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Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

3 June 2021 (*)

(Action for annulment – Article 7(1) TEU – European Parliament resolution on a proposal calling on the Council of the European Union to determine the existence of a clear risk of a serious breach of the values on which the European Union is founded – Articles 263 and 269 TFEU – Jurisdiction of the Court – Admissibility of the appeal – Challengeable act – Article 354 TFEU – Rules for counting votes in the Parliament – Rules of Procedure of the Parliament – Rule 178(3) – Concept of ‘votes cast’ – Abstentions – Principles of legal certainty, equal treatment, democracy and sincere cooperation)

In Case C-650/18,

ACTION for annulment under Article 263 TFEU, brought on 17 October 2018,

Hungary, represented initially by M.Z. Fehér, G. Tornyai and Zs. Wagner, and subsequently by M.Z. Fehér, acting as Agents,

applicant,

supported by:

Republic of Poland, represented by B. Majczyna, acting as Agent,

intervener,

v

European Parliament, represented by F. Drexler, N. Görlitz and T. Lukácsi, acting as Agents,

defendant,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot, M. Vilaras, E. Regan, L. Bay Larsen and A. Kumin, Presidents of Chambers, T. von Danwitz, C. Toader, M. Safjan, D. Šváby, S. Rodin, K. Jürimäe, C. Lycourgos (Rapporteur) and I. Jarukaitis, Judges,

Advocate General: M. Bobek,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 29 June 2020,

after hearing the Opinion of the Advocate General at the sitting on 3 December 2020,

gives the following

Judgment

1 By its application, Hungary seeks the annulment of the European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) [TEU], the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)) (OJ 2019 C 433, p. 66, ‘the contested resolution’).

Legal context

The procedure under Article 7 TEU

2 Article 7 TEU provides as follows:

‘1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.

The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State.

4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.

5. The voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article are laid down in Article 354 [TFEU].’

3 Article 354 TFEU provides as follows:

‘For the purposes of Article 7 [TEU] on the suspension of certain rights resulting from Union membership, the member of the European Council or of the Council representing the Member State in question shall not take part in the vote and the Member State in question shall not be counted in the calculation of the one third or four fifths of Member States referred to in paragraphs 1 and 2 of that Article. Abstentions by members present in person or represented shall not prevent the adoption of decisions referred to in paragraph 2 of that Article.

For the adoption of the decisions referred to in paragraphs 3 and 4 of Article 7 [TEU], a qualified majority shall be defined in accordance with Article 238(3)(b) of this Treaty.

Where, following a decision to suspend voting rights adopted pursuant to paragraph 3 of Article 7 [TEU], the Council acts by a qualified majority on the basis of a provision of the Treaties, that qualified majority shall be defined in accordance with Article 238(3)(b) of this Treaty, or, where the Council acts on a proposal from the Commission or from the High Representative of the Union for Foreign Affairs and Security Policy, in accordance with Article 238(3)(a).

For the purposes of Article 7 [TEU], the European Parliament shall act by a two-thirds majority of the votes cast, representing the majority of its component Members.’

Judicial review

4 The first and sixth paragraphs of Article 263 TFEU are worded as follows:

‘The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.

...

The proceedings provided for in this article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.’

5 In accordance with Article 269 TFEU:

‘The Court of Justice shall have jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 [TEU] solely at the request of the Member State concerned by a determination of the European Council or of the Council and in respect solely of the procedural stipulations contained in that Article.

Such a request must be made within one month from the date of such determination. The Court shall rule within one month from the date of the request.’

Protocol (No 24)

6 The sole article of Protocol (No 24) on asylum for nationals of Member States of the European Union (OJ 2010 C 83, p. 305, ‘Protocol (No 24)’) provides as follows:

‘Given the level of protection of fundamental rights and freedoms by the Member States of the European Union, Member States shall be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters. Accordingly, any application for asylum made by a national of a Member State may be taken into consideration or declared admissible for processing by another Member State only in the following cases:

...

(b) if the procedure referred to in Article 7(1) [TEU] has been initiated and until the Council, or, where appropriate, the European Council, takes a decision in respect thereof with regard to the Member State of which the applicant is a national;

...’

Rules of Procedure of the European Parliament

7 Rule 178(3) of the Rules of Procedure of the European Parliament, in the version applicable at the time of the adoption of the contested resolution (‘the Rules of Procedure’) states as follows:

‘In calculating whether a text has been adopted or rejected, account shall be taken only of votes cast for and against, except in those cases for which the Treaties lay down a specific majority.’

8 Rule 226(1) of the Rules of Procedure provides:

‘If doubt arises over the application or interpretation of these Rules of Procedure, the President may refer the matter to the committee responsible for examination.

Committee Chairs may do so when such a doubt arises in the course of the committee's work and is related to it.’

9 It follows from point 8 of Section XVIII of Annex V to the Rules of Procedure that the Parliament’s Committee on Constitutional Affairs is responsible for the interpretation of those rules.

