



INSIGHT

BREAKING A TRADITION: HOW SIGNING OF AGREEMENTS IS NO LONGER A MATTER FOR THE COUNCIL

DAVIDE GENINI*

ABSTRACT: The European Union has always concluded international agreements with third countries and international organisations as an integral component of its external action. In contrast to its predecessors, the Treaty of Lisbon introduced a uniform procedural framework for the negotiation and conclusion of international agreements in art. 218 TFEU with the aim of simplification and coherence between all EU external policies, including the CFSP. However, the act of signing international agreements has remained a grey area, shared between the Commission and the Council as a result of a well-established practice within EU institutional governance. On 9 April 2024, the European Court of Justice brought the Council back to a literal interpretation of the EU Treaties, removing any doubt about the role of the Commission in representing the EU externally and crystallising the legal authority of the sole Commission to sign agreements on behalf of the EU.

KEYWORDS: EU law – external representation – sincere cooperation – international agreements – art. 218 TFEU – European Court of Justice.

I. INTRODUCTION

The conclusion of international agreements by the European Union (EU) is essential to uphold its fundamental values and to promote its interests vis-à-vis third countries and international organisations.¹ International agreements are therefore an integral component of the EU's external action.

By concluding international agreements, the EU seeks to achieve the multitude of objectives listed in arts 3(5) and 21(2) TEU and to consolidate its global role on the international scene. To this end, international agreements may relate to the whole spectrum of the EU's external action, covering both the external policies of the TFEU as set out in Part V and the Common Foreign and Security Policy (CFSP), which has a specific legal basis in art. 37 TEU.

Art. 218 TFEU uniformly regulates the 'life' of an international agreement binding both the EU institutions and the EU Member States, covering all procedural steps from

* Ph.D. candidate in Law and Government, Dublin City University, davide.genini2@mail.dcu.ie.

¹ See, more extensively, M Gatti and P Manzini, 'External representation of the European Union in the conclusion of international agreements' (2012) CMLRev 1703.



negotiation to signature, as well as the termination and suspension of contractual obligations. It is worth noting that art. 218 TFEU is a substantial expansion of the previous text, reflecting the increasing need for coherence in the EU's external action and the growing need for the EU to project its values and promote its interests through a clear and unitary external representation of the EU to the "wider world".² For this reason, the Treaty of Lisbon merged the different procedures for concluding international agreements for CFSP and non-CFSP policies under the same provisions in art. 218 TFEU.³ This innovation was intended to underline the coherence and interdependence of all external actions in accordance with art. 21(3) TEU, although international agreements dealing "principally or exclusively" with CFSP issues still retain a distinct procedural character, with unanimity in the Council as the norm and the European Parliament having no role other than that of a passive recipient of information from the High Representative.⁴ In short, the all-encompassing nature of art. 218 TFEU responds to the need for "clarity, consistency and rationalisation" promoted by the Lisbon Treaty.⁵

This *Insight* focuses on the signature phase of international agreements *ex art.* 218 TFEU in the light of the recent developments of the European Court of Justice, which has broken a long-standing practice at EU level.

II. THE SIGNATURE OF INTERNATIONAL AGREEMENTS INTO EU LAW AND THE EMERGENCE OF A PRACTICE

Art. 218 TFEU does not contain a specific provision on the act of signing international agreements, which at first sight makes it an ambiguous area of EU law. As a result, the Council has been accustomed to delegating the signing of agreements to a representative of the Member State holding the Presidency, often alongside the Commission (or the High Representative in CFSP matters). Such a practice of dual signature of international agreements on behalf of the EU has favoured the legal certainty of the acts by avoiding future conflicts of competence between EU institutions. The lack of clarity in the Lisbon Treaty regarding the signing of agreements has often led to confusion in the relationship between the Council and the Commission, thus calling for a more precise rule.

