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# **Institutional balance and sincere cooperation in Treaty Making Under EU Law**

Panos Koutrakos\*

## **ABSTRACT**

A stream of recent judgments by the Grand Chamber of the European Court of Justice has shed light on the procedures that govern treaty-making by the European Union. This article explores how this case-law approaches the principle of institutional balance and the duty of cooperation between the institutions. It argues that the former is construed in a balanced manner on the basis of a literal interpretation of primary law that promotes strict compliance with procedural rules and does not favour a particular institution. As for the duty of cooperation, whilst its procedural dimension is strengthened, its scope remains somewhat elusive. The analysis identifies a pragmatic streak in the Court's balanced approach, and argues that there is an inherent limit to the impact of constitutional law on inter-institutional disputes. Ultimately, the less time and energy the institutions waste on turf wars about their procedural powers, the greater their contribution to increasing the efficiency of the Union's treaty-making practice.

## **Keywords**

European Law, treaty-making, ECJ, procedures, Article 218 TFEU

## **1. Introduction**

Treaty-making by the European Union (EU) is being talked about. Once occupying the minds of only decision-makers, mandarins, and lawyers, it is now the subject of public discourse. The on-again, off-again negotiation of the now moribund Transatlantic Trade and Investment Partnership (TTIP),<sup>1</sup> the signing and provisional application of the Comprehensive Economic and Trade Agreement (CETA),<sup>2</sup> and the conclusion of the EU-Ukraine Association Agreement in the Netherlands<sup>3</sup> have all brought public attention not only to what the EU does as a treaty-making actor, but also to how it does it. This interest increased further after the 23 June 2016 referendum in the United Kingdom and the ensuing negotiations with the EU about Brexit.<sup>4</sup>

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<sup>1</sup> At the time of writing, instead of any progress on the TTIP front, there is a concern about the aggressively unilateralist initiatives of the Trump administration. On 25 June 2018, the two parties agreed to negotiate about how to negotiate a closer trade relation (Joint EU-U.S. Statement following President Juncker's visit to the White House: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1898>).

<sup>2</sup> See [2017] OJ L 11/23.

<sup>3</sup> Following the non-binding referendum in the Netherlands, see Decision of the Heads of State or Government of the 28 Member States of the European Union, meeting within the European Council, Annexed to European Council Conclusions on Ukraine (15 December 2016).

<sup>4</sup> Art. 50 TEU that governs the Brexit negotiations states that these would be governed by Article 218(3) TFEU, that is the provision pursuant to which the EU negotiates agreements with third countries. This is analysed in Section 3 of the article. The EU rules on treaty-making will also govern the negotiation and conclusion of any agreement on the future relationship between the EU and the UK.

The rules and procedures governing the process of the negotiation and conclusion of international treaties are laid down in Article 218 TFEU. Described by Dashwood as ‘the procedural code’ for treaty-making,<sup>5</sup> they apply to most international agreements.<sup>6</sup> These provisions are of a constitutional character. As the Court of Justice puts it,<sup>7</sup>

Article 218 TFEU constitutes, as regards the conclusion of international treaties, an autonomous and general provision of constitutional scope, in that it confers specific powers on the EU institutions. With a view to establishing a balance between those institutions, it provides, in particular, that agreements between the European Union and one or more third States are to be negotiated by the Commission, in compliance with the negotiating directives drawn up by the Council, and then concluded by the Council, either after obtaining the consent of the European Parliament or after consulting it....

The constitutional character of the procedures governing treaty-making and the definition of the scope of the ensuing powers of the institutions have profound implications for the EU’s policy and practice. After all, in principle, the violation of the internal, that is the EU, procedural rules on treaty-making notwithstanding, a treaty concluded by the EU would be binding on the EU under international law.<sup>8</sup>

These provisions have been the subject-matter of a stream of recent cases. This is explained by the increasing prominence that the EU has attached to its global action in the last decade. The amendments of Article 218 TFEU may also have a role to play: they streamline the applicable procedures and recalibrate the underlying relationship between the different institutions,<sup>9</sup> with the position of the European Parliament significantly enhanced.<sup>10</sup> This revamped constitutional framework has provided fertile ground for legal disputes about how the EU should exercise its treaty-making powers.

This recent case-law on treaty-making will provide the canvas for this article. There are good reasons for this choice: the judgments were all rendered by the Grand Chamber and a considerable number of Member States intervened in many of these cases. There is also a broader point: in a short period of time, this case-law has settled a considerable number of fundamental questions about the procedures that govern the Union’s treaty-making. By elaborating on the institutional and procedural dimension, it has brought to the fore an aspect of EU external relations law that had not attracted as much attention

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<sup>5</sup> A Dashwood, M Dougan, B Rodger, E Spaventa, D Wyatt, *Wyatt and Dashwood’s European Union Law* 6<sup>th</sup> ed (Oxford: Hart Publishing, 2011) 936.

<sup>6</sup> Special rules apply to the conclusion of exchange rate and monetary agreements which is governed by Article 219 TFEU, and to the agreements concluded in the area of Common Commercial Policy in so far as ‘special provisions’ are provided for in Article 207 TFEU.

<sup>7</sup> Case C-425/13 *Commission v Parliament (EU-Australia trading emissions agreement)* EU:C:2015:483, para. 62. This formulation originated in Case C-327/91 *France v Commission* EU:C:1994:305, para. 28, except that the term ‘constitutional’ had only been included in the summary of the judgment in the official Court reports.

<sup>8</sup> See Case C-327/91 *France v Commission* EU:C:1994:305, para 25. See also Art. 46(2) of the Vienna Convention on the Law of Treaties which codifies customary international law (*Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* (2008) ICJ Rep 177.

<sup>9</sup> For the Lisbon Treaty amendments on EU external relations provisions, see, amongst others, P Koutrakos (ed.), *The European Union’s external relations a year after Lisbon* (2011) CLEER Working Paper 3.

