



Eingangsdatum : 28/11/2013

GZ BKA-N.C-209/13/0006-V/7/2013

COURT OF JUSTICE Luxembourg	
Entrée	17 OCT. 2013

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An den Herrn Präsidenten und die Mitglieder des Gerichtshofs

STREITHILFESCHRIFTSATZ DER REPUBLIK ÖSTERREICH

gemäß Artikel 40 Absatz 1 der Satzung des Gerichtshofs der Europäischen Union
und Artikel 132 der Verfahrensordnung des Gerichtshofs

in der

RECHTSSACHE C-209/13

Vereinigtes Königreich Großbritannien und Nordirland,

Klägerin,

gegen

Rat der Europäischen Union

Registered at the Court of Justice under No. <u>947514</u>
Luxembourg 17 -10- 2013
Fax / E-mail: <u>15.10.13</u> <i>p.o. J. Hewlett</i>
Received on: <u>17.10.13</u> <i>Lynn Hewlett</i>
For the Registrar Lynn Hewlett Principal Administrator

Beklagter,

Republik Österreich,

vertreten durch Dr. Christine PESENDORFER, Verfassungsdienst des
Bundeskanzleramtes der Republik Österreich, Ballhausplatz 2, A-1014 Wien,

Zustellanschrift: Bundeskanzleramt, Verfassungsdienst, Abteilung V/7, Ballhausplatz 2,
1014 Wien, Österreich;

Zustellung per Telefax an: 0043-1-53109-209528 (Art. 48 § 2 VerfO des Gerichtshofs);

Streithelferin,

LG

Im Verfahren nach Art. 263 des Vertrags über die Arbeitsweise der Europäischen Union, in dem das Vereinigte Königreich Großbritannien und Nordirland mit Klage, eingereicht am 18. April 2013, beantragt hat,

- den Beschluss 2013/52/EU des Rates vom 22. Januar 2013 über die Ermächtigung zu einer Verstärkten Zusammenarbeit im Bereich der Finanztransaktion für nichtig zu erklären und
- dem Rat die Zahlung der Kosten der Klägerin aufzutragen,

reicht die Republik Österreich – nach Zulassung als Streithelferin auf Seiten des Rates der Europäischen Union durch Beschluss des Präsidenten des Gerichtshofs – folgenden Streithilfeschriftsatz ein:

I. Einleitung

- (1) Die Republik Österreich verweist hinsichtlich des Sachverhalts und des rechtlichen Rahmens auf die Ausführungen der Parteien. Die Republik Österreich beschränkt sich im Folgenden auf eine kurze rechtliche Würdigung der geltend gemachten Klagegründe und wird darlegen, dass die Klage keine hinreichenden Gründe für eine Nichtigklärung des Beschluss 2013/52/EU des Rates vom 22. Jänner 2013 über die Ermächtigung zu einer Verstärkten Zusammenarbeit im Bereich der Finanztransaktionssteuer vorbringt und daher abgewiesen werden sollte.

II. Inhaltliche Unbegründetheit der Klage

- 1. Zum ersten und zweiten Klagegrund: Kein Widerspruch zu Art. 327 AEUV bzw. Völkergewohnheitsrecht**
- (2) Mit dem ersten und zweiten Klagegrund wird auf den Kern zusammengefasst vorgetragen, dass die im Rahmen der Verstärkten Zusammenarbeit beabsichtigte Erhebung einer Finanztransaktionsteuer zu unzulässigen extraterritorialen Wirkungen der Steuer führen würde.
- (3) Die Klage unterstellt damit jedoch dem Beschluss 2013/52/EU einen Sinngehalt, den der Beschluss bei verständiger Auslegung nicht hat, weshalb nach Ansicht der Republik Österreich dieses Vorbringen keine Nichtigkeit des

Beschlusses 2013/52/EU aufzuzeigen vermag. Wie letztlich auch bereits in der Klage in Rn. 6 ff. unter der Bezeichnung einer verfrühten Klageerhebung („prematurity“) zugestanden wird, wären die geltend gemachten Klagegründe allenfalls gegen einen künftigen, bislang noch nicht erlassenen, Rechtsakt zur Durchführung der Verstärkten Zusammenarbeit zu richten. Es erscheint jedoch offenkundig, dass die von der Klägerin gerügten Nichtigkeitsgründe nicht auch schon dem Ermächtigungsbeschluss 2013/52/EU anhaften.

- (4) Nach dem Wortlaut von Art. 1 des Beschlusses 2013/52/EU werden die dort genannten teilnehmenden Mitgliedstaaten nur dazu „ermächtigt, auf der Grundlage der einschlägigen Bestimmungen der Verträge untereinander eine Verstärkte Zusammenarbeit im Bereich der Schaffung eines gemeinsamen Finanztransaktionssteuersystems zu begründen“. Weitere Bedingungen oder Einzelheiten der Rechtsakte, die im Rahmen der Verstärkten Zusammenarbeit angenommen werden können, sind im Beschluss jedoch nicht enthalten. Wie auch bereits der Rat in seiner Klagebeantwortung festgehalten hat, verlangt der Beschluss keine Besteuerung auf Grundlage eines „Gegenparteiprinzips“ oder eines „Ausgabeprinzips“ noch ermächtigt der Beschluss als solcher zu einer derartigen Besteuerung noch schließt er diese ausdrücklich aus (vgl. Rn. 31, 39 der Klagebeantwortung). Schon nach dem gewöhnlichen Sprachgebrauch zwingt Art. 1 des Beschlusses daher nicht zu einer Auslegung, wonach der Beschluss beabsichtige, zu einer Finanztransaktionssteuer mit extraterritorialen Effekten zu ermächtigen, und auch so verstanden worden sei (vgl. zB. Rn. 9, 16, 44 der Klage).
- (5) Auch aus dem Zusammenhang, der historischen Entwicklung sowie Ziel und Zweck des Beschlusses ergibt sich kein anderes Auslegungsergebnis. Insbesondere ist die Nennung des Kommissionsvorschlages für eine Richtlinie zur Finanztransaktionssteuer vom 28. September 2011 im Erwägungsgrund 6 des Beschlusses 2013/52/EU nicht so zu verstehen, dass die Regelungen des Richtlinienvorschlages aus 2011 damit schon Bestandteil des Beschlusses geworden wären. Wie auch der Gerichtshof bereits im Zusammenhang mit der Verstärkten Zusammenarbeit im Bereich der Schaffung eines einheitlichen Patentschutzes festgestellt hat, führt eine derartige Bezugnahme auf Kommissionsvorschläge nicht dazu, dass sie zum Bestandteil des Beschlusses

werden (vgl. Urteil vom 16. April 2013, in den verb. Rs. C-274/11 und C-295/11, Italien und Spanien gegen den Rat, Rn. 76 f). Auch der Inhalt der Regelungen zur Finanztransaktionssteuer befand sich bei Annahme des Beschlusses noch in einem Stadium der Vorarbeiten und ist daher kein Bestandteil des Beschlusses. Insbesondere war – worauf auch in Rn. 21 der Klagebeantwortung des Rates bereits hingewiesen wird – der in der Klage zitierte Kommissionsvorschlag aus 2013 im Zeitpunkt der Erlassung des Beschlusses noch gar nicht rechtlich existent. Die Vereinbarkeit der in diesen Kommissionsdokumenten enthaltenen Regelungen mit dem Unionsrecht kann daher im Rahmen der vorliegenden Klage nicht geprüft werden (vgl. wiederum Urteil in den verb. Rs. C-274/11 und C-295/11, Rn. 76).

- (6) Wie sich aus dem zuletzt genannten Urteil (Rn. 92) weiters ergibt, war der Rat auch nicht verpflichtet, in dem angefochtenen Beschluss zusätzliche Angaben zum Inhalt zu machen, den die von den Teilnehmern der Verstärkten Zusammenarbeit zu erlassenden Regelungen haben könnten.
- (7) Nach Ansicht der Republik Österreich vermag weder der erste noch der zweite Klagegrund eine Nichtigkeit des Beschlusses 2013/52/EU aufzuzeigen.

