

JUDGMENT OF THE MOOT EUROPEAN COURT OF JUSTICE

Action of annulment - nullity Agreement of Alternative Partnerships (AAP) - legal basis AAP- 217 TEUF (Association Agreement) - 8 TEU (Neighborhood Agreement) - European Neighborhood Policy (ENP) - Competence of the Commission- Consultation European Parliament- infringement of essential procedural requirement

In Case C-329/17,

The Republic of Austria, represented by M. Höhn, F.Sommerfeld, C. Uzuntaş,

The Republic of France, represented by D. Heler, M.Pezzetta, J. Zulkarnaen,

Applicants,

Supported by:

European Parliament, represented by L-M.Bache, S. Uçar, C. Güldal

V

European Commission, represented by H.Boyraz, R. Kratunkova, M. Nusser

Defendant,

Supported by:

The United Kingdom of Great Britain and Northern Ireland, represented by M. Bellini, B. Çelebi, L. Jackson,

The Republic of Turkey, represented by E. Binkert, Y. Diallo, A. Küch.

APPLICATION for annulment of the Agreement on Alternative Partnerships on the grounds of violation of formal standards, lack of legal basis of such agreement and political pressure within the Commission,

THE EUROPEAN COURT OF JUSTICE

Composed of E. Leyva Ruiz, *President*, E. O'Connell, *Vice-President*, S. Göksu and H.S. Karacar, *Judges*.

Registrar: M.F., Administrator

having regard to the written procedure and further to the hearings on 15 and 16 June 2017,

after hearing the opinion of the Advocate General at the sitting on 16 June 2017,

gives the following

Judgment

By its application, the applicants, Austria and France, Member States of the European Union, seek the annulment of the Agreement on Alternative Partnership (henceforth AAP) adopted by the Commission.

Background to the dispute

Following the March 2016 agreement between Turkey and the European Union, which led to the opening of new chapters in the negotiations for Turkey's accession into the EU, and the result of the June 23rd 2016 referendum on the United Kingdom's membership in the European Union, which led to the triggering of Article 50 TEU by the British Government in March 2017, the European Union has sought to develop a new framework within which to develop new kinds of relationships with third countries.

In this context, the European Commission, the defendant, developed and negotiated the AAP, aimed at providing new kinds of partnerships with third countries, most notably Turkey and the United Kingdom, two supporters of the defendant. The defendant argues that it acted legally and in conformity with European treaties and law, by virtue of Article 216 TFEU, Article 217 TFEU, or Article 8 TEU. The defendant further argued that "it was their duty to take extraordinary steps to achieve important ambitions for the benefit of all European citizens".

During the negotiations in the European Council, seven countries abstained and two countries voted against the AAP, namely Austria and France. The Commission decided to go ahead with the AAP, and as a result the applicants, Austria and France, have brought forward, in accordance with Article 263 TFEU, an action of annulment of the AAP to the Court on three grounds. First, they argue formal standards were violated, since the negotiations took place without any public dialogue and the practice of the AAP is against the standard procedure of so called ‘co-decision’. Second, the applicants argue that the agreement has no legal basis, despite the defendant’s claims that it acted in accordance with Articles in either the TFEU or the TEU. Third, the applicants contend that the AAP was the result of political peer pressure within the Commission. The applicants are supported by the European Parliament, whose representatives claim that it has not been consulted in the negotiations leading to the AAP and that its consent would be needed in order to endorse any AAP.

Legal Context

The contested agreement between the European Union and third countries, the AAP, was initiated and negotiated by the defendant, the European Commission, on the grounds that it acted either by virtue of Article 216 TFEU, Article 217 TFEU or Article 8 TEU.

Article 216 and Article 217 of the TFEU

According to Article 216(1) of the TFEU:

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

Article 217 of the TFEU further provides that

“The Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure.”

Article 8 of the TEU

Article 8 (1) of the TEU provides that agreements between the EU and third parties should be aimed at the pursuit of developing:

“a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation”.

To this end, Article 8 (2) TEU provides that:

“the Union may conclude specific agreements with the countries concerned. These agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly. Their implementation shall be the subject of periodic consultation.”

Procedure and forms of order sought

By the application lodged at the Registry of the General Court on 2 June 2017, the applicants claimed that the Court should annul the contested Agreement on Alternative Partnerships.

Upon reading the pleadings sent by applicants and defendant on 2 June 2017, the Court decided to open the oral procedure.

The parties presented oral argument and replied to the Court's oral questions at the hearing on 15 and 16 June 2017.

The applicants claim that the Court should:

- declare void and null the contested agreement;
- order the Commission to pay the costs.

The Commission contends that the Court should:

- dismiss the action and acknowledge the AAP;
- order the applicants to pay the costs.

Law

The applicant relies on three pleas in law in support of its action. The first alleges an infringement of essential procedural requirements according to Art. 263 (2), the second, lack of competence of the Commission according to Art. 263 (2) TFEU and the third argument results from the political pressure within the Commission.

