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The EU as an Area of Freedom, Security and … Diplomacy

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The legal acts of the European Union enjoys direct effect in 27 Member States without a prior transformation. This is a unique constellation since the activity of the European Union is influenced – to a high level – by diplomacy and diplomatic relations. Thus, the law-making process of this supranational organization is influenced to a high level by diplomatic relations. Negotiations on new legislative proposals are conducted behind "closed doors" of the European Council or European Parliament. The public does not always see the debate on a legislative draft or can follow the deliberation. That is why it is very important to read the judgments of the European Court of Justice carefully and between the lines. These factual insights provide all of us with intelligence on how the strive for more legislative powers and competencies has developed and progressed over the years. The author has determined several cases that reached the European Court of Justice in which the EU institutions were – formally – arguing about wording of the Treaties, going – in fact – for more legislative influence. The European Parliament applied different tactics, like postponing the debate to the very last session in a year or legislative period, so that the consultation could not take place. This is a tactic that did not find a legal base in any of the Treaties. The Parliament applied its rules of procedure in order to hollow out the regulations laid down in the Treaties – the law of the highest hierarchy in the European Union. The following paper deals with the discrepancies between the European Union institutions that continue since its beginnings and occur during law marking procedures. It shows which interests were and are involved. Moreover, it shows the strive for power of the European Parliament. That is why the paper focuses on these matters rather than on legal aspects of the judgments discussed below. Findings of this paper are of importance for those who negotiate EU law, negotiate with EU institutions as well as those who apply European law and struggle to understand any legal act.

Keywords: *ordinary legislative procedure, formal trilogues, informal trilogues, European Union institutions, strive for power*

Introduction

It is indeed barely possible to measure the extent to which the diplomacy influences every single legal act that the European Union issues. However, it is possible study cases of the European Court of Justice. This could offer first overview regarding the topic in question. Surely, this will offer intelligence regarding the strive for power and shift of legislative competencies resulting thereof.

A careful study of selected judgments of the Court of Justice on the legislative activity of the EU institutions presents how complicated the law-making process

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can be if the institutions don't work together but are driven by differing or even opposing interests, like the strive for legislative power. The conducted case study offers an overview over different negotiation tactics.

First, the author discusses judgments dealing with the consultation of the European Parliament on legal drafts and its tactics – applied during legislative procedures – to gain more political power and influence.

Subsequently the present paper analyzes the legal impact of a withdrawal of a legislative proposal through the European Commission in order to hinder the co-legislators on reaching an interinstitutional agreement on a legislative proposal.

Each case constitutes a solid base to ask questions regarding the reasons for the applied tactic by a given EU institution as well as on its (final) impact. The assumption here is, that the conflict over the powers, e.g. competencies of EU institutions, constitutes the actual background of every argument. Worth noticing is differing strategy, depending on the applicable Treaty, that author discusses.

Consultation of the European Parliament

a) Case 138/79 (Roquette Frères/Council)

The background of this case constitutes a judgment of the Court, in which it held Council Regulation No 1111/77 of 17.5.1977 laying down common provisions for isoglucose[1] for partially invalid.[2] Following that judgment, the Commission laid before the Council on 7.3.1979 a proposal for a regulation amending the provisions of Regulation No 1111/77. Few days later, the Council decided to consult the European Parliament on that legislative proposal pursuant to Article 43 of the EEC Treaty[3]. In its letter seeking an opinion the Council underlined the time schedule, in particular entering into force on 1.7.1979.[4]

However, the Parliament couldn't fulfill this time schedule, since any "additional session would be for the purpose only of considering reports which had been adopted following urgent consultation."[5] The Parliament rejected the legislative proposal and referred it back according to Article 22 of the Rules of Procedure to the Committee on Agriculture for reconsideration.

In spite of that, the Council adopted the Regulation No 1293/79, stating that "the Parliament had been consulted but had not given its formal opinion". The preamble to Regulation contains – what is remarkable – the words "having regard to the fact that the European Parliament has been consulted". The regulation entered into force on 1.7.1979. It lets the assumption arise, the Council would understand the right to be consulted different than the Parliament.

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[1]Official Journal L 134, p. 4.

[2] Invalid to the extent to which Articles 8 and 9 thereof imposed a production levy on isoglucose of 5 units of account per 100 kilograms of dry matter for the period corresponding to the sugar marketing year 1977/78.

[3]„Treaty" means any Treaty, being respectively in force in the period of time of each judgment; EEC/TFEU.

[4]CJEU, Report of cases, 1980, I -3333, 3336.

[5]CJEU, Report of cases, 1980, I -3333, 3337.

The President of the Parliament wrote to the President of the Council a letter in which it stated: "In spite of the fact that consultation of the European Parliament on this matter was compulsory the Council has acted before the European Parliament gave its opinion."[6]

The President of the Council answered by a letter in which he defended the adoption of Regulation before the opinion of the Parliament had been received and referred to the "legal need to implement … the judgment of the Court of Justice... " and "to the extreme importance for the public". These considerations were set out in the fourth recital in the preamble to the regulation.[7]

In his statement, the President of the Council referred to legal and factual reasons that were supposed to justify the adoption of the regulation without receiving a prior statement of the Parliament.

At its sitting on 14.12.1979 the Parliament adopted a motion for a resolution to intervene in Cases 138/79 and 139/79 before the Court of Justice of the European Communities so that the Council's adoption of Regulation No 1293/79 – without obtaining the compulsory opinion from the European Parliament – can be censured.

Here, the used word "censured" presents the need of the Parliament to proceed against the Council. The Commission wanted to and could intervene in support of the contentions of the Council. So, in this case there were two institutions having the same point of view, against one – the Parliament.

This factual basis shows the common practice of EU institutions: there are often circumstances that are referred to in order to justify an exception from the legal provisions of the respective version of the Treaty. This practice hasn't changed since the 70ies, when the institutions had different points of view over the consultation procedure. Nowadays, however, they still refer to similar reasons like for example the speed of the legislative process, when they try to justify the need for informal trilogues. Informal trilogues are negotiations that EU institutions decide to conduct in order not to follow the deadlines of the formal trilogues set up in the Treaty.[8]

The paradox here is that the EU institutions are the legal entities who avoid following the provisions of the Treaty on the Functioning of the European Union, speak the legal framework their activity is based on and that provides legal basis and justification for their activity. They refer to facts, such as faster and more flexible legislative procedure, in order to justify the lack of the applicability of the Treaty that – actually – constitutes the legal base of their existence and their activity.

Insider views on how the relationships between the EU institutions were shaped back than give the arguments exchanged between the parties in the proceedings in front of the Court of Justice.

The Council repeated legal and factual reasons. It admitted that consultation of the Parliament would constitute an "essential procedural requirement" within the meaning of Article 173 of the Treaty.[9] Nevertheless there is discretion in that respect. To support its point of view, the Council – lacking arguments in the Treaty

[6]CJEU, Report of cases, 1980, I -3333, 3340.
[7]CJEU, Report of cases, 1980, I -3333, 3340.
[8]Skowron, M., Secrecy During the Ordinary Legislative Procedure of the European Union: The Legal Dimension, in: European Public Law, Volume 29, Issue 2, 2023, pp. 1 – 30.
[9]CJEU, Report of cases, 1980, I -3333, 3346.