Technically speaking, the signing of international agreements is preceded by the combination of two factors in a chronological order. On the one hand, the negotiator appointed by the Council *ex art.* 218(3) TFEU adds his initials to each page of the document to mark

² See, more extensively, S Blockmans and RA Wessel (eds), 'Principles and practices of EU external Representation' (CLEER Working Papers 2012/5); P Bruno, 'Navigating Art. 218 TFEU: Third States' Accession to International Conventions and the Position of the EU in This Respect' European Papers (European Forum Insight of 22 June 2022) www.europeanpapers.eu 333.

³ Previously, the procedure for the conclusion of international agreements was laid down in art. 24 TEU for the CFSP and art. 300 TEC for the other external policies.

⁴ See art. 36 TEU.

⁵ Case C-180/20 *Commission v Council (Accord avec l'Arménie)* ECLI:EU:C:2021:658 para. 27.

the satisfactory conclusion of the negotiations. Such a decision on the conclusion of the negotiation phase does not create any legal obligations for the EU. On the other hand, the Council formally authorises the signature of the agreement by adopting a Council Decision on the proposal of the negotiator himself, in accordance with art. 218(5) TFEU.

In international law, the signature of international agreements does not constitute the consent of the signatories to be bound by the agreement, but the formal validation of a text as the result of intense diplomatic negotiations and the positive will of the signatories to move the agreement to the approval phase by the national authorities. Translated into the EU legal system, this pragmatically means that signature is not the last stage in the life of an international agreement under art. 218 TFEU. Indeed, each signed international agreement is followed by a Council Decision concluding the agreement itself, accompanied by the consent (in the case of association agreements and agreements on policies subject to either the ordinary legislative procedure or the assent procedure) or the opinion (for all other areas of law) of the European Parliament.⁶

Thus, the signature of an international agreement is an expression of the principle of good faith and a corollary “of the principle of protection of legitimate expectations which, according to the case law, forms part of the Community legal order”,⁷ since it obliges the signatories (and therefore the entities they represent, *i.e.*, the Commission and the Council in the case of the EU) to refrain from any action that would alter or defeat the object and purpose of the signed agreement.⁸

The Lisbon Treaty does not explicitly reserve the act of signing an international agreement to a specific EU institution. In contrast, the current legal framework is silent on this point, only providing that it is up to the Council to authorise the signing and conclusion of an international agreement. In other words, the Treaty of Lisbon expressly regulates the internal decision-making procedure leading to the conclusion of an international agreement in art. 218 TFEU, but not its external dimension, of which the act of signature is the most valuable expression. Widening the scope of analysis to a broader picture of the Treaties is therefore the only way to understand the institution responsible for signing an international agreement in EU law.

It is worth noting that one of the main innovations brought by the Lisbon Treaty referred to the empowerment of the Commission on acting on behalf of the EU. In particular, art. 17(1) TEU provides the Commission the legal authority to represent the EU in external relations, with the sole exceptions of the CFSP, which is in the hands of the High Representative pursuant to art. 27(2) TEU, and other unspecified cases: “with the

⁶ See art. 218(6) TFEU. In CFSP-agreements, the European Parliament has no role at all, and a Council Decision is sufficient to conclude the agreement.

⁷ Case T-115/94 *Opel Austria GmbH v Council of the European Union* ECLI:EU:T:1997:3 para. 93. Similarly, see case 112/77 *August Töpfer & Co. GmbH v Commission of the European Communities* ECLI:EU:C:1978:94 para. 19.

⁸ See art. 18 of the Vienna Convention on the Law of Treaties [1969].

exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union's external representation".

Against this background, the derogation from the general rule of external representation of the EU by the President of the Commission by "other cases provided in in the Treaties" constitutes a residual clause which aims to embody all those areas where the EU Treaties explicitly assign external representation to an institution other than the Commission, as is the case with the external representation of the eurozone, which is the responsibility of the President of the Eurogroup.⁹

These innovations were largely the result of the dismantling of the three-pillar structure, which allowed the EU to speak with one voice - through the Commission - on the international stage. This shift favoured the development of a more coherent external action and bolstered the Commission's role within the EU's legal governance framework. Art. 218 TFEU does not deviate from the general rule of external representation before the Commission. Therefore, the joint reading of art. 218(5) TFEU and art. 17(1) TEU is consistent in providing the Commission with the legal authority to sign international agreements on behalf of the EU.