The Court finds it appropriate to begin by addressing the second plea, followed by the first plea and lastly the third one.

1) First plea in law: lack of competence on the part of the Commission

By the first plea, the applicants submit that the contested Agreement is unlawful on the ground that it lacks legal basis and that the Commission therefore acted beyond the scope of its powers.

The legal analysis consists of six parts, which will analyse the different possible legal bases of the AAP in order to determine if the Commission acted within its powers.

i) Article 216 TFEU

Admissibility of the first part of the first plea:

The defendant, the Commission, states that they acted by virtue of what is disposed in Article 216 TFEU, being this a valid legal basis to conclude the agreement AAP. The Commission submitted that the aforementioned article gives the general competence to the European Union to conclude an Agreement implicitly when it is “necessary in order to achieve (...) one of the objectives referred to in the Treaties”.

One of the applicants, Austria, emphasizes however the character of Art. 216 TFEU, orientated to codify the Court of Justice of the European Union (CJEU), does not grant directly any competences to the European Union. According to Art. 216 (1) (2nd alternative) TFEU the European Union can conclude such an agreement if it is necessary to achieve one of the objectives referred to in the Treaties. This leads the applicant to submit in essence, that Art. 216 in connection with Art. 3 TEU does not constitute a sufficient legal basis as Art. 3 TEU constitutes a purely programmatic provision. With the aim of providing arguments to

this affirmation, Austria refers to the need of specific provisions in the Treaties in order to create an external competence, as the Kramer Judgment¹ states.

First part of the first plea:

Art. 216 TFEU reveals itself as a referral norm that regulates the competences of the EU to conclude international agreements and makes a distinction between explicit and implicit competences. Within the explicit competences that the different parties claim to be the legal basis for the AAP are Art. 8 TEU and Art. 217 TFEU the most important ones in this context.

We must first understand the character of the implicit competences to which Art. 216 (2nd Alternative) TFEU refers. Art. 216 (2nd Alternative) TFEU must be understood under the light of the case-law that the CJEU has developed in the course of the years.

First, the AETR judgment² stated that the competences of the EU could be extracted not only from primary legislation but also from secondary legislation. This was nuanced by the Kramer judgment³ and the opinion about the European laying-up fund of the CJEU. The Court recognized the principle of “Parallelism of internal and external competences”⁴, that reveals that “whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community has authority to enter into the international commitments necessary for the attainment of that objective, even in the absence of an express provision in that connection”.⁵

The scope of Art. 216 (2nd Alternative) and the interpretation that must be done according to the case-law is problematic.

First of all, the wording of Art. 216 (1) (2nd Alternative) indicates that this legal position goes beyond the principle established by the Court on the aforementioned Opinion, due to the fact that it focuses on the necessity to achieve the objectives referred to in the Treaties without establishing a connection with the principle developed by the Court. If we assume a wide interpretation of the case-law of the Court in relation to Art.216 TFEU, the conclusion would

¹ Kramer Judgment, C-3/76, 6/76

² AETR, EuGH, Rs 22/70, Sgl. 1971, 263 Rn.16-18.

³ Kramer Judgment, C-3/76, 6/76.

⁴ Callies, Kommentar Beck- Online, Art. 216 TFEU, paragraph 10.

⁵ Opinion 1/76 of the Court of Justice (26 April 1977) European laying-up fund.

be that the EU could conclude international agreements in the political field without the necessity of having a concrete legal basis.⁶

Against this wide interpretation speaks Art. 5 (2) TEU, that makes the acting of the EU conditional on/to the specific provisions laid out on the Treaties and the powers that the Member States have conferred to the EU according to the principle of conferral.

How the manner that Art. 216 is formulated reminds of the form that Article 352 (1) TFEU describes the competences given to the European Union in cases not envisaged by the Treaty (implied powers):

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

The difference between Art. 216 (1) (2nd Alternative) and Art. 352 (1) TFEU resides however in the fact that Art. 352 TFEU is a general clause and the intention of Art. 216 TFEU is not that one, what leads to a narrow interpretation of 216 (1) (2nd Alternative) in the form of an exception.

Given these facts, it is necessary to understand Art. 216 TFEU in relation to Art. 3 (2) TFEU, which states that

The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

It is however necessary to remember, that 216 needs a restrictive interpretation and that means, that it is not an exclusive competence of the European Union but a shared competence with the Member States.⁷

Findings of the Court:

⁶ Streinz, Kommentar Beck-Online, Art. 216 TFEU, paragraph 30.

⁷ Streinz, Kommentar Beck Online, Art. 50 TEU, paragraph 32.