– referred the case law in certain Member States.[10] According to national case law, a consultative system could not paralyze the procedure of consultation. That is why the incorrect nature of the consultation would not necessarily involve an essential procedural defect of a legal act in question.

Although the articles of the EEC Treaty provide for consultation of the Parliament, they would not mention the need to issue an opinion by the assembly. It would be sufficient if the Assembly has been given an opportunity to give its opinion. That is why, there would be no procedural defects during the legislative procedure and the legal act could enter into force.

With regard to the meaning of the nature of the consultation, the Parliament based its reasoning[11] on arguments from the Treaty. Where the Treaty would expressly provide for it, the consultation would be necessary condition for the validity of the legal measures. The institutions therefore would have no discretion regarding consultation.

The European Parliament, as intervener, argued, there would be a time limit, foreseen in the Treaty to present its opinion.[12] That is why the Parliament may have given its opinion within a reasonable time. It therefore fulfilled its obligations under the Treaty.

It admitted that it rejected in the May session the proposed regulation. However, neither in the May session nor subsequently neither the Commission nor the Council informed it that the adoption of the regulation in question before 30.6.1979 was urgent. This statement shows the lack of any communication between the institutions.

The Parliament admitted problems of coordination[13] with the Council. Moreover, it established a special procedure involving inviting the Council to take part in the work of the Bureau of the Parliament and its committees. In the present case the Council did not make use of that procedure to obtain the opinion of the Parliament in due time.

This shows how little cooperation the EU institutions applied. There was no sincere exchange of basic information that would allow to progress with legislative procedures – the tasks of the EU institutions.

The question here is how far it had to get that one of the institutions admits "coordination" problems with another institution in front of a third institution – the Court.

Next question is the one about "coordination" problems within a legislative procedure. Possibly involved officers of the Commission or Council do not know the calendar of meetings of the Parliament or its committees. Without this basic knowledge it could be impossible to plan the process that could be, so they claimed, so urgent. Possibly the officers solely held the formal requirements and "stayed in touch" by exchanging formal letters. this could be a problem, since they are actors participating on legislation during the same legislative procedure, they are expected to cooperate close for the sake of the general good – the legislation, which one is enjoying direct effect in 27 Member States across Europe. Possibly, the chasm between the EU institutions was great, since representatives of one institution,

[10]CJEU, Report of cases, 1980, I -3333, 3349.
[11]CJEU, Report of cases, 1980, I -3333, 3347.
[12]CJEU, Report of cases, 1980, I -3333, 3347.
[13]CJEU, Report of cases, 1980, I -3333, 3348.

diplomats, didn't take the invitation of another European entity and weren't ready to cooperate during the work of the Bureau of the Parliament and its committees.

The Parliament referred also Article 139 of the Treaty,[14] which authorized the Council to request the meeting of the Parliament in an extraordinary session, as a means of action enabling it to deal with emergency cases. If the Council would fail to make use of that means, it could not justify the conduct that is contrary to the valid Treaty.[15]

If a measure had been absolutely indispensable regarding time and if all efforts to obtain an opinion from the Parliament in due time had failed, the Council could have taken measures only of an undoubtedly transitional nature.[16] The Parliament could decide on its own on the manner and the time for how long it considers draft legislation.

Regarding the "public" interest in the adoption of legislation before 1.7.1979, a ground which refers to the "state of emergency", the Parliament maintained that the Council could not decide unilaterally to determine the appropriate procedure to serve the public interest.

In its rejoinder the Council gave up the distinction between legal and factual reasons and focused on doctrinal issues. It agreed that parliamentary institution participates in Union's legislative process through consultation.[17] Logically one could distinguish three kinds of consultation: optional, compulsory where the opinion is not binding and compulsory with an opinion having a binding effect (in fact with an approval). Only the latter would involve sharing of the power of decision between two authorities. The Council referred the wording of the Treaties, and stated that they would mention only compulsory consultation as the consultative function of the Assembly. This means, that the Council would only be required to consult the competent authority for an opinion. That is what would be meant by "after consulting the Assembly".

At Council's point of view, it means that the institution – having complied with the obligation to enter into consultation – would not be bound to follow that opinion and does not even have the right to consider itself legally bound by the opinion. In reliance upon the logic of the system of the Treaty and guidelines from national case-law the Council concluded that in certain circumstances it would be entitled and even obliged to act without the opinion of the Parliament.

At Council's point of view, the consultation has been effectively conducted.

The Council did not define what kind of "legal scruple" was raised by a member of the Assembly in the last minute. We can assume, reading the opinion of advocate General next to the judgment, it could mean the question of a Member of the Parliament, who asked whether the report by the Committee on Agriculture in fact took account of the legal position created by the judgment of the Court.

The fact that "legal scruple" is a part of its statement, may be meaningful. It evokes the discussion stated above, as during the session on 12th May a representative of the Commission refused to answer a question of a member of the Parliament and

[14]CJEU, Report of cases, 1980, I -3333, 3348.
[15]CJEU, Report of cases, 1980, I -3333, 3348.
[16]CJEU, Report of cases, 1980, I -3333, 3348.
[17]CJEU, Report of cases, 1980, I -3333, 3349.

referred him to statements made day before by his colleague. It is indeed unusual in the diplomatic circles to refuse answering questions during a debate.

A further question of Council's rejoinder was if its power was bound somehow. The Council affirmed it. It recalled factual reasons, such as the need to deal with the situation created by the judgment of 25.10.1978 and a reasonable period had elapsed since the matter had been put before the parliamentary institution. Maybe the Council was impatient.

As regards the possibility of using the emergency procedure, the Council referred to the parliamentary procedure.

According to the Council, the Parliament was properly informed about the emergency nature of the issue. It would not have prevented it from rejecting the motion for a resolution from the Committee on Agriculture in the circumstances described above.

The Council also argued that – in spite of the general possibility of an extraordinary session – the Assembly did not consider such a session appropriate.

With further argument, the Council seems to reallocate responsibility in the legislative process. Since the attention of the Parliament was drawn to the urgency and to the discrimination arising from the loophole in the law, the vote of 12.5.1979 had to – at Council's point of view – constitute a refusal to treat the matter as an emergency or at least a refusal by the Parliament to consider in due time the proposals submitted to it for an opinion. As far as the Council was concerned, the EP would have exhausted the Council's efforts to obtain the opinion sought in sufficient time.

This reasoning means, that if one institution would inform another one, which one would not undertake any acceptable action, the first institution might take the liberty to interpret the situation on its own and progress with the procedure started. In this regard there is not only the question, who decides, if the institution to consult has been prodded to the emergency nature of the legal act (since this matter was controversial between the involved actors).

