sign the addendum. The Council reasoning is, moreover, empty since the Council does not object to the amount of the SFC. The Commission has ensured that there is continuity of the approach already determined by the Council.

– Assessment

99. The first sentence of Article 13(2) TEU reflects the principle of institutional balance and requires each institution to exercise its powers with due regard for the powers of others.[49] If one institution encroaches upon the prerogatives of another institution, that provision has not been respected.

100. In this case, did the Commission exceed its powers under the Treaties, in particular Article 17 TEU, and possibly encroach upon the Council's prerogatives under Article 16 TEU? If so, that conclusion is sufficient to annul the contested decision.

101. In my view, the answer to that question is, yes.

102. The Court has held, in a case regarding the Commission's power to conclude Guidelines on regulatory cooperation and transparency with the United States of America, that the conditions under which a measure such as non-binding guidelines may be adopted require that 'the division of powers and the institutional balance established by the [Treaties in the relevant field] be duly taken into account'.[50] That implies that the lack of specific procedures in the Treaties on certain forms of action is not a bar to using those instruments in the Union's external relations. The Court cautioned that its judgment was not to be 'construed as upholding the Commission's argument that the fact that a measure such as the Guidelines is not binding is sufficient to confer on that institution the competence to adopt it'.[51] Whilst the Court thus concluded that (what is now) Article 218 TFEU did not apply,[52] it did not make a positive finding on the applicable procedures and the respective power(s) of the institutions as regards the Guidelines at issue in that case.

103. In the present case, Article 17 TEU is the sole legal basis identified in the contested decision. No mention is made of the competence conferred on the Union to adopt a decision such as that at issue.[53]

104. Union policies are formulated at the level of the European Council and the Council. Without their prior intervention, the Commission cannot know what Union policy to represent (externally). The Council's power under the second sentence of Article 16(1) TEU to carry out policy-making functions as laid down in the Treaties[54] means that it is the Council's prerogative to decide as to what (in)action is necessary for the pursuit of the common policies as laid down by the Treaties,[55] particularly the Treaty on the Functioning of the European Union. It must do so in the light of the

49 — See judgment in *Council* v *Commission*, C-73/14, EU:C:2015:663, paragraph 61 and the case-law cited.

50 — Judgment in *France* v *Commission*, C-233/02, EU:C:2004:173, paragraph 40. See also judgment in *ERTA*, 22/70, EU:C:1971:32, paragraph 72, and my Opinion in Joined Cases *Parliament and Commission* v *Council*, C-103/12 and C-165/12, EU:C:2014:334, points 99 and 100.

51 — Judgment in *France* v *Commission*, C-233/02, EU:C:2004:173, paragraph 40.

52 — Judgment in *France* v *Commission*, C-233/02, EU:C:2004:173, paragraph 45.

53 — See points 75 to 77 above.

54 — I have explained my reading of the phrase 'as laid down in the Treaties' in my Opinion in *Council* v *Commission*, C-73/14, EU:C:2015:490, points 93 and 94.

55 — Judgment in *Parliament and Commission* v *Council*, C-103/12 and C-165/12, EU:C:2014:2400, paragraph 50.

European Council's position, pursuant to Article 15(1) TEU, on the Union's general political directions and priorities. The third subparagraph of Article 16(6) TEU confirms that relationship. The European Council lays down strategic guidelines; the Foreign Affairs Council elaborates the Union's external action on the basis of those guidelines.

105. Thereafter, it is for the Commission, in accordance with Article 17(1) TEU, to (inter alia) ensure the application of the Treaties and measures adopted pursuant thereto, exercise coordinating, executive and management functions as laid down in the Treaties and, subject to a few exceptions, to ensure the representation of the Union and its policies in external relations. [56]

106. Thus, in the context of external relations, when Article 21(2) TEU indicates that the Union is to define and pursue common policies and actions in order to achieve the objectives stated therein, it is the European Council which sets out the strategic interests and objectives of the Union in external relations, [57] the Council which defines those policies and the Commission which executes the measures which give effect to those policies.

