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Demarcating the Union's Development Cooperation Policy after Lisbon: Commission v. Council (Philippines PCFA)

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Demarcating the Union’s Development Cooperation Policy after Lisbon: *Commission V. Council (Philippines PCFA)*

Case C-377/12, *European Commission v. Council of the European Union (Philippines PCFA)*, Judgment of the Court (Grand Chamber) of 11 June 2014, EU:C:2014:1903

1. Introduction

This case concerns the choice of legal basis for the Council decision authorizing the signing of a Framework Agreement on Partnership and Cooperation between the EU and the Republic of the Philippines.¹ This is the first ECJ ruling since the entry into force of the Lisbon Treaty concerning the European Union’s external action in the field of development cooperation policy and, as we shall see below, the ruling has not merely confirmed, but also *re-framed* the principles laid down by the Court in its pre-Lisbon case law, in particular in *Portugal v. Council*.² The case also concerned the question of when the special procedures in the area of “justice and home affairs”, regarding United Kingdom and Ireland (opt-in) as well as Denmark (opt-out), come into play.

2. Background

2.1. Facts of the case and its legal predecessor

In 2004, the Council authorized the Commission to negotiate a framework agreement on partnership and cooperation between the EU, its Member States, and the Philippines. Following conclusion of the negotiations, on 6 September

1. Framework Agreement on Partnership and Cooperation between the European Union and its Member States, of the one part, and the Republic of the Philippines, of the other part, annexed to Proposal for a Council Decision on the conclusion of the Framework Agreement on Partnership and Cooperation between the European Union and its Member States, of the one part, and the Republic of the Philippines, of the other part, COM(2013)925 final. The Philippines PCFA, together with several other Partnership and Cooperation Agreements, was put on hold whilst the Commission, the Council and the Member States awaited the ruling by the ECJ.

2. Case C-268/94, *Portugal v. Council (re the India Agreement)*, EU:C:1996:461.

2010, the Commission adopted a proposal for a Council decision on the signing of a framework agreement on partnership and cooperation between the European Union and its Member States, of the one part, and the Republic of the Philippines, of the other part (the Philippines PCFA).³ The legal basis of the Commission's proposal was Article 207 TFEU (on the EU's Common Commercial Policy, CCP) and Article 209 TFEU (on the EU's development cooperation policy) in conjunction with Article 218(5) TFEU (concerning the procedure for authorizing signing of international agreements to which the EU is a party).

On 14 May 2012 the Council unanimously adopted a decision authorizing the signing of the Philippines PCFA, subject to the conclusion of that agreement (the contested decision). However, in addition to Articles 207 TFEU and 209 TFEU and Article 218(5) TFEU, the Council included as legal bases Article 79(3) TFEU (on readmission of third-country nationals), Articles 91 TFEU and 100 TFEU (on transport), and Article 191(4) TFEU (on the environment). In other words, the Council decided that additional legal bases were needed in order to cover all the types of cooperation envisaged by the PCFA. The addition of Article 79(3) TFEU as a legal basis was particularly contentious, because it meant that parts of the PCFA fell within the scope of Part Three, Title V of the TFEU⁴ and would thus be subject to United Kingdom's and Ireland's opt-in scheme laid down in the Protocol (No. 21) on the position of the United Kingdom and Ireland in respect of the area of Freedom, Security and Justice annexed to the EU Treaty and the Treaty on the Functioning of the European Union, as well as to Denmark's opt-out scheme laid down in the Protocol (No. 22) on the position of Denmark annexed to those Treaties.

The main point of disagreement in this respect was Article 26(3) and (4) of the PCFA, which reads:

“(3) Within the framework of cooperation in this area and without prejudice to the need to protect victims of human trafficking, the Parties further agree that:

(a) The Philippines shall admit back any of its nationals . . . present in the territory of a Member State upon request by the latter, without undue delay once nationality has been established and due process in the Member State carried out;

3. Proposal for a Council Decision on the signing of the Framework Agreement on Partnership and Cooperation between the European Union and its Member States, of the one part, and the Republic of the Philippines, of the other part, COM(2010)460 final.

4. Area of Freedom, Security and Justice.

(b) Each Member State shall readmit any of its nationals . . . present in the territory of the Philippines upon request by the latter, without undue delay once nationality has been established and due process in the Philippines carried out;

(c) The Member States and the Philippines will provide their nationals with required documents for such purposes. Any request for admission or readmission shall be transmitted by the requesting state to the competent authority of the requested state.

Where the person concerned does not possess any appropriate identity documents or other proof of his/her nationality, the competent diplomatic or consular representation concerned shall be immediately requested by the Philippines or Member State to ascertain his/her nationality, if needed by means of an interview; and once ascertained to be a national of the Philippines or Member State, appropriate documents shall be issued by the competent Philippine or Member State authorities.

(4) The Parties agree to conclude as soon as possible an agreement for the admission/readmission of their nationals, including a provision on the readmission of nationals of other countries and stateless persons.”

In the opinion of the Commission, the PCFA’s obligations did not go beyond an objective linked to trade and development cooperation, and the addition of the extra Articles by the Council as legal bases for the contested decision was unnecessary and unlawful. The Commission particularly referred to the leading ECJ case, *Portugal v. Council*⁵ – a ruling which formed the cornerstone for delimiting the Union’s development cooperation policy.