There is the further question of the reallocation of responsibility: from which point may the consulting institution decide it would have used all the instruments available and go on with the procedure? There was no legal provision containing the right to assume or legal assumption that the lack of an opinion would allow to progress with the legislative procedure. All these questions show how much tension existed between the institutions involved. In this regard also a further statement is important. The Council referred to the Parliament's claim that "the Parliament must . . . be its own judge of how and for how long it considers draft legislation" and rejected it. At its point of view, once a reasonable period has elapsed the Council must, in certain exceptional circumstances of an emergency nature such as those of the case, be entitled to act in the absence of a formal opinion.[18]

Although these institutions were working on one legislative procedure, they did not recognize each other's rights.

[18]CJEU, Report of cases, 1980, I -3333, 3351.

The Commission shared the reasoning of the Council and stated that it could act in the absence of an opinion from the Parliament in the present case since the Parliament had a reasonable time to inquire fully into the matter.

The Commission referred further facts. It stated that both the Council and the Commission pointed out the relationship between the proposed regulation and all the agricultural price proposals for 1979/80 and the imperative need that the opinion must be given during the May session.

The Court didn't refer to arguments of the parties regarding legal scruple, problems with interinstitutional coordination or interpersonal problems. Since they are described in the section "Facts and issues" one can ask why do they constitute a part of the judgment,[19] if they weren't relevant for it.[20] Maybe, back then, this was the way to build the structure of judgments. However, one has to argue, what was the reason for repeating all the exchanged views and comments, if they weren't relevant for the final ruling.

b) Case C-65/93 (European Parliament *vs*. Council)

This case[21] deals with a regulation based on Articles 43 and 113 of the EEC Treaty. While Art. 43 foresaw a consultation of the Parliament, it was not necessary according to Art. 113.[22] Since the regulation was based on those 2 provisions, the Council informed the Parliament.

This case is unique, since the factual basis the Advocate General and the Court of Justice based their respective opinion and judgment on, were different: at the point of view of the Advocate General, the Council did not demonstrate that the adoption of the Regulation would be urgent.[23] The Court of Justice was of a different opinion. At its point of view, the Council requested the Parliament to apply the

[19]"Facts and issues" appear under "Judgment", so that it is a part of it.
[20]The Court did not base its decision on them.
[21]Judgment from 30.03.1995.
[22]The Council stated in its rejoinder in the proceedings in front of the court that consultation of the Parliament on the proposal for the regulation became obligatory only because Article 43 of the Treaty was included in the legal basis for its adoption. However, as the Court held in Case 45/86 Commission v Council [1987] ECR 1493, generalized preferences fall in principle solely within the common commercial policy, and thus within Article 113. Accordingly, the reference to Article 43 could have been avoided, and, since Article 113 was the only legal basis lawfully required, the Parliament might not have had to be consulted at all (CJEU, judgment from 30.3.1995, I-666, p. 17). Similar legal issue was raised in case C-70/88. The Parliament argued, a regulation at issue was based on Article 31 of the EAEC Treaty, which provides only that the Parliament is to be consulted, whereas it ought to have been based on Article 100a of the EEC Treaty, which requires implementation of the procedure for cooperation with the Parliament, the Parliament is in fact claiming that its prerogatives were breached as a result of the choice of the legal basis. This reasoning shows not only a deep mistrust between the EU institutions but also that the Parliament assumes, the Council would apply the legal bases freely, in order to shape a legislative procedure as easy and simple as possible, without any regard to the provisions of the Treaty, which foresee some rights of the Parliament. The legal bases of the Treaty would be misused by the Council and the Commission, just in order to shape the legislative procedure according to the will of those institutions.
[23]Opinion from 13.12.1994, I-648.

procedure in cases of urgency under Article 75 of its Rules of Procedure.[24] The Parliament applied this procedure. The draft of the regulation was referred back to the committee for further debate, so that the report by the Committee on Development was placed on the agenda for the sitting on 18.12.1992, the last day of the last session of the European Parliament for 1992.

However, the Parliament adjourned this sitting. The debate was postponed to 18.1.1993. An immediate telephone consultation between the offices of the General Secretary of the Council and the President of the Parliament followed. In their course it was agreed that it would no longer be possible for practical reasons to convene an extraordinary session of the Parliament before the end of 1992. The Council adopted the contested regulation on 21.12.1992 without having obtained the Parliament's opinion. The Parliament examined the proposal on 18.1.1993 and proposed 17 amendments.

In spite of the fact, that the regulation was already in force, the Parliament, continued with its procedure like nothing would have happened.

The reasoning in this case is related to the previous case, the Isoglucose judgment. Here, the Council argued however, it would have exhausted – without success – all the procedural means at its disposal in order to obtain the opinion of the Parliament.[25] In so far this case would be different than the previously discussed judgment. The impossibility to consult the Parliament could not prevent the Council from exercising its final decision-making power. A paralysis of the decision-making process would be avoided.[26]

In order to justify the adoption of regulation without an opinion of the Parliament, the Council raised the factual consequences of a legal vacuum in the system of EU law[27] as well as legal ones.[28] Thanks to this reasoning, one can see different lines of argument. The Council used both possible facts and legal reasons. The Council has used different arguments in order to suspend the obligation to consult the Parliament. The consultation would have "constitutional character".[29] Similar, one can understand a statement of the General Advocate. General Advocate admitted that notwithstanding a request made to the Parliament to examine a proposal under the urgency procedure or in an extraordinary session, it nevertheless would prove impossible to obtain the opinion within the time-limits imposed in the Union interest.[30] The General Advocate referred to the urgency character of the consultation in this case due to the

[24]CJEU, judgment from 30.03.1995, I-662.

[25]At the point of view of the Council this would be the correct reading of the 'Isoglucose' judgments. In which the regulation was annulled because the Council had not availed itself of all the possibilities for obtaining the opinion in good time. In the present case however, the Council would have fulfilled all the requirements in order to obtain an opinion of the Parliament.

[26]Opinion from 13.12.1994, I-649.

[27]Opinion from 13.12.1994, I-650 ("This could cause a tangible damage to the exports of beneficiary non-member countries and also to economic operators in the Member States, who would be deprived of a legal instrument on which they were entitled to rely in planning their activities. … a legal vacuum of that kind would also risk seriously harming the Community's relations with the developing countries").

[28]That could involve the Council in liability, or at least leave it open to a declaration of failure to act.

[29]Opinion from 13.12.1994, I-648, p. 8.

[30]Opinion from 13.12.1994, I-649.

