

# THE JURISDICTION OF THE COURT OF JUSTICE OF THE EUROPEAN UNION TO DELIVER A CANCELLATION JUDGMENT REGARDING THE INTERNATIONAL AGREEMENTS TO WHICH THE EU IS PARTY

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## Abstract

*In the case where international agreements are treated as legal acts of EU institutions, they may be subject to judicial review exercised by the Court in Luxembourg. Given the fact that we assimilate international agreements to legal acts of the European Union, we would be tempted to ask ourselves the following questions: to what extent declaring an agreement, by a judgment of the Court of Justice of the EU delivered in the action for cancellation, as being inapplicable to the EU legal order, affects the security of international relationships? If these relationships are affected, is it possible to exclude the subsequent verification conducted by the Court? In the study below, our purpose is to find answer to these questions.*

**Keywords:** *competence, Court of Justice of the European Union, action for cancellation, international agreements.*

## 1. Introductory considerations

The action for cancellation lies in the possibility of Member States, European Union institutions and natural and legal persons to challenge before the Court of Justice of the European Union, a legally binding act issued by the EU institutions and to obtain, under certain conditions, its cancellation<sup>1</sup>. It is a means of monitoring the compliance of EU legal acts, a control of

legality which seeks the abolition<sup>2</sup> of an unlawful act<sup>3</sup>, not its changing.

In the case where international agreements are treated as legal acts<sup>4</sup> of EU institutions, they may be subject to judicial review exercised by the Court in Luxembourg. Given the fact that we assimilate international agreements to legal acts of the European Union, we would be tempted to ask ourselves the following questions: to what extent declaring an agreement, by a judgment of the Court of

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<sup>1</sup> For details see Augustin Fuerea, *Dreptul Uniunii Europene. Principii, acțiuni, libertăți*, Universul Juridic Publishing House, Bucharest, 2015, pp. 65-74.

<sup>2</sup> The Act will be cancelled with *ex tunc* effect (as if it did not exist) and, exceptionally, with *ex nunc* effects (for the future).

<sup>3</sup> For details see Elena Emilia Ștefan, *Reflecții privind independența justiției*, in CKS- eBook, Bucharest, 2013, pp. 671-672.

<sup>4</sup> See: Augustina Dumitrașcu, *Dreptul Uniunii Europene și specificitatea acestuia*, second edition, Universul Juridic Publishing House, Bucharest, 2015; Laura Spătaru-Negură, *Some Aspects Regarding Translation Divergences Between the Authentic Texts of the European Union*, in CKS (Challenges of the Knowledge Society) 2014, Bucharest, 2014, pp. 368-387.

Justice of the EU delivered in the action for cancellation, as being inapplicable to the EU legal order, affects the security of international relationships? If these relationships are affected, is it possible to exclude the subsequent verification conducted by the Court? We believe that under no circumstances, as long as the legal control has as effect also the possibility of revising the agreements, and not only that of cancelling them. In support of this answer, we have also the opinion of the Court which considers that "it is its duty to control the deficiencies of institutions on rules of procedure and of fund, despite difficulties that may arise for third contracting States and for the security of international relations"<sup>5</sup>. Moreover, the Court even accepted an action brought by a Member State, although the State had the possibility to notify the Court with an application for advisory opinion under Article 218 par. (11) TFEU. In this regard, we consider the case *Portugal v. / Council*<sup>6</sup>, where the Portuguese Republic sought the cancellation of Decision 94/578/EC of the Council of July 18, 1994 on the conclusion of the Cooperation Agreement between the European Community and the Republic of India on partnership and development.