Background to the dispute

10 By a resolution of 17 May 2017 on the situation in Hungary (2017/2656(RSP)) (OJ 2018 C 307, p. 75), the Parliament instructed its Committee on Civil Liberties, Justice and Home Affairs to draw up a special report on that Member State with a view to holding a plenary vote on a reasoned proposal calling on the Council of the European Union to act pursuant to Article 7(1) TEU. That report was adopted on 25 June 2018.

11 In a letter of 10 September 2018, Hungary’s Permanent Representative to the European Union notified the Parliament’s Secretary General of the Hungarian Government’s position that abstentions should be taken into account in the vote on the Parliament’s contested resolution, in accordance with Article 354 TFEU and Rule 178(3) of the Rules of Procedure, and asked that the Members of the Parliament be informed accordingly.

12 On 10 September 2018, the Parliament's Deputy Secretary General informed Members of the European Parliament ('MEPs') via email that, in the context of the calculation of the votes cast, only the votes cast in favour and those cast against the adoption of the resolution would be taken into account, excluding abstentions.

13 On 12 September 2018, the Parliament voted on the contested resolution. Four hundred and forty-eight MEPs voted in favour of that resolution, 197 voted against it and 48 MEPs abstained. After the vote, the Chair of the sitting announced that the contested resolution had been adopted.

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

14 Hungary claims that the Court should:

- annul the contested resolution and
- order the Parliament to pay the costs.

15 The Parliament contends that the Court should:

- dismiss the appeal as manifestly inadmissible or, in the alternative, as unfounded and
- order Hungary to pay the costs.

16 In accordance with the third paragraph of Article 16 of the Statute of the Court of Justice of the European Union, Hungary requested that the Court assign the case to the Grand Chamber.

17 By the order of 14 May 2019, *Hungary v Parliament* (C-650/18, not published, EU:C:2019:438), the Court ordered that the opinion of the Parliament's Legal Service in Annex 5 to Hungary's application be removed from the file and rejected the request for production of documents submitted by that Member State.

18 By decision of 22 May 2019, the President of the Court granted the Republic of Poland leave to intervene in support of the form of order sought by Hungary.

The action

The jurisdiction of the Court and the admissibility of the action

Arguments of the parties

19 The Parliament maintains that the present action for annulment is inadmissible on the ground that it follows from Article 269 TFEU and, in the alternative, from Article 263 TFEU that the contested resolution cannot be the subject of such an action.

20 As regards, in the first place, Article 269 TFEU, the Parliament submits that it follows from a literal interpretation of that provision that it restricts the jurisdiction of the Court to final acts adopted by the Council or the European Council pursuant to Article 7 TEU.

21 According to the Parliament, that interpretation is borne out by the legislative history of Article 269 TFEU. It is apparent from the changes made to the Treaties that the procedure laid down in Article 7 TEU was only gradually made subject to a degree of scrutiny by the Court.

Accordingly, acts adopted under that provision which do not fall within the substantive scope of Article 269 TFEU, continue to belong to the ‘political sphere’ of the Treaties, which is not subject to any judicial review.

22 Moreover, in the Parliament’s view, Article 269 TFEU should be regarded as a *lex specialis* in relation to Article 263 TFEU and stands alongside provisions which, like Articles 271, 275 and 276 TFEU, provide for a limited possibility of judicial review in specific predefined areas.

23 Furthermore, the Parliament asserts that it would not be consistent for determinations of the Council and the European Council, which are expressly referred to in Article 269 TFEU and which can have serious consequences for the Member State concerned, largely to escape any judicial review under Article 269 TFEU, aside from in respect of their procedural aspects, while a mere proposal to initiate the procedure provided for in Article 7 TEU may be subject to full judicial review.

24 In the second place, the Parliament submits that the action, even if it were to be examined in the light of Article 263 TFEU, is inadmissible on the ground that the contested resolution does not have the characteristics of a ‘challengeable act’ for the purposes of the first paragraph of that article.

25 The Parliament maintains that that resolution does not entail any change in Hungary’s legal situation, since it merely initiates the procedure laid down in Article 7 TEU without binding the Council as to the determination that may be made. Furthermore, even if the adoption of that resolution allowed Hungarian nationals to lodge an application for asylum in another Member State, under point (b) of the sole article of Protocol (No 24), such a possibility would not result in adverse effects for those nationals or for any other EU citizen or for Hungary itself.

26 Furthermore, the Parliament asserts that, in its judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the System of Justice)* (C-216/18 PPU, EU:C:2018:586), the Court merely held that factual information, contained in a reasoned proposal adopted in accordance with Article 7(1) TEU, is a particularly relevant factor when assessing, in the abstract, whether there is a real risk of breach of fundamental rights in the Member State issuing a European arrest warrant. That judgment does not therefore permit the view that such proposals produce binding legal effects.

