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# Analysis

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Disputes between the EU institutions and the Member States are still abounding in the area of EU external relations law, despite the Lisbon Treaty’s objective to simplify and rationalise. Most of these cases raise the question of competence. The latest inter-institutional dispute brought before the Court of Justice of the EU is no different: In *Commission v Council of the EU* (C-24/20) the Commission reproaches the Council for having authorised *all* Member States to accede to an international law instrument that squarely comes under EU exclusive competence. This will be a landmark case. Apart from its implications for EU external relations law, this case offers the Court of Justice an opportunity to shed light on cross-cutting legal questions such as the Council of the EU’s competence to amend Commission proposals, the importance of institutional balance and the conditions under which Member States are authorised to exercise EU exclusive competences.

**Background**

In *Commission v Council* (C-24/20) the Commission is challenging Council Decision 2019/1754 on the accession of the European Union to the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications. In that Decision, the Council approved the EU’s accession and also authorised all of the Member States ‘which wish to do so’ to become party to this agreement alongside the EU. This is remarkable because the Court of Justice had earlier ruled that the Geneva Act falls squarely within the EU’s Common Commercial Policy and therefore within EU exclusive competence. While the Council accepted the EU’s exclusive competence for the agreement, it still diverted from the Commission’s proposal that only foresaw the EU’s accession to the Geneva Act. The Council did so for two reasons: firstly, the Geneva Act amends the Lisbon Agreement to which seven EU Member States were already contracting parties. Secondly, like most international agreements that allow international organisations to become parties, the Geneva Act provides that the international organisation in question is entitled to the same number of votes as the combined number of its member states (that are also party to the agreement). Although decision-making is normally by consensus, the more EU

Member States that become party to it, the more votes the EU will be able to cast in the Assembly of the Special Union created by the Lisbon Agreement.

**The notion of amendment**

The Commission invokes a violation of Article 218(6) TFEU in conjunction with Article 293(1) TFEU. These provisions prescribe that the Council can only act pursuant to a formal proposal of the Commission, and that if the Council wishes to amend Commission proposals it can only do so unanimously. The argument of the Commission here seems to be that the Council adopted a Decision that was so contrary to what the Commission had proposed that one cannot speak of 'amendment' anymore. The question of when certain modifications of a Commission proposal cannot be qualified anymore as 'amendments', has only once been put to the Court of Justice. But in that case the Court explicitly noted that it did not have to address that question to solve the case before it. The Commission's present argument also links up with the earlier *MFA* case in which the Court ruled that the Commission can exceptionally withdraw its proposal if the Council intends to amend a proposal in such a way that one of its essential elements is distorted 'in a manner irreconcilable with the objective pursued by that proposal.'

In the present case, the Commission probably thought that it would not be expedient to withdraw its proposal (assuming the *MFA* test was met) as that would have meant that the EU would not be able to accede to the Geneva Act either.

**The principle of institutional balance**

The Commission alleges that the Council has also infringed the notion of institutional balance under Article 13(2) TEU. The principle of institutional balance has become a classic argument in any inter-institutional dispute before the Court of Justice. Unfortunately, its scope, function and content remain unclear and it is uncertain whether it is an actionable principle of EU law. Rather, what typically happens in inter-institutional disputes is that the Court looks into whether a specific (procedural) provision in the Treaties has been respected and if not/so it automatically concludes that the institutional balance has not/indeed been respected (for example, in C-425/13). Unless the Court elaborates a different reasoning in this case, the institutional balance will again not acquire a self-standing function. It would remain a mere shorthand for referring to the requirements flowing from specific Treaty provision(s) of relevance in the case at hand.

**The authorisation of Member States**

When the Lisbon Treaty introduced the catalogue of competences it also explicitly provided in Article 2(1) TFEU that Member States may be authorised to act in an area of EU exclusive competences. In the present case, the Commission had noted that it might have accepted an amendment exceptionally allowing the Member States that are parties to the Lisbon Agreement to be granted the authorisation to also accede to the Geneva Act but that an authorisation for all the Member States is unwarranted. As already noted, the reason given by the Council was rather practical. The question thus raised is whether the

authorisations envisaged in Article 2(1) TFEU ought to be exceptional and whether practical reasons such as those invoked by the Council are permitted to justify such authorisations. Under established jurisprudence of the Court of Justice, practical reasons cannot affect the competence question. At the same time, competence is not a question here as the Council recognises that only the EU holds competence *in casu*. Then again, is the competence question (which cannot depend on practical considerations) not circumvented by authorising (for practical reasons) Member States to act in an area of exclusive EU competence?

**Functional mixity?**

Finally, because of the practical reasons which the Council will presumably advance, this case might invite the Court of Justice to look into the idea of functional mixity suggested in doctrine. The Council decided in favour of mixed action and it will invoke the international law context to justify this choice. This would follow up on the recent *MPA Antarctic* case where the Court seems to have accepted the relevance of international law for the question of the exercise of EU competence, albeit in an area of shared competence. Here it should be stressed again that the Commission originally proposed that only the EU would accede to the Geneva Act. As noted, the latter provides that an international organisation has as many votes as its member states that are parties to the Act. But if only the EU is a party it would not enjoy any voting rights which would not only hamper its own effectiveness in the Special Union but might also frustrate the operation of the Special Union and the application of the Geneva Act. Could this consequence (under international law) of EU-only action then be a reason for the Court to accept (or even require) mixed action by both the EU and its Member States in an area coming under EU exclusive competence?

*Merijn Chamon is Assistant Professor of EU Law at Maastricht University.* *The author would like to thank Isabelle Van Damme and Ayana Dootalieva for their comments on an earlier draft. Any errors or omissions remain his own.*

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