INSIGHT

WHO YOU GONNA CALL? INSIGHTS FROM THE ECJ'S CASE C-551/21 ON THE SIGNATURE OF INTERNATIONAL AGREEMENTS

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ABSTRACT: The current *Insight* analyses the judgment of the European Court of Justice in Case C-551/21, which upheld the Commission's claim regarding its right to exercise the external act of treaty signature. The decision sheds light on the signature procedure outlined in art. 218 TFEU and adds to previous cases, clarifying the proper contours and roles of each institution in relation to the procedure set in the article. An initial observation of the practice appears to indicate the Permanent Representative of the country holding the Council's presidency as the responsible party to sign international agreements with third parties representing the Union. However, a more in-depth analysis reveals a lack of consistent and standardised practice. The judgment correctly recalibrates the institutional balance and is coherent with the reforms of the Lisbon Treaty, which sought to bring about an evolution of the principles of the Treaties without a formal amendment process.

KEYWORDS: art. 218 TFEU – institutional balance – external representation – Commission – Council – Lisbon Treaty.

I. INTRODUCTION

The recent ruling by the European Court of Justice (ECJ) in case C-551/21 marks the conclusion of yet another chapter in the ongoing saga of inter-institutional disputes stemming from the treaty-making procedures within the European Union. While the (institutional) balance among institutions has always been dynamic and marked by changes over time, the post-Lisbon era has witnessed a surge in litigation to resolve issues about inter-institutional relations, especially in the field of external competences.

The dispute was brought by the European Commission, which challenged the European Council's signing of the Protocol on Fisheries Partnership Agreement with Gabon. In the Commission's view, this was perceived as a violation of its competence to exercise the Union's external representation. The European Court of Justice was called upon to intervene and elucidate potential ambiguities in the interpretation of the procedure

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outlined in art. 218 TFEU, the limits of powers conferred by the Treaties under art. 13(1) and (2) TEU, and finally, the Commission's competence under art. 17 TEU.

This *Insight* will argue that the Court correctly ruled the case in favour of the Commission for several reasons. Firstly, it appropriately addressed the role of the principle of institutional balance and sincere cooperation in the case by acknowledging that while the Council had previously held a broader role in external representation in past agreements, this role has been narrowed since the Treaty of Lisbon. Secondly, it accurately interpreted and applied the procedure outlined in art. 218(5) TFEU, acknowledging the Commission's competence to sign international agreements as the representative of the European Union and clarifying potential ambiguities within the article. Thirdly, despite recognising the procedural failure in the signing process, the Court correctly declared that the effects of the already signed agreement were to be upheld definitively, preserving the legal certainty of the signature.

II. Signature of international agreements: the (in)consistent practice

Who is responsible for signing an international agreement with third states on behalf of the European Union, and how is this process carried out? To analyse the present decision, it is necessary to examine the genesis of the relevant facts and the current practice concerning the signing of international agreements within the European Union (EU) in the post-Lisbon era.

As observed,[1] the practice tends to point out that historically, the Council has assumed and performed the responsibility for signing or designating the signatory for international agreements of the Union with third countries, both in the pre- and post-Lisbon era. In a few words, the procedure, as it seems to unroll departs from the Council's decision, in which its President takes power to designate the person who will perform the act of representation. Such appointments are mostly respected and involve the Permanent Representative of the Member State holding the Council Presidency representing the Union in signing new international agreements.

However, a deeper analysis of the agreements shows that the established practice is somewhat inconsistent and confusing. It is impossible to extract a standard practice or understand the criteria adopted by the Council when it "authorised" the Commission's participation in the signature process.