27 In addition, according to the Parliament, the contested resolution must be regarded as an intermediate measure, in so far as it does not lay down the Parliament’s definitive position. Only intermediate measures which have immediate, certain and sufficiently binding legal effects can be subject to direct judicial review, which is not the case with the contested resolution.

28 Hungary, supported by the Republic of Poland, maintains that the action is admissible on the ground that the contested resolution is a challengeable act, for the purposes of Article 263 TFEU, in view of its effects, in particular under point (b) of the sole article of Protocol (No 24), and in view of the guidance given in the judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the System of Justice)* (C-216/18 PPU, EU:C:2018:586). Moreover, Article 269 TFEU is to be interpreted strictly and does not deprive the Court of its jurisdiction to hear and determine that action.

Findings of the Court

29 In the first place, it is necessary to examine whether, as the Parliament maintains, the Court lacks jurisdiction by virtue of Article 269 TFEU to hear and determine the present action.

30 In that regard, it should be noted, first, that, in accordance with that article, the Court is to have jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 TEU solely at the request of the Member State concerned by a determination of the European Council or of the Council and in respect solely of the procedural stipulations contained in Article 7 TEU. Furthermore, that request must be made within one month from the date of such determination.

31 Article 269 TFEU, in so far as it subjects the possibility of bringing an action for annulment against acts adopted by the European Council or the Council under Article 7 TEU to stricter conditions than those imposed by Article 263 TFEU, entails a limitation on the general jurisdiction conferred by that article on the Court of Justice of the European Union to review the legality of acts of the EU institutions and must, therefore, be interpreted narrowly (see, by analogy, judgment of 19 July 2016, *H v Council and Others*, C-455/14 P, EU:C:2016:569, paragraph 40 and the case-law cited).

32 Second, it must be observed that Article 269 TFEU covers only acts of the Council and of the European Council adopted in the context of the procedure laid down in Article 7 TEU. Resolutions of the Parliament, adopted under Article 7(1) TEU, are not referred to in Article 269.

33 Therefore, it can be inferred from the wording of that article that the authors of the Treaties did not intend to exclude an act such as the contested resolution from the general jurisdiction conferred on the Court of Justice of the European Union by Article 263 TFEU for the purpose of reviewing the legality of acts of the EU institutions.

34 Moreover, this interpretation of Article 269 TFEU contributes to the observance of the principle that the European Union is a union based on the rule of law which has established a complete system of legal remedies and procedures designed to enable the Court of Justice of the European Union to review the legality of acts of the EU institutions (see, to that effect, judgments of 23 April 1986, *Les Verts v Parliament*, 294/83, EU:C:1986:166, paragraph 23; of 28 March 2017, *Rosneft*, C-72/15, EU:C:2017:236, paragraph 66 and the case-law cited; and of 5 November 2019, *ECB and Others v Trasta Komercbanka and Others*, C-663/17 P, C-665/17 P and C-669/17 P, EU:C:2019:923, paragraph 54).

35 Contrary to the Parliament's assertion, that finding is not called into question by the context of Article 269 TFEU. It is sufficient to note that Articles 271, 275 and 276 TFEU, with which the Parliament compares Article 269 TFEU, do not deprive the Court of any jurisdiction under Article 263 TFEU to review the legality of EU acts referred to therein and relate, in any event, to areas that are wholly unconnected with the procedure laid down in Article 7 TEU. Furthermore, Articles 271, 275 and 276 TFEU are drafted using words that are significantly different from those of Article 269 TFEU, meaning that no useful lessons can be drawn from them for the purpose of interpreting the latter article.

36 It follows that Article 269 TFEU does not exclude the Court's jurisdiction to hear and determine the present action.

37 As regards, in the second place, the admissibility of that action, it is settled case-law that the action for annulment provided for in Article 263 TFEU is available in the case of all measures adopted by the institutions, whatever their form, which are intended to have binding legal effects (judgments of 26 March 2019, *Commission v Italy*, C-621/16 P, EU:C:2019:251, paragraph 44, and of 9 July 2020, *Czech Republic v Commission*, C-575/18 P, EU:C:2020:530, paragraph 46 and the case-law cited).

38 In order to determine whether an act produces such effects and may, accordingly form the subject matter of an action for annulment under Article 263 TFEU, it is necessary to examine the substance of that act and to assess those effects in the light of objective criteria, such as the content of that act, taking into account, as appropriate, the context in which it was adopted and the powers of the institution which adopted the act (judgment of 9 July 2020, *Czech Republic v Commission*, C-575/18 P, EU:C:2020:530, paragraph 47).

39 In the present case, it should be noted that the adoption of the contested resolution initiates the procedure laid down in Article 7(1) TEU. Under point (b) of the sole article of Protocol (No 24), once that procedure is initiated and as long as the Council or the European Council has not taken a decision in respect of the Member State concerned, a Member State may, by way of derogation from the general rule laid down in that single article, take into consideration or declare admissible to be examined any asylum application lodged by a national of the Member State that is the subject of that procedure.

