

# Pinpointing the Appropriate Legal Basis for External Action

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*Case C-658/11, European Parliament v Council of the European Union [2014]  
(not yet reported)*

*CFSP acts can be challenged before the Court when the arguments relate to procedural points outside of the CFSP articles in Title V TEU. The Court can annul Council CFSP acts when the proper notification procedures to the Parliament stemming from Article 218 TFEU have not been followed. The effects of CFSP acts can remain in place, even after the Court annuls them, until such a time when the act has been replaced.*

## I. Introduction

This judgment from the Court of Justice dealt with the issue of international agreements that the Union enters into since the Treaty of Lisbon, therefore having wide-ranging ramifications for that of EU external relations. The EU and the state of Mauritius concluded and signed an agreement in 2011 arising out of the piracy acts taking place in the Gulf of Aden off the eastern coast of Africa. There were two pleas to be made by the Parliament in the case for annulling the agreement. Firstly, it contested the appropriate legal basis for the agreement based upon the Common Foreign and Security Policy (CFSP) which the Council used to conclude the agreement. Secondly on a more procedural point of law, the Parliament contested that they were not fully informed of the EU-Mauritius transfer agreement which on their reading of the Treaties, stated they must be for proper democratic oversight to occur.

The scenario demonstrated the institutions of the Union continue to clash over the appropriate legal basis for particular forms of external action, and are not hesitant to contest differing interpretations before the Court of Justice. Whilst the technical intricacies of the case may seem trivial in the grander scheme of litigation, the mere case of the Council failing to duly inform the Parliament led them to a partial victory, culminating in the annulment of the agreement. Given that an annulment of an internal Union CFSP act poses substantial external risks in the form of security in the region, an onus lay upon

the Court to uphold the effects on the annulled agreement until such a time arose when the internal legal procedure could be replaced.

## II. Case Facts and Arguments of the Parties

The facts of the case should be recalled in order to understand its wider significance in the field of EU law. The Union's first ever joint naval mission, EUNAVFOR (Operation Atalanta), was launched in 2008 as a reaction to the rising threat of piracy operations in the Indian Ocean. When naval forces of EU Member States operating under the auspices of the Union captured individuals engaged in such activity, they sought to transfer the individuals to nearby countries who have an interest in bringing such individuals to justice for alleged crimes. Upon the capturing of persons suspected of piracy, the Union was willing to transfer these individuals to nearby states where they could be prosecuted under local laws. The overarching aim of pirate transfer agreements was to transfer persons suspected to commit, committing or having committed acts of piracy off the territorial seas of the third country that is within the scope of the EUNAVFOR operation. The Union, through unanimous agreement at the Council, therefore negotiated and concluded an international agreement with a number of states, including Mauritius and others in the region on the transferral of individuals suspected of piracy, a Pirate Transfer Agreement, relying on Article 37 TEU, Articles 218(5) TFEU, and Article 218(6) TFEU. The Parliament were not contesting the legality of the EU's military Common Security and Defence Policy (CSDP) mission off the Somalian coast in itself, but

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rather the points concerning the appropriate legal basis which Decision 2011/640/CFSP had taken place.

The two issues were as follows. First, the agreement provided a framework for the transfer by Union operations of individuals engaged in perceived piracy activity to local authorities in the state of Mauritius. Article 218 TFEU details the procedures when the Union opens, negotiates and concludes international agreements. The Parliament took issue with the conclusion of the agreement that the Council made unilaterally with Mauritius, attempting to make the distinction between the appropriate “centre of gravity”, which they agreed was principally CFSP, but should have been consulted because of the non-CFSP elements such as judicial cooperation and development policy. In their view, the Council had erred in basing the conclusion of the agreement on an exclusively CFSP legal basis. Under Article 218(6) TFEU, this meant the Parliament had no formal input into the conclusion of the agreement. The Parliament were of the opinion that the agreement negotiated between the two parties contained measures relating to the Area of Freedom, Security and Justice (AFSJ), which should be done under a legal basis providing for the Ordinary Legislative Procedure, and therefore, the consent of the Parliament as per Article 218(6)(a)(v) TFEU. On the contrary, the Council believed a lone CFSP legal basis was correct, whereas the Parliament said given other matters were part of the agreement, a non-CFSP legal basis through judicial cooperation and development was appropriate, therefore requiring its consent. This first plea was an active attempt by the Parliament to narrow the scope of CFSP actions on a legal basis, in an endeavour to force more external action on a non-CFSP legal basis, thereby ensuring the Parliament’s own involvement. The ultimate question was what was the correct legal basis, CFSP or non-CFSP?