A few examples are worth mentioning to illustrate the lack of standard practice. Starting in the pre-Lisbon era, the Lomé Convention provided two exciting insights. First,

[1] P Craig and G De Búrca, *EU Law: Text, Cases, and Materials* (Oxford Univiversity Press 2011, 5th edn). G Kübek, 'Reflections on the Signature of EU International Agreements and the Court of Justice's Judgment in Case C-551/21, Commission v Council' (23 April 2024) EU Law Live eulawlive.com; case C-551/21 *European Commission v Council of the European Union* ECLI:EU:C:2024:281, opinion of AG Kokott.

although the Council decision authorises the agreement's signature, it does not explain how the decision of "whom" was to perform the act was to be decided. Second, the actual signing of the Agreement was made by both Council and Commission representatives.[2]

In the post-Lisbon-era, while it is possible to identify the Council deciding on the designation of the signatory in a series of Decisions, in the final version of the agreement, two signatures are presented and recognised as the representatives of the Union without any further identification of "whom" they are related to, neither by name nor institutional affiliation.[3]

In the specific case under consideration, regarding the Commission's proposal submitted to the Council for the signature of the Implementing Protocol to the Fisheries Partnership Agreement between the Gabonese Republic and the European Community, the situation was aggravated due to the Commission's challenge to the Council's "established" practice. The Commission expressly required that the Commission itself be designated as the signatory.[4] However, this requirement was disregarded in Council Decision (EU) 2021/1117 of 28 June 2021, notably in art. 2,[5] wherein the recurring practice prevailed and resulted in the appointment of the then Permanent Representative of Portugal as the Union's representative.

This time, however, the Commission has opted to challenge the Council's decision to follow the already established procedure by understanding that the procedure was at odds with elements of EU law, requiring, once more, the European Court of Justice to address the intra-institutional disputes.

III. Solving the indeterminacy of art. 218 TFEU

The reforms introduced by the Lisbon Treaty brought a series of changes to the already established institutional architecture of the Union. It is fair to say that conflicts over inter-institutional relations were expected and indeed emerged in the subsequent years as the previous equilibrium among institutions was rebalanced.[6]

[2] Fourth ACP-EEC Convention signed at Lomé on 15 December 1989.

[3] Trade Agreement of 14 May 2011 between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part; Trade Agreement of 26 June 2012 between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part.

[4] Case C-551/21 *Commission v Council* cit. para. 13.

[5] Art. 2 reads as follows: "The President of the Council is hereby authorised to designate the person(s) empowered to sign the Protocol on behalf of the Union". 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).

[6] See P Craig and G De Búrca, *EU Law: Text, Cases, and Materials* cit. 151; 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.

Previously, the procedure for concluding and signing agreements with third states was governed by art. 300 TEC, a process divided between the Council and the Commission. While the Commission conducted the negotiations and formulated proposals on the signature, the prerogatives of establishing the negotiation directives and deciding on the signing and conclusion of the agreement belonged to the Council. The Reform Treaty, through the new art. 218, reformed this procedure by reinforcing collaborative interaction among institutions and granting an active role to the European Parliament, which was absent in the earlier framework.[7]

However, the complexity of interactions within the EU's institutional framework, coupled with the new textual content and procedures, did not escape the fate of many international rules that lack textual determinacy and precision. As a result, parties often need to resort to the appropriate Court to resolve disputes over the proper interpretation of such provisions.[8] Before advancing to the analysis of the Court's decision in case C-551/21, it is worth mentioning a few elements from previous case law related to art. 218, as they have helped define the contours of the EU's external relations.

III.1. Scope, institutional balance and sincere cooperation

The EU institutional framework is unique and characterised by a singular separation of powers; the interaction and balance among the three pillar institutions are fundamental to the functioning of the Union's executive and legislative powers. The co-decision procedure derived from this interaction has a horizontal dimension and thus aims to provide a single and legitimate voice in its external relations, reflected in the principles of institutional balance and sincere cooperation presented in art. 13(1) and (2) TEU.

In this sense, the institutional balance should not be understood as a balance in the allocation of powers but rather as a division of power among the institutions, ensuring each institution performs its roles and tasks as defined by its competencies. In other words, this principle governs how the institutions coexist within the European system. The boundaries and meaning of the principle of institutional balance have been delineated in case law, such as in cases C-133/06 and C-409/13, safeguarding the powers granted to each institution.[9]

[7] Art. 300 TEC required the Council to inform and consult the European Parliament, while art. 218 TFEU included the requirement for the Council to look for the Parliament's "consent" in order to conclude an agreement.

