Provisional text

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 3 December 2020(1)

Case C-650/18

Hungary
v
European Parliament

(Action for annulment – Article 7(1) TEU – Reasoned proposal by the European Parliament – Jurisdiction of the Court – Article 263 TFEU – Article 269 TFEU – Resolution on a proposal calling on the Council to determine the existence of a clear risk of a serious breach by Hungary of the common values of the Union – Rules for counting votes pursuant to Article 354 TFEU and Rule 178 of the Parliament's Rules of Procedure – Concept of vote cast – Exclusion of abstentions)

I. Introduction

1. On 12 September 2018, the European Parliament adopted a resolution 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 ('the contested resolution'). (2) By the present action, Hungary is seeking the annulment of that resolution under Article 263 TFEU.

2. The action raises two key legal issues. First, are reasoned proposals adopted under Article 7(1) TEU amenable to judicial review under Article 263 TFEU, in particular, in view of Article 269 TFEU? Second, should that indeed be the case, how are abstentions in the Parliament to be counted for the purpose of determining whether the two-thirds majority of the votes cast, as required by Article 354 TFEU, has been reached?

II. Legal framework

A. EU Treaties

3. Article 7 TEU provides that:

'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 TEU. 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 of the Treaty on the Functioning of the European Union.'

4. In accordance with Article 263 TFEU, the Court of Justice shall review the legality of acts of the European Parliament intended to produce legal effects vis-à-vis third parties.

5. Further, by virtue of 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 of the Treaty on European Union 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.'

6. The general rule on voting in the European Parliament, provided in Article 231 TFEU, states that if not otherwise provided in the Treaties, the European Parliament shall act by a majority of the votes cast. The Rules of Procedure shall determine the quorum.

7. Pursuant to Article 354 TFEU:

'For the purposes of Article 7 of the Treaty on European Union 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 of the Treaty on European Union, 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 of the Treaty on European Union, 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 of the Treaty on European Union, the European Parliament shall act by a two-thirds majority of the votes cast, representing the majority of its component Members.'

8. In accordance with the 'Sole Article' of Protocol No (24) on asylum for nationals of Member States of the European Union:

'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:

(a) if the Member State of which the applicant is a national proceeds after the entry into force of the Treaty of Amsterdam, availing itself of the provisions of Article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, to take measures derogating in its territory from its obligations under that Convention;

(b) if the procedure referred to in Article 7(1) of the Treaty on European Union 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;

(c) if the Council has adopted a decision in accordance with Article 7(1) of the Treaty on European Union in respect of the Member State of which the applicant is a national or if the European Council has adopted a decision in accordance with Article 7(2) of that Treaty in respect of the Member State of which the applicant is a national;

…'

B. Rules of Procedure of the European Parliament

9. Under Rule 83 of the European Parliament's Rules of Procedure ('Rules of Procedure'), (3) entitled 'Breach by a Member State of fundamental principles and values':

'1. Parliament may, on the basis of a specific report of the committee responsible drawn up in accordance with Rules 45 and 52:

(a) vote on a reasoned proposal calling on the Council to act pursuant to Article 7(1) of the Treaty on European Union;

(b) vote on a proposal calling on the Commission or the Member States to submit a proposal pursuant to Article 7(2) of the Treaty on European Union;

(c) vote on a proposal calling on the Council to act pursuant to Article 7(3) or, subsequently, Article 7(4) of the Treaty on European Union.

2. Any request from the Council for consent in relation to a proposal submitted pursuant to Article 7(1) and (2) of the Treaty on European Union shall, along with any observations submitted by the Member State in question, be announced to Parliament and referred to the committee responsible, in accordance with Rule 99. Except in urgent and justified circumstances, Parliament shall take its decision on a proposal from the committee responsible.

3. In accordance with Article 354 of the Treaty on the Functioning of the European Union, decisions under paragraph 1 and 2 shall require a two-thirds majority of the votes cast, constituting a majority of Parliament's component Members.

…'

10. Pursuant to Rule 178 of the Rules of Procedure, which concerned 'voting':

'1. As a general rule, Parliament shall vote by show of hands.

However, the President may at any time decide that the voting operations will be carried out by means of the electronic voting system.

…

3. In calculating whether a text has been adopted or rejected account shall be taken only of votes cast for and against, except where a specific majority is laid down by the Treaties.

…'

11. Rule 226(1), concerning the application of the Rules of Procedure, provided that:

'Should doubt arise 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.'

III. Facts and proceedings before the Court

12. On 17 May 2017, the European Parliament ('the defendant') adopted a resolution instructing the Committee on Civil Liberties, Justice and Home Affairs ('the LIBE Committee') to draw up a special report with a view to holding a plenary vote on a reasoned proposal calling on the Council to act in accordance with Article 7(1) TEU in relation to Hungary ('the applicant'). (4)

13. On 4 July 2018, the LIBE Committee adopted the report, (5)also known by the name of its rapporteur as the Sargentini report.

14. On 7 September 2018, at the request of the President of the European Parliament, the Parliament's Legal Service submitted to the former a legal opinion aimed at clarifying the rules for counting the votes applicable to the procedure under Article 7(1) TEU, in particular whether abstentions were to be counted as votes cast for the purposes of determining whether the required two-thirds majority of the votes cast was reached.

15. By letter of 10 September 2018, Hungary's Permanent Representative to the European Union notified the Parliament's Secretary General that, according to the Hungarian Government, abstentions should be taken into account in the vote on the Parliament's contested resolution.

16. On the same day, the Parliament's Deputy Secretary General informed Members of the European Parliament ('MEPs') via email that only the votes cast in favour and those cast against the contested resolution would be taken into account.

17. On 12 September 2018, the European Parliament adopted the contested resolution. There were 448 votes cast in favour of the resolution and 197 cast against. There were 48 abstentions.

18. By the present action, the applicant asks the Court to annul the contested resolution and to order the defendant to bear the costs.

19. The defendant asks the Court to dismiss the application as manifestly inadmissible, or in the alternative as unfounded, and to order the applicant to pay the costs.

20. By order of 14 May 2019, at the request of the Parliament, the Court ordered the removal from the file of the opinion of the Parliament's Legal Service, contained in Annex 5 to the application. It also rejected Hungary's request for disclosure of that document. (6)

21. By decision of the Court on 22 May 2019, Poland ('the intervener') was granted leave to intervene in support of the applicant.

22. The applicant, the defendant and the intervener participated at the hearing which took place on 29 June 2020.

IV. Assessment

23. This Opinion is structured as follows. I shall first examine the admissibility of the present action for annulment. In a nutshell, that issue requires the determination of whether reasoned proposals triggering the procedure under Article 7 TEU are open to review under the ordinary provisions of Article 263 TFEU, and whether Article 269 TFEU may affect, in one way or another, that general proposition (A). I shall then turn to the merits of the case, focusing in particular on the first and third grounds of appeal: how are the abstentions of MEPs to be taken into account for the purpose of ascertaining whether the contested resolution reached the two-thirds majority of the votes cast required by Article 354 TFEU? (B) Since I find nothing wrong with the interpretation of the relevant rules and the practice of the Parliament in that regard in the context of the present case, I propose to reject the action as unfounded.

A. Admissibility

1. Arguments of the parties

(a) The applicant

24. According to the applicant, the contested resolution can be reviewed under Article 263 TFEU since it produces significant legal and political effects in three respects. First, the contested resolution is not only stigmatising for the Member State concerned, but it also opens up the possibility for the Council to make a determination concerning that Member State pursuant to Article 7(1) TEU. Second, the resolution entails the automatic loss of the status of safe country of origin in asylum cases. Third, it affects the execution of instruments of cooperation between Member States, such as European arrest warrants.

25. Furthermore, the applicant is of the view that the contested resolution sets out the Parliament's definitive position. The subsequent involvement of the Parliament in the course of the procedure under Article 7 TEU, by giving consent to the Council to make a determination, is different from its initial proposal. It concerns another act, adopted by another institution, which has a different content and subject matter. The Article 7 TEU procedure cannot be compared to a legislative procedure. The contested resolution is thus not analogous to the Commission's legislative proposals. The Article 7 TEU procedure is a unique sanction procedure, all the steps of which produce legal effects even if the next step is not triggered. It is far from certain whether the unlawfulness identified by the contested resolution could be remedied at a later stage since there is no guarantee that the Council will ultimately adopt a decision thereon.

26. In the applicant's view, Article 269 TFEU does not render the action for annulment against the contested resolution inadmissible. That provision applies only to the legal acts mentioned therein. It is

therefore not applicable to the contested resolution. Article 269 TFEU contains an exception to the general litigation rules and should therefore be interpreted strictly. That provision should be interpreted in the light of the constitutional amendments brought in by the Treaty of Lisbon, which opened up the Court's jurisdiction to all areas covered by EU law. Each stage of the procedure under Article 7 TEU must respect all the relevant provisions of EU law. Thus, Article 269 TFEU cannot be interpreted as exempting the contested resolution from judicial review, particularly in the framework of a procedure that is intended to protect the rule of law, at least with regard to rules of competence and procedure.