Secondly, there was the issue of being kept fully informed at all stages of the agreement, relating to the larger issue of parliamentary input in the Union’s international agreements. Article 218(10) TFEU is an important provision in the Treaties for the Parliament in international agreements which provides that, “the European Parliament shall be immediately and fully informed at all stages of the procedure”, which the Parliament interpreted as applying to both CFSP and non-CFSP international agreements. This clause was only inserted into the Treaties by Lisbon and in this instance, the Parliament received noti-

fication of the conclusion of the EU-Mauritius agreement from the Council three months after its conclusion, falling foul of what they understood as “immediately and fully informed”. Furthermore, this was after the conclusion of the agreement by the Council had been published and appeared in the *Official Journal of the European Union*. The Council, disagreeing, argued that since the agreement was solely CFSP related, it has fulfilled its obligations under Article 218(6) TFEU. This second plea by the Parliament was made of democratic principles which the Parliament argued was essential for the effective functioning of the institution as mandated by the Treaties.

### III. Opinion of the Advocate-General

On the first point regarding the choice of legal base, Advocate-General (AG) Bot interpreted that the Parliament was claiming the agreement should also have additional non-CFSP legal bases to cater for all the measures within the agreement. In attempting to answer the question of which legal base applied for this particular agreement, the AG disagreed with the Council on the point that it had only had CFSP elements, as he said there were non-CFSP components, however further stated the agreement was correct to be conducted through a CFSP measure because the basic objectives of the agreement have been “traditionally assigned” to CFSP.<sup>1</sup> In citing the international context of the anti-piracy mission with references to United National Security Council Resolutions on the issue,<sup>2</sup> CFSP in his view was the appropriate instrument to use for implementing the Union’s actions given that CFSP’s objectives<sup>3</sup> range from the preservation of EU values to the principles of international law. To this end, AG Bot concluded that “the objective of preserving international peace and strengthening security, [the case] militates in favour of it being related to the CFSP.”<sup>4</sup> He further stated that the contested measures of transferring individuals to the third state under the agreement did not fall within judicial cooperation and development (requiring Parliament involvement under an alternative

1 Case C-658/11, AG Opinion, para 87.

2 Case C-658/11, AG Opinion, paras 43-53.

3 Article 21(2)(a) – Article 21(2)(h) TEU.

4 Case C-658/11, AG Opinion, para 89.

legal base), but rather within the scope of Articles 42 and 43 TEU on civilian and military grounds,<sup>5</sup> upon which the joint naval mission was based upon within CSDP. AG Bot also rejected the other legal bases that the Parliament advocated for.<sup>6</sup>

On the second point on the appropriate notification procedure used by the Council, whilst the Council claimed the Court had no basis to make such a finding, the AG said the Court has jurisdiction to examine the application of the rule informing Parliament, despite Article 24(1) TEU, Article 40 TEU and Article 275 TFEU having a limiting influence of the Court in the CFSP area. The Treaties have gone some way to strengthening the Court in CFSP,<sup>7</sup> and it is allowed to make authoritative pronouncements in a limited range of CFSP scenarios, which the AG was of the view. Beyond whether the Court had the jurisdiction to hear the CFSP argument, the AG ultimately was of the opinion that such pleadings by the Parliament cannot result in the annulment that was sought.<sup>8</sup> Whilst he said the Parliament had been informed at particular stages such as the opening of negotiations, since it was a CFSP agreement, that Parliament therefore could not be expected to continuously informed,<sup>9</sup> even though in the spirit of Article 218(10) TFEU that it should have been informed of the contest decision before its appearance in the *Official Journal*.<sup>10</sup> Accordingly on both counts, AG Bot proposed that the Court in its judgment should dismiss the application by the Parliament against the Council on both pleadings.

#### IV. Judgment of the Court

The Court both agreed and disagreed with the AG's Opinion on a number of points within the two plead-

ings. However, it was on the second pleading it disagreed with AG, that the Court took a favourable view of the argument put forward by the Parliament on its "fully informed" position.

