

# Upholding the 'Community method': limits to the commission's power to withdraw legislative proposals-council v commission (C-409/13)

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**Upholding the “Community Method”: Limits to the  
Commission’s Power to Withdraw Legislative  
Proposals—*Council v Commission* (C-409/13)**

**by**

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# Analysis and Reflections

## Upholding the “Community Method”: Limits to the Commission’s Power to Withdraw Legislative Proposals—*Council v Commission* (C-409/13)

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☞ Actions for annulment; Community financial aid; Duty to provide reasons; EU law; Principle of conferral; Reasons; Sincere co-operation; Third countries; Withdrawal

*While all institutions traditionally agreed that the Commission can withdraw its legislative proposals for “administrative” reasons (e.g. in the case of an outdated proposal), the Commission’s competence to withdraw a proposal for political reasons was never generally accepted. The present case was the first in which this controversy was put to the Court. Because the Parliament and Council had (informally) clinched a deal in a way that, according to the Commission, undermined the purpose of the original proposal, the Commission withdrew the proposal, preventing the legislator from formally adopting the act. The Court was faced with two competing views on the role of the Commission in the legislative process and chose the golden mean, upholding the “Community method”: the Commission may withdraw its proposal if the legislator intends to alter its essential elements in such a way that the purpose of the original proposal would be defeated. Still, it remains unclear whether the Commission is barred from withdrawing a proposal, in the ordinary legislative procedure, after the conclusion of the first reading.*

### Introduction

In EU studies, the unique way in which legislative acts are adopted at EU level is often referred to, even in post-Lisbon times, as the “Community method”.<sup>1</sup> A distinct feature of the “Community method” of EU legislative decision-making is the European Commission’s monopoly over the right of initiative.<sup>2</sup> As a rule,<sup>3</sup> regardless of whether the ordinary or a special legislative procedure applies, the legislator (Council or Council and Parliament) can only act following a formal proposal by the Commission. Further, once such a proposal is made, the Commission’s part is not played out as it may still modify its proposal and adopt opinions on the positions taken by Parliament and Council. Although the Treaties do not expressly provide so, the Commission’s power to alter its proposals following their submission to the legislator is

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<sup>1</sup>R. Dehousse, “The Community Method at Sixty” in R. Dehousse (ed.), *The “Community Method”: Obstinate or Obsolete?* (Basingstoke: Palgrave Macmillan, 2011), p.5.

<sup>2</sup>G. Majone, “Is the Community Method Still Viable?” in *The “Community Method”* (2011), pp.23–24; B. Smulders and K. Eisele, “Reflections on the Institutional Balance, the Community Method and the Interplay between Jurisdictions after Lisbon” (2012) 31 *Yearbook of European Law* 112, 115–116.

<sup>3</sup>As regards formal legislation, the notable exception is the power of proposal in the areas of police co-operation and judicial co-operation in criminal matters which is shared between the Commission and the Member States pursuant to art.76(b) TFEU.

generally understood to also encompass the power to withdraw these proposals.<sup>4</sup> While most withdrawals will go unchallenged, it is clear that the possibility of withdrawing a proposal harbours the potential for inter-institutional conflict. From this perspective, it is indeed rather surprising that the present case was the very first case before the Court in which the limits to the Commission's power of withdrawal were raised.<sup>5</sup> At the same time, and as noted by Pennera and Schoo, withdrawing a proposal is the Commission's nuclear option and therefore not really that useful. Also for that reason, Pennera and Schoo doubted whether a (politically motivated) withdrawal would ever materialise, at the same time predicting that, in such a case, the issue would be referred to the Court of Justice.<sup>6</sup>

## Facts of the case

The facts leading to this case can be summarised shortly as follows: after the Commission submitted a proposal under the ordinary legislative procedure, the Council and Parliament were on the verge of adopting a legislative act that would, according to the Commission, pervert the aim and content of the original proposal. The Commission therefore decided to withdraw its proposal, preventing the Council and Parliament from adopting the legislative act. The Council, being upset by this course of action, brought proceedings against the Commission.

While this short summary may suffice to follow the reasoning of the Court *in casu*, it is still useful to elaborate on the facts giving rise to the present controversy, since the present case is also part of the case law resulting from the changes introduced by the Lisbon Treaty. While the ordinary legislative procedure as such has not really been altered by the Lisbon Treaty (apart from its name),<sup>7</sup> the Lisbon Treaty did expand the procedure's scope. Secondly, the Lisbon Treaty introduced the distinction between delegated and implementing acts, both of which hitherto fell under the broad notion of implementation.

The present case then concerned the Commission's attempt to come to a rationalisation in the area of macro-financial assistance (MFA) to third (non-EU) countries. While "European" macro-financial assistance to euro zone states through the European Stability Mechanism is a well-known complement to the macro-financial assistance by the International Monetary Fund (IMF), the EU itself may also grant loans to non-EU countries that have received support from the IMF. In the past, such aid was granted by legislative acts based on arts 235 EEC and (later) 308 EC. The Lisbon Treaty created a specific legal basis: art.212 TFEU for aid to developed countries and art.209 TFEU for aid to developing countries.

As a result, the position of the European Parliament was greatly strengthened. Aid was no longer granted following a mere consultation (or under current art.352 TFEU still only the consent) of the Parliament, but instead following the ordinary, co-decision, legislative procedure. However, having to go through a legislative procedure to grant MFA is rather burdensome, while the nature of the cases often requires

<sup>4</sup>Domestici-Met noted that the withdrawal of a proposal is the supreme form of the Commission's power to alter proposals. See M.-J. Domestici-Met, "Les Procédures Législatives Communautaires après l'Acte Unique" (1987) 310 *Revue du Marché Commun* 556, 567.

<sup>5</sup>Opinion of A.G. Jääskinen in *Council v Commission* (C-409/13) EU:C:2014:2470; [2015] 3 C.M.L.R. 21 at [4]. For a case in which the Commission had argued that the Council had overstepped the limits to its power of amendment, see *Commission v Council* (C-355/87) [1989] E.C.R. 1517; [1991] 1 C.M.L.R. 586 at [42]–[45].

<sup>6</sup>C. Pennera and J. Schoo, "La Codécision—Dix ans d'application" (2004) 40 *Cahiers de droit européen* 531, 554–555.

