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

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The law of the European Union enjoys direct effect in 27 Member States without a prior transformation. This is a unique constellation since its activity is influenced – to a high level – by the diplomacy and diplomatic relations. The law making process of this organization is influenced to a high level by diplomatic relations. It is indeed barely possible to measure the extent to which the diplomacy influences every single legal act that the EU issues. However it is possible to read between the lines and study cases of the Court of Justice. This could offer first overview regarding the topic in question. The following paper deals with the discrepancies between the EU institutions that continue since its beginnings and occur during law marking process. It shows which interests 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.

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Keywords: *EU legislative procedure, formal trilogues, informal trilogies, EU institutions, strive for power*

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Introduction

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

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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.

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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 agreement on a legislative proposal.

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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.

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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 that Council Regulation No 1111/77 of 17.5.1977 laying down common provisions for isoglucose[1] was partially invalid.[2] Following that judgment, the Commission laid before the Council ~~on 7 March 1979~~ a proposal for a regulation amending the provisions of Regulation No 1111/77, which was held invalid. 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". Pursuant to Article 5 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.

The President of the Parliament wrote to the President of the Council a letter in which it was said: "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... given on 25 October 1978" and "to the extreme importance for the public". Those considerations were set out in the fourth recital in the preamble to the regulation.[7]

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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.
[6]CJEU, Report of cases, 1980, I -3333, 3340.
[7]CJEU, Report of cases, 1980, I -3333, 3340.

1 In his statement, the President of the Council referred to legal and factual
2 reasons that were supposed to justify the adoption of the regulation without
3 receiving a prior obligatory statement of the Parliament.
4 At its sitting on 14.12.1979 the Parliament adopted a motion for a resolution
5 to intervene in Cases 138/79 and 139/79 before the Court of Justice of the
6 European Communities so that the Council's adoption of Regulation No 1293/79
7 without obtaining the compulsory opinion from the European Parliament can be
8 censured.
9 Here, the used word “censured” presents the need of the Parliament to
10 proceed against the Council. It is also interesting, that the Commission wanted
11 to and could intervene in support of the contentions of the Council. So, in this
12 case there were two institutions having the same point of view, against one – the
13 Parliament.
14 Already this factual basis shows the common practice of EU institutions:
15 there are often circumstances that are referred to in order to justify an exception
16 from the legal provisions of the respective version of the Treaty. This practice
17 hasn’t changed since the 70ies, when the institutions were of a different view
18 over the consultation procedure. Now, however, they still refer to similar reasons
19 like for example the speed of the legislative process, when they try to justify the
20 need for informal trilogues. Informal trilogues are negotiations that EU
21 institutions decide to conduct in order not to follow the deadlines of the formal
22 trilogues set up in the Treaty.[8]
23 The paradox here is that the EU institutions are the legal entities who avoid
24 following the provisions of the Treaty on the Functioning of the European Union,
25 speak the legal framework their activity is based on and that provides legal basis
26 and justification for their activity. They refer to facts, such as faster and more
27 flexible legislative procedure, in order to justify the lack of the applicability of
28 the Treaty that – actually – constitutes the legal base of their existence and their
29 activity.
30 Insider views on how the relationships between the EU institutions were
31 shaped back than give the arguments exchanged between the parties in the
32 proceedings in front of the Court of Justice.
33 The Council repeated legal and factual reasons. It admitted that consultation
34 of the Assembly constitutes an "essential procedural requirement" within the
35 meaning of Article 173 of the Treaty.[9] Nevertheless there is discretion in that
36 respect. To support its point of view, the Council – lacking arguments in the
37 Treaty – referred the case law in certain Member States.[10] According to this
38 national case law, a consultative system cannot paralyze the procedure of which
39 part it constitutes. That is why the incorrect nature of the consultation would not
40 necessarily involve an essential procedural defect of a legal act in question.
41 Although the articles of the EEC Treaty provide for consultation of the
42 Assembly, they would not mention the need to issue an opinion by the Assembly.

[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.
[10]CJEU, Report of cases, 1980, I -3333, 3349.

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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 thus valid.

With regard to the meaning of the nature of the consultation, the Parliament put forward[11] arguments following from the Treaty. According to the EP, 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. But neither in the May session nor subsequently did either the Commission or the Council inform it that they would have considered the adoption of the regulation in question before 30.6.1979 as urgent. This statement shows the lack of any communication between the institutions.