<sup>10</sup> PJ Kuijper suggests that, at Lisbon, ‘foreign policy underwent a wave of democratization’: ‘The Case Law of the Court of Justice and the Allocation of External Relations Powers: Whither the Traditional Role of the Executive in EU Foreign Relations?’ in M Cremona and A Thies (eds), *The European Court of Justice and External Relations Law-Constitutional Challenges* (Hart Publishing 2014) 95 at 113.

as the disputes about treaty-making competence. After all, it was the existence and, crucially, the nature of external competence that had dominated this area of law since its genesis in the early 1970s. This emphasis manifested itself in a series of judgments, starting with the historic *AETR* case,<sup>11</sup> the complexity of which has exercised policy-makers in Brussels and national capitals over the years.<sup>12</sup> These principles have been so nuanced and context-specific that their incorporation in primary law at Lisbon has hardly enhanced the much-needed clarity necessary for their application.<sup>13</sup> In fact, it is more than 45 years since the *AETR* doctrine has been introduced and questions about the nature and scope of the Union's external competence are still being raised.<sup>14</sup>

The case-law examined in this article moves in another direction: it sheds light on another layer of what the EU does in the world, that is the procedural, and is about how the EU and/or Member States may act in the process of treaty-making. The emphasis on this dimension is a sign of maturity for EU external relations, as it illustrates a greater emphasis on the mechanics of what the EU does in the world. Focusing on the practicalities of policy-making, the case-law examined in this article contributes to making EU external relations a more rounded area of law.

In the politically charged context that prevails currently, commentators have addressed the legal implications of treaty-making for the effectiveness of the Union's external action.<sup>15</sup> This article will approach this area from another perspective: it will explore how the institutions relate to each other. Rather than analysing all aspects of the procedures governing treaty-making,<sup>16</sup> this article will focus on two themes, namely the principle of institutional balance and the duty of cooperation.

## **2. The themes: institutional balance and the duty of cooperation**

The first theme, that is the principle of institutional balance, is embedded in the EU's DNA. As early as in 1958, the European Court of Justice, in *Meroni*, referred to 'the balance of powers which is characteristic of the institutional structure of the Community'.<sup>17</sup> As is well known, this principle is not about a balanced allocation of powers.<sup>18</sup> It is, instead, about the division of powers between institutions by the framers

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<sup>11</sup> Case 22/70 *Commission v Council* EU:C:1971:32.

<sup>12</sup> See B De Witte, 'Too much constitutional law in the European Union's Foreign Relations?' in M Cremona and B De Witte (eds), *EU Foreign Relations Law* (Hart Publishing, 2008).

<sup>13</sup> See G De Baere and P Koutrakos, 'The Interactions Between the Legislature and the Judiciary in EU External Relations' in P Syrpis (ed.), *The Relationship Between the Legislature and the Judiciary in the Internal Market* (CUP 2012) 243.

<sup>14</sup> See, for instance, Opinion 2/15 EU:C:2017:376 and Opinion 3/15 EU:C:2017:114.

<sup>15</sup> See, for instance, G Van der Loo and R A. Wessel, 'The non-ratification of mixed agreements: Legal consequences and solutions' (2017) 54 CMLRev 735. For a broader and older perspective of mixity, see also C Hillion and P Koutrakos (eds), *Mixed Agreements Revisited – The EU and its Member States in the World* (Hart Publishing, 2010).

<sup>16</sup> See A Dashwood, 'EU Acts and Member State Acts in the Negotiation, Conclusion and Implementation of International Agreements' in M Cremona and C Kilpatrick (eds) *EU Legal Acts – Challenges and Transformations* (Oxford: OUP, 2018) 189.

<sup>17</sup> Case 9/56 *Meroni v High Authority* EU:C:1958:7, p152.

<sup>18</sup> See J. - P. Jacqué, 'The Principle of Institutional Balance', (2004) 41 CMLRev 384.

of the Treaties in a manner that would reflect the legal and political nature of the Union.<sup>19</sup> As the Court puts it,<sup>20</sup>

[t]he Treaties set up a system for distributing powers among the different Community institutions, assigning to each institution its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community’.

Viewed from this angle, the principle of institutional balance is intrinsically linked to the principle of conferral.<sup>21</sup> As the latter governs what the EU does, the former governs what the EU institutions do in order to enable the EU to act in accordance with the powers conferred under primary law. The principle of institutional balance encapsulates, therefore, the institutional implications of the principle of conferral.

There is also a second dimension in institutional balance: in addition to what the institutions do, the principle governs how they do it. The principle of institutional balance is, therefore, about ensuring that the coexistence of the EU institutions would be based on a system of inherent constraints on their interactions: ‘each of the institutions must exercise its powers with due regard for the powers of the other institutions’.<sup>22</sup> Put differently, ‘in accordance with the balance of powers between the institutions provided for by the treaties, the practice of [an institution, in that case the European Parliament] cannot deprive the other institutions of a prerogative granted to them by the treaties themselves’.<sup>23</sup>

Viewed from this angle, the principle of institutional balance lies at the core of the European Union’s constitutional order.<sup>24</sup> On the one hand, it captures the particularities of the EU’s idiosyncratic system that make it difficult for it to become tilted towards either unambiguous supranationalism or undiluted intergovernmentalism. On the other hand, the principle has clear implications for the conduct of the institutions in the legislative and executive sphere.

And yet, the principle is not articulated in the Treaties expressly. It is ‘reflected’,<sup>25</sup> instead, in the provisions of Article 13(2) TEU that read as follows:

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<sup>19</sup> See, amongst others, Jacqu , *ibid*, P Craig, ‘Institutions, Power and Institutional Balance’ in P Craig and G de Burca (eds), *The Evolution of EU Law 2<sup>nd</sup> ed* (Oxford: OUP, 2011) 41, G Guillermin, ‘Le principe de l’ quilibre institutionnel dans la jurisprudence de la Cour de justice des Communaut s europ ennes’, (1992) *Journal de droit International* 319, B Smulders and K Eisele, ‘Reflections on the Institutional Balance, the Community Method and the Interplay between Jurisdictions after Lisbon’, 31 *YEL* (2012) 112.