The applicant submits, as mentioned before, that Art. 216 TFEU, in connection with Art. 3 TEU, is not enough to constitute a legal basis for the AAP and that it is a purely programmatic provision. Indeed is not enough to act as a basis for the reasons above exposed. However, if Art. 3 TEU was a pure programmatic provision, the sense of Art. 216 TFEU would be emptied out of its content and therefore completely unnecessary. Therefore, it is necessary to understand that Art. 216 in connection with Art. 3 does constitute a legal basis that allows the EU to conclude international agreements with third countries but just in the form of mixed agreements, as the competence is not exclusively of the EU but rather shared with the Member States, that can, this way, shape the future relations with third countries together with the Union.

However, it needs to be pointed out that the implicit competences to which Art. 216 (1) TFEU refers, act just according to the principle of subsidiarity and it is mandatory to analyse first, if an explicit legal basis existed in order to create the AAP.

ii) Article 50 TEU

Admissibility of the second part of the first plea:

The Parliament, as supporter of the applicant, submits that the Commission does not consider Art. 50 (2) TEU, which regulates the exit of member states. They add, furthermore, that this article provides a specific agreement between the Union and the member state in question, and according to this, the consent of the European Parliament is needed. Given these facts, the Parliament implies that Art. 50 was a suitable legal basis for the agreement and that the procedural forms were not respected.

On the other hand, the UK, as supporter of the defendant, the Commission, affirms that Art. 50 TEU leaves an “excessive room of interpretation” to conclude if this article can constitute or not a legal basis for agreements covering the future relationship. Besides, according to Art. 50 TEU the expression “taking into account of the framework for its future relationship with the Union” raises many questions about its interpretation. Therefore, they continue, the Commission just acted moved by the possible legal loop in which the member state could find itself.

Second part of the first plea:

The extraordinary situation of the UK leaving the European Union could and will lead to numerous questions of interpretation of different norms of the legislation of the union.

Indeed the wording of Art. 50 (2) TEU leads to doubts about the nature of this article and the question whether it is a valid legal basis for such an international agreement or not:

A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

As the supporter of the defendant exposes, a wide interpretation of the second section could be translated in the possibility of concluding an agreement such as the AAP.

However, the sense of this article appears, in the opinion of the Court, to be a different one: the expression “taking account of the framework” indicates that it refers to a different agreement that can be concluded in the future to articulate the relation between the UK and the European Union. This article regulates primarily the agreement concerning the “details”⁸. Therefore, the agreement negotiated to leave the European Union would be a different one and in different terms to the one that could be afterwards decided in the form, for example, of an association agreement (Art. 217 TFEU) or a Neighbouring Agreement (Art. 8 TEU).

This does not exclude, however, the possibility of taking into account some aspects that could be reflected afterwards on the other agreement. Regarding this matter, it is natural that due to the close ties that the UK and the European Union have shared during decades, topics such as economy or political relations will be present on the negotiation table, as well as fundamental freedoms in order to be able to protect the European citizens, that are still working or living in the UK. This on the other hand constitutes an indication of the form that the future agreement could present.

Findings of the Court:

⁸ Streinz, Kommentar Beck Online, Art. 50 TEU, paragraph 8.

Against what the supporter of the applicants, the European Parliament, erroneously implies, Art. 50 (2) TEU does not represent a valid legal basis for the creation of an agreement as the AAP, but it gives a mere hint to the form that an agreement could have in the future, after the complete withdrawal. Therefore, the statement that the Commission did not comply with the information duty towards the parliament, cannot find its justification on Art. 50 (2). Thus, Art. 50 (2) TEU does not represent a valid legal basis for the conclusion of the AAP.

iii) Regulation (EU) No. 231/2014 (IPA II)

Third part of the first plea and findings of the Court

Articles 212 (2) and 290 TFEU in connection with the Regulation 231/2014 (IPA II) could be translated into a competence of the Commission to act and therefore as a legal basis. The Opinion of Advocate General states correctly that Article 212 (3) subparagraph (2) TFEU provides a legal way to conclude agreements with third countries.

According to the first ground of the regulation, the Instrument for Pre-accession Assistance (hereinafter IPA II) represents an instrument “for financing external action”⁹.

The main purpose of this instrument is to provide financial assistance to countries like Bosnia and Herzegovina, Kosovo, Serbia, Turkey, etc. ¹⁰ in order to prepare them to meet the accession criteria, that means, the “Copenhagen Criteria”, foreseen as a requirement to access the Union.¹¹

Following the Strategy Paper adopted the 30/06/2014 by the European Commission, Turkey is explicitly mentioned as one of the countries that would fall in the scope of this regulation and that would benefice from the reforms implemented through this instrument in order to comply with the aforementioned criteria.

⁹ Regulation (EU) No 231/2014 ground (1).

¹⁰ European Commission, Multi-Country Indicative Strategy paper (214-2020), adopted on 30/06/2014, Instrument for pre-accession assistance (IPA II), page 1.

¹¹ Established by the Copenhagen European Council in 1993, completing the conditions for accession laid out in Article 6 (1) and Art. 49 TEU.