[8] On the indeterminacy and Ambiguity of treaty language see: A Chayes and AH Chayes, *The new sovereignty: compliance with international regulatory agreements* (Harvard University Press 1995) 10.

[9] Case C-133/06 *Parliament v Council* ECLI:EU:C:2008:257; case C-70/88 *Parliament v Council* ECLI:EU:C:1991:373; case C-409/13 *Council v Comission* ECLI:EU:C:2015:217; D Yuratich, 'Article 13(2) TEU: Institutional Balance, Sincere Co-Operation, and Non-Domination During Lawmaking?' (2017) German Law journal 99; P Koutrakos, 'Institutional Balance and Sincere Cooperation in Treaty-Making Under EU Law' (2019) ICLQ 1.

Sincere cooperation, in turn, represents the progression and implementation within the EU institutions of the longstanding duty of cooperation among Member States since the Union's inception. Both principles are brought together in art. 13(2) TEU as an indissoluble whole. The first principle informs the division and sharing of competence in the decision-making process for the Court's analysis, while the latter provides guidance on how these powers are to be exercised in practice.[10]

The reasoning informed by both principles working together is one of non-domination among institutions, which is central to legitimising the Union's external action. However, as the present case under discussion and previous cases have shown, determining the exact boundaries of each institution's competence is not straightforward.

ECJ case C-425/13 of 16 July 2015 is one such case that dealt with art. 218 TFEU and helped clarify the proper division of power and roles to be performed by each European institution, as well as the article's scope. In this case, the Court recognised that the conclusion of international agreements had a constitutional scope and that the power of each institution in this procedure was laid down in art. 218, respecting the balance among the institutions. In simpler terms, each institution has an assigned role: the Commission acts as the negotiator, the Council defines the negotiation guidelines, concludes the agreement, and authorises the signature with the consent of the European Parliament.[11]

To summarise, it cannot be said that the new legal provision for concluding and signing agreements with third countries and international organisations introduced by the Lisbon Treaty has helped in improving the determinacy of the procedure to be followed. On the contrary, by rebalancing the roles to be performed by each institution, legal disputes over each institution's competence continue to emerge. From the already decided cases, it can be inferred that the ECJ has approached these discussions from a balanced and managed perspective, reflecting the system of checks and balances within the EU framework.[12]

III.2 Signature of non-binding agreements

Case C-660/13 is yet another dispute that adds to the case law related to the indeterminacy of art. 218 TFEU. The dispute arises from the article's silence regarding the procedure to be adopted for the signature of non-binding instruments by the Union's institutions. The case brought to the ECJ by the Council questioned the signing of an Addendum

[10] See P Koutrakos, 'Institutional Balance and Sincere Cooperation in Treaty-Making Under EU Law' cit.; See D Yuratich, 'Article 13(2) TEU: Institutional Balance, Sincere Co-Operation, and Non-Domination During Lawmaking?' cit. 13.

[11] The case also clarified that while the Council has the competence to define the negotiation directives to be followed by the Commission, such positions are to work as guides and not as an obligation of result with all of the directives informed. Case C-425/13 *European Commission v European Parliament*, ECLI:EU:C:2015:483 para. 62.

[12] RA Wessel and J Larik (eds), *EU External Relations Law: Text, Cases and Materials* (Hart Publishing 2020, 2nd edn) 111.

to a Memorandum of Understanding, concluded and signed by the Commission without the Council's proper prior approval.

By not providing a specific procedure for the signature of soft law instruments, art. 218 TFEU was considered inapplicable to the case, requiring the Court to decide based on a possible violation of art. 13(2) TEU, which addresses institutional balance.