Worth noticing is the used phrase "paralysis of the … decision-making process" by the Council that could be caused by the "impossibility to consult". It clearly blames the Parliament, which would make it impossible to consult it, for the paralysis of the legislative procedure. It is indeed untypical, when one institution, that takes part in the legislative procedure, blames another entity of paralyzing this process. One has to ask and argue, where is the diplomatic charm that should be applied in relations between EU institutions. Because "paralysis" may go a little bit too far, if one wants to express that an institution would not cooperate and act in due time and good faith. In similar context may appear the statement of the General Advocate, who called the reasoning of the Council as an "absurd view".[31] This example supports the conclusions drawn in respect to previous case *Roquette Frères* that the EU institution refer to legal and factual reasons in order to justify the violation of the provisions of the Treaty. In the EU the diplomatic practice, the acting of EU institutions, may overrule the rule of law.[32]

Advocate General did not agree with Council with respect to the power to adopt a regulation – only in exceptional cases – without the foreseen opinion of the Parliament. It would constitute a derogation from the rules on the formation of legal acts, without an explicit Treaty provision allowing it. The institutional balance could be alterated, without permission in the Treaty and outside the procedures and forms of the 'constitutional charter' laid down for revision.[33] At the same time Advocate General underlined, those rules could be changed.[34]

The Council would have void rights of Parliament and would try to justify it by applying technical or economic reasons. The overriding urgency and the need to safeguard a fundamental interest of the Union would enable the Council to adopt a regulation in breach of the Parliament's "constitutional" prerogatives, "unreasonable".[35]

The Court of Justice did not agree with the reasoning of the Advocate General. It decided regarding inter-institutional dialogue, the particular base of the consultation procedure.[36] This dialogue would be subject to the same mutual duties of sincere cooperation as those, which govern relations between Member States and the EU institutions.[37]

It would be uncontested that the Council informed the Parliament of the need to adopt the regulation before the end of 1992, so that it could enter into force on 1.1.1993. It would also be undisputed, that this request was justified.[38]

However, the Parliament decided to adjourn the plenary session, without having debated the proposal for the regulation. This decision was based on reasons unconnected to the contested regulation and did not take into account the urgency

[31]Opinion from 13.12.1994, I-650, p. 14.
[32]Like it is now in case of informal trilogues.
[33]Opinion from 13.12.1994, I-652, p. 20.
[34]Taking into account the previous and this case and noticing, that (diplomatic) practice of the institutions overrules explicit provisions of the Treaty, one may be tempted to give an example for it. A change of the rules would occur, if all EU institutions would agree unanimously on the alteration of the Treaty rules. Like it is now in case of informal trilogues.
[35]Opinion from 13.12.1994, I-658, p. 33.
[36]CJEU, judgment from 30.3.1995, I-668, p. 23.
[37]See Case 204/86, 1988, ECR 5323, p. 16.
[38]CJEU, judgment from 30.3.1995, I-668, p. 24.

of the procedure.[39] The Parliament would have failed to discharge its obligation to cooperate sincerely with the Council.

There was no interest on the side of the Parliament to work together with the Council on this regulation. The essential procedural requirement of Parliamentary consultation was not complied with due to the Parliament's failure to cooperate sincerely with the Council.

c) Case C-417/93 (European Parliament *vs.* Council)

In this case[40] the Commission adopted a proposal for a new regulation, based on Articles 235 of the EEC Treaty and Article 203 of the EAEC Treaty. The Council requested twice to apply the urgent procedure, if necessary, by convening an extraordinary session, so that the opinion of the Parliament could be delivered on time. The Parliament agreed to that second request, unlike in case of the first one. The Parliament however rejected Commission's proposal. In spite of this negative opinion, the Council adopted the Regulation on 19.7.1993. Subsequently, the Parliament has filed a law suit against the Council in front of the Court of Justice.

In front of the Court of Justice, the Parliament argued it would be the only one of the institutional participants in the consultation procedure (political institutions[41] and Member States) not to be present at Council meetings.

Furthermore, the consultation of the Parliament would be a mere sham or fiction in this case since the Commission's proposal immediately became the subject-matter of discussions in the Council. Discussions in the Council started even before the proposal had been officially referred to the Parliament.[42] By the time it was referred to the Parliament, discussions within the Council were so advanced that the subject-matter of the consultation was a different proposal (the Commission's proposal was by then out-of-date and obsolete). Although – at that point – the Council had not yet formally adopted the regulation, it has already made the decision on the substance of this legislative draft. Such conduct would constitute not only an infringement of an essential procedural requirement but also a misuse of powers and a breach of the duty of cooperation in good faith between institutions.[43]

At Advocate General's point of view the Council may act notwithstanding the absence of Parliament's opinion if it establishes that it has '... exhausted all the possibilities of obtaining the preliminary opinion of the Parliament', if the latter may not exercise a right of veto.[44] Furthermore, it would be fruitless to wish to constrain the Council to await the Parliament's opinion on a Commission's proposal before starting any study, discussion or consideration of the proposal in question.[45] The practice of the Council would be justified for legal reasons and for reasons of legislative policy.

[39]CJEU, judgment from 30.3.1995, I-669, p. 26.
[40]A law suit of the Parliament against the Council occupied the Court of Justice in this case.
[41]The Commission is invited to meetings of the Council and Member States.
[42]CJEU, case 417/93, p. 8.
[43]CJEU, case 417/93, p. 8.
[44]Opinion of GA, case 417/93, point 27.
[45]Opinion of GA, case 417/93, point 45.

In the opinion of the author, depending of any debate on the legal act in the Council on a statement of the Parliament would mean that the Parliament – by its work plan – could in fact influence the work and agenda of the Council. Taking into consideration, that negotiations on legal acts take months or years, the Parliament could exercise its influence during a very long period of time.

Moreover, the facts in the discussed cases show that the Parliament may not want to cooperate, finish discussions on the proposal[46] and let it enter into force. Meetings were postponed for several times, causing "paralysis" of work of the EU institutions.

The Advocate General gave further reasons for the position of the Council.[47] He concerned a.o. the fact that the Parliament didn't agree to apply the urgent procedure in this case. Moreover, there was no legal duty that would require the Council to abstain from acting and dealing with the proposal on a new legal act until the Parliament's opinion has been delivered. The consultation would not require that the text on which the Parliament issues its opinion and the text after the Council has worked on, should correspond. Moreover, the Parliament would give its opinion on the Commission's proposal.[48] This would distinguish the consultation procedure from the legislative co-decision procedure where 'agreement on a joint text' would be sought or from the cooperation procedure where the consultation of the Parliament refers both to the Commission's proposal and to the "common position" adopted by the Council.[49] Finally, and in contrast to the co-decision procedure[50], the consultation procedure would permit it to depart from the text submitted to the Parliament.

All the reasoning of the parties didn't provide sufficient line of argument. The Court of Justice didn't decide considering these reasons. Moreover, it referred to the hearing and to the fact that the Parliament did not adduce any evidence to the contrary. That is why the court rejected first plea in law as unfounded.[51]

This means that the Court decided on the grounds of burden of proof. This way of decision-making process is well known in civil procedure, but not in public or European law. It may mean that the court was not keen to decide on the rights or duties of EU institutions. Their conflict took place 1993. 1995, two years later, as

[46]Since the Members of the European Parliament cannot have the knowledge the officials of the Commission have (they don't consult Member States), one has to ask on the further reason for the common postponing of discussions: possibly they wait for opinions from sector or lobbyists on the Commission's proposals.

[47]Opinion of GA, case 417/93, point 46.

[48]Opinion of GA, case 417/93, point 49 and 61.

[49]The Court of Justice shared the legal assessment of the Advocate General in this case. The Council would be entitled to search for a general approach or even for a common position before the Parliament's opinion would be delivered, provided that it would not adopt its final position before being apprised of the opinion. Furthermore, such a prohibition would not exist under any institutional or procedural objective. CJEU, case 417/93, p. 10. In addition, the taken approach reflects the legitimate concern to make good use of the period during which it is awaiting the Parliament's opinion in order to prepare its own position and thus to avoid unnecessary delay. CJEU, case 417/93, point 11.