(b) The defendant

27. According to the defendant, the action for annulment against the contested resolution is inadmissible. It argues that Article 269 TFEU, which is a *lex specialis* with regard to Article 263 TFEU, the *lex generalis*, is applicable in the present case. Article 269 TFEU is one of a number of other provisions limiting the Court's jurisdiction in special domains. It precludes judicial review by the Court of the contested resolution. The authors of the Treaties did not intend to have a broad scope of judicial review for acts pertaining to the Article 7 TEU procedure.

28. The procedure under Article 7 TEU constitutes an extraordinary political safeguard which is largely insulated from the Court's jurisdiction. Among the different acts that may be adopted under Article 7 TEU, only the determination made by the European Council or the Council may be subject to judicial review under Article 269 TFEU. In particular, it would be illogical to have full judicial review of preparatory acts under Article 263 TFEU while determinations are subject to a limited review under Article 269 TFEU. What this means is that the political debate which ought to take place within the Council would then take place in the courtroom. The Court may examine alleged procedural irregularities committed during the adoption of an act, such as the contested resolution, but at a later stage during the judicial review of the determination made by the Council or the European Council.

29. Should the Court embrace a different approach, the defendant remains of the view that the contested resolution is not challengeable due to its lack of legal effects. First, the resolution does not entail any change in the applicant's legal situation. The Council is entirely free to follow the Parliament's proposal or to choose not to do so. Second, even if the contested resolution were to affect the possibility for Hungarian nationals to lodge a request for asylum in another Member State, that should not determine the content of the final decision which that Member State would take in that respect. In any event, the contested resolution is an intermediary measure immune from judicial challenge. It does not contain the final position of the Parliament, since the latter is to approve the determination made by the Council pursuant to Article 7 TEU at a later stage of the procedure. It is comparable to the Commission's proposals within the ordinary legislative process.

(c) The intervener

30. The intervener submits that the application for judicial review of the contested resolution is admissible under Article 263 TFEU. That act is not a preparatory act to the Council determination pursuant to Article 7(1) TEU. Thus, the procedural irregularities allegedly tainting the adoption of the contested resolution cannot be invoked later in support of claims that the Council infringed the procedural requirements by making its determination under Article 7(1) TEU. The Parliament's reasoned proposal under Article 7(1) TEU cannot be equated with Commission proposals within the legislative process. Within that latter process, Commission proposals limit the Council's power of assessment. That is not the case for the Parliament's reasoned proposals under Article 7 TEU. The autonomous nature of reasoned proposals is confirmed by the fact that the Parliament is also involved at a later stage of the procedure.

31. The possibility of subjecting the contested resolution to judicial review under Article 263 TFEU is not at odds with the historical, or the purposive interpretation of Article 269 TFEU. Unlike the former Article 46 TEU, Article 269 TFEU does not limit the Court's jurisdiction to a closed list of acts. The aim of Article 269 TFEU is to limit the judicial review of politically significant discretionary acts only, such as the

determinations referred to in Article 7(1) TEU. The other acts adopted under Article 7 TEU may thus be reviewed under Article 263 TFEU.

32. As far as reasoned proposals are concerned, they cannot be immune from judicial review, at least as regards the respect for procedural rules, in view of their significant political and legal effects. The absence of limitation in time of the adverse effects of reasoned proposals also warrants judicial review. Should reasoned proposals be excluded from judicial review under Article 263 TFEU, other acts, such as Council decisions adopted under Article 7(3) TEU which suspend the rights of a Member State, would also not be reviewable. The aim of the Article 7 TEU procedure, which is to encourage Member States to respect EU values, would be entirely compromised if the measures intended to achieve that objective could themselves threaten individual rights, including those deriving from EU citizenship.

2. Analysis

(a) The starting point: A complete system of legal remedies

33. It is established case-law that the European Union is a union based on the rule of law in which all acts of its institutions are subject to review of their compatibility with, in particular, the Treaties, the general principles of law and fundamental rights. (7) To that end, the TFEU has established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of EU acts, and has entrusted such review to the EU Courts. (8)

34. Naturally, such a complete system of remedies is at the disposal of any applicant, be it an individual, an institution or a Member State. Thus, *Member States* may also invoke, for their own benefit, the principle of effective judicial protection. (9) Furthermore, under the second paragraph of Article 263 TFEU, as a privileged applicant, a Member State need not prove direct and individual concern. All that a Member State needs to establish for its action under Article 263 TFEU to be admissible is, in principle, that an act – in the present case one of the Parliament – was intended to produce legal effects vis-à-vis third parties. Thus, a Member State may challenge an EU act even if that act does not produce legal effects specifically with regard to that Member State. (10)

35. The existence of a complete system of remedies has an important consequence. Since the entry into force of the Treaty of Lisbon, the Court enjoys jurisdiction *by default* with regard to all acts adopted by EU institutions, at least those which are intended to have legal effects. It follows that it is only when the Treaties lay down express exclusions that the Court has no jurisdiction. For example, the first paragraph of Article 275 TFEU and Article 276 TFEU provide for such exclusions, in relation, respectively, to the common foreign and security policy and law and order operations carried out in the Member States.

36. However, even in those scenarios, the Court has insisted on the fact that Article 19 TEU has conferred general jurisdiction on the Court to ensure that, with regard to the interpretation and application of the Treaties, the law is observed. Accordingly, any derogation from that rule of general jurisdiction must be interpreted narrowly. (11)

37. In short, under the Treaty of Lisbon, the default rule is uncompromisingly simple: unless the Treaty clearly and expressly excludes it, the Court has jurisdiction over all EU acts. Moreover, any such express exclusion is to be interpreted narrowly.

(b) Article 7 TEU and acts adopted within its framework

38. Article 7 TEU, initially numbered as Article F.1 TEU, entered into force as a result of the Treaty of Amsterdam in 1997. Article 7(1) TEU constitutes the initial phase in the procedure in the event of a clear risk of a serious breach by a Member State of the common values enshrined in Article 2 TEU. Article 7(2) TEU governs the next stage in which a serious and persistent breach by a Member State of the values laid down in Article 2 TEU can be established. Article 7(3) TEU ultimately provides for the issuing of sanctions against the Member State concerned.

39. For each of those stages, Article 7 TEU provides for the adoption of a number of legal acts by the relevant institution(s). First, Article 7(1) TEU is to be triggered by a *reasoned proposal* coming from either one third of the Member States, the European Parliament or the Commission, calling on the Council to take action. Second, the Council may then make *recommendations* to the Member State concerned.Third, the Council may make a *determination* that there is a clear risk of a serious breach by that Member State of the values of Article 2 TEU, subject to the Parliament's *consent*.

40. Article 7(2) TEU largely follows the same pattern (albeit with some minor differences), but leads to the determination that a breach already exists. After a proposal by one third of the Member States or by the Commission, the European Council may *determine* the existence of a serious and persistent breach by a Member State of the values referred to in Article 2 TEU. The Parliament is to give its *consent* and the Member State concerned is invited to submit observations.

41. Finally, Article 7(3) TEU can be seen as the culmination of the two previous stages, ultimately allowing for the adoption of a *decision* to suspend certain rights of the Member State concerned, including its voting rights. Article 7(4) TEU complements that by allowing for the adoption of a *decision* to subsequently vary or revoke the suspension measures in response to a change in the situation.

42. It follows that, apart from the reasoned proposals under Article 7(1) TEU, a wide range of legal acts may be adopted by the institutions under the Article 7 TEU procedure before potentially culminating in the adoption of sanction measures by the Council under Article 7(3) TEU. It is rather clear, on the face of it, that the procedure under Article 7 TEU is likely to be neither a quick nor a straightforward exercise; but there is some logic to the structure of that provision. In particular, the individual cascades of decisions follow a given pattern, which is also reflected in the terminology chosen.

(c) Article 269 TFEU: a clause excluding jurisdiction?

43. How does Article 269 TFEU, which is, together with Article 263 TFEU, at the core of the present action for annulment, fit within the Union's complete system of legal remedies with regard to the specific procedure under Article 7 TEU outlined above? Is it, as argued by the defendant, a *lex specialis* which applies across the entire Article 7 TEU procedure and excludes judicial review of any act adopted within that procedure, save the acts expressly set out in Article 269 TFEU? Or is it rather, as the applicant and the intervener maintain, an exception to the standard litigation rules that warrants a specific type of review only for that latter category of acts, without precluding the review of other acts adopted under Article 7 TEU?

