

JUDGMENT OF THE COURT (Grand Chamber)

20 April 2010

(Failure of a Member State to fulfil obligations – Breach of [the second and third paragraphs of Article 4 (3) TEU] and [Article 218 (1) to (8) TFEU] – Stockholm Convention on Persistent Organic Pollutants – Unilateral proposal by a Member State to list a substance in Annex A to that convention)

In Case C-246/07,

ACTION under [Article 258 TFEU] for failure to fulfil obligations, brought on 22 May 2007,

**European Commission**, represented by G. Valero Jordana and C. Tufvesson, acting as Agents, with an address for service in Luxembourg,

applicant,

v

**Kingdom of Sweden**, represented by A. Kruse and A. Falk, acting as Agents,

defendant,

supported by:

**Kingdom of Denmark**, represented by C. Pilgaard Zinglersen and R. Holdgaard, acting as Agents,

**Kingdom of the Netherlands**, represented by C.M. Wissels and D.J.M. de Grave, acting as Agents,

**Republic of Finland**, represented by J. Heliskoski, acting as Agent,

**United Kingdom of Great Britain and Northern Ireland**, represented by V. Jackson, acting as Agent, and by D. Anderson QC,

intervenors,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, R. Silva de Lapuerta, E. Levits and C. Toader, Presidents of Chambers, C.W.A. Timmermans, A. Rosas (Rapporteur), A. Borg Barthet, J. Malenovský, U. Löhmanns, and J.-J. Kasel, Judges,

Advocate General: M. Poiares Maduro,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 29 April 2009,

after hearing the Opinion of the Advocate General at the sitting on 1 October 2009,

gives the following

## Judgment

- 1 By its application, the Commission of the European [Union] requests the Court to declare that, by unilaterally proposing that a substance, perfluorooctane sulfonate ('PFOS'), be added to Annex A to the Stockholm Convention on Persistent Organic Pollutants ('the Stockholm Convention'), the Kingdom of Sweden has failed to fulfil its obligations under [the second and third paragraphs of Article 4 (3) TEU] and [Article 218 (1) to (8) TFEU].

### Legal context

#### *The Stockholm Convention*

- 2 The Stockholm Convention was adopted on 22 May 2001. In accordance with Article 26(1) thereof, the Convention entered into force on 17 May 2004, that is to say on the 90th day after the date of deposit of the 50th instrument of ratification, acceptance, approval or accession. As stated in Article 1 of the Convention, its objective is to protect human health and the environment from persistent organic pollutants ('POPs') as the parties to the Convention recognise in particular that POPs 'possess toxic properties, resist degradation, bioaccumulate and are transported, through air, water and migratory species, across international boundaries and deposited far from their place of release, where they accumulate in terrestrial and aquatic ecosystems'.
- 3 It is apparent from Article 2 of the Stockholm Convention that, for the purposes of that convention, 'party' means a State or regional economic integration organisation that has consented to be bound by the Convention and for which it is in force and 'regional economic integration organisation' means an organisation constituted by sovereign States of a given region to which its member States have transferred competence in respect of matters governed by that convention and which has been duly authorised, in accordance with its internal procedures, to sign, ratify, accept, approve or accede to that convention.
- 4 Article 3 of the Stockholm Convention provides that the parties must adopt the necessary legal and administrative measures as regards the chemicals listed in the Annexes to the Convention. Those measures relate, in substance, to eliminating or restricting the production, use, import and export of those substances.
- 5 The Stockholm Convention contains provisions on the procedure to be followed to have a new chemical listed in Annexes A to C to that convention. Article 8 of the Convention, relating to the listing of chemicals in those annexes, provides:
  1. A Party may submit a proposal to the Secretariat for listing a chemical in Annexes A, B and/or C. The proposal shall contain the information specified in Annex D. In developing a proposal, a Party may be assisted by other Parties and/or by the Secretariat.
  2. The Secretariat shall verify whether the proposal contains the information specified in Annex D. If the Secretariat is satisfied that the proposal contains the information so specified, it shall forward the proposal to the Persistent Organic Pollutants Review Committee.
  3. The Committee shall examine the proposal and apply the screening criteria specified in Annex D in a flexible and transparent way, taking all information provided into account in an integrative and balanced manner.
  4. If the Committee decides that:

(a) It is satisfied that the screening criteria have been fulfilled, it shall, through the Secretariat, make the proposal and the evaluation of the Committee available to all Parties and observers and invite them to submit the information specified in Annex E;

...

6. Where the Committee has decided that the screening criteria have been fulfilled, or the Conference of the Parties has decided that the proposal should proceed, the Committee shall further review the proposal, taking into account any relevant additional information received, and shall prepare a draft risk profile in accordance with Annex E...

7. If, on the basis of the risk profile conducted in accordance with Annex E, the Committee decides:

(a) That the chemical is likely as a result of its long-range environmental transport to lead to significant adverse human health and/or environmental effects such that global action is warranted, the proposal shall proceed. Lack of full scientific certainty shall not prevent the proposal from proceeding. The Committee shall, through the Secretariat, invite information from all Parties and observers relating to the considerations specified in Annex F. It shall then prepare a risk management evaluation that includes an analysis of possible control measures for the chemical in accordance with that Annex; or

(b) That the proposal should not proceed, it shall, through the Secretariat, make the risk profile available to all Parties and observers and set the proposal aside.

8. For any proposal set aside pursuant to paragraph 7(b), a Party may request the Conference of the Parties to consider instructing the Committee to invite additional information from the proposing Party and other Parties during a period not to exceed one year. After that period and on the basis of any information received, the Committee shall reconsider the proposal pursuant to paragraph 6 with a priority to be decided by the Conference of the Parties. If, following this procedure, the Committee again sets the proposal aside, the Party may challenge the decision of the Committee and the Conference of the Parties shall consider the matter at its next session. The Conference of the Parties may decide, based on the risk profile prepared in accordance with Annex E and taking into account the evaluation of the Committee and any additional information provided by any Party or observer, that the proposal should proceed. If the Conference of the Parties decides that the proposal shall proceed, the Committee shall then prepare the risk management evaluation.

9. The Committee shall, based on the risk profile referred to in paragraph 6 and the risk management evaluation referred to in paragraph 7(a) or paragraph 8, recommend whether the chemical should be considered by the Conference of the Parties for listing in Annexes A, B and/or C. The Conference of the Parties, taking due account of the recommendations of the Committee, including any scientific uncertainty, shall decide, in a precautionary manner, whether to list the chemical, and specify its related control measures, in Annexes A, B and/or C.<sup>7</sup>

6 Article 12 of the Stockholm Convention, headed 'Technical assistance', provides that the parties are to cooperate to provide appropriate technical assistance to developing country parties and parties with economies in transition, to assist them to develop and strengthen their capacity to implement their obligations under that convention. Likewise, Article 13(2) of the Convention provides that the developed country parties are to provide new and additional financial resources to enable developing country parties and parties with economies in transition to meet the agreed full incremental costs of implementing measures which fulfil their obligations under that convention.