Furthermore, as the Advocate General well states on its Opinion that the instrument constitutes a “path to the achievements of those criteria and cannot require them as a precondition for the beneficiaries”¹².

However, two facts play here an important role to decide against the validity of this instrument in connection with Art. 212 (2) and 290 TFEU to conclude the AAP:

First of all, the fact that Turkey states that the agreement constitutes an “informal end to the efforts made by Turkey to access the Union as a full member” speaks against it, and enters in contradiction with the main purpose of the IPA II, which is, as Article 1 of the regulations states, to adopt and implement

“the political, institutional, legal, administrative, social and economic reforms required by those beneficiaries in order to comply with the Union's values and to progressively align to the Union's rules, standards, policies and practices, with a view to Union membership”

Secondly, Turkey has not proven the will neither the commitment to align with the values defended by the European Union.

For these reasons, the Court does not support that the IPA II could be a suitable legal basis for the AAP.

iv) Regulation (EU) No. 232/2014 (ENI)

Admissibility of the fourth part of the first plea:

The UK as supporter of the defendant submits that the ENI is an instrument that serves as a provider of “direct support for the EU's external policies”, and defending Art. 8 as a legal basis to connect the ENI. To continue with, the UK affirms that even if Turkey and the UK itself are not on the list of Annex 1 of the ENI, this instrument allows the Commission to extend to extend the participation of by a third country not covered by Art. 1 in “duly justified circumstances”

Fourth part of the first plea:

¹² Opinion of the Advocate General, “Agreement on Alternative Partnerships” C-329/17, page10.

The Regulation (EU) No 232/2014 (ENI) establishes on its Ground 5 that it should serve as support for the “implementation of political initiatives that have shaped the ENP”.¹³

In relation to the ENP countries, this regulation represents the most important financial instrument, showing similarities with the IPA II, as its aim according to Article 1 Regulation (EU) No. 232/2014 (ENI) is to advance

“towards an area of shared prosperity and good neighbourliness involving the Union and the countries and territories listed in Annex I (‘the partner countries’) by developing a special relationship founded on cooperation, peace and security, mutual accountability and a shared commitment to the universal values of democracy, the rule of law and respect for human rights in accordance with the TEU.”

However, this regulation also presents an important difference with IPA II and has to be considered in a different context. While the IPA II's main objective is to support countries to “comply” with the values of the Union, the ENI states a “shared commitment” to values such as democracy.¹⁴ Therefore this regulation stresses the need of the ENP countries towards political values rather than promoting incentives to follow the economic model of the European Union¹⁵

To the question of whether the ENI could be a suitable legal basis for the conclusion of the AAP, it is first to be noted, that the Annex 1 presented by the UK, where the list of partner countries that Article 1 makes reference to do not include Turkey nor the UK.

It is true, as the UK considers, that Article 16 takes in consideration

“in duly justified circumstances and in order to ensure the coherence and effectiveness of the Union financing or to foster regional or trans-regional cooperation”

the possibility that the Commission may extend the eligibility of specific actions to countries which would not otherwise be eligible for financing.¹⁶

¹³ Regulation (EU) No. 232/2014 (ENI), Ground (5).

¹⁴ Sara Poli, „The European Neighbourhood policy, Values and principles”, page 40.

¹⁵ Sara Poli, „The European Neighbourhood policy, Values and principles”, page 41.

¹⁶ Regulation (EU) No. 232/2014, Art. 16.

Findings of the Court:

The Court finds that Art. 16 of the ENI is conditioned to the existence of specific requirements that appear to be cumulative. This is clearly not the case, as the effectiveness and coherence of the European Union is not endangered or in other words, the non-participation of the UK does not translated into a legal loophole provoking legal uncertainty as the UK suggests.

Moreover, and as the Opinion of the Advocate General states, in the case of Turkey, the measures established in Article 3 (2) and 4(1) of this regulation wouldn't cover sufficiently the aspects that were treated in the 35 chapters open in the light of a possible accession of Turkey to the European Union¹⁷. For this reason, Turkey does not constitute either an exception to which Article 16 of the ENI makes reference.

On this grounds, the Court does not consider the Regulation (EU) No. 232/2014 in connection with Article 8 TEU to be an adequate legal basis neither for the case of the UK nor for Turkey.

v) Article 8 TEU

Admissibility of the fifth part of the first plea

The supporter of the defendant, Turkey, states that Art. 8 TEU constitutes a “lex specialis” to Art. 217 TFEU and that Art. 8 TEU constitutes therefore a legal basis to conclude the AAP. In addition they defend that the ENP does not rule out limit the partnership to a determine number of States and that therefore a bilateral agreement with Turkey may as well be considered a deal that is contained in the ENP.

The EP as the supporter of the applicant, states that to start with, that it is controversial if Article 8 TEU constitutes a legal basis for any agreement and that in any case it represents a special case of 217 TFEU because the objectives regulated in both provisions are the same.

