



INSIGHT

SWIMMING IN A SEA OF COURTS: THE EU'S REPRESENTATION BEFORE INTERNATIONAL TRIBUNALS

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ABSTRACT: The judgment in case C-73/14, *Council v. Commission*, forms part of the saga of inter-institutional disputes arising after the entry into force of the Treaty of Lisbon in the context of EU external representation. The Court in this case, in line with Advocate General Sharpston, excludes the applicability of Art. 218, para. 9, TFEU to the submission of statements by the EU before judicial bodies established by international agreements. In this case, the Court established the applicability of Art. 335 TFEU as a sufficient legal basis for the Commission to represent the EU in international judicial proceedings. Insofar as there were no policy-making choices in the submission of the statements for ITLOS advisory opinion in Case No 21, Art. 16, para. 1, TEU had been fully respected. This was also the case for Art. 13, para. 2, TEU and the duty of loyalty, insofar as the Commission had duly consulted the Council and taken the observations from the FISH and COMAR groups into account.

KEYWORDS: institutional balance – sincere cooperation – EU external representation – international courts and tribunals – Art. 218 TFEU – ITLOS – ECJ.

I. INTRODUCTION

The judgment in *Council v. Commission* for the first time raises the important issue of European Union (EU) external representation before international courts and Tribunals. While Art. 335 of the Treaty on the Functioning of the European Union (TFEU) provided for a basis for the Commission to represent the EU in Member State courts, the Treaty text is not very clear as to whether the delivery of statements before international

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courts and tribunals would fall within Art. 335 TFEU or would constitute statements in 'bodies set up by an international agreement' in the sense of Art. 218, para. 9, TFEU.

The case at issue arises in the context of the International Tribunal on the Law of the Sea (ITLOS) Advisory Opinion in Case No. 21, handed out on 2 April 2015, in response to a request by the Sub-Regional Fisheries Commission (SRFC) on questions related to the liability of the flag State for illegal, unreported and unregulated (IUU) fishing within the economic exclusive zone (EEZ) of States other than the flag State. Besides, it also covered the question of liability where the fishing license had been issued within the framework of an international organization in order to know whether the State or the international organization should be liable.¹ Therefore, while taking place in the course of an Advisory Opinion procedure, it raised important points of law that are of key interest to the European Union.

In the context of the request for an advisory opinion from the SRFC received by ITLOS on 23 March 2013, the Commission adopted on 5 August 2013 the decision concerning the submission of statements on behalf of the Union in the context of the Advisory Opinion procedure in Case Number 21 on the basis of Art. 335 TFEU, according to which the Union is to be represented in legal proceedings by the Commission. This request was also examined within the Council by the COMAR and the FISH groups where the Commission reaffirmed its intention to submit written observations without the need of the Council's approval. The Council working groups and the COREPER contended that its prior approval was required on the basis of Art. 16 of the Treaty on European Union (TEU). The Commission maintained its view that it was fully entitled to submit observations while having to keep the Council fully informed in respect of the duty of co-operation.

This case again exemplifies the difficulties in pinpointing the principle of institutional balance in legal terms after the entry into force of the Treaty of Lisbon. It must be placed within the context of the constant tension between the Council and the Member States, on the one side, and the Commission and the Parliament, on the other, that has arisen as a result of the new system of international representation of the EU.² The implementation of this new system has created changes both in institutional balance as well as in division of competences between the EU and its Member States, which in turn have led to a long series of inter-institutional disputes before the Court of Justice in the

¹ E. PAASIVIRTA, *The European Union and the United Nations Convention on the Law of the Sea*, in *Fordham International Law Journal*, 2015, pp. 1059-1060.

² See J. SANTOS VARA, *EU Representation to International Organisations: A Challenging Task for the EEAS*, in L.N. GONZÁLEZ ALONSO (ed.), *Between Autonomy and Cooperation: Shaping the Institutional Profile of the European External Action Service*, *CLEER Working Paper 2014/6*, p. 65 *et seq.*; B. VAN VOOREN, R. A. WESSEL, *External Representation and The European External Action Service: Selected Legal Challenges*, in S. BLOCKMANS, R.A. WESSEL (eds), *Principles and Practices of EU External Representation*, *CLEER Working Paper 2012/5*.

past years.³ It appears that this tension will continue to be battled before the Court of Justice over the coming years as a result of the lack of provisions – and lack of clarity in the existing ones – and due to the great number of questions that still remain unanswered.⁴

II. THE JUDGMENT OF THE COURT AND THE OPINION OF THE ADVOCATE GENERAL

II.1. ARGUMENTS OF THE PARTIES

The Council had raised two pleas in law in support of its action. On the one hand, it alleged the infringement of the principle of conferral in Art. 13, para. 2, TEU and of institutional balance as a result of the breach of Art. 218, para. 9, TFEU and Art. 16, para. 1, TEU. On the contrary, the Commission contended that Art. 335 TFEU in connection with Art. 17, para. 1, TEU, which allowed the Commission to ensure external representation of the Union, was sufficient for the Commission to reach that decision.