7 Article 19 of the Stockholm Convention establishes a conference of the parties which 'shall keep under continuous review and evaluation the implementation' of the Convention. It is apparent from Article 19(6) that 'the Conference of the Parties shall, at its first meeting, establish a subsidiary

body to be called the Persistent Organic Pollutants Review Committee for the purposes of performing the functions assigned to that Committee by [the] Convention.<sup>7</sup> As is apparent from Document SC-1/7, headed 'Establishment of the Persistent Organic Pollutants Review Committee', the committee consists of 31 members appointed by the Conference of the Parties. In order to ensure equitable geographical distribution, it is specified that the members of that committee are to be drawn from the various regions as follows:

- African States: 8;
- Asian and Pacific States: 8;
- Central and Eastern European States: 3;
- Latin American and Caribbean States: 5;
- Western European and other States: 7.

8 Article 21(1) to (3) of the Stockholm Convention provides:

‘Amendments to the Convention

1. Amendments to this Convention may be proposed by any Party.
2. Amendments to this Convention shall be adopted at a meeting of the Conference of the Parties. The text of any proposed amendment shall be communicated to the Parties by the Secretariat at least six months before the meeting at which it is proposed for adoption. The Secretariat shall also communicate proposed amendments to the signatories to this Convention and, for information, to the depositary.
3. The Parties shall make every effort to reach agreement on any proposed amendment to this Convention by consensus. If all efforts at consensus have been exhausted, and no agreement reached, the amendment shall as a last resort be adopted by a three-fourths majority vote of the Parties present and voting.<sup>8</sup>

9 Article 22(1) to (4) of the Stockholm Convention provides:

‘Adoption and amendment of annexes

1. Annexes to this Convention shall form an integral part thereof and, unless expressly provided otherwise, a reference to this Convention constitutes at the same time a reference to any annexes thereto.
2. Any additional annexes shall be restricted to procedural, scientific, technical or administrative matters.
3. The following procedure shall apply to the proposal, adoption and entry into force of additional annexes to this Convention:
  - (a) Additional annexes shall be proposed and adopted according to the procedure laid down in paragraphs 1, 2 and 3 of Article 21;
  - (b) Any Party that is unable to accept an additional annex shall so notify the depositary, in writing, within one year from the date of communication by the depositary of the adoption of the additional annex. The depositary shall without delay notify all Parties of any such notification received. A Party may at any time withdraw a previous notification of non-

acceptance in respect of any additional annex, and the annex shall thereupon enter into force for that Party subject to subparagraph (c); and

(c) On the expiry of one year from the date of the communication by the depositary of the adoption of an additional annex, the annex shall enter into force for all Parties that have not submitted a notification in accordance with the provisions of subparagraph (b).

4. The proposal, adoption and entry into force of amendments to Annex A, B or C shall be subject to the same procedures as for the proposal, adoption and entry into force of additional annexes to this Convention, except that an amendment to Annex A, B or C shall not enter into force with respect to any Party that has made a declaration with respect to amendment to those Annexes in accordance with paragraph 4 of Article 25, in which case any such amendment shall enter into force for such a Party on the 90th day after the date of deposit with the depositary of its instrument of ratification, acceptance, approval or accession with respect to such amendment.<sup>7</sup>

10 Article 23 of the Stockholm Convention is worded as follows:

Right to vote

1. Each Party to this Convention shall have one vote, except as provided for in paragraph 2.
2. A regional economic integration organisation, on matters within its competence, shall exercise its right to vote with a number of votes equal to the number of its member States that are Parties to this Convention. Such an organisation shall not exercise its right to vote if any of its member States exercises its right to vote, and vice versa.<sup>7</sup>

11 Under Article 24 of the Stockholm Convention that convention is open for signature by all States and regional economic integration organisations.

12 Article 25 of the Stockholm Convention, headed 'Ratification, acceptance, approval or accession', is worded thus:

1. This Convention shall be subject to ratification, acceptance or approval by States and by regional economic integration organisations. It shall be open for accession by States and by regional economic integration organisations from the day after the date on which the Convention is closed for signature. Instruments of ratification, acceptance, approval or accession shall be deposited with the depositary.

2. Any regional economic integration organisation that becomes a Party to this Convention without any of its member States being a Party shall be bound by all the obligations under the Convention. In the case of such organisations, one or more of whose member States is a Party to this Convention, the organisation and its member States shall decide on their respective responsibilities for the performance of their obligations under the Convention. In such cases, the organisation and the member States shall not be entitled to exercise rights under the Convention concurrently.

3. In its instrument of ratification, acceptance, approval or accession, a regional economic integration organisation shall declare the extent of its competence in respect of the matters governed by this Convention. Any such organisation shall also inform the depositary, who shall in turn inform the Parties, of any relevant modification in the extent of its competence.

4. In its instrument of ratification, acceptance, approval or accession, any Party may declare that, with respect to it, any amendment to Annex A, B or C shall enter into force only upon the deposit of its instrument of ratification, acceptance, approval or accession with respect thereto.<sup>7</sup>

13 The Stockholm Convention was approved on behalf of the European [Union] by Council Decision 2006/507/EC of 14 October 2004 concerning the conclusion, on behalf of the European [Union],

of the Stockholm Convention on Persistent Organic Pollutants (OJ 2006 L 209, p. 1). The [Union]’s instrument of approval was deposited on 16 November 2004.

14 Point 8 of the grounds for Decision 2006/507 states that the [Union] has already adopted instruments covering matters governed by the Stockholm Convention, including Regulation (EC) No 850/2004 of the European Parliament and Council of 29 April 2004 on persistent organic pollutants and amending Directive 79/117/EEC (OJ 2004 L 158, p. 7, and corrigendum OJ 2004 L 229, p. 5) (‘the POPs regulation’), Regulation (EC) No 304/2003 of the European Parliament and Council of 28 January 2003 concerning the export and import of dangerous chemicals (OJ 2003 L 63, p. 1) and Council Directive 96/59/EC of 16 September 1996 on the disposal of polychlorinated biphenyls and polychlorinated terphenyls (PCB/PCT) (OJ 1996 L 243, p. 31).

15 Point 10 of the grounds for Decision 2006/507 states:

‘In the event of an amendment to Annex A, B or C or additional Annexes to the Convention being adopted, the Commission should provide for its implementation in the framework of Regulation (EC) No 850/2004, or other relevant [Union] legislation. If any amendment is not implemented within one year from the date of communication by the depositary of the adoption of the amendment, and to avoid situations of non-compliance, the Commission should notify the depositary accordingly.’