The Parliament admitted that there were problems of coordination[13] with the Council and pointed out that it has 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 actual tasks of the EU institutions.

The question arises here 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 would be what could constitute “coordination” problems within a legislative procedure? Do not the involved officers of the Commission or Council know the calendar of meetings of the Parliament or its committees? How do they then plan the process, if they claim, this would be so urgent? Do they only hold the formal requirements and “stay in touch” by exchanging formal letters? Can they allow it, since they are the actors of the same legislative procedure and they are actually supposed and expected to cooperate as close as possible for the sake of the general good – the legislation, which one is enjoying direct effect in 27 Member States across Europe? How far was the chasm between them, since the representative of one institution, a diplomat, 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,

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[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.
[14] CJEU, Report of cases, 1980, I -3333, 3348.

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 from the point of view of 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.

Finally, in regards to the "public" interest in the adoption of rules before 1.7.1979, a ground which refers to the "state of emergency", the Parliament maintained that it is not for the Council 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 it would be through consultation that the parliamentary institution participates in Union's legislative process.[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 true sharing of the power of decision between two authorities. In this regard, 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 would follow that the institution – having complied with the obligation to enter into consultation – would not be bound to follow that opinion and normally 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 referred him to statements made day before by his colleague. It is indeed unusual in the diplomatic circles to refuse answering questions

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[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.

during a debate. Did the representatives of the Commission lose his temper? And it was easier to decide that the statement of the Parliament has "effectively" been issued. What kind of misunderstanding occurred between those institutions that they had to assume – fictitious – that a statement has been issued? Did they do it in order to avoid further cooperation?

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 Assembly was properly informed that the issue would have an emergency nature. 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 also 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 question is 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? Who gave it the right to assume the fiction of a (negative) opinion in order to progress? All this 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 to the effect 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 present 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.

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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, as 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 consequently of 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. But, 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 procedure in cases of urgency under Article 75 of its Rules of

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[19]"Facts and issues" appears 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.[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 Friday 18 December, 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 consultations between the offices of the General Secretary of the Council and the President of the Parliament followed, in the course of which 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 prior opinion of the Parliament.[25] In so far this case would be different than the previous judgment. The impossibility to consult the Parliament could not prevent the Council from exercising its final decision-making power. A paralysis of the Community decision-making process would be avoided.[26]

In order to justify the adoption of the 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] On this reasoning, one can see different lines of argument. The Council used both possible facts and legal reasons. Those different arguments are being used in order to suspend the obligation to consult the Parliament, which would have "constitutional character".[29] In the same respect one can understand a statement made by the General Advocate, as he admits 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]

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[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.

1 Worth noticing is also the usage of the phrase "paralysis of the … decision-
2 making process" by the Council that could be caused by the "impossibility to
3 consult". It clearly blames the Parliament, which would make it impossible to
4 consult it, for the paralysis of the legislative procedure. But, can one institution,
5 that takes part in one and the same procedure, blame another of paralyzing this
6 process? One has to ask and argue, where is the diplomatic charm that should be
7 applied in relations between EU institutions. Because "paralysis" may go a little
8 bit too far, if one wants to express that an institution would not cooperate and act
9 in due time and good faith. Also, too far may have gone the General Advocate,
10 who called the statement of the Council as an "absurd view".[31] This example
11 supports the conclusions drawn in respect to previous case *Roquette Frères* that
12 the EU institution refer to legal and factual reasons in order to justify the
13 violation of the provisions of the Treaty. In the EU law the diplomatic practice,
14 the acting of EU institutions, may overrule the rule of law.[32]
15 Advocate General did not accept Council's argument in respect to the power
16 to adopt – only in exceptional cases – a regulation without the foreseen opinion
17 of the Parliament. He stated, it would mean a derogation from the rules on the
18 formation of legal acts, without an explicit Treaty provision allowing it. The
19 institutional balance could be alterated, without permission in the Treaty and
20 outside the procedures and forms of the 'constitutional charter' laid down for
21 revision.[33] At the same time he underlined, those rules could be changed.[34]
22 The Council would have void rights of Parliament and would try to justify
23 it by applying technical or economic reasons. The overriding urgency and the
24 need to safeguard a fundamental interest of the Union would enable the Council
25 to adopt a regulation in breach of the Parliament's "constitutional" prerogatives,
26 "unreasonable".[35]
27 The Court of Justice did not follow the reasoning of the Advocate General.
28 It decided on the base of its own jurisdiction regarding inter-institutional
29 dialogue, on which the consultation procedure in particular is based.[36] This
30 dialogue would be subject to the same mutual duties of sincere cooperation as
31 those, which govern relations between Member States and the EU institutions.[37]
32 It would be uncontested that the Council informed the Parliament of the
33 need to adopt the regulation before the end of 1992, so that it could enter into
34 force on 1.1.1993. It would also be undisputed, that request was justified.[38]
35 However, the Parliament decided to adjourn the plenary session, without
36 having debated the proposal for the regulation. This decision was based on