2. Zum dritten Klagegrund: Kein Widerspruch zu Art. 332 AEUV

- (8) Mit dem dritten Klagegrund wird eine Verletzung von Art. 332 AEUV behauptet, da aufgrund der Amtshilfe-Richtlinien 2011/16/EU und 2010/24/EU die Umsetzung der Finanztransaktionssteuer unweigerlich zu Kosten für Mitgliedstaaten führe, die an der Verstärkten Zusammenarbeit nicht teilnehmen (insb. Rn. 75 ff der Klage).
- (9) Die Republik Österreich hält auch dieses Vorbringen für ungeeignet, eine Nichtigkeit des Beschlusses 2013/52/EU aufzuzeigen. Wie auch bereits der Rat in Rn. 10 der Gegenerwiderung ausgeführt hat, verpflichtet der Beschluss als solcher weder zu einer Amtshilfeleistung noch regelt er diese. Die Klage erweist sich auch insoweit als verfrüht, wobei ebenfalls auf die Ausführungen unter Punkt 1 verwiesen werden kann.
- (10) Im Übrigen entstünden die in der Klage genannten möglichen Ausgaben auf Grund der Verpflichtungen der Mitgliedstaaten aus der Richtlinie 2011/16/EU über die Zusammenarbeit der Verwaltungsbehörden im Bereich der Besteuerung und der

Richtlinie 2010/24/EU über die Amtshilfe bei der Beitreibung von Forderungen in Bezug auf bestimmte Steuern, Abgaben und sonstige Maßnahmen. Diese Ausgaben ergeben sich insoweit nicht aus der Durchführung der Verstärkten Zusammenarbeit und fallen daher nach Ansicht der Republik Österreich auch gar nicht in den sachlichen Anwendungsbereich des Art. 332 AEUV. Eine Verletzung des Art. 332 AEUV scheidet daher aus.

- (11) Nach Ansicht der Republik Österreich vermag daher auch der dritte Klagegrund nicht zu überzeugen.

III. Schlussfolgerung und Anträge

- (12) Zusammenfassend kann festgehalten werden, dass der Beschluss 2013/52/EU keine Regelungen enthält, die einer unionsrechtskonformen, insbesondere primärrechtskonformen, Ausübung der Ermächtigung zur Einführung einer Finanztransaktionssteuer im Rahmen einer Verstärkten Zusammenarbeit entgegenstehen. Es ist daher weder ein Widerspruch zu Art. 327 AEUV noch zu Völkergewohnheitsrecht noch zu Art. 332 AEUV zu erkennen.
- (13) Die Republik Österreich beantragt daher in Unterstützung der Anträge des Rates des Europäischen Union,
1. die gegenständliche Klage als unbegründet abzuweisen und
 2. der Klägerin die Kosten des Verfahrens aufzuerlegen.

Wien, am 14. Oktober 2013
Für die Republik Österreich:



Dr. Christine PESENDORFER

Die Richtigkeit der Abschrift
wird beglaubigt:





Eingangsdatum : 28/11/2013

STATEMENT IN INTERVENTION OF THE BELGIAN GOVERNMENT

Case C-209/13*

Document lodged by:

Kingdom of Belgium

Usual name of the case:

UNITED KINGDOM v COUNCIL

Date lodged:

31 October 2013

Kingdom of Belgium

Federal Public Service of Foreign Affairs,

Foreign Trade and Development Cooperation

COURT OF JUSTICE OF THE EUROPEAN UNION

Statement in intervention of the Belgian Government

Lodged in accordance with Article 132 of the Rules of Procedure of the Court of Justice of the European Union by the Belgian Government, represented by the Minister of Foreign Affairs, Jean-Christophe HALLEUX and Marie JACOBS acting as Agents, attached to the Directorate General for Legal Affairs of the Federal Public Service of Foreign Affairs, Foreign Trade and Development Cooperation, 15 rue des Petits Carmes at 1000 Brussels, in Case

C-209/13

United Kingdom

v

Council of the European Union

In the context of an action for annulment brought by the United Kingdom against Council Decision 2013/52/EU of 22 January 2013 authorising enhanced

* Language of the case: English.

cooperation in the area of financial transaction tax, and registered at the Registry of the Court of Justice of the European Union under number 932629.

To The President and Members of the Court of Justice of the European Union

The Belgian Government would present the following observations:

I – INTRODUCTION

- 1 By application of 18 April 2013, the United Kingdom brought an action for annulment of Council Decision 2013/52/EU authorising enhanced cooperation in the area of financial transaction tax ('FTT').
- 2 In its defence, the Council challenged the United Kingdom's position and defended the validity of that decision.
- 3 In its statement in intervention, the Belgian Government **supports the Council**, taking the view that the United Kingdom's action against the decision authorising enhanced cooperation in the area of financial transaction tax **is unfounded**.
- 4 The Belgian Government refers to paragraph 3 of the application for the presentation of the factual background to this action and to paragraphs 6 to 22 of the defence as regards the legal background.
- 5 As concerns the premature nature of the application and its possible inadmissibility, the Belgian Government shares entirely the Council's position expanded in paragraphs 3 to 6 of the rejoinder.
- 6 The subject of the United Kingdom's action, being an existing Council measure which has binding legal effects, such as the contested decision, satisfies the requirements of Article 263 TFEU. Accordingly, the Belgian Government considers that the present action is admissible.

II – GROUNDS AND ARGUMENTS

- 7 As a preliminary point, the Belgian Government notes that the subject of the present action is the Council Decision authorising the Member States to resort to the enhanced cooperation procedure to establish, between the participating Member States, a FTT, namely, Council Decision 2013/52/EU of 22 January 2013 ('the contested decision').
- 8 In an action for annulment, based on Article 263 TFEU, of a decision authorising the enhanced cooperation procedure, the Court of Justice will focus its review of lawfulness on the authorisation, and will concentrate on compliance with the

conditions laid down in Articles 20 TEU and 326 to 334 TFEU by the Council Decision.

- 9 In support of its action, the United Kingdom puts forward several grounds of annulment referring to failure to comply with Union law:
- infringement of Article 327 TFEU;
 - infringement of customary international law;
 - in the alternative, infringement of Article 332 TFEU.

II.1 First and second pleas in law: infringement of Article 327 TFEU – extraterritoriality of the tax

- 10 As the first ground, the United Kingdom relies on an alleged infringement of Article 327 TFEU. That provision is intended to protect the competencies, rights and obligations of those Member States that do not participate in enhanced cooperation.
- 11 For the Belgian Government, the second plea relied on by the United Kingdom alleging infringement of customary international law is merely a variation of the first ground as the applicant expressly mentions in paragraph 24 of its application.
- 12 The Belgian Government states, as the Council did in paragraphs 24 to 26 of its defence, that although the subject of the action is the aforementioned decision, all the arguments put forward by the United Kingdom to substantiate its action are based on the 2011 and 2013 Commission proposals for a directive.
- 13 As the Council noted at paragraphs 2 and 18 of its defence, the 2011 Commission proposal for a directive did not obtain the unanimity required by Article 113 TFEU.
- 14 As regards the 2013 Commission proposal for a directive, it is clear that it is still, as these words are being written, under discussion and that the provisions it contains cannot, therefore, serve as a basis for an action for annulment directed against a decision authorising enhanced cooperation. In fact, the details of the definitive arrangements of the FTT are not yet known.
- 15 At recital 14 of the preamble to the contested decision, the Belgian Government notes that in terms of compliance with Article 327 TFEU, the intended arrangements do not prevent the non-participating Member States from introducing or maintaining an unharmonised FTT, nor can they grant the participating Member States taxing rights based on inappropriate connecting factors.