16 Article 2 of Decision 2006/507 is worded as follows:

- ‘1. Whenever an amendment to Annexes A, B or C or additional Annexes to the Convention is not implemented in the Annexes to Regulation No 850/2004 or other relevant [Union] legislation, within one year from the date of communication by the depositary of the adoption of the amendment, the Commission shall notify the depositary in accordance with Article 22 of the Convention.
2. In case an amendment to Annexes A, B or C or additional Annexes to the Convention is implemented after a notification referred to in paragraph 1, the Commission shall withdraw the notification without delay.’

17 Decision 2006/507 contains, in an Annex, the declaration by the [Union] in accordance with Article 25(3) of the Stockholm Convention. That declaration is worded as follows:

‘The [Union] declares that, in accordance with the Treaty [on the Functioning of the European Union], and in particular [Article 192] thereof, it is competent for entering into international environmental agreements, and for implementing the obligations resulting therefrom, which contribute to the pursuit of the following objectives:

- preserving, protecting and improving the quality of the environment,
- protecting human health,
- prudent and rational utilisation of natural resources,
- promoting measures at international level to deal with regional or worldwide environmental problems.

Moreover, the [Union] declares that it has already adopted legal instruments, binding on its Member States, covering matters governed by this Convention, and will submit and update, as appropriate, a list of those legal instruments to the Conference of the Parties in accordance with Article 15(1) of the Convention.

The [Union] is responsible for the performance of those obligations resulting from the Convention which are covered by [Union] law in force.

The exercise of [Union] competence is, by its nature, subject to continuous development.<sup>7</sup>

18 The [Union] did not make use of the possibility, which is provided for in Article 25(4) of the Stockholm Convention, of declaring that, with respect to it, any amendment to Annex A, B or C to the Stockholm Convention is to enter into force only upon the deposit of its instrument of ratification, acceptance, approval or accession with respect thereto.

19 All the Member States are parties to the Stockholm Convention.

*The Aarhus Protocol*

20 The Protocol to the 1979 United Nations' Convention on Long-range Transboundary Air Pollution on Persistent Organic Pollutants was adopted in Aarhus (Denmark) on 24 June 1998 ('the Aarhus Protocol'). It seeks to control, reduce or eliminate emissions or losses of those pollutants.

21 As is apparent from Articles 1 and 15 of the Aarhus Protocol, that protocol was to be open for signature by States members of the United Nations Economic Commission for Europe, States having consultative status with that Commission and regional economic integration organisations, constituted by sovereign States members of that Commission.

22 Article 3 of the Aarhus Protocol describes the basic obligations of the contracting parties. These are, in essence, to eliminate the production and use of the substances listed in Annex I to that protocol, to restrict the substances listed in Annex II to the protocol to the uses set out in that annex and to reduce emissions of the substances listed in Annex III to the protocol to a set level in relation to a reference year determined in accordance with that annex.

23 Article 14(1) to (3) of the Aarhus Protocol governs the procedure for amendments to Annexes I to III of that protocol as follows:

1. Any Party may propose amendments to the present Protocol.

2. Proposed amendments shall be submitted in writing to the Executive Secretary of the Commission, who shall communicate them to all Parties. The Parties meeting within the Executive Body shall discuss the proposed amendments at its next session, provided that the proposals have been circulated by the Executive Secretary to the Parties at least 90 days in advance.

3. Amendments to the present Protocol and to annexes I to IV, VI and VIII shall be adopted by consensus of the Parties present at a session of the Executive Body, and shall enter into force for the Parties which have accepted them on the 90th day after the date on which two thirds of the Parties have deposited with the Depositary their instruments of acceptance thereof. Amendments shall enter into force for any other Party on the 90th day after the date on which that Party has deposited its instrument of acceptance thereof.<sup>8</sup>

24 After the adoption of Council Decision 2004/259/EC of 19 February 2004 concerning the conclusion, on behalf of the [Union], of the Protocol to the 1979 Convention on Long Range Transboundary Air Pollution on Persistent Organic Pollutants (OJ 2004 L 81, p. 35), the [Union]'s instrument of ratification was deposited on 30 April 2004.

25 Not all of the Member States are parties to the Aarhus Protocol.

*The POPs regulation*

26 Article 3 of the POPs regulation prohibits the production, placing on the market and use of substances on the list which constitutes Annex I to that regulation. It regulates the use of substances on the list constituting Annex II to that regulation. The list of substances subject to release reduction provisions constitutes Annex III to that regulation.

27 Article 14(1) of that regulation provides that, whenever a substance is listed in the Stockholm Convention or the Aarhus Protocol, the Commission is, where appropriate, to amend Annexes I to III to that regulation accordingly, in accordance with the procedure referred to in Article 16(2) thereof. According to Article 16(2), which refers *inter alia* to Article 5 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1999 L 184, p. 23), the Commission is to be assisted by a regulatory committee.

*Directive 76/769/EEC*

28 Council Directive 76/769/EEC of 27 July 1976 concerns the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations (OJ 1976 L 262, p. 201). At the time of the facts alleged against the Kingdom of Sweden in the present proceedings, that directive did not cover PFOS.

**Background to the dispute**

29 On 4 August 2004, a proposal for a Council decision (COM(2004) 537 final) was presented by the Commission, seeking authorisation to submit, on behalf of the [Union] and the Member States which are parties, proposals to have a certain number of chemicals included in the relevant Annexes to the Aarhus Protocol and/or the Stockholm Convention.

30 That proposal, in so far as it concerned the Aarhus Protocol, sought to have hexachlorobutadiene, octabromodiphenyl ether and pentachlorobenzene included in Annex I to that protocol, polychlorinated naphthalenes included in Annexes I and III and short-chained chlorinated paraffins included in Annex II.

31 In so far as it concerned the Stockholm Convention, that proposal sought to have hexachlorobutadiene, octabromodiphenyl ether and pentachlorobenzene, that is to say substances already named with a view to having them included in Annex I to the Aarhus Protocol, and pentabromodiphenyl ether, chlordcone, hexabromobifenyl and hexachlorocyclohexane included in Annex A to that convention, polychlorinated naphthalenes included in Annexes A and C and short-chained chlorinated paraffins included in Annex B.

32 PFOS was not covered by the proposal for a Council decision, either as regards inclusion in the Annexes to the Aarhus Protocol or inclusion in the Annexes to the Stockholm Convention.