[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.

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reasons wholly unconnected with the contested regulation and did not take into account the urgency of the procedure.[39] The Parliament would have failed to discharge its obligation to cooperate sincerely with the Council.

Clearly, there was no visible 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 because of the Parliament's failure to discharge its obligation 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 in June. The Parliament agreed to that second request, unlike in case of the first one. The Parliament rejected Commission's proposal. In spite of this rejection, the Council adopted the Regulation on 19.7.1993. A law suit of the Parliament against the Council occupied the Court of Justice in this case.

During the procedure in front of the Court of Justice, the Parliament has stated that it is 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, not just before the opinion was delivered but 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 in fact so far advanced that the subject-matter of the consultation was a proposal which by then was out-of-date and obsolete. Although at that point the Council had not yet formally adopted the text of the regulation, its decision on the substance had already been taken. 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]

The Advocate General stated that the Council may act notwithstanding the absence of the 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

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[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.

wish to constrain the Council to await the Parliament's opinion on a Commission 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.

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 in 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. Meeting were postponed again and again, causing "paralysis" of work of the EU institutions.

The Advocate General referred further to several reasons for the position of the Council in this case.[47] He concerned a.o. the fact that the Parliament didn't agree to apply the urgent procedure in this case. He also stated that nothing would require the Council to abstain from acting and dealing with the proposal for a new legal act until the Parliament's opinion has been delivered. The procedure of consultation would not require that the text on which the Parliament gives its opinion and the text as it is after the Council has worked on should correspond exactly. Moreover, the Parliament would give its opinion on the Commission's proposal.[48] This would precisely be what distinguishes 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 Parliament is consulted not only on the Commission's proposal but also on the "common position" adopted by the Council.[49] Finally, and in contrast to the co-decision procedure under which the Council may not adopt a measure different from that on which the opinion was given, the consultation procedure would permit it to depart from the text submitted to the Parliament.

All the arguments of the parties in this procedure didn't provide sufficient line of argument. In this case the court didn't decide considering those reasons. Moreover, it referred to the hearing and to the fact that the Parliament did not

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[45]Opinion of GA, case 417/93, point 45.

[46]Since the Members of the European Parliament cannot have the knowledge the officials of the Commission have (they don't have a back office and don't consult Member States), one has to ask on the further reason for the common postponing of discussions: do they – maybe – 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.

adduce any evidence to the contrary. That is why first plea in law must be rejected as unfounded.[50]

This means that the court did not make a substantive decision but that it 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 of the EU institutions. Their conflict took place 1993. Two years later the court, as another institution, might still have felt tensions occurred in the past and preferred to avoid a clear ruling in this case.

A great reluctance in this case one could observe already after the opinion of General Advocate. He referred to a statement made by the Parliament[51] and noted that by the wording of this rule the Parliament implicitly accepts that the Council may, before receiving the Parliament's opinion, debate the Commission’s proposal.[52] If a party in front of the court expresses its point of view in a direct manner and sues against another party, is there really place for assuming what does this party think or accept “implicitly”? Was the General Advocate too shy to draw conclusions on his own, so that he had to refer rules made by one of the parties in order to hold them against this party? Or maybe the still existing tensions between involved EU institutions didn’t allow it to make an independent statement in this particular case.

Regarding the second plea in law the court stated that the legal aspect in question, the amendment to the Commission's proposal was indeed a substantial one.[53] Nevertheless, in this case the overall balance of powers allocated to the Commission and the Council is not decisively affected by the choice between the two types of committee at issue so that the amendment to the Commission's proposal is not substantial.[54] Also in this regard one may notice a slight tendency of the court towards the arguments of the Council.