40 It follows that the adoption of the contested resolution has the immediate effect of lifting the prohibition, which is in principle imposed on the Member States, on taking into consideration or declaring admissible to be examined an asylum application made by a Hungarian national. That resolution thus changes, in relations between Member States, the position of Hungary in the field of asylum.

41 Consequently, the contested resolution produces binding legal effects from the time of its adoption until the Council takes a decision on the action to be taken on it.

42 The Parliament submits, however, that the contested resolution constitutes an intermediate measure expressing a provisional position, which is not amenable to judicial review under Article 263 TFEU.

43 In that regard, it should be noted that intermediate measures whose aim is to prepare the final decision do not, in principle, constitute acts which may form the subject matter of an action for annulment (judgment of 15 March 2017, *Stichting Woonlinie and Others v Commission*, C-414/15 P, EU:C:2017:215, paragraph 44 and the case-law cited).

44 However, on the one hand, the intermediate acts thus referred to are, first and foremost, acts which express a provisional opinion of the institution concerned (see to that effect, judgment of 13 October 2011, *Deutsche Post and Germany v Commission*, C-463/10 P and C-475/10 P, EU:C:2011:656, paragraph 50).

45 A resolution, such as the contested resolution, by which the Parliament calls on the Council to determine, pursuant to Article 7(1) TEU, the existence of a clear risk of a serious breach by a Member State of the values referred to in Article 2 TEU, cannot be regarded as expressing a provisional position of the Parliament, notwithstanding the fact that such a subsequent determination by the Council is, should one be made, subject to the prior approval of the Parliament under Article 7(1) TEU. Such approval will be given only where the Council determines that there is such a risk and will relate, moreover, to a measure resulting from an assessment of the existence of that risk, specific to the Council, which may differ from the assessment which the Parliament carried out when adopting the contested resolution.

46 On the other hand, it is also apparent from the case-law of the Court that an intermediate measure which has independent legal effects may form the subject matter of an action for annulment in so far as the illegality attaching to that measure cannot be remedied in an action

brought against the final decision for which it represents a preparatory step (see, to that effect, *inter alia*, judgments of 30 June 1992, *Spain v Commission*, C-312/90, EU:C:1992:282, paragraphs 21 and 22; of 30 June 1992, *Italy v Commission*, C-47/91, EU:C:1992:284, paragraphs 27 and 28; and of 13 October 2011, *Deutsche Post and Germany v Commission*, C-463/10 P and C-475/10 P, EU:C:2011:656, paragraphs 53, 54 and 60).

47 In the present case, Hungary could, it is true, as the Parliament submits, rely on the unlawfulness of the contested resolution in support of any action for annulment brought by it against any determination of the existence of a clear risk of a serious breach of EU values, made by the Council on the basis of Article 7(1) TEU, pursuant to that resolution.

48 However, aside from the fact that, as the Advocate General observed in point 100 of his Opinion, the Council is not required to adopt a position on the contested resolution, the possible success of an action for annulment brought against a determination made by the Council under Article 7(1) TEU would not, in any event, make it possible to eliminate all the binding legal effects produced by that resolution and referred to in paragraph 40 above.

49 In those circumstances, it must be held that the contested resolution is a challengeable act, for the purposes of the first paragraph of Article 263 TFEU.

50 As regards, lastly, the assertion, in support of the Parliament's plea of inadmissibility, that the legal effects of the contested resolution are not of direct concern to Hungary, it should be added to what has been stated in paragraph 40 of the present judgment that, under the second paragraph of Article 263 TFEU, a Member State need not, in any event, provide proof that it is directly and individually concerned by the EU act which it seeks to have annulled or that it has an interest in bringing proceedings (see, in that regard, judgment of 5 September 2012, *Parliament v Council*, C-355/10, EU:C:2012:516, paragraph 37 and the case-law cited).

51 That said, in the third place, the general jurisdiction conferred on the Court of Justice of the European Union by Article 263 TFEU to review the legality of acts of the EU institutions cannot be interpreted in such a way as to deprive of practical effect the limitation on that general jurisdiction provided for in Article 269 TFEU (see, by analogy, judgment of 1 July 2010, *Povse*, C-211/10 PPU, EU:C:2010:400, paragraph 78).

52 It follows that, where Article 263 TFEU constitutes, as in the present case, the basis of an action for annulment against an act adopted by an EU institution under Article 7 TEU, Article 263 TFEU cannot be applied independently of Article 269 TFEU but must, on the contrary, be interpreted in the light of that article.

53 In that regard, it should be noted that Article 269 TFEU makes actions for annulment against acts of the Council and of the European Council adopted under Article 7 TEU subject to certain specific conditions which seek to take account of the particular nature of the procedure established by that provision. Thus, the conditions referred to in the first paragraph of Article 269 TFEU confer the right to bring such an action only on the Member State concerned by that procedure, and limit the grounds that may be relied on in support of that action solely to complaints alleging infringement of the procedural rules referred to in Article 7 TEU.