33 Point 6 of the explanatory memorandum to that proposal was worded as follows:

Proposals to amend Annexes to the Convention or the Protocol should only be done on behalf of the [Union] and its Member States, based on the obligation of co-operation and unity in the international representation of the [Union] that flows from [the second and third paragraphs of Article 4 (3) TEU].<sup>7</sup>

34 The last sentence of recital 5 of that proposal stated:

Based on the obligation to ensure unity in the international representation of the [Union] and in order to ensure that proposals are justified and have sufficient support in the [Union], only joint proposals by the [Union] and the Member States should be submitted.<sup>2</sup>

- 35 The Council of the European Union's Working Party on International Environmental Issues met on 8 September 2004. On that occasion, the Kingdom of Sweden declared that it was in favour of a common proposal to list PFOS in the relevant Annex to the Stockholm Convention and raised the possibility of its unilaterally presenting a proposal to that effect. During that meeting, the discussions concerning PFOS essentially related to the legal consequences of that possible unilateral listing of PFOS in the Stockholm Convention and to the Commission's legal objections to that possibility.
- 36 On 10 March 2005, the Council adopted conclusions containing a common position on the substances to be proposed for listing in the Annexes to the Stockholm Convention. In those conclusions (document 7292/05 of 14 March 2005), the Council 'recommends the European [Union] and the Member States consider the further proposal of up to three additional substances, to be forwarded to the Secretariat [of that Convention] at the earliest convenience, if possible before [the first meeting of the Conference of the Parties], but in any case in time for examination by the first meeting of the POPs Review Committee and to that end requests that, as a first priority, their experts explore the list of substances under the [Aarhus Protocol] as the source for these substances since these are already controlled as POPs in the [European Union]'. Furthermore, the Council recommended, in point 5(h) of those conclusions that financial rules and a budget should be adopted to allow the effective implementation by the Secretariat of the decisions of the Conference of the Parties to the Stockholm Convention.
- 37 The first meeting of the Conference of the Parties to the Stockholm Convention was held on 2 to 6 May 2005. At that meeting the POPs Review Committee was created. Two substances, namely chlordcone and hexabromobifenyl, were proposed by the [Union] and the Member States for listing in the Annexes to the Stockholm Convention. The Review Committee was to meet for the first time in November 2005.
- 38 On 6 July 2005, the Council's Working Party on International Environmental Issues examined the Commission's proposal referred to in paragraph 29 of this judgment relating to proposals to include certain chemicals in the Annexes to the Aarhus Protocol and the Convention of Stockholm. It is apparent from the minutes of that meeting that the Presidency introduced a document comparing the procedures for amendments under the Protocol and the Convention and drawing up proposals for amendments in respect of each of those instruments. As regards the proposals relating to the Aarhus Protocol, which had to be made quickly in view of the deadline to be taken into consideration, the members of that group agreed on the nomination of five substances, namely hexachlorobutadiene, octabromodiphenyl ether, pentachlorobenzene, polychlorinated napthalenes and short-chained chlorinated paraffins. As regards the Stockholm Convention, those members agreed that the listing of some substances should be proposed at the second Conference of the Parties, but no agreement was reached on which substances and the discussion on that issue was postponed.
- 39 As regards PFOS, that same group recognised that that substance exhibits the characteristics of a POP and noted that work was ongoing on the identification of control measures at [Union] level. As soon as the Commission had submitted a proposal on those control measures PFOS should be proposed for inclusion in the Aarhus Protocol. It is stated by the Commission in its written submissions, and confirmed, inter alia, in the statement in intervention of the Kingdom of the Netherlands, that the Presidency drew the attention of that group to the economic consequences of a proposal to include PFOS in the Stockholm Convention following the notifications already made, since that might result in a call for additional financial aid on the part of developing countries which are parties to that convention.

40 On 14 July 2005, the Kingdom of Sweden submitted in its name and on its own behalf a proposal to list PFOS in Annex A of the Stockholm Convention to the Secretariat of that convention.

41 On 20 July 2005, the Committee of Permanent Representatives (Coreper) examined an amended draft, drawn up by the Presidency, of the Council's decision concerning proposals of substances to be added to the Annexes to the Aarhus Protocol (document No 11164/05 of 15 July 2005). Article 1 of that document authorised the proposal for inclusion of the five substances named by the Council's Working Party on International Environmental Issues at its meeting of 6 July 2005, referred to in paragraph 38 of this judgment. Article 2 of the document authorised the Commission 'to submit, preferably in time for consideration by the next Meeting of the Executive Body for the Convention in December 2005, a proposal, together with Member States which are Parties to the Protocol, to amend the relevant Annexes of the Protocol by adding PFOS to the Protocol once the Commission has submitted a proposal for restriction of marketing and use under Directive 76/769'. That document, in the version resulting from the Coreper discussions of 20 July 2005 (document 11386/05 of 22 July 2005) was approved by written procedure which ended on 8 September 2005.

42 On 5 December 2005, the Commission submitted a proposal for a Directive of the European Parliament and of the Council relating to restrictions on the marketing and use of perfluorooctane sulfonates (amendment of Directive 76/769). That proposal (COM(2005) 618 final) became Directive 2006/122/EC of the European Parliament and of the Council of 12 December 2006 amending for the 30th time Directive 76/769 (OJ 2006 L 372, p. 32). Furthermore, on 5 December 2005, the Commission also submitted to the Executive Body for the United Nations Convention on Long-Range Transboundary Air Pollution, on behalf of the [Union] and the Member States which were parties to the Aarhus Protocol, a proposal for amendment to the relevant Annexes to that protocol seeking to have added to those annexes the five substances nominated by the Council's Working Party on International Environmental Issues at its meeting of 6 July 2005, referred to in paragraph 38 of this judgment, and PFOS.

43 As regards the Stockholm Convention, the Council, in its 'Environment' session, adopted conclusions, reproduced in a press release of 9 March 2006 (document 6762/06 (Presse 58)), in which it 'recommends that the European [Union] and the Member States announce at [the second meeting of the Conference of the Parties] their intention of making a proposal for at least two and up to four additional substances, to be forwarded to the Secretariat, in order to allow examination by the second meeting of the POPs Review Committee.' The Council points out that 'the submission of further substances will require a decision by the Council'. A proposal for a Council decision (document 8391/06) relating to the presentation, on behalf of the [Union] and the Member States, of a proposal to add to Annexes A to C to the Stockholm Convention three substances, namely pentachlorobenzene, octabromodiphenyl ether and short-chained chlorinated paraffins, that is to say three of the five substances the addition of which to Annexes I to III to the Aarhus Protocol had been proposed in December 2005, was approved by the Council in April 2006.

### **Pre-litigation procedure and the proceedings before the Court**

44 By letter of 19 December 2005, the Commission, after referring to the discussions which took place on 6 July 2005 within the Council's Working Party on International Environmental Issues and the decisions proposed by that group, pointed out to the Swedish Government that the unilateral submission, by the Kingdom of Sweden, of a proposal to list PFOS in Annex A to the Stockholm Convention had the consequence of splitting the international representation of the and compromising the unity achieved both during the first Conference of the Parties to that convention and, in the context of the proposal for the addition of new substances under the Aarhus Protocol, would constitute a failure on the part of the Kingdom of Sweden to fulfil its obligations under [the second and third paragraphs of Article 4 (3) TEU].