While the Court recognised the Commission's power to represent the Union in its external actions, it clarified that such competence did not extend to signing non-binding agreements without proper authorisation. This conclusion derives from an analysis of the symmetry in the treaty-making process, wherein the decision to sign a non-binding instrument could not override the necessity for authorisation to negotiate, which must be granted by the Council. Excluding the Council from the adopted procedure, even for non-binding agreements, would elevate the Commission's role in a manner incompatible with the Union's institutional balance and thus compromise the principle of non-domination among institutions.[13]

IV. Case C-551-21: insights and commentaries

IV.1. Understanding the arguments

Under the Commission's argument, the adopted practice regarding the signature procedure of international agreements was conflictive with its competence to represent the Union on its external relations under art. 17 (1) of the Treaty on European Union (TEU). The Commission's argument was developed using a strict interpretation of the content informed by art. 7 (1) of the Vienna Convention of the Law of the Treaties (VCLT),[14] which states that the person designated for the act of signing has the status of representative.

Here, it is necessary to understand that the Commission's argument over the procedure present under art. 218 (5) TFEU becomes twofold, and a distinction must be made. One part of the procedure deals with the internal procedure development at the European level over the decision to "authorise" the signing or not of an agreement, which was not contested by the Commission on its demand as under the Council's competence. However, according to the Commission's strict reading of the article in conjunction with the VCLT, the actual "act" of signing international agreements as an act of external representation was to be recognised under the Commission's competence. The continuity of such an act by the Commission would violate the Commission's prerogative to exercise the Union's external representation.[15]

On the opposite side, the Council's approach to the procedure informed under art. 218 (5) TFEU understood the act of singing as a mere continuity of the Council's

[13] Case C-660/13 *Council v Commission* cit.; See P Koutrakos, 'Institutional Balance and Sincere Cooperation in Treaty-Making Under EU Law' cit..

[14] Vienna Convention on the Law of Treaties of 23 May 1969.

[15] Case C-551/21 *Commission v Council* cit. para. 48.

competence to authorise the signature of international agreements, further arguing that the signature itself had the intention to create legal effects under international law and not to express a Union's position of a determinate matter, in other words, not being classified as an act of external representation. Finally, the Council contended that if such an act were to be characterised as an act of external representation, such act should be addressed as an "other cases" exception under art. 218 (5).[16]

IV.2. The Court's Findings

The Court's findings depart from the analysis of the institutions' limits to the institution's competence by remembering the already defined role of the institutional balance and sincere cooperation brought in previous cases and practices.[17] The finding doesn't add to the earlier cases' definition or contours already established for both principles but instead recalls their importance in the EU machinery's power distribution. In other words, it remembers that each institution must exercise its respective competence, not dominate the others, respect the limits, and act with due respect to the other institutions' powers. Both principles are then used to guide the Court's analysis of the competence that followed.

Accessing the competence of the Council brought by art. 16 TEU, the Court noted that while the Council have the role of "policy-making and coordinating functions", its role in external representation was limited to the third paragraph of art. 16 (6) TEU that granted the Foreign Affairs Council the role to "elaborate the Union's external action based on strategic guidelines laid down by the European Council". Conversely, the competence of the Commission, as informed by art. 17 TEU, was to "promote the general interest of the Union" as well as to "ensure the Union's external representation" with the exemption on matters that concern the Common Foreign and Security Policy (CFSP).[18]

When applying the above division of prerogatives to art. 218 TFEU, the Court accepted the strict interpretation argued by the Commission by dividing the "authorisation" to sign the agreement from the "act" of signing. Such a decision clarifies each institution's role in respecting the proper institutional balance over the legislative act related to the conclusion of international agreements. While the article confirms that the Council, on a proposal by the Commission, is the one to "authorise" the signature of global agreements on behalf of the Union, the Court recognises that the act of singing is to be compared to

[16] *Ibidem* paras 56–59.

[17] Case C-70/88 *Parliament v Council* cit.; case C-660/13 *Council v Commission* cit.; case C-687/15 *Commission v Council* ECLI:EU:C:2017:803; case C-409/13 *Council v Commission* cit.; case C-24/20 *Commission v Council* ECLI:EU:C:2022:911; case C-551/21 *Commission v Council* ECLI:EU:C:2024:281, paras 62-63.