<sup>20</sup> Case C-70/88 *Parliament v Council (re: Chernobyl)* EU:C:1990:217, para. 21.

<sup>21</sup> Art. 5(1)-(2) TEU.

<sup>22</sup> Case C-70/88 *Parliament v Council* EU:C:1990:217, para. 22; also Case C-133/06 *Parliament v Council* EU:C:2008:257, para. 57.

<sup>23</sup> Case C-149/85 *Wubot* EU:C:1986:310, para. 23.

<sup>24</sup> Writing in 2000, De Witte pointed out that the Court had not referred to the institutional balance as a principle, and argued that to have done otherwise would have suggested an unwritten higher principle of an independent content: B De Witte, ‘The Role of Institutional Principles in the Judicial Development of the European Union Legal Order’ in F Snyder (ed.), *The Europeanisation of Law: The legal effects of European integration* (Hart Publishing, 2000) 83 at 92. Recent case refers expressly to the principle of institutional balance: see, for instance, Case C-63/12 *Commission v Parliament* EU:C:2013:752 at para. 73 and Case C-73/14 *Council v Commission (re: ITLOS)* EU:C:2015:663 at para. 61.

<sup>25</sup> Case C-73/14 *Council v Commission (re: ITLOS)* EU:C:2015:490, para. 461, Case C-425/13 *Commission v Council* EU:C:2015:483, para. 69, and Case C-660/13 *Council v Commission* EU:C:2016:616, para. 32.

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 in them. The institutions shall practice mutual sincere cooperation.

While the first sentence of the first limb had been part of primary law,<sup>26</sup> the second was added at Lisbon. This new formulation illustrates the wide scope of the principle and its intense impact on the construction of institutional powers. After all, the power-conferring provisions of the Treaties are not so clearly drafted as to provide certainty about the outer limits of what the institutions may do. The principle of institutional balance, therefore, provides the overall framework within which institutional powers are defined. As such, Article 13(2) TEU articulates a richer and more elaborate take on the principle.<sup>27</sup> This is confirmed by the reference to sincere cooperation, which brings us to the second theme of this analysis.

The notion of ‘mutual sincere cooperation’ refers to the duty of cooperation that has been part of the Union’s primary law since the establishment of the European Economic Community. The latter duty, however, was construed in the Treaties in relation to the conduct of the Member States. It is in those terms that the duty is set out in Article 4(3) TEU and its precursors.<sup>28</sup> It is also in that context that a solid body of case-law has elaborated on the implications of the principle for the Member States in numerous legal fields and has elevated it to a central aspect of the constitutionalisation process of the EU legal order.<sup>29</sup> Over the years, the Court of Justice has made it clear that the duty of cooperation also applies to the EU institutions.<sup>30</sup>

It is for the first time, however, that this dimension of sincere cooperation is enshrined in primary law. In fact, Article 13(2) TEU not only formalises the application of the duty of cooperation to institutional interactions, but it also brings it together with the principle of institutional balance. As a matter of policy, it would be difficult to envisage the latter without due regard to the former. After all, there is an elusive quality to the principle of institutional balance: it is not the sharp sword which would delineate with clarity and in advance the limits of institutional powers. The inherent uncertainties, therefore, of the principle are modulated in practice by how the institutions relate to each other. The way, therefore, Article 13(2) TEU brings these two principles together suggests that they amount to an indissoluble whole, as, in order to be consistent with the constitutional character of the EU legal order, the implementation of the principle of institutional balance requires compliance with the duty of cooperation.

Whilst, however, their significance is in no doubt, the definition of what compliance with the above principles would entail is hardly straightforward. It is not easy to ascertain how the opaque wording of Article 13(2) TEU would constrain the inherent

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<sup>26</sup> Ex Art. 7(1) EC.

<sup>27</sup> See C Hillion, ‘Conferral, cooperation and balance in the institutional framework of the EU external action’ in M Cremona (ed.), *Structural Principles in EU External Relations Law* (Oxford: Hart Publishing, 2018) 117 at 125.

<sup>28</sup> Art. 4(3) TEU articulates the duty in stronger terms than its precursor (Art. 10 EC).

<sup>29</sup> See the analysis in M Klamert, *The Principle of Loyalty in EU Law* (OUP, 2014).

<sup>30</sup> Case C-65/93 *European Parliament v Council (re: GTP)* EU:C:1995:91 at para. 23. See also Case 204/86 *Greece v Council* EU:C:1988:450, para. 16, and C-65/93 *Parliament v Council* EU:C:1995:91, paras 23 and 27.

tendency of any institution to increase its powers either boldly or gradually and imperceptibly. This is hardly surprising in itself, given the nature of the Union's Treaties as *traité cadre*. The formulation of Article 13 TEU(2) TEU, therefore, reflects the somewhat elusive quality of both the principle of institutional balance and the duty of cooperation.<sup>31</sup> It also has implications for the conduct of the institutions. On the one hand, what the principle of institutional balance means would depend, to a considerable extent, on the wording of the specific primary rules defining the powers of the institutions in specific policy areas. On the other hand, its elusive quality provides a degree of flexibility so that its elaboration in practice would also depend on policy considerations, in particular the willingness of institutions to test the limits of their powers and the shifting dynamics that may characterise their interactions at a given time.

Exploring the themes of institutional balance and the duty of cooperation in the context of treaty-making will shed light not only on how the Union's decision-making actors relate to each other, but also on the role of the Court of Justice. It is a truism that the Court has been central to the genesis and development of the EU's external relations law in general and the principle of duty of cooperation in particular.<sup>32</sup> The emphasis on the latter has been somewhat one-dimensional, as the case-law deals with it in the context of the relationship between the EU and the Member States. The disputes in *Mox Plant*,<sup>33</sup> *PFOS*,<sup>34</sup> and Case C-45/07 *Commission v Greece (IMO)*<sup>35</sup> and the attention they provoked<sup>36</sup> focus on the Court's role in reading into the duty of cooperation rigorous duties for the Member States.