45 Furthermore, the Kingdom of Sweden had proposed the listing of PFOS on 14 July 2005, although it knew that work regarding that substance was ongoing, as is apparent from Article 2 of the Council's decision of 8 September 2005 concerning proposals of substances under the Aarhus Protocol, which reproduces the conclusions formulated by the working party at its meeting of 6 July 2005. That preparatory work was a condition for international action by the [Union] and the Member States in the context of that protocol. The unilateral action of the Kingdom of Sweden seeking to have PFOS listed in Annex A to the Stockholm Convention could result in an amendment to the POPs regulation, depriving the Commission of its right of initiative in an area to a large extent covered by [Union] competence and depriving the Council of the opportunity of deciding on the submission of a proposal for the listing of that substance pursuant to [Article 218 (1) to (8) TFEU]. Consequently, the Commission gave the Kingdom of Sweden formal notice to submit its observations.

46 In a letter of 15 February 2006, that Member State maintained that the [Union] had not adopted measures relating to PFOS at the time when it took the initiative complained of by the Commission, with the result that Member States retained competence to propose that that substance be listed in the relevant Annexes to the Stockholm Convention. It also stated that, in spite of its efforts to have that listing proposed within the framework of [Union] action, there had been no agreement in that regard at the meeting of the Council's Working Party on International Environmental Issues of 6 July 2005. Consequently, the Kingdom of Sweden considered that there had been no breach of [the second and third paragraphs of Article 4 (3) TEU] and [Article 218 (1) to (8) TFEU].

47 On 4 July 2006, the Commission sent that Member State a reasoned opinion, dated 28 June 2006, requesting that it take the measures necessary to comply with that reasoned opinion within two months of its receipt. The Kingdom of Sweden replied to that reasoned opinion by letter of 4 September 2006 in which it maintained the position set out in its letter of 15 February 2006.

48 Not satisfied with the answers given by the Kingdom of Sweden, the Commission decided to bring this action.

49 By order of the President of the Court of 31 October 2007, the Kingdom of Denmark, the Kingdom of the Netherlands, the Republic of Finland and the United Kingdom of Great Britain and Northern Ireland were granted leave to intervene in this case in support of the form of order sought by the Kingdom of Sweden.

### **The action**

*The complaint alleging breach of [the second and third paragraphs of Article 4 (3) TEU]*

Arguments of the parties

50 In support of the complaint alleging infringement of the duty of cooperation in good faith arising out of [the second and third paragraphs of Article 4 (3) TEU], the Commission submits that the Kingdom of Sweden did not take all the measures necessary to facilitate the achievement of the [Union]'s tasks and did not abstain from measures which could jeopardise the attainment of the [Union]'s objectives.

51 The Commission states that, at the time when the Kingdom of Sweden unilaterally proposed that PFOS be listed in Annex A to the Stockholm Convention, work on the matter was ongoing at Council level. More specifically, the Council's Working Party on International Environmental Issues had reached agreement on a strategy in that regard during its meeting of 6 July 2005. In view of the deadlines to be taken into consideration, it was important for a decision to be adopted quickly with regard to proposals that certain substances be included in the Annex to the Aarhus

Protocol. PFOS was taken into consideration on that basis, but the Working Party decided that it would be proposed only after the Commission had submitted a proposal concerning control measures as regards that substance pursuant to Directive 76/769. As regards the Convention of Stockholm, to which the Swedish proposal related, the members of the Working Party were agreed that the listing of certain substances in the relevant Annexes to that convention should be proposed, but had not determined which substances as the discussion on that issued had been postponed. The Working Party had discussed the financial consequences of the proposal to list PFOS in the relevant Annexes to that convention.

- 52 The Commission maintains that PFOS were not a priority issue as regards the Stockholm Convention and that that choice was the result of a common position within the Council. That does not however mean that PFOS was not taken into consideration in the [Union]'s strategy. Furthermore, the Commission disputes the fact that it was a matter of great urgency to propose that substance under the Convention.
- 53 The Commission acknowledges that the Council's conclusions do not constitute a binding legal act, but disputes the argument that such conclusions have no legal significance and may be disregarded.
- 54 According to the Commission, the main question is not whether the [Union] exercised its competence as regards the environment specifically as regards PFOS, but whether it used it to regulate dangerous chemicals, and more particularly POPs. In that regard it maintains that a [Union] regulatory framework for dangerous chemicals, and more specifically for POPs, already existed, with the result that the submission of proposals for the listing of substances under the Stockholm Convention is a measure which is essentially covered by [Union] rules. The existence of [Union] competence, whether exclusive or shared, means that, where action is required at international level, such action should be taken by the [Union], on its own or together with the Member States.
- 55 The unilateral action on the part of the Kingdom of Sweden thus resulted in splitting the international representation of the [Union] as regards the listing of PFOS under the Stockholm Convention, which is contrary to the obligation of unity in international representation of the [Union] which arises out of the duty of cooperation in good faith in [the second and third paragraphs of Article 4 (3) TEU].
- 56 The Commission disputes the argument that a proposal for the listing of a substance in an Annex to the Stockholm Convention does not affect the [Union], given the need for a decision by the Committee referred to in Article 8 of that convention, and then for a vote by the Parties, and the possibility for any Party to make a declaration under Article 22(3)(b) and (4) of that convention that it does not accept to be bound by an amendment made to Annexes A, B or C. The Kingdom of Sweden's proposal could result in conflict between that Member State and the [Union] even if the [Union] elected not to be bound by such an amendment. Secondly, such an argument does not take into account the difficulties raised by the decision-making process under that convention. In particular, the [Union] would not be able to block the adoption of the proposed amendment. Lastly, the existence of a mechanism designed to eliminate a contradiction between [Union] law and the international action of a Member State does not remove the obligation to ascertain beforehand whether [Union] law may be affected by that action.
- 57 According to the Commission, the purpose of the Kingdom of Sweden's proposal was to establish a new international legal rule, which would have the direct effect of affecting [Union] law since it would give rise to an obligation to amend the POPs regulation.
- 58 The Commission disputes the argument that Member States are entitled to adopt national rules which are more stringent than the POPs regulation on the ground that that regulation constitutes only minimum [Union] rules, which has the consequence, pursuant to [Article 193 TFEU], that Member States are entitled to submit proposals for amendments to the Annexes to the Stockholm Convention. According to the Commission, the purpose of such a proposal is necessarily the

introduction of a more stringent international legal rule, with effects not only with regard to the Member State which has made that proposal, but also with regard to the [Union].

59 Lastly, the Commission disputes the argument that the Kingdom of Sweden's initiative is consistent with the [Union]'s objectives as regards the environment and that there is no need to take economic considerations into account. The Commission states that the Stockholm Convention contains provisions on financial aid to developing countries to enable them to honour their obligations under that convention. It is therefore necessary to take into account all the provisions of that convention before submitting proposals for the listing of new substances in the relevant Annexes thereto.

