

JUDGMENT OF THE COURT (Second Chamber)

30 April 2014 (\*)

(Common system of financial transaction tax — Authorisation of enhanced cooperation under Article 329(1) TFEU — Decision 2013/52/EU — Action for annulment in respect of infringement of Articles 327 TFEU and 332 TFEU and of customary international law)

In Case C-209/13,

APPLICATION for annulment under Article 263 TFEU, brought on 18 April 2013,

**United Kingdom of Great Britain and Northern Ireland**, represented by E. Jenkinson and S. Behzadi Spencer, acting as Agents, and by M. Hoskins QC, P. Baker QC and V. Wakefield, Barrister,

applicant,

v

**Council of the European Union**, represented by A.-M. Colaert, F. Florindo Gijón and A. de Gregorio Merino, acting as Agents,

defendant,

supported by:

**Kingdom of Belgium**, represented by J.-C. Halleux and M. Jacobs, acting as Agents,

**Federal Republic of Germany**, represented by T. Henze, J. Möller and K. Petersen, acting as Agents,

**French Republic**, represented by D. Colas and J.-S. Pilczer, acting as Agents,

**Republic of Austria**, represented by C. Pesendorfer, acting as Agent,

**Portuguese Republic**, represented by L. Inez Fernandes, J. Menezes Leitão and A. Cunha, acting as Agents,

**European Parliament**, represented by A. Neergaard and R. van de Westelaken, acting as Agents, with an address for service in Luxembourg,

**European Commission**, represented by R. Lyal, B. Smulders and W. Mölls, acting as Agents, with an address for service in Luxembourg,

interveners,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, K. Lenaerts (Rapporteur), Vice-President of the Court, J.L. da Cruz Vilaça, G. Arestis and J.-C. Bonichot, Judges,

Advocate General: N. Wahl,

Registrar: A. Calot Escobar,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

## **Judgment**

1 By its application, the United Kingdom of Great Britain and Northern Ireland asks the Court to annul Council Decision 2013/52/EU of 22 January 2013 authorising enhanced cooperation in the area of financial transaction tax (OJ 2013 L 22, p. 11; ‘the contested decision’).

### **Background to the proceedings**

2 On 28 September 2011 the European Commission adopted a proposal (COM(2011) 594 final) for a Council Directive on a common system of financial transaction tax and amending Directive 2008/7/EC (‘the 2011 proposal’).

3 Article 1(2) of the 2011 proposal, the article being headed ‘Subject matter and scope’ provided:

‘This Directive shall apply to all financial transactions, on condition that at least one party to the transaction is established in a Member State and that a financial institution established in the territory of a Member State is party to the transaction, acting either for its own account or for the account of another person, or is acting in the name of a party to the transaction.’

4 Article 3(1) of that proposal, the article being headed ‘Establishment’, provided:

‘For the purposes of this Directive, a financial institution shall be deemed to be established in the territory of a Member State where any of the following conditions is fulfilled:

...

(e) it is party, acting either for its own account or for the account of another person, or is acting in the name of a party to the transaction, to a financial transaction with another financial institution established in that Member State pursuant to points (a), (b), (c) or (d), or with a party established in the territory of that Member State and which is not a financial institution.’

5 After three meetings of the Council of the European Union which took place on 22 and 29 June and 10 July 2012, it became apparent that it would not be possible to achieve unanimous support for the principle of a common system of financial transaction tax (‘FTT’) within the Council in the foreseeable future and, consequently, that the objective of the whole European Union adopting such a common system could not be attained within a reasonable period.

6 In those circumstances, between 28 September and 23 October 2012 11 Member States informed the Commission that they wished to establish enhanced cooperation between themselves in the area of FTT.

7 On 22 January 2013 the Council, on the Commission's proposal, adopted the contested decision.

8 Recital 6 of the preamble to that decision reads as follows:

'... 11 Member States, namely Belgium, Germany, Estonia, Greece, Spain, France, Italy, Austria, Portugal, Slovenia and Slovakia, addressed requests to the Commission ... 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'.

9 The contested decision contains two articles. Article 1 thereof authorises the 11 Member States referred to in the preceding paragraph of this judgment ('the participating Member States') to establish enhanced cooperation between themselves in the area of the establishment of a common system of FTT, by applying the relevant provisions of the Treaties. Article 2 of that decision provides that it is to enter into force on the day of its adoption.

10 On 14 February 2013 the Commission adopted a proposal for a Council Directive implementing enhanced cooperation in the area of FTT ('the 2013 proposal').

11 Article 3(1) of the 2013 proposal, that article being headed 'Scope' provides:

'This Directive shall apply to all financial transactions, on the condition that at least one party to the transaction is established in the territory of a participating Member State and that a financial institution established in the territory of a participating Member State is party to the transaction, acting either for its own account or for the account of another person, or is acting in the name of a party to the transaction.'

12 Article 4(1) and (2) of the 2013 proposal, that article being headed 'Establishment', provide:

'1. For the purposes of this Directive, a financial institution shall be deemed to be established in the territory of a participating Member State where any of the following conditions is fulfilled:

...