Austria, as applicant, submits to the Court that Art. 8 is purely programmatic provisions, more than a proper legal basis that enables the Commission to act. Furthermore, they argue that fundamental principles such as human rights are a prerequisite for the conclusion of Art. 8 TEU.

¹⁷ Opinion of Advocate general, Case-329/17, page 10 .

On the other hand, the Commission stresses the need for Art.8 TEU to fill the gap that the UK leaves by not being a member anymore. Besides, Art. 8 TEU does not fix a specific context or conditions for a neighbouring agreement, so it leaves an ample frame of decision to the Commission in order to shape it.

Fifth part of the first plea:

The European Neighbourhood policy (ENP) confers the possibility of concluding agreements with the neighbouring countries of the EU in order to develop special relationships, based on the values of the Union.¹⁸ This does not mean however, as Austria states, that those fundamental principles constitute a precondition for the conclusion of an agreement based on Art. 8.

In this sense, Article 8 represents a valid legal basis and not a purely programmatic provision as the applicant submits. Furthermore, its aim is to provide stability and create conditions for democratic and social development.¹⁹

It is true, as the defendant affirms, that Art. 8 does not determine specific conditions or a framework in which the agreement has to move. However, it has to be taken into account, how the treaties of the ENP look like. To start with, the ENP relates to specific countries in the EU's Eastern neighbourhood (specifically Bielorussia, Ukraine, Moldova, Armenia and Georgia)²⁰ and Southern neighbourhood (specifically Syria, Lebanon, Israel and Egypt)²¹. Taking this into the reasoning, it looks like Article 8 does not require shared values with the European Union and it appears therefore to be an instrument that follows a mere "cooperation" thought, that means, a guarantee to ensure peaceful relations with those neighbouring countries.

To be dismissed are therefore the arguments of the EP and Austria that say that Art. 8 is a special case (lex specialis) to Art. 217 for referring to the same objectives.

¹⁸ Streinz Art. 8 Rn. 7

¹⁹ COM (2011) 303, 25 may 2011 joint communication to the European Parliament, the Council, the European economic and social committee and the Committee of the Regions. "A new responso to a changing Neighbourhood".

²⁰ Streinz, Kommentar Beck-online, Art. 8TEU, paragraph 4.

²¹ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3Ar14104>

Findings of the Court:

On these grounds and following the Opinion of the Advocate General, the Court finds that even if Article 8 is a valid legal basis per se for the Commission to act, the AAP concluded with Turkey and foreseen to cover the future relation of the UK with the European Union, does not adjust to the objectives of the ENP.

vi) Article 217 TFEU

Admissibility of the sixth part of the first plea:

The defendant submits to this Court that Art. 217 TFEU grants the possibility and competence to form an association partnership such as the one of the AAP, affirming too, that Art. 217 TFEU constitutes the basis of most of the agreements.

As mentioned before, the EP and Turkey consider Art. 8 TEU to be a special case of 217 TFEU.

Sixth part of the first plea:

Article 217 TFEU constitutes an explicit competence that allows the European Union to conclude association agreements with third countries or international Organizations.²²

Even if the conditions established on Article 217 TFEU could lead to a wide interpretation of this article; the Court has already nuanced and interpreted this provision, specially shaping the definition of “agreement”, by establishing in the Case Demirel that “since the agreement in question is an association agreement creating special, privileged links with a non-member country which must, at least to a certain extent, take part in the Community system”²³

Additionally, are the conditions of “common action” and “special procedure” characteristics that should be considered to set a delimitation to other international agreements, such as those ones contained in article 8 TEU.²⁴ Another indicator is the durability and stability of the association agreements, that can be closed with a periodic revision²⁵ or not.²⁶

²² Streinz, Kommentar Beck-online, Art. 217 TFEU, paragraph 1

²³ C-12/86 Meryem Demirel v. Stadt Schwäbisch Gmünd, paragraph 9.

²⁴ Callies /Ruffert, Kommentar Beck-online, Art. 217 TFEU, paragraph 4.

²⁵ Cotonou Agreement, Abl. 2000 Nr. L 317/3,39.

²⁶ Agreement with Turkey, Abl. 1964 Nr. 217/3685.

Regarding the scope of article 217 TFEU, association agreements are not only concluded with countries that might access the EU, but can also have as objective free trade or just development.

Findings of the Court:

a) The case of Turkey:

First of all, it is essential to consider, as the Commission says, that most of the agreements are done with the base of Art. 217. However, the contractual praxis shows that a lot of these agreements have the form of mixed agreements²⁷, like the one EU closed in 1964 with Turkey²⁸. This agreement shows already a complex relation between both subjects that is reflected in the treated topics (political and economical areas, provisions for the free movement of goods, etc).

This complexity could speak for the AAP being an association agreement in the sense of Art. 217 TFEU. Besides, the fact that Turkey gives up the intention to become a “full member” leaves space for a similar relation that considers different topics, such as the ones that have already been treated on the 35 Chapters that the European Union opened to negotiate the accession of Turkey.