- 16 Account being taken of the subject of the contested decision, which is to authorise the 11 Member States that have expressed the wish to do so to establish a FTT between them, the Belgian Government is of the opinion that the Council, in that authorising decision, need not expand in more detail the arrangements it intends to draw up.¹
- 17 Consequently, the Belgian Government, like the Council, claims that the first and second grounds of the United Kingdom's application are not well founded since the tax system which serves as a basis for its arguments is only part of a Commission proposal and, in accordance with the Court's case-law, it was only at a preparatory stage when the contested decision was adopted and it is not a constitutive element of it.²

II.2 Third ground: infringement of Article 332 TFEU – costs incurred by the non-participating Member States

- 18 In the alternative, as its third ground, the United Kingdom relies on an alleged infringement of Article 332 TFEU by the contested decision.
- 19 That article precludes the Member States participating in enhanced cooperation from imposing on non-participating Member States the costs of implementing that enhanced cooperation, without unanimous Council authorisation from all its members.
- 20 Under that head of claim, the United Kingdom supports its argument by alleging³ that the enhanced cooperation will inevitably lead to costs for the non-participating States, through the application of directives relating to mutual assistance⁴ and administrative cooperation.⁵
- 21 As the Council wrote at paragraph 25 of its defence, the Belgian Government claims that, as it did for its first two heads of claim, the United Kingdom bases its arguments on elements of the 2011 Commission proposal.
- 22 As pointed out above, the Belgian Government is of the opinion that those factors do not form part of the contested decision and, consequently, they cannot be used as the basis for an action for annulment such as that in the present case (see paragraph 43 of the defence).

¹ – Joined Cases C-274/11 and C-295/11 *Spain and Italy v Council* [2013] ECR I-0000, paragraph 92.

² – Joined Cases C-274/11 and C-295/11 *Spain and Italy v Commission*, paragraph 77.

³ – Paragraph 75 of the application.

⁴ – Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures (OJ 2010 L 84, p. 1).

⁵ – Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (OJ 2011 L 64, p. 1).

III – CONCLUSION

- 23 On those grounds, the Belgian Government requests the Court of Justice of the European Union to declare that the United Kingdom’s action for annulment is unfounded.

Brussels, 28 October 2013

[signatures and seal]



Eingangsdatum : 28/11/2013

STATEMENT IN INTERVENTION OF THE GOVERNMENT OF THE
FRENCH REPUBLIC

Case C-209/13*

Document lodged by:

FRENCH REPUBLIC

Usual name of the case:

UNITED KINGDOM v COUNCIL

Date lodged:

29 October 2013

MINISTRY OF FOREIGN AFFAIRS FRENCH REPUBLIC

Paris, 24 October 2013

**TO THE PRESIDENT AND MEMBERS OF THE COURT OF JUSTICE
OF THE EUROPEAN UNION**

**STATEMENT IN INTERVENTION OF THE GOVERNMENT OF THE
FRENCH REPUBLIC IN CASE C-209/13**

**THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN
IRELAND**

v

COUNCIL OF THE EUROPEAN UNION

* Language of the case: English.

INTRODUCTION

1 By application made on 18 April 2013 on the basis of Article 263 TFEU, the United Kingdom of Great Britain and Northern Ireland requests the Court to:

‘– annul Council Decision 2013/52/EU of 22 January 2013 authorising enhanced cooperation in the area of financial transaction tax;

– order the Council of the European Union to pay the costs.’

2 By letter dated 2 August 2013, the French Government requested that the Court, pursuant to Article 40 of the Statute of the Court, grant it leave to intervene in support of the Council of the European Union.

3 By decision of the President of the Court, the French Republic was authorised to intervene in support of the conclusions of the Council of the European Union.

I – SUMMARY OF THE PROCEEDINGS AND THE SUBJECT-MATTER OF THE DISPUTE

4 On 28 September 2011, the Commission presented a proposal for a Council directive on a common system of financial transaction tax. For want of unanimity on that system, the proposal at issue could not be adopted on the basis of Article 113 TFEU.

5 At the request of 11 Member States (Austria, Belgium, Estonia, France, Germany, Greece, Italy, Portugal, Slovakia, Slovenia and Spain, ‘the Participating States’), on 25 October 2012 the Commission presented a proposal for a Council decision authorising enhanced cooperation in the area of financial transaction tax (‘FTT’). On 22 January 2013, the Council adopted Authorising Decision 2013/52/EU.

6 On 14 February 2013, the Commission then presented a proposal for a Council directive implementing enhanced cooperation in the area of FTT.

7 It is in that context that the British Government brought the present action against Authorising Decision 2013/52/EU.

II – POSITION OF THE FRENCH GOVERNMENT

8 In order to clarify the terms of the debate between the British Government and the Council, it is necessary to distinguish between the forms of order sought in the application, which are admissible, the pleas in law raised, which are unfounded, and the arguments made, which are ineffective.

- 9 In that regard, and contrary to what the British Government is prepared to admit at paragraphs 6 and 8 of its application and at paragraphs 2 to 5 of its reply, its application cannot be dismissed as inadmissible on the ground that it is premature.
- 10 In fact, it follows from settled case-law that any measures adopted by the institutions, whatever their form, which are intended to have binding legal effects are regarded as acts open to challenge, for the purposes of Article 263 TFEU (see, inter alia, Case 22/70 *Commission v Council*, known as ‘AETR’, [1971] ECR 263, paragraph 42 and Case C-301/03 *Italy v Commission* [2005] ECR I-10217, paragraph 19).
- 11 It is apparent from Article 20(2) TEU that the decision authorising enhanced cooperation is to be adopted by the Council as a last resort, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole, and provided that at least nine Member States participate in it. The Council is to act in accordance with the procedure laid down in Article 329 of the Treaty on the Functioning of the European Union.
- 12 Accordingly, a decision authorising enhanced cooperation closes unfruitful negotiations between Member States. On that subject, the Court has held that the Union’s interests and the process of integration would, quite clearly, not be protected if all fruitless negotiations could lead to one or more instances of enhanced cooperation, to the detriment of the search for a compromise enabling the adoption of legislation for the Union as a whole. Therefore, only those situations in which it is impossible to adopt such legislation in the foreseeable future may give rise to the adoption of a decision authorising enhanced cooperation (see Joined Cases C-274/11 and C-295/11 *Spain and Italy v Council* [2013] ECR I-0000, paragraphs 49 and 50). Moreover, the purpose and effect of such a decision is to authorise the requesting Member States to establish enhanced cooperation (see, to that effect, the same judgment, paragraph 92).
- 13 The Court could deduce from that that a Council decision authorising enhanced cooperation produces binding legal effects such as to affect the interests of a non-requesting Member State and may, as a result, be challenged by that Member State.
- 14 After all, since the conditions of admissibility of an action for annulment and the heads of claim which are set out in it are public policy, the Court may examine them of its own motion (see Case 294/83 ‘*Les Verts*’ v *Parliament* [1986] ECR 1339, paragraph 19).
- 15 In *Spain and Italy v Council*, the Court consented to rule on the actions from the Spanish and Italian Governments seeking annulment of the decision authorising enhanced cooperation in the area of the creation of unitary patent protection, and without even examining the question of the admissibility of that application. By

analogy, nothing appears to prevent Decision 2013/52/EU from being challenged by the British Government.

- 16 In contrast, the French Government considers that the arguments put forward by the British Government are ineffective, in so far as they are based on criticism of the content of the enhanced cooperation to come, although the content of that cooperation has not yet been adopted.
- 17 Generally, an argument relating to an event occurring after the contested measure is ineffective, in so far as the legality of a Union measure must be assessed on the basis of the facts and the law as they stood at the time when the measure was adopted (see Case C-443/07 P *Centeno Mediavilla and Others v Commission* [2008] ECR I-10945, paragraphs 110 and 111, and Case C-485/08 P *Gualtieri v Commission* [2010] ECR I-3009, paragraph 26).
- 18 In this line of case-law, the Court has had opportunity to rule that, as regards the decision authorising enhanced cooperation in the area of the unitary patent, in so far as the applicant refers to a language arrangement which was only at a preparatory stage when the authorising decision at issue was adopted and does not form a component part of the latter, the compatibility of that arrangement with Union law may not be examined in the context of an action for annulment against that decision (see, to that effect, *Spain and Italy v Council*, paragraphs 76 and 77) (emphasis added).
- 19 In the same judgment, the Court also dismissed the ground alleging infringement of Article 327 TFEU on that basis. In its view, the prospect, indicated by the authorising decision at issue, of the introduction of a language arrangement objected to by that Member State may not be described as prejudicial to the competencies, rights or obligations of a Member State (paragraph 82 of the judgment) (emphasis added).
- 20 In any case, as the Court has stated, the sole purpose of the decision authorising enhanced cooperation was to authorise the requesting Member States to establish that cooperation. It is next for those States to set up that cooperation and to lay down the rules attaching to it (see, to that effect, *Spain and Italy v Council*, paragraph 92).
- 21 In the present case, the British Government relies on the incompatibility of Decision 2013/52/EU authorising enhanced cooperation in the area of the FTT, on the one hand, with Article 327 TFEU and customary international law on the ground that that decision would authorise a tax having extraterritorial effects and, on the other, with Article 332 TFEU on the ground that implementing the enhanced cooperation at issue would impose costs on non-Participating States.
- 22 However, it is important to note that the content of the enhanced cooperation at issue had not yet been adopted on the date of Decision 2013/52/EU and has still not been definitively adopted to date. In that regard, it must be observed that the

contested decision was adopted on 22 January 2013 whereas the corresponding draft proposal was presented on 14 February 2013. In addition, it is to be pointed out that, because the FTT arrangements are still being negotiated, amendments to the draft proposal are therefore still possible.