(g) it is party, acting either for its own account or for the account of another person, or is acting in the name of a party to the transaction, to a financial transaction in a structured product or one of the financial instruments referred to in Section C of Annex I of Directive 2004/39/EC issued within the territory of that Member State, with the exception of instruments referred to in points (4) to (10) of that Section which are not traded on an organised platform.

2. A person which is not a financial institution shall be deemed to be established within a participating Member State where any of the following conditions is fulfilled:

...

(c) it is party to a financial transaction in a structured product or one of the financial instruments referred to in Section C of Annex I to Directive 2004/39/EC issued within the territory of that Member State, with the exception of instruments referred to in points (4) to (10) of that Section which are not traded on an organised platform.'

## **Forms of order sought by the parties and the procedure before the Court**

13 The United Kingdom claims that the Court should annul the contested decision and order the Council to pay the costs.

14 The Council contends that the Court should dismiss the action and order the United Kingdom to pay the costs.

15 The Kingdom of Belgium, the Federal Republic of Germany, the French Republic, the Republic of Austria, the Portuguese Republic, the European Parliament and the Commission were granted leave to intervene in support of the forms of order sought by the Council.

## **The action**

16 While recognising that its action, brought as a precautionary measure, could be considered to be premature, the United Kingdom relies on two pleas in law in support of its action. The first plea concerns a claimed infringement of Article 327 TFEU and of customary international law in so far as the contested decision authorises the adoption of an FTT which produces extraterritorial effects. The second plea, relied on in the alternative, relates to a claimed infringement of Article 332 TFEU in that that decision authorises the adoption of an FTT which will impose costs on Member States which are not participating in the enhanced cooperation ('the non-participating Member States').

## *Arguments of the parties*

17 The first plea has two parts, claiming infringement of Article 327 TFEU and of customary international law respectively.

18 In the first part of that plea, the United Kingdom claims that, by authorising the adoption of an FTT with extraterritorial effects because of 'the counterparty principle' laid down in Article 3(1)(e) of the 2011 proposal, and the 'issuance principle' laid down in Article 4(1)(g) and (2)(c) of the 2013 proposal, the contested decision was in breach of Article 327 TFEU.

19 The United Kingdom claims that that decision permits the introduction of an FTT applicable, by reason of the two abovementioned principles of taxation, to institutions, persons or transactions situated or taking place in the territory of non-participating Member States, a fact which adversely affects the competences and rights of those Member States.

20 In the second part of its first plea in law, the United Kingdom claims that customary international law permits legislation which produces extraterritorial effects only on the condition that there exists between the facts or subjects at issue and the State exercising its competences thereon a sufficiently close connection to justify an encroachment on the sovereign competences of another State.

21 In this case, the extraterritorial effects of the future FTT stemming from 'the counterparty principle' and 'the issuance principle' are not justified in the light of any accepted rule of tax jurisdiction under international law.

22 By its second plea in law, the United Kingdom claims that, whereas expenditure linked to the implementation of enhanced cooperation in the area of FTT may in principle, under Article 332 TFEU, be borne only by the participating Member States, that implementation will also be the source of costs for the non-participating Member States, because of the application of Council Directives 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) and 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).

23 The United Kingdom claims that those two directives do not authorise the non-participating Member States to seek the recovery of the costs of mutual assistance and administrative cooperation linked to the application of those directives to the future FTT.

24 The United Kingdom adds, in that regard, that the concept of 'expenditure resulting from implementation of enhanced cooperation', within the meaning of Article 332 TFEU, covers expenditure linked to requests for assistance or cooperation based on the national legislation adopted to give effect to enhanced cooperation in the area of FTT.

25 The Council, all of the Member States intervening in its support with the exception of the Federal Republic of Germany, the European Parliament and the Commission accept, explicitly or implicitly, the admissibility of this action and of the pleas in law which underpin it. They contend however that those pleas are unfounded.

26 As regards the first plea in law, those parties state, in essence, that the principles of taxation disputed by the United Kingdom within this plea are, at this stage, purely hypothetical components of legislation which is yet to be adopted. Consequently, the arguments relied on by the United Kingdom, based on the alleged extraterritorial effects of the future FTT, are premature and speculative. Consequently, they are ineffective in the context of this action.

27 As regards the second plea in law of the action, the same parties argue, in essence, that this plea invites a premature debate on the manner in which the European Union legislature will regulate the question of liability for costs linked to the implementation of enhanced cooperation authorised by the contested decision. Further, that decision in no way regulates questions of mutual assistance for the purposes of the application of the future FTT.

28 The Council, the Republic of Austria, the Portuguese Republic and the Commission add that the second plea in support of the action rests on a misinterpretation of Article 332 TFEU. That article concerns solely operational expenditure to be borne by the European Union budget in relation to measures establishing enhanced cooperation and not the expenditure, disputed by the United Kingdom, which might be incurred by the Member States under Directives 2010/24 and 2011/16.