On the other hand, the fact that the AAP with Turkey could constitute a mixed agreement with the legal basis being Art. 217 is based on the capacity of decision that Organs created in this kind of agreements are given and the binding character of their resolution. This could infringe the principle of conferred powers, regulated in Art. 5 TEU. This arguments corresponds to an intergovernmental view that prioritizes the representation of the political interests of the Member States to the detriment of the power of the EU to close such agreements.

It is however recognized, that it exists a limit to this agreements, which was clarified in the Opinion 1/78²⁹, that requires the participation of the Member States as long as financial obligations appear for the Member States. In this case it makes sense that the MS have the guarantee that their economical interests will be respected and guaranteed.³⁰

²⁷ Callies/ Ruffert , Kommentar Beck-online, Art. 217 TFEU, paragraph 16

²⁸ Agreement with Turkey, 1964 Nr. 217/3685.

²⁹

³⁰ mirar Rn. 19 Von Streinz 217 Grenzen der Assoziierungskompetenz.

This Court considers that this case is not given and that a contract closed on the base of Art. 217 TFEU could be beneficial for the integration progress of the European Union as Art. 1 of the TEU foresees:

“This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen”

Therefore, Art. 217 appears as a valid legal basis for the conclusion of the AAP with Turkey

b) The case of the UK:

The Court considers that the AAP aims to define the future relation of the EU with the UK, after the its definitive exit from the Union.

The close relationship that the EU has maintained with the UK for decades seems to indicate that this agreement must include and cover issues like single market or political and economical relations. Following the Opinion of the Advocate General, the Court considers that the ENP is not the adequate instrument for this, as the CJEU has already stressed in several judgments.³¹ This issues must be treated by taking in consideration the possible consequences in relation with the four freedoms for citizens residing of working at the UK, that means, an adequate legal and real protection must be guaranteed, as well as by ensuring a transition that minimizes the damage for both parts.

However, in the case of the UK the Court must point out the “significant infrastructure projects related to the EU” that the UK has invested in. This translates into financial obligations related to the AAP, in which Member States would incur. As the Court has mentioned, this case has being considered by the Court in more occasions as a sufficient reason for including the Member States as parties on the agreement in order to defend their economical interests.

Thus, the Court considers, that Art. 217 is alone, in the case of the UK, an insufficient legal basis to the conclusion of the AAP, and requires the form of a mixed agreement, which means that not only the EU is a party on the agreement but also each one of the Member States, and that the validity of such an agreement requires the ratification of all of the Member States

³¹ Judgments of the Court of Justice Sevice C-192/89; Kus C- 237/91 (1992)

2) Second plea in law: Infringement of essential procedural requirements

By the second plea, the applicants submit that the contested Agreement is unlawful on the ground that procedural requirements in accordance with Article 263 (2) TFEU have been violated.

This plea will be considered in two parts: in a first part, the co-decision will be analysed; a second part will then examine whether standard procedures according to Art 218 TFEU have been violated.

a) Co-decision procedure

Admissibility of the first part of the second plea:

The applicants, Austria and France, claim that formal standards were violated as stated in Article 263 TFEU by the Commission, since the negotiations regarding the AAP took place without any public dialogue and public notification. Therefore, they assert that the practice of the AAP is against the standard procedure of the co-decision, which is supported by the European Parliament (henceforth EP).

The competences of the EP are defined in Article 14 (1) TEU:

“The European Parliament shall, jointly with the Council, exercise legislative and budgetary functions. It shall exercise functions of political control and consultation as laid down in the Treaties. It shall elect the President of the Commission. “

The EP has a range of control and supervisory powers. These allow it to exercise oversight over EU institutions, to monitor the proper use of the EU budget and to ensure the correct implementation of EU law.

The Parliament may approve or reject a legislative proposal, or propose amendments to it. A distinction is made between the co-decision procedure, former called ordinary legislative procedure, which gives the same weight to the EP and the Council on a wide range of areas³²,

³² cf. <http://www.europarl.europa.eu/aboutparliament/en/20150201PVL00008/The-Lisbon-Treaty>, called at 10.06.2017

and the special legislative procedures, which apply only in specific cases where the Parliament has a consultative role only! Former allows the EP (Article 225 TFEU) and the Council (Article 241 TFEU), to request the Commission to recommend a legal act, since the latter hold the right of initiative in the law-making process as stated in Article 294 (2) TFEU.