In practice, however, the Commission's role in the signature of international agreements has never been clarified. In perfect continuity with the pre-Lisbon legal framework, the Council Presidency has been keen to maintain a leading role throughout the procedural life of an international agreement, including by adding its signature to the final act.¹⁰ The Council's caution in retaining a key role in the signing of international agreements is quite obvious. Indeed, the signing of an international agreement is an extraordinary political showcase for the EU Member States, both to confirm their leading role throughout the decision-making process and to assert their national interests in the agreement before public opinion. Combined with the guidance that the Council provides to the Commission throughout the negotiation process through "directives to the negotiator", the signing of international agreements confirms the clear will of EU Member States to maintain a visible and direct role in representing the EU and not to take a step backwards in favour of a more supranational EU external action.

The practice of co-signing international agreements on behalf of the EU has thus survived the entry into force of the Lisbon Treaty in 2009 as an unwritten part of the procedure under art. 218 TFEU. In stark contrast to the ambitious aims of the drafters of the Lisbon Treaty, who sought to strengthen the EU's external influence by empowering the Commission, the entrenched practice of co-signing has starkly exposed the internal disunity within the EU institutions and consequently undermined the EU's global standing

⁹ See European Central Bank, *The External Representation of the EU And EMU* www.ecb.europa.eu.

¹⁰ See, for example, the signing ceremony of the 2023 EU-Chile trade agreement, signed by the Spanish Minister for the Economy and Digital Transformation and the Spanish Minister of Foreign Affairs, European Union and Cooperation, representing the Council. See EU-Chile trade and political agreements of 13 December 2023, in European Commission Press Release of 13 December 2023.

and representation. At the same time, it has sanctified the leading role of EU member states as the main political actors in the EU's external action.

The tradition of double signature clashes with the reasons that led the EU pioneers to transfer the external representation of the EU from the Council to the Commission. In particular, the six-monthly rotation of the Member State holding the Presidency of the Council can create uncertainty for those third countries and international organisations that have decided to conclude an agreement with the EU. Above all, each Council Presidency pursues its own agenda, the political objectives of which are often very different from those of the preceding presidencies, leading to a lack of continuity in external action and undermining the international visibility of the EU as a single international legal entity. However, the historical roots, together with the beneficial effects of shaping a spectrum of external action supported by the EU Member States, have contributed to the consolidation of the practice of signing international agreements.

III. BREAKING A TABOO

On 9 April 2024, the European Court of Justice (ECJ) delivered a judgment that clarifies the still unclear legal framework regarding the practice of dual signatures on international agreements.¹¹ In its judgment, the ECJ clearly recognised that the Commission is the institution competent to sign an international agreement pursuant to art. 17(1) TEU, reaffirming a well-established principle that the practice of dual signature of international agreements, as inherited from the pre-Lisbon Treaty, “however consistent, cannot alter the rules of the Treaties that the institutions are obliged to respect”.¹²

The ECJ intervened following an action for annulment brought by the Commission against art. 2 of Council Decision (EU) 2021/1117 authorising the signing of the “Implementing Protocol to the Fisheries Partnership Agreement between the Gabonese Republic and the European Community (2021-2026)” by the Permanent Representative of the Portuguese Republic to the European Union alone.¹³ Surprisingly, the Council thus decided to sideline the Commission in the signing of an international agreement, breaking the fragile line of cooperation that had been built up over the years and which was at the heart of the tradition of dual signature.

This is not the first time that an inter-institutional dispute has arisen between the Council and the Commission over the signing of acts on behalf of the EU. The ECJ has

¹¹ Case C-551/21 *Commission v Council (Signature d'accords internationaux)* ECLI:EU:C:2024:281.