## **2. ECJ jurisdiction to rule by a judgment in the action for cancellation which has as object, an international agreement to which the Union is party**

Pursuant to art. 275 par. (1) TFEU, the Court "has no jurisdiction as regards the provisions on Common Security and Defence Policy or in respect of acts adopted thereunder." However, pursuant to para. (2) there of, "the Court has jurisdiction to monitor compliance with art. 40 TEU". What does this thing mean? The implementation of "common foreign and security policy shall not affect the procedures and scope of the powers of institutions provided for in the appropriate treaties, in order to exercise the Union's competences"<sup>7</sup> in other areas. In this way, the Court of Justice in Luxembourg has the competence to cancel even a legal act on an international agreement based on CFSP; nevertheless, exercising the Union's competence should be based on a different legal ground. Regarding this matter, the Court has ruled, since 2008, in the case *Commission v. / Council*<sup>8</sup>, where the European Commission required the Court, the cancellation of the Commission Decision 2004/833/CFSP of the Council, of December 2nd, 2004 implementing the Joint Action 2002/589/CFSP in view of the European Union's contribution to ECOWAS in the framework of the Moratorium regarding weapons and small arms and the finding of inapplicability for illegality of the joint Action 2002/589/CFSP of the Council of 12 July 2002 on the

<sup>5</sup> Emmanuelle Leray, Aymeric Poteau, *Réflexions sur la cohérence du système de contrôle de la légalité des accords internationaux conclus par la Communauté européenne*, Revue trimestrielle de Droit Européen, Paris, no. 4/1998, pp. 535-571 (quoted by Eleftheria Neframi in *JurisClasseur Europe Traité*, Fasc. 192-2: *Accords internationaux – Statut des accords internationaux dans l'ordre juridique de l'Union européenne*, August 30, 2011, p. 26 - [https://orbilu.uni.lu/bitstream/10993/15170/1/Fasc.\\_192-2\\_\\_ACCORDS\\_INTERNATIONAUX.\\_-\\_Stat.PDF](https://orbilu.uni.lu/bitstream/10993/15170/1/Fasc._192-2__ACCORDS_INTERNATIONAUX._-_Stat.PDF))

<sup>6</sup> ECJ ruling, *The Portuguese Republic v. / Council of the European Union*, C-268/94, ECLI:EU:C:1996:461.

<sup>7</sup> Art. 40 TFEU.

<sup>8</sup> ECJ ruling, *European Commission v. / Council of the EU*, C-91/05, ECLI:EU:C:2008:288.

European Union's contribution to combating the destabilizing accumulation and spread of light weapons and small arms and to repealing the joint Action 1999/34/CFSP. The Case brings to the forefront of attention the interference of foreign policy and development cooperation policy, the Court cancelling<sup>9</sup> the decision ruled in the CFSP matter. Although the contested act was a joint action, and not an act on the closing of an international agreement, the Court competence regarding agreements in CFSP matters was founded on the possibility of penalizing the choice of the legal basis. The Court accepted jurisdiction, stating that it has "the task of ensuring that the documents about which the Council claims that fall within the scope of Title V<sup>10</sup> of the EU Treaty and which, by nature, can produce legal effects, do not affect the powers that the EC Treaty confers on the Community"<sup>11</sup>. The Court argued its position in the previous case: "The Court must ensure that the acts about which the Council claims that fall under Art. K.3 para. (2) of the Treaty on European Union do not affect the powers which the EC Treaty attributes to the Community"<sup>12</sup>; "It is the Court's competence to ensure that acts which in the Council's opinion fall within the scope of Title VI do not affect the powers which the EC Treaty attributes to the Community"<sup>13</sup>; "It is the Court's task to ensure that acts about which the Council claim to fall within the scope of Title VI do not affect the powers

which the EC Treaty attributes to the Community"<sup>14</sup>.

Turning to the Court's jurisdiction to rule in an action for cancellation against international agreements, it is clear, as we have already stated that it could reject such an action, knowing that it can only control those legal acts of EU institutions. The Court jurisprudence, however, seems to contradict us, if we consider the case *France v. / Commission*<sup>15</sup>. In that case, the French Republic sought the cancellation of the Agreement signed on 23 September 1991 by the Commission of the European Communities and the United States of America on the application of national competition laws. The Court accepted the request, considering that "the action of the French Republic must be understood as being directed against the act whereby the Commission sought to conclude the agreement"<sup>16</sup>. In this way, the Court becomes competent to carry out an indirect control on the compliance of international agreements with European Union treaties (primary law). We assimilate the doctrinarian view according to which "the assimilation of the agreement to the act of the EU institution ordering its conclusion is not dictated by a dualistic approach, but only by the need to review the legality of an act which produces legal effects in the EU legal order, in accordance with art. 216 para. (2) TFEU"<sup>17</sup>.