<sup>7</sup>The changes from Nice (art.251 EC) to Lisbon (art.294 TFEU) appear editorial but are remarkable in the light of the present case (see below). Both arts 250(2) EC and 293(2) TFEU refer to the Council having "acted" (see below), an expression which could be found again in art.251(2) EC, the Council "acting" by qualified majority voting in the first reading. In art.294 TFEU, however, the Council "adopts an act" or "adopts its position" in the first reading, and only "acts" in the second reading (art.294(8) TFEU). This is so in the English (act, acting) and French (*statue, statuant*) versions of the Treaty; in some other language versions (e.g. German and Dutch), the changes to art.294 TFEU do not seem meaningful in the light of the wording of art.293(2) TFEU).

speedy action on the part of the EU. The MFA to the Ukraine for instance was requested by that country in September 2014, the Commission made a proposal in January 2015 and (only) in April 2015 was the act granting MFA adopted.<sup>8</sup> Similarly, the MFA for Tunisia was requested in August 2013, a proposal was made in December 2013 and approved by the legislator in May 2014.<sup>9</sup>

While the timing of these procedures was rather impressive, in light of the fact that they were legislative procedures, it is clear that the decision to grant MFA could be taken even more efficiently and that the resulting time gained could be decisive for crisis-struck states such as the Ukraine and Tunisia. To increase the efficiency of these procedures, the Commission proposed in 2011 to adopt a framework regulation setting out the criteria for MFA and laying down an executive procedure to adopt MFA decisions.<sup>10</sup> Therefor, the Commission would be empowered to adopt implementing acts under a comitology procedure.<sup>11</sup>

With this element however, the Commission's proposal landed right into the controversy, following the Lisbon Treaty, on executive decision-making and the relation between legislative, delegated and implementing acts. Without entering into that discussion,<sup>12</sup> it should be remarked that an EU legislative act can empower the Commission to adopt implementing acts (foreseen in art.291 TFEU) if it is necessary that that act is implemented following uniform conditions. These acts are adopted through a comitology procedure which means that the Commission has to submit its drafts to a committee of national representatives and, unless they vote against the draft, the Commission will adopt it. In these procedures, the European Parliament does not play a meaningful role,<sup>13</sup> which is why it proposed, in the procedure giving rise to the present controversy, to provide in the framework regulation that the Commission should adopt MFA decisions through delegated, rather than implementing, acts.<sup>14</sup> These delegated acts are foreseen in art.290 TFEU and are adopted by the Commission, which first has to submit them to the Council and Parliament. Unless one (or both) of them object to the draft act, the Commission will adopt them.

Parliament therefore has a decisive role to play in the adoption of delegated acts. Still, it is important to note that the implementing and delegated acts are not simply alternative instruments but instead are fundamentally different from each other: an implementing act serves to *implement* any binding EU act following uniform conditions; a delegated act on the other hand serves to *amend or supplement* a legislative EU act. As a result, and in theory, both are very different and serve different functions. In practice, however, the Court has recently accepted that there is a grey zone between the two where the EU legislator has a

<sup>8</sup> See Commission, COM(2015) 5 final; Decision 2015/601 providing macro-financial assistance to Ukraine [2015] OJ 2015 L100/1.

<sup>9</sup> See Commission, COM(2013) 860 final; Decision 534/2014 providing macro-financial assistance [to Tunisia] [2014] OJ 2014 L151/9.

<sup>10</sup> Commission, "Proposal for a Regulation laying down general provisions for Macro-Financial Assistance to third countries" COM(2011) 396 final.

<sup>11</sup> See Proposal art.7(2) with art.14(2) of the proposal, indicating that the examination procedure should be used when taking decisions on MFA.

<sup>12</sup> For a discussion, see P. Craig, "Delegated Acts, Implementing Acts and the New Comitology Regulation" (2011) 36 E.L. Rev. 671.

<sup>13</sup> Under the Comitology Regulation (see art.11), the Parliament only has a limited right of scrutiny. In theory the Council is in the same position, but in practice the "appeal committee" (see art.6) can de facto convene in the configuration of the Council. See Regulation 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers [2011] OJ L55/13. For a discussion of this right of scrutiny, see C. Fabricius, "Das Kontrollrecht von Rat und Parlament nach der Komitologie-Durchführungsverordnung" (2014) 25 *Europäische Zeitschrift für Wirtschaftsrecht* 453.

<sup>14</sup> See Amendment 35 of the Amendments adopted by the European Parliament on 24 May 2012 to the proposal for a regulation of the European Parliament and of the Council laying down general provisions for Macro-Financial Assistance to third countries [2013] OJ CE 264/119.

discretion in deciding whether the Commission should be empowered to further regulate through either implementing or delegated acts.<sup>15</sup>

Looking at the functions of both acts, the decision to grant MFA following the criteria laid down in a framework regulation would indeed seem to come under the notion of implementation and would therefore have the Commission adopt implementing acts, rather than delegated acts as suggested by the Parliament. The Council, equally wary of losing control over these decisions,<sup>16</sup> simply suggested to keep adopting MFA decisions through legislative acts and to only list the criteria in the framework regulation.

Following several informal meetings between the institutions in the so-called trilogues (see below), Parliament and Council had settled on the original position of the Council and both institutions were about to adopt the framework regulation in that sense. However, before the regulation could be formally adopted, the Commission withdrew its proposal. The College of Commissioners decided so in an internal meeting, and Vice-President Rehn informed the Council and Parliament of the withdrawal by letter on the same day.

Although both the Council and Parliament were deprived of the competence to adopt the framework regulation, only the former instituted proceedings against the Commission, and while many Member States intervened in support of the Council, the Parliament did not.<sup>17</sup>

## The Court's judgment

The Council adduced three pleas: (1) infringement of the principle of division of powers and of the principle of institutional balance; (2) infringement of the principle of sincere co-operation; and (3) infringement of the obligation to state reasons. Although only the first two pleas were really intertwined, the principles invoked all coming under art.13(2) TEU, the Court addressed all three pleas together.

Further, while A.G. Jääskinen explicitly addressed the admissibility of the action, the Court simply confirmed so by noting that,

“a decision to withdraw a proposal ... constitutes an act against which an action for annulment may be brought given that ... such a decision prevents the Parliament and the Council from exercising ... their legislative functions.”<sup>18</sup>

Probably rightly, the Court did not enter into the technicalities of the admissibility even if this left some legal questions unaddressed. After all, the actual decision withdrawing the proposal was an internal Commission decision, while the letter sent to Parliament and Council (on the same date) could not be said to have binding effects itself. Still, A.G. Jääskinen concluded that it was by the Vice-President's letter that “the Commission concluded the legislative procedure, thus depriving the Parliament and the Council of any means of action”.<sup>19</sup> In line with earlier case law,<sup>20</sup> regardless of whether the act in question was binding, it resulted in legal effects since Parliament and Council were *formally* prevented from acting in their legislative capacity.

<sup>15</sup> See *Commission v Parliament and Council* (C-427/12) EU:C:2014:170; [2014] 3 C.M.L.R. 23. For a discussion of this case, see M. Chamon, “Clarifying the Divide between Delegated and Implementing Acts?” (2015) 42 *Legal Issues of Economic Integration* 175. See also *Commission v Parliament and Council* (C-88/14) EU:C:2015:499.