Findings of the Court:

Against the background of Article 217 TFEU, which builds the legal basis of the AAP, a co-decision procedure is not intended. Co-decision only occurs regarding legislative acts following the procedure defined in Article 294 TFEU. In other procedures such as the hearing procedure or the proceeding on the granting of approval, an active participation of the EP is not legally defined. Here, the EP can consent or reject legal acts and treaties, but it does not have the competence of giving formal amendments. This can be seen at the constitution of international treaties in the light of Article 218 TFEU.

b) Violation of standard procedures according to Art 218 TFEU

Admissibility of the second part of the second plea:

As mentioned, the applicants Austria and France claim that the practice of the AAP cause a violation of standard procedures according to Article 218 TFEU. This is supported by the EP: The Parliament claims that its consent would be needed in order to endorse any form of AAP since it represents the direct will of the European citizens. Additionally, the EP as a supervisory power would be eluded and the implemented separation of powers would be disregarded, if the Commission created precedents without any consultation with the EP. The Commission as the defendant and Turkey as its supporter admit the violation of Article 218 (10) TFEU. The Commission states that it acted in the interests of the common weal and rely on the urgency of the situation and the referendum of the Austrian people as a symbol the citizens' concerns. The UK as a supporter of the Commission rejects any violation of formal standards.

i) Article 218 (10) TFEU:

The central importance in legislatures is policy and law making, since legislatures participate in the law-making process, whereupon their law-making powers differ significantly in diverse policy areas. Legislatures advocate their constituencies interests and therefore play a central role in legitimizing representative democracies. Due to this, their abilities, qualities and competences are important. Such as the European Parliament. Article 10 TEU defines the EP

as a representative democracy, whose citizens are directly represented in the parliament. But some difficulties arise regarding the direct representation, which have important implications for the legitimacy of the EP.

One procedural challenge constitutes the digressive proportionality of Article 14 (2) TEU. Small states are overrepresented and large states are underrepresented here, which leads to an asymmetric representation: the citizens of the European Union are not represented equally. This fact results in a lack of input legitimacy at the European level.

Secondly, there are still no Pan-European elections. EP parties are not elected directly; citizens elect national parties that build party groups. Although EP party groups vote according to the ideology of their group, the link with their voters is weak. Furthermore, they are not directly accountable to the constituency, only national parties are. European citizens can't reward or punish their MEPs. The Europeanisation of consumption patterns has not contributed to the emergence of a homogenous European society. Many citizens identify exclusively with their state or just secondly with the EU³³.

This is why the elections of the EP are characterized as second order elections (Reif & Schmitt 1980)³⁴. In addition, the gap between the MEPs and citizens widens with regard to the position concerning the European integration process. While the voters on average want to keep the status quo, MEPs look forward to deepen the integration. This discrepancy can be seen in the certainty, that an increase of powers of the EP with the Lisbon Treaty and the maximum interpretation of its competences, were followed by a decrease in the turnout: The Citizens of the EU are indifferent to what the EP does. Explanation are of course the poor engagement of national media in covering EP activities, but also a collective disinterest in the concrete activities of European institutions.

In terms of these circumstances it can be summed up, that the EP is facing a lack of legitimacy at the input dimension. Although it represents the people living in the EU, the direct representation of the citizens, hence the representation of their interests, is burdened

³³ cf. _

http://www.europarl.europa.eu/pdf/eurobarometre/2014/post/post_2014_survey_analitical_overview_de.pdf
called at 06.06.2017

³⁴ Reif, K. and Schmitt, H. 1980: "Nine Second Order Elections: A Conceptual Framework for the Analysis of European Election Results." *European Journal of Political Research* 8: 3-44

with some essential challenges.

Regarding all agreements defined under the Articles 216 to 219 TFEU the EP must be kept up to date in matters of all stages of the procedure: Article 218 (1) TFEU says that “[...] agreements between the Union and third countries or international organizations shall be negotiated and concluded [...]” with the authorization of the Council, whereupon the EP shall be immediately and fully informed at all stages of the procedure. Since it is known that the negotiations took place without any public dialogue, a formal standard referring to Article 218 (10) TFEU was violated, as the applicants claimed correctly.

But in the light of the challenges the EP is facing in itself, the violation of Article 218 (10) TFEU alone would not lead the Court to declare the AAP null and void. The absence of information in this case is referring to Article 263 no grounds for the invalidity of the treaty. Furthermore, the political outcome of the nullity would not be sustainable for the Union. The Court has to consider the Commission’s aim to achieve important ambitions for the benefit of all European citizens during the hard times the Union undergoes. In this respect, the conflict between the input and output legitimacy decides in favor of the output legitimacy: The costs of nullity are not in the sense of the common weal.

Besides representative democracy, one means of direct democracy is the referendum, which were more often used to deal with important political issues, such as the Brexit showed us. Regarding the deepening of the European integration process, the number of realized referenda increased over the last four decades, making a total of approximately 50 EU-referenda. This instrument implicates a direct vote in which an electorate votes on a particular proposal.³⁵

Here it is important to recall who initiated the referendum – the government, the parliament or the citizens – and afterwards examine, whether the national law considers its outcome as binding or advisory. The Austrian constitution accepts the outcome of a plebiscite referring to Article 43 B-VG as binding, if the National Council decides with a majority of its participants to use this instrument of direct democracy. The referendum of the Austrian people concerning the AAP does not fulfill the conditions of Article 43 B-VG, since it is a petition voluntarily initiated by the people themselves.