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<sup>9</sup> According to pt. 1 of the device: "For these reasons, the Court (Grand Chamber) hereby: 1) Annuls Commission Decision 2004/833/CFSP of 2 December 2004 implementing Joint Action 2002/589/CFSP in view of the European Union's contribution to ECOWAS in the framework of the Moratorium on small arms and light weapons".

<sup>10</sup> Currently, Title V has the following name: "General provisions on the Union's external action and specific provisions on Common Security and Defence Policy".

<sup>11</sup> Pt. 33 of the ruling.

<sup>12</sup> Pt. 16 of the ECJ ruling, the *Commission v. / Council*, C-170/96, ECLI:EU:C:1998:219.

<sup>13</sup> Pt. 39 of the ECJ ruling, the *Commission v. / Council*, C-176/03, ECLI:EU:C:2005:542.

<sup>14</sup> Pt. 53 of the ECJ ruling, *Commission v. / Council*, C-440/05, ECLI:EU:C:2007:625.

<sup>15</sup> ECJ ruling, *the French Republic v. / European Commission*, C-327/91, ECLI:EU:C:1994:305.

<sup>16</sup> Pt. 17 of the ruling.

<sup>17</sup> Eleftheria Neframi, *op. cit.*, p. 26.

In 2002, France filed an action for cancellation<sup>18</sup>, seeking the abolition of the decision whereby the European Commission had concluded with the United States an agreement entitled "Guidelines for cooperation and transparency in the regulation area." The reason given by France was that the guidelines negotiated by the Commission with the United States in the field of cooperation and transparency, in the regulation area constituted themselves into a genuine international agreement, the conclusion of which fell under the jurisdiction of the Council. Therefore, the problem that had to be solved was to know whether the guidelines developed by the Commission and its partners could be challenged by an action for cancellation. The Court ruled in favour of the Commission, considering that the Guidelines were devoid of legal force and constituted only an administrative arrangement: "The Commission (...) as institution and collegiate body has never expressed its consent to be bound by guidelines which, moreover, are only an administrative arrangement concluded at the level of services"<sup>19</sup>. Therefore, no act of the Commission can be the subject of an action for cancellation.

One aspect to look at is the one which is considering the *a posteriori* control exercised by the Court on a mixed agreement, as more questions arise, such as: is the Court's jurisdiction limited only to those matters falling under the Union's competence? Will the cancellation of a joint agreement affect the entire agreement? In this case, the "conclusion of the agreement would not be a common one, of the Union and the Member States, and the Member

States could not continue to be bound by an agreement that does not fall entirely within their jurisdiction, unless the cancellation of provisions falling within the competence of the Union is accompanied by a special enabling of Member States which would entitle them to correct their lack of competences and give them a mandate to act on behalf of the Union. In this way, the validity of a mixed agreement could not consider the division of powers, the Court's review concerning only the unique act which constitutes a mixed agreement"<sup>20</sup>. The law does not seem to give an answer to the questions mentioned, if we refer to the judgment ruled in the case *Spain v. / Council*<sup>21</sup> in which, being notified with an action for cancellation of a Council Decision on the conclusion of the Convention on Cooperation for the Protection and Sustainable Use of the Danube, in its judgment, the Court made no reference to the mixed nature of the agreement in question.

### 3. The causes of illegality<sup>22</sup>

#### A. The lack of competence of the Commission

In the case *France v. / Commission*<sup>23</sup>, the Court cancelled the act by which the European Commission had decided to conclude the agreement with the United States on the application of competition law, on the ground that the institution had no competence for concluding such an agreement. The Agreement had as object to "promote cooperation, coordination and to reduce the risk of disputes between the

<sup>18</sup> Case *the French Republic v. / European Commission*, C-233/02, ECLI:EU:C:2004:173.