A few general references may still be done.

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 particular regard. This request has been indeed rejected. Nevertheless, the Parliament could notice the urgency behind this request and the legal proposal. It is worth noticing that the Parliament wouldn’t implement the urgent procedure – on a request made for several times by the Council – but it would demand, that the Council does not progress with his works until it won’t get a formal statement from the Parliament.

Worth noticing is also the argument, the Parliament would be only one of the institutional participants in the consultation procedure not to be present at Council meetings'.[55] But, also in the Member States’ legal orders it is unusual

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[50]CJEU, case 417/93, point 15.
[51]Opinion of GA, case 417/93, point 56.
[52]Opinion of GA, case 417/93, point 57.
[53]CJEU, case 417/93, point 24.
[54]CJEU, case 417/93, point 26.
[55]GA, Opinion, case 417/93, point 19.

that Parliament would be present at governmental meetings. The principle of separation of powers would 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 they are supposed to account for legal proposals and their outcomes in front of the Parliament. Nevertheless, this reasoning shows the striving for power and influence by the Parliament.

In this regard, there is one more fact that can present mutual distrust and striving for power of the EU institutions, one can notice in this example. On 21.11.1990, the Parliament adopted a resolution on the obligation for the Council to await Parliament's opinion.[56] In this resolution the Parliament noted that 'in numerous cases' the Council had begun work on a Commission proposal before the Parliament had delivered its opinion and that it had even concluded political agreements in advance. As stated above, this resolution constitutes an example in which the Parliament strives to influence the work plan of the Council, although there were no legal means to do so. At the same time, when the Council applies to use the urgent procedure of the Parliament, this last actor rejects it, not letting other institutions exercise any control over its schedule. In addition, here one can notice how the Parliament applies double standards 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 had to solve once again matters regarding the relations between the institutions. This time the Parliament filed a law suit against the Commission. The Council has intervened in support of the form of order sought by 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 in question was to exclude it from the normal procedure for settling that question. This question would fall within the ambit of the Council's basic regulation that should be based on Article 43 of the Treaty, which provided that the Parliament must be consulted. The Parliament questioned the relevance of the legal basis in this case. It assumed the Commission would have added the question whether GMMOs can be authorized in the organic production of agricultural products to the regulation in question in order to apply a legal basis according to which it is not supposed to consult the Parliament.

That is why the Commission would have excessed its powers.

In this regard the Court of Justice referred its previous judgments[57], and stated that the Council cannot 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

[56]O.J. C 324, p. 125.

[57]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.

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adopted in accordance with the procedure laid down by that provision.[58] The court rejected this part of the law suit and – at the same time – pointed out the Parliament that it cannot have influence on all the details of an aspect.

In another part of the law suit the Parliament claimed that the Commission would have abused its discretion. It referred to the debate at the Parliament and to the statements of Commission's representative made back then, during the debate on the basic regulation. One could understand them as a commitment to follow a procedure laid down in the basic Regulation and apply a legal base that foresees a consultation of the Parliament.[59]

The Commission objected this interpretation.[60] It stated that it would not have tried to abuse its discretion and applied the legal base in question in order to avoid the consultation of the Parliament. The Council supported this reasoning and stated that the Commission could not legally bind itself by a declaration of intent, made during parliamentary debate and certainly not before the Council had itself reached a decision on the proposal and conferred implementing powers on the Commission.[61] Consequently, the Commission's declaration could not have the legal effect attributed to it by the Parliament.[62]

The reasoning, an EU institution would have bound itself during a debate deserves our attention. Clearly, EU institutions try to argue with all means both "under four eyes" in a solely interinstitutional exchange and in front of the Court. How could a debate, spoken words cause a legal bound, especially if they state facts opposing the text of a legal act? And – what is imaginable on the contrary – how could a representative of an institution assure others by means of spoken words or other, 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 European law.

In addition to common distrust and striving 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 too often in the proceedings in front of the Court, so that it could not to be true.[63] To conduct a legislative procedure with less actors to consult or involve is clearly much easier than to consult several institutions, who enjoy extensive rights and may issue statements, which one would bind Commission and Council. Legislative procedure involving less actors can be finished faster and demands less effort,

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[58]CJEU, point 18.
[59]CJEU, point 28.
[60]CJEU, p. 29.
[61]CJEU, p. 30.
[62]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.
[63]See previous cases, footnote 22.