Portugal v. Council concerned the Council decision on the conclusion of the Cooperation Agreement between the European Community and India.⁶ The decision was jointly based on the Treaty provisions on the CCP and on development cooperation. Portugal, however, argued that the legal basis of the contested decision did not confer on the Community the necessary powers to conclude the Agreement as regards *inter alia* a number of provisions relating to various specific fields of cooperation.⁷ It challenged the decision, arguing

5. Case C-268/94, *Portugal v. Council*.

6. Cooperation Agreement between the European Community and the Republic of India on partnership and development – Declaration of the Community concerning tariff adjustments – Declarations of the Community and India (O.J. 1994 L 223/ 24).

7. As well as with regard to the Agreement’s provision relating to human rights.

that it should also have been based on what is now Article 352 TFEU⁸ and that all Member States should have taken part in the conclusion of the Agreement.⁹

According to the Portuguese Government, the fact that the India Agreement included provisions relating to energy, tourism, culture, drug abuse control, and intellectual property meant that the Council could not base its decision only on the CCP and development cooperation provisions. The ECJ rejected the Portuguese claims, finding that the EU's competence in the field of development cooperation provided a sufficient legal basis for the contested provisions of the Agreement. The Court, in other words, found that the Treaty Title on development cooperation policy could be given a rather broad scope. Some have argued that the ECJ feared that this extensive interpretation of the Title on development cooperation could lead to circumvention of the Treaty-based limits on the EU's powers.¹⁰ Even if the Court did entertain such doubts, it nevertheless opted for a broad construction of the notion of EU development cooperation policy.¹¹ In this regard it is worth noting that whilst the contested Council decision was based on the provision on CCP as well as the provision on development cooperation, the ECJ only made reference to the latter when finding the decision to be lawful – possibly the decision could have been adopted solely on the basis of the Union's competence in the field of development cooperation policy.¹² However that may be, a practical consequence of the ECJ's broad interpretation of the development cooperation policy competence in *Portugal v. Council* was that Member States were deprived of the possibility of individually vetoing the conclusion of the cooperation agreement. This potentially boosted the effectiveness of EU action in the field.

8. The so-called flexibility provision – which requires unanimity amongst all members of the Council (thereby in practice giving each Member State a veto right).

9. For a general examination of the ruling's impact on the EU's development policy, see Peers, "Fragmentation or evasion in the Community's development policy? The impact of *Portugal v. Council*" in Dashwood and Hillion (Eds.), *The General Law of E.C. External Relations* (Sweet & Maxwell, 2000).

10. Eeckhout, *EU External Relations Law*, 2nd ed. (OUP, 2011), p 136. See also Cremona, "External relations and external competence: The emergence of an integrated policy" in Craig and de Búrca (Eds.), *The Evolution of EU Law* (OUP, 1999), pp. 137–176, p. 161.

11. Eeckhout, *op. cit. supra* note 10, p. 136 observes: "... Even if the Court did not accept Portugal's claims, it may have been too restrictive in its analysis, putting up high constitutional hurdles for an effective Community development co-operation policy". The same author at p. 140 characterizes the Court's approach as "rather restrictive".

12. Note that also in the present case, the Commission included both the CCP and development cooperation as bases for the proposal for the Council decision – and this was not questioned by the Council (or the ECJ). In Case C-268/94, *Portugal v. Council*, Portugal asked whether the Council Decision could have been taken without referring to what is now Art. 207 TFEU on Common Commercial Policy; the ECJ however declined to answer this question (paras. 78–79).

Basing itself to a considerable extent on *Portugal v. Council*, the Commission brought an action under Article 263 TFEU, asking the Court to annul the Council decision “in so far as the Council added thereto the legal bases relating to readmission of third-country nationals (Art. 79(3) TFEU), transport (Arts. 91 TFEU and 100 TFEU) and the environment (Art. 191(4) TFEU)”.¹³

2.2. Arguments of the parties

According to the Commission, the objective of the PCFA was to establish a framework for cooperation and development. However, since the trade part of the PCFA could not be seen as being merely incidental to the part concerning development cooperation, the decision had to be based on both Article 207 TFEU (CCP) and Article 209 TFEU (development cooperation). On the other hand, the Commission found that the provisions of the PCFA which led the Council to add Articles 79(3) TFEU, 91 TFEU, 100 TFEU and 191(4) TFEU were entirely covered by the provision on development cooperation policy. The Commission observed that it follows from Articles 21 TEU, 208 TFEU and 209 TFEU and the ECJ’s case law¹⁴ that development cooperation policy is conducted in the framework of a wide range of policy objectives which pursue the development of the third country concerned, so that development cooperation agreements necessarily encompass a wide range of specific areas of cooperation without the character of such agreements as development cooperation agreements being affected. According to the Commission, this broad notion of development cooperation is also reflected in secondary legislation, as demonstrated by the wide range of actions eligible for EU financing under the financing regulation normally referred to as the “Development Cooperation Instrument”¹⁵ and by the European Consensus on Development.¹⁶ Thus, in the view of the Commission, all the provisions of the PCFA except for the part on trade and investment contributed to the aim of furthering the development of the Philippines and did not impose extensive obligations distinct from those of development cooperation. They therefore

13. At the same time the Commission (subsequently supported by the Council) asked the Court to maintain the effects of the contested decision.

14. In particular the Commission referred to Case C-268/94, *Portugal v. Council*, paras. 37–38.

15. At the material time Regulation (EC) No. 1905/2006 of the European Parliament and of the Council of 18 Dec. 2006 establishing a financing instrument for development cooperation (O.J. 2006, L 378/41).

16. Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: “The European Consensus” (O.J. 2006, C 46/1).

came within the objectives of the EU's development cooperation policy and were covered by Article 209 TFEU. That was also so with regard to the PCFA's provisions relating to transport, its provisions relating to readmission of nationals of the contracting parties, as well as its provisions concerning protection of the environment and of natural resources.