<sup>16</sup> Generally, see the Member States' reticence in completely aligning pre-Lisbon legislation with the new post-Lisbon comitology discussed in Chamon, “Clarifying the Divide between Delegated and Implementing Acts?” (2015) 42 *Legal Issues of Economic Integration* 175, 177–178.

<sup>17</sup> The Parliament and Council did adopt a Joint Declaration on the failed legislative procedure that was annexed to the Decision granting MFA to Georgia; see [2013] OJ L218/18.

<sup>18</sup> *Council v Commission* (C-409/13) EU:C:2015:217; [2015] 3 C.M.L.R. 21 at [77].

<sup>19</sup> Opinion of A.G. Jääskinen in *Council v Commission* (C-409/13) EU:C:2014:2470; [2015] 3 C.M.L.R. 21 at [24].

<sup>20</sup> In *Commission v Council* (C-27/04) for instance, the Court had found that the decision to suspend an executive deficit procedure produces legal effects; see *Commission v Council* (C-27/04) [2004] E.C.R. I-6649 at [44]–[51].

The Court started by recalling art.17(2) TEU, which provides that, as a rule, it is up to the Commission to make legislative proposals.<sup>21</sup> Next, it found this competence complemented by the two safeguards of art.293 TFEU.<sup>22</sup> That article's first paragraph provides that the Council, as a rule, can only amend the Commission's proposal by unanimity, while its second paragraph provides that: "As long as the Council has not acted, the Commission may alter its proposal at any time during the procedures leading to the adoption of a Union act."

The Court then remarked that the existence of a power of withdrawal for the Commission was not contested but that the parties disagreed on the extent of this power. According to the Council, the Commission could only withdraw its proposals in certain objective scenarios: a long period of inactivity without a prospect of concluding the procedure, new (scientific) information making the proposal obsolete, the existence of an agreement between the three institutions on the expediency of withdrawing a proposal, and so on.<sup>23</sup> As for the rest, the Council argued in favour of the European Commission as an honest broker,<sup>24</sup> a facilitator in the legislative process. The Commission on the other hand argued for a mirroring of the rules in relation to its right of initiative to identify the rules concerning its "right of withdrawal".<sup>25</sup>

The Court, however, referred to arts 17(2) TEU and 293 TFEU to come to a middle ground. Without expressly confirming this, the Court assumed the power to withdraw a legislative proposal from the power in art.293(2) TFEU to alter a proposal. The power to withdraw a proposal could then be exercised so long as the Council had not acted, on which the Advocate General explicitly noted that the Council "acts",<sup>26</sup> in the ordinary legislative procedure, when it concludes the first reading either by confirming the Parliament's position (art.294(4) TFEU) or adopting its own common position (art.294(5) TFEU). The Court continued by suggesting that the power to withdraw a proposal was still more restricted than the power to alter a proposal since it could not amount to a veto right and because every withdrawal has "to be supported by cogent evidence or arguments".<sup>27</sup>

Having laid the ground for its appraisal of the Council's first plea, the Court moved on to the third plea, to verify whether the Commission had adequately motivated its decision. This issue was indeed problematic. The external act of the Commission, the Vice-President's letter, simply informed the Parliament and Council of the withdrawal without stating reasons. However, under well-established jurisprudence, the extent of the obligation to state reasons also depends on the degree to which the parties concerned were involved in the procedure resulting in the contested decision. The Court invoked this case law to find that the Council was perfectly aware of the reasons which had led the Commission to withdraw its proposal since the latter had reiterated its position multiple times during the trilogues and had warned the two other institutions of its intent to withdraw the proposal should they insist on prescribing the ordinary legislative procedure to adopt MFA decisions.<sup>28</sup>

Having concluded that the Council had indeed been informed of the reasons for the withdrawal, the Court proceeded by verifying whether the reasons provided were indeed adequate and conformed to the rules governing the Commission's power of withdrawal. Here the Court again picked up on the Council's first two pleas, finding that:

<sup>21</sup> *Council v Commission* (C-409/13) EU:C:2015:217 at [68].

<sup>22</sup> *Council v Commission* (C-409/13) at [71]–[73].

<sup>23</sup> *Council v Commission* (C-409/13) at [34].

<sup>24</sup> Opinion of A.G. Jääskinen in *Council v Commission* (C-409/13) EU:C:2014:2470 at [27].

<sup>25</sup> Opinion of A.G. Jääskinen in *Council v Commission* (C-409/13) at [39].

<sup>26</sup> Opinion of A.G. Jääskinen in *Council v Commission* (C-409/13) at [60].

<sup>27</sup> *Council v Commission* (C-409/13) at [76].

<sup>28</sup> *Council v Commission* (C-409/13) at [80]; Opinion of A.G. Jääskinen in *Council v Commission* (C-409/13) at [107].

“It must be accepted that, where an amendment planned by the Parliament and the Council distorts the proposal for a legislative act in a manner which prevents achievement of the objectives pursued by the proposal and which, therefore, deprives it of its *raison d’être*, the Commission is entitled to withdraw it.”<sup>29</sup>

Were these conditions met *in casu*? To settle that issue, the Court went back to the Commission’s original proposal and found that its *raison d’être* was to make the decision-making process more efficient and to streamline the EU’s policy on MFA to third countries with the EU’s general external policy. The Court therefore concluded that the amendment by Parliament and Council “would have distorted an *essential* element of the proposal for a framework regulation in a manner irreconcilable with the objective pursued by that proposal”.<sup>30</sup> As a result, the Court found that the Commission had exercised its power of withdrawal *intra vires*.<sup>31</sup> Further, since the Commission had tried to come to a compromise and had acted constructively towards Parliament and Council in the framework of the trilogues, it also found that the Commission had not breached its duty of sincere co-operation.<sup>32</sup>

All three pleas having failed, the Council’s action was dismissed as unfounded.

## Comment

First, I will comment on the case itself and the reasoning of the Court and the Advocate General. Next some constitutional issues which lingered in the background and which merit further contemplation will be addressed.