¹² *Ibid.* para. 82. See also Case C-687/15 *European Commission v Council of the European Union* ECLI:EU:C:2017:803 para. 42: “In accordance with settled case-law, a mere practice on the part of the Council cannot derogate from the rules of the Treaty and cannot therefore create a precedent that is binding on the EU institutions”.

¹³ Council Decision (EU) 2021/1117 of 28 June 2021 on the signing, on behalf of the European Union, and provisional application of the Implementing Protocol to the Fisheries Partnership Agreement between the Gabonese Republic and the European Community (2021-2026).

already ruled on the need for the Council's prior consent for the Commission to sign a non-binding agreement¹⁴ and on the Commission's power to submit observations on behalf of the EU to international courts.¹⁵ However, unlike in all previous cases, the High Representative supported the Commission's appeal. This unprecedented move highlights the High Representative's concern that the Council's push for a more dominant role in signing international agreements could extend to the CFSP area, potentially sidelining the High Representative in the future.

The Council's first line of defence, supported by the Czech, French, Hungarian, Netherlands and Portuguese Governments, was based on its historic autonomous competence to sign international agreements, inherited from the previous Treaties and now enshrined in art. 16(1) TEU, from which the Council derives this competence. The Council therefore presented the signing of an international agreement as an integral part of the EU's internal decision-making process.

"All the steps from the decision authorising the signing to the signing itself form a legal and procedural continuum falling within the Council's competence under Article 16(1) TEU, which finds specific expression in Article 218(5) TFEU. Since the signing of an international agreement produces legal effects, it must be regarded as a constituent element of EU policy-making".¹⁶

In particular, the Council emphasised that the act of signing international agreements falls within the residual clause "other cases provided for in the Treaties" provided for in art. 18(1) TEU, for which the Commission is exceptionally deprived of its prerogatives of external representation.¹⁷ Moreover, the Council noted that the difference in the wording between the previous provisions and the current art. 218(5) are "purely editorial" and as such leave no room for an important role for the Commission in the signature phase of a treaty. Procedurally, there would be no *raison d'être* for the existence of a special department, the Treaties and Agreements Office, within the General Secretariat of the Council if the Council did not have a legal mandate to sign international agreements on behalf of the Union.¹⁸

The ECJ rejected the Council's objections and annulled the Council decision in so far as it stated that "[t]he President of the Council is hereby authorised to designate the person(s) empowered to sign the Protocol on behalf of the Union" without the presence of the Commission, while preserving the effects of the signature for reasons of legal certainty. This ruling followed a pragmatic line of reasoning, based on both a literal and systemic interpretation of the Treaties, which inevitably brings the Council back to the legal reality of the complex but inescapable allocation of powers among the EU institutions.

¹⁴ See case C-73/14 *Council v Commission* ECLI:EU:C:2015:663.

¹⁵ See case C-660/13 *Council v Commission* ECLI:EU:C:2016:616.

¹⁶ *Commission v Council (Signature d'accords internationaux)* cit. para. 57.

¹⁷ *Ibid.* para. 59.

¹⁸ *Ibid.* para. 54.

First of all, the ECJ bluntly observed that the authorisation of the signing of an international agreement by Council Decision and the act of the signing itself of the agreement are two legally separate stages in art. 218(5) TFEU.¹⁹ In particular, the designation of the signatory “does not require a determination that falls within the scope of the ‘policy-making’ of the European Union or of the functions of ‘coordinating’ or of ‘[elaborating its] external action’, within the meaning of Article 16(1) and (6) TEU”.²⁰ Therefore, the institution designated to sign the international agreement certainly follows a Council Decision authorising it to do so, in accordance with art. 218(5) TFEU, but it is not the result of the assessment made by the Council in that Decision.