³⁵ cf. <http://dictionary.cambridge.org/dictionary/english/referendum> called at 10.06.2017

Findings of the Court:

Therefore, the will of the Austrian people to endorse the AAP is not binding for the Austrian government and just holds an advisory character in the light of Article 41 B-VG. Nevertheless, the Court encourages the Austrian member state to respect the interests and demands of its own citizens.

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ii) Article 218 (6)

The consent of the EP was introduced by the 1986 Single European Act concerning association agreements and agreements governing accession to the European Union. The scope for the application of the procedure was extended by all subsequent modifications of the Treaties. As a non-legislative procedure, it usually applies to the ratification of certain agreements negotiated by the European Union, or is applicable most notably in the cases of serious breach of fundamental rights under Article 7 TEU or for the accession of new EU members or arrangements for the withdrawal from the EU.³⁶

The Council is enabled to adopt a decision concluding an international agreement referring to Article 218 (6) TFEU. The EP must be consulted in all cases under Article 218 (6b) TFEU. It has to give its consent to the proposal by the Commission in the cases mentioned in Article 218 (6a) TFEU. Since the legal basis of the AAP has been defined as an association agreement as stated in Article 217 TFEU, the Parliament should have been informed and its consent secured as stated in Article 218 (6) subparagraph 2(a)(i). Since the negotiations didn't take place with the EP, its role as a supervisory power and the principle of the separation of powers were circumvented by the Commission. These facts mean a violation of essential procedural requirements.

Findings of the Court:

Although the Parliament faces several challenges regarding its input legitimacy, it is still the institution of the European Union, which represents the European citizens. Nevertheless, it is a democratically elected body, whose competences are clearly fixed in the TEU and the TFEU. Thus, the Court finds that the violation of Article 218

³⁶cf. <http://www.europarl.europa.eu/aboutparliament/en/20150201PVL00004/Legislative-powers> called 11.06.2017

(10) TFEU does not translate into an automatic nullity of the agreement, whereas the violation of Article 218 (6) TFEU does: The AAP violated therefore the procedural standards, as brought by the defendants.

3) Third plea in law: political peer pressure within the Commission

By the third plea of the application, France and Austria, the applicants, claim that the AAP came about as a result of political peer pressure within the Commission.

Specifically, one of the applicants, Austria, in its written pleading puts forward: one hypothesis of such pressure, speculating that the Council put pressure on the Commission since Turkey might make the refugee deal null and void if the AAP was not passed, which will be considered as the first part of the third plea; and an accusation that there was political pressure within the Council to pass the AAP, which shall be considered as the second part of the third plea.

First part of the third plea: Council's pressure due to EU-Turkey refugee deal

The applicant in question first submits that “political peer pressure may have been put on the Commission” from the European Council since Turkey allegedly vowed to make the so-called March 2016 “refugee deal” with the EU null and void if the AAP is declared void[2].

The Advocate General has recognised in its opinion that “the delicate migrant situation [...] incentivises closer EU-Turkey collaboration” and as a result may have led to “political pressure” which “could have had an impact onto the direction of the negotiations”[3].

However, since neither of the applicants have brought forward any substantive evidence that the negotiations on the AAP could have been influenced by political pressure as a result of the so-called “refugee deal”, the first part of the third plea must be rejected.

Second part of the third plea: peer pressure within the Council

In its written pleading, Austria also contends that there was political pressure within the Council itself to accept the AAP. Specifically, the applicant submits that “countries which are in favour of the AAP influenced other countries to accept it” which led “to the huge amount of abstention in the Council and shows, that there isn't a broad consent for concluding the AAP”[4].

The Court believes that using the abstention in the Council in the vote on the AAP is not a sufficient proof that there was in fact peer pressure within the Council itself, and as a result rejects the second part of the third plea.

Whilst the Court remains concerned with possible pressure that may have been exerted in order to push forward the negotiations and agreement on the AAP, the applicants have failed to provide any substantive evidence to support the second plea in law put forward in the action.

As a result, the second plea in law must therefore be rejected.

4) Final Judgement

On those grounds,

THE MOOT EUROPEAN COURT OF JUSTICE

Hereby:

1. Accepts the action brought forward by Austria and France;
2. Declares the Agreement on Alternative Partnerships (AAP) null and void.
3. Orders the Commission to pay the costs.
4. According to Art. 264 (2) TFEU, we declare the specific provisions adopted by the EU leading to the significant investments by the United Kingdom for definitive, as the UK reasonably could rely in those and therefore should be protected.

E. Leyva Ruiz

E. O'Connell

S. Göksu

H.S. Karacar

Delivered in open court in Brussels on 16 June 2017.