1 less resources of the Commission. It is also more likely that the legal act as a
2 whole, like it was drafted by and agreed within the Commission, will stay
3 "untouched". The more participants, the higher the risk of changes and – at the
4 point of view of the Commission – changes that weren't its intention. The legal
5 act, as drafted by the Commission, could lose its focus and impact. Amendments
6 of other institutions can cause a distortion of the substance of the legal act. That
7 is why the assumption of the Parliament, the Commission would pick the legal
8 base according to its interests, can constitute – in general – a valid point, why
9 the Commission decides to use one legal base and not another.[64]
10
11
12 *Re-consultation of the Parliament*
13
14 In Case C-21/94[65] the Parliament was asserting its right to consult it a second
15 time before adopting a directive. The lack of a second consultation would
16 constitute an infringement of its right to take part in the legislative process.
17 At the point of view of the Court of Justice, the duty to consult the European
18 Parliament in the course of the legislative procedure, in the cases provided for
19 by the Treaty, implies the requirement that the Parliament should be re-consulted
20 whenever the text finally adopted, viewed as a whole, departs substantially from
21 the text on which the Parliament has already been consulted on, except where
22 the amendments essentially correspond to the wish of the Parliament itself.[66] In
23 spite of the settled case law, the Council failed to re-consult the Parliament.[67]

[64]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.

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

[66]See for example, the judgment in Case C-388/92 Parliament v Council [1994] ECR 1-2067, p. 10; Case C-280/93 Germany v 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.

[67]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

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The motions of the Parliament in the proceedings provide further insights. The Parliament suggested that the Court should order the Council to adopt new legislation within a period to be fixed by the Court in order to prompt that institution to resume as quickly as possible the procedure for the proper replacement of the directive.[68] The Court did not upheld the request of the Parliament that it should impose on the Council a time-limit within which the latter must adopt a new directive. The Court would not have jurisdiction to issue such an order in the context of its review of the legality of an act under the Treaty.[69] The fact nonetheless remains that the Council is under a duty to put an end within a reasonable period to the infringement it has committed.[70]

The request of the Parliament shows how little trust it had on the Council to re-consult it and follow the judgment. It needed a judgment of the Court to be sure, its rights would not be valid any more. Possibly, the Parliament lost its trust to be consulted or the cooperation with the Council was so disturbed that there was no actual exchange any more, let alone productive cooperation on legislative matters. Nevertheless, the EP, as a lawmaker, should have known that the Court – respecting its rule of procedure – may not judge this motion and may not sentence the Council to consult the Parliament.

But most important, the Parliament should have known that judgment this kind, to impose on the Council a time-limit within which the latter must adopt a new directive, would valid the principle of separation of powers. This principle however, constitutes a constitutional guarantee. It is worth noticing that only the Parliament applied for this motion.

Withdrawal of the draft legislative proposal

In case C-409/13[71] the Court was called on to assess the validity of an act of the Commission withdrawing a legislative proposal.[72]

During the negotiations on a regulation, the Council and Parliament had different points of view regarding delegated and implementing acts, than the Commission.[73] During several informal trilogues the parties were trying to reach a compromise. During the fourth trilogue, the Commission made a proposal with regard to 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-

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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).

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

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

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

[71]Digital ECR.

[72]Opinion of 18.12.2014, p. 4.

[73]Opinion of 18.12.2014, p. 14.

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'.[74]

It shows, that the role of the Commission during legislative procedure ends under no circumstances with an exercising of its initiative right, but it continues, during the negotiations with Parliament and in the Council. The Commission may also conciliate later on, during trilogues.

During the negotiations, since institutions were looking for an agreement,[75] the Commission expressed its compromise-will by 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.

At the end of the fourth trilogue, the Parliament and the Council suggested different compromise solutions, which involved applying 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 to the Commission the power to adopt certain acts linked to the assistance thus granted.[76]

In practice, this means a mixing of the procedure according to art. 290 and 291 TFEU.

This reasoning shows that compromises and compromise proposals don't really serve a better regulation. Their point is a deviation of competences between the institutions or between institutions and Member States. However, this deviation of competences does not have to be just. In reality, it serves keeping 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 the Parliament and the Council have in fact more power, while article 291 gives more legislative powers to the Commission.[77] 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 and the same procedure. And – or better – moreover, is it allowed? Doesn't it violate the Treaty that foresees those two separate procedures?