The focus of this article will enable us to explore another dimension of the role of the Court, that is its approach to the interactions of the EU's institutions in the treaty-making process. The analysis of this dimension is timely. On the one hand, the new formulation of Article 13(2) TEU at Lisbon has brought the inter-institutional dimension of the principle to the fore and has enabled the Court to rule on the specific duties that it imposes on the institutions.<sup>37</sup> On the other hand, the opaque formulation of this provision underlines the central role of the Union's Judges in the elucidation of both principles. Finally, there is now a body of post-Lisbon case-law which provides a timely and useful point of reference against which to assess the Court's role in the area.

The analysis will examine how the above two themes play out in the case-law that has emerged from the different phases of the life cycle of international treaties, that is from the negotiation to the signing, the provisional application and their conclusion. How

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<sup>31</sup> See T Christiansen, 'The European Union after the Lisbon Treaty: An Elusive "Institutional Balance"?' in A Biondi and P Eeckhout (eds), *EU Law After Lisbon* (OUP, 2012) 228.

<sup>32</sup> See Cremona and Thies (eds), n10 above and De Baere and Koutrakos, n13 above, 243.

<sup>33</sup> Case C-459/03 *Commission v. Ireland* EU:C:2006:34.

<sup>34</sup> Case C-246/07 *Commission v. Sweden* EU:C:2010:203.

<sup>35</sup> ECLI:EU:C:2009:81.

<sup>36</sup> See A Delgado Casteleiro and J Larik, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations', (2011) 36 *ELRev* 524, C Hillion, 'Mixity and Coherence in EU External Relations: The Significance of the Duty of Cooperation' in Hillion and Koutrakos (eds), n15 above, 87, P Koutrakos, 'In Search of a Voice: EU law constraints on member states in international law-making' in R Liivoja and J Petman (eds), *International Law-Making – Essays in Honour of Jan Klabbers* (Routledge, 2014) 211, and E Neframi, 'The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations', (2010) 45 *CMLRev* 331.

<sup>37</sup> See Hillion, n27 above, 135 *et seq.*

has the principle of institutional balance affected the content and intensity of the interactions between the institutions in treaty-making? Does its construction by the Court of Justice favour specific functions and institutions? What role has the duty of co-operation played in the application of institutional balance? And has the Court of Justice approached these two themes in an interventionist manner, therefore reflecting the tenor of its constitutional case-law on external competence? In addressing the above questions, this article will tease out common threads in the case-law and will analyse them in the post-Lisbon constitutional context.

### 3. Negotiating international treaties

The power to negotiate on behalf of the EU is bestowed by primary law depending on the subject-matter of the agreement to be negotiated. Article 218(3) TFEU refers to the Commission and the High Representative of the Union for Foreign Affairs and Security Policy, the latter responsible for the negotiation of agreements which relate exclusively or principally to the common foreign and security policy (CFSP).<sup>38</sup> The negotiation of an international agreement is carried out pursuant to negotiating directives which are adopted by the Council under Article 218(2) TFEU. Article 218(4) TFEU also provides that the Council ‘may address directives to the negotiator and designate a special committee in consultation with which the negotiations must be conducted’.

The principle of institutional balance does not provide an easy yardstick which would enable the institutions to be confident about how to interact in carrying out the above functions. On the one hand, the right to negotiate is an important power that establishes the Commission’s ‘pre-eminent role in any negotiation’.<sup>39</sup> It is also tied in with the general role assigned to the Commission under Article 17(1) TEU which provides that, ‘[w]ith the exception of the common foreign and security policy, and other cases provided for in the Treaties, [the Commission] shall ensure the Union’s external representation’. On the other hand, the dividing line between the Council’s authorising and the Commission’s negotiating roles is not clear. Construed widely, the latter may test the limits of the Council’s negotiating directives; understood narrowly, they may deprive the Commission of any leeway and authority that an effective negotiator would require in order to carry out their role effectively.

In Case C-425/13 *Commission v Council*, a case about the negotiation of an EU-Australia Agreement aiming to introduce a mutual recognition mechanism for trading greenhouse gas emission allowances,<sup>40</sup> the Court stressed the balance between the above tasks allocated to the EU institutions: the negotiating role of the Commission should be meaningful, the special committee ought to be ‘in a position to formulate

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<sup>38</sup> Art. 218(3) TFEU also refers to ‘the Union’s negotiating team’ which may relate to agreements the subject-matter of which would fall within the scope of both the CFSP and other strands of the EU’s external action.

<sup>39</sup> I MacLeod, ID Hendry and S Hyett, *The External Relations of the European Communities* (OUP, 1996) 88. The significance of this power has become all the more apparent in the context of the Brexit negotiations under Art. 50 TEU (the Council’s negotiating directives of 22 May 2017 for the withdrawal agreement are available here: <https://www.consilium.europa.eu/media/21766/directives-for-the-negotiation-xt21016-ad01re02en17.pdf>, and for the transitional period here: <http://www.consilium.europa.eu/media/32504/xt21004-ad01re02en18.pdf>).

<sup>40</sup> EU:C:2015:483. Such agreements are envisaged in Art. 25 of Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community [2003] OJ L 275/32, amended by Directive 2009/29/EC [2009] OJ L 140/63.

opinions and advice relating to the negotiations’ and, ultimately, the Council ought to have ‘clear knowledge of the course of the negotiations concerning the preparation of a draft agreement that will be submitted to it for approval’.<sup>41</sup>

Against this context, compliance with the principle of institutional balance is ensured by a set of strong procedural mechanisms. The Council has the right to set out in the negotiating directives a set of arrangements governing the process for the provision of information, for communication and for consultation, and to impose on the Commission a rigorous reporting obligation (in writing, on the outcome of the negotiations after each negotiating session and, in any event, at least quarterly). In so far as the directives were not ‘liable to deny the negotiator the power which is granted in Article 17(1) TEU’,<sup>42</sup> they could impose on the Commission a wide set of obligations: to have the negotiations prepared for well in advance; to inform the Council of the schedule anticipated and the issues to be negotiated, to forward relevant documents as early as possible, to report to the Council on the outcome of the negotiations after each negotiating session and, in any event, at least quarterly, to inform on any major problem that may arise during the negotiations, to obtain prior authorization from the special committee for seeking guidance on specific technical aspects of the negotiations.