60 The Kingdom of Sweden states that the Commission's sole plea in law in support of its action is the fact that the Kingdom of Sweden, by unilaterally proposing that PFOS be listed in Annex A to the Stockholm Convention, failed to fulfil its obligations under [the second and third paragraphs of Article 4 (3) TEU] and [Article 218 (1) to (8) TFEU]. In the course of the pre-litigation procedure the Commission did not assert that the Kingdom of Sweden was not entitled to take that course of action on account of exclusive [Union] competence in that regard. Were the Court to interpret the arguments contained in the Commission's application as including such an assertion of breach of the rules on competence, that would be a new plea which would have to be rejected.

61 According to the Kingdom of Sweden, there were no rules at [Union] level in respect of PFOS when that Member State proposed that it be added to Annex A to the Stockholm Convention. Neither the POPs regulation nor Directive 76/769 applied to that substance at the time, with the result that, since there was shared competence, both the Member States and the [Union] could propose that PFOS be added to that annex.

62 Like the Kingdom of Sweden, the Kingdom of Denmark, the Kingdom of the Netherlands and the Republic of Finland maintain that there was no common position with regard to PFOS as at 14 July 2005. As the Kingdom of the Netherlands states, the principle of good faith within the [Union] does not mean that the Commission could legitimately expect the Kingdom of Sweden, despite its repeated efforts, to wait for an indefinite period for internal action on the part of the [Union] even though both the Member States and the Commission were in agreement on the fact that PFOS poses serious risks to human health and the environment.

63 As regards the interpretation of the principle of cooperation in good faith arising out of [the second and third paragraphs of Article 4 (3) TEU], the Kingdom of Sweden maintains that the Commission's interpretation of that principle is likely to render shared competence in the case of mixed agreements meaningless. That principle means merely that Member States must make every effort, in so far as possible, to cooperate with the [Union] institutions. The Kingdom of Sweden takes the view that that is what it did. It gave sufficient information to and consulted the [Union] and the other Member States in that regard and attempted to obtain common action before depositing its proposal for the listing of PFOS in Annex A to the Stockholm Convention.

64 The Kingdom of Sweden states, moreover, that deviations from the requirement for unity in international representation must be allowed, in so far as the obligation of cooperation does not mean that there is an obligation to reach unanimity in all circumstances. The Republic of Finland maintains in that regard that [the second and third paragraphs of Article 4 (3) TEU], as interpreted by the case-law of the Court, does not give rise to an obligation on the part of a Member State which is a party to a mixed agreement to refrain from using its competence in a case where the [Union] has not decided to make use of its own competence and where it has not been possible for the [Union] and the Member States to define a common course of action. The Member States may decide unilaterally on the use of their competence while complying with [Union] law.

65 The Kingdom of the Netherlands also states that the application of the principle of cooperation in good faith cannot have the effect that Member States may not, under any circumstance, unilaterally

take a course of action outside the [Union] with regard to the environment when such competence is expressly conferred on them by the second subparagraph of [Article 191 (4) TFEU]. Likewise, the Kingdom of Denmark maintains that the principle of cooperation in good faith must not in practice become a principle relating to the allocation of competence and that it cannot result in taking away from the Member States a competence vested in them. As stated by the United Kingdom, that would amount to giving the [Union] *de facto* exclusive external competence, in circumstances where such competence does not exist.

66 The Kingdom of Sweden, supported by the interveners, also maintains that a proposal for the listing of a substance in an Annex to the Stockholm Convention does not produce any legal effects with regard to the other parties to that convention. As the Kingdom of Denmark points out, only the Conference of the Parties may take a position on the possible listing of a substance and it is only when that conference follows a proposal from the Technical Committee that the question of a position being taken by the [Union] arises, as it is open to the [Union] to choose not to be bound.

67 The Kingdom of Sweden, also supported on this point by the interveners, further maintains that the legal position resulting from its unilateral proposal to list PFOS in Annex A to the Stockholm Convention is comparable to that which could arise if it decided, on the basis of [Article 193 TFEU], to adopt national rules for the protection of the environment that were more stringent than those stemming from [Union] law. The Republic of Finland states that there is nothing in the Court's case-law to substantiate the Commission's view that a Member State may not, in the context of an international agreement, adopt protective measures that are more stringent than the [Union] rules.

68 Lastly, the defendant and the interveners submit that the Kingdom of Sweden's initiative did not have the effect of jeopardising the [Union]'s objectives in the field of environmental policy. There is no need to take economic considerations into account in that respect.

#### Findings of the Court

69 In all the areas corresponding to the objectives of the Treaty, [the second and third paragraphs of Article 4 (3) TEU] requires Member States to facilitate the achievement of the [Union]'s tasks and to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty (Opinion 1/03 [2006] ECR I-1145, paragraph 119, and Case C-459/03 *Commission v Ireland* [2006] ECR I-4635, paragraph 174).

70 The Kingdom of Sweden considers that the duty of cooperation in good faith provided for in [the second and third paragraphs of Article 4 (3) TEU] is limited in scope when what are involved are areas in which competence is shared between the [Union] and the Member States.

71 In that regard, the Court has already held that this duty of genuine cooperation is of general application and does not depend either on whether the [Union] competence concerned is exclusive or on any right of the Member States to enter into obligations towards non-member countries (Case C-266/03 *Commission v Luxembourg* [2005] ECR I-4805, paragraph 58, and Case C-433/03 *Commission v Germany* [2005] ECR I-6985, paragraph 64).

72 In the present case, the Commission has pointed out that it was not claiming that the [Union] had exclusive competence to submit a proposal for the listing of PFOS in Annex A to the Stockholm Convention. It must therefore be assumed that competence is shared. In that sense the present case can be distinguished from the situation at issue in Case C-45/07 *Commission v Greece* [2009] ECR I-701, which concerned exclusive competence.

73 Where it is apparent that the subject-matter of an agreement or convention falls partly within the competence of the [Union] and partly within that of its Member States, it is essential to ensure close cooperation between the Member States and the [Union] institutions, both in the process of

negotiation and conclusion and in the fulfilment of the commitments entered into. That obligation to cooperate flows from the requirement of unity in the international representation of the [Union] (Ruling 1/78 [1978] ECR 2151, paragraphs 34 to 36 (by analogy with the EAEC Treaty); Opinion 2/91 [1993] ECR I-1061, paragraph 36; Opinion 1/94 [1994] ECR I-5267, paragraph 108; and Case C-25/94 *Commission v Council* [1996] ECR I-1469, paragraph 48).

74 The Court has held that Member States are subject to special duties of action and abstention in a situation in which the Commission has submitted to the Council proposals which, although they have not been adopted by the Council, represent the point of departure for concerted [Union] action (Case 804/79 *Commission v United Kingdom* [1981] ECR I-1045, paragraph 28; *Commission v Luxembourg*, paragraph 59; and *Commission v Germany*, paragraph 65).