[50]Under the under-co-decision procedure, the Council might not adopt a measure different from that on which the opinion was given.

[51]CJEU, case 417/93, point 15.

the court – another institution – issued judgment, it might still have felt tensions occurred in the past and preferred to avoid a clear ruling.

A great reluctance in this case one could observe on the opinion of General Advocate. He referred to a statement made by the Parliament[52] and noted its wording. The Parliament would implicitly accept that the Council may, before receiving the Parliament's opinion, debate the Commission's proposal.[53] However, if a party expresses its point of view – in front of the court – in a direct manner and sues against another institution, there may be no room for assuming what does this party mean "implicitly". The General Advocate drew conclusions that have no legal basis in the Treaties ruling on inter-institutional matters. Moreover, the rules of procedure of EU institutions would not cover this kind of reasoning.

Regarding the second plea the court stated that the legal aspect in question, the amendment to the Commission's proposal was indeed a substantial one.[54] Nevertheless, the overall balance of powers allocated to the Commission and the Council would not be decisively affected by the choice between the two types of committee at issue so that the amendment to the Commission's proposal would not be substantial.[55] Also in this regard one may notice a slight tendency of the court towards the reasoning of the Council.

A few general references are necessary.

First, the postponing of the vote on 27.5.1993, taking under consideration "view of the Council's position ..." raises questions, since the Council applied at the end of March for implementation of the urgent procedure in this regard. This request was rejected. Nevertheless, the Parliament could notice the urgency behind this request and the legal proposal. However, the Parliament did not implement the urgent procedure – on a request made for several times by the Council. Moreover, it demanded the Council not to progress with works on the legislative proposal until it will not receive a formal statement of the Parliament.

Worth noticing is also the argument, the Parliament would be only institutional participants in the consultation procedure not present at Council meetings.[56] However, in the Member States' constitutional orders it is unusual that Parliament is present at governmental meetings. The principle of separation of powers could be violated, if the Parliament would attend the meetings of the Council. It is a fact, that representatives of the Council and the Commission take part in meetings of the Parliament. This participation is justified since account for legal proposals and their outcomes in front of the Parliament. Nevertheless, this reasoning shows the strive for political power and legislative influence of the Parliament.

In this regard, there is one more fact that can present mutual distrust and strive for power of the EU institutions, one can notice in this example. On 21.11.1990, the Parliament adopted a resolution and obliged the Council to await Parliament's opinion.[57] In this resolution the Parliament noted that 'in numerous cases' the

[52]Opinion of GA, case 417/93, point 56.
[53]Opinion of GA, case 417/93, point 57.
[54]CJEU, case 417/93, point 24.
[55]CJEU, case 417/93, point 26.
[56]GA, Opinion, case 417/93, point 19.
[57]O.J. C 324, p. 125.

Council had begun work on a Commission's proposal before the Parliament had delivered its opinion and that the Council had even concluded political agreements in advance. This resolution constitutes an example how the Parliament tried to influence the work plan of the Council, although there were no legal provisions to support it. At the same time, when the Council applied to use the urgent procedure of the assembly, this actor rejected it. It did not let other institutions exercise any control over its schedule. Based on this example the reader can notice double standards applied by the Parliament in the law-making process.

d) Case C-156/93 (Parliament *vs*. Commission)

1995, two months after the judgment in case C-417/93 (Parliament *vs.* Council), the Court of Justice dealt again with matters regarding the relations between the institutions. This time the Parliament filed a law suit against the Commission. The Council intervened to support the Commission. The Parliament challenged both the admissibility and the merits of that intervention.

The Parliament claimed here that the effect of the contested regulation was to exclude it from the procedure. This matter would fall within the basic regulation that should be based on Article 43 of the Treaty, which provided the consultation of the Parliament. The Parliament questioned the applicability of the legal basis. The Commission would have added the question whether GMMOs can be authorized in the organic production of agricultural products to the regulation in order to apply a legal basis that does not foresee the consultation of the Parliament. That is why the Commission would excess its powers.

The Court of Justice referred its previous judgments[58]. The Council could not be required to rule all details of the regulations concerning the common agricultural policy according to the procedure laid down in Article 43 of the Treaty. Only the essential elements of the matter must be adopted in accordance with the procedure foreseen by that provision.[59] The court rejected this part of the law suit and – at the same time – it pointed out that the Parliament cannot have influence on all the details of an aspect.

In another part of the law suit the Parliament claimed the Commission would have abused its discretion. It referred to the debate at the Parliament and to the statements of Commission's representative made during the debate on the basic regulation. One could understand it as a commitment to follow a procedure laid down in the basic regulation and apply a legal base that foresees a consultation of the assembly.[60]

The Commission objected this interpretation.[61] It would not have tried to abuse its discretion. It applied the legal base not in order to avoid the consultation of the Parliament. The Council supported this reasoning. The Commission could not legally bind itself by a declaration of intent, made during parliamentary debate and certainly

[58]In particular, Case 46/86 Romkes [1987] ECR 2671, p. 16; judgment of 10 May 1995 in Case C-417/93 Parliament v Council [1995] ECR 1-1185, p. 30.
[59]CJEU, point 18.
[60]CJEU, point 28.
[61]CJEU, p. 29.

not before the Council had reached a position on the proposal and conferred implementing powers on the Commission.[62] Consequently, the Commission's declaration could not have the legal effect as attributed by the Parliament.[63]

The reasoning, an EU institution would have bound itself during a debate deserves the attention of the reader. Clearly, EU institutions argue by all means both in private (tête-à-tête) in a solely inter-institutional exchange and in front of the Court. A debate, spoken words cannot cause a legal bound, especially if they state facts opposing the text of a legal act. Moreover, a representative of an institution cannot assure other stakeholders by means of oral statements or unofficial exchange of views (like an E-mail), a new legal act would not create a precedence. What one considers as science fiction in national legal orders seems to be a commonly used measure in the inter-institutional exchange at the European level.

In addition to common distrust and strive for more political power and influence showed in previous cases, this case presents a mistrust between the institutions and shows interesting arguments, like the expressed assumption, the other institutions would misuse its powers. It is unclear if the Commission does misuse legal bases in order to enjoy more freedom during the legislative procedure or not. But it is obvious that this argument appears very often in the proceedings in front of the Court. That is why it deserves the attention of the reader.[64] To conduct a legislative procedure with less actors to consult or involve is clearly easier than to consult several institutions, which enjoy extensive rights and may issue statements, that would bind Commission and Council. Legislative procedure involving less actors can be accomplished faster and demands less effort, less resources of the Commission. Moreover, it is more likely that the legal act as drafted by and agreed within the Commission, will stay "untouched". The more participants, the higher the risk of changes and – at Commission's point of view– unintended changes. The legal act drafted by the Commission could lose its focus and impact. Amendments of other institutions can cause a distortion of the substance of the legal act. That is why the assumption of the Parliament, the Commission would pick the legal base according to its interests, can constitute – in general – a valid point, why the Commission decides to use specific legal base.[65]

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[62]CJEU, p. 30.