- 23 As regards, more specifically, the alleged infringement of Article 327 TFEU and of customary international law, the British Government cannot usefully dispute the compatibility of the ‘counterparty principle’ and the ‘issuing principle’ respectively set out in Article 4(1)(f) of the proposal for the directive of 14 February 2013 and in Article 4(1)(g) and (2)(c) of that proposal. Decision 2013/52/EU does not include any mandatory provision relating to those principles and cannot therefore, on that basis, adversely affect the competencies, rights or obligations of the non-Participating Member States. At this stage, the ‘counterparty’ and ‘issuing’ principles are only proposals and working hypotheses in the context of negotiations under way on the future directive (see, to that effect, paragraphs 30 to 39 of the defence and the rejoinder).
- 24 As regards, moreover, the alleged infringement of Article 332 TFEU, it must be stated that the British Government’s arguments are ineffective for the same reasons (see, to that effect, paragraphs 43 and 44 of the defence and paragraph 10(a) and (c) of the rejoinder).
- 25 According to the French Government, those considerations are sufficient for the British Government’s arguments to be dismissed as ineffective, in so far as the future content of enhanced cooperation cannot in any case influence the lawfulness of the decision authorising that enhanced cooperation.
- 26 In any event, the Union judicature will not undertake a speculative review of the lawfulness of hypothetical acts not yet adopted (see Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v Council* [2006] ECR II-4665, paragraph 32).
- 27 In those circumstances, contrary to what the British Government suggests in paragraphs 9 and 72 of its application, the review of the lawfulness of Decision 2013/52/EU is not the time to review the lawfulness of the future directive implementing enhanced cooperation in the area of FTT.
- 28 In the light of the foregoing, the French Government considers that the British Government’s arguments are ineffective and that the pleas in law raised on that basis are unfounded.¹ It follows that the British Government’s action must be dismissed.

¹ – The French Government notes that, in the context of an action for annulment of a decision authorising enhanced cooperation, the pleas in law alleging infringement of Articles 327 TFEU and 332 TFEU have very little chance of success. In all likelihood, the arguments put forward in support of those pleas will most often be based on facts relating to the content of the directive implementing the enhanced cooperation at issue and therefore after the adoption of the contested decision. Nevertheless, it cannot be excluded as a matter of

- 29 On those grounds, the French Government claims that the Court should dismiss the action brought by the United Kingdom of Great Britain and Northern Ireland and order the United Kingdom of Great Britain and Northern Ireland to pay the costs.**

[Signatures]

principle that a decision authorising enhanced cooperation may include provisions incompatible with Articles 327 TFEU and 332 TFEU. In those circumstances, it is for the Court to examine the merits of those grounds, even though it must generally dismiss them because of the ineffectiveness of the arguments made in support of them.



Eingangsdatum : 28/11/2013

STATEMENT IN INTERVENTION OF THE PORTUGUESE REPUBLIC

Case C-209/13*

Document lodged by:

PORTUGUESE REPUBLIC

Usual name of the case:

UNITED KINGDOM v COUNCIL

Date lodged:

9 October 2013

MINISTÉRIO DOS NEGÓCIOS ESTRANGEIROS

(Ministry of Foreign Affairs)

Direcção-Geral dos Assuntos Europeus

(Directorate General for European Matters)

Court of Justice of the European Union

Case C-209/13

United Kingdom v Council

STATEMENT IN INTERVENTION OF THE PORTUGUESE REPUBLIC

in the proceedings brought by the United Kingdom for the annulment of Council Decision 2013/52/EU of 22 January 2013 authorising enhanced cooperation in the area of financial transaction tax

* Language of the case: English.

Lisbon, 8 October 2013

Statement addressed to the President and Judges of the Court of Justice of the
European Union

The Government of the Portuguese Republic, represented by Luís Inez Fernandes, Ana Cunha and João Menezes Leitão, acting as Agents, with an address for service at the Ministério dos Negócios Estrangeiros, Direcção-Geral dos Assuntos Europeus, Palácio Cova da Moura, Rua Cova da Moura No 1, 1350-115 Lisbon, having been informed that the Portuguese Republic has been granted leave to intervene in support of the submissions of the defendant, the Council of the European Union, in Case C-209/13 *United Kingdom v Council*, in which the annulment is sought of Council Decision 2013/52/EU of 22 January 2013 authorising enhanced cooperation in the area of financial transaction tax, has the honour to submit, under Article 40 of the Statute of the Court of Justice and in accordance with Article 132(1) and (2) of the Rules of Procedure, a statement in intervention, in the following terms and on the basis of the following grounds:

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I – The proceedings and the intervention of the Portuguese Republic

- 1 By an originating application giving rise to Case C-209/13, the United Kingdom brought an action against the Council of the European Union, under Article 263 TFEU, in which it seeks the annulment, under Article 264 TFEU, of Council Decision 2013/52/EU of 22 January 2013 authorising enhanced cooperation in the area of financial transaction tax ('Decision 2013/52/EU' or 'the contested decision').
- 2 The United Kingdom bases its action for annulment on the following grounds (see paragraphs 4 and 5 of the application):
 - Decision 2013/52/EU is incompatible with Article 327 TFEU and/or customary international law in so far as it allegedly authorises adoption of a financial transaction tax which has extraterritorial effects;
 - and – or in the alternative – the contested decision infringes Article 332 TFEU in so far as it will allegedly impose costs on non-participating States.

The United Kingdom concluded its application by seeking an order from the Court of Justice (paragraph 81):

- a. annulling the authorising decision; and
 - b. requiring the Council to pay the United Kingdom's costs of the proceedings.
- 3 In its defence, the Council rejects the grounds and arguments relied on by the United Kingdom in support of its application and calls on the Court of Justice to dismiss the application and order the applicant to pay the costs.
 - 4 In its reply, the United Kingdom reiterates the claims put forward in its originating application, to which the Council replied in its rejoinder, clarifying certain arguments set out in its defence.
 - 5 The President of the Court of Justice granted leave to the Portuguese Republic to intervene in support of the Council, setting a time-limit for submission of the statement in intervention.
 - 6 In the present statement in intervention, the Portuguese Government respectfully requests the Court of Justice to uphold the claims of the Council and dismiss the action for annulment brought by the United Kingdom, ordering the latter to pay the costs.
 - 7 For that purpose, fully supporting the grounds relied on by the Council, the Portuguese Government will set out below its views on certain specific aspects of

the proceedings in relation to which it wishes to put forward and highlight the legal arguments which it considers most conducive to justifying dismissal of the present action for annulment.

II – Legal framework of the European Union

- 8 It is appropriate to start by setting out the legal framework of the Union, as relevant to this case, and, given that the main parties have already set out the relevant provisions in their pleadings, this will be due only to the extent necessary to organise and expound the arguments set out below by the Portuguese Government. Consequently, so far as concerns the provisions of the proposal for a Council Directive of 14 February 2013 implementing enhanced cooperation in the area of financial transaction tax [COM (2013) 71 final] and the Proposal for a Council directive of 28 September 2011 on a common system of financial transaction tax, amending Directive 2008/7/EC [COM (2011) 594 final], the Portuguese Government refers to the terms cited by the main parties.