There is, however, a limit on the obligations that could be imposed on the Commission: the negotiating directives could not bestow on the special committee and the Council the right to establish ‘detailed negotiating positions’. As these would seek ‘to bind the negotiator’,<sup>43</sup> they would be contrary to the role that Article 218(4) TFEU assigned to the relevant actors: they would go ‘beyond the consultative function’ of the special committee, and would ‘invest’ the Council ‘with the power to impose “detailed negotiating positions” on the negotiator’.<sup>44</sup>

This is a measured reading of what the principle of institutional balance entails in the negotiations of international agreements. Whilst adopting a broad approach to information-sharing and reporting, the Court stopped short of impinging upon the negotiating power of the Commission, and rejected what would amount to constant and *ad hoc* binding constraints that are not envisaged in Article 218 TFEU. After all, were the possibility of the adoption of detailed negotiating positions by the special committee accepted, the latter could, in effect, amend the negotiating directives.<sup>45</sup>

This approach also deems institutional balance as intrinsically linked to the duty of sincere cooperation. Whilst the latter is only spelled out at the beginning of the judgment, it clearly informs the specific procedural interactions between the institutions that the Court examines. The duty of cooperation, therefore, provides the filter through which compliance with the principle of institutional balance would become feasible in practice. As such, it is difficult to disentangle it from that principle. This view is faithful to the reading of Article 13(2) TEU articulated in Section 2 above.

In adopting this approach, the judgment focuses on the specifics of the negotiations and is devoid of general statements about the role of the institutions. This is in contrast to

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<sup>41</sup> Paras 66 and 67 of the judgment respectively.

<sup>42</sup> Para. 79 of the judgment.

<sup>43</sup> Para. 86 of the judgment.

<sup>44</sup> Paras 89 and 90 of the judgment respectively.

<sup>45</sup> This point is made by AG Wathelet in para, 105 of his Opinion (EU:C:2015:174).

the Opinion of Advocate General Wathelet who had put forward a somewhat abstract and one-dimensional analysis in order to reject a purely technical role for the Commission by relying on the Union's interest.<sup>46</sup> For all the force of his analysis, however, the learned Advocate General did not show how, in practical terms, the specific reporting requirements would impinge upon the Commission's negotiating role.

This construction of the principle of institutional balance and the duty of cooperation reflects a sense of pragmatism. The introduction of a detailed, formalized and enhanced reporting obligation for the Commission would have internal and external benefits: it would contribute to rigorous communication with the special committee and the Council, and, ultimately, to the smooth process of the negotiation and signing of international agreements. This aspect of the negotiations becomes clearer if viewed against a specific policy concern, that is to ensure that the Commission would not take initiatives beyond the authority granted by the Council and which might not be sanctioned by the Member States. This concern was borne out by previous incidents, such as the Blair House Agreement that the Commission negotiated with the United States in 1992, and the Framework Agreement on Bananas in 1994.<sup>47</sup> Furthermore, the Council sought to avoid a repeat of the negotiation of a similar agreement with Switzerland, during which it had viewed the Commission's engagement in consultation as considerably lacking both in terms of frequency of meetings and content of information provided to the special committee. Viewed from this angle, the strong procedural dimension of the interactions between the institutions required by the Court addresses a practical issue of considerable significance for the Council and the Member States.

#### **4. Signing non-binding agreements**

The authority to sign binding international agreements rests with the Council and is exercised following a proposal by the Commission under Article 218(5) TFEU. By signing such an agreement, the EU is bound by international law not to engage in acts or omissions that would defeat the object and purpose of the agreement.<sup>48</sup> This authority amounts to a significant power that the Council guards zealously. The TFEU, however, does not set out any decision-making mechanism specifically for non-binding agreements.<sup>49</sup> In Case C-233/02 *France v Commission*, the Court held that the determination of which institution had the power to adopt a non-binding agreement ought to be made on the basis of the division of powers and the institutional balance established in the Treaties.<sup>50</sup>

And yet, given the silence in the Treaties, compliance with the principle of institutional balance is complicated by the allocation of tasks to the EU institutions that may appear to overlap. The broad terms in which these tasks are set out do not help. On the one hand, and in addition to its general power to 'carry out policy-making and coordinating functions as laid down in the Treaties' pursuant to Article 16(1) TEU, the Council has

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<sup>46</sup> EU:C:2015:174, paras 193 and 126.

<sup>47</sup> See the overview in P Eeckhout, *EU External Relations Law* 2<sup>nd</sup> ed (Oxford: OUP, 2011), 197-9.

<sup>48</sup> See Art. 18(a) Vienna Convention on the Law of Treaties. See also Case T-115/94 *Opel Austria v Council* EU:T:1997:3, paras 90-95.

<sup>49</sup> Given the lack of binding effect, they are not governed by Article 218 TFEU.

<sup>50</sup> EU:C:2004:173, para. 40.

a specific external relations function: in its Foreign Affairs formation, it has the power ‘to elaborate the Union's external action on the basis of strategic guidelines laid down by the European Council and ensure that the Union's action is consistent’ under Article 16(6) TEU. On the other hand, the Commission is entrusted under Article 17(1) TFEU with the task of ‘promot[ing] the general interest of the Union and tak[ing] appropriate initiatives to that end’ as well as ‘exercis[ing] coordinating, executive and management functions, as laid down in the Treaties’.