### *The Commission’s power of withdrawal following Council v Commission*

In his Opinion, A.G. Jääskinen rightly noted the importance of this case for “the community method”.<sup>33</sup> Although the Court, evidently, did not rely on this notion itself it must have played in the minds of the judges since the Court firmly rejected the argument of the Council, relegating the Commission’s role in the legislative procedure (once a proposal is submitted) to that of a facilitator in service of the legislative procedure itself. That argument is indeed at odds with the proper role of the Commission as guardian of the common EU interest. It is, *inter alia*, this interest that should be pursued when EU legislation is adopted, EU legislation not being an end in itself. It is also the Commission’s role of guardian of the common interest that explains why the right of initiative was conferred on the Commission in the first place; why the Commission’s position on the Parliament’s amendments determines the majority threshold to be reached in the Council under art.294(9) TFEU; why in the “Europe of the Six” the three big Member States only formed a large enough majority in the Council if the latter voted on a proposal by the Commission, etc. While the Commission could also promote the common EU interest in a role of “honest broker”, the present ruling would confirm that the Commission should play a more active role. Specifically for the legislative procedure, while the Court has not elevated the Commission to the status of a (third) legislative branch on a par with Council and Parliament, the Commission’s role as guardian of the common interest may require it to intervene against Council and Parliament also after having submitted a proposal. The Commission is then competent to withdraw proposals, at least until the conclusion of the first reading.

This is then also a first temporal limit to the power of withdrawal, albeit that the Advocate General was much clearer on this than the Court. Since the Commission withdrew its proposal before the conclusion

<sup>29</sup> *Council v Commission* (C-409/13) EU:C:2015:217 at [83].

<sup>30</sup> *Council v Commission* (C-409/13) at [90] (emphasis added).

<sup>31</sup> *Council v Commission* (C-409/13) at [95].

<sup>32</sup> *Council v Commission* (C-409/13) at [102]–[103].

<sup>33</sup> Opinion of A.G. Jääskinen in (C-409/13) EU:C:2014:2470 at [44].

of first reading, the Court did not have to express itself on the possibility of a withdrawal *after* the first reading. The problem here ultimately goes back to art.293(2) TFEU, which speaks of “as long as the Council has not acted”. This provision is indeed problematic because it dates back to the original Rome Treaties when the Council was the only legislator and when there were no “readings” in the legislative procedure. The Single European Act (SEA) then introduced several readings (in the co-operation procedure), meaning that the Council “acted” at different moments during the procedure, but the Council still remained the only institution “acting” when legislation was formally adopted (see below).

Indeed, in the original Rome Treaties, art.149(1) EEC provided that the Council acted following a proposal by the Commission, with its second paragraph adding that:

“As long as the Council has not so acted, the Commission may amend its original proposal, particularly in cases where the Assembly has been consulted on the proposal concerned.”

The SEA reconfigured art.149 EEC by introducing the legislative co-operation procedure (again abolished by the Lisbon Treaty) in its second paragraph. The old second paragraph was then reintroduced in art.149(3) EEC as follows:

“As long as the Council has not acted, the Commission may alter its proposal at any time during the procedures mentioned in paragraphs 1 and 2.”<sup>34</sup>

The Maastricht Treaty replaced art.149(3) EEC with art.189(a)(2) EEC and introduced the wording as currently found in art.293(2) TFEU (under the Amsterdam numbering, art.250(2) EC).

Remarkably, few commentators noted the change in wording introduced by the SEA. De Ruyt drew attention to it and found that,

“the Commission may therefore still modify its proposal during the deliberations in Council during the second reading and even at the last moment of a ‘final marathon’, also if this would mean it has to reject the amendments of Parliament which it had earlier accepted.”<sup>35</sup>

Since the Council, also in the co-operation procedure, acted alone when legislation was formally adopted,<sup>36</sup> “the Council not having acted” could still be interpreted as the Council not having adopted the proposed legislative act. Still, Bieber noted the inconsistency between art.149(3) EEC and the logic of the co-operation procedure, finding that the Council’s common position (in first reading) had legal significance separate from the Commission’s proposal and concluding that if the Parliament had not acted on the Council’s position, the Commission could no longer amend or withdraw its proposal.<sup>37</sup> This would suggest that if the Parliament had acted, the Commission could still alter its proposal following the adoption of the common position. However, others were of the opinion that the Commission could only do so in function of the Parliament’s amendments to the common position,<sup>38</sup> pursuant to art.149(2)(d) EEC (now analogously art.294(7)(c) TFEU) rather than art.149(3) EEC (art.293(2) TFEU). As a result, the Commission would

<sup>34</sup> Emphasis added.

<sup>35</sup> J. de Ruyt, *L’acte Unique Européen — Commentaire* (Bruxelles: Éditions de l’Université de Bruxelles, 1989), p.132 (own translation).

<sup>36</sup> This despite the “strengthening” of the Parliament, as was noted by, inter alia, Wagner-Wieduwilt. See Klaus Wagner-Wieduwilt, “Das Zusammenwirken der Organe der Europäischen Gemeinschaften im Rahmen von Rechtssetzungsverfahren” (1988) 42 *Zeitschrift für Wirtschafts- und Bankrecht* 597, 602.

<sup>37</sup> R. Bieber, “Das Gesetzgebungsverfahren der Zusammenarbeit gemäß Art. 149 EWVG” (1989) 42 *Neue Juristische Wochenschrift* 1295, 1401.

<sup>38</sup> See the interventions of Glaesner and Dondelinger recorded in Institut d’Études Européennes, *L’Acte Unique Européen — Journée d’Études, Bruxelles 1er mars 1986* (Bruxelles: Université Libre de Bruxelles, 1986), p.21. Glaesner elaborated his position in H.-J. Glaesner, “Die Einheitliche Europäische Akte” (1986) 21 *Europarecht* 119, 150. For a French translation of this contribution see H.-J. Glaesner, “L’Acte Unique Européen” (1986) 29 *Revue du Marché Commun* 307, 320.

only have a severely restricted power to alter its proposal and presumably no possibility of withdrawing it anymore.

Today, under the ordinary legislative procedure, the Council “acting” is no longer the same as the legislator “acting”. “As long as the Council has not acted” has therefore changed in meaning and can now be understood, as the Advocate General explicitly confirmed, as the Council adopting its common position.<sup>39</sup> Generally, from the second reading onwards, the text on which the Parliament and Council deliberate is no longer the Commission’s text,<sup>40</sup> and the latter’s role is narrowed down to expressing its position on the amendments introduced by Parliament (and Council) pursuant to art.294(7)(c) TFEU (and art.294(6) TFEU).

The new meaning of art.293(2) TFEU may then have temporal consequences for the Commission’s power to withdraw a proposal, since the latter is tied to the former. Before the present case, Craig and De Búrca noted that the Commission,

“has the power to withdraw a proposed measure before it is adopted and submit a modified version or refuse to proceed again if it feels that any such measure will be amended in ways to which it is fundamentally averse.”<sup>41</sup>

Similarly, Lenaerts and Van Nuffel noted that “the Commission may also withdraw its proposal *at any time*”.<sup>42</sup> According to Driessen, however, the adoption of the common position meant that the Council had acted.<sup>43</sup> Further, as already implied by Craig and De Búrca, an unfettered right of withdrawal was never generally accepted, even if the limits which most authors had in mind were substantive, rather than temporal (see below).