(a) Primary law

- 9 Article 20 of the Treaty on European Union (TFEU) provides as follows

‘1. Member States which wish to establish enhanced cooperation between themselves within the framework of the Union’s non-exclusive competences may make use of its institutions and exercise those competences by applying the relevant provisions of the Treaties, subject to the limits and in accordance with the detailed arrangements laid down in this Article and in Articles 326 to 334 of the Treaty on the Functioning of the European Union.

Enhanced cooperation shall aim to further the objectives of the Union, protect its interests and reinforce its integration process. Such cooperation shall be open at any time to all Member States, in accordance with Article 328 of the Treaty on the Functioning of the European Union.

2. The decision authorising enhanced cooperation shall be adopted by the Council as a last resort, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole, and provided that at least nine Member States participate in it. The Council shall act in accordance with the procedure laid down in Article 329 of the Treaty on the Functioning of the European Union.

3. All members of the Council may participate in its deliberations, but only members of the Council representing the Member States participating in enhanced cooperation shall take part in the vote. The voting rules are set out in Article 330 of the Treaty on the Functioning of the European Union.

4. Acts adopted in the framework of enhanced cooperation shall bind only participating Member States. They shall not be regarded as part of the acquis which has to be accepted by candidate States for accession to the Union.'

- 10 Article 329(1) TFEU, the legal basis of Decision 2013/52/EU, states as follows:

'Member States which wish to establish enhanced cooperation between themselves in one of the areas covered by the Treaties, with the exception of fields of exclusive competence and the common foreign and security policy, shall address a request to the Commission, specifying the scope and objectives of the enhanced cooperation proposed. The Commission may submit a proposal to the Council to that effect. In the event of the Commission not submitting a proposal, it shall inform the Member States concerned of the reasons for not doing so.'

Authorisation to proceed with the enhanced cooperation referred to in the first subparagraph shall be granted by the Council, on a proposal from the Commission and after obtaining the consent of the European Parliament.'

- 11 Article 326 TFEU provides as follows:

'Any enhanced cooperation shall comply with the Treaties and Union law.'

Such cooperation shall not undermine the internal market or economic, social and territorial cohesion. It shall not constitute a barrier to or discrimination in trade between Member States, nor shall it distort competition between them.'

- 12 Article 327 TFEU is worded as follows:

'Any enhanced cooperation shall respect the competences, rights and obligations of those Member States which do not participate in it. Those Member States shall not impede its implementation by the participating Member States.'

- 13 As regards enhanced cooperation, Article 332 TFEU provides that:

'Expenditure resulting from implementation of enhanced cooperation, other than administrative costs entailed for the institutions, shall be borne by the participating Member States, unless all members of the Council, acting unanimously after consulting the European Parliament, decide otherwise.'

(b) The contested decision

- 14 Article 1 of Council Decision 2013/52/EU of 22 January 2013 authorising enhanced cooperation in the area of financial transaction tax provides as follows:

'The Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Austria, the Portuguese Republic, the Republic of

Slovenia and the Slovak Republic are hereby authorised to establish enhanced cooperation between themselves in the area of the establishment of a common system of financial transaction tax, by applying the relevant provisions of the Treaties.'

15 Recitals (3) to (6) of the contested decision state as follows:

'(3) In 2011, the Commission took note of a debate which was ongoing at all levels on additional taxation of the financial sector. This debate originates from the desire to ensure that the financial sector fairly and substantially contributes to the costs of the crisis and that it is taxed in a fair way vis-à-vis other sectors for the future, to disincentivise excessively risky activities by financial institutions, to complement regulatory measures aimed at avoiding future crises and to generate additional revenue for general budgets or specific policy purposes.

(4) Against this background, on 28 September 2011, the Commission adopted a proposal for a Council Directive on a common system of financial transaction tax and amending Directive 2008/7/EC. The main objective of that proposal was to ensure the proper functioning of the internal market and to avoid distortion of competition.

(5) At the Council meeting of 22 June 2012, it was ascertained that there was no unanimous support for a common system of financial transaction tax (FTT) as proposed by the Commission. The European Council concluded on 29 June 2012 that the proposed Directive would not be adopted by the Council within a reasonable period. At the Council meeting of 10 July 2012, reference was made to persisting and essential differences in opinion as regards the need to establish a common system of FTT at the Union level and it was confirmed that the principle of harmonised taxation on financial transactions will not receive unanimous support within the Council in the foreseeable future.

(6) In these circumstances, 11 Member States, namely Belgium, Germany, Estonia, Greece, Spain, France, Italy, Austria, Portugal, Slovenia and Slovakia, addressed requests to the Commission by letters received between 28 September and 23 October 2012 indicating that they wished to establish enhanced cooperation between themselves in the area of FTT. These Member States requested that the scope and objectives of the enhanced cooperation be based on the Commission proposal for a Directive of 28 September 2011. Reference was also made in particular to the need to avoid evasive actions, distortions and transfers to other jurisdictions.'

16 According to Recitals (9) to (14) of the contested decision:

'(9) It was recorded at the Council meeting on 29 June 2012 and confirmed on 10 July 2012 that the objective to adopt a common system of FTT cannot be attained within a reasonable period by the Union as a whole. Consequently, the

requirement set out in Article 20(2) TEU that enhanced cooperation may be adopted only as a last resort is fulfilled.

(10) The substantive area within which enhanced cooperation would take place, namely, the establishment of a common system of FTT within the Union, is an area covered by Article 113 TFEU and therefore by the Treaties.

(11) Enhanced cooperation in the area of the establishment of a common system of FTT aims at ensuring the proper functioning of the internal market. At the scale of this cooperation, it avoids the coexistence of differing national regimes and thus an undue fragmentation of the market, as well as ensuing problems in the form of distortions of competition, deflections of trade between products, actors and geographical areas, and incentives for operators to avoid taxation through operations with little economic value. Such issues are of particular relevance in the area concerned, which is marked by highly mobile tax bases. Thus, it furthers the objectives of the Union, protects its interests and reinforces its integration process in accordance with Article 20(1) TEU.

(12) The establishment of a common harmonised system of FTT is not included in the list of areas of exclusive competence of the Union set out in Article 3(1) TFEU. Since it serves the functioning of the internal market, in accordance with Article 113 TFEU, it falls under the shared competences of the Union within the meaning of Article 4 TFEU and is thus within the framework of the Union's non-exclusive competence.

(13) Enhanced cooperation in the area concerned complies with the Treaties and Union law, in accordance with the first paragraph of Article 326 TFEU. In line with the second paragraph of Article 326 TFEU, it will not undermine the internal market or economic, social and territorial cohesion, nor constitute a barrier to or discrimination in trade between Member States or distort competition between them.

(14) Enhanced cooperation in the area concerned respects the competences, rights and obligations of non-participating Member States, in accordance with Article 327 TFEU. Such system would not affect the possibility for non-participating Member States to keep or introduce an FTT on the basis of non-harmonised national rules. The common system of FTT would attribute taxing rights to the participating Member States only on the basis of appropriate connecting factors.'