44. The text (1), the historical context (2), and above all the system and the logic (3) of Article 269 TFEU lead me to the conclusion that that provision is not in fact a jurisdiction exclusion clause. Within the system and the logic for standing under Article 263 TFEU, especially in view of the exclusion of preparatory acts from judicial review, the effect of Article 269 TFEU is rather the opposite: to expressly confirm and thus to attribute (albeit indeed limited) jurisdiction to the Court with regard to specific types of act (determinations made by the European Council or the Council) that could be, if normal rules were applicable, excluded. Thus, Article 269 TFEU does *not* govern – nor, as a consequence, preclude – the initiation of actions for annulment against *other* acts under Article 7 TEU, that is to say those not referred to in Article 269 TFEU, including the reasoned proposal of the Parliament under Article 7(1) TEU. The normal rules under Article 263 TFEU are applicable to those acts.

(1) Text

45. The wording of Article 269 TFEU refers to the judicial review of 'an act adopted by the European Council or by the Council pursuant to Article 7 [TEU]'. In addition to that institutional limitation vis-à-vis the scope, that review is further circumscribed in two other ways: first, with regard to the potential applicant (requests for judicial review can be filed only by the Member State concerned), and second, as to the scope of that review (limited to procedural issues in so far as the Court is required only to examine respect for the procedural stipulations contained in Article 7 TEU).

46. As far as the exact *positive* scope of Article 269 TFEU is concerned, the types of act included under that provision cover, upon the first reading, rather broad range – 'an act adopted by the European Council or by the Council pursuant to Article 7 [TEU]'. Thus, Article 269 TFEU could, on the basis of the first sentence of that provision, include *any* act of either institution adopted under the procedure pursuant to Article 7 TEU: not only determinations (under Article 7(1) and (2) TEU) and recommendations (under Article 7(1) TEU), but also acts not expressly mentioned in Article 7 TEU which might be adopted by either the European Council or the Council.

47. Nevertheless, when the first and second sentences of Article 269 TFEU are read together, it becomes rather clear that Article 269 TFEU applies only to *determinations* made by the European Council or the Council. Indeed, that provision further requires that a request for judicial review be made by 'the Member State concerned by a *determination* … within one month from the date of *such determination*'.

48. By contrast, as far as the *negative* scope of Article 269 TFEU is concerned, certainly in relation to its text, other acts potentially adopted pursuant to Article 7 TEU *other than determinations*, adopted by institutions *other than the European Council or the Council*, are simply not covered by Article 269 TFEU. Thus, Article 269 TFEU is silent as regards acts of the Parliament or of the Commission that might be adopted under Article 7 TEU.

(2) Historical context

49. The wording of the current Article 269 TFEU largely reflects the original Article III-371 of the Treaty establishing a Constitution for Europe. There appears to be, however, no specific discussion of that particular provision in the Convention's preparatory works. (12)

50. Another historical parallel has been discussed by the parties, and invoked in particular by the defendant, in order to put forward the argument that the current Article 269 TFEU was intended to exclude the entire Article 7 TEU procedure from judicial control. It concerns the predecessor of Article 269 TFEU, the former Article 46(e) TEU.

51. Under the Treaty of Nice, the former Article 46(e) TEU provided as follows: 'The provisions of the [Treaties] concerning the powers of the Court of Justice of the European Communities and the exercise of those powers shall apply only to the … purely procedural stipulations in Article 7 [TEU], with the Court acting at the request of the Member State concerned within one month from the date of the determination by the Council provided for in that Article.'

52. It is true that, the wording of that article bears some similarity with that of Article 269 TFEU. Both provisions do limit judicial review to procedural stipulations contained in Article 7 TEU. Both provisions require that review to take place, at the request of the Member State concerned, within one month from the date of a determination. However, the similarities stop there.

53. First, at the textual level, the only clear feature stemming from the tenor of the former Article 46(e) TEU is that, within Article 7 TEU, the Court could exercise its powers (thus, in particular, its powers of judicial review and annulment under the predecessor to Article 263 TFEU) only with regard to the purely procedural stipulations in Article 7 TEU. Thus, the material scope of the former Article 46(e) TEU was not crystal clear since it did not specify *to which acts exactly* it would apply and whether acts other than determinations could fall within that provision (and be subject to the type of review foreseen therein). By contrast, as stated above, (13) the scope of Article 269 TFEU is not only narrower, but is also clearer than that of former Article 46(e) TEU. Unlike the latter, Article 269 TFEU is silent as regards the possible review (or non-review), under another head of jurisdiction such as Article 263 TFEU, of *other* types of act adopted within Article 7 TEU.

54. Second, the rationale behind the former Article 46 TEU *as a whole*, which was initially inserted in the Treaty of Maastricht together with the creation of the European *Union*, (14) is absent from the Treaty of Lisbon. That article was closely associated with the 'pillars structure': it set out the Court's jurisdiction and

limited it with regard to the intergovernmental matters formerly governed by the Treaty on the European Union, thereby providing for a number of exceptions to the Court's jurisdiction. (15) At that time, the specific nature of the European *Union*, as opposed to the European *Community*, called for a limited jurisdiction of the Court in matters, such as the procedure under Article 7, which fell outside the Community pillar.

55. The entry into force of the Treaty of Lisbon has brought about a paradigm shift, rendering any discussion on the possible textual similarities between the current Article 269 TFEU and the former Article 46(e) TEU redundant. Article 269 TFEU cannot simply be considered as merely succeeding the former Article 46(e) TEU, thereby potentially taking over its scope, purpose and spirit, because the entire foundation upon which the former Article 46 TEU was based has disappeared. Thus, there is no longer a general provision that would list the different heads where the Court has no jurisdiction with regard to the pillar structure. Instead, the Treaty of Lisbon has introduced a rule of general jurisdiction, to which only specific and concretely listed exclusions apply.(16)

56. In summary, the argument based on the former Article 46 TEU and what was previously the scope of a parallel exclusion hardly gains any traction. In fact, if anything, it might be an argument by contrast, but certainly not by analogy.

(3) System

57. There are systemic arguments which explain why Article 269 TFEU cannot be construed as excluding anything from the jurisdiction of the Court. That provision rather positively attributes jurisdiction by expressly including something.

58. First, Article 269 TFEU is not placed amongst the exceptions to the Court's jurisdiction in Part Six, Title I, Chapter 1, Section 5 of the TFEU, next to Articles 274, 275 and 276 TFEU. Instead, Article 269 TFEU features amongst the provisions attributing jurisdiction to the Court: it comes *after* Article 268 TFEU (conferring jurisdiction on the Court as regards the Union's extra-contractual liability), and *before* Article 270 TFEU (attributing competence to the Court regarding disputes between the Union and its servants).

59. Second, that systemic placement is equally confirmed when considering the language used. In contrast to the wording employed in true exclusions ('the Court … shall not have jurisdiction' in Article 275 TFEU or 'the Court … shall have no jurisdiction' in Article 276 TFEU), Article 269 TFEU is a provision which positively attributes jurisdiction ('the Court … shall have jurisdiction'). (17)

60. Third and most importantly, this begs the question: why was it then necessary to positively attribute, or rather to confirm, jurisdiction with regard to determinations of the Council or European Council adopted under Article 7(1) or (2) TEU, while limiting that jurisdiction as to its scope?

61. In my view, that express confirmation was necessary precisely because of the more traditional case-law relating to standing and access to judicial review under Article 263 TFEU. Under that case-law, (18) determinations under Article 7(1) and (2) TEU could be viewed as preparatory measures to the final suspension decision under Article 7(3) TEU. On that basis, they could be seen as excluded from judicial review. Thus, in order to remove any such uncertainty, a fortiori in the sensitive political area where by default the Court would likely show some reticence in exercising its review, (19) it would make good sense to provide clearly for a limited review of the acts that were chosen as those which ought to be in any event subject to judicial review.

62. Thus, viewed in such systemic terms, Article 269 TFEU is indeed a type of *lex specialis*, but a very different one from that suggested by the defendant. It is not, and logically cannot be, a straightforward, across the board exclusion from judicial review of any acts not expressly mentioned therein but adopted nonetheless under Article 7 TEU. It is a special confirmation or attribution of jurisdiction vis-à-vis specific types of act mentioned therein that were likely to be excluded. That, however, also means that the acts not

expressly mentioned in that provision are not regulated by that provision and fall under the general rules of Article 263 TFEU.

(4) Overall logic

63. There is an additional systemic argument which merits a mention. It concerns the (il)logical consequences to which the interpretation proposed by the defendant would lead.

64. Assuming that the defendant is correct and the content of Article 269 TFEU should be read, against its wording, context and systemic logic, as stating essentially that 'the Court of Justice shall not have jurisdiction to review any acts issued pursuant to Article 7 TEU with the exception of determinations made by the European Council or by the Council'. The next logical question to arise is what then of judicial review of potential suspension decisions under Article 7(3) TEU by the Council?