54 To accept that, on the basis of Article 263 TFEU, an action for annulment against a reasoned proposal of the Parliament, adopted under Article 7(1) TEU, may be brought by an applicant other than the Member State which is the subject of that proposal, and that, in support of that action, any ground referred to in the second paragraph of Article 263 TFEU may be relied on, would, to a large

extent, deprive of their practical effect the specific conditions, laid down in Article 269 TFEU, relating to the bringing of an action for annulment against the determination of the Council referred to in Article 7(1) TEU, which could be adopted as a result of that proposal.

55 Thus, if such a reasoned proposal of the Parliament were to be annulled at the request of such an applicant, the Council would be prevented from determining that there was a clear risk of a serious breach of EU values, even though, in accordance with the first paragraph of Article 269 TFEU, that applicant cannot seek annulment of such a determination.

56 Similarly, if that proposal were to be annulled on the basis of a ground other than those referred to in Article 269 TFEU, the Council would equally be precluded from determining the existence of such a risk, although, in accordance with Article 269 TFEU, that ground cannot be relied on in order to obtain annulment of such a determination.

57 By contrast, the possibility, for a Member State concerned by a reasoned proposal by the Parliament, adopted under Article 7(1) TEU, of bringing an action for annulment against that proposal within two months of its publication, as provided for in the sixth paragraph of Article 263 TFEU, is not such as to undermine the effectiveness of the specific provisions to which an action for annulment directed against a determination of the Council, adopted under Article 7(1) TEU, is subject under Article 269 TFEU.

58 Thus, although, in accordance with the second paragraph of Article 269 TFEU, an action for annulment of such a determination must be brought within one month of its adoption, it would go beyond what is necessary to preserve the effectiveness of Article 269 TFEU to require that an action for annulment against the Parliament's reasoned proposal, adopted under Article 7(1) TEU, be subject to the same reduced period for bringing it.

59 It follows from the considerations set out in paragraphs 54 to 58 above that an action for annulment under Article 263 TFEU against a reasoned proposal adopted by the Parliament under Article 7 TEU may be brought only by the Member State which is the subject of that proposal within two months of its adoption. In addition, the grounds for annulment relied on in support of such an action can only be based on infringement of the procedural rules referred to in Article 7 TEU.

60 In the present case, Hungary is the Member State referred to in the contested resolution. In addition, that Member State's action was brought within the time limit laid down in the second paragraph of Article 263 TFEU.

61 It follows from all the foregoing considerations that the present action for annulment is admissible, without prejudice to the question whether the Court may hear and determine each of the pleas put forward in support of that action.

The pleas raised in the action

62 In support of its action, Hungary puts forward four pleas in law. The first plea alleges infringement of the fourth paragraph of Article 354 TFEU and Rule 178(3) of the Rules of Procedure. The second plea alleges breach of the principle of legal certainty. By its third plea, Hungary maintains that the Parliament infringed the principles of democracy and equal treatment. The fourth plea alleges infringement of the principles of sincere cooperation, cooperation in good faith between the institutions, respect for legitimate expectations and legal certainty.

63 In view of the connection between them, it is appropriate, first, to examine the first and third pleas together.

The first and third pleas, alleging infringement of the fourth paragraph of Article 354 TFEU, of Rule 178(3) of the Rules of Procedure and of the principles of democracy and equal treatment

– *Arguments of the parties*

64 By its first plea, Hungary submits that the Parliament wrongly excluded abstentions when counting the votes cast for the purposes of adopting the contested resolution.

65 According to that Member State, the requirement, laid down in the fourth paragraph of Article 354 TFEU, for a qualified majority in order to adopt a reasoned proposal by the Parliament under Article 7(1) TEU reflects the importance of such an act. An interpretation of that provision of the FEU Treaty to the effect that abstentions should be regarded as votes cast, with the result that a greater number of favourable votes would be required for the purposes of the adoption of that act, would make it possible precisely to reflect that importance.

66 In Hungary's view, the context of Article 354 TFEU also militates in favour of such an interpretation. Thus, it is apparent from the first paragraph of that article that, in the procedure laid down in Article 7(1) TEU, in order to establish whether a majority of four fifths of the members of the Council is reached, the votes of all Member States, other than the Member State concerned, must be counted, be it a vote in favour, against or an abstention.

67 Furthermore, Hungary asserts that, by requiring a majority of two thirds of votes cast representing a majority of MEPs, the fourth paragraph of Article 354 TFEU provides for a specific majority, within the meaning of the last part of Rule 178(3) of the Rules of Procedure. It follows from the latter provision that, where the Treaties provide for a specific majority, both votes in favour and against the proposed vote and abstentions must be regarded as votes cast.

68 By contrast, according to Hungary, the very wording of that provision of the Rules of Procedure precludes an interpretation of the exception that it lays down in the case of a specific majority imposed by the Treaties as applying only to the calculation of a majority of MEPs. That provision contains a very clear contrast between a situation in which only votes in favour and against the measure in question must be taken into account in calculating the number of votes cast and situations in which that text can be validly adopted only by means of a specific majority provided for by the Treaties.