III – Legal assessment

(a) Subject-matter of the proceedings

- 17 The application for annulment submitted by the applicant, the United Kingdom, is characterised *ab initio* by its fragility.
- 18 In fact, in the application itself (paragraphs 6 and 8), the United Kingdom acknowledges that it may be contended that its application for annulment is premature and that, rather than attacking the authorising decision, it should have reserved its challenge for the act implementing and executing the enhanced cooperation that was authorised. The United Kingdom even declares that the aim of the present application is to adopt a cautious approach to the risk, albeit a limited risk, that it might be alleged, if it does not contest the authorising decision, that it will not then be able to challenge, after its adoption, the directive giving effect to enhanced cooperation in the area of financial transaction tax ('FTT').
- 19 Accordingly, noting that Article 53(2) of the Rules of Procedure provides that, if it considers that an application or action is manifestly inadmissible, the Court of Justice may decide to issue a reasoned order, bringing the proceedings to an end, the United Kingdom expressly states in its application (paragraph 8) that it would be content if such an order were adopted, since it considers that this would give it the legal certainty needed to challenge the measure implementing enhanced cooperation (see also paragraph 5 of the reply).
- 20 In this context, the Portuguese Government observes that, the grounds put forward by the United Kingdom do not in any way enable the action for annulment to proceed, in so far as it attacks not the actual content of the authorising decision but rather the *hypothetical content* of proposals for European measures which have not been adopted.
- 21 In fact, the United Kingdom has filed an application under Article 263 TFEU against a Council decision authorising enhanced cooperation on the basis of Article 329 TFEU. For that reason, the subject-matter of the action can cover only the conditions for the validity of that authorising decision itself, which relate to its actual content and effects, and not to those which relate, rather, to statements or proposals emanating from elsewhere.
- 22 Thus, since the action for annulment is concerned with Decision 2013/52/EU, the review exercised by the Court of Justice, in these proceedings, can focus only on verifying whether *that same Council decision, having regard to its actual content and effects*, fulfils the conditions laid down for enhanced cooperation in accordance with Articles 20 TEU and 326 et seq TFEU.
- 23 The actual significance of a decision authorising enhanced cooperation, as stated by Advocate General Yves Bot in his Opinion delivered on 11 December 2012 in

Joined Cases C-274/11 *Spain v Council* and Case C-295/11 *Italy v Council*, paragraph 99 is that it is ‘merely the premiss for the adoption of other legislative acts which will then have to give specific effect to that enhanced cooperation.’

- 24 Indeed, it is clear from Article 20(2) and (4) TEU (cited above in paragraph 9) that it is necessary to clearly distinguish and deal separately with the ‘*decision authorising enhanced cooperation*’ and the ‘*[a]cts adopted in the framework of enhanced cooperation*’, with the result that any illegal aspects pertaining to the latter do not call in question the legality of the former.
- 25 The decision authorising enhanced cooperation, which is clearly a challengeable measure, is, however, challengeable only on the basis of its own grounds and content and not on the basis of any terms of the measure implementing the authorised enhanced cooperation. As was observed by Advocate General Yves Bot in his abovementioned Opinion in Joined Cases C-274/11 and C-295/11 (paragraph 137): ‘*The decision authorising the setting-up of enhanced cooperation defines the procedural framework within which other acts will subsequently be adopted in order to give concrete effect to that cooperation. Accordingly, judicial review of the authorisation decision must not be confused with judicial review of the acts subsequently adopted within the context of the enhanced cooperation.*’
- 26 This point has moreover been dealt with in the case-law of the Court of Justice, specifically in its judgment of 16 April 2013 in Joined Cases C-274/11 and C-295/11, cited above (paragraphs 76 and 77), in which the Court held that it is not possible, in the context of proceedings concerning a decision authorising enhanced cooperation, to assess the compatibility with Union law of elements that do no more than correspond to a proposal by the Commission, are only at a preparatory stage and do not form a component part of the contested decision.
- 27 In that judgment, the Court of Justice even states, regarding the actual content of a decision authorising enhanced cooperation, that (paragraph 92): ‘*The Council was not obliged to provide, in the contested decision, further information with regard to the possible content of the system adopted by the participants in the enhanced cooperation in question. The sole purpose of that decision was to authorise the requesting Member States to establish that cooperation. It was thereafter for those States, having recourse to the institutions of the Union following the procedures laid down in Articles 20 TEU and 326 TFEU to 334 TFEU, to set up the unitary patent and to lay down the rules attaching to it, including, if necessary, specific rules in the judicial sphere.*’
- 28 Accordingly, given that the grounds relied on in the applicant’s challenge are not directed against the authorisation of enhanced cooperation (‘the premiss’ of enhanced cooperation) but rather against a putative future legislative measure and such hypothetical solutions as might derive from it, whereby the enhanced cooperation will be put into effect (thus constituting, as implementation and

execution of enhanced cooperation, ‘*the conclusion*’ of such cooperation), the action for annulment can only be held to be unfounded.

(b) The grounds of challenge are not feasible

- 29 As the Council observes in its defence (paragraph 26) in terms which the Portuguese Government fully endorses, the applicant does not question the principle as such of establishing enhanced cooperation in relation to the financial transaction tax but directs its challenge against specific details of the Proposal for a Council Directive of 28 September 2011 on a common system of financial transaction tax and amending Directive 2008/7/EC [COM(2011) 594 final] (‘the 2011 Proposal’), which was never adopted, or against the Proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax [COM (2013) 71 final], (‘the 2013 Proposal’), which did not exist when the contested decision was adopted.
- 30 In fact, when, in the first ground for annulment put forward (see paragraph 2 above), the United Kingdom alleges that the authorisation for enhanced cooperation relates to the adoption of an FTT with extraterritorial effects, it is referring, on the one hand, so far as concerns the so-called ‘counterparty principle’, to the content of Article 3(1)(e) of the 2011 Proposal and the content of Article 4(1)(f) of the 2013 Proposal (see paragraphs 10 and 11 of the originating application) and, on the other hand, as regards the so-called ‘issuance principle’, to the content of Article 4(1)(g) and Article 4(2)(c) of the 2013 Proposal (see paragraphs 14 and 15 of the originating application).
- 31 The fact is that it is not possible to infer from the authorising decision any specific content concerning enhanced cooperation in relation to the FTT which involves either of the ‘counterparty’ or ‘issuance’ principles which, according to the United Kingdom, entail extraterritorial effects. As the Council correctly states in its defence (paragraph 31): *‘the “counterparty” and “issuance” principles challenged by the applicant are purely hypothetical features of ... legislation yet to be established, which have not been authorised as such by the contested Decision.’*
- 32 As a matter of fact, the enacting terms of the contested decision (Article 1) make no reference to those possible solutions.
- 33 Having regard also to the recitals (see above, paragraphs 15 and 16), which set out the reasons for which the Council considers to be fulfilled the requirements laid down in the Treaties regarding authorisation for enhanced cooperation, there is no indication or requirement concerning precisely what constitutes the FTT covered by enhanced cooperation.
- 34 Nevertheless, the United Kingdom seems to attach importance (see paragraph 12 of the originating application) to recital 6 of the contested decision (see
- 10

paragraph 15 above), where it states that: *‘These Member States requested that the scope and objectives of the enhanced cooperation be based on the Commission proposal for a Directive of 28 September 2011.’*

- 35 However, as the Council correctly points out (paragraph 32 of its defence), recital 6 is purely a procedural formality, simply confirming that the corresponding requirement of Article 329(1) TFEU has been met, namely that the Member States wishing to establish enhanced cooperation between them should make the necessary application to the Commission.
- 36 Moreover, it would seem absolutely unworkable to regard the content of a future hypothetical regulation as predetermined and predefined merely in reliance on a request that the scope and objectives of the enhanced cooperation *‘should be based’* on the 2011 Proposal.
- 37 Nor must it be forgotten that the preamble to a Union measure cannot, by itself, have any legal value or be binding. The value of a preamble lies simply in the fact that it is a means of interpreting the relevant legislative measure and does not itself contain provisions having any binding effect. As stated by Advocate General Ruiz-Jarabo Colomer in his Opinion in Case C-267/06 *Maruko*, at point 76: *‘... legislative provisions describe facts, situations or circumstances and attribute certain consequences to them. The factual situation and the legal result are therefore the two essential elements of a legal rule. But the explanatory memorandum, the preamble or the introductory recitals, which merely seek to illustrate, state the reasons for or explain, do not form part of these essential elements, since, although they accompany, and usually precede, the enacting terms of the measure, forming a physical part of it, they have no binding force, notwithstanding their usefulness as criteria for interpretation, a role which the Court has frequently cited.’*
- 38 It is not therefore viable to challenge a measure exclusively by reference to the terms of its preamble, particularly where the challenge seeks in advance to attribute to the recitals hypothetical courses of action to be included in future measures not yet adopted. To quote a view expressed by Advocate General Christine Stix-Hackl in her Opinion delivered on 20 January 2004 in Joined Cases C-37/02 *Di Lenardo Adriano Srl* and C-38/02 *Dilexport Srl* (paragraph 59), which seems to be particularly relevant here: *‘recitals cannot, in themselves, constitute a criterion for assessment, but acquire sufficient normative significance only in connection with the operative part.’*
- 39 In brief, the decision authorising enhanced cooperation in the area of FTT, challenged here, does not constitute a preliminary decision as to the terms and aims of the legislative measure implementing enhanced cooperation.
- 40 Accordingly, since the contested decision, as a decision authorising enhanced cooperation in the area of FTT, does not impose or exclude any specific courses of

action regarding FTT, which will form the subject-matter and content only of a future measure giving effect to enhanced cooperation and, specifically, the contested decision does not impose or exclude solutions relating to the so-called ‘counterparty’ and ‘issuance’ principles, the illegality imputed to the contested decision, on the ground that it infringes Article 327 TFEU and/or customary international law, by allegedly authorising the adoption of financial transaction tax which has extraterritorial effects, the challenge cannot succeed, since it is wholly unfounded.