107. What each power entails will depend in part on the instrument through which the Union acts externally. For some forms of instrument, the Treaties expressly set out the role of each institution in the external action and lay down the procedural rules for involving the Union (and the institutions through which it acts). The most common example is Article 218 TFEU. However, unlike internal Union action, the instruments through which the Union acts externally are not limited to those for which the Treaties expressly provide, establish the form and effects and lay down the procedural steps to be taken. [58] How the Union, as an international legal person, [59] acts on the international plane depends rather on both international law and EU law. [60]

108. I have accepted elsewhere that, given the lack of separate rules laying down procedures to enable the Union to act externally by means of unilaterally binding declaration, there may be scope to apply (parts of) Article 218 TFEU by analogy. [61] However, where the external action of the Union is *not* intended to bind the Union (and any other parties involved in it), I see no basis for that approach.

109. In the present case, the Commission accepts that it was for the Council to decide on whether to start negotiations with Switzerland in order to obtain an agreement on an SFC for Croatia; that decision involved policy-making. At the hearing, the Commission acknowledged that the 2012 conclusions formed the basis for it to initiate those negotiations. That implies that the Commission also accepts that Article 17(1) TEU would not be a correct legal basis for the decision to initiate negotiations.

110. I agree that it is for the Council to assess the situation and decide whether the Union should initiate negotiations with a third State in order to find agreement on a matter that forms part of 'or is related to' an area for which the Union is competent (whether that competence is exclusive or shared) and to decide on the Union policy and interests to be pursued and any limiting constraints.

56 — See also my Opinion in *Council* v *Commission*, C-73/14, EU:C:2015:490, point 104.

57 — See also the first subparagraph of Article 22(1) TEU. Decisions of the European Council are to be implemented in accordance with the procedures laid down in the Treaties (see the third subparagraph of Article 22(1) TEU).

58 — There is thus no equivalent to the list of available legislative instruments for internal Union action contained in Article 288 TFEU.

59 — See Article 47 TEU.

60 — See also my Opinions in Joined Cases *Parliament and Commission* v *Council*, C-103/12 and C-165/12, EU:C:2014:334, point 107, and *Council* v *Commission*, C-73/14, EU:C:2015:490, point 94.

61 — See my Opinion in Joined Cases *Parliament and Commission* v *Council*, C-103/12 and C-165/12, EU:C:2014:334, points 112 to 121 and 123. On the possibility of applying Article 218 TFEU in another context, see also the Opinion of Advocate General Cruz Villalón in *Germany* v *Council*, C-399/12, EU:C:2014:289, points 101 to 114.

111. As I see it, policy-making includes the decision that an objective for which the Union is competent can be pursued by obtaining a commitment (whether or not binding) from a third State to pay a financial contribution to a new Member State pursuant to a future bilateral agreement between those two parties (assuming no such decision has been taken earlier) and thus by participating in external action, in the form of negotiations and possibly the subsequent conclusion of an instrument to obtain that commitment.

112. When the Council has exercised that prerogative by authorising negotiations, it is then for the Commission to represent the Union in negotiations, in accordance with the Council's authorisation and the Union's policies and interests. However, that initial Council decision does not extinguish the Council's power under Article 16(1) TEU to decide on whether or not the Union should become a party to the instrument resulting from those negotiations and sign it.

113. It is for the Council to verify the content of the agreement, the form of external action used, whether any relevant constraints have been respected and the continuing need for the Union to become a party to that agreement. These considerations apply without distinction to both binding and non-binding agreements to which the Union is to become a party. The Council must decide, in circumstances such as those at issue, whether the commitments actually made by the Union and the third State in the agreement contribute to the objective pursued, whether the need for such commitments and the form of the external act remain relevant, whether the Union is willing to accept it and whether the Union agrees to whatever consequences international law (and EU law) may attach to the external action. Consequently, the mere fact that the content of the agreement reached corresponds to the negotiating mandate given by the Council does not mean that the Commission can disregard the Council's powers under Article 16(1) TEU to decide whether or not to become a party to an agreement such as the 2013 addendum. Nor does the Council's silence as to the content of the 2013 addendum necessarily imply that it had exercised its power and acquiesced in the decision to approve and sign the 2013 addendum.