On the first point regarding the choice of legal base, when contrasted with the Opinion of the AG, the Court took a different approach to the issue. The judgment of the Court said that the wording of the Treaties was to be interpreted in a manner than ensures consistency between the internal and external powers of the Parliament.<sup>11</sup> With the Parliament's mere powers provided under Article 36 TEU, that it is regularly consulted on the "main aspects and the basic choices" of CFSP, according to the Court, this fulfilled the Council's criteria for engaging with them. The Court rejected the Parliament's questioning of the CFSP legal basis as grounds for the conclusion of the agreement as it represented the balance of internal powers between the different institutions. Whilst the transfer arrangement in the agreement had been adopted on a CFSP basis, the consent of the Parliament was not required because the agreement related exclusivity to CFSP within the interpretation of Article 218(6) TFEU as the other non-CFSP aspects of the agreement were merely "incidental", as opposed to being centred on those features. Therefore, in view of the Court, the proportionate balance had been struck by the Council between the decision-making procedure chosen and the appropriate legal basis.

On the second point on the appropriate notification procedure, the Council lost on two points of law here. Regarding the admissibility argument, the Court rejected the Council's claim the Court had no jurisdiction on this individual point (and therefore agreed with the AG), and stated that Article 218 TFEU was of "general application",<sup>12</sup> meaning its applicability to both CFSP and non-CFSP international agreements. More importantly, once the admissibility issue had been resolved, the Court found that the Council has erred by failing to immediately inform the Parliament, and that the delay of three months was insufficient to meet the standards imposed by the Treaties. It said the steps laid out in Article 218(10) TFEU were to be implied the Parliament was to be fully informed at all stages of an agreement, including the conclusion of the agreement. In stating that mere publication in the *Official Journal* was not enough,<sup>13</sup> the Council had therefore infringed Article 218(10) TFEU, and therefore the Court under Ar-

5 Case C-658/11, AG Opinion, para 94.

6 Case C-658/11, AG Opinion, paras 112 and 122.

7 Marise Cremona and Anne Thies, "Introduction," in *The European Court of Justice and External Relations Law: Constitutional Challenges*, Modern Studies in European Law (Oxford: Hart Publishing, 2014), 1-11. p. 11.

8 Case C-658/11, AG Opinion, para 154.

9 Case C-658/11, AG Opinion, para 156.

10 Case C-658/11, AG Opinion, para 156.

11 Case C-658/11, Judgment, para 57.

12 Case C-658/11, Judgment, para 72.

13 Case C-658/11, Judgment, paras 78-79.

Article 263 TFEU was in a position to annul the particular Council action based on this contravention alone. The Court went even further to state that technical rules constituting an essential procedural requirement can lead to nullity of Union acts,<sup>14</sup> even though the contested agreement was on a CFSP legal basis. Furthermore, it was to be applied to all stages of all international agreements, despite the Parliament not possessing consenting powers. Finally, the Court said that when the full steps set out in Article 218(10) TFEU were not followed, the Parliament's ability to exercise its Treaty-mandated work would be significantly hampered and its right of scrutiny may not be able to be fulfilled. In its assessment, the Council's action in this regard amounted to an infringement of the basis procedural requirements expected of it when engaging externally with international agreements, significantly neglecting the Parliament of its ability to perform its Treaty-based functions.

Consequently, the Parliament succeeded in having a Council decision annulled due to their inability to follow Treaty-mandated procedures on its working arrangements with the Parliament. Whilst the contested decision was annulled, all parties requested that the effects of the decision remain in place until such a time that it is replaced. This was to ensure the full effectiveness of the EUNAVFOR mission were maintained,<sup>15</sup> which the Court was satisfied to grant under its powers in Article 264 TFEU.

## V. Case Comment

The Parliament is no stranger to seeking ways to justify itself attaining more powers, and using those powers, particularly in the post-Lisbon environment.<sup>16</sup> Under the auspices of the democratic enhancement of the Union, it sees this prerogative on both internal and external measures. It is unquestionable that this case signified the Parliament's intent on moving closer to, and even into the Union's CFSP framework, having won a new stake in CFSP that has traditionally been an instrument of intergovernmentalism.