Identifying the conclusion of the first reading as the ultimate limit (in time) to withdraw a proposal might, however, seem rather arbitrary, especially if it assumed that the Commission must continue to act in the common EU interest, also after having submitted a legislative proposal (see above). What if a proposal becomes devoid of purpose only on the second reading whereby all three institutions agree on the expediency of a withdrawal? While in theory this is imaginable, in practice this scenario does not pose a problem since the conclusion of the first reading in the ordinary legislative procedure also means that

<sup>39</sup> This was the traditional position of the Council; see I. Pingel, “Article 211 CE La Commission” in I. Pingel (ed.), *De Rome à Lisbonne : Commentaire Article par Article des Traités UE et CE* (Bruxelles: Bruylant, 2010), p.1389; B. Driessen, “*Interinstitutional Convention as Checks and Balances in EU Law*” (Dissertation, Katholieke Universiteit Leuven, Faculty of Law, 2006), pp.278–279, <https://lirias.kuleuven.be/bitstream/1979/890/2/20061112+SeppowEU.pdf>. [Accessed October 22, 2015].

<sup>40</sup> See also A. Dashwood and D. Wyatt, *European Union Law*, 6th edn (Oxford: Hart Publishing, 2011), pp.73–74.

<sup>41</sup> P. Craig and G. de Búrca, *EU Law: Text, Cases, and Materials*, 5th edn (Oxford: Oxford University Press, 2011), p.129 (emphasis added). This was the traditional position of the Commission: see Pingel, “Article 211 CE La Commission” in *De Rome à Lisbonne* (2010), p.1389; Driessen, “*Interinstitutional Convention as Checks and Balances in EU Law*” (2006), pp.278–279. In the same vein, see Glaesner, “Die Einheitliche Europäische Akte” (1986) 21 *Europarecht* 119, 150/Glaesner, “L’Acte Unique Européen” (1986) 29 *Revue du Marché Commun* 307, 320. Remarkably, this would mean that Glaesner thought that the Commission’s power to alter its proposal in the second reading was limited by Parliament’s amendments but that its power to withdraw the proposal was not restricted (in the second reading).

<sup>42</sup> K. Lenaerts and P. van Nuffel, *Constitutional Law of the European Union*, 2nd edn (London: Sweet and Maxwell, 2005), p.581 (emphasis added). Further, Lenaerts and Van Nuffel refer to *Germany v Council* to show that the Commission may also alter its proposal orally (at any time) and to *Austria v Council* to show that the Commission can make significant modifications to its proposal (at any time), but *Germany v Council* dealt with a Council legislative act arrived at through the consultation procedure, while *Austria v Council* did not deal with a legislative act, but with an executive Council act arrived at through an ad hoc comitology procedure foreseen in art.16 of Protocol 9 to the Act of Accession of Norway, Austria, Finland and Sweden. See *Germany v Council* (C-280/93) [1994] E.C.R. I-4973; *Austria v Council* (C-445/00) [2001] E.C.R. I-1461; [2003] 2 C.M.L.R. 14.

<sup>43</sup> Driessen, “*Interinstitutional Convention as Checks and Balances in EU Law*” (2006), pp.278–279.

mandatory time-limits start to run. If the institutions let these limits lapse, the procedure simply ends. A less hypothetical scenario, even if most legislative procedures are now finalised in first reading (see below), is the one in which Parliament and Council only subvert the Commission's proposal, depriving it of its *raison d'être*, on the second or third reading. In light of this, how can the timing (first or second/third reading) of such a subversion be determinate for a possible withdrawal? Yet, if the Commission's competence to withdraw a proposal is derived exclusively from art.293(2) TFEU, as the Court seems to suggest, and if that paragraph is to be understood as meaning that the Council "acts" once it adopts its common position, such a temporal limit on the Commission's competence to withdraw follows as a logical consequence. Still, one way out of this conundrum would be to interpret "the Council acting" as "the Council adopting (the final legislative act)", and furthermore to interpret "the Council adopting an act" in such a way that it encompasses "the Council and the Parliament jointly adopting an act".<sup>44</sup>

A second, and clearer, limit is a substantive one. Before the present case, *Domestic-Met* noted that withdrawing a proposal solely to restrict the legislative will of the Council, without being inspired by the "community interest", might be a *détournement de procédure* rather than a political act.<sup>45</sup> Further, the Commission itself also never claimed a veto right in the legislative procedure and agreed that non-administrative withdrawals should be exceptional and informed by the "community interest".<sup>46</sup> In reply to a parliamentary question in 2001, the Commission noted that it would (only) withdraw a proposal,

"where there is a risk that the Council may alter the nature of the proposal or where the decision taken on the proposal may result in an infringement of the EC Treaty."<sup>47</sup>

Where the Council had essentially argued that the Commission cannot withdraw a proposal when Parliament and Council have informally agreed on a text and are on the verge of formalising this agreement by adopting an act,<sup>48</sup> the Court confirmed that the Commission can withdraw a proposal where an amendment by Parliament and Council distorts the proposal in a manner preventing the achievement of its objectives and depriving it of its *raison d'être*. In its judgment, the Court twice emphasised that the amendment *in casu* would have distorted an *essential element* of the proposal.<sup>49</sup> This wording is remarkable since it is

<sup>44</sup> Support for the latter may be found in the *LIFE* case in which the Court noted that the reference to "acts which the Council adopts" in art.202 EC also referred to acts which the Parliament and Council adopt. See (C-378/00) *Commission v Parliament and Council* [2003] E.C.R. I-937; [2003] All E.R. (EC) 421 at [40]. Further, in *Parliament v Council*, the Court noted that "Acts of the Council, without further qualification, are those adopted by that institution, either alone or together with the Parliament under the co-decision procedure". See *Parliament v Council*, (C-259/95) [1997] E.C.R. I-5303 at [26]. It must be noted, however, that this jurisprudence only lends support to the second issue but not the first, i.e. the equation of "the Council acting" with "the Council adopting an act".

<sup>45</sup> See *Domestic-Met*, "Les Procédures Législatives Communautaires après l'Acte Unique" (1987) 310 *Revue du Marché Commun* 556, 567. See also J.-L. Dewost, "Le Conseil" in J. Megret, M. Waelbroeck and J.-V. Louis, *Le droit de la Communauté économique européenne 9: L'Assemblée, Le Conseil, La Commission, Le Comité économique et social* (Bruxelles: Éditions de l'Université de Bruxelles, 1979), pp.135–136.