114. In any event, the content of the 2013 addendum does not fully correspond to that of the 2012 conclusions. In negotiating the 2013 addendum, choices were made and decisions were taken by the Commission. These decisions needed to be approved by the Council. The task of external representation does not encompass deciding on whether or not the Union should participate in a particular form of external action, having a particular content and resulting in particular political and legal consequences for the Union (and possibly the Member States). In the present case, the 2012 conclusions did not set out the total amount of the SFC, the duration of the funding, when the funding would start and end, or the extent to which the 2006 MoU and its Annex would apply. The 2013 addendum gave a particular substance to each of those matters. Nor did or could the 2012 conclusions determine in advance whether or not it would still be desirable for the Union to conclude the addendum to the 2006 MoU that emerged from the negotiations.

115. I thus reject the Commission's submission that the 2012 conclusions set out the factual framework and method in such a manner that there was no margin left for any real negotiation by the Commission. In fact, the Council gave the Commission a considerable degree of discretion to negotiate the agreement. What it did *not* authorise the Commission to do was to decide itself on whether the result of the negotiations was consistent with, and remained desirable in the context of, the policy pursued by the Union or, consequently, to authorise one or more of its Members to sign the resulting addendum alone on behalf of the Union. Even if Switzerland set the amount of the SFC unilaterally, it was still for the Council to verify whether that amount was sufficient, taking into account the policy being pursued and the wider context in which the 2013 addendum was concluded. Moreover, the 2013 addendum was not merely a clarification or application of existing commitments assumed under the 2006 MoU. Deciding on the 2013 addendum required a separate assessment of whether, in relation to Croatia, an SFC was (still) needed and under what conditions.

116. Nor can the Commission rely on the fact that it undertook to exercise executive and management functions in accordance with the 2006 MoU and the different addenda to claim that it could sign the 2013 addendum on the ground that, pursuant to Article 17(1) TEU, it is charged with such functions. The mere fact that the Commission exercises those functions does not empower it to sign agreements in which those functions are confirmed in one or more provision(s) thereof.

117. I conclude that the decision on whether or not to approve and sign a non-binding international agreement with a third State belongs to the Council. I therefore consider that the Court should uphold the first plea because the Commission exceeded its powers under Article 17(1) TEU and thus the contested decision infringes the first sentence of Article 13(2) TEU.

Principle of sincere cooperation (second plea)

– Arguments

118. The Council's second plea is that the Commission, by its conduct, breached the principle of sincere cooperation laid down in the second sentence of Article 13(2) TEU — the same as that which applies between the Member States and the institutions. At the hearing, the Council explained that its second plea was directed partly against the Commission's conduct leading up to the adoption of the contested decision but mostly against the Commission's conduct subsequent to the adoption of the contested decision.

119. First, the Commission knowingly encroached on the Council's powers under Article 16 TEU and therefore acted in breach of the principle of institutional balance. It proceeded to sign the 2013 addendum despite being asked *repeatedly* by the Council not to do so. Prior to the adoption of the contested decision, the Council was never informed that the Commission intended to empower itself to sign the 2013 addendum without prior authorisation and to do so before the Council could finalise the procedures it had launched to remedy the situation created by the Commission. The fact that, on the Commission's behalf, the EEAS expressed disagreement with the Council's conclusions to be adopted on 19 November 2013 is not tantamount to informing the Council that the Commission intended to sign the 2013 addendum alone and on its own terms.

120. Second, the Commission knowingly and unilaterally disregarded the role of the Member States, in breach of Article 4(1) TEU. The issue is not whether the Council may raise a separate plea regarding Member States' competence. The contested decision was not in line with the 2012 conclusions because it disregarded the shared nature of the competence as regards those conclusions.

121. Third, the Commission intentionally acted in a manner which rendered ineffectual the Council's efforts to correct the situation created by the Commission. The Commission never informed the Council of its intention to adopt the contested decision and to sign the 2013 addendum and send it to the Swiss authorities. In the EFTA Working Party meetings that took place between the adoption of the contested decision (3 October 2013) and the signature of the 2013 addendum (7 November 2013), the Council repeatedly asked the Commission not to proceed. The Commission wrongly suggests that the Council failed to react for more than a month. In fact, the point was inserted in the agenda (for information only) of the first EFTA Working Party meeting after the Council was (informally) informed of the contested decision. At the meeting of 23 October 2013, the Commission was repeatedly asked not to proceed. When the EFTA Working Party found a solution, at the meeting of 31 October 2013, the EEAS rejected it on the spot.