<sup>19</sup> Pt. 24 of the ruling.

<sup>20</sup> Eleftheria Neframi, *op. cit.*, p. 27.

<sup>21</sup> ECJ ruling, *Royaume d'Espagne c. / Conseil de l'Union européenne*, C-36/98, ECLI:EU:C:2001:64.

<sup>22</sup> Eleftheria Neframi, *op. cit.*, pp. 27-28.

<sup>23</sup> C-327/91 *cited above*.

parties in the application of their competition laws or to reduce their effects"<sup>24</sup>. Although the Commission argued that "the agreement is in reality an administrative arrangement for the conclusion of which it has jurisdiction"<sup>25</sup> and that "the failure to comply with the agreement provisions would not determine the liability of the Community, but simply its termination"<sup>26</sup>, the Court considered that the agreement, being binding to the Community and generating obligations, could not be qualified as administrative agreement.

### B. Violations of treaties

Another cause of illegality is the violation of treaties. Thus in the case *Germany v. / Council*<sup>27</sup>, the Court ruled in favour of Germany's request to cancel art. 1 para. (1) first indent of Decision 94/800 / EC of 22 December 1994 concerning the conclusion on behalf of the European Community concerning its fields of competence, of the agreements of multilateral negotiations of the Uruguay Round (1986-1994) to the extent that the Council approved the Framework Agreement on bananas with the Republic of Costa Rica, Republic of Colombia, Republic of Nicaragua and the Republic of Venezuela. Germany argued that "the regime established by the Framework Agreement affected the fundamental rights of operators of A and C categories, namely the right of freely exercising the profession and property

rights and discriminated them against the operators of B category "<sup>28</sup>.

The Court ruled differently in the case *Portugal v. / Council*<sup>29</sup>. In that case, Portugal requested the Court to cancel the Council Decision 96/386/EC of 26 February 1996 on the conclusion of Memoranda of Agreement between the European Community and the Islamic Republic of Pakistan, and between the European Community and the Republic of India on arrangements in the area of market access for textile products. The reasons invoked by Portugal were taking into account "on the one hand, the infringement of certain fundamental WTO rules and principles and, secondly, the breach of certain rules and fundamental principles of the Community legal order"<sup>30</sup>. This time, the Court held that "the statement of the Portuguese Republic, according to which the contested judgment was delivered by breaching certain rules and fundamental principles of the Community legal order, is unfounded"<sup>31</sup> and dismissed the action in its entirety<sup>32</sup>.

### C. The wrong choice of the legal ground

As in the case of acts of secondary law, the choice of the legal ground for concluding an international agreement "must be based on objective factors which can be subject to judicial review, of which stand the purpose

<sup>24</sup> Pt. 5 of the ruling.

<sup>25</sup> Pt. 21 of the ruling.

<sup>26</sup> *Idem*.

<sup>27</sup> ECJ ruling, *the Federal Republic of Germany v. / Council of the European Union*, C-122/95, ECLI:EU:C:1998:94.

<sup>28</sup> Pt. 48 of the ruling.

<sup>29</sup> C-149/96 *cited above*.

<sup>30</sup> Pt. 24 of the ruling.

<sup>31</sup> Pt. 94 of the ruling.

<sup>32</sup> For details on the role of the legal principles, see Elena Anghel, *The importance of principles in the present context of law recodifying*, in Proceedings of the Challenges of the Knowledge Society Conference (CKS) no. 2/2012, p. 753.