[63]The Court of Justice of the European Union referred its case law, in which it defines misuse of powers as the adoption by a community institution of a measure with the exclusive or main purpose of achieving an output other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case. The CJEU rejected also the second plea of misuse of powers. CJEU, point 31, judgment in case C-248/89, p. 26.

[64]See previous cases, footnote 22.

[65]A completely different question is the one, how to prove an assumption this kind. How to prove the Commission, it would misuse a legal base in question. Frankly, it is barely possible. One would have to discuss it with members and representatives of this institution, listen to their arguments and read between the lines. Anyway, once a legal base is applied and a part of a legal proposal, one cannot hope, the Commission would change it during the negotiations in the Council or with the Parliament. At this time, the legal act in question is already agreed within the Commission (all Directorate General) so that one common position of the Commission entered into force. A single representative does not enjoy the power to change it. He can, however, admit it unofficially.

Re-consultation of the European Parliament

The Case C-21/94[66] deals with Parliament's right to re-consultation before adopting a directive. The lack of a second consultation would constitute an infringement of its right to take part in the legislative process.

According to the Court of Justice, the duty to consult the European Parliament in the course of the legislative procedure implies the re-consultation whenever the text finally adopted, viewed as a whole, departs substantially from the text on which the Parliament has already been consulted on. The re-consultation would not be necessary if the amendments essentially correspond with the views of the Parliament.[67] In spite of the settled case law, the Council failed to re-consult the Parliament.[68]

The motions of the Parliament in the proceedings provide further insights regarding the institutional (in)balance. The Parliament suggested to order the Council an adoption of a new legislation within a period fixed by the Court. This would prompt Council to resume as quickly as possible the procedure for the proper replacement of the directive.[69] The Court did not uphold the request of the Parliament. It refused to impose a time-limit for Council to adopt a new directive. The Court would lack the jurisdiction to oblige the Council. It may review the legality of an act under the Treaty.[70] The Council is nonetheless obliged to heal the infringement it has committed within a reasonable time.[71]

This particular request of the Parliament shows how little trust it had in the Council to re-consult it and follow the judgment. It applied for a sentence in the ruling of the Court to be sure. Possibly, the Parliament lost its trust in the re-consultation or the cooperation with the Council lacked an actual exchange of views, let alone productive cooperation on legislative matters. Nevertheless, the EP, as a lawmaker,

[66]Reports of Cases, 1995, I-01827.

[67]See for example, the judgment in Case C-388/92 Parliament ν Council [1994] ECR 1-2067, p. 10; Case C-280/93 Germany ν Council [1994] ECR 1-4973, p. 38. In a further case C-388/92, the Parliament approved the Commission's proposal, which was subject to three compromise amendments. The resolution mentions that the Parliament 'requests the Council to notify Parliament should it intend to make substantial modifications to the Commission's proposal'. Although the duty to re-consult the Parliament was already settled case law, the Parliament had a strong need to remind the Council to do so. The fact, that this issue built a case in front of the Court of Justice, shows that the reservations of the Parliament were justified. Similar call for re-consultation the Parliament expressed in case C-392/95.

[68]In case C-65/90, the regulation was adopted during a Council session on 21.12.1989, in which the Commission amended its original proposal in line with the text of the regulation adopted. The Council adopted the regulation in accordance with the amended proposal by a qualified majority without re-consulting the European Parliament on the amended proposal. This factual basis shows how – according to the current needs – the interests and rights of institutions may shift away or be disregarded. The Council was defending its violation of the Treaty by stating that there would be no legal consequences as regards the Council of consulting the Parliament. According to the Advocate General, the fact that the Council is not legally bound by the Parliament's opinion would not mean that the absence of further consultation if the initial proposal is substantially amended does not in any way affect the prerogatives of that institution regarding participation in the Community's legislative process (opinion, of 26.02.1992, I-4606, p. 25).

[69]CJEU, judgment from 5.7.1995, I-1855, p. 30.

[70]CJEU referred in this case Article 173 of the Treaty.

[71]CJEU, judgment from 5.7.1995, I-1855, p. 33.

should have known that the Court – respecting its rule of procedure – may not rule on this motion and may not sentence the Council to re-consult the Parliament.

Most important, the Parliament should have known that judgment imposing on the Council a time-limit to adopt a new directive, could valid the principle of separation of powers. This principle constitutes a constitutional guarantee. It is worth noticing that only the Parliament applied for this motion.

Withdrawal of the Draft Legislative Proposal by the European Commission

The case C-409/13[72] deals with withdrawal of a legislative proposal by the Commission.[73]

During the negotiations on a regulation, the Council and Parliament had different points of view regarding delegated and implementing acts, than the Commission.[74] During several informal trilogues[75] the parties were trying to reach a compromise. During the fourth trilogue, the Commission made a proposal regarding the procedure for granting macro-financial assistance. That consisted of a 'combination of (i) detailed conditions for [macro-financial assistance] …, (ii) informal consultation mechanisms upstream [from the proposed decision-making process], (iii) the inclusion of up to four delegated acts, (iv) the selected use of comitology and (v) the various reporting and evaluation mechanisms'.[76]

According to the wording of the Treaties, the Commission may only propose legislation. However, this particular case shows, that the role of the Commission during legislative procedure ends under no circumstances with an exercising of its initiative right. Moreover, it continues, during the negotiations with Parliament and in the Council. The Commission may also conciliate subsequently, during trilogues.

During the informal negotiations the institutions were looking for an agreement.[77] The Commission expressed its compromise-will issuing a 'non-paper' entitled 'Landing zone on implementing acts, delegated acts and co-decision in the MFA Framework Regulation'. A non-paper – as a document – is usually submitted few days or hours before the beginning of the negotiations or it even circulates just during the negotiations. It is an instrument commonly accepted and used during negotiations in Brussels and differs from "the Commission proposal". This raises a question regarding the legal quality of a non-paper.

[72]Digital ECR.
[73]Opinion of 18.12.2014, p. 4.
[74]Opinion of 18.12.2014, p. 14.
[75]Katz, Magdalena, Must the Democratic Deficit of the European Union Go on – Remarks Based on Practice of EU Institutions, as Expressed in Official Statements, International Journal of Law and Society, 2006: Skowron M., Secrecy During the Ordinary Legislative Procedure of the European Union: The Legal Dimension, European Public Law, Volume 29, Issue 2 (2023) pp. 219 – 248, https://doi.org/10.54648/euro202301.
[76]Opinion of 18.12.2014, p. 11.
[77]Compare for wording footnote 49: Skowron, M., Secrecy During the Ordinary Legislative Procedure of the European Union: The Legal Dimension, in: European Public Law, Volume 29, Issue 2, 2023, pp. 1 – 30 (interinstitutional agreement is a European contract).

At the end of the fourth informal trilogue, Parliament and Council suggested diverging compromise solutions, i.e. the ordinary legislative procedure for the adoption of a decision to grant macro-financial assistance, using an implementing act for the adoption of the memorandum of understanding with the beneficiary country and delegating the Commission the power to adopt certain acts linked to the assistance granted.[78] In practice, this means a mix of the procedures as laid down in Articles 290 and 291 TFEU.[79]

This reasoning shows that compromises and compromise proposals don't really serve a better legislation. Their point is a deviation of competencies between the institutions or between institutions and Member States. However, this division of responsibilities and powers does not have to serve better legislation. In reality, it secures the (political) influence and power.