122. Fourth, the Commission knowingly acted in a manner which compromised the principle of unity in the Union's external representation and involved Switzerland in an interinstitutional disagreement. Any action by the Council to correct the situation would necessarily have required Switzerland to sign a further different version of the 2013 addendum. The Commission also failed to respect the 2012 conclusions inviting it to agree on an SFC 'in close cooperation with the Presidency of the Council' and to consult the competent preparatory body of the Council regularly on the progress of discussions.

123. The Commission objects that the Council has not explained how the second plea, if upheld, is capable of affecting the validity of the contested decision. It contests the four arguments advanced in support of that plea.

124. The first argument in essence reiterates the Council's submissions in support of its first plea. However, the Commission made its position clear to the Council all along. Furthermore, the fact that the Commission had accepted the Council's approach on previous occasions does not show that it disregarded its duty of sincere cooperation in this case.

125. The second argument must be rejected because the Council has not (and could not have) raised any plea based on Article 4(1) TEU. There is no submission in the Council's application on what Member States' individual roles in this case might have been. No Member State challenged the contested decision within the deadline for doing so.

126. The third argument has no merit. The Commission's position on non-binding instruments and, in particular, the 2013 addendum was well known. It also kept the Council regularly informed. Moreover, more than a month elapsed between the date on which the Council was informed of the adoption of the contested decision and the signature of the 2013 addendum. If the Council feared any negative consequences from the Commission's signature, it could and should have lodged a request for interim relief as soon as possible. The fact that the Council asks the Court to maintain the effects of the contested decision until such time as it is replaced undermines the notion that it is concerned about the situation created by the Commission.

127. As regards the fourth argument, the Commission submits that, when signing the 2013 addendum and exercising powers under Article 17 TEU, it ensured the external representation of the Union. In any event, it did not implicate Switzerland in an interinstitutional disagreement. That argument too contradicts the request to maintain the effects of the contested decision.

– Assessment

128. The duty of EU institutions to practice mutual sincere cooperation in accordance with the second sentence of Article 13(2) TEU applies together with the principle of institutional balance under the first sentence of the same provision.[62] That principle governs the manner in which powers, validly established under other Treaty provisions, are to be exercised. Thus, it cannot create obligations where no power exists and cannot change those powers.[63] It also applies in conjunction with other provisions which are specifically aimed at establishing an appropriate balance between various institutions, such as Article 218 TFEU.[64] The Court made it clear in Case C-425/13 *Commission* v *Council*, in the context of the respective functions of different institutions under provisions such as Article 17(1) TEU and Article 218 TFEU, that the Council and the Commission are required to respect the second sentence of Article 13(2) TEU. Such respect is particularly important for external

62 — See judgment in *Council* v *Commission*, C-409/13, EU:C:2015:217, paragraphs 64 and 65.

63 — See judgment in *Council* v *Commission*, C-73/14, EU:C:2015:663, paragraph 84 and the case-law cited.

64 — See, as regards Article 218 TFEU, judgment in *Commission* v *Council*, C-425/13, EU:C:2015:483, paragraph 62, where the Court characterised that provision as being 'an autonomous and general provision of constitutional scope, in that it confers specific powers on the EU institutions'.

action.[65] It requires each institution to abstain from any measure that could jeopardise the attainment of the Union's objectives and to contribute to facilitating the tasks of the other institutions. In the context of the principle of sincere cooperation as it applies between the Union and the Member States, the Court has said that the obligation flows from the requirement of unity of the international representation of the Union.[66] In my view, the same applies between Union institutions.

129. The Council has not stated whether its two pleas apply together or whether the second plea is made in the alternative should the first plea be dismissed. At the hearing, it appeared to suggest that the second plea offered additional support to the first plea. I have already concluded that the first plea should be upheld, inasmuch as the Commission exceeded its powers under Article 17(1) TEU and thus infringed the first sentence of Article 13(2) TEU. If the Court agrees, that excludes any further need to consider a separate plea based on the second sentence of Article 13(2) TEU.