<sup>46</sup> The Commission makes a distinction (see fn.47) between administrative withdrawals (outdated proposals, agreement between the institutions, etc.) and withdrawals for reasons of substance. In its answer to a question by MEP Herman, the Commission remarked that: "The Commission feels that its right to withdraw a proposal is the corollary to its right of initiative. Withdrawal must therefore be guided by the same criterion as the exercise of its right of initiative, i.e. the Community interest." See [1987] OJ C220/7. See also the Commission's answer to a question by MEP Lady Elles [1984] OJ C164/17.

<sup>47</sup> See answer to a question by MEP Huhne [2001] OJ C261E/209.

<sup>48</sup> *Council v Commission* (C-409/13) EU:C:2015:217 at [36]; Opinion of A.G. Jääskinen in *Council v Commission* (C-409/13) EU:C:2014:2470 at [29]. Dewost also argued that the Commission did not have a right of withdrawal where the Council (still before the co-decision procedure) was ready to take a decision by unanimity, deviating from the original proposal. See Dewost, "Le Conseil" in *Le droit de la Communauté économique européenne* (1979), pp.135–136.

<sup>49</sup> See *Council v Commission* (C-409/13) EU:C:2015:217 at [90] and [94].

reminiscent of the wording in art.290 TFEU, which provides that the essential elements of a legislative act need to be decided by the formal legislator, while the non-essential elements may be amended or supplemented by the Commission through delegated acts. However, it should be clear that the essential elements of a legislative proposal cannot be equated with the essential elements of a legislative act. If that were the case, the Parliament and Council would not have a meaningful role to play in the ordinary legislative procedure. The essential elements of a legislative act necessarily make up a broader category than that of the essential elements of a legislative proposal and probably also encompass the latter.

It should further be noted that following the present case, the essential elements of a Commission proposal are not immune from amendments by Parliament and Council. This is so because the Commission can only withdraw its proposal if such amendments go against the aim of the original proposal. To make this more concrete and using the facts of the present case: the Parliament's original suggestion to use delegated acts to adopt MFA decisions,<sup>50</sup> and abstraction made of the question whether a delegated act would be the right instrument (see above), would also have changed an essential element of the Commission's proposal, but not in a way that goes against the aim of that proposal, i.e. increased efficiency of the decision-making process. After all, depending on the modalities of the procedure, e.g. limiting the time available to Council and Parliament to object to a draft delegated act, adopting a delegated act is easier than adopting a legislative act and could match the efficiency of adopting an implementing act. In the present case, the Court seems to suggest that not just any incompatibility with the original proposal is sufficient to justify a withdrawal. Instead, the incompatibility should be so fundamental that the proposal loses its *raison d'être*.<sup>51</sup> This particular issue could be further clarified in a currently pending case in the areas of fisheries, where the Commission argues that the Council has fundamentally altered the nature of the Commission's proposal.<sup>52</sup>

Since the above conditions would have to be met cumulatively, the Commission's power to withdraw its legislative proposals is significantly restricted: it can only withdraw a proposal up to the second reading, when Parliament and Council contemplate amending an essential element of the proposal that contravenes the original aim of the proposal in such a way that the latter loses its purpose. Still, an important element over which the Commission does exercise influence is that related to the aim of the proposal, since it will be the Commission setting out the reasons underlying its proposal in the explanatory memorandum and in the Preamble to the proposal. Of course this was also debated *in casu*. The Council had argued that prescribing a legislative procedure to adopt MFA decisions would not go against the aim of the proposal because the framework regulation would still lay down the criteria to be taken into account when deciding on MFA requests. The Court, however, was more convinced by the Commission's line of reasoning, which saw the aim of the proposal in making the procedure for MFA more efficient.

### *Scrutinising a withdrawal decision*

The review exercised by the Court was markedly different from that proposed by the Advocate General. A.G. Jääskinen had suggested that a decision to withdraw a proposal was only subject to a restricted review, i.e. verifying whether a given withdrawal conforms to the essence of the power of withdrawal. This meant that the Court would only be able to check whether (1) the withdrawal happened before the

<sup>50</sup> See Amendment 35 of the Amendments adopted by the European Parliament on May 24, 2012 to the proposal for a regulation of the European Parliament and of the Council laying down general provisions for Macro-Financial Assistance to third countries [2013] OJ CE 264/119.

<sup>51</sup> See Amendment 35 of the Amendments adopted by the European Parliament on May 24, 2012 to the proposal for a regulation of the European Parliament and of the Council laying down general provisions for Macro-Financial Assistance to third countries [2013] OJ CE 264/119, para.94.

<sup>52</sup> See the Commission's third plea in *Commission v Council* (C-125/13) [2013] OJ 2013 C156/21.

conclusion of the first reading<sup>53</sup>; (2) whether the principle of sincere co-operation was respected<sup>54</sup>; and (3) whether the Commission was not under a duty to act,<sup>55</sup> i.e. whether the Treaties require the Commission to adopt proposals. By contrast, the Court could not scrutinise the substantive reasons invoked by the Commission to justify its proposal because it would otherwise rule prematurely on the legality of an embryonic legislative act.<sup>56</sup>

The Advocate General's suggestion further had repercussions for his appreciation of the plea related to the duty to motivate. Since the purpose of the latter is to ensure that an interested party is informed of the rationale underpinning a decision, the Advocate General found that a decision to withdraw a legislative proposal should not be motivated,<sup>57</sup> otherwise the Court would again have to rule on the grounds invoked by the Commission. From the account of the case (see above) it should be clear that the Court did not follow these suggestions of the Advocate General, scrutinising instead the reasons adduced by the Commission and its motivation for the contested act.

The different appraisals of these legal questions by the Advocate General and the Court are very interesting, but from a practical point of view the Court's approach appears preferable. Although it should be assumed that the Commission will make use of its power of withdrawal diligently (which this case, being the first on the issue, actually confirms) and in the common EU interest, the Court's limited judicial review of withdrawal decisions seems appropriate. This is also because the Advocate General's approach appears to carry within it some inherent tensions. After all, according to the Advocate General it should still be verified whether the Commission acts in conformity with the principle of sincere co-operation (see above) when it withdraws legislative proposals. It would be difficult to claim, however, that that principle only entails certain procedural safeguards. Surely, the principle of sincere co-operation also comes with substantive strings attached: it cannot be said that the Commission acts in conformity with its duty of sincere co-operation if, for instance, in cases of disagreement with the ordinary legislator, it limits itself to organising an extra round of informal trilogues without also intending to negotiate, in that extra round, on the substantive issues which are the source of the controversy between the three institutions. Further, the Advocate General also remarked that the prohibition of misuse of powers also applies to the Commission's power of withdrawal.<sup>58</sup> If, however, the Commission were accused of a *détournement de pouvoir*, it would be difficult not to enter into the reasoning and the grounds invoked by the Commission to appreciate such a claim.