The Council, supported by six intervening Member States, opposed the Commission's reasoning. It first observed that, as opposed to earlier partnership and cooperation agreements such as the Agreement with India (at issue in *Portugal v. Council*¹⁷) more recent such agreements sought to establish a comprehensive relationship covering many different areas of cooperation. According to the Council, the nature and content of such agreements had evolved in conjunction with the extension of the EU's competences, and a particular area could not be identified as predominant compared to others. In the Council's view, it follows from *Portugal v. Council*¹⁸ that, when a provision in an agreement prescribes in concrete terms the manner in which cooperation in a specific area is to be implemented, that agreement must be founded on the corresponding legal basis. Each specific area of an agreement of this kind must be considered separately, irrespective of any concurrent development aid programme in that area, while taking account of the legal, binding and self-standing nature of the obligations entered into. The Council argued that the recitals and Article 2 of the PCFA, defining the aims of the cooperation, did not assign a predominant role to a particular area, such as development cooperation, and the PCFA's structure confirmed that it related to "the establishment of a comprehensive multi-dimensional relation". In the Council's opinion, the PCFA's provisions on transport, readmission of nationals and the environment all had such prominence that they could not be classified as merely incidental to the trade and the development objectives. Consequently, specific legal bases for these aspects of the PCFA had to be included.

The Commission and the Council both focused on the provisions concerning readmission. In particular, the Commission submitted that the addition by the Council of Article 79(3) TFEU would produce unwarranted legal effects, both internally and externally. Because of Protocol No 21 and Protocol No 22, its addition would give rise to the application of voting rules that differed and were incompatible, to the alteration of the territorial scope of the contested decision, to legal uncertainty as regards determining which provisions of the PCFA were covered by Article 79(3) TFEU, to the limitation of the institutional rights of the European Parliament and the ECJ, and to uncertainty as regards the degree of the exercise of the EU's competence

17. Case C-268/94, *Portugal v. Council*.

18. *Ibid.*

under Articles 3(2) TFEU and 4(2) TFEU.¹⁹ To this the Council replied “that it is not procedures that define the legal basis of a measure but the legal basis of a measure that determines the procedures to be followed in adopting that measure.”²⁰

3. Opinion of the Advocate General

In his Opinion of 23 January 2014, Advocate General Mengozzi observed that the first impression given by the PCFA is that of the establishment of a scheme of comprehensive cooperation, as contended by the Council, not subject to limitation.²¹ He noted that – in contrast to the agreement at issue in *Portugal v. Council* – the PCFA did not contain a reference, in its title, to development. Indeed, Article 2 of the PCFA (which listed no less than 11 categories of aims pursued by the cooperation and partnership established by the PCA) only introduced the term “development” in point (h), and this point amounted to a kind of “catch-all” provision listing “all other sectors of common interest”; until that point, “development” was not mentioned in the text. Further, point (h) mentioned no less than 22 different sectors, extending from development cooperation to statistics, and ranging over information and communication technology, cultural and interfaith dialogue and fisheries. Moreover, only one of the PCFA’s 58 provisions was exclusively concerned with development cooperation: namely Article 29 which fell within Title VI on economic and development cooperation and other sectors. Even though some other provisions also referred to the concept of development, so that, with regard to certain fields covered by the PCFA, the text incidentally linked the progress envisaged or the objectives to be attained by the partnership with development, the Advocate General concluded that the objective of development of the contracting third country was “not fully set out” in the PCFA.

Nevertheless, the Advocate General immediately went on to observe that “[i]t is not . . . possible on the basis of that finding alone to hold that development cooperation is merely a secondary preoccupation of the [PCFA]. The question must, on the contrary, be asked whether the [PCFA] does not reflect *the new approach* henceforth taken by the European Union to development cooperation policy”.²² In this regard the Advocate General

19. Judgment, para 22.

20. Judgment, para 31. See likewise Case C-130/10, *European Parliament v. Council*, EU:C:2012:472, para 80.

21. Case C-377/12, *European Commission v. Council*, EU:C:2014:29.

22. Opinion, para 37, emphasis added.

found that the content of the PCFA was substantially linked to the EU's development cooperation policy.²³ However, the Advocate General also cautioned that the areas for EU development cooperation policy had become "so broadly defined as to allow a link to development to be established in every case and no matter what the area concerned". So whilst he acknowledged the multi-faceted nature of development cooperation, he simultaneously found it more difficult to regard the legal basis for development cooperation alone as sufficient when so many and varied areas of relatively specific cooperation were covered by the same agreement as with the PCFA. Since the determination of the appropriate legal basis "has constitutional significance" for the EU, the Advocate General said, a certain vigilance was needed for these types of agreements.²⁴

The Advocate General, however, went on to make an important distinction between, on the one hand, agreements which not only specify certain actions or aspects, but where the provisions also prescribe in concrete terms the manner in which cooperation in each specific area envisaged is to be implemented, and, on the other hand, agreements – like the PCFA – which may well affect a multitude of varied fields while remaining within the framework only of the objectives pursued by development cooperation, and where the provisions which concern those diverse specific matters are limited to determining the framework for cooperation and the areas of cooperation and to specifying certain of its actions or aspects.²⁵

As particularly concerns the Council's insertion of Article 26 of the PCFA, on readmission of third-country nationals (which falls under Title V of the TFEU, and thus entails application of Protocols Nos. 21 and 22), the Advocate General opined that this was necessary. Following an examination of Article 26 of the PCFA, the Advocate General also found that it was possible to establish a link between this provision and the objectives pursued by development cooperation. Finally, he concluded that the insertion of readmission clauses is part of an established practice which essentially serves the interest of the EU and he emphasized that, to his mind, there were considerable differences between the terms of Article 26 of the PCFA and two recent, much more comprehensive, readmission agreements between the EU and Georgia and between the EU and Pakistan – both based on Article 79(3) TFEU.²⁶

23. Opinion, para 42.

24. Opinion, para 43.

25. Opinion, para 44.

26. The A.G. also observed that Art. 26(4) of the PCFA anticipated an international agreement on readmission of third-country nationals. If the parties to the PCFA were to adopt such agreement, this – he said – would have to be done on the basis of Art. 79 TFEU, meaning that Protocols Nos. 21 and 22 would become applicable. See further Opinion, para 77.