130. In what follows, I shall therefore proceed on the assumption that the first plea is dismissed.

131. If the Commission was competent to adopt the contested decision, it cannot be faulted for failing to respect the principle of institutional balance because it approved and then signed the 2013 addendum despite the Council's objections (the first argument).[67] After all, on that premiss, the Council had no power to adopt the decision; nor could it block the Commission's decision.

132. As regards the second argument, the principle of sincere cooperation laid down in the second sentence of Article 13(2) TEU is not concerned with the division of competence between the Union and the Member States. Thus, a claim based on that provision cannot be supported by an argument relying on the Member States' competence. In any event, any position on the merits of that argument presupposes that the Union has competence and that the relationship between that competence and that of the Member States is first established.[68] Neither has been fully explored and decided here.

133. Nor can the Council complain that the Commission went ahead and signed the 2013 addendum despite its objections and attempts to remedy the situation by initiating Council procedures for approving the 2013 addendum and authorising its signature (third argument). In any event, after the adoption of the contested decision, the Council was put on notice (by that decision) of the Commission's intention to sign the 2013 addendum.

134. In so far as the third argument relates to the Commission's failure to inform the Council *prior* to the adoption of the contested act, I consider that the principle of sincere cooperation cannot furnish the Council with a right to oppose the contested decision for failing to respect its initial authorisation in the 2012 conclusions (because the issue arises in the context of the second plea only if the first plea is dismissed, and such dismissal would imply that the Commission itself could verify that conformity). Sincere cooperation nevertheless presupposes good faith and active cooperation between institutions in the exercise of their own powers and those of others. At a minimum, the Commission had to inform the Council. If it failed to do so, the question of whether the Commission also had to consult the Council does not arise.[69]

65 — See, as regards Article 218 TFEU, judgment in *Commission* v *Council*, C-425/13, EU:C:2015:483, paragraph 64.

66 — See, for example, judgment in *Commission* v *Sweden*, C-246/07, EU:C:2010:203, paragraph 73 and the case-law cited.

67 — See also my Opinion in *Council* v *Commission*, C-73/14, EU:C:2015:490, point 99.

68 — See, in particular, point 75 above.

69 — On the duty to consult resulting from the principle of sincere cooperation, see judgment in *Council* v *Commission*, C-73/14, EU:C:2015:663, paragraph 86.

135. In the present case, it appears that the Commission informed the Council of its decision only on the day of its adoption. It did so despite knowing that EFTA Working Party Members were proceeding on the assumption that they could scrutinize the results of the negotiations on the 2013 addendum. By acting in such a manner and not informing the Council beforehand, the Commission rendered the principle of sincere cooperation ineffective and made it impossible for the Council to contribute (if it wished to do so).

136. However, I consider that the Council has not shown that this infringement vitiated the contested decision, in particular by affecting its content or form, and is therefore sufficient to justify annulling the contested decision. As I see, the Council's arguments in that regard all correspond with those supporting its first plea.

137. The third argument also concerns the Commission's conduct between adoption of the contested decision and signature of the 2013 addendum. Those arguments relate to conduct that is irrelevant to the legality of the contested decision (even if they may support a finding of infringement of the principle of sincere cooperation).

138. I accept that the conduct prior to the adoption of a contested act may be contrary to the principle of sincere cooperation and affects its content or form. In appropriate circumstances, this may be a proper basis for annulling that act.

139. However, where a contested act (and the conduct leading to its adoption) is found to be in conformity with relevant Treaty provisions and otherwise consistent with EU law and where the plea based on the principle of sincere cooperation concerns conduct that took place subsequent to the contested act, that plea cannot be relevant to the legality of that prior act. In so far as that conduct affects a subsequent act (such as, in the present case, the act of signing the 2013 addendum), an action under Article 263 TFEU, especially if based on conduct that is contrary to obligations to abstain from certain behaviour, may be directed against that subsequent act provided the admissibility conditions are satisfied. Conversely, where a plea that the principle of sincere cooperation has been violated is based on the failure to act pursuant to positive obligations resulting from that principle, an action under Article 265 TFEU (for failure to act) would seem to be the more appropriate remedy.