75 Likewise, the Court has held that the adoption of a decision authorising the Commission to negotiate a multilateral agreement on behalf of the [Union] marks the start of a concerted [Union] action at international level and requires for that purpose, if not a duty of abstention on the part of the Member States, at the very least a duty of close cooperation between the latter and the [Union] institutions in order to facilitate the achievement of the [Union] tasks and to ensure the coherence and consistency of the action and its international representation (*Commission v Luxembourg*, paragraph 60, and *Commission v Germany*, paragraph 66).

76 In the present case, it is settled ground that, at the time when the Kingdom of Sweden submitted the proposal for the listing of PFOS in Annex A to the Stockholm Convention on 14 July 2005, the Council had not adopted any formal decision as regards a proposal to list substances in that annex. However, the Court must examine whether, as the Commission maintains, there was at the time a [Union] strategy in that regard which was not to propose the listing of PFOS immediately in the context of that convention, *inter alia* for economic reasons.

77 In that regard, it does not appear to be indispensable that a common position take a specific form for it to exist and to be taken into consideration in an action for failure to fulfil the obligation of cooperation in good faith, provided that the content of that position can be established to the requisite legal standard (see, to that effect, *Commission v Council*, paragraph 49).

78 As regards PFOS, it must be borne in mind, as a preliminary point, that, as at March 2005, that substance had not been included in the Aarhus Protocol or the Stockholm Convention.

79 In the conclusions which it adopted in March 2005 with a view to the first Conference of the Parties to the Stockholm Convention, the Council recommended that the [Union] and the Member States consider a proposal for the inclusion of 'up to three additional substances' in the relevant Annexes to that convention. The experts of the [Union] and Member States were asked, as a first priority, to explore the list of substances under the Aarhus Protocol 'as the source for these substances since these are already controlled as POPs in the [European Union]?'.

80 Since PFOS had not, at that time, been included in the Aarhus Protocol and was not yet regulated as a POP within the Union, it did not, according to those conclusions of the Council, have to be taken into consideration in the first proposals to be submitted, whether in respect of that protocol or the Stockholm Convention.

81 Furthermore, the restriction on the number of substances to be proposed ('up to three'), read in the light of point 5(h) of those conclusions, reinforces the argument that economic considerations were part of the [Union] strategy as regards the Stockholm Convention, which it must be recalled is intended to apply worldwide and Article 13 of which provides for financial aid to developing countries or countries with economies in transition. In point 5(h) the Council recommends that financial rules and a budget are adopted to allow the effective implementation of the decisions of the [Conference of the Parties to the Stockholm Convention] by the Secretariat'.

82 In accordance with those conclusions of the Council, and as was pointed out in paragraph 37 of this judgment, two substances, of which PFOS was not one, were proposed by the [Union] and the Member States during the first meeting of the Conference of the Parties to the Stockholm Convention, which was held in May 2005.

83 It is apparent from the minutes of the meeting of the Council's Working Party on International Environmental Issues of 6 July 2006, the content of which is summarised in paragraphs 38 and 39 of this judgment, that the discussion related to the nomination of substances both under the Aarhus Protocol and the Stockholm Convention. Although those minutes do not expressly mention the economic considerations which were discussed, that fact is not disputed by the Kingdom of Sweden and is admitted *inter alia* by the Kingdom of the Netherlands.

84 It is apparent from those minutes that the immediate objective was the nomination under the Aarhus protocol of the substances mentioned in paragraphs 30 and 38 of this judgment, which were already covered by [Union] legislation.

85 It was at that time envisaged that PFOS would be nominated under that protocol as soon as the Commission had submitted a proposal for [Union] legislation on control measures in respect of that substance. All the subsequent events (the adoption of the Council's decision on 8 September 2005, the submission of a proposed amendment to Directive 76/769 on 5 December 2005, the proposal, of the same date, to list PFOS in the relevant Annexes to that protocol) show that that was in fact the case.

86 Furthermore, as regards the proposals under the Stockholm Convention, the minutes of the meeting of the Council's Working Party on International Environmental Issues of 6 July 2005 state that 'Agreement was reached by the [Working Party for International Environmental Issues]' that some substances should be nominated at the Second Conference of the Parties. However, there was no agreement on the substances to be proposed and discussion of that issue was postponed.

87 Contrary to what the Kingdom of Sweden and the interveners maintain, it appears that there was no 'decision-making vacuum' or even a waiting period equivalent to the absence of a decision. A number of factors lend support to the argument that the Council's Working Party on International Environmental Issues did not intend to reach a decision on 6 July 2005 – but certainly thereafter – on the substances to be proposed under the Stockholm Convention in addition to those already proposed in May 2005. The urgency of deciding first on the substances to be proposed under the Aarhus Protocol and the economic considerations connected with proposals under that convention may be mentioned in that regard.

88 Subsequent events have borne out that intention to act and to make proposals under the Stockholm Convention, namely the Council's recommendation of 9 March 2006 and the decision adopted by the Council in April 2006, which is mentioned in paragraph 43 of this judgment, authorising the Commission to present such proposals as regards pentachlorobenzene, octabromo diphenyl ether and short-chained chlorinated paraffins.

89 In any event, it may be regarded as established that, in 2005, there was a common strategy not to propose, at that time, to list PFOS in Annex A to the Stockholm Convention, since, as is apparent from the Council's conclusions of March 2005, the experts of the Member States and of the [Union] were to choose the substances to be proposed from among those already covered by the Aarhus Protocol and that, as is apparent from the minutes of the meeting of the Council's Working Party on International Environmental Issues of 6 July 2005, PFOS was not one of those substances.

90 Furthermore, in connection with the Stockholm Convention, the institutions of the Union considered it preferable to take into account all the relevant factors, including economic factors, when deciding on the strategy to be adopted by the Union and its Member States in relation to that

substance. That led them not to propose immediately that PFOS be prohibited under that agreement, but to propose it, as a first priority, under another agreement, that is, the Aarhus Protocol.