On the basis of a specific analysis of the provisions in the PCFA relating to each of the three policy areas, the Advocate General found that the provisions were linked to the overall objective of development cooperation; he therefore recommended that the Court admit the Commission's application and annul the contested decision (while maintaining its effects)

4. Judgment of the Court of Justice

The Court phrased the central question in the case thus: "it must be determined whether, among the provisions of the Framework Agreement, those relating to readmission of nationals of the contracting parties, to transport and to the environment also fall within development cooperation policy or whether they go beyond the framework of that policy and therefore require the contested decision to be founded on additional legal bases".²⁷

In reaching its decision, the Court reasoned in three steps. First, the Court examined *whether the PCFA provisions relating to readmission of nationals of the contracting parties, to transport and to the environment could, as a matter of principle, fall within the Union's development cooperation policy* or whether they went beyond the framework of that policy and therefore required the contested decision to be founded on additional legal bases.

To this end the Court demarcated the EU's policy in the field of development cooperation. It observed that according to Article 208 TFEU this policy had to be conducted within the framework of the principles and objectives of EU external action, as resulting from Article 21 TEU. The primary objective of this policy, however, was the reduction and, in the long term, the eradication of poverty. In EU policies likely to affect developing countries, account must be taken of the objectives of development cooperation. For implementation of its development cooperation policy, Article 209 TFEU provides that the EU may conclude any agreement helping to achieve the objectives referred to in Article 21 TEU and Article 208 TFEU.²⁸ It followed, the Court said, that the EU's policy in the field of development cooperation is not limited to measures directly aimed at the eradication of poverty, but also pursues the objectives referred to in Article 21(2) TEU, such as fostering the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty.²⁹

27. Judgment, para 35.

28. See in particular Art. 209(2) TFEU.

29. See in particular Art. 21(2)(d) TEU.

As part of its delineation of EU development cooperation policy, the ECJ turned to *Portugal v. Council*³⁰ in order to consider to what extent this ruling's *ratio* applied to the situation now before it. It pointed out, in the first place, that the evolution of cooperation agreements between the EU and third countries, since the agreement at issue in *Portugal v. Council*,³¹ corresponded to an increase in the objectives of development cooperation and in the matters concerned by it.³² Importantly, the Court found support for this in paragraphs 5 and 7 of the European Consensus³³ from 2006. In this regard it pointed out that the main objective of development cooperation is the eradication of poverty in the context of sustainable development, and that the concept of sustainable development included environmental aspects. Referring to paragraph 12 of the European Consensus, the Court observed that since the eradication of poverty had several aspects, achievement of those aims required the implementation of many development activities.³⁴ On the other hand, the Court added, even if a measure contributes to the economic and social development of developing countries, it does not fall within development cooperation policy if it has as its main purpose the implementation of another policy.³⁵

Like the Advocate General, the Court observed that, at first glance, the PCFA did not appear to be particularly focused on development. The word "development" did not appear in the title of the PCFA and only seemed to occupy a rather humble place in the agreement's provisions.³⁶ Nevertheless, the Court found that the intention of the contracting parties to promote sustainable social and economic development, the eradication of poverty and the achievement of the eight so-called Millennium Development Goals³⁷ was affirmed in the preamble to the PCFA. The commitment to promote sustainable development, addressing the challenges of climate change and contributing to the internationally agreed development goals, including those contained in the Millennium Development Goals, formed part of the general principles set out in Article 1 of the PCFA. The objective of sustainable development and reducing poverty was not only laid down in Article 29 of the PCFA, which specified the aims of the development cooperation dialogue, but

30. Case C-268/94, *Portugal v. Council*.

31. See *supra* note 6.

32. Judgment, para 42.

33. See *supra* note 16.

34. Judgment, para 42.

35. Cf. Judgment, para 44: the ECJ refers to Case C-91/05, *Commission v. Council*, EU:C:2008:288, para 72.

36. Judgment, para 45.

37. See <www.un.org/millenniumgoals/>.

was also affirmed in several other provisions.³⁸ According to the Court it was apparent from the whole of the PCFA that the cooperation and partnership provided for by the agreement took account especially of the needs of a developing country and, therefore, contributed to furthering, in particular, pursuit of the objectives referred to in Articles 21(2)(d) TEU and 208(1) TFEU.³⁹

Having found that the PCFA as such fell within the field of development cooperation policy, the ECJ, in a second step, considered *whether the specific provisions of the PCFA relating to readmission of nationals of the contracting parties, to transport and to the environment also contributed to the pursuit of the objectives of development cooperation.*