### *Constitutional issues in the background of Council v Commission*

Inter-institutional controversies, such as the present one, are often intertwined with more fundamental constitutional issues and this case was not different in this respect.

### Trilogues

One of these issues, besides of course that related to the "community method", is the informal process of trilogues, which is now commonplace in EU legislative decision-making.<sup>59</sup> Despite this, the present case

<sup>53</sup> Opinion of A.G. Jääskinen in *Council v Commission* (C-409/13) EU:C:2014:2470 at [57]–[63].

<sup>54</sup> Opinion of A.G. Jääskinen in *Council v Commission* (C-409/13) at [65].

<sup>55</sup> Opinion of A.G. Jääskinen in *Council v Commission* (C-409/13) at [66].

<sup>56</sup> Opinion of A.G. Jääskinen in *Council v Commission* (C-409/13) at [74].

<sup>57</sup> Opinion of A.G. Jääskinen in *Council v Commission* (C-409/13) at [122].

<sup>58</sup> Opinion of A.G. Jääskinen in *Council v Commission* (C-409/13) at [96].

<sup>59</sup> For some background to the phenomenon of trilogues, see B. Fox, "Secret EU law-making: the triumph of the trialogue", EUObserver, April 4, 2014, <https://euobserver.com/investigations/123555>; House of Lords, European Union Committee, Codecision and national parliamentary scrutiny, 17th Report of Session 2008-09, HL Paper 125

is only the first in which the phenomenon plays such an important part. The trilogues, being informal, cannot be found in the Treaties. The ordinary legislative procedure of art.294 TFEU only hints at them in the conciliation stage and otherwise only foresees the three readings as moments at which the three institutions interact with each other. The time-limits from the first reading onwards being quite ambitious, the institutions already early on started to engage in informal talks on legislative proposals to “even the path” for the formal procedure (described in art.294 TFEU). The informal trilogues helped clinch a deal in the second (or third) reading, but over time the trilogues were also introduced in the first reading, before time-limits start to play. This has also meant that today most ordinary legislative procedures are already concluded in the first reading. According to Roederer-Rynning and Greenwood, in the Parliament’s seventh term (2009–14) this was so for 90 per cent of the procedures, up from 50 per cent in the sixth term (2004–09).<sup>60</sup>

The trilogues are undeniably effective at securing agreements between the three institutions, and it is safe to assume they are also very efficient. What is equally clear, however, is that the trilogues, which are not held in public, are not transparent.<sup>61</sup> Since trilogue meetings are usually *en petit comité*,<sup>62</sup> most MEPs, let alone ordinary citizens, are not informed about the decision-making. Of course, one should not be naive, since any political decision-making depends on informal processes, but if the informal processes take the upper hand over the formal procedures, the legitimacy of the decision-making process comes under pressure. The legitimacy of the EU’s ordinary legislative procedure depends on much the same elements determining the legitimacy of legislative decision-making in the Member States: public debate in society, public debate by the representatives of the people, public voting, transparency, and so on. The trilogues on the other hand are more akin to the diplomatic decision-making of traditional international organisations. As a result, the growing dominance of the trilogues clashes with the democratic decision-making on which the EU’s legitimacy (partially) depends.<sup>63</sup>

The procedure leading to the present controversy is a nice illustration of the above. If one were to solely look at the formal procedure, accessible on the EurLex website, one would conclude that not much has happened: the Commission made a proposal and the Parliament adopted an opinion in the first reading. However, the present case shows that in reality the institutions held six trilogue meetings. Who attended those meetings as a representative of one of the institutions is unknown, as are the positions taken during the meetings. In fact, it is only because the Council brought proceedings that the ordinary citizen is aware of the fact that these trilogues took place. A.G. Jääskinen principally rejected the argument that an informal (trilogue) agreement between Parliament and Council could prevent the Commission from formally withdrawing its proposal,<sup>64</sup> because “the political dimension of the legislative procedure cannot prevail over its legal dimension”.<sup>65</sup> This also meant that the Advocate General had difficulties accepting that the Commission’s interventions during the trilogues could be invoked by that institution to argue that it had

(July 21, 2009), pp.13–15, <http://www.publications.parliament.uk/pa/ld200809/ldselect/lddeucom/125/125.pdf> [Both accessed October 23, 2015].

<sup>60</sup> C. Roederer-Rynning and J. Greenwood, “The Culture of Trilogues” (2015) 22 *Journal of European Public Policy*, doi: 10.1080/13501763.2014.992934 [Accessed October 23, 2015].

<sup>61</sup> For a discussion of the Parliament’s attempt at reforming the trilogues, see Roederer-Rynning and Greenwood, “The Culture of Trilogues” (2015) 22 *Journal of European Public Policy*, pp.2–3, doi: 10.1080/13501763.2014.992934 [Accessed October 23, 2015].

<sup>62</sup> The type of trilogue meeting determines the number and type of people present around the table: see Roederer-Rynning and Greenwood, “The Culture of Trilogues” (2015) 22 *Journal of European Public Policy*, pp.7–9, doi: 10.1080/13501763.2014.992934 [Accessed October 23, 2015].

<sup>63</sup> Recently the EU Ombudsman has started an own-initiative inquiry on the (lack of) transparency of the trilogues. See Press Release 9/2015, “Ombudsman opens investigation to promote transparency of ‘trilogues’” (May 28, 2015).

<sup>64</sup> Opinion of A.G. Jääskinen in *Council v Commission* (C-409/13) EU:C:2014:2470 at [64].

<sup>65</sup> Opinion of A.G. Jääskinen in *Council v Commission* (C-409/13) EU:C:2014:2470 at [101].

provided “a detailed explanation in due time” before withdrawing the proposal,<sup>66</sup> as required by the Framework Agreement on Parliament-Commission relations.<sup>67</sup> The Court did not go as far and allowed the Commission to rely on the statements it made during the trilogues,<sup>68</sup> although this still does not mean that the Court, unlike the Advocate General, would accept that the “political dimension of the legislative procedure could prevail over its legal dimension”. As a result it would also appear too far stretched to argue that the Court has sanctioned or even legitimised the trilogues in this case.

## Division of powers between the institutions, institutional balance and loyal co-operation

As noted, the Council’s first two pleas were closely intertwined. The fact that the Court dealt with all three pleas together further confirms this, but also had the result that the requirements flowing from the principles of (1) division of powers; (2) institutional balance; and (3) sincere co-operation are hard to dissociate.

These three principles can be retraced to art.13(2) TEU which provides:

“Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation.”