69 Moreover, Hungary submits that, in Parliament's plenary session, MEPs vote by selecting buttons marked 'for', 'against' or 'abstention'. It clearly follows that abstention is one of the forms of casting a vote.

70 The Republic of Poland maintains that the fourth paragraph of Article 354 TFEU must be understood, in the light of the first paragraph of that provision, as an obligation to regard abstentions as votes cast. The instruction, contained in the last sentence of the first paragraph of Article 354 TFEU, to the effect that, within the European Council, abstentions should not be taken into account is an exception to the rule, so that the absence of such an instruction in the fourth paragraph of Article 354 TFEU demonstrates *a contrario* that abstentions must be taken into account where the Parliament takes a decision for the purposes of Article 7 TEU.

71 Furthermore, according to that Member State, to consider that the final part of Rule 178(3) of the Rules of Procedure was introduced to reflect the fact that, in cases where the Treaties provide for a specific majority, a simple majority is not sufficient to adopt a decision would be illogical, having regard to the wording of Rule 83(3) of those rules, which expressly refers to the majority laid down in the fourth paragraph of Article 354 TFEU. Finally, that Member State points out that Rule 180 of the Rules of Procedure formally provides for the possibility of abstaining.

72 The Parliament considers that, although Article 354 TFEU does not specify whether abstentions must be taken into account among the votes cast, that provision confers on it the power to settle that question in its Rules of Procedure. It follows from Rule 178(3) of those rules that abstentions did not have to be taken into consideration in the present case, since the exception laid down at the end of that provision is intended solely to derogate from the principle, laid down in Article 231(1) TFEU, that a majority is attained if there are more votes in favour than against, and must be interpreted as meaning that votes in favour of the text concerned must also correspond to a majority of MEPs.

73 By its third plea, Hungary claims, first, that Article 354 TFEU and Rule 178(3) of the Rules of Procedure should have been interpreted in the light of the principle of democracy, enshrined in Article 2 TEU, and should have required that abstentions be taken into account in the calculation of the votes cast, since such taking into account would best ensure the democratic values of the European Union through full popular representation.

74 In Hungary's view, the manner in which the Parliament calculated the votes cast in the present case, on the contrary, renders abstention meaningless as a voting option. The MEPs did not have at their disposal all the possibilities arising from the exercise of their functions and that restriction was not based on a legitimate objective.

75 Second, Hungary maintains that the interpretation of the fourth paragraph of Article 354 TFEU and of the Rules of Procedure made by the Parliament gives rise to unequal treatment, which cannot be justified by any legitimate aim, between MEPs who abstained from voting on the contested resolution and MEPs who cast their vote.

76 The Parliament considers that Hungary altered the sense of its third plea in its reply by claiming therein that the Parliament had infringed the fourth paragraph of Article 354 TFEU and Rule 178(3) of the Rules of Procedure. It maintains that that argument is not comprehensible and is therefore inadmissible. In any event, Hungary's third plea is unfounded.

– *Findings of the Court*

77 As a preliminary point, it should be noted, first, that the Court cannot hear and determine the first plea in so far as, by that plea, Hungary complains that, for the purposes of adopting the contested resolution, the Parliament infringed Rule 178(3) of the Rules of Procedure. That provision cannot be regarded as a procedural rule laid down in Article 7 TEU, within the meaning of Article 269 TFEU, unlike the rules contained in Article 354 TFEU, which is expressly referred to in Article 7(5) TEU.

78 As regards, second, the plea of inadmissibility raised by the Parliament with regard to the third plea in law, it should be noted that, under Article 120(c) of the Court's Rules of Procedure and the case-law relating thereto, an application initiating proceedings must state the subject matter of the dispute, the pleas in law and arguments relied on 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 or her 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 (judgment of 16 April 2015, *Parliament v Council*, C-540/13, EU:C:2015:224, paragraph 9 and the case-law cited).

79 In the present case, it is apparent from the application initiating proceedings that, by its third plea, Hungary disputes, in essence, the compliance of the contested resolution with, inter alia, the fourth paragraph of Article 354 TFEU, read in conjunction with the principle of democracy and the principle of equal treatment, on the ground that abstentions were not taken into account in the calculation of the votes cast.

80 Since that complaint was raised at the stage of the application and is not ambiguous, the Parliament's plea of inadmissibility must be rejected.

81 Furthermore, since, as stated in paragraph 79 of the present judgment, by that third plea Hungary does not invoke infringement of the principles of democracy and equal treatment in isolation, but seeks to demonstrate that the adoption of the contested resolution infringed, inter alia, the procedural rule referred to in the fourth paragraph of Article 354 TFEU, read in the light of those principles, the Court may address that third plea, as is apparent from paragraph 59 above.