The Commission’s power of external representation under Article 17(1) TEU does not amount to the power to sign a non-binding agreement. This was the conclusion reached in Case C-660/13 *Council v Commission*, a case about a 2013 addendum to a non-binding EU-Switzerland Memorandum of Understanding regarding the latter’s financial contribution to Member States in exchange for access to the EU’s single market.<sup>51</sup>

Its approach to the principle of institutional balance highlights further the sense of pragmatism that we have already seen in the context of the negotiations of international agreements (Section 3). Here, a decision to sign non-binding agreements is tied in with a policy assessment. The latter should be made ‘in compliance with strategic guidelines laid down by the European Council and the principles and objectives of the Union’s external action laid down in Article 21(1) and (2) TEU, of the Union’s interests in the context of its relations with the third country concerned, and the divergent interests arising in those relations to be reconciled’.<sup>52</sup> As such a policy assessment is for the Council to make, in accordance with Article 16(1) and (6) TEU, it is also for the Council to sign non-binding agreements.<sup>53</sup> This emphasis on the policy underpinnings of the power to sign a non-binding agreement was borne out by the factual context of the dispute: the agreement in question referred to the amount of the Swiss contribution and its duration, both of which were ‘essential aspects of the Union’s policy making’ in the area.<sup>54</sup>

The judgment in *EU-Switzerland MoU* sheds light on how the Court approaches the position of the principle of institutional balance in relation to other constitutional principles governing treaty-making, namely that of conferral and the duty of cooperation. The inherent linkages between institutional balance and conferral were mentioned above in Section 2. The Court assumes that the violation of the former entails a violation of the latter.<sup>55</sup> This explains the economy of the *EU-Switzerland MoU* judgment, a characteristic that also explains the silence on the duty of cooperation: there is no scope for examining how an EU institution has exercised a power with which it has not been endowed under primary law.

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<sup>51</sup> EU:C:2016:616.

<sup>52</sup> *Ibid.*, para. 39.

<sup>53</sup> The judgment suggests that the Council could in fact authorize the Commission to sign a non-binding agreement (para. 43). This is also the Council’s position: Doc. No. 5707/13, Council Legal Service Opinion on the procedure to be followed for the conclusion by the EU of Memoranda of Understanding, Joint Statements and other texts containing policy commitments, with third countries and international organizations (Brussels, 1 Feb. 2013), para 12.

<sup>54</sup> Para. 45 of the judgment. As AG Sharpston pointed out in her Opinion, this information had not, in fact, been laid down in the 2012 Conclusions and, therefore, the 2013 addendum did not correspond to these fully.

<sup>55</sup> EU:C:2016:616, para. 53.

The Court's take on institutional balance in *EU-Switzerland MoU* introduces a degree of symmetry in treaty-making. It does so in two ways. First, it links the decision to sign a non-binding agreement with the decision to authorise its negotiation. The former does not emerge in a legal and policy vacuum. It follows, instead, from a Council authorization. Given that the Council's assessment of the EU's policy requirements is the source for the negotiation of an agreement, it would be paradoxical if the Council was not involved in the signature of that agreement. This is even more so in the light of the significance of the power to sign agreements for this institution's standing in EU external relations. The policy choice as to whether the content of an agreement negotiated by the Commission would be acceptable for the Union is central to this power.

Second, the above approach to institutional balance alludes to a symmetry with the procedures laid down in Article 218 TFEU which endow the Council with the power to sign international agreements. The lack of any emphasis in the judgment on the nature of the Addendum to the Memorandum of Understanding as a non-binding measure, for instance, is noteworthy. Given the increasing significance of non-binding agreements in international relations,<sup>56</sup> such symmetry is justified in practical terms. Furthermore, this approach is faithful to the general scheme of the allocation of tasks to the EU institutions. Had a power to sign non-binding agreements been conferred on the Commission in the absence of an express provision to that effect, the Court would have elevated the status of the Commission in EU external relations in a manner that would be incompatible with the institutional structure that shapes the Union's external action.

## **5. Authorising the signature and provisional application of international agreements**

The limits of the principle of institutional balance and the duty of cooperation in the context of treaty-making are tested directly by hybrid decisions. These are adopted by both the Council and the Representatives of the Member States meeting within the Council in order to authorise the signature and, where necessary, the provisional application international agreements. As mentioned above, this power rests with the Council under Article 215(5) TFEU and is exercised, in principle, by qualified majority voting (Article 218(8) TFEU). Hybrid decisions have relied upon, albeit infrequently, in EU external relations, recently for the signing and provisional application of various air transport agreements.<sup>57</sup> They have also been relied upon in other policy areas in the

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<sup>56</sup> See A Schafer, 'Resolving Deadlock: Why International Organisations Introduce Soft Law', (2006) 12 ELJ 194. For the use of soft law instruments in the European Neighbourhood Policy in particular, see B Van Vooren, 'Soft Law in EU External Relations: The European Neighbourhood Policy', (2009) 34 ELRev 696.

<sup>57</sup> See Dec. 2013/398/EU re: Euro-Mediterranean Aviation Agreement with Israel [2013] OJ L 208/1, Dec. 2012/639/EU re: the Common Aviation Area Agreement with Moldova [2012] OJ L 292/1, Dec. 2012/708/EU re: Common Aviation Area Agreement with Georgia [2012] OJ L 321/1, Dec. 2012/750/EU re: Euro-Mediterranean Aviation Agreement with Jordan [2012] 334/1, Dec. 2006/959/EC re: Euro-Mediterranean Aviation Agreement with Morocco [2006] OJ L 386/55.

past,<sup>58</sup> and, in the distant past, even more sparingly on the internal plane.<sup>59</sup> On the one hand, this practice may appear to run counter to the principle of institutional balance, as it may encroach upon the decision-making powers granted to the Council under primary law. On the other hand, it may illustrate a specific application of the duty of cooperation which would facilitate the Union's action along with that of the Member States.

The adoption of hybrid decisions has now been held to violate the principle of institutional balance. This is what the Grand Chamber decided in Case C-28/12 *Commission v Council*.<sup>60</sup> This case arose in the dense context of the 2007 air transport agreement between the EU and its Member States and the United States of America,<sup>61</sup> in particular a hybrid decision on the signing and provisional application of two agreements: the first extended the 2007 agreement to Norway and Iceland,<sup>62</sup> and the second was about the Commission representing Iceland and Norway in any issues that arose from the implementation of the 2007 agreement.