According to the Commission, Art. 218, para. 9, TFEU only applied where a body set up by an international agreement has the power to establish rules or adopt decisions in the context of the agreement in question.⁵ With regards to the powers of the Council under Art. 16, para. 1, TEU, a distinction had to be made between the situations where external representation relates to political or diplomatic contexts such as the negotiation of international agreements, which may fall under Art. 16, para. 1, TEU in absence of an EU policy. A different situation would concern representation of the EU before an international court, where the Commission would be required to ensure the application of EU law, and accordingly of international agreements to which the EU is a party, as a

³ Court of Justice, judgment of 24 June 2014, case C-658/11, *Parliament v. Council*; Court of Justice, judgment of 7 October 2014, case C-399/12, *Germany v. Council*; Court of Justice, judgment of 4 September 2014, case C-114/12, *Commission v. Council*; Court of Justice, judgment of 22 October 2013, case C-137/12, *Commission v. Council*; Court of Justice, judgment of 16 July 2015, case C-425/13, *Commission v. Council*; Court of Justice, opinion of 14 October 2014, Opinion 1/13; Court of Justice, judgment of 11 June 2014, case C-377/12, *Commission v. Council*; Court of Justice, judgment of 18 December 2014, case C-81/13, *United Kingdom v. Council*.

⁴ S. RODRÍGUEZ SÁNCHEZ-TABERNEIRO, *La ilegalidad de las decisiones híbridas en el marco de la celebración de acuerdos mixtos. Comentario de la sentencia TJUE de 24.04.2015 (Gran Sala), C-28/12 Comisión/Consejo*, in *Revista de Derecho Comunitario Europeo*, 2015, p. 1057 et seq., p. 1060; R. GOSALBO BONO, *Insuficiencias jurídicas e institucionales de la acción exterior de la Unión Europea*, in *Revista de Derecho Comunitario Europeo*, 2015, p. 231 et seq., p. 234; E. WHITE, *La mise en oeuvre des accords internationaux en Droit de l'Union*, in J. BOURGEOIS (ed.), *L'Union européenne comme acteur international, commentaire J. Mégret*, Brussels: Éditions de l'Université de Bruxelles, 2015, pp. 155-184, p. 156.

⁵ Court of Justice, judgment of 6 October 2015, case C-73/14, *Council v. Commission (ITLOS)*, para. 51.

result of its role as warrant of the general interest of the EU, pursuant to the second sentence of Art. 17, para. 1, TEU.⁶

II.2. THE JUDGMENT OF THE COURT: INTERNATIONAL TRIBUNALS AS REGULAR COURTS?

The Court inferred from the judgment in the *Reynolds Tobacco* case that Art. 335 TFEU “although restricted to Member States on its wording”, was the expression of a general principle that the EU has legal capacity and is to be represented to that end by the Commission, from which it followed that Art. 335 TFEU provided a basis for the Commission to represent the EU before ITLOS in the case at issue.⁷ However, the case in *Reynolds Tobacco* concerned an appeal filed by Reynolds Tobacco and other tobacco companies against a ruling of the Court of First Instance dismissing the action filed by those tobacco companies in order to challenge the Commission’s decision to lodge a civil action against several cigarette manufacturers before various United States (US) courts. It could be accepted that Art. 335 TFEU serves for the EU to be represented before domestic courts in jurisdictions other than those of the Member States. However, in the case of international proceedings before a body set up by an international agreement, the Union is not to have *legal capacity*, but legal personality. Therefore, the reasoning of the Court in this respect is at best poor.

The Court then went on to analyze whether the principle of conferral of powers laid down in Art. 13, para. 2, TEU required the content of the written statement to receive prior approval of the Council. The Court recalled in this regard the principle of institutional balance and then focused on the Council’s powers under Art. 218, para. 9, TFEU. In this regard it held that the reference to the positions to be adopted on the European Union’s behalf ‘in’ a body set up by an international agreement could not apply in the case at issue insofar as the Union “was invited to express, as a party, a position ‘before’ an international court, and not ‘in’ it”, as supported by the context and purpose of this provision and in line with the opinion of Advocate General Sharpston.⁸ The Court made a difference between the *Wine and Vine* case, where it found Art. 218, para. 9, TFEU was applicable, and the case at issue insofar as the adoption of the advisory opinion fell solely within the remit and responsibility of the ITLOS, acting wholly independently of the parties to the proceedings.⁹ Therefore, on the grounds that the EU was not taking

⁶ *Ivi*, para. 53.