and content of the envisaged agreement"<sup>33</sup>. If the agreement has a dual purpose, the act regarding its conclusion should have as legal ground, the one required for the predominate purpose. "Only exceptionally, if goals are inextricably linked, the act concluding the agreement must have as legal ground, two legal bases"<sup>34</sup>. The wrong choice of the legal ground is, for the Court, a reason for cancellation of the agreement. In this respect, stands the Court judgment in the case the *Parliament v. / Council*<sup>35</sup>, in which the Court cancelled the decision because of the wrong choice of the legal ground. In that case, the Parliament asked the Court to cancel Decision 93/323/EEC of the Council of 10 May 1993 on the conclusion of an agreement in the form of a Memorandum of Agreement between the European Community and the United States concerning the purchases. The reason given was that the decision had as legal grounds, only Article 133 TEC which regulated conditions for the negotiation and conclusion of agreements in the field of common commercial policy, the Parliament being, thus excluded from the procedure to conclude the agreement. In the opinion of the Parliament, in addition to this article, the decision had to have as legal basis, also other articles of the Treaty, specific to the provision of services, articles that provided a cooperation procedure. Therefore, the Parliament believed that delivering a judgement only pursuant to art. 113 TEC constituted an infringement of its

prerogatives to participate in the procedure of cooperation.

Likewise, the Court ruled in the case *Commission v. / Council*<sup>36</sup>, which cancelled the Council Decision on the conclusion, on behalf of the Union, of an agreement with the United States on the coordination of labeling programs for energy efficiency of office equipment. The reason for cancellation was the wrong choice of the legal grounds, given that the Council considered that the decision to conclude the agreement fell within the scope of the article concerning the common commercial policy<sup>37</sup>, without taking into account the article on environmental policy<sup>38</sup>.

In 2006, the Court cancelled the judgment in the case *Commission v. / Council*<sup>39</sup> on the conclusion of the Rotterdam Convention on the prior informed consent procedure applicable to certain hazardous chemicals and pesticides from the international trade. The Court considered that the decision concluding the Convention was based not only on environmental policy, but it must have a dual legal ground: the environmental policy and the commercial policy.

Another judgement cancelled by the Court is the one concerning an Agreement between the European Community and the United States of America on the processing and transfer of PNR<sup>40</sup> data by air carriers to Customs, and border protection by the Department of Homeland Security United States. The peculiarity of this judgment<sup>41</sup> is

<sup>33</sup> Eleftheria Neframi, *op. cit.*, p. 27

<sup>34</sup> *Idem*.

<sup>35</sup> ECJ ruling, *the European Parliament v. / Council of the European Union*, C-360/93, ECLI:EU:C:1996:84.

<sup>36</sup> ECJ ruling, *European Commission v. / Council of the European Union*, C-281/01, ECLI:EU:C:2002:761.

<sup>37</sup> The current art. 207 TFEU (ex.-art. 133TCE).

<sup>38</sup> The current art. 192 TFEU (ex.-art. 175 TCE).

<sup>39</sup> ECJ ruling, *Commission des Communautés européennes c. / Conseil de l'Union européenne*, C-94/03, ECLI:EU:C:2006:2.

<sup>40</sup> Passenger name records.

<sup>41</sup> ECJ ruling, *the European Parliament v. / EU Council and the European Commission*, C-317/04, ECLI:EU:C:2006:346.

that "the Commission's decision was adopted *ultravires* since provisions<sup>42</sup> of Directive 95/46/EC have not been complied with "and in breach of (...) [provisions] concerning the exclusion of activities which fall outside the scope of the European Union law"<sup>43</sup>. It's hard to say whether a decision concluding the agreement is cancelled for the wrong choice of the legal ground, but it can be concluded from the Court's approach that the former art. 95 TEC<sup>44</sup> did not constitute the appropriate legal basis, and that the decision had to be based on the former art. 308 TCE<sup>45</sup>. However, it can be concluded from the Court's analysis, that the Union had no competence whatsoever to conclude the agreement in question"<sup>46</sup>.

#### 4. The consequences of cancelling a decision for concluding an international agreement

Pursuant to art. 364 par. (1) TFEU, if the action is well grounded, the Court declares the act void. Therefore, the act disappears from the *ex tunc* EU legal order, from the date of the entry into force. A cancellation judgment has retroactive effect and *erga omnes* value, resulting in the total or partial nullity of the legal act of the European Union. It should be noted that the partial cancellation operates under the condition of not distorting the act. The Court can cancel a legal act, but it can also declare if some of its effects survive. It can also limit the retroactive effects. Thus, for example, it can limit its retroactivity only to the one who

brought the action to court. However, the Court can cancel the act, but it can still keep it in force, until the institution adopts a new act to replace it.