The Court's approach to institutional balance is based on the premise that, when it comes to treaty-making, procedures laid down in primary law matter, and the Court is prepared to enforce them rigorously. A hybrid decision is adopted pursuant to a single procedure, even though the issues covered by the contested decision ought to have been dealt with on the basis of different procedures: the signing and provisional application of the agreements on behalf of the EU is decided, in principle, by qualified majority voting in the Council under Article 218(8) TFEU, whereas the provisional application of the agreements by the Member States is subject to consensus of their representatives. The significance that the Court attaches to procedural propriety is illustrated strikingly by the following extract from the judgment: 'the rules regarding the manner in which the EU institutions arrive at their decisions are laid down in the Treaties and are not at the disposal of the Member States or of the institutions themselves.'<sup>63</sup>

The procedural anomaly that is pointed out in the judgment is tied in with a violation of the principle of conferral. Given that the hybrid decision 'in fact merges two different acts ... without it being possible to discern which act reflects the will of the Council and which the will of the Member States',<sup>64</sup> the EU institutions end up exercising a power they do not have. This is also the case for the Member States, as Article 218(5)

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<sup>58</sup> See Dec. 91/586/ECSC, EEC suspending the application of the Agreements between the EC, its Member States and Yugoslavia [1991] OJ L 315/47 and Dec. 76/755/ECSC, EEC, Euratom on practical measures of economic cooperation within the EC-Canada Joint Committee [1976] OJ L 260/36.

<sup>59</sup> See Dec. 90/238/Euratom, ECSC, EEC adopting a 1900 to 1994 action plan in the context of the 'Europe against Cancer' programme [1990] OJ L 137/31, Dec. 88/351/EEC adopting a 1988 to 1989 plan of action for an information and public awareness campaign in the context of the 'Europe against cancer' programme [1988] OJ L 160/52, Dec. 77/294/EEC adopting the fourth medium economic policy programme [1977] OJ L 101/1,

<sup>60</sup> EU:C:2015:282. They had also been raised in Case C-114/12 *Commission v Council (re: broadcasting rights)* EU:C:2014:2151, but the Court did not examine them, as it held that the contested measure was illegal because it violated the Union's exclusive competence (AG Sharpston, however, analysed them: EU:C:2014:224, paras 167 *et seq.*)

<sup>61</sup> [2007] OJ L 134/4, amended by a Protocol in 2010 ([2010] OJ L 223/3).

<sup>62</sup> [2011] OJ L 283/3.

<sup>63</sup> Case C-28/12, para. 42.

<sup>64</sup> Para. 49 of the judgment.

TFEU does not confer any competence on Member States to adopt a decision on the signing and provisional application by the EU of an international agreement.

By objecting to the fusion of different procedures and the ensuing lack of clarity as to which actor does what and on the basis of which power, the judgment is entirely consistent with other strands of the case-law. In relation to legal basis disputes, for instance, the Court is distinctly reluctant to sanction reliance upon more than one legal bases which would entail different procedures, an approach that, at times, gives rise to a somewhat esoteric assessment of the aims, context, and content of an international agreement.<sup>65</sup> The parallel between the problems raised by hybrid decisions and legal basis disputes is illustrated by the reasoning in Case C-28/12 *Hybrid Decisions*, as the authority it provides ‘by analogy’ in this part of the judgment is itself a legal basis case.<sup>66</sup>

This emphasis on the rigorous enforcement of the procedural rules laid down in Article 218 TFEU may explain the cursory manner in which the Court held in the *Hybrid Decisions* judgment that the adoption of a hybrid decision may not constitute a specific illustration of the duty of cooperation between the EU institutions and the Member States: ‘that principle cannot justify the Council setting itself free from compliance with the procedural rules and voting arrangements laid down in in Article 218 TFEU’.<sup>67</sup> There is no reference, for instance, to the alternatives that would be open to the EU and the Member States in order to deal with the practical problems raised by their joint participation. Such alternatives had been discussed at the hearing and examined by Advocate General Mengozzi. They included the simultaneous adoption of two separate decisions, one by the Council and the other by the Representatives of the Member States,<sup>68</sup> or a decision adopted solely by the Council.<sup>69</sup>

Given the inherently open ended scope of the duty of cooperation, is the reluctance of the Court to put some flesh on the duty of cooperation bone regrettable?<sup>70</sup> And does the judgment signify a shift away from facilitating joint EU-Member State external action?<sup>71</sup> Such questions touch upon the proper role of the Court of Justice in such disputes. It is not for the Court either to make suggestions to the Union’s institutions about possible policy choices or to provide a list of specific alternatives as to how to deal with the complexities of the co-existence of the EU and the Member States on the international scene. Had it done so, it would have been viewed as steering dangerously

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<sup>65</sup> In the area of trade and environmental policy, see Case C-94/03 *Commission v Council* EU:C:2006:2, para. 51. See also Opinion 2/00 EU:C:2001:664 and Case C-281/01 *Commission v Council* EU:C:2002:761, analysed in P Koutrakos, *EU International Relations Law* 2<sup>nd</sup> ed (Hart Publishing 2015) 54-67. This reluctance is also apparent in the areas of foreign policy and development cooperation: see Case C-130/10 *European Parliament v Council* EU:C:2012:472, para. 49.

<sup>66</sup> Para. 52 of Case 28/12 *Commission v Council* EU:C:2015:282, with reference to Case C-338/01 *Commission v Council* EU:C:2004:253.

<sup>67</sup> Para. 55 of the judgment.

<sup>68</sup> This option would not be without problems, given the intrinsic links between areas in transport agreements which fall within EU and national competence (AG Opinion, EU:C:2015:43, para.88).

<sup>69</sup> This had been suggested by the Commission and, according to AG Mengozzi, it was rather ‘sensitive’ as it would give rise to legal problems given the constitutional requirements in some Member States (AG Opinion, *ibid*).

<sup>70</sup> Dashwood argues that the judgment is characterized by ‘procedural purity’: n16 above at 248. He also suggests that careful drafting could address the concerns expressed in the judgment (*ibid*, at 244-5).