⁷ *Ivi*, paras 58-59; Court of Justice, judgment of 12 September 2006, case C-131/03 P, *R.J. Reynolds Tobacco Holdings et al. v. Commission*, para. 94.

⁸ *Council v. Commission (ITLOS)*, cit., para. 63.

⁹ *Commission v. Council*, case C-377/12, cit.; on this case, see I. GOVAERE, *Novel Issues Pertaining to EU Member States Membership of Other International Organisations: the OIV Case*, in I. GOVAERE et al. (eds), *The European Union in the World. Essays in Honour of Marc Maresceau*, Leiden: Martinus Nijhoff Publishers, 2014, p. 225 et seq.

part in the adoption of the decision, the Court concluded that Art. 218, para. 9, TFEU was not applicable to the present case.¹⁰

While we may agree with the outcome that Art. 218, para. 9, TFEU should not apply to the submission of statements before international courts as the parties do not take part in the adoption of the decision, the Court's attitude towards this omission silence in Art. 218, para. 9, TFEU and in Art. 335 TFEU is striking. In fact, none of those provisions clarifies who must represent the EU in international proceedings. Yet, the Court considered that Art. 335 TFEU was a reasonable legal basis despite the fact that it referred to Member State courts and not to international courts.

Finally, as to Art. 16, para. 1, TEU, the Court considered that IUU fishing was comprehensively regulated in a range of provisions of UNCLOS and the FAO Compliance Agreement, which form an integral part of the EU legal order, as well as by detailed regulation in EU law. Therefore, the Court concluded that the purpose of that statement was not to formulate a policy with regards to IUU fishing and therefore it escaped the application of Art. 16, para. 1, TEU.¹¹

A joint reading of Art. 335 TFEU, Art. 17, para. 1, and Art. 16, para. 1, TEU might have been an interesting avenue to explore, in line with Judge Lenaerts' line of questioning at the hearing, where he tried to elucidate whether the Commission was using Art. 335 TFEU to avail itself of the roles of both attorney and client. What must be taken into account nevertheless in the context of this judgment is the fact that the question of IUU fishing in the EEZ was an area that was already fully regulated by internal EU law. This is probably leading the Court to understand that there are no policy choices being made in the context of the advisory opinion in Case No 21 but rather is pure external representation by the Commission under Art. 17, para. 1, TEU. Perhaps, had the question raised in the context of the advisory opinion been different, and not fully regulated under EU law, the Court's approach would have been different. Therefore, the key as to whether the Council's approval would be required would lie in whether the Council has already exercised its policy-making function or not.

As to the breach of the principle of sincere cooperation laid down in Art. 13, para. 2, TEU which was also contended by the Council, the Court considered that this principle required the Commission to consult the Council beforehand if it intends to express positions on behalf of the European Union before an international court.¹² In the Court's view, the Commission had fully complied with that obligation when sending the document to the Council, which was revised several times over the course of a month to take account of the views expressed by the FISH and COMAR groups.¹³

¹⁰ *Council v. Commission (ITLOS)*, cit., paras 66-67.

¹¹ *Ivi*, paras 68-75.

¹² *Ivi*, para. 86.

¹³ *Ivi*, para. 87.

II.3. THE OPINION OF ADVOCATE GENERAL SHARPSTON

AG Sharpston firstly differs from the Court in that she finds the action should be declared inadmissible as a result of the absence of a reviewable act challenged in good time. However, the Court bypassed the case and she understood that the parties wished to have a clear ruling on the case.¹⁴

On the substance, the Advocate General followed essentially the same line as the Court's ruling. On Art. 218, para. 9, TFEU, AG Sharpston understands that when the EU takes part in international judicial proceedings such as the advisory opinion procedure before ITLOS, it is not taking a position in the body set up by an agreement insofar as it does not take part in the formation that deliberates. She raises in this sense the example of the World Trade Organization (WTO) dispute settlement mechanism, by which the EU takes part in the adoption of the panel and Appellate Body reports by the Dispute Settlement Body but not in the panels' and AB's exercise of their jurisdiction.¹⁵

While Sharpston considered that an ITLOS advisory opinion could constitute an act having legal effects in the sense of Art. 218, para. 9, TFEU, it could not include situations where the EU does not participate in a body's adoption of those acts.¹⁶ Besides, looking at the drafting history, text and context of Art. 218, para. 9, TFEU she concludes that it is not designed to cover situations such as the case at issue, but rather international negotiations.