- 41 Those considerations are also applicable to the second ground for annulment of the contested decision raised by the applicant, claiming infringement of Article 332 TFEU, on the basis of the allegation that the authorisation for enhanced cooperation in the area of FTT is alleged to result in the imposition of costs on non-participating States (see above, paragraphs 2 and 13).
- 42 As the Council pertinently observes (paragraph 43 of its defence), it is only at the time of adoption of the legislative act implementing the enhanced cooperation that the legislature will ensure that participating Member States are to bear the costs entailed by that legal act, or that the Council, acting unanimously and having consulted the European Parliament, may waive the requirement that the non-participating Member States are to be excluded from such costs.
- 43 It should also be observed that the conclusion that the requirement relating to the bearing of expenses can be assessed only by reference to the legislative measure implementing enhanced cooperation and not by reference to the authorising decision itself is to be inferred directly from Article 332 TFEU, which refers specifically to the ‘expenditure resulting from *implementation* of enhanced cooperation’.
- 44 In any event, it would never be relevant, for the purposes of applying Article 332 TFEU, to invoke the costs associated with the application of Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC or Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures; the fact is that such costs are solely the costs applicable under the general rules, with their specific scope, laid down in those measures of secondary Union law.
- 45 Having regard to all the foregoing considerations, the Portuguese Government considers, in short, that the grounds of annulment relied on by the applicant against the contested decision do not relate to the actual content of that decision but, rather, concern hypothetical solutions that may be incorporated in a future directive implementing enhanced cooperation in the area of FTT.
- 46 Consequently, the Portuguese Government considers that it is not appropriate, in the present proceedings, to examine the merits (or lack of merits) of the grounds

put forward in the application regarding the content and effects of hypothetical courses of action which might be provided for in the relevant directive implementing the enhanced cooperation in question. At this stage, it is appropriate to refer to the statement in paragraph 82 of the abovementioned judgment of the Court of Justice of 16 April 2013 (in Joined Cases C-274/11 and C-295/11, cited above): ‘*While it is, admittedly, essential for enhanced cooperation not to lead to the adoption of measures that might prevent the non-participating Member States from exercising their competences and rights or shouldering their obligations, it is, in contrast, permissible for those taking part in this cooperation to prescribe rules with which those non-participating States would not agree if they did take part in it.*’

- 47 Finally, the Portuguese Government endorses the views of the Council, set out in its rejoinder (paragraphs 4 and 5), to the effect that the present application is unjustified (and inadmissible) because it lacks any foundation, in so far as the applicant is in fact questioning the legality of Council Decision 2013/52/EU of 22 January 2013, which authorises enhanced cooperation in the area of the FTT, and does so on the basis of grounds that are not feasible in so far as they refer to hypothetical courses of action that are not encompassed in the contested decision and may, possibly, take concrete form only as a result of future legislative measures.

IV – Conclusion

- 48 Having regard to the foregoing and to the reasoning set out, the Portuguese Government considers, in support of the contentions of the defendant, the Council of the European Union, that the Court of Justice should:
- Dismiss the present action for annulment brought by the United Kingdom as unfounded;
 - Order the applicant to pay the costs of the proceedings.

Agents for the Portuguese Republic

Luís Inez Fernandes

Ana Cunha

João Menezes Leitão

(Signed digitally by Luís Inez Fernandes)



Eingangsdatum : 28/11/2013



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Brussels, 2 October 2013

STATEMENT IN INTERVENTION

submitted by the

EUROPEAN PARLIAMENT

represented by Anders Neergaard and Rob van de Westelaken, Members of the Legal Service, acting as Agents, who agree on service being effected per e-Curia or, if need be, at the following address: European Parliament, Legal Service, Office KAD 06A007, L-2929 Luxembourg.

In Case C-209/13

The United Kingdom and Northern Ireland

v

The Council of the European Union

concerning an application for the annulment of Council Decision 2013/52/EU of 22 January 2013 authorising enhanced cooperation in the area of financial transaction tax (OJ L 22 of 25.1.2013, p. 11).

The European Parliament has the honour to make the following submissions to the Court of Justice.

INTRODUCTION

1. The United Kingdom seeks the annulment of Council Decision 2013/52/EU authorising enhanced cooperation in the area of financial transaction tax. It advances three grounds. Firstly, according to the United Kingdom, the Decision authorises the adoption of a Financial Transaction Tax with extraterritorial effects contrary to Article 327 TFEU. According to the second ground the Decision is for the same reason contrary to customary international law. The third ground is that according to the United Kingdom the Decision authorises the adoption of a Financial Transaction Tax which will impose costs on non-participating Member States in breach of Article 332 TFEU.
2. Parliament agrees with the summary of facts and procedure, as well as with the description of the legal framework given by the Council, which will therefore not be repeated here in the interest of brevity.
3. It would seem sufficient to make one simple statement on the facts. In effect, Council decision 2013/52/EU only stipulates that the participating Member States are “authorised to establish enhanced cooperation between themselves in the area of the establishment of a common system of financial transaction tax, by applying the relevant provisions of the Treaties”. This means that it contains none of the features concerned by any of the three grounds raised by the United Kingdom.

LAW

4. The European Parliament also subscribes to the assessment made by the Council on the legal situation and refers to this assessment.
5. In the understanding of the European Parliament, the United Kingdom has stated the pleas in law as required by Article 21 of the Statute of the Court of Justice of the European Union. The problem is that it has invoked grounds that are completely irrelevant for the application to annul Decision 2013/52.

6. In this situation the European Parliament only wants to underline that as none of the provisions of Decision 2013/52/EU can have the extraterritorial effect criticised by the United Kingdom on its first and second grounds or result in costs for non-participating Member States criticised on the third ground, it is clear that those grounds are unfounded in respect of that decision. As the grounds invoked by the United Kingdom do not concern Decision 2013/52/EU but a hypothetical content of a hypothetical future Directive, the action brought by the United Kingdom must be rejected as unfounded.

CONCLUSIONS

7. In conclusion, Parliament is of the view that the application is unfounded.

FORM OF ORDER SOUGHT

8. In light of the foregoing, the European Parliament respectfully requests the Court of Justice to grant the order sought by the Council and thus:
 - dismiss the application, and
 - order the Applicants to pay the costs.

(signed)

Anders Neergaard

(signed)

Rob van de Westelaken

Agents for the European Parliament



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EUROPEAN COMMISSION

Brussels, 21 October 2013
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TO THE PRESIDENT AND MEMBERS OF THE COURT OF JUSTICE
OF THE EUROPEAN UNION

STATEMENT IN INTERVENTION

submitted, pursuant to Article 132 of the Rules of Procedure of the Court of Justice, by the
EUROPEAN COMMISSION

represented by Mr. Richard Lyal and Mr. Ben Smulders, Principal legal advisers, and Mr. Walter Mölls, Legal adviser, acting as agents, with an address for Service at the office of Mrs. Merete Clausen, member of its Legal Service, Building BECH, 5, rue A. Weicker, L-2721 Luxembourg, who consent to service by e-Curia,

in Case C-209/13

United Kingdom of Great Britain and Northern Ireland

against

Council of the European Union

in which the Applicant seeks annulment of Council Decision No 2013/52/EU, of 22 January 2013, authorising enhanced cooperation in the area of financial transaction tax (OJ L 22, 25.1.2013, p. 11).