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[74]Opinion of 18.12.2014, p. 11.

[75]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).

[76]Opinion of 18.12.2014, p. 12.

[77]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.

Coming back to the question of competence in this particular case, the Commission would enjoy more power, if the provisions in question would foresee implementing acts.

There is also another relevant point: that intense exchange of views regarding the question of competences in this advanced stage of the legislative procedure – the fourth trilogue – lets arise the political question if there is no end in the fight for competences. 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 competences need to be covered already with a draft of a legal act. Since the CJEU often refers Member States' legal orders as an argument in the proceedings, one has to argue how can it be, if the legislative procedures of Member States and EU differ so much in such crucial points.

During the sixth trilogue, the Parliament and the Council agreed to replace the implementing act procedure with the ordinary legislative procedure. On that occasion, the Commission`s representative officially expressed his disagreement with that approach.[78] The Chairman of Coreper[79] stated in a letter to the Vice-President of the Commission that he deeply regretted the announcement made by the Commission representative during the sixth trilogue. He asked the Commission to reconsider its position in the light, in particular, of the fact that agreement between the Parliament and the Council appeared very close.

The Vice-President of the Commission stated in a letter to the President of the Parliament and the President of the Council from 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.[80] The minutes of that meeting state, on this point, that '[t]he Commission approved the line set out in SI(2013)231'. It is clear from that note that the staff of the Commission considered that use of the ordinary legislative procedure would constitute a distortion of the proposal for a framework regulation. The procedure would become burden and unpredictable and, above all, that decisions to grant assistance in the form of specific regulations would be at the same legislative level as a framework regulation. Furthermore, the note also referred to constitutional concerns relating to a 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, which was adopted on 9.7.2013.

There are further comments in the opinion regarding the negotiations that deserve the attention. 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.[81] In November

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[78]Opinion of 18.12.2014, p. 14.

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

[80]Opinion of 18.12.2014, p. 15.

[81]Opinion of 18.12.2014, p. 88.

2011, one of its officials informed a 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 which they had reached.

This statement does not let gain more trust in the action of the Commission. Moreover, it lets the assumption, its decision would be politically motivated rather than better regulation oriented. There is in fact no prohibition in the Treaty that would forbid that decisions based on a certain regulation could not be issued at the same legislative level as a framework regulation. The Commission, asked at the meeting of the Working Party of Financial Counsellors of 7.5.2013 by the Presidency of the Council to inform the delegations whether it intended to withdraw the proposal for a framework regulation, made no reference whatsoever to the fact that this issue was on the College of Commissioners' agenda planned for the following day.[82]

Some Member States, acting as intervener, submitted that, irrespective of the point at which the Commission withdrew the proposal for a framework regulation, it excluded from the outset any discussion or negotiation with the co-legislators on the content of Article 7 of that proposal, whereas the co-legislators shared a common approach in that regard.[83]

It is unclear, how much one can trust the reasons expressed by the Commission. In the procedure in front of the Court of Justice, Commission stated that when internal note SI(2013)231 was drafted, the date of the next trilogue was not yet known. The fact that the contested decision was adopted on the day on which the co-legislators were to finalize an agreement would be a coincidence.[84] The Commission adds that a premature reference, on its part, 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.

The question here is, how can it go along with the role of the Commission during the legislative procedure. It is supposed to conciliate between the institutions. There is no trilogue meeting, which date wouldn't be agreed with the Commission's representatives. This means, that this two actions, i.e. appointing for the 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. It is moreover a proof that the Commission plays against the actors during the legislative procedure and may try to play them off against each other.

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[82]Opinion of 18.12.2014, p. 89.
[83]Opinion of 18.12.2014, p. 91.
[84]Opinion of 18.12.2014, p. 94.

Also, how can one 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), how can one of those ways distort the substance of the basic act?

The factual basis of the judgment itself

In case 25/70[85], the facts, that the judgment is based on, constitute an interesting subject which shows further 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.[86] 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. The Court does see it as a valid point and it constitutes an accurate reason. This also shows that the Union tends to establish a system and also refers its – established – system as a reason in a procedure. One may wonder, if EU institutions refer its systems in any kind of procedures, in particular in front of the court or negotiations in the Council regarding new regulations, directives and so on.