65. At the hearing, the defendant confirmed that in its view, any acts adopted pursuant to Article 7 TEU, other than determinations, would be immune from judicial review, including decisions on sanctions taken by the Council pursuant to Article 7(3) TEU. The defendant maintained essentially that if the Member State concerned is allowed, under Article 269 TFEU, to challenge determinations, including a determination by the European Council under Article 7(2) TEU, any potential illegality should be established at that stage. If a determination under Article 7(2) TEU is annulled by the Court, no suspension decision may be taken under Article 7(3) TEU. If the determination is not annulled, then it will provide a solid legal basis for a suspension decision under Article 7(3) TEU, with the latter being essentially just a political decision, which cannot be challenged.

66. In my view, such an interpretation is untenable.

67. First, it should once again be recalled that the European Union is a Union 'based on the rule of law, inasmuch as *neither its Member States nor its institutions* can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty'. (20) Article 7 TEU has set up a procedure that is specifically dedicated to ensuring compliance with the rule of law by *the Member States*. Judicial protection is one of the most important principles of the rule of law. As recently recalled by the Court on the basis of Article 2 TEU, the very existence of effective judicial review designed to ensure compliance with provisions of EU law is inherent in the existence of the rule of law. (21) That structural argument is of particular importance in the context of Article 7(3) TEU.

68. Second, it would be illogical to submit to limited judicial review, under the interpretation of Article 269 TFEU proposed by the defendant, determinations, which could be seen as preparatory acts to a suspension of rights, but to withdraw the final act (for example, a suspension decision itself) from any control. Moreover, in contrast to the previous stages of the procedure under Article 7 TEU, the (political) discretion of the Council is in fact expressly limited by the Treaty at that specific stage: in adopting its suspension decision (and choosing in fact which rights derive from the application of the Treaties other than the voting rights in the Council), 'the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons'.

69. Thus, at the stages where the Council has prima facie unlimited political discretion, its decisions could be reviewed. But then, when the discretion of the Council becomes circumscribed and starts having real impact, there would be no review. This would turn the entire (normally applicable) logic of judicial review upside down: (indeed, essentially political) preparatory acts (in the form of determinations) would be reviewable, but the final (as to its content perhaps more legal) decision(s), which may actually clearly 'affect' third parties and are subject to some substantive criteria beyond the political considerations, could not be reviewed.

70. Third, it is quite clear that Article 7(3) TEU decisions would be, for their part, final legal acts that may produce legal effects, not only for the Member State concerned, but also for third parties, individuals, expressly referred to in that provision. Article 7(3) TEU leaves a wide margin of discretion to the Council

to decide which rights of the Member States shall be suspended, how this should be done, and to what extent. Again, without assuming the manner in which, or the extent to which, such an individually launched review could take place, it would indeed be rather peculiar if, for instance, the freezing of assets and other restrictive measures taken against an individual were subject to review under the second paragraph of Article 275 TFEU, but decisions taken under Article 7(3) TEU decisions, which could ultimately give rise to equally adverse or even stronger legal effects for individuals, could not be reviewed.

71. I certainly agree that, as maintained by the defendant at the hearing, the present case does not concern the admissibility of the judicial review of a suspension decision taken under Article 7(3) TEU. However, that point helps to highlight that the overall position of the defendant relating to the proposed interpretation of Article 269 TFEU is unfounded. In this regard, the fate of both Article 7(1) TEU acts adopted *before* a determination under that provision and any further acts adopted *after* a determination under Article 7(2) TEU, as well as the overall logic of Article 7 TEU, must provide for at least some degree of a coherent whole.

72. For this reason, the same logic must apply to the relationship between Article 269 and Article 263 TFEU, which then must also apply to Article 7 TEU *considered as a whole*. In reaching that conclusion, one does not need to take any bold steps to establish new remedies, as inferred by the repeatedly invoked judgment *Les Verts* v *Parliament*, (22) relied on by the applicant and intervener. What suffices in the present case is simply not to succumb to the compartmentalisation logic in access to review advocated by the defendant, which would effectively mean dividing Article 7 TEU in term of access to judicial review into disconnected loops governed by various rules or rather no rules at all.

(5) Interim conclusion: Article 269 TFEU as a clause attributing (a specific kind of) jurisdiction

73. Following a textual, historical, systemic and logical interpretation, I suggest that Article 269 TFEU clarifies and governs the Court's jurisdiction only in so far as the judicial review of *determinations* is concerned. Any other acts adopted under Article 7 TEU and not expressly referred to in Article 269 TFEU fall within into the regime of ordinary judicial review, namely Article 263 TFEU, and must be examined accordingly.

74. Before carrying out such an examination in the specific context of the reasoned proposal in question under Article 7(1) TEU, I would like to conclude with several general points as to why such a conclusion is unlikely to result in the Court being suddenly flooded with quintessentially political cases, thereby bringing any procedure pursuant to Article 7 TEU to an effective standstill.

75. First, under Article 263 TFEU, several of the 'other acts' not referred to in Article 269 TFEU are likely to be considered preparatory acts within the meaning of the classic case-law on Article 263 TFEU. Those acts will therefore be excluded from judicial review altogether.

76. Second, in order to be able to challenge those acts, provided that they are not just preparatory acts, any non-privileged applicants under Article 263 TFEU will have to demonstrate that they are individually and directly concerned by those acts. It is rather difficult to imagine that the fulfilment of those criteria, in particular the one of direct concern, will be met by individual applicants vis-à-vis acts other than the possible final suspension decision pursuant to Article 7(3) TEU.

77. Third, judicial review does not necessarily mean an in-depth review. This is not only the case in view of the four grounds listed in the second paragraph of Article 263 TFEU which delineate the potential reach of an action, but also in view of the specific, political nature of Article 7 TEU. It is indeed established case-law that the EU institutions must be allowed broad discretion when they adopt measures in areas which entail choices, in particular of a political nature, on their part and complex assessments. (23)

78. In summary, the foregoing considerations lead me to conclude that the alleged danger of relocating an essentially political debate from the halls of the Council to the courtroom, and thereby frustrating the smooth running and effectiveness of the procedure under Article 7 TEU as a whole, is very unlikely to

happen as a result of the interpretation of the relationship between Articles 263 and 269 TFEU proposed here.

(d) Judicial review of reasoned proposals within the meaning of Article 7(1) TEU under Article 263 TFEU

79. The contested resolution is a reasoned proposal, within the meaning of Article 7(1) TEU, which was adopted by the defendant on 12 September 2018. By means of that proposal, the initial phase of Article 7 TEU was triggered, thereby potentially allowing for the Council to make a determination, pursuant Article 7(1), acknowledging the existence of a clear risk of a serious breach of EU values. However, at the date when the present action for annulment was brought, as well as, to my knowledge, at the date of the delivery of this Opinion, the Council has not acted in one way or another upon that reasoned proposal.

80. The reasoned proposal under Article 7(1) TEU belongs to the initial phase under Article 7 TEU. That is several steps removed from the adoption of a suspension decision under Article 7(3) TEU, or prior even to a determination under Article 7(1) TEU. Should a reasoned proposal under Article 7(1) TEU, therefore, not be viewed as a mere preliminary act, not amenable to judicial review under Article 263 TFEU?

81. In my view, that is not the case. A reasoned proposal under Article 7(1) TEU is neither a mere preparatory act, nor is it devoid of (own, independent) legal effects. Not only does it definitively lay down the position of the Parliament (i), but also any potential shortcomings within that procedure cannot be remedied at later stages (ii). Above all, however, the reasoned proposal is not only intended to have, but also actually and clearly deploys (independent) legal effects (vis-à-vis third parties) within the meaning of the first paragraph of Article 263 TFEU (iii).

(1) Definitively laying down the Parliament's position

82. It is established case-law that, in the case of acts or decisions adopted by a procedure involving several stages, an act is open to review only if it definitively lays down the position of the institution that adopted it. (24) While the applicant and the intervener consider that to be the case, the defendant takes the opposite view. In its opinion, the contested resolution is comparable to a Commission legislative proposal.

83. I disagree with the defendant.

84. To start with, it should be acknowledged that the cited case-law was established primarily in cases of complex administrative procedures, in particular economic ones, involving technical assessment, notably on the part of the Commission. It is, therefore, not immediately apparent that the same rules would apply to legislative – and a fortiori constitutional – procedures. However, since this line of case-law was invoked and discussed further at the hearing, it could perhaps be accepted as a starting point and as a general rule applying to any type of procedure that an act is open to judicial review only when it lays down a final position of the institution that adopted it. (25)

85. At the formal level, the contested resolution could remind one of Commission legislative proposals, which are not subject to judicial review, at least according to the General Court. (26) The annex to the contested resolution indeed contains a draft 'Proposal for a Council decision determining, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded'.

86. However, that is where the analogy with Commission legislative proposals ends. First, reasoned proposals do not have to take the form of the contested resolution, with a fully fledged draft Council determination in its annex. It could simply take the form of a resolution without any draft attachment, but rather a mere explanatory statement: (27) the text of Article 7(1) TEU asks for a reasoned proposal, not necessarily for a draft determination.