In this context, the designation of the signatory to an international agreement falls under a literal interpretation of art. 17(1) TEU, as it ensures the external representation of the EU. As a corollary, the Commission is legally empowered, following a Council decision and with the exception of the CFSP and other areas provided for in the Treaties, to sign international agreements in order to ensure the external representation of the EU.²¹ In particular, art. 218(5) TFEU does not contain a derogation from art. 17(1) TEU, since the former does not contain any reference to the power to designate the signatory.²² In this respect, the Council’s longstanding practice of designating “the signatories to international agreements” and regularly designating “as signatory the permanent representative to the European Union of the Member State exercising the rotating Presidency of the Council” cannot affect the allocation of powers laid down in the EU Treaties and the meaning of art. 17(1) TEU, which confers on the Commission alone the power to sign international agreements on behalf of the EU.²³

Meanwhile, the ECJ observed that “the Commission must exercise its competence relating to the signing of international agreements in the general interest of the European Union” and in the light of the principle of sincere cooperation *ex art. 13(2) TEU*. Indeed, it is for the Commission to ensure that the international agreement is signed in “the shortest possible time and in circumstances that reflect appropriately the importance of that agreement” and to consult the Council whenever a fundamental change of circumstances occurs after the Council Decision authorising the signing, pursuant to art. 28(1), second subparagraph, TEU.²⁴

IV. CONCLUSION

The combination of legal uncertainty and political sensitivity has traditionally made the moment of signing international agreements a contentious issue in EU law. The fact that

¹⁹ *Ibid.* para. 67.

²⁰ *Ibid.* para. 69.

²¹ *Ibid.* paras 73 and 74.

²² *Ibid.* para. 79.

²³ *Ibid.* paras 80 and 82.

²⁴ *Ibid.* para. 83.

the Council continued to sign international agreements on behalf of the EU, together with the Commission, became part of a practice that was generally accepted among the EU institutions as a “continuum” of the traditional role played by the Presidency in external representation before 2009. Although the rationale of the Lisbon Treaty was to ensure greater unity and continuity in the external representation of the EU, the Council retained its prerogative as the Commission's counterpart in signing international agreements and representing the interests of EU Member States in them.

The Council's surprising decision to authorise the signing of the Protocol implementing the Fisheries Partnership Agreement between the Gabonese Republic and the European Community (2021-2026) on 28 June 2021 by the Council without the Commission was the last straw. Following an action brought by the Commission, the European Court of Justice clarified once and for all the Commission's competence to sign international agreements on behalf of the EU as a manifestation of the external representation of the Union *ex art. 17(1) TEU*.

In particular, two main principles have emerged. First, the practice of the Council signing international agreements “however consistent, cannot alter the rules of the Treaties that the institutions are obliged to respect”.²⁵ Indeed, the external representation of the Union is the result of the understanding of the allocation of powers in the EU Treaties and the act of signing is not part of the EU decision-making process enshrined in art. 16(1) and (6) TEU to the Council. Second, the principle of sincere cooperation has horizontal effects and, as such, applies to the Commission in the act of signing of international agreements. As a result, the Commission must sign the agreement on behalf of the EU as quickly as possible following the Council Decision authorising it, and must also keep the Council informed of any fundamental changes in the circumstances that led to the conclusions of that agreement, in line with art. 13(2) TEU.²⁶

In conclusion, the C-551/21 judgment is clearly a landmark case that sheds light on the external representation of the EU. The ECJ has unexpectedly broken with a long-standing tradition that, after decades of accepted practice, ensured the participation of Member States in the act of signing international agreements on behalf of the EU. It remains to be seen how such a ruling will affect the practical implementation of the tradition of the Council signing international agreements on behalf of the EU together with the Commission. Whether or not the Commission will demand a more autonomous role at the moment of signing an international agreement, after the Council tried to exclude it for the first time, would clearly open a new chapter in the external representation of the EU in a more competitive world.

²⁵ *Ibid.* para. 82.

²⁶ See the *clausula rebus sic stantibus* in art. 62 of the Vienna Convention on the Law of Treaties.