82 As regards the substance, it should be noted, in the first place, that, under the fourth paragraph of Article 354 TFEU, when it is called upon to take a decision under Article 7 TEU, the Parliament is to act by a two-thirds majority of votes cast, representing the majority of its component Members.

83 Since the Treaties do not define what is to be understood by 'votes cast', that autonomous concept of EU law must be interpreted in accordance with its usual meaning in everyday language, while also taking into account the context in which it occurs and the purposes of the rules of which it is part (see, by analogy, judgment of 23 April 2020, *Associazione Avvocatura per i diritti LGBTI*, C-507/18, EU:C:2020:289, paragraph 32 and the case-law cited).

84 As the Advocate General observed in points 128 to 130 of his Opinion, the usual meaning of the concept of 'votes cast' covers only a positive or negative vote on a given proposal. Since abstention must be understood in its usual sense as a refusal to adopt a position on a given proposal, it cannot be treated in the same way as a 'vote cast'.

85 That said, it should be recalled that the majority rule laid down in the fourth paragraph of Article 354 TFEU entails a dual requirement. Acts adopted by the Parliament under Article 7 TEU must obtain, on the one hand, agreement from two thirds of the votes cast and, on the other hand, the agreement of the majority of MEPs.

86 By requiring that acts adopted by the Parliament under Article 7 TEU obtain that double majority, the authors of the FEU Treaty emphasised the importance of such acts, from both a political and constitutional perspective.

87 Thus, while, for the reasons set out in paragraph 84 of the present judgment, account cannot be taken of abstentions for the purpose of determining whether a majority of two thirds of the votes cast has been attained in favour of the adoption of such an act, such abstentions are, on the other hand, taken into account in order to ascertain, as required by the fourth paragraph of Article 354

TFEU, that the votes in favour represent the majority of the component Members of Parliament. In accordance with that majority rule, a reasoned proposal by the Parliament, under Article 7 TEU, cannot be adopted if the number of MEPs who voted in favour of it does not exceed the number of remaining MEPs, whether they voted against that proposal, abstained or were absent from the vote.

88 It follows from the considerations set out in paragraphs 84 to 87 above that the fourth paragraph of Article 354 TFEU must be interpreted as meaning that it is not necessary to take into account, for the purposes of Article 7 TEU, abstentions in the calculation of a two-thirds majority of the votes cast.

89 The fact that, as Hungary has argued, abstentions are taken into account in the calculation of a four-fifths majority of the Members of the Council, referred to in Article 7(1) TEU, is irrelevant in that regard. As is apparent from paragraph 87 above, it is inherent in a voting rule requiring a majority of the members of an institution that those who refrain from casting their votes are taken into account for the purpose of determining whether that majority of members has been reached, unlike a voting rule requiring a majority of the votes cast.

90 Nor can the Republic of Poland's argument based on the last sentence of the first paragraph of Article 354 TFEU succeed. While it is true that that provision provides that abstentions by Members present or represented within the European Council do not prevent the Council from finding, unanimously, pursuant to Article 7(2) TEU, that there has been a serious and persistent breach by a Member State of the values on which the European Union is founded, it does not follow that, in the absence of such a clarification in the fourth paragraph of Article 354 TFEU, abstentions must be taken into account in the calculation of two thirds of the votes cast in the Parliament.

91 In that regard, it should be noted that the clarification relating to abstentions expressly contained in the first paragraph of Article 354 TFEU makes it possible to remove any uncertainty as to the weight of abstentions on the part of the Member States present or represented in the European Council for the purposes of applying Article 7(2) TEU.

92 Thus, by providing, in the last sentence of the first paragraph of Article 354 TFEU, that abstentions do not preclude that institution from adopting the determination referred to in Article 7(2) TEU, the authors of the FEU Treaty intended expressly to preclude abstention on the part of only one of the Member States present or represented in the European Council, excluding the Member State concerned, from being able to prevent that institution from establishing the existence of a serious and persistent breach by that Member State of the values on which the European Union is founded.

93 By contrast, contrary to what the Republic of Poland maintains, it was not necessary to provide such clarification for the fourth paragraph of Article 354 TFEU, since, as is apparent from paragraph 84 of the present judgment, the concept of 'voting' implies, according to its usual meaning, that abstentions are not taken into account in the calculation of such votes. Therefore, even without a clarification such as that contained in the first paragraph of Article 354 TFEU, a rule which, like the fourth paragraph of Article 354 TFEU, requires a majority of votes cast must be understood as precluding the taking into account of abstentions.

94 As regards, in the second place, the alleged infringement of the fourth paragraph of Article 354 TFEU, read in the light of the principle of democracy and the principle of equal treatment, it should be noted that those two principles are values on which the European Union is founded, in accordance with Article 2 TEU. In addition, under Article 10 TEU, the functioning of

the European Union is to be founded on representative democracy and Article 20 of the Charter of Fundamental Rights of the European Union enshrines the principle of equal treatment.