87. Second and in more structural terms, the contested resolution is simply not comparable to a Commission legislative draft proposal. Indeed, Article 7 TEU sets out a sanctions procedure of a *constitutional* nature against an individual Member State. That is very different from a general *legislative* procedure which aims to give shape to policies. (28) Even more importantly, it is clear that Commission legislative proposals do not set out the Commission's definitive position. It is rather on the basis of such proposals that the whole legislative discussion is to take place between several institutions, including the Commission.

88. A reasoned proposal pursuant to Article 7(1) TEU is a very different animal. It is not an invitation to negotiate, to collectively deliberate over the text and its individual provisions, which epitomises the typical back and forth process of a legislative procedure. A reasoned proposal under Article 7(1) TEU reflects the final position of its author: the metaphorical baton in the multistage procedure under Article 7 TEU is passed from one institution to another. It is the final (and therefore irrevocable) position of one of the actors in the relay race. The procedure is triggered (and not just provisionally).

89. However, in contrast to a reasoned proposal of the Commission under Article 7(1) TEU, where the Commission is not involved, at least not expressly, in the following steps of the procedure, the Parliament is for its part asked to give its consent to any possible determinations under both Article 7(1) and (2) TEU.

90. In my view, that subsequent consent requirement changes nothing with regard to the finality of the Parliament's initial reasoned proposal. Above all, by either consent, the Parliament is not asked to reconsider its reasoned proposal, if it indeed issued one. The subject matter of both acts are different: while the reasoned proposal concerns the triggering of Article 7(1) TEU, the required consent concerns the contemplated content of the Council determination and the latter's finding of either a clear risk, or the existence, of a serious breach of EU values by a Member State.

91. Moreover, the Parliament is only one of three possible actors under Article 7(1) TEU that might, by adopting a reasoned proposal, initiate the Article 7 TEU procedure. It is reasonable to assume that a reasoned proposal under Article 7(1) TEU should have the same value, irrespective of the body which adopted it. Thus, the fact that one of the three bodies able to initiate that procedure plays a subsequent role by giving its consent should make no difference. It would be somewhat illogical to take the rather circumstantial fact that, in the present case, it was the Parliament and not the Commission or one third of the Member States that triggered the procedure, combine this with what appears to be the intention of the author of the Treaty to assign to the Parliament a special place in the entire procedure, in order to arrive finally at the exact opposite of what was intended: rather than upgrading the role of the Parliament in the procedure, actually downgrading it. Yet, that would be the result if one were to suggest that the Parliament's reasoned proposal is of somewhat 'lesser value' or is 'less final' than that of the Commission or one third of the Member States, and may be indirectly reconsidered or even cancelled by the consent required from that institution with regard to a different proposal in that procedure at a subsequent stage.

92. The latter is, in addition, hardly the case: hypothetically speaking, suppose the Parliament were to issue a reasoned proposal under Article 7(1) TEU, calling on the Council to determine that there is a clear risk of a serious breach by a Member State. However, when asked subsequently for its consent under the same provision, the Parliament refuses to provide it for whatever reason: it might not agree with the text of the determination proposed; it may no longer be convinced, after obtaining further information, or perhaps also after the Member State is heard by the Council, that there is in fact a risk; or the majority in the Parliament might think that a set of recommendations suggested by the Council is enough to remedy the situation for the moment. In each of these cases, and perhaps in other cases too, would the refusal to give consent have any repercussions on the finality of the previously issued reasoned proposal? Would it render the previous position of the Parliament 'less final'? I do not think so.

93. It follows that by adopting a reasoned proposal within the meaning of Article 7(1) TEU, the Parliament sets out its *final* position with regard of the triggering of the Article 7 TEU procedure.

(2) Can it be remedied at a later stage?

94. It is equally settled case-law that an intermediate measure is not capable of forming the subject matter of an action if it is established that the illegality attached to that measure can be relied on in support of an action against the final decision for which it represents a preparatory step. In such circumstances, the action brought against the decision terminating the procedure will provide sufficient judicial protection. However, if that latter condition is not satisfied, it will be considered that the intermediate measure – regardless of whether the latter expresses a provisional opinion of the institution concerned – produces independent legal effects and must therefore be capable of forming the subject matter of an action for annulment. (29)

95. This line of case-law, borne again in (economic) administrative procedures, acts as an internal exception to the situation described in previous subsection of this Opinion. It opens up avenues for judicial review of acts that do *not* lay down a definitive position, but still produce *independent* legal effects. Since I have suggested, in the previous point, that the contested resolution lays down the final position of the Parliament, and hence is not a mere preparatory act, I consider this point only for the sake of completeness, since it has been raised and discussed by the parties.

96. Within a multistage constitutional procedure such as that under Article 7 TEU, it may indeed appear reasonable, certainly in general and in the abstract, to wait until the adoption of a decision terminating that procedure in order to challenge any prior irregularity committed in the exercise of that procedure.

97. However, upon closer inspection, such a proposition becomes untenable in the present case.

98. First, to start with, it is difficult to imagine how one could impute illegalities *across* constitutional actors, *in casu* making complaints to the European Council or the Council about a procedural irregularity allegedly committed by the Parliament when it adopted its reasoned proposal under Article 7(1) TEU, and then seeking the annulment of, for example, a suspension decision of the Council under Article 7(3) TEU for that prior irregularity of the Parliament. This merely highlights the fact that the 'holistic review' approach to judicial review might work well for complex procedures within one and the same institution, or within the same type of institution, such as various individual decisions of the public administration combining to lead to one final, integrated decision. However, that logic simply cannot be applied to a series of distinct, independent, and as regards their nature, different decisions by diverse constitutional actors.

99. Second, it is not immediately clear what in fact the 'decision terminating the procedure' is in the context of Article 7 TEU. On the one hand, when looking at Article 7 TEU *as a whole*, the decision terminating the procedure which started by way of a reasoned proposal could be the determination made under either Article 7(1) or (2) TEU, as suggested by the defendant (inner cycle). On the other hand, it could also be, and perhaps more reasonably so, the ultimate decision to impose sanctions on the basis of Article 7(3) TEU (outer cycle). (30) Moreover, depending on which one identified as the decision terminating the procedure, the intensity of judicial review is likely to vary. Indeed, if the relevant 'decision' constitutes the determination under Article 7(1) or (2) TEU, then Article 269 TFEU would be applicable, with the review set out in that provision being triggered. Conversely, if it is a decision adopted on the basis of Article 7(3) TEU, a normal review under Article 263 TFEU would be carried out.

100. Third and perhaps most importantly, there may never be any 'decision terminating the procedure', regardless of the relevant provision. Article 7(1) and (2) TEU, at least as regards its text, does not require the Council to take action in response to a reasoned proposal. Nor does it provide that the effects of the reasoned proposal be extinguished after a reasonable period if nothing occurs. However, it is clear from the Court's case-law that the requirement of legal certainty means that the EU institutions must exercise their powers within a reasonable time. (31) I will certainly not be entering the minefield relating to whether there might be a legal obligation incumbent upon the Council to make a determination within a reasonable period of time (or to expressly refuse to do so), and whether such an obligation perhaps flows from the principle of sincere cooperation. (32)

101. For the purposes of the present Opinion, it suffices simply to note that it would be positively Kafkaesque to make access to judicial review conditional on there being, one day, potentially, a final

decision of unknown nature, while, in the meantime, the reasoned proposal remains effective for an indefinite period of time. Such a scenario would hardly fit the description of a Union of law where 'the very existence of effective judicial review designed to ensure compliance with provisions of EU law is inherent in the existence of the rule of law'. (33)

102. I must, therefore, conclude that effective judicial protection requires that reasoned proposals may be open to review pursuant to Article 263 TFEU, provided they produce (independent) legal effects, an issue to which I now finally turn.

(3) (Independent) legal effects

103. In my view, the reasoned proposal at issue in the present case triggered the procedure under Article 7 TEU and, from this perspective of analysis, already has some legal effects or was certainly intended to have them. However, for the purpose of the requirement of the first paragraph of Article 263 TFEU, the contested resolution *does* produce at least two further types of legal effects in its capacity as a reasoned proposal within the meaning of Article 7(1) TEU.

104. First, pursuant to paragraph (b) of the 'Sole Article' of Protocol No (24) on asylum for nationals of Member States of the European Union introduced by the Treaty of Amsterdam, once the procedure under Article 7(1) TEU has been initiated, and until the Council takes a decision in respect thereof with regard to the Member State of which the applicant is a national, that Member State may no longer be regarded as a safe country of origin in respect of the other Member States for all legal and practical purposes in relation to asylum matters. Accordingly, an application for asylum made by a national of that Member State may then be taken into consideration on its merits by another EU Member State.

105. There is no doubt that such a consequence constitutes a (binding) legal effect of reasoned proposals not only for the Member State concerned, but also for all the other Member States, the EU institutions, and the nationals of that State. If Protocol No (24) is triggered, a Member State indeed loses the status of safe country vis-à-vis the other Member States (and possibly also vis-à-vis third countries). That outcome is not affected in any way by the possibility of the Council itself taking position with regard to the reasoned proposal.