The Court – referring to its Advocate General – observed that migration (including the fight against illegal migration), transport and the environment were all integrated into the development policy defined in the European Consensus. In paragraph 12 of the European Consensus, both migration and the environment and sustainable management of natural resources were among the many development activities envisaged in order to achieve the Millennium Development Goals agenda and to take account of the economic, social and environmental dimensions of poverty eradication in the context of sustainable development. Migration was viewed as being a positive factor for development contributing to poverty reduction,⁴⁰ and development was viewed as being the most effective long-term response to forced and illegal migration.⁴¹ The environment and transport were included among the main areas of EU action in order to respond to the needs of partner countries.⁴² Moreover, migration, transport and the environment were all included in the EU's Development Cooperation Instrument⁴³ – a key regulation for financing development cooperation activities – as areas of development cooperation that may receive EU assistance by means of geographic programmes, in particular for the countries of Asia, and, in the case of the environment and migration, by means of thematic programmes.⁴⁴

The Court also found that the PCFA itself displayed a link between, on the one hand, the cooperation that it aimed to establish regarding migration, transport and the environment and, on the other, the objectives of development cooperation. According to the Court, it was therefore apparent from these findings that the provisions of the PCFA relating to readmission of nationals

38. Judgment, para 46.

39. Judgment, para 47.

40. In para 38 of the European Consensus.

41. In para 40 of the European Consensus.

42. In paras. 75 and 77 of the European Consensus.

43. Cf. *supra* note 15.

44. Judgment, paras. 49–50.

of the contracting parties, to transport and to the environment, contributed to the pursuit of the objectives of development cooperation – and did this consistently with the European Consensus.⁴⁵

In a third and final step, the Court considered *whether the provisions of the PCFA relating to readmission, transport and the environment contained obligations so extensive that they constituted distinct objectives that were neither secondary nor indirect in relation to the objectives of development cooperation*. In the Court's view, it was clear that Article 34 relating to the environment and natural resources and Article 38 relating to transport were limited to declarations of the contracting parties on the aims that their cooperation must pursue and the subjects to which that cooperation will have to relate, and did not determine in concrete terms the manner in which the cooperation would be implemented.⁴⁶

In contrast, the ECJ observed, with regard to readmission of nationals of the contracting parties, Article 26(3) of the PCFA did contain specific obligations: the Philippines and the Member States undertook to readmit their nationals who did not fulfil the conditions of entry or residence on the other party's territory, on request and without undue delay once nationality is established and due process carried out, and to provide their nationals with necessary documents. The parties also agreed to conclude an agreement governing admission and readmission as soon as possible. Whilst Article 26(3) of the PCFA contained wording stating how requests for readmission were to be dealt with, the fact remained, the Court said, that the readmission of persons residing without authorization was included as one of the matters upon which cooperation on migration and development would have to focus, without it being covered at that stage by detailed provisions enabling its implementation, such as those contained in a readmission agreement. It could *not* therefore be considered that Article 26 of the PCFA prescribed *in concrete terms* the manner in which cooperation concerning readmission of nationals of the contracting parties was to be implemented. This conclusion was reinforced by the commitment, in Article 26(4), to conclude a readmission agreement very soon.⁴⁷

The ECJ thus concluded that the provisions of the PCFA relating (i) to readmission of nationals of the contracting parties, (ii) to transport and (iii) to the environment did not contain obligations so extensive that they should be considered to constitute objectives distinct from those of development cooperation that were neither secondary nor indirect in relation to the latter objectives. The Council had therefore been wrong to add the legal bases to the

45. Judgment, paras. 51–55.

46. Judgment, para 56.

47. Judgment, paras. 57–58.

contested decision. Consequently, the Court annulled the decision insofar as the legal bases were added to the decision – but otherwise the decision remained in force.⁴⁸

5. Comments

5.1. Introduction

Article 209 TFEU vests in the EU competence to enter into international agreements within the field of the Union’s development cooperation policy. According to Article 209(2) TFEU, “The Union may conclude with third countries and competent international organizations any agreement helping to achieve the objectives referred to in Article 21 [TEU] and in Article 208 of this Treaty.” Article 209 TFEU thus explicitly foresees international agreements with the horizontal objectives mentioned in Article 21 TEU, including – amongst others – fostering the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty; encouraging the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade; and helping develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development.

The legal significance of this broad construction of the Union’s competence under Article 209 TFEU, we submit, has been acknowledged by this ruling of the ECJ. As is known, it was not until the entry into force of the Maastricht Treaty in 1993 that the EU (as it is today) was given an explicit legal basis in the EC Treaty to carry out development cooperation policy. Before the Maastricht Treaty, the Union did not have an independent development cooperation policy competence. In the pre-Maastricht case law development cooperation policy was therefore treated as a component of, and thus subordinate to, other Union policies, notably the common commercial policy.⁴⁹ With the Maastricht Treaty, the Union acquired its own development policy competence. In *Portugal v. Council*, the classic post-Maastricht case, the ECJ opted for a broad construction of the notion of EU development

48. Judgment, paras. 59–61. Since the Court merely annulled superfluous legal bases in the decision (and since the parties agreed to uphold its legal effects), there was no need to rule on the question of whether the effects of the contested decision – if annulled – should be maintained.

49. Cf. Opinion 1/78, *International Agreement on Natural Rubber*, EU:C:1979:224. and Case 45/86, *Commission v. Council (First GSP Case)*, EU:C:1987:163.

cooperation policy.⁵⁰ With the *Philippines PCFA* judgment, the first post-Lisbon case, the Court has not merely confirmed but also further extended the permissive use of the Union's development cooperation policy competence to conclude multifaceted international agreements.

5.2. *The constitutional dilemma of multi-faceted instruments*

The judgment in this case is a first and very instructive post-Lisbon example of a classic constitutional dilemma concerning competence demarcation, which is becoming increasingly relevant with the use of multi-faceted legal instruments: the need to ensure that no legal basis in the Treaties becomes nugatory. In the field of development cooperation, the significance of this aspect of the judgment can only be fully understood and appreciated when considered in light of the evolution of the Union's development cooperation policy competence.