This (political) point makes the difference between the two procedures according to Article 290 and 291 TFEU. In case of Art. 290 Parliament and Council enjoy in fact more rights, while Article 291 gives more legislative competencies to the Commission.[80] The legal question that arises here is the following: since the Treaty foresees two differing procedures, what is the point of mixing them within one procedure. And – or better – moreover, could this be the will of the Contracting States which concluded the Treaties. This could violate the Treaty that foresees those two separate procedures.

Coming back to the question of competencies in this particular case, implementing acts would provide the Commission with more responsibilities.

Another relevant point is an intense exchange of views regarding the question of competencies. The fight for political powers occurred in an advanced stage of the legislative procedure – the fourth trilogue. It is indeed inconceivable that questions this kind would arise within a progressed stage of a national legislative procedure of Member States. Moreover, all relevant competencies are ruled on already in a draft of a legal proposal. The Court of Justice of the European Union often refers Member States' legal orders as an argument. However, the legislative procedures of Member States and EU differ in crucial points.

During the sixth informal trilogue, Parliament and Council agreed to replace the implementing act with the ordinary legislative procedure. The Commission`s representative officially expressed his disagreement with this approach.[81] The Chairman of Coreper[82] stated in a letter to the Vice-President of the Commission that

[78]Opinion of 18.12.2014, p. 12.

[79]Treaty on the Functioning of the European Union, Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, pp. 47–390, http://data.europa.eu/eli/treaty/tfeu_2012/oj

[80]In a brighter view, that covers also Member States, there is a further perspective possible: since the EU gets more and more competences and national authorities lose them, they may argue, to apply procedures that give bodies more power, in which national experts represent member states' interests and discuss it with the Commission. In relevant, for example purely technical, cases, national experts would prefer to act within procedures according to article 291 TFEU, instead of article 290 TFEU, even though the Council would have more power and influence in legislative procedure according to article 290 TFEU.

[81]Opinion of 18.12.2014, p. 14.

[82]From French Comité des représentants permanents, is the Committee of Permanent Representatives in the European Union.

he deeply regretted the announcement made by the Commission's representative during the sixth trilogue. The Chairman asked the Commission to reconsider its position. An agreement between the Parliament and the Council on the legislative proposal in question appeared very close.

The Vice-President of the Commission stated in a letter addressed to Presidents of the Parliament and the Council dated 8.5.2013 that, at its 2045th meeting, the College of Commissioners had decided to withdraw the proposal for a framework regulation in accordance with Article 293(2) TFEU.[83] The minutes of that meeting state, on this point, that '[t]he Commission approved the line set out in SI(2013) 231'. The Commission's staff considered the ordinary legislative procedure causing a distortion of the proposal for a framework regulation. The procedure would become burden and unpredictable and, above all, decisions to grant assistance in the form of specific regulations would be at the same legislative level as framework regulation. Furthermore, the note referred to constitutional concerns regarding restriction of the Commission's right of initiative.

In spite of the formal withdrawal of the legislative proposal, the Parliament and the Council formalized their agreement in a joint statement adopted on 9.7.2013.

There are further comments regarding the negotiations that deserve the consideration of the reader. At the stage of the adoption of the general approach of the Council or of the debates on the Parliament's report, the Commission stated that the report constituted a good basis for subsequent discussions.[84] November 2011, one of its officials informed Council official that a number of amendments distorted the substance of its proposal for a framework regulation, without referring specifically to the amendment of Article 7 of that proposal. The Commission's 'non-paper' of January 2013 also did not refer to the possibility that its legislative initiative might be withdrawn. Despite its constant presence at the Council's working sessions and at the trilogues, the Commission did not officially manifest its intention to withdraw the proposal until a late stage, namely during the trilogue of 25.4.2013. Its internal note SI(2013)231 shows that it rushed to withdraw its proposal on the very day that the Parliament and the Council were to initial the agreement they had reached.

This statement does not let gain more trust in the action of the Commission. Moreover, it lets assume its decision would be politically motivated rather than better regulation oriented. There is no prohibition in the Treaty that would forbid decisions based on a certain regulation to be issued at the same legislative level as a framework regulation. The Commission, asked by the Presidency of the Council at the meeting of the Working Party of Financial Counselors of 7.5.2013, to inform the delegations whether it intended to withdraw the proposal for a framework regulation, made no reference to the fact that this issue was on the College of Commissioners' agenda planned for the following day.[85]

Some Member States, acting as intervener in front of the Court of Justice, held that the Commission excluded any discussion or negotiation with the co-legislators on the content of the provision, that the co-legislators shared a common approach

[83]Opinion of 18.12.2014, p. 15.
[84]Opinion of 18.12.2014, p. 88.
[85]Opinion of 18.12.2014, p. 89.

on.[86] Additionally, the Commission withdrew the proposal for a framework regulation at a very late stage of the legislative procedure.

In front of the Court of Justice, Commission argued not to know the date of the next trilogue meeting, as internal note SI(2013)231 was drafted. It would be a coincidence that the contested decision was adopted on the day on which the co-legislators were to finalize an agreement.[87] A premature reference to the possibility that the proposal for a framework regulation might be withdrawn would have disturbed the serenity of the inter-institutional discussions and the smooth running of the legislative procedure.

During the legislative procedure the role of the Commission is to conciliate between the institutions, co-legislatures. Every date of every informal trilogue meeting is agreed with the Commission's representatives. This means, that these two actions, i.e. appointing for informal trilogue, which is supposed to bring the negotiations forward on the one hand and having issued the internal note, which deals with a withdrawal of the proposal, on the other, do not agree. Moreover, it constitutes a proof that the Commission does not fulfill its role to conciliate between the co-legislatures. Because in this particular case the co-legislatures already agreed on the common approach.

Moreover, it is impossible to reason with the arguments of the Commission, delegated acts would distort the substance of a legal act. Since there is a foreseen way to issue further legal acts (delegated or implementing acts), it is unclear, how could one of those ways distort the substance of the basic act. The Commission did not provide any thorough reasoning in this regard.

The Factual basis of the Judgment itself

In case 25/70[88], the factual basis of the judgment, constitutes a further interesting reasoning technique commonly used by EU institutions. The Court of Justice, dealing with the question of the legality of the so-called Management Committee procedure refers the fact, that this procedure would be re-enacted by numerous other agricultural regulations.[89] The question arises, when does a court refer a fact in its judgment. At first, this fact does not seem to have further meaning. And all facts, on which the judgment is based on, should be referred to.

Thus, the fact that several or many regulations would refer to a certain procedure, constitutes a valid reason regarding legality of a legal act of the EU – at the point of view of EU institutions. The Court does see it as an important point and an accurate reason. This also shows that the Union tends to establish a system and refers its – established – system as a reason in a procedure. Possibly, EU institutions refer the systems created in any kind of procedures, in particular both in front of the court and during negotiations in the Council regarding new regulations, directives and other acts.