106. Of course, one might wonder whether it was appropriate for a reasoned proposal triggering Article 7(1) TEU to *already* entail such a far-reaching effect. One could even try to downplay the significance of the so-called Aznar Protocol, suggesting that it was adopted in different times and for different purposes.

107. In my view, such a downplaying would be inappropriate for a court given the very clear letter of the law. The intention of the drafters of the Protocol, which has the same legal value as the Treaties, (34) is clear. That provision and its application have now been validly triggered by the adoption of the Parliament's reasoned proposal.

108. Moreover, I find the argument of the defendant, suggesting, in essence, that the activation of Protocol No (24) may not give any directly enforceable rights to individuals, or that the public authorities in the other Member States still have discretion as to whether or not they will ultimately grant international protection to applicants from Hungary, irrelevant.

109. To me, such an argument confuses the standing of individuals (and in particular the condition of direct concern) with the interests of a Member State. First, a Member State is a privileged applicant. It is not obliged to establish direct concern. Second, even if it were, *quod non*, it would be a concern *for that State*, not for its citizens, or for administrative authorities in other States. In the present case, there is no doubt that Hungary is concerned by being deprived of the standing of safe country, which clearly means that applications for international protection lodged by its citizens in other Member States may be examined on the merits. Whether or not an application will ultimately be successful is a completely different matter. To use an analogy from the world of sovereign bonds, it is like changing a country's credit rating from AAA

to B overnight and then suggesting that the country is not concerned by that downgrading because a number of its citizens still have some money. While that suggestion might, technically speaking, be true, it is also irrelevant, having regard to the subject matter of the complaint.

110. Second, another type of legal effect attached to reasoned proposals under Article 7(1) TEU results from the Court's case-law. The existence of a reasoned proposal may indeed have an impact on mutual trust and mutual recognition within the area of freedom, security and justice, in particular, in the context of the execution of European arrest warrants, but such an impact is certainly not limited to that area of law.

111. In its judgment in *LM*, (35) the Court held that, in cases where there is a real risk of breach of the fundamental right to a fair trial due to systemic or generalised deficiencies concerning the independence of the issuing Member State's judiciary, the executing authority may, following a case-by-case assessment, refuse the surrender of a person if there are substantial grounds for believing that that person will run such a risk if he or she is surrendered to that State. In reaching such a conclusion, that executing authority may do so if it 'has material, such as that set out in a *reasoned proposal of the Commission adopted pursuant to Article 7(1) TEU*, indicating that there is a real risk of breach of the fundamental right to a fair trial'. (36)

112. Certainly, any decision to refuse to execute a European arrest warrant will not be automatic. A reasoned proposal is just one of the documents that a national court may take into account in making its own assessment.(37) Paragraph 61 of the *LM* judgment nonetheless emphasises that a reasoned proposal under Article 7(1) TEU is a document of *particular relevance*. (38) It is indeed true that the judgment in *LM* referred to a reasoned proposal adopted by the Commission. However, that statement was, in my view, simply made in the factual context of that judgment. I certainly do not interpret it as an indication of the intention to single out the reasoned proposal of the Commission to the detriment of those that might be adopted by the other two actors provided for in Article 7(1) TEU. (39)

113. Thus, there are indeed no automatic consequences attached to the existence of a reasoned proposal in this area. It is nonetheless difficult to maintain that something which, in the authoritative pronouncement of this Court, may serve as a basis for denying mutual trust and suspending mutual recognition has no legal effects. Is an undoubtedly legal document, not a mere fact, which may lawfully be used to displace a number of key primary and secondary law obligations of the Member States under EU law, devoid of any legal effects?

114. I find such a suggestion untenable. Indeed, in pragmatic terms, the importance of such authoritative statements coming from a European level can hardly be underestimated. It is unlikely that a criminal jurisdiction in a Member State, typically a first-instance criminal court competent to deal with surrender requests, would either have the capacity or feel competent to carry out a full spectrum review of the quality of the rule of law in another Member State. Thus, if such actors are expressly invited to rely on a statement made by the European institutions, then when it comes to upholding such pronouncements and accepting the necessary consequences thereof at EU level, which includes allowing for reasonable access to a court, (40) the once exercised power which started to have legal effects cannot suddenly disappear in a 'denial-of-any-knowledge-mist', reminding one of '*The X-Files*' tagline.

115. Thus, Hungary has a clear interest in bringing proceedings against the contested resolution. That resolution does not merely trigger Article 7(1) TEU, thereby empowering the Council to find a clear risk of a serious breach of EU values by a Member State. It also carries legal consequences of its own for that Member State.

116. The action for annulment brought by the applicant against the contested resolution under Article 263 TFEU is therefore admissible.

B. Merits

117. The applicant has raised four pleas against the contested resolution on the merits. I will first address (together) the two pleas suggesting essentially that the defendant should have taken into account

abstentions when counting the votes cast to determine whether the required majority had been reached. I will then briefly turn to the two other pleas.

1. First and third pleas

(a) Arguments of the parties

118. In its first plea, the applicant is of the view that the contested resolution would not have been adopted if abstentions had been taken into account properly. Rule 178(3) of the Rules of Procedure provides that only 'yes' and 'no' votes are to be taken into account as votes cast with the caveat, introduced in 2016, 'except where a specific majority is laid down by the Treaties'. Article 354 TFEU, which applies to the acts adopted by the Parliament pursuant to Article 7 TEU, lays down such a specific majority in the form of two-thirds of the votes cast and the majority of MEPs. Interpreting Rule 178(3) in conformity with Article 354 TFEU requires one to take into account abstentions as part of the counting system.

119. According to the defendant, not taking abstentions into account does not constitute a breach of Article 354 TFEU, nor of Rule 178(3) of the Rules of Procedure. Assemblies across the world have various rules relating to the taking into account of abstentions. Pursuant to Article 232 TFEU, the Parliament can decide on its own organisation and functioning. Since Article 354 TFEU does not specify how abstentions should be treated, it is for the Parliament to decide thereon. In that respect, the Parliament's consistent practice has always been not to take abstentions into account as votes cast. The 2016 revision of the Rules of Procedure was not intended to provide an exception to the general rule under which abstentions are not be taken into account.

120. According to the intervener, the fourth paragraph of Article 354 TFEU is to be interpreted as laying down an obligation to take into account abstentions, in the light of the first paragraph of Article 354 TFEU. Since the latter expressly provides that abstentions within the Council or the European Council do not prevent the adoption of a decision, the absence of such a caveat under the fourth paragraph of Article 354 TFEU suggests that abstentions must be taken into account.

121. In its third plea, the applicant argues that, by failing to take into account abstentions, MEPs have not been placed in a capacity to exercise their functions as representatives of the people, thereby breaching the principles of democracy and equality of treatment between MEPs. MEPs should be able to express their political opinions in several different ways. Furthermore, MEPs were not properly informed about the voting modalities since that information was provided, via email, only one and a half days before the vote.

122. According to the defendant, that third plea should be held to be manifestly unfounded. The fact that abstentions are not taken into account does not amount to an inequality in treatment between MEPs. All MEPs have the same right to vote and are free to vote in accordance with their political opinions and in complete awareness of the impact that their (type of) vote will have on the final outcome. Moreover, in the present matter, MEPs were able to make an informed choice because they knew before the vote exactly how the votes would be counted.

(b) Analysis

123. While the applicant's first plea argues that the contested resolution has infringed Article 354 TFEU and Rule 178(3) of the Rules of Procedure, the third plea focuses on the infringement of the principles of democracy and equality, respectively under Article 2 TEU and Article 21 of the Charter of Fundamental Rights of the European Union ('the Charter'). Nevertheless, both pleas boil down to essentially the same issue: whether the failure to take into account abstentions when counting the votes is compatible with various EU law provisions. As such, it is best to assess them together.

124. Pursuant to Article 231 TFEU, 'save as otherwise provided in the Treaties, the European Parliament shall act by a majority of the votes cast'. Article 7 TEU contains such an exception to that rule. According

to Article 7(5) TEU, 'the voting arrangements applying to the European Parliament … for the purposes of this Article are laid down in Article 354 of the Treaty on the Functioning of the European Union'.

125. By virtue of the fourth paragraph of Article 354 TFEU, 'for the purposes of Article 7 of the Treaty on European Union, the European Parliament shall act by a two-thirds majority of the votes cast, representing the majority of its component Members'. It follows that *two types of majority* are required by Article 354 TFEU for the purposes of the adoption of reasoned proposals calling on the Council to act pursuant to Article 7(1) TEU: a two-thirds majority of the votes cast *and* the majority of its component Members. (41)

126. Only the first type of majority is at issue here. The difference between the parties to the proceedings lies in the definition of 'votes cast'. While the applicant and the intervener consider that 'votes cast' shall include abstentions, the defendant claims that that concept refers only to the votes cast in favour of or against the proposal.