Secondly, looking at Art. 16, para. 1, TEU and the Council's exercise of policy-making functions, the AG considered that the policy making functions were exercised in joining UNCLOS and agreeing to be bound by their dispute settlement provisions, as well as by adopting a wide range of internal rules covering the substantial aspects of those agreements.¹⁷ It therefore appears that, in the Advocate General's view, it is the fact that the policy-making choices have been already made by the Council that results in the impossibility to rely on Art. 16, para. 1, TEU. On Art. 13, para. 2, TEU, the Advocate General is also of the opinion that in the preparation of the statement, the Commission did consult the Member States and the Council and took their comments into account before lodging the written statement and therefore Art. 13, para. 2, TEU has been fully complied with.¹⁸

What differs from the Court in the AG's opinion, although not in the substance, is the degree of reasoning found regarding the applicability of Art. 335 TFEU and Art. 17, para. 1, TEU. While the Court concludes that Art. 335 TFEU is the legal basis for the

¹⁴ Opinion of Advocate General Sharpston delivered on 16 July 2015, case C-73/14, *Council v. Commission (ITLOS)*, points 36-37.

¹⁵ *Ivi*, points 62-63.

¹⁶ *Ivi*, point 66.

¹⁷ *Ivi*, points 87-89.

¹⁸ *Ivi*, points 98-101.

Commission to present statements, AG Sharpston reads Art. 335 TFEU as the specific expression regarding court proceedings of Art. 17, para. 1, TEU. This type of reading could be more satisfactory.

Besides, unlike the Court, the AG replies to the question of whether the Commission can be seen as an attorney or both attorney and client on the basis of the Court's ruling in *Reynolds Tobacco*. According to the AG, the factual differences in the forms of order sought in *Reynolds Tobacco* and the ITLOS Case No 21 are not so as to alter the grounds for the Commission's powers in both cases and therefore, Art. 335 TFEU in conjunction with Art. 17, para. 1, TEU provided with sufficient legal basis for the Commission to act.¹⁹ In this regard, the reasoning of AG Sharpston appears more satisfactory than that of the Court insofar as it reads Art. 335 TFEU in conjunction with Art. 17, para. 1, TEU. However, the case might have required a different answer had policy-making choices not been made by the Council. In this hypothetical situation, Art. 16, para. 1, TEU might have required the Council to act as the client.

III. CONCLUDING REMARKS

The judgment in *Council v. Commission* is thus a new step in the series of interinstitutional disputes opposing the Council and its Member States on the one side, against the Commission and Parliament on the other.

Differently from the previous cases, the position of the Commission appears to be, *prima facie*, weaker than that of the Council. However, even the argument of the Council based on Art. 218, para. 9, TFEU does not appear particularly strong. Indeed, Art. 218, para. 9, TFEU does not seem appropriate to determine the EU's positions *before* a Tribunal set up by an international agreement.

In turn, also the choice of Art. 335 TFEU as a legal basis is not entirely convincing. Had the Court adopted, with regard to that provision, the same interpretative approach adopted with regard to Art. 218, para. 9, TFEU, the conclusion of the judgment would have probably been different.

The ruling of the Court is probably to be explained in the light of its pro-integrationist tendency, which entails a certain favour for the Commission in interinstitutional litigations. In this sense, AG Sharpston's joint reading of Art. 335 TFEU and Art. 17, para. 1, TEU appears to be more persuasive. A reference to Art. 16, para. 1, TEU would have probably enhanced this line of reasoning, as also emerges from the questions asked by Judge Lenaerts at the hearing. In this line of reasoning, the power of the Commission to represent the EU in international proceedings would emerge from a functional interpretation of Arts 335 TFEU and 17, para. 1, TEU, and on the basis of the

¹⁹ *Id.* points 109-115.

Court's interpretation in the *Reynolds Tobacco* case, provided that it already has sufficient guidance on the Council's policy-making choices pursuant to Art. 16, para. 1, TEU.

Admittedly, the unclear provisions of the Treaties create almost insurmountable difficulties in pinpointing, ascertaining and safeguarding the principle of institutional balance in judicial proceedings. In this case, and perhaps in future cases to come, a key role is played by the policy-making functions entrusted to the Council under Art. 16, para. 1, TEU. If, as in this case, internal EU legislation had been adopted and that the question at issue had been regulated, it is easier for the Commission to draw from the internal regulation guidance for the exercise of its power of external representation. One can speculate that the answer of the Court could be different in fields in which there is no internal regulation to draw guidance from.²⁰

²⁰ See in this regard, the pending case on the MoU with Switzerland. Advocate General Sharpston in her opinion considers that Art. 16, para.1, TEU has not been respected by the Commission insofar as it has encroached on Council's prerogatives and thus Art. 13, para. 2, TEU and the principle of institutional balance has not been respected. Opinion of Advocate General Sharpston, case C-660/13, *Council v. Commission*, points 99-117. On this Opinion see P. GARCÍA ANDRADE, *The Distribution of Powers Between EU Institutions for Conducting External Affairs through Non-Binding Instruments*, in *European Papers*, 2016, Vol. 1, No 1, p. 115 *et seq.*, www.europeanpapers.eu.