- 91 It follows that, in unilaterally proposing the addition of PFOS to Annex A to the Stockholm Convention, the Kingdom of Sweden dissociated itself from a concerted common strategy within the Council.
- 92 Moreover, as is apparent from examination of the decision-making process provided for by that convention, the Kingdom of Sweden's unilateral proposal has consequences for the Union. It must be pointed out, in that regard, that the Convention establishes an institutional and procedural framework containing a body of specific rules for the adoption of amendments, including the listing of new substances in Annexes A, B or C.
- 93 Under Article 8(9) of the Stockholm Convention, a proposal to list a substance in Annex A to that convention is to be the subject of a positive or negative recommendation on the part of the Persistent Organic Pollutants Review Committee. As Article 23(2) of the Convention states, a regional economic integration organisation, such as the Union, is not to exercise its right to vote if any of its Member States exercises its right to vote, and vice versa. Article 25(2) of the Stockholm Convention also provides that in the case of such an organisation, one or more of whose member States is, like that organisation, a Party to that Convention, the organisation and the member States are not to be entitled to exercise rights under the Convention concurrently.
- 94 The submission of a proposal for the listing of a substance under the Convention of Stockholm by a Member State could therefore give rise to a situation where either the Union voted against that proposal, thus depriving the Member State making the proposal of the possibility of defending its own proposal at the level of the Conference of the Parties, or that Member State exercised its right to vote in favour of its own proposal, thus depriving the Union of the possibility of exercising its right to vote with a number of votes equal to the number of its Member States and leaving the other Member States free to vote for or against the proposal.
- 95 In that regard, it must be pointed out that the declaration deposited by the [Union] in accordance with Article 25(3) of the Stockholm Convention does not contain specific rules as regards the allocation of competence between itself and the Member States. That declaration states that '[t]he [Union] is responsible for the performance of those obligations resulting from the Convention which are covered by [Union] law in force' and that '[t]he exercise of [Union] competence is, by its nature, subject to continuous development'.
- 96 In any event, it must be pointed out that the Union does not represent a sufficient number of votes to oppose the adoption of an amendment to an Annex to the Stockholm Convention. It should be added that, with regard to a party which, like the Union, has not made use of the possibility of making a declaration under Article 25(4) of that convention, an amendment to an Annex which has been decided on by the Conference of the Parties enters into force, subject to the method known as 'opting out', on the expiry of a period of one year from the date on which the depositary communicated the amended Annex.
- 97 The Kingdom of Sweden and the interveners maintain that, in such a case, the Union could, in any event, make use of that possibility of 'opting out' and notify a declaration under Article 22(3)(b) and (4) of the Stockholm Convention that it is unable to accept the amendment of an Annex.
- 98 That argument is, however, based on the assumption that the Union would be in a position to make a declaration of non-acceptance of an amendment proposed and voted for by one or more Member States. Under Article 25(2) of the Stockholm Convention, the Union and its Member States are not entitled to exercise rights under the Convention concurrently. At the hearing the parties set out different interpretations of Article 25(2) of the Stockholm Convention.

99 However, even supposing, despite Article 25(2) of the Stockholm Convention, that the Union could still notify a declaration of non-acceptance of an amendment proposed and voted for by several Member States, such a situation could give rise to legal uncertainty for the Member States, the Secretariat of the Stockholm Convention and non-member countries which are parties to that convention.

100 Irrespective of that aspect, it is common ground that the objective sought by depositing a proposal for the listing of a substance in Annex A to the Stockholm Convention is the adoption of an international legal rule which will be binding on the parties to that convention. Since the Union is a party to that convention, it could be bound by the resulting amendment to that annex, provided it has not previously, in compliance with the internal procedures set out in Article 14(1) of the POPs regulation, notified a declaration of non-acceptance within a period of one year from the date on which the depositary communicated that annex, as amended.

101 Examination of the decision-making process provided for by the Stockholm Convention thus shows that a proposal to list a substance in Annex A to that convention has consequences for the Union.

102 In that regard, the assertion by the Kingdom of Sweden and the interveners that a proposal to list a substance in the Annex to an international convention which is binding on the Union is equivalent to a national measure that is more stringent than a minimum Union measure and is permitted by [Article 193 TFEU] cannot be accepted. The Union could be bound by an amendment to an Annex to the Stockholm Convention whereas it is not bound by such a national measure.

103 As was pointed out in paragraph 74 of this judgment, the Court has held that Member States are subject to special duties of action and abstention in a situation in which the Commission has submitted to the Council proposals which, although they have not been adopted by the Council, represent the point of departure for concerted [Union] action (*Commission v Germany*, paragraph 65). That is especially true in a situation such as that in the present case which is characterised, as established in paragraph 91 of this judgment, by a unilateral proposal which dissociates the Member State in question from a concerted common strategy within the Council and was submitted within an institutional and procedural framework such as that of the Stockholm Convention.

104 Such a situation is likely to compromise the principle of unity in the international representation of the Union and its Member States and weaken their negotiating power with regard to the other parties to the Convention concerned.

105 Consequently, the Commission's first complaint, alleging breach of [the second and third paragraphs of Article 4 (3) TEU], is well founded.

*The complaint alleging breach of [Article 218 (1) to (8) TFEU]*

Arguments of the parties

106 In its second complaint, the Commission submits that the Kingdom of Sweden's unilateral action constituted a breach of [Article 218 (1) to (8) TFEU], which establishes a legal basis and procedure for negotiating and concluding international conventions, whether they fall under exclusive or shared competence. That unilateral action meant that the [Union] institutions were not able to exercise the powers which they possess under the Treaty, as a common proposal on the part of the [Union] and its Member States relating to the amendment of the Stockholm Convention would have had no practical effect.

107 The Kingdom of Sweden, supported by the interveners, denies that its conduct is contrary to [Article 218 (1) to (8) TFEU]. The Republic of Finland maintains that that provision does not establish material competence in favour of the [Union] as regards the conclusion of international agreements,

but exclusively defines the allocation of competence between the [Union] institutions. It does not give rise to any obligation on the part of Member States which if not complied with would make it possible to uphold the Commission's head of claim in that regard. Furthermore, the United Kingdom maintains that [Article 218 (1) to (8) TFEU] applies only to the opening of negotiations leading to the conclusion of international agreements.

#### Findings of the Court

108 As the Advocate General pointed out in footnote 13 of his Opinion, [Article 218 (1) to (8) TFEU] concerns 'the conclusion of agreements', whereas any initiative taken by the [Union] 'for the purpose of establishing the positions to be adopted on behalf of the [Union] in a body set up by an agreement' is governed not by [Article 218 (1) to (8) TFEU], but by [Article 218 (9) TFEU].

109 It is common ground that, in the present case, the conduct on the part of the Kingdom of Sweden which is complained of is the submission of a proposal for an amendment to a body set up by an international agreement, with the result that that conduct is not *per se* covered by [Article 218 (1) to (8) TFEU].

110 It follows that the complaint alleging breach of [Article 218 (1) to (8) TFEU] is not well founded.

#### Costs

111 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Commission has applied for costs to be awarded against the Kingdom of Sweden, and the latter has, essentially, been unsuccessful, the Kingdom of Sweden must be ordered to pay the costs.

112 In accordance with Article 69(4) of the Rules of Procedure, the Kingdom of Denmark, the Kingdom of the Netherlands, the Republic of Finland and the United Kingdom must bear their own costs.

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

- 1. Declares that, by unilaterally proposing that a substance, perfluorooctane sulfonate, be listed in Annex A to the Stockholm Convention on Persistent Organic Pollutants, the Kingdom of Sweden failed to fulfil its obligations under [the second and third paragraphs of Article 4 (3) TEU];;**
- 2. Dismisses the action as to the remainder;**
- 3. Orders the Kingdom of Sweden to pay the European Commission's costs;**
- 4. Orders the Kingdom of Denmark, the Kingdom of the Netherlands, the Republic of Finland and the United Kingdom of Great Britain and Ireland to bear their own costs.**