Cancelling a legal act which has as object, the concluding of an international agreement leads to the impossibility of applying the agreement in the EU legal order. It should be noted that the decision to cancel the EU legal act of concluding an international agreement is not enforceable against the third State, party to the agreement. In this situation, naturally, the Union can be internationally held liable, and that while art. 27 para. (2) of the Vienna Convention of 1986 on the Law of Treaties between States and international organizations or between international organizations, provides that an international organization, party to a treaty, cannot rely on its own internal rules to justify an event of default under the Treaty<sup>47</sup>. Article 46 of the same Convention states: "in the situation where the consent of an international organization, to be bound by a treaty, has been expressed by breaching the organization rules regarding the competence to conclude treaties, this cannot be considered a vice of consent, unless that violation was express and aimed at an essential regulation". "The European Union law does not recognize the breach of its regulations as a manifest violation to co-contracting third countries. Consequently, the cancellation of the act concluding an international agreement will lead to international liability of the Union.

<sup>42</sup> Pt. 51 of the ruling.

<sup>43</sup> *Idem*.

<sup>44</sup> Currently, art. 114 TFEU.

<sup>45</sup> Currently, art. 352 TFEU.

<sup>46</sup> Flavien Mariatte, *La sécurité intérieure des États-Unis... ne relève pas des compétences externes de la Communauté: Europe 2006, étude 8 RTDE*, 2006, pp. 549-559 (quoted by Eleftheria Neframi, *JurisClasseur Europe Traité, Fasc. 192-2, op. cit.*, p. 28).

<sup>47</sup> For details regarding forms of legal liability, see Elena Emilia Ștefan, *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ*, Prouniversitaria Publishing House, Bucharest, 2013, pp. 85-95.

However, the Union's international liability is up to the contracting parties"<sup>48</sup>.

#### 4. Conclusions

Echoing some previous mentions, it can be noted that the Luxembourg Court can cancel the act, but still keep it in force, until the institution adopts a new act to replace it, under art. 264 par. (2) TFEU, which states: "(...) the Court shall, if it considers it necessary, indicate the effects of the void act which must be considered definitive". Thus, in the case the *Parliament v. / Council*<sup>49</sup>, the Council asked the Court to limit the effects of the cancellation of the ruling<sup>50</sup>, simply because the abolition of the act concluding the agreement would undermine the rights arising therefrom<sup>51</sup>. For these reasons, related to legal reasons comparable to those which arise when certain regulations are annulled, the Court found it necessary to exercise the power conferred by Art. 264

par. (2) TFEU and to maintain some effects of the cancelled decision<sup>52</sup>. Thus, the Court upholds certain effects until the Council will replace the annulled act by one that will comply with European Union treaties.

In the case the *Parliament v. / Council*<sup>53</sup>, the Court maintained the effects of the ruling that it had cancelled, justifying its action in the following manner: "Having regard, on the one hand, that the Community cannot invoke its right as justifying the non-execution of the Agreement which stays applicable within 90 days from its denunciation and, on the other hand, to the close link between the agreement and the decision on adequacy, it would seem justified, for reasons of legal certainty and to protect the persons concerned, to maintain the effects of the adequacy ruling during that period. In addition, it is necessary to take into account the necessary time for adopting the measures posed by the enforcement of this ruling"<sup>54</sup>.

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<sup>48</sup> Eleftheria Neframi, *op. cit.*, p. 29.

<sup>49</sup> C-360/93 *cited above*.

<sup>50</sup> Pt. 32 of the ruling.

<sup>51</sup> Pt. 33 of the ruling.

<sup>52</sup> Pt. 35 of the ruling.

<sup>53</sup> C-317/04, *cited above*.

<sup>54</sup> Pt. 73 of the ruling.



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