On the first account with regard to the appropriate legal basis, the judgment can first of all be seen from the perspective that the Court is resolutely defending the unique legal order of CFSP. This is continuously intriguing given the Court itself continues

to have Treaty-imposed restrictions of judicial review placed upon it by the Member States. Therefore, the Court's judgment appears consistent with the general premise of the effective conclusion of international agreements as the Treaties outline, much to the detriment of the Parliament's argument, which maybe just stretched a little too far for the Court to appeased by such a construal in this case. Had the Parliament been victors on this point, it would have seen the further supranationalisation of CFSP, mandating that the Parliament would have to provide consent to CFSP agreements in many scenarios, going against the spirit of the Treaties, despite the Parliament already possessing consenting powers for other EU external relations policies on non-CFSP legal bases. Moreover, it could have potentially allowed the Court to provide clarity on the general extent of CFSP acts, the first possible scenario since Lisbon revisions, conceivably redrawing the line to be thread between having a legal framework that should be followed as per the Treaties, whilst simultaneously allowing for more democratic decision-making. Instead, in the judgment of Court, a much narrower legal point was clarified, leaving open the possibility for the Parliament to challenge future CFSP agreements and argue further before the Court. Questions may arise in the future on CFSP measures are taken and contain a substantial number of other external policies where a non-CFSP legal base may be more appropriate.

On the second account, when the jurisdiction of the Court was challenged first of all, the Court stating it had jurisdiction to hear CFSP cases is a significant point. This is the Court in a roundabout manner ensuring its own place within the CFSP framework by allowing the case to proceed and be deemed admissible, rather than the institutional interests of the Parliament being served. Regardless, the outcome of the case means that CFSP acts on procedural points

<sup>14</sup> Case C-658/11, Judgment, para 80.

<sup>15</sup> Case C-658/11, Judgment, paras 88-91.

<sup>16</sup> The Parliament rejected the Anti-Counterfeiting Trade Agreement (ACTA) in July 2012, thereby preventing its furtherance within the Union. The Commission subsequently withdrew its request for an opinion of the Court of Justice on its compatibility with the Treaties and in particular, with the Charter of Fundamental Rights, on the grounds that without the consent of the Parliament, the agreement would go no further. Similarly, a member of the European Parliament initiated proceedings at the Court on the same agreement, which the Parliament was not allowed to intervene in. See T-301/10, *Sophie in 't Veld v European Commission* [2013] (not yet reported) ECLI:EU:T:2013:135.

outside of CFSP's Title V TEU can be challenged in the Court. Whilst the AG was not of the view that lack of notification from the Council to the Parliament was inconsistent with the Treaties, the Court's decision to annul the act as the Council had acted in an improper manner has ensured that the Parliament's ever-increasing range of powers must be protected, guaranteeing effective democratic representation and legitimacy of all Union policies, including those that are primarily CFSP in nature. The Court found the Council's attitude towards the Parliament so brash and ill-considered on this point that it was enough to annul the agreement. The Council's defence argument, that proper notification by way of the *Official Journal* and direct notification to the Parliament one month after this has been described as simply "staggering".<sup>17</sup>

There is potential that the judgment has significantly broadened the Parliament's broader legal standing in its information rights from the Council.<sup>18</sup> By ensuring that Article 218 TFEU procedural aspects are strictly followed, the judgment could give rise to the Parliament to a whole range of other CFSP-related acts, including the different scenarios referred to in Article 218 TFEU. Thus, parliamentary input informally into future CFSP acts at an earlier stage could be a way of future engagement between the institutions – a significant enhancement for the Parliament that is always content in enjoying further command where it has traditionally been deliberately excluded. The wording of Article 218 TFEU does also not make a distinction between international agree-

ments, CFSP or otherwise, meaning the Court was correct to reject the AG's opinion on this point.

Even with the textual reforms of external relations provisions through the Treaty of Lisbon, the institutional actors with a stake in the outcome of different choices of legal bases continue to litigate for furthering their own institutions powers. Recent scholarship has emerged on the narrowing scope of CFSP in EU external action.<sup>19</sup> It has been put forward that Article 40 TEU, although not applied in this Mauritius judgment, could be used to bring CFSP and non-CFSP legal bases together,<sup>20</sup> integrating them eventually fully into the Union structures over time. Likewise, the ruling did not clarify fully the scope of the relationship between CFSP and other policies.<sup>21</sup> This judgment would appear to uphold CFSP decision-making under the correct set of circumstances, and would be upholding its legal nature as specified by the Treaties. Likewise in Opinion 2/13 of the Union's accession the European Convention on Human Rights,<sup>22</sup> the Court staunchly upheld the specific legal order of CFSP and used it as one of the reasons to find the Draft Accession Agreement for the Union to join the European Convention on Human Rights incompatible with the Treaties. The unique nature of CFSP within the Treaties, in the Court's view, was unable to receive external judicial review by the European Court of Human Rights if internal judicial review by the Court of Justice was barred under Article 24(1) TEU, Article 40 TEU, and Article 275 TFEU, potentially undermining the Court's jurisdiction to protect the EU legal order that it has resolutely defended.