95 As regards, first, the principle of democracy, it must be recalled that the political and constitutional importance of a reasoned proposal under Article 7(1) TEU, such as the contested resolution, is reflected in the double majority required by the fourth paragraph of Article 354 TFEU for its adoption.

96 In addition, contrary to Hungary's submissions, the MEPs who wished to exercise their prerogatives by refraining from voting on the contested resolution were not deprived of that possibility, since the abstentions were taken into consideration as such, for the purposes of verifying that the votes in favour were cast by a majority of the component Members of Parliament. Furthermore, the MEPs who decided to abstain from that vote acted with full knowledge of the facts, since it is not disputed that they had been informed in advance that abstentions would not be counted as votes cast.

97 It follows that the exclusion of abstentions from the calculation of votes cast, within the meaning of Article 354 TFEU, is not contrary to the principle of democracy.

98 As regards, second, the principle of equal treatment, which Hungary also alleges has been infringed, it is necessary to recall that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see, to that effect, judgments of 16 September 2010, *Chatzi*, C-149/10, EU:C:2010:534, paragraph 64, and of 8 September 2020, *Commission and Council v Carreras Sequeros and Others*, C-119/19 P and C-126/19 P, EU:C:2020:676, paragraph 137).

99 In the present case, it should be noted that all MEPs had the same options at the time of the vote on the contested resolution, namely to express a vote in favour of or against the adoption of that resolution, or to abstain on the occasion of that vote and that they were fully aware, at the time of that vote, of the consequences of the choice they would make in that regard and, more particularly, of the fact that abstentions, unlike votes in favour of or against that resolution, would not be taken into account in the calculation of the votes cast. Accordingly, and in the light of what has been stated in paragraph 84 of the present judgment, Members who chose to abstain on that occasion cannot be regarded as being in an objectively comparable situation to those who have expressed their views in favour of or against that adoption, for the purposes of calculating the votes cast, within the meaning of the fourth paragraph of Article 354 TFEU.

100 In the light of all the foregoing considerations, it must be held that the Parliament did not infringe the fourth paragraph of Article 354 TFEU, read in the light of the principles of democracy and equal treatment, by not counting abstentions as votes cast when adopting the contested resolution.

101 The first and third pleas must therefore be rejected.

The second and fourth pleas in law, alleging infringement of Article 4(3) TEU and breach of the principles of cooperation in good faith between the EU institutions, respect for legitimate expectations and legal certainty

– *Arguments of the parties*

102 By its second plea, Hungary claims that the contested resolution infringes the principle of legal certainty, on the ground that it was adopted without the Parliament having first clarified, by raising the matter with the Committee on Constitutional Affairs, uncertainty as to the interpretation of Rule 178(3) of the Rules of Procedure.

103 Even though Rule 226 of the Rules of Procedure leaves it to the President of the Parliament to decide whether to refer the matter to that committee, Hungary asserts that the fact remains that that committee cannot be deprived of its powers by allowing a measure to be adopted on the basis of a rule the interpretation of which is doubtful.

104 Furthermore, it cannot be ruled out that the Committee on Constitutional Affairs might, in future, interpret the Rules of Procedure differently and call into question a posteriori the result of the vote on the contested resolution, which would lead to an uncertain situation.

105 The Parliament considers this plea to be manifestly inadmissible and, in any event, unfounded.

106 By its fourth plea, Hungary maintains that the contested resolution infringes Article 4(3) TEU and the principles of cooperation in good faith between the EU institutions, respect for legitimate expectations and legal certainty. That Member State submits, in that regard, that, for the purposes of adopting that resolution, the Parliament wrongly relied on infringement procedures of EU law which the Commission had closed or in respect of which that Member State and the Commission initiated a dialogue process. In addition, Hungary notes that, despite the existence of such procedures, the Commission did not consider it justified to initiate the procedure laid down in Article 7 TEU, which precludes those infringement procedures from forming the basis of the contested resolution.

107 The Parliament doubts the admissibility of that plea and considers it to be unfounded in any event.

– *Findings of the Court*

108 It is apparent from paragraph 59 of the present judgment that the Court is entitled to rule on the lawfulness of the contested resolution only as regards compliance with the procedural rules laid down in Article 7 TEU.

109 By its second and fourth pleas, Hungary does not allege infringement of any of those procedural rules.

110 It follows that the second and fourth pleas in law must be rejected.

111 In the light of all of the foregoing considerations, the action must be dismissed in its entirety.

Costs

112 Under Article 138(1) of the Rules of Procedure of the Court, 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 Parliament has applied for costs to be awarded against Hungary, and the latter has been unsuccessful, it must be ordered to pay the costs.

113 In accordance with Article 140(1) of those rules, the Republic of Poland must be ordered to bear its own costs as intervener in the proceedings.

On those grounds, the Court (Grand Chamber) hereby:

1. **Dismisses the action;**
2. **Orders Hungary to bear its own costs and to pay those incurred by the European Parliament;**
3. **Orders the Republic of Poland to bear its own costs.**

[Signatures]

* Language of the case: Hungarian.