As mentioned in section 2.1 above, the ruling in the *Portugal v. Council* case confirmed that the Maastricht Treaty entailed a methodological shift in the way the scope of the EU's development cooperation policy competence was defined. The judgment signalled that the ECJ took seriously that development cooperation policy had been given its own Chapter and power-conferring provisions with the Maastricht Treaty and was therefore now entitled to its own "space" and *raison d'être*.⁵¹

Contemporary development cooperation was, already at that time, a multi-faceted policy encompassing a broad range of areas, most of which under other circumstances could be considered to constitute separate policy areas (intellectual property protection, environmental protection, migration policy etc.). Therefore, inevitably, with the changes made by the Maastricht Treaty, another classic constitutional dilemma (well-known in e.g. the ECJ's case law concerning trade and environment)⁵² arose: on the one hand, in order not to render the policy field and its new comprehensive legal basis "nugatory", its power-conferring provision has to be capable of applying to

50. Case C-268/94, *Portugal v. Council* is presented in section 2.1 *supra*.

51. Compare, in this respect, the Court's original restrictive approach to the Union's environmental protection competence after it was introduced with the Single European Act. In Case 62/88, *Greece v. Council*, EU:C:1990:153, notably paras. 19–20, the Court made it clear that the new power-conferring provisions on environmental protection "leave intact the powers held by the Community under other provisions of the Treaty". The Court subsequently "refined" its approach to the Union's environmental protection competence, most notably in Opinion 2/00, *Cartagena Protocol*, EU:C:2001:64 where the Court (in para 40) held that the Commission's extensive interpretation of the scope of the CCP would render the environmental protection policy largely nugatory.

52. E.g. Case 62/88, *Greece v. Council*, 62/88, Opinion 2/00, *Cartagena Protocol*, and in Case C-94/03, *Commission v. Council (Rotterdam Convention)*, EU:C:2006:2.

contemporary policy instruments within its sphere of application.⁵³ In the field of development cooperation, instruments are typically and to an increasing extent multi-faceted, thus touching upon several policy fields where the Union holds other specific powers. However, if the Union legislature were required to use these more specific legal bases each time it adopted multi-faceted development cooperation measures, Article 209 TFEU would soon become virtually superfluous. Thus, an inflation in the use of legal bases would be contrary to the intentions of the Treaty and could potentially be detrimental to the effectiveness of the development cooperation policy. On the other hand, it is equally important to ensure that the Union legislature respects the institutional balance and decision-making restraints set up in the Treaties when it adopts multi-faceted instruments (e.g. the decision to sign the Philippines PCFA) within the framework of development cooperation. Or, put differently, broad competence provisions (e.g. concerning development cooperation, CCP or environmental protection) should not be stretched so far that they empty other power-conferring provisions of their substance and thus distort the institutional balances and decision-making procedures set up in the Treaties.⁵⁴

From this over-arching view, the *Philippines PCFA* case is an instructive post-Lisbon example of the practical and constitutional difficulties that arise when the Union institutions, in their day-to-day policy implementation, must ensure that multi-faceted legal instruments respect the scope of all power-conferring provisions in the Treaties. As we explain below, the outcome in this case was clearly favourable to the Union's development cooperation policy to the detriment of notably more specific powers and procedures as regards readmission.

5.3. *Reframing the demarcation of EU development cooperation competence*

The *Philippines PCFA* case reveals a slight change in (or reframing of) the way in which the Court demarcates the Union's development cooperation competence compared to *Portugal v. Council*. In two ways, there is a subtle evolution in the Court's reasoning. On the one hand, the Lisbon Treaty has introduced various significant changes to the Union's development cooperation policy, entailing *inter alia* a streamlining of the policy objectives

53. Case C-268/94, *Portugal v. Council*, paras. 36–38. See, similarly, the Court's reasoning with respect to the scope of the CCP in Opinion 1/78, *Natural Rubber Agreement*, para 44, and with respect to environmental protection policy in Opinion 2/00, *Cartagena Protocol*, para 40.

54. Most famously illustrated by the Court's reasoning concerning the scope of the CCP in Opinion 1/94, *WTO Agreement*, EU:C:1994:384.

and the introduction of horizontal external action objectives – there is already extensive writing on the possible consequences this might have for the Union’s capabilities to act externally.⁵⁵ In this light, it is interesting that the Court appears to pay merely lip-service to the Lisbon Treaty amendments, including notably the fact that poverty reduction/eradication has explicitly been made the primary aim of the Union’s development cooperation policy (i.e. the streamlining of the Union’s development cooperation objectives), and the fact that the Union, when implementing this policy on the basis of Article 209 TFEU, may conclude agreements, merely “helping to achieve” the general objectives referred to in Article 21 TEU, setting out the broader aims of the European Union’s external actions (whereas pre-Lisbon several of these broader aims formed part of the development cooperation policy aims *as such*). It appears to follow from this short reasoning that these Treaty amendments do not have a noticeable impact on the scope of the Union’s competences in this field and that the Court’s older case law in this area therefore remains relevant.⁵⁶

Instead, when defining the scope of the post-Lisbon development cooperation competence, the Court pays more heed to two secondary law instruments. It seems that the Court’s real benchmark for determining the scope of the Union’s development cooperation policy competence is derived, not from (post-Lisbon) Articles 208 TFEU and 209 TFEU, but from the European Consensus and the Development Cooperation Instrument, both pre-Lisbon.⁵⁷ In particular, it is remarkable that the Court concludes that the provisions of the PCFA relating to the three contested areas,⁵⁸ “consistently with the European Consensus, contribute to the pursuit of the objectives of development cooperation”.⁵⁹

It is not entirely clear what to make of this reasoning. At first sight, one might wonder whether the Court is suggesting that the outer limits of the Union’s development cooperation policy are defined by a soft law (the European Consensus) and a hard law (the Development Cooperation

55. See e.g. Broberg and Holdgaard, *EU External Action in the Field of Development Cooperation Policy – The Impact of the Lisbon Treaty*, SIEPS Report no. 6, 2014, sections 2.1.2 and 4.