Looking at the three principles separately, the principle of division of powers relates to the *existence* or conferral of certain competences (to a specific institution). The principle of institutional balance then relates more to the *exercise* of these competences and falls into three sub-rules, according to Lenaerts and Verhoeven: (1) each institution should enjoy a sufficient independence in order to exercise its powers; (2) institutions should not unconditionally assign their powers to other institutions; and (3) institutions may not in the exercise of their own powers encroach on the powers and prerogatives of other institutions.<sup>69</sup> Lastly, the principle of sincere co-operation relates exclusively to the manner in which powers are exercised.

In practice of course it is much more difficult to make a clear distinction between these principles. After all, competences are not only positively but also negatively defined under the principle of division of powers. This links up with the third sub-rule of the institutional balance and this prohibition on encroaching on another institution’s powers or prerogatives is in turn complemented by the commandment to co-operate sincerely with that institution.

As with many inter-institutional conflicts, the present one also saw the institutions juggle with the principle of institutional balance. This has to do with the fact that institutional balance has an unclear function in the Court’s jurisprudence.<sup>70</sup> While it has been qualified as a principle of EU law by the Court and while it has been a very potent instrument, in the past, to solidify the position of the European Parliament vis-à-vis the Council and Commission, it has not really functioned as an *actionable* principle. Further, not only do arguments based on institutional balance fall on deaf ears in Luxembourg, the Court also consistently ignores frivolous arguments based on the institutional balance.<sup>71</sup> This is odd, since if the institutional balance is indeed a legal principle of EU law, one would expect the Court to be sensitive to

<sup>66</sup> Opinion of A.G. Jääskinen in *Council v Commission* (C-409/13) EU:C:2014:2470 at [105].

<sup>67</sup> Framework Agreement on relations between the European Parliament and the European Commission [2010] OJ L304/47, point 39.

<sup>68</sup> *Council v Commission* (C-409/13) EU:C:2015:217 at [104].

<sup>69</sup> K. Lenaerts and A. Verhoeven, “Institutional Balance as a Guarantee for Democracy in EU Governance” in C. Joerges and R. Dehousse, *Good Governance in Europe’s Integrated Market* (Oxford: Oxford University Press, 2001), pp.44–45.

<sup>70</sup> Le Bot argues that institutional balance indeed is a principle of EU law, but that the Court has not yet drawn all the necessary conclusions from this. See F. Le Bot, “Le principe de l’équilibre institutionnel en droit de l’union européenne” (Dissertation, Université Panthéon-Assas (Paris 2), 2012), p.298.

<sup>71</sup> See M. Chamón, “The Institutional Balance, an Ill-Fated Principle of EU Law?” (2015) 21 *European Public Law* 371, 383.

such arguments and to insist on some dogmatic purity. Again, the present case illustrates this nicely since the Council argued that the Commission had violated the institutional balance by withdrawing the proposal,<sup>72</sup> while the Commission argued that it had fully respected the institutional balance and that it was the Council (and Parliament) that had infringed the institutional balance by upsetting its original proposal.<sup>73</sup> The Council retorted by observing that it had not done so and, even if it had,<sup>74</sup> that an “alleged serious interference with the institutional balance ... does not authorise the Commission to withdraw its proposal”.<sup>75</sup> Interestingly, this would suggest that the Council sees the institutional balance as a purely judicially enforceable principle.

Although the Court referred to the institutional balance multiple times in its ruling, which is not always the case when parties invoke the principle, it unfortunately did not really engage with the institutions on the content and the function of the institutional balance. In light of this, the present case again raises the question whether the institutional balance can rightly be qualified as a legal principle, rather than “a bat for the institutions to swat each other with”.<sup>76</sup> Although “institutional balance” plays a prominent role in the Opinion of the Advocate General and in the judgment of the Court, it is unclear whether and how the principle was important in coming to a solution to the controversy presented to the Court.<sup>77</sup> Is the present solution any different from a solution (solely) based on a combined application of the principles of division of powers and sincere co-operation? The unclear role of the principle of institutional balance again seems to confirm the position taken already in 1984 by Bieber, who found that institutional balance is unworkable as a principle and that instead one should rely on a combination of the principles of institutional autonomy and sincere co-operation.<sup>78</sup>

## Conclusion

The Court’s ruling in the present case should be welcomed since it is legally sound and practically workable. The Commission’s competence to withdraw its legislative proposal is intimately related to its competence to initiate the legislative procedure which in turn goes to the core of the “community method”. The Court has safeguarded the latter by confirming that the Commission does not cease to act in the EU interest after it submits a proposal—this contrary to the Council argument which placed the Commission in service of the legislative procedure instead of the legislative procedure in service of, *inter alia*, the general EU interest (safeguarded by the Commission).

At the same time, the Court did not simply confirm the existence of a power of withdrawal analogous to a power of proposal. In its judgment, the Court laid down some important limits, both temporal as well as substantive. Of course, some questions remain. As regards the temporal limit, it is unclear whether the Court is in complete agreement with the Advocate General to the effect that the end of the first reading is the ultimate limit to withdraw a proposal. Substantively, it may be asked whether the scenario *in casu* is the only scenario in which the Commission can “alter its proposal in the most drastic way”, *i.e.* withdrawing it.

<sup>72</sup> *In fine* Opinion of A.G. Jääskinen in *Council v Commission* (C-409/13) EU:C:2014:2470 at [27]–[28].

<sup>73</sup> Opinion of A.G. Jääskinen in *Council v Commission* (C-409/13) EU:C:2014:2470 at [67].

<sup>74</sup> *Council v Commission* (C-409/13) EU:C:2015:217 at [40].

<sup>75</sup> *Council v Commission* (C-409/13) EU:C:2015:217 at [39].

<sup>76</sup> D. Chalmers, “Justifying Institutional Accommodation” (2008) 33 E.L. Rev. 455, 456.

<sup>77</sup> For this, an institutional balance test might have to be developed by the Court. In his Opinion in the *Visa Reciprocity Mechanism* case, A.G. Mengozzi hinted at the possibility of applying an institutional balance test to verify whether a literal interpretation of art.290 TFEU should be followed or instead whether an interpretation going against the wording of that provision should be favoured. See Opinion of A.G. Mengozzi in *Commission v Parliament and Council* (C-88/14) EU:C:2015:304 at [48].

<sup>78</sup> R. Bieber, “The Settlement of Institutional Conflicts on the Basis of Article 4 of the EEC Treaty” (1984) 21 C.M.L. Rev. 505, 518–520.

The significant limits which the Court imposed on the Commission confirm the exceptional character of a withdrawal but are not too strict. After all, EU decision-making comes down to the art of compromise, much more so than legislating in most Member States, underscoring the importance of the principle of sincere co-operation (also between institutions). In addition, the Court in its test referred back to the objectives of the proposal. To a large extent these are defined by the Commission, which is in a position to pre-empt certain amendments which Parliament and Council might otherwise introduce.