29 The Federal Republic of Germany, relying on an argument analogous to that mentioned in paragraphs 26 and 27 of this judgment, considers that the action is inadmissible, even manifestly inadmissible, because of a disregard of the requirements of Article 120(c) of the Court's Rules of Procedure, given that the pleas relied on by the United Kingdom in support of its action bear no relation to the subject-matter of the contested decision. Alternatively, the Federal Republic of Germany contends that the action should be dismissed as being unfounded.

### *Findings of the Court*

30 As regards, first, the plea of inadmissibility mentioned in the preceding paragraph of this judgment, it must be recalled that, under Article 120(c) of the Rules of Procedure and the case-law relating thereto, an application initiating proceedings must state the subject-matter of the dispute and a summary of the pleas in law on which the application is based. That statement must be sufficiently clear and precise to enable the defendant to prepare his defence and the Court to rule on the application. It is therefore necessary for the essential points of law and of fact on which a case is based to be indicated coherently and intelligibly in the application itself and for the heads of

claim to be set out unambiguously so that the Court does not rule *ultra petita* or fail to rule on a claim (Case C-360/11 *Commission v Spain* EU:C:2013:17, paragraph 26, and Case C-545/10 *Commission v Czech Republic* EU:C:2013:509, paragraph 108).

31 It is clear, in this case, that the content of the application satisfies those requirements of clarity and precision. It enabled the Council and the Member States intervening in its support to prepare their arguments in relation to the pleas relied on by the United Kingdom and it puts the Court in a position to carry out its review of the contested decision.

32 It follows that that plea of inadmissibility must be rejected.

33 Secondly, it must be stated that, in the context of an action for the annulment of a Council decision which, like the contested decision, has as its subject-matter the authorisation of enhanced cooperation on the basis of Article 329 TFEU, the Court's review is related to the issue of whether that decision is valid as such in the light of, *inter alia*, the provisions, contained in Article 20 TEU and in Articles 326 TFEU to 334 TFEU, which define the substantive and procedural conditions relating to the granting of such authorisation.

34 That review should not be confused with the review which may be undertaken, in the context of a subsequent action for annulment, of a measure adopted for the purposes of the implementation of the authorised enhanced cooperation.

35 In this action, the purpose of the first plea in law therein is to challenge the effects which the recourse to certain principles of taxation in respect of the future FTT might have on institutions, persons and transactions situated in or taking place in the territory of non-participating Member States

36 It is clear that the objective of the contested decision is to authorise 11 Member States to establish enhanced cooperation between themselves in the area of the establishment of a common system of FTT with due regard to the relevant provisions of the Treaties. The principles of taxation challenged by the United Kingdom are, however, not in any way constituent elements of that decision. First, 'the counterparty principle' corresponds to an element in the 2011 proposal mentioned in recital 6 of that decision. Second, the 'issuance principle' first appeared in the 2013 proposal.

37 As regards the action's second plea in law, whereby the United Kingdom claims, in essence, that the future FTT will give rise to costs for the non-participating Member States because of the obligations of mutual assistance and administrative cooperation linked to the application of Directives 2010/24 and 2011/16 to that tax, which, according to the United Kingdom, is contrary to Article 332 TFEU, it must be observed that the contested decision contains no provision related to the issue of expenditure linked to the implementation of the enhanced cooperation authorised by that decision.

38 Further, and irrespective of whether the concept of 'expenditure resulting from implementation of enhanced cooperation', within the meaning of Article 332 TFEU, does or does not cover the costs of mutual assistance and administrative cooperation referred to by the United Kingdom in its second plea, it is obvious that the question of the possible effects of the future FTT on the administrative costs of the non-participating Member States cannot be examined for as long as the principles of taxation in respect of that tax have not been definitively established as part of the implementation of the enhanced cooperation authorised by the contested decision.

39 Those effects are dependent on the adoption of 'the counterparty principle' and the 'issuance principle', which are however not constituent elements of the contested decision, as

stated in paragraph 36 of this judgment.

40 It follows from the foregoing that the two pleas in law relied on by the United Kingdom in support of its action must be rejected and, accordingly, that the action must be dismissed.

### **Costs**

41 Under Article 138(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Council has applied for costs and the United Kingdom has been unsuccessful, the latter must be ordered to pay the costs. In accordance with Article 140(1) of those Rules, under which Member States and institutions which have intervened in the proceedings are to bear their own costs, the Kingdom of Belgium, the Federal Republic of Germany, the French Republic, the Republic of Austria, the Portuguese Republic, the European Parliament and the Commission shall bear their own costs.

On those grounds, the Court hereby:

1. **Dismisses the action;**
2. **Orders the United Kingdom of Great Britain and Northern Ireland to pay the costs;**
3. **Orders the Kingdom of Belgium, the Federal Republic of Germany, the French Republic, the Republic of Austria, the Portuguese Republic, the European Parliament and the European Commission to bear their own costs.**

[Signatures]

\* Language of the case: English.