[86]Opinion of 18.12.2014, p. 91.
[87]Opinion of 18.12.2014, p. 94.
[88]Report of Cases, 1970, 01161.
[89]CJEU, judgment from 17.12.1970, 1171, p. 4

Relations between EU institutions and Member States

The differences of opinion during legislative procedures occur both in inter-institutional context as well as between EU institutions and Member States. In case 68/86[90] the United Kingdom of Great Britain and Northern Ireland, supported by Kingdom of Denmark, filed a law suit against Council of the European Communities, who was supported by Commission. The plaintiff applied for declaring a Council Directive void. This case constitutes a parallel to previously discussed "interinstitutional" case C-156/93, in which the legal base, at the point of view of the applicant, was used in order to void its consultation right.

Here, in the context between Member States and EU institutions, the applicant claimed that the directive in question, which was adopted by a qualified majority on the basis of Article 43 of the Treaty, should have been based on both Article 43 and on Article 100, which requires unanimity on the part of the Council.[91] It would be necessary to base the directive at issue on those two articles. In the applicant's view, that aim of legislative draft would be covered by Article 43 and Article 100. Previous practice of the Council would bear out the need for that dual legal basis. On the contrary, both Council and Commission held Article 43 of the Treaty for the appropriate legal base.

The Court pointed out – with regard to the correct legal basis – that this argument would not be a purely formal one, inasmuch as Articles 43 and 100 of the Treaty would entail different rules regarding the manner in which the Council may arrive at its decision. The choice of the legal basis could thus affect the determination of the content of the contested directive.[92]

The Court referred its judgment of 26.3.1987 in Case 45/86[93]. In the context of the organization of powers of the Community, the choice of the legal basis for a measure must be based on objective factors, which are subject to judicial review. A mere practice on the part of the Council cannot derogate from the rules laid down in the Treaty.[94] Such a practice cannot therefore create a precedent binding on institutions of the EU with regard to the correct legal basis.

The reasoning in this regard may astonish. A mere practice that could influence the question of the proper legal basis of a legislative act. It turns out, it could. Neither the defendant nor any other party of the procedure did deny findings of the applicant, that the Council departed from its practice of basing measures in the field in question on Articles 43 and 100 of the Treaty.[95] It means that the practice of the Council was violating the provisions of the Treaty.

It is worth noticing that the Council decided – contrary to the votes of the United Kingdom and Denmark – to adopt the directive by means of the written procedure.[96] This constituted a breach of the Rules of Procedure of the Council.[97] Moreover, the

[90]Report of Cases, 1988, 00855.
[91]CJEU, judgment from 23.02.1998, 894, p. 4.
[92]CJEU, judgment from 23.02.1998, 894, p. 6.
[93]Commission v Council [1987] ECR 1493.
[94]CJEU, judgment from 23.02.1998, 898, p. 24.
[95]CJEU, judgment from 23.02.1998, 898, p. 23.
[96]CJEU, judgment from 23.02.1998, 901, p. 43.
[97]CJEU, judgment from 23.02.1998, 902, p. 49.

United Kingdom opposed the use of the written procedure as well as the directive itself.

This example shows that there are cases, in which an opposing opinion of a participant does not matter. The EU institutions, some Member States, try to force their will no matter what opposing opinion is expressed and stressed out. The written and agreed text of the Rules of Procedure is left aside, if there is a belief among the majority of involved and acting parties to do the "right" thing.

Since the informal trilogues do bypass the written provisions of the Treaty and are established by practice of EU institutions, one must argue, if the CJEU applies double standards: regarding the legal base, the EU institutions cannot – according to the court – create a precedence derogation from provisions of the Treaty (what present case shows). However, regarding the informal trilogues, that serve and aim to derogate Treaty rules, the EU institutions are free to create precedence.

Findings

The referred cases and arguments exchanged present different techniques and tactics that are well known to officers of EU institutions, since they apply them during the law-making processes over the years on a regular base. This variety of tactics and ways to gain more political influence and power may result from the impact of the diplomacy, that plays an important role in this regard. Further reason can be the significant amount of actors, which constitute officers of all three EU institutions and representatives of 27 Member States taking part in negotiations. Surely, there are many involved parties with opposing interests. Moreover, all the parties apply EU law standards; during law making process all Member State representatives enjoy immunity, just like EU officers. That is why the diplomacy seems to be the crucial factor for the character of the EU law making process.

The significant amount of cases dated back to 1993 lets us assume that there seemed to be a crisis in the mid 90ies between the EU institutions. However, it is also possible, that the EU institutions had to get used to first and establish their relations anew after the Maastricht Treaty came into force 1992. The presented tactics constitute a proof that the EU institutions were using their rules of procedure in order to cause and actively influence further Treaty changes. After the initial fight for political influence, the institution might have decided to work together in order to accumulate competencies and shift them away from Member States.

The presented cases show different tactics that aim more power and political influence. A suitable legal base may make a legal proceeding easier, since it makes participation of some actors obsolete (C-156/93) or does not require unanimity among Member States (case 68/86). Moreover, it can make a law-making proceedings possible, for example if a legal base would require unanimity among Member States[98] and the Commission knows that this would lack (since, for example, EU agencies or

[98]This particular reason gained in importance since Lisbon Treaty in 2009, which revoked unanimity in many cases and introduced majority vote. Even Member States which voted against particular law in the Council are obliged to implement this law. At the same time the European Parliament was given more rights.

institutions would gain more competencies on the expense of Member States, who would lose them) and thus the legal initiative would not be successful (and therefore the EU would not be able to gain more political powers).

Another way to gain and keep more competencies is to issue a legal act that foresees further legal acts. Here the question arises if the derived acts should be issued according to article 290 or 291 TFEU. Those respective provisions mention either delegation of power or implementing acts. It means also that the actors differ, depending on the applied article. What follows is that further competence arguments arise during negotiation on the basic legal act constituting the legal base for issuing delegated or implementing acts.

The tactics do not only refer to the phase of initiative (question of an appropriate legal base), but they are also applied by the EU institutions during trilogues until the end of the procedure, since the legislative proposal may be withdrawn, if the initiating institution cannot accept the outcome (Commission changed its proposal after consultation of EP, during Coreper).

The discussed cases show how institutions ignore procedures or outcomes of discussions of other institutions (EP was advising on a regulation in January, although the Council issued it in December, year before) and continue the discussions on a legal act in their own manner (Council and Parliament continued to work on a legal act and put it in force although Commission withdraw its proposal), how they disrespect the settled case law[99] and written request of institutions. One has to ask if there really was no way to recognize each other's rights and focus on solid and just law making in good faith.

In general one has to classify some of the tactics as unusual for diplomatic relations. But most importantly, there is the danger, that law making within EU does differ from Directorate General to Directorate General and depends more on representatives of institutions acting and conducting the negotiations in particular case than on a one approach and technique. This makes it less foreseeable for those who apply the law and have to interpret it.

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[99]For example settled case law regarding re-consultation of Parliament C-388/92, C-392/95. In spite of the fact, that the Parliament explicit asked for re-consultation, the Council finished the discussions without referring it back to the Parliament.

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