Treaty development has continuously placed further competences upon the Parliament in the spirit of greater effectiveness and enhanced legitimacy. The Council through its actions in this scenario seem to be devoid of the same spirit. The Parliament is nowhere near having a formal say through a vote on CFSP agreement as the Treaties do not permit this. Yet, the Court's judgment has been a victor for those of the belief that CFSP still possess a strong democratic deficit compared to other external actions that have the consent of a greater number of institutional actors. In effect, the judgment has ensured a minimum notification procedure for the Parliament is upheld. Whilst this judgment was relatively straightforward dealing with two distinct matters, issues of substance and procedure, other potential cases in the future may not be so candidly delineated. One of the several aims of the Treaty of Lisbon was an attempt

17 Panos Koutrakos, "Inter-Institutional Disputes and Treaty-Making," *European Law Review* 39, no. 5 (2014): 599–600. p. 600.

18 Steve Peers, "The CJEU Ensures Basic Democratic and Judicial Accountability of the EU's Foreign Policy," *EU Law Analysis*, June 24, 2014, <http://eulawanalysis.blogspot.com/2014/06/the-cjeu-ensures-basic-democratic-and.html>.

19 For example, see Christophe Hillion, "A Powerless Court? The European Court of Justice and the Common Foreign and Security Policy," in *The European Court of Justice and External Relations Law: Constitutional Challenges*, Modern Studies in European Law (Oxford: Hart Publishing, 2014), 47–72. and Paul James Cardwell, "On 'Ring-Fencing' the Common Foreign and Security Policy in the Legal Order of the European Union," *Northern Ireland Legal Quarterly* 64, no. 4 (2013): 443–63.

20 Annegret Engel, "Delimiting Competences in the EU: CFSP versus AFSJ Legal Bases," *European Public Law* 21, no. 1 (2015): 47–60. p. 59.

21 Andrea Ott, "The Legal Bases for International Agreements Post-Lisbon: Of Pirates and The Philippines," *Maastricht Journal of European and Comparative Law* 21, no. 4 (2014): 739–52. p. 751.

22 Opinion 2/13 [2014] (not yet reported) ECLI:EU:C:2014:2454.



at unifying the external representation of the Union, but instead in practice, there are still distinct legal bases for foreign policy actions, depending on what they are. The Court is beginning to shed some light on the distinction between the external policy areas which is to be welcomed, but it fell short of being a wide-ranging competency developing judgment that it could have been like the ECOWAS judgment was pre-Lisbon.<sup>23</sup>

The Parliament is certainly a master of interpreting post-Lisbon reforms from the Treaties in its own interest, but its only means of attaining its rights delivered to it in the Treaties appears to be through litigation in the Court of Justice. In the past, the Court has been requested in many instances to give judgment on complex and sensitive cases relating to CFSP.<sup>24</sup> With this EU-Mauritius judgment now to hand, it has lodged another action for annulment on a similar EU-Tanzania agreement where the main pleas are nearly identical to those of this case,<sup>25</sup> challenging the agreement's sole CFSP legal basis, affording the Court another opportunity to define more explicitly the scope of CFSP and AFSJ international

agreements, testing the limit of Article 40 TEU. The issue of the correct legal base within the field of EU external relations, as well as the procedural matters than accompany them is likely to continue to fester as long as CFSP remains a unique area of Union law with "specific rules and procedures". On a broader note beyond CFSP, when the Commission is negotiating international agreements for the Union in the future, it must pay heed to Parliament's concerns and inform it at all stages, including at junctures throughout the sensitive ongoing negotiations in the Transatlantic Trade and Investment Partnership (TTIP), as the Court in this EU-Mauritius case that it is not afraid of striking down an agreement if Treaty-mandated procedures like those in Article 218 TFEU are not correctly followed.

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23 C-91/05 Commission v Council [2008] I-03651.

24 Andrea Biondi and Silvia Bartolini, "Recent Developments in Luxembourg: The Courts' Activities in 2013," *European Public Law* 20, no. 4 (2014): 611-30. p. 630.

25 Case C-263/14, European Parliament v Council of the European Union, *pending*.