56. The situation is different for the CCP competence in Art. 207 TFEU, since several Treaty amendments have altered its substantive scope, including notably as regards trade in services, trade-related aspects of intellectual property rights and foreign direct investments. Earlier case law on the Union’s external trade competence with respect to these matters may therefore no longer be relevant. See Case C-414/11, *Daiichi Sankyo Co. Ltd and Sanofi-Aventis Deutschland GmbH v. DEMO Anonymos Viomichaniki kai Emporiki Etairia Farmakon*, EU:C:2013:520, para 48.

57. Judgment, paras. 42–43, 49–50 and 55.

58. (i) Readmission, (ii) transport and (iii) the environment.

59. Judgment, para 55.

Instrument – a regulation) measure adopted prior to the Lisbon Treaty. From a legal point of view, this would be unacceptable, since it would conflict with the principles of hierarchy of Union law norms. Hence, this cannot be what the Court meant to say. Rather, we submit, the above reasoning should be understood as a practical way of showing that the provisions of the Philippines PCFA fell within Article 208(1) TFEU and Article 21(2) TEU. The importance attached to, notably, the European Consensus document should therefore only be understood as an illustration – not a justification – of the conclusion that the provisions of the PCFA fall within the scope of development cooperation. However that may be, the judgment underlines the practical importance of the European Consensus document and the Development Cooperation Instrument (i.e. at the material time Regulation 1905/2006). It necessarily follows that both Member States and Union institutions should be careful when revising these instruments, since the Court’s ruling suggests that the two measures may have considerable practical, if not legal, importance for the overall scope of the Union’s development cooperation competence.⁶⁰

The Court’s reasoning leading up to its finding that the provisions of the Philippines PCFA “relating to readmission of nationals of the contracting parties, to transport and to the environment, consistently with the European Consensus, contribute to the pursuit of the objectives of development cooperation”, is also interesting for another reason. It may suggest that the requirement of policy coherence, which has been strengthened by the Lisbon Treaty, is taken seriously. More precisely, this finding may be read to the effect that if the provisions of the PCFA were not “consistent” with the European Consensus,⁶¹ the conclusion might have been different. Thus, the judgment may reinforce the requirement of policy coherence.

5.4. *Expanding EU development cooperation policy competence*

The third point to note is that the Court both confirms and even further extends its pre-Lisbon broad construction of the Union’s development cooperation policy competence. This broad construction has two dimensions. Not only does the Court confirm that this policy is multi-faceted and that its power-conferring provisions can therefore be used to adopt multi-faceted instruments covering a *broad* range of policy areas, the Court also accepts that development cooperation competence can be used for relatively *deep* forms of

60. In 2014, Regulation 1905/2006 was replaced by Regulation 233/2014, O.J. 2014, L 77/44.

61. In the French version of the judgment, the Court has termed this “en cohérence avec le consensus européen”.

cooperation. As regards the latter, the Court repeats the distinction made in the *Portugal v. Council* case between cooperation of a declaratory nature and cooperation “in concrete terms” (regarding the manner in which cooperation in each specific area envisaged is to be implemented). However, the Court accepts that provisions in the Philippines PCFA concerning readmission contain specific legal obligations and clear rules on how to proceed (by conclusion of a future readmission agreement), and thereby transgress the limits of being mere declaratory statements. In this respect, the *Philippines PCFA* case clearly takes the doctrine developed in the *Portugal v. Council* case a step further.

The Court – to our knowledge for the first time – appears to accept that clear and central legal obligations concerning readmission, which has its own treaty-making competence and a specific decision-making procedure that differs from development cooperation, can be assumed on the basis of development cooperation competence; provided the obligations are not immediately implementable. This is so even in a situation where, as mentioned above, particular procedures apply with respect to readmission due to the special situations of the United Kingdom and Ireland (opt-in) and Denmark (opt-out) precisely in this field. Arguably, while *Portugal v. Council* contains a detailed assessment of whether the relevant provisions concerning other policy areas were merely declaratory or whether they were *concrete*, the present judgment contains, in effect, only a relatively short assessment of whether the relevant provisions in the PCFA require *implementation*.⁶² Obviously, the latter is a narrower and more lenient test, allowing development cooperation policy competence to be used for deeper and more concrete types of cooperation in other policy fields. This new flexibility will probably be useful for Union negotiators, including notably the Commission’s Directorate General for Development and Cooperation – EuropeAid, who may wish to take a holistic approach to cooperation with particular developing countries. Arguably, it strengthens the ability of the Commission (and the European External Action Service) to pursue ambitious and multi-faceted types of cooperation in this policy area.

62. In Case C-268/94, *Portugal v. Council*, para 45, the Court did take into account the question of whether the provisions concerning each specific policy area prescribed the manner in which cooperation with India was to be implemented. However, the question of implementation was just one element in an overall assessment of whether cooperation in these policy areas was specified “in concrete terms”, cf. the Court’s assessment in paras. 49–79. The Court’s examination of Art. 26 of the PCFA is contained in one paragraph (para 58) in the *Philippines PCFA* case. Here, the Court relies solely on the fact that readmission cooperation with the Philippines is to be implemented subsequently, including in particular through a specific readmission agreement. On this basis, the Court concludes that the provision does not envisage cooperation in concrete terms. This appears to be a much more lenient test than that applied in *Portugal v. Council*.