[18] Case C-551/21 *Commission v Council* cit. para. 65.

an act of external representation. Thus, the signature and the designation of the person to perform it shall be reserved by the Commission.[19]

Another clarification about the correct procedure to be followed is regarding para. 79 of the decision, where it was clarified that while art. 218 (5) grants the Council the power to authorise the signature of the treaty, such article did not grant it with the power to designate the signatory as no derogation to art. 17 (1) TEU is present.[20]

Finally, the Court correctly decided to maintain the effects of Decision 2021/1117 by understanding that the annulment of art. 2, as pleaded by the Commission, could be severed from the decision without altering the substance of the decision. The questioned article dealt with issues of the inner functioning of the Union and that either of the parties did not question the later effects and signing, so there was no doubt about the intention of the Union to be bound to such an act. Thus, although the Court decided by the annulment of art. 2, it correctly maintained the effects of the signature as definitive to preserve the legal certainty.[21]

This case reinforces the Court's importance in helping define the institutional limits of the Union's external representation. This delimitation is important to ensure the union's effective representation as a global actor.[22]

V. Conclusions

By deciding in favour of the Commission's claim, in my opinion, the Court correctly resolved the case and clarified an important question regarding who is to exercise the external act of treaty signature. The present ruling squarely integrates into the ECJ's case law that has defined aspects such as the signing of non-binding agreements and the procedure of negotiation, addressing the indeterminacies contained in the legal text of art. 218 TFEU, providing a proper interpretation of the legal content, and resolving institutional imbalances. In other words, it is a logical and welcomed development that adds to a consistent line of external relations case law handed down by the Court in recent years.

In essence, one of the purposes of the Lisbon reforms was to unify the role of the Union's external representation in the hands of the Commission, with the exception of the High Representative for CFSP matters. This reform aimed to resolve the confusion created by the Council's rotating presidency in the Union's external representation, which caused uncertainty for third countries regarding whom to contact for external relations matters. The present ruling seems to serve this purpose in a logical manner.

As clarified by the first section of this *Insight*, although observations of practice pointed to the Council as the institution performing the signature role in recent years, a deeper analysis of the agreements themselves reveals inconsistency dating back to the Lisbon era.

[19] *Ibidem* para. 66.
[20] *Ibidem* para. 79.
[21] *Ibidem* paras 86–89.
[22] See P Craig and G De Búrca, *EU Law: Text, Cases, and Materials* cit. 251.

Some agreements were signed by one institution, others by both the Council and the Commission, making it impossible to identify an established standard practice, thereby going against the unifying external representation objective promoted by the reform.

The Court recognised that a reiterated erroneous practice is insufficient to overcome a legal error in interpreting the obligations contained in the Treaties or an error in the balance of power among the institutions. By adopting a strict interpretation of art. 218(5) TFEU, the Court's decision is in consonance with the previous case law presented in this *Insight*. It correctly rebalanced the co-decision process and once more recognised that although the authorisation for the signature of both binding and non-binding agreements resides within the competences of the Council, the act of signing, being an act of external representation, must be performed by the European Commission to align with the principles of institutional balance and sincere cooperation, respecting each institution's competence.

Furthermore, since the intention of both parties was not to review the effects of the Council's Decision 2021/1117, but to address questions of the internal functioning of the Union, the Court correctly decided on the possibility of severing art. 2 of the decision while preserving its substance and effects, thereby ensuring legal certainty and avoiding negative consequences in the relationship with Gabon.

In summary, the Court once more played a pivotal role in shaping the Union's external action, improving the clarity and determinacy of the EU procedures contained in art. 218 TFEU regarding the signature and conclusion of treaties. It correctly acknowledged that the role of external representation pertains to the Commission. It is reasonable to expect that the future effects of the decision will positively impact and refine future practice in a more consistent manner.