140. If the Court were to dismiss the first plea, the fourth argument in support of the second plea disappears (there would be no need for the Council to produce a new version of the 2013 addendum in order to remedy a breach of that principle). Moreover, the principle of sincere cooperation in the second sentence of Article 13(2) TEU does not govern relations between the Union and third States.

141. Finally, the Commission's argument that the Council could and should have lodged a request for interim relief (for which Article 279 TFEU provides) as soon as possible presumably relates to a request for the suspension of the application of the contested decision (pursuant to Article 278 TFEU). However, since any such relief would have been without prejudice to the substance of the case before the Court, I consider that the fact that the Council did not formulate either type of request cannot be invoked to counter a plea based on a breach of the principle of sincere cooperation.

142. I conclude that, if the first plea is dismissed, the second plea should also be dismissed.

Request to maintain the effects of the contested decision

143. Should the Court annul the contested decision, the Council requests it to exercise its discretion pursuant to the second paragraph of Article 264 TFEU to maintain the effects of that decision until such time as it is replaced. The Council's request is based on considerations relating to legal certainty and the consistency of the Union's external action.

144. The effects of an act which has been declared void may be maintained, on grounds of legal certainty, in particular where the immediate effects of its annulment would give rise to serious negative consequences for the persons concerned and where the lawfulness of the act is contested not because of its aim or content but on grounds of lack of competence or infringement of an essential procedural requirement, including the ground that an incorrect legal basis was used.[70] In such cases, the Court has maintained the effects until the entry into force, within a reasonable period of time after the date of its judgment annulling the act, of a new act adopted on the proper legal basis.[71]

145. As I see it, in the context of external relations cases, these requests are often prompted by the fact that,[72] whilst EU rules setting out the rules under which the Union can act externally cannot be relied on vis-à-vis the third parties with which the Union interacts in its external relations, the decision to annul an act that enabled and/or formed the basis for the Union's external action may result in considerable legal uncertainty within and outside the Union and is liable to undermine the principles on which the Union's external relations are founded.

146. In the present case, the effects of the contested decision, that is, the approval of and authorisation to sign the 2013 addendum, should be maintained. Otherwise, annulment is liable to undermine the effectiveness of the Union's external action, the wider set of agreements with Switzerland forming the background to the 2013 addendum, the subsequent bilateral agreement between Switzerland and Croatia and the contributions (to be) made by Switzerland to Croatia.

147. However, it seems difficult to identify an obvious period of time during which those effects should be maintained. Doing so would require confirmation of the proper legal basis of the decision to be adopted (including that establishing substantive competence) as well as a decision on whether the Union had shared or exclusive competence. It seems to me that the Court can either set a (necessarily arbitrary) time limit, such as one year, within which the institutions and (if relevant) the Member States are to take the necessary steps to resolve these issues, or maintain the effects of the contested decision until a new decision comes into effect. My preference is for the latter.

Costs

148. Pursuant to Article 138(1) of the Rules of Procedure of the Court of Justice, the Commission as the unsuccessful party in the present proceedings should be ordered to pay the costs for which the Council applied in its pleadings. In accordance with Article 140(1) of those rules, the intervening Member States should bear their own costs.

Conclusion

149. In the light of these considerations, I conclude that the Court should:

— annul the decision of the European Commission of 3 October 2013 on the signature of an addendum to the Memorandum of Understanding on a Swiss financial contribution of 27 February 2006;

— maintain the effects of that decision until the decision to be made in consequence of the Court's judgment comes into operation;

70 — Judgment in *Parliament and Commission* v *Council*, C-103/12 and C-165/12, EU:C:2014:2400, paragraph 90 and the case-law cited.

71 — See, for example, judgment in *Parliament and Commission* v *Council*, C-103/12 and C-165/12, EU:C:2014:2400, paragraph 93.

72 — Advocate General Wahl has expressed concerns about recurring requests to maintain effects because these in essence imply asking the Court to make a ruling without consequences which is not the typical role of a judicial body: see Opinion of Advocate General Wahl in Joined Cases *Parliament and Commission* v *Council*, C-132/14 to C-136/14, EU:C:2015:425, point 40.

— order the Commission to pay the costs; and

— order the Czech, Finnish, French, German, Greek, Hungarian, Lithuanian, Polish, and United Kingdom Governments to bear their own costs.