In support of the form of order sought by the Council, the Commission has the honour to submit the following remarks.

1. Background

1. According to the first and second pleas put forward by the United Kingdom in its application, Decision 2013/52/EU (the contested Decision) allows the adoption of an FTT with “extraterritorial effects” and is therefore contrary to Article 327 TFEU and customary international law. According to the United Kingdom’s third plea, that same Decision is also contrary to Article 332 TFEU since it allows the adoption of an FTT which will impose costs on non-participating Member States.
2. The United Kingdom has conceded that the application could be considered “premature”, in the sense that the pleas it contains should be directed against any later act implementing the enhanced cooperation rather than the contested Decision authorising such cooperation. It adds that it would be “content for the adoption” of an order dismissing the application as “manifestly inadmissible” on these grounds.
3. The Council’s defence concludes that the application is unfounded, since the contested Decision does not determine any detail of the harmonised rules in the area concerned; these can instead be fixed only in a potential future act implementing the enhanced cooperation. If, upon the adoption of such future act, the United Kingdom were to consider that it was contrary to the rules and principles referred to in the application, it could bring an application for the annulment of that act.
4. In its reply, the United Kingdom repeats that it would be content for the adoption of a reasoned order dismissing the application as manifestly inadmissible on the grounds of prematurity.

2. The Commission’s observations

5. As a preliminary point, the Commission should note that it does not agree with the arguments of “substance” put forward by the United Kingdom. More precisely, it does not consider that a directive incorporating the substance of either of its proposals (those of 2011¹ or 2013²) would be contrary to Articles 327 or 332 TFEU or indeed to customary international law.

¹ COM(2011) 594 final.

² COM(2013)71 final.

6. That said, the Commission concurs with the Council's view that the application brought by the United Kingdom is unfounded, specifically because the pleas on which it is based are directed against legal elements that are not contained in the contested Decision.
7. An authorising decision under Article 329(1) TFEU provides participating Member States with the possibility referred to in Article 20 TEU, namely to "make use of [the Union's] institutions and exercise [non-exclusive] competences by applying the relevant provisions of the Treaties", subject to the limits and in accordance with the arrangements laid down in Articles 326 to 334 TFEU.
8. An action for annulment against such an authorising decision can succeed only if that decision *in itself* infringes one or more of these limits and arrangements, which concern either the procedural requirements for the adoption of an authorising decision or substantive limitations.
9. The United Kingdom does not seek to challenge the procedure followed for the adoption of the authorising decision.
10. Substantive limitations on enhanced cooperation may be invoked in order to challenge the legality of an authorising decision only if the measure whose adoption it enables will by its nature infringe one or more of those limitations. An obvious example would be the adoption by the Council of an authorising decision in an area of exclusive EU competence (contrary to Article 20(1) TEU): it would be clear from the outset that any measure adopted on the basis of that authorisation would be unlawful.
11. The present case is quite different. Whatever the merits of the United Kingdom's criticisms of certain elements of the 2011 and 2013 Commission proposals, it cannot be said today that they will necessarily be part of the measure to be adopted.
12. The actual content of any measure adopted by way of enhanced cooperation is fixed not in the authorising decision itself but in the act implementing such cooperation, to be adopted by the "Union's institutions" on the basis of the appropriate "competences".
13. An authorising decision must naturally be *applied* in compliance with all the pertinent provisions of primary law. But this is a matter for the legislator to take care of and unrelated to the legality of the authorising decision itself. The Commission remains convinced that its proposals, including the provisions criticised by the United Kingdom,

respect perfectly the substantive limitations laid down in the Treaty; but the legislator is free to adopt them or not, or to modify them, for reasons presented by the UK or for other reasons altogether. By consequence, the arguments of “substance” put forward by the United Kingdom in the present proceedings can be directed only against a possible future act implementing enhanced cooperation, and the Court would assess them in that context.

14. As the Court held in its judgment of 16 April 2013 in Joined Cases C-274/11 and C-295/11 *Spain and Italy v Council*, referred to by the Council, the “sole purpose” of an authorising decision under Article 329 TFEU is “to authorise the requesting Member States to establish [enhanced] cooperation. It [is] thereafter for those States, having recourse to the institutions of the Union following the procedures laid down in Articles 20 TEU and 326 TFEU to 334 TFEU, to set up” the rules implementing such cooperation.³
15. The reasoning set out above is not called into question by the fact that, in the present case, the participating Member States have specified the scope and objectives of the enhanced cooperation (cf. Article 329 TFEU) by reference to the Commission’s 2011 proposal⁴, a text the United Kingdom considers to be at odds with rules and principles it refers to in its application. This does not alter the point that is fundamental to the analysis, namely that the precise terms of the implementing act are a matter for the legislator to consider and decide.
16. Like the legal basis of the implementing act, the authorising decision (whose scope cannot exceed that basis),⁵ simply forms part of the background to that implementing act. Substantive requirements with which the act itself must comply, be they general in nature or specific to enhanced cooperation, are wholly distinct from this framework.
17. The Court has confirmed this approach in the above mentioned judgment,⁶ which concerned Council Decision 2011/167/EU authorising enhanced cooperation in the area

³ Paragraph 92 of the judgment.

⁴ Cf. sixth recital of the contested Decision.

⁵ Cf. Article 329 TFEU : Enhanced cooperation has to fall “in one of the areas covered by the Treaties...”. Cf. also the 10th recital of the Authorising Decision.

⁶ Footnote 3 above.

of the creation of unitary patent protection.⁷ The applicant Member States had taken issue with that Decision *inter alia* because one of its recitals referred to a language regime they considered as unlawful. The Court ruled as follows:

76 In so far as, in order to demonstrate such damage to the internal market and discrimination and distortion of competition as well, the applicants also make reference to the language arrangements considered in recital 7 in the preamble to the contested decision, it must be declared that the compatibility of those arrangements with Union law may not be examined in these actions.

77 As is stated in recital 7, the language arrangements there described do no more than correspond to a proposal by the Commission with the addition of certain elements of compromise proposed by the Member State presiding over the Council of the Union at the time the requests for enhanced cooperation were made. The language arrangements as set out in that recital were, therefore, only at a preparatory stage when the contested decision was adopted and do not form a component part of the latter.

18. This reasoning is fully transposable to the present case
19. In the light of the foregoing, it is not necessary to address the substantive arguments of the United Kingdom. However, the Commission observes that the United Kingdom's third plea appears to reflect some misunderstanding of what is meant by the limitation contained in Article 332. The Council is right to highlight the (obvious) absence of incompatibility with that provision. First, Article 332 TFEU must be read in the light of Article 327 TFEU, which already protects non-participating Member States from being subjected to new obligations through measures adopted under enhanced cooperation. Against this background, Article 332 can only refer to burdens imposed upon them, indirectly, through the Union's budget. Secondly, Directives 2011/16/EU and 2010/24/EU form part of the existing Union *acquis*, and obligations flowing therefrom can by definition not "[result] from implementation of enhanced cooperation", within the meaning of Article 332 TFEU. Third, since these Directives apply, with a few exceptions, to all national taxes, including taxes on financial transactions, it makes no difference whether a Member State imposes a non-harmonised financial transactions tax or one that is harmonised by way of enhanced cooperation.

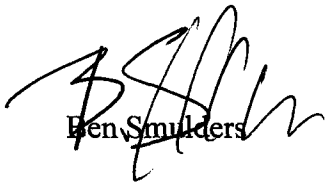
⁷ OJ 2011 L 76, p. 53.

3. Conclusion and form of order sought

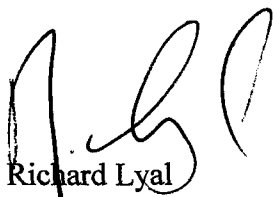
20. It follows from the above that the application is directed against elements which the contested Decision, by its nature, does not contain, and that it is therefore unfounded.

21. Consequently, the Commission joins the Council's request to:

- 1) dismiss the application;
- 2) order the applicant to bear the costs.



Ben Smulders



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Walter Mölls