127. In my view, the defendant is correct on this point.

128. First, in terms of everyday language, the word 'abstention' comes from the Latin word *abstinere*, meaning to keep off or away, to hold back or at a distance, or to abstain/refrain from. In a similar vein, the *Oxford English Dictionary* defines abstentions as to 'formally decline to vote either for or against a proposal or motion'. Thus, a person abstaining does not wish to be counted as being either in favour of or against a proposition. He or she simply wishes (or behaves as if) he or she were not there at all. That person refuses to cast a vote and asks to be treated as if he or she were not voting at all.

129. For its part, the natural meaning of 'vote cast' is that the person has actively expressed his or her opinion through voting by making a choice from among the various alternatives. That choice can then take the form of voting in favour of or against someone or something, be it a resolution, a statute or a report.

130. It follows from the combined meaning of 'abstentions' and 'vote cast' that they are normally mutually exclusive. That basic logical conclusion is not called into question by other specific rules designed for other purposes, in which MEPs might be called on to actively express their abstention. (42) Such rules clearly concern very different subject matter. Any reasoning 'by analogy' with those specific rules for interpreting general rules on voting is simply not possible.

131. Second, in its version in force at the time of the adoption of the contested resolution, Rule 178(3) of the Rules of Procedure, which is a general provision regarding voting, stated that in calculating whether a text has been adopted or rejected account shall be taken only of votes cast for and against, except where a specific majority is laid down by the Treaties. That provision clearly excludes abstentions as a matter of principle. In doing so, the Parliament has exercised its power to decide its own organisation and functioning, as indeed permitted by Article 232 TFEU.

132. The fact that the 2016 revision of the Rules of Procedure has added the caveat 'except where a specific majority is laid down by the Treaties' in Rule 178(3) changes nothing in that regard. The wording retained in that provision is open ended, simply containing a legislative opening and a *renvoi* to other provisions.

133. However, none of the provisions of primary law put forward by the applicant lead to the conclusion that Rule 178(3) of the Rules of Procedure should be interpreted, in the light of those provisions of primary law, as *obliging* the Parliament to take into account abstentions as votes cast for the purposes of calculating the two-thirds majority of the votes cast required for the adoption of a reasoned proposal under Article 7(1) TEU, such as the contested resolution.

134. When asked about this specific point at the hearing, the applicant merely referred to Article 354 TFEU. Indeed, that provision provides for a specific majority (two-thirds majority of votes cast, representing the majority of component MEPs), but does not contain any specific, derogating rules on the way the 'votes cast' are to be counted. At this stage, the applicant's reasoning becomes somewhat circular,

trapped in cross-references amongst the same provisions, none of which in fact says otherwise. In sum, Rule 178(3) of the Rules of Procedure has made an opening for something that has never materialised.

135. Third, in contrast to what the applicant argues, it is difficult to see how, by making their own free and sovereign choice to abstain, the MEPs would be incapacitated in their functions as representatives of the people. The decision to abstain was, after all, their (political) choice. Moreover, abstentions of MEPs are in themselves a way of expressing a political opinion. Even if they do not count as votes cast, they are usually directly relevant for calculating the number of votes needed to reach the respective majority. (43) They are also important in terms of political legitimacy. Usually, the higher the abstention rate, the less legitimate the political decision, even if eventually adopted.

136. Fourth and finally, in relation specifically to the applicant's third plea, the principle of democracy could indeed be said to *legally* require the *foreseeability* of the applicable voting rules. When voting, MEPs must be aware of the rules applicable to the voting process. For example, they certainly should know *prior to the vote* what the modalities thereof are.

137. However, in the present case, I fail to see how those requirements would not be met. It is undisputed that the MEPs were informed of the fact that abstentions would not be counted as votes cast one and a half days before the vote. Without wishing to enter into the debate of what constitutes a sufficient period of time in politics, it certainly was timely information on how an actual vote would be organised. I also fail to see how the choice of communicating that information via an email addressed to the Members would be anything other than entirely appropriate in view of the nature and the function of that information in the 21st century.

138. In my view therefore, the first and third pleas are unfounded.

2. Second plea

139. The applicant claims that the President of the European Parliament's failure to seek the opinion of the Parliament's Committee on Constitutional Affairs ('the AFCO Committee') on how to interpret the Rules of Procedure amounted to a breach of legal certainty since, before and after the vote, the interpretation of those rules was uncertain. By failing to consult the AFCO Committee regarding the voting method, the President of the Parliament did not fulfil the obligation to dissipate the uncertainties. As a result, the possibility for MEPs to exercise their rights as representatives of the people in relation to voting was seriously undermined.

140. According to the defendant, the second plea should be held to be manifestly unfounded. The applicant does not allege an infringement of legal certainty. It is unclear whether the second plea raises the issue of the invalidity of Rule 178(3) of the Rules of Procedure with regard to legal certainty, or the decision of the President to consult the legal service but not the AFCO Committee, or the disregard of substantive forms in the adoption of the resolution. In any event, the President does not have to consult the AFCO Committee on the interpretation of Rule 178(3) of the Rules of Procedure.

141. The second plea is manifestly unfounded.

142. The Parliament's Rules of Procedure do not contain any obligation to consult the AFCO Committee, in circumstances such as the present case, in order to interpret the voting rules. Rule 226(1) of the Rules of Procedure indeed provides that, 'should doubt arise over the application or interpretation of these Rules of Procedure, the President *may* refer the matter to the committee responsible for examination'. (44) As a result, the vote on the contested resolution could take place without the prior, interpretive involvement of the AFCO Committee.

143. Thus, there is simply no obligation on the part of the President of the Parliament to proceed in the way indicated by the applicant. To refer in this context to the principle of legal certainty does not change alter that conclusion. In addition, in terms of ensuring legal certainty, not only did the President seek advice

from the Parliament's Legal Service, (45) even though the President was not obliged to do so, but, prior to the vote, all MEPs were also informed of the way in which the votes would be counted. (46)

3. Fourth plea

144. According to the applicant, the contested resolution breached the principles of sincere cooperation, good faith, legal certainty and legitimate expectations. In drawing up its proposed resolution, the defendant should not have relied on infringement proceedings brought against the applicant that are still pending or have been closed by the Commission. Since the Commission, as guardian of the Treaties, has not considered it justified to introduce Article 7 TEU proceedings, another EU institution could not rely on closed infringement proceedings to trigger the Article 7 TEU procedure.

145. For its part, the defendant is of the view that that plea should be held to be manifestly unfounded. There is no legal basis which allows for the conclusion that pending or closed infringement proceedings prevent the initiation of the Article 7 TEU procedure. In accordance with Article 7(1) TEU, the Parliament has discretionary power to determine on which facts its position shall be based.

146. The fourth plea is also manifestly unfounded.

147. Article 7(1) TEU does not limit the reasons on the basis of which a reasoned proposal may be adopted. Nor could it seriously be argued that there is some other provision of EU law, including the duty of sincere cooperation, which somehow limits the pool of sources on which a reasoned proposal under Article 7(1) TEU would be permitted to rely. Since that proposal must be reasoned, the Parliament must rely on objective elements suggesting the existence of such a risk. Previous findings of infringement may undoubtedly constitute such elements, thereby helping to make a case against the Member State concerned under Article 7 TEU to the extent that such infringements amount to a disregard of EU values. Thus, in relying on infringement proceedings, whether they be closed or pending, the contested resolution has not breached any of the principles relied upon by the applicant within its fourth plea.

V. Costs

148. Under Article 138(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the applicant has been unsuccessful and the defendant has applied for costs, the applicant is to be ordered to pay the costs. Under Article 140(1) of the Rules of Procedure, the intervener shall bear its own costs.

VI. Conclusion

149. I propose that the Court should:

– dismiss the action;

– order Hungary to pay the costs; and

– order Poland to bear its own costs.

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1 Original language: English.

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2 Resolution P8_TA-PROV (2018) 0340 (2017/2131(INL)).

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3 In their version applicable to the 2014 to 2019 legislature, as amended by European Parliament's decision of 13 December 2016 on the general revision of Parliament's Rules of Procedure.

4 P8_TA(2017)0216.

5 Report A8-0250/2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)).

6 Order of 14 May 2019, *Hungary* v *Parliament* (C−650/18, not published, EU:C:2019:438).

7 See, for example, judgments of 26 June 2012, Poland v Commission (C−336/09 P, EU:C:2012:386, paragraph 36 and the case−law cited); of 6 October 2015, Schrems (C−362/14, EU:C:2015:650, paragraph 60); and of 29 May 2018, *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen and Others* (C−426/16, EU:C:2018:335, paragraph 38).

8 See, for example, judgments of 3 October 2013, Inuit Tapiriit Kanatami and Others v Parliament and Council (C−583/11 P, EU:C:2013:625, paragraphs 91 and 92); of 13 March 2018, Industrias Químicas del Vallés v Commission (C−244/16 P, EU:C:2018:177, paragraph 102); 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).