However, from a legal point of view, the Court's approach is not unproblematic.

In this context, it is worth recalling that Advocate General Mengozzi in his Opinion in the case, like the Court, concluded that the Council wrongly included the three legal bases concerning transport, the environment and readmission of TCNs. However, though he accepted the broad and multi-faceted nature of the notion of development cooperation policy, he insisted that a careful analysis should be made before concluding that development coordination policy competence can be used. In the words of the Advocate General:

“According to the European consensus on development, the areas for European Union action are defined so broadly as to allow a link to development to be established in every case and no matter what the area concerned. As correctly explained by the Council, the European Union's practice in its relations with less developed countries has evolved significantly and has progressed from being a mere system of financial assistance to the establishment of comprehensive and more elaborate agreements in which reference to ‘mutual’ advantages is not mere diplomatic language and the relationship put in place is much less lopsided and is, thus, more balanced. It is, however, for that reason that, while I can certainly acknowledge the multi-faceted nature of development cooperation, I find it, by contrast, more difficult to regard the legal basis for development cooperation alone as sufficient when so many and varied areas are covered by the same agreement. I call, in that regard, for a certain vigilance, precisely because the determination of the appropriate legal basis ‘has constitutional significance’ for the European Union”.⁶³

This call for vigilance seems warranted. With the Lisbon Treaty's cross-reference to the Union's general objectives in its external action in Article 21 TEU, and with the ECJ's heavy reliance on broadly defined secondary (soft and hard) law in determining the scope of Union competence in the field of development cooperation, it is appropriate to recall the constitutional significance of the choice of legal basis: no specific power-conferring provisions of the Treaty should be allowed to become nugatory, and no policy competence should be allowed to take precedence over another. If, for example, the key elements in the Union's readmission policy and the main substantive and procedural obligations *vis-à-vis* specific third countries are, in reality, established in the Union's development

63. Opinion, para 43 (footnotes omitted).

cooperation agreements and based on Article 209 TFEU, this would, arguably, be contrary to the principle of conferral. At least, such practice would seem to be contrary to the spirit of the Treaties, which provide for an independent competence as regards readmission.⁶⁴ Moreover, proponents of an ambitious and effective development cooperation policy should not forget that the same reasoning could be used to pursue quite deep forms of development cooperation policy within the framework of, say, the CCP.

In the present case, the ECJ expresses the basic demarcation principle as whether the relevant specific provisions in the agreement determine “in concrete terms” issues which belong to other policy areas; a principle which appears to be clear and reasonable. Nevertheless, the application of this principle should be rigorous. Indeed, it is noteworthy that the Advocate General observed that the Philippines PCFA provision on readmission of third-country nationals anticipated an international agreement on such readmission, and that “[i]t is indeed when that agreement is concluded – namely when the European Union is preparing to adopt a measure based on a provision falling under Title V of the TFEU Treaty – that the full effectiveness of Protocols Nos. 21 and 22 will be ensured, together with the rights of the Member States concerned.”⁶⁵ The Court of Justice did not make a similar observation in its judgment. Rather, the Court’s reasoning (in paras. 56–58) on this particular point is remarkably short and superficial and does not, we submit, provide sufficient security for those who wish to prevent creeping Union competences based on open-ended power-conferring provisions.⁶⁶ In particular, it is not clear from the judgment *why* the provisions in the PCFA concerning readmission are not sufficiently “concrete” to warrant their own legal basis, and *how much more* concretization can be allowed before an additional legal basis is necessary.⁶⁷

64. In Case C-268/94, *Portugal v. Council*, the Court held in para 47: “The mere inclusion of provisions for cooperation in a specific field does not therefore necessarily imply a general power such as to lay down the basis of a competence to undertake any kind of cooperation action in that field. It does not, therefore, predetermine the allocation of spheres of competence between the Community and the Member States or the legal basis of Community acts for implementing cooperation in such a field”. On this basis, the Court in *Portugal v. Council* went on to make a specific examination of each of the provisions in the India Agreement providing for cooperation in other policy areas (in paras. 49–79). As mentioned above, the Court apparently did not subject Art. 26 of the Philippines PCFA to the same test.

65. Opinion, para 77.

66. Not merely limited to the “conflict” between justice and home affairs, on the one hand, and development cooperation policy, on the other.

67. Contrast with Opinion, paras. 66 et seq., which contains a much more detailed analysis, and clearly indicates the limits of the use of the development cooperation competence in relation to readmission.

6. Final remarks

The *Philippines PCFA* judgment clarifies, in a number of ways, the method to be used for demarcating the Union's development cooperation policy competence, both as regards breadth and depth. The ruling confirms that the Lisbon Treaty's streamlining and reorganization of the EU's development cooperation policy competences do not restrict the Union's competences, and it clarifies the method for determining whether a multi-faceted agreement can be concluded with reference to the Union's development cooperation competence, including how deep cooperation under such an agreement can be. Overall, the judgment appears to construe this competence even more generously than did the ruling in the *Portugal v. Council* case, and perhaps too generously. In particular, the Court allows for a very significant interference with the Union's readmission agreement competence (justice and home affairs). At the same time, the ruling leaves several fundamental questions open. In all likelihood, this will not be the last case concerning the scope of the Union's post-Lisbon development cooperation policy competence.

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