Relations between EU institutions and Member States

The differences of opinion during legislative proceedings do not occur only between EU institutions, but also the Member States and the institutions. In case 68/86[87] 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 right to be consulted.

Here, 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 not only on that article, but also on Article 100, which requires unanimity on the part of the Council.[88] It considered that it would be necessary to base the directive at issue on those two articles. In the applicant's view, that aim would not be covered by Article 43 of

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[85]Report of Cases, 1970, 01161.
[86]CJEU, judgment from 17.12.1970, 1171, p. 4
[87]Report of Cases, 1988, 00855.
[88]CJEU, judgment from 23.02.1998, 894, p. 4.

the Treaty but under Article 100. Previous practice on the part of the Council would bear out the need for that dual legal basis. At the point of view of the Council and the Commission, the raised reasons would be covered by Article 43 of the Treaty.

At the beginning, 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.[89]

The Court referred its judgment of 26.3.1987 in Case 45/86[90], in the context of the organization of the 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. The court underlines that a mere practice on the part of the Council cannot derogate from the rules laid down in the Treaty.[91] 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. How could a mere practice influence the question of the right legal basis of a legal 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.[92] It means that the practice of the Council was actually 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[93] – in breach of the Rules of Procedure of the Council,[94] although, the United Kingdom stated that it 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 which opposing opinion is being expressed and stressed. 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 differ from 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. But regarding the informal trilogues, that in fact serve and aim to derogate from time limits under the Treaty, the EU institutions are free to create precedence.

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[89] CJEU, judgment from 23.02.1998, 894, p. 6.
[90] Commission v Council [1987] ECR 1493.
[91] CJEU, judgment from 23.02.1998, 898, p. 24.
[92] CJEU, judgment from 23.02.1998, 898, p. 23.
[93] CJEU, judgment from 23.02.1998, 901, p. 43.
[94] CJEU, judgment from 23.02.1998, 902, p. 49.

Findings

The referred cases and arguments exchanged in their regard 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. If this variety of tactics and ways to gain more political influence and power is due to the diplomacy, that plays an important role in this regard, or rather due to the big amount of actors, which constitute EU institutions and 27 Member States. Sure is, that there are more involved parties than in a national proceedings. 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 big 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. On the other hand – maybe – the institutions had to get used to first and establish their relations anew after the Maastricht Treaty came into force.

Anyway, can we know for sure that the presented tactics have changed? Is there just more political pressure in the wings, so that the institutions agree, work out better compromises and avoid lawsuits, which could offer legal researchers and the citizens an overview what is in fact going on? Could they – maybe – have decided to work together in order to accumulate competences on the cost of the responsibilities of Member States?

The presented cases do not paint a too rosy picture. They 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[95] and the Commission knows that this would lack (since, for example, EU agencies or institutions would gain more competences 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 competences).

Another way to gain and keep more competences 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.

They go as far as they not only refer to the phase of initiative (question of an appropriate legal base), but they also occupy the institutions during trilogues

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[95]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.

1 and they stay until the very end of the procedure, since the legislative proposal
2 may be withdrawn, if one of the initiating institution cannot accept the outcome
3 (Commission changed its proposal after consultation of EP, during Coreper).
4 From pure striving for power one has to differ the need to teach each other's
5 a lesson, which can in fact also be classified as a way to strive for power (in the
6 long run). This is how the author would classify the tactics applied be the
7 European Parliament, like postponing the debate to the very last session in a year
8 or legislative period, so that the consultation actually can not take place.
9 The discussed cases show how institutions ignore procedures or outcomes
10 of discussions of other institutions (EP was advising on a regulation in January,
11 although the Council issued it in December, year before) and continue the
12 discussions on a legal act in their own tempo (Council and Parliament continued
13 to work on a legal act and put it in force although Commission withdraw its
14 proposal), how they disrespect the settled case law[96] and written request of
15 institutions. One has to ask if there really was no way to recognize each other's
16 rights and focus on solid and just law making in good faith.
17 In general one has to classify some of the tactics as unusual for diplomatic
18 relations. But most importantly, there is the danger, that law making within EU
19 does differ from Directorate General to Directorate General and depends more
20 on representatives of institutions acting and conducting the negotiations in
21 particular case than on a one approach and technique. This makes it less
22 foreseeable for those who apply the law and have to interpret it.
23
24

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[96] 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.