9 See to that effect, for example, judgments of 5 December 2017, Germany v Council (C−600/14, EU:C:2017:935, paragraph 108), and of 9 July 2020, *Czech Republic v Commission* (C−575/18 P, EU:C:2020:530, paragraph 52).

10 See, for example, order of 27 November 2001, Portugal v Commission (C−208/99, EU:C:2001:638, paragraph 23).

11 See, for example, as regards the first paragraph of Article 275 TFEU, judgments of 24 June 2014, Parliament v Council (C−658/11, EU:C:2014:2025, paragraph 70); of 19 July 2016, H v Council and Others (C−455/14 P, EU:C:2016:569, paragraph 40); and of 25 June 2020, *SatCen v KF* (C−14/19 P, EU:C:2020:492, paragraph 66). For a detailed review of the scope of the jurisdiction of the Court in the field of the common foreign and security policy, see my Opinion in *SatCen v KF* (C−14/19 P, EU:C:2020:220, points 51 to 89).

12 In particular, the Discussion Circle on the Court of Justice addressed only the exclusion of judicial control relating to the common foreign and security policy (CONV 689/1/03 REV 1).

13 Points 45 to 48 of this Opinion.

14 Then Article L TEU.

15 Not only with regard to the Article 7 TEU procedure, but also, in particular, with regard to the non-Community second and third pillars (the common foreign and security policy and cooperation in the area of justice and home affairs).

16 See above, point 37 of this Opinion.

17 Article 269 TFEU is written as an empowering clause in most language versions, for example in Czech, German, Spanish, English or Italian. , ,. Albeit drafted in negative terms (‘la Cour de justice n’est compétente … que …’), the French version by no means suggests that the Court has no jurisdiction for acts other than those adopted by the European Council or the Council. Its wording makes it clear only that the judicial review of the latter acts shall be carried out in the specific and limited way set out in Article 269 TFEU.

18 Discussed precisely in that context later on, in points 82 to 102 of this Opinion.

19 On the area-dependent intensity of judicial review exercised by the Court, see judgment of 19 December 2019, *Puppinck and Others* v *Commission* (C−418/18 P, EU:C:2019:1113, paragraphs 87 to 97). See also, for example, in relation to another type of political act of the European Parliament, judgment of 9 December 2014, *Schönberger v Parliament* (C−261/13 P, EU:C:2014:2423, paragraph 24), where the Court found that the Parliament had a broad discretion, of a political nature, as regards the manner in which that petition should be dealt with. Accordingly, the Court held that a decision taken in that regard was not amenable to judicial review.

20 See, for example, judgments of 23 April 1986, Les Verts v Parliament (294/83, EU:C:1986:166, paragraph 23), and of 3 September 2008, Kadi and Al Barakaat International Foundation v Council and Commission (C−402/05 P and C−415/05 P, EU:C:2008:461, paragraph 281). My emphasis.

21 See, for example, judgments of 19 July 2016, H v Council and Others (C−455/14 P, EU:C:2016:569, paragraph 41), and of 28 March 2017, Rosneft (C−72/15, EU:C:2017:236, paragraphs 72 and 73), which upheld the Court’s jurisdiction *despite* the first paragraph of Article 275 TFEU.

22 Judgment of 23 April 1986, Les Verts v Parliament (294/83, EU:C:1986:166).

23 See, for example, judgments of 6 September 2017, Slovakia and Hungary v Council (C−643/15 and C−647/15, EU:C:2017:631, paragraphs 123 to 124 and the case−law cited), and of 19 December 2019, *Puppinck and Others* v *Commission* (C−418/18 P, EU:C:2019:1113, paragraph 95).

24 See, for example, judgments of 22 June 2000, Netherlands v Commission (C−147/96, EU:C:2000:335, paragraph 26), and of 17 July 2008, *Athinaïki Techniki v Commission* (C−521/06 P, EU:C:2008:422, paragraph 42).

25 See, for example, to that effect, as far as the budgetary procedure is concerned, judgment of 27 September 1988, *Parliament v Council* (302/87, EU:C:1988:461, paragraphs 23 and 24).

26 See, as regards the proposal for a regulation submitted by the Commission to the Council, order of 15 May 1997, Berthu v Commission (T−175/96, EU:T:1997:72, paragraph 21).

27 For example, the Commission’s reasoned proposal regarding the rule of law in Poland contained a very long explanatory memorandum followed by a very brief draft proposal (COM(2017) 835 final).

28 It is a fortiori different from an *administrative* procedure. As a consequence and for example, I find the case-law on state aid (for example, judgment of 9 October 2001, *Italy v Commission* (C-400/99, EU:C:2001:528, paragraphs 62 and 63) of limited relevance in this regard.

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29 See, for example, judgment 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 to 54).

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30 See the name given to that procedure by the first paragraph of Article 354 TFEU: 'Article 7 of the Treaty on European Union on the suspension of certain rights resulting from Union membership'. That wording clearly suggests that sanction measures constitute the pinnacle of Article 7 TEU.

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31 See, for example, judgments of 13 November 2014, Nencini v Parliament (C-447/13 P, EU:C:2014:2372, paragraph 48), and of 14 June 2016, *Marchiani v Parliament* (C-566/14 P, EU:C:2016:437, paragraph 96).

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32 See for example, by analogy, judgments of 12 February 2015, Parliament v Council (C-48/14, EU:C:2015:91, paragraphs 57 and 58), and of 21 June 2018, *Poland v Parliament and Council* (C-5/16, EU:C:2018:483, paragraph 90). See also Opinion of Advocate General Mengozzi in *Commission v Netherlands* (C-523/04, EU:C:2006:717, points 52 to 126) regarding the allegation by the Netherlands, in relation to sincere cooperation, of the belated nature of the Commission's decision to introduce infringement proceedings against that Member State.

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33 See, for example, judgments of 19 July 2016, H v Council and Others (C-455/14 P, EU:C:2016:569, paragraph 41), and of 28 March 2017, Rosneft (C-72/15, EU:C:2017:236, paragraphs 72 and 73).

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34 See, for example, Opinion 2/13 *(Accession of the European Union to the ECHR)* of 18 December 2014 (EU:C:2014:2454, paragraph 161), and judgment of 10 May 2017, *de Lobkowicz* (C-690/15, EU:C:2017:355, paragraph 40).

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35 Judgment of 25 July 2018*, Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586).

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36 Ibid., paragraph 79. My emphasis.

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37 With, however, the scenario opened by the Court no longer remaining in the realm of hypotheses. See, for example, the decision of 17 February 2020 of the Oberlandesgericht Karlsruhe (Higher Regional Court, Karlsruhe, Germany) (301 AR 156/19) and the preliminary reference order of 3 September 2020 of the Rechtbank Amsterdam (District Court, Amsterdam, Netherlands), currently pending before this Court as C-412/20 PPU.

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38 'Information in a reasoned proposal recently addressed by the Commission to the Council on the basis of Article 7(1) TEU is *particularly relevant* for the purposes of that assessment' (paragraph 61 of that judgment). My emphasis.

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39 In similar vein as above, point 91 of this Opinion. In the logic of Article 7(1) TEU, a reasoned proposal is a reasoned proposal, irrespective of the three actors that adopted it.

40 In similar vein, on the necessary correlation between the Union action, on the one hand, and the necessary access to court for challenging that action, on the other, see my Opinion in *Région de Bruxelles-Capitale* v *Commission* (C−352/19 P, EU:C:2020:588, points 80 and 126 to 136).

41 See also Rule 83(3) of the Rules of Procedure of the European Parliament, quoted above in point 9 in this Opinion.

42 Such as Rule 180(3) regulating roll call in cases of a failure of the electronic voting system, which then logically foresees three options to be expressed ('Yes', 'No', or 'I abstain'); or possibly special rules concerning the remuneration of the MEPs, who are required to account for their physical presence in the Parliament, which will be complied with even if their votes are not recorded as either 'Yes' or 'No' in the individual votes.

43 Normally, abstentions lower the number of votes needed in favour in cases of voting by a simple majority of present members. That is also why specific majorities, requiring not only a certain number of members present and voting, but also the reaching of a certain threshold with regard to all (constituent) members of a legislative assembly, are established for special types of voting.

44 My emphasis. More broadly, Rule 83(1) of the Rules of Procedure, which sets out the procedure to be followed by the Parliament when adopting a reasoned proposal under Article 7(1) TEU, provides solely for the drawing up of a specific report by the committee responsible (*quod* the LIBE Committee, not the AFCO Committee) prior to the vote. The formal involvement of the committee responsible is only envisaged later, at the stage of the Parliament's consent to a Council determination and in the context of follow-up measures to that consent (see Rule 83(2), (4) and (5) of the Rules of Procedure).

45 See above, point 14 of this Opinion.

46 See above, point 16 and 137 of this Opinion.