<sup>71</sup> T. Verellen, On hybrid decisions, mixed agreements and the limits of the new legal order: *Commission v Council* (“*US Air Transport Agreement*”), (2016) 53 CMLRev 741 at 741-2 and 748-753.

close to interfering with policy-making. In fact, such an approach would be tantamount to providing direction to the Member States as to how to exercise their competence, rather than merely establishing the parameters within which they may exercise it. Any court would be loath to do so. It would also have made it necessary for the Court to examine the scope of the Union's competence, a discussion that is absent in the judgment. Any abstract analysis of what the duty of cooperation might entail in practice would be bound to disappoint: it would fail to capture the considerable range of possibilities on which the ingenuity of the legal services of the institutions and the Member States could rely. If, furthermore, taken out of context, it might lead to potentially problematic outcomes that were not envisaged at the time of the judgment.

The above analysis may explain the economy that characterizes the judgment in *EU-Switzerland MoU*. By focusing on the wording of specific provisions and the specific implications of the procedural aspects of the case, the Court avoids general pronouncements about hybrid decisions of the kind made by both the parties<sup>72</sup> and Advocate General Mengozzi.<sup>73</sup> The judgment, instead, is based on the rigorous application of the primary rules on treaty-making within the specific legal and factual context of the dispute raised before the Court.

## **6. The right of the European Parliament to be informed**

The strong procedural dimension that underpins the application of the principle of institutional balance in treaty-making regarding the Council-Commission interplay (identified in Section 3 above) also characterises the interactions between the Parliament and the other institutions. The opportunity for this to emerge was given by the entry into force of the Lisbon Treaty. By redrawing the EU's institutional map in external relations, it enhanced considerably the powers of the European Parliament.<sup>74</sup> The latter's consent is now necessary for the conclusion of most international agreements,<sup>75</sup> a power that the Parliament has not shied away from exercising quite early on.<sup>76</sup> The Lisbon Treaty also bestows on the Parliament a general right to be informed. Article 218(10) TFEU provides that the Parliament 'shall be immediately and fully informed at all stages of the procedure'.

This broad provision has been given teeth in two judgments about the EU's agreements with Mauritius (Case C-658/11 *Parliament v Council*)<sup>77</sup> and Tanzania (Case C-263/14 *Parliament v Council*).<sup>78</sup> Both agreements were about the transfer of individuals

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<sup>72</sup> The Commission had suggested that reliance upon hybrid decisions would blur the autonomy of the Union's presence in international relations.

<sup>73</sup> AG Mengozzi had argued that hybrid decisions would, amongst others, be 'liable to weaken the EU as a full player on the world stage' (n68 above, para. 86).

<sup>74</sup> See B Kleizen, *Mapping the involvement of the European Parliament in EU external relations-a legal and empirical analysis*, (2016) CLEER Working Paper 4 and R Passos, 'The European Union's External Relations A Year after Lisbon: A First Evaluation from the European Parliament' in Koutrakos (ed.), n9 above, at 49.

<sup>75</sup> Art. 218(6)(a) TFEU.

<sup>76</sup> This has been the case regarding the EU-US SWIFT Agreement (EP legislative resolution of 11 February 2010 [2010] OJ C 341 E/100), the renegotiation of PNR Agreements with Australia ([2012] OJ L 18/4), the United States ([2012] OJ L 174/1), and Canada (the conclusion of which the Court has recently found contrary to the Treaties: Opinion 1/15 EU:C:2016:656), and ACTA (EP legislative resolution of 4 July 2012 P7\_TA (2012) 028).

<sup>77</sup> EU:C:2014:2025.

<sup>78</sup> EU:C:2016:435.

suspected of piracy at sea and arrested by EU personnel in the context of the anti-piracy operation Atalanta off the coast of Somalia.<sup>79</sup> It is worth-pointing out that these judgments were rendered in relation to the Common Security Defence Policy (CSDP), an area where the Parliament has no formal input and its only right is to be informed under Article 218(10) TFEU.

This right amounts to ‘an expression of the democratic principles on which the European Union is founded’,<sup>80</sup> and the Court left no doubt as to the significance of its implications:<sup>81</sup>

If the Parliament is not immediately and fully informed at all stages of the procedure in accordance with Article 218(10) TFEU, including that preceding the conclusion of the agreement, it is not in a position to exercise the right of scrutiny which the Treaties have conferred on it in relation to the CFSP or, where appropriate, to make known its views as regards, in particular, the correct legal basis for the act concerned. The infringement of that information requirement impinges, in those circumstances, on the Parliament’s performance of its duties in relation to the CFSP, and therefore constitutes an infringement of an essential procedural requirement.

In practical terms, this suggests that Article 218(10) TFEU applies to all stages that precede the conclusion of an international agreement, including the negotiation phase. Whilst the right to be informed does not extend to stages that are part of the internal preparatory process within the Council, it does cover the intermediate results reached by the negotiation, including the texts of the draft agreement and the draft decision approved by the Council’s Foreign Relations Counsellors and communicated to the Union’s interlocutors.

This is a strong construction of the right to be informed. Given the factual context within which the dispute arose, it is also not surprising. It is staggering that the Council should have seriously argued in Case C-658/11 *EU-Mauritius Agreement*<sup>82</sup> that sending the Parliament the decision adopting an agreement three months later was reasonable. Or that the publication of the text of the agreement and the Council Decision concluding it in the *Official Journal* would have sufficed. While it suggested in *EU-Tanzania* that the word ‘immediately’ should not be taken literally (information delivered after a period of a few days may be acceptable at times),<sup>83</sup> the Court pointed out that the Council had failed altogether to communicate the text.

The Court’s interpretation of the right to be informed is not based expressly on the principle of institutional balance. The threads, however, that were identified above in the analysis of the principle emerge clearly. The Court’s approach suggests that the procedures on treaty-making laid down in primary law matter, a point highlighted above in the context of hybrid decisions (Section 5). Indeed, to have interpreted Article 218(10) TFEU differently would have been tantamount to rendering it irrelevant. Such a view would also have been difficult to sustain in the broader scheme of the Union’s

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<sup>79</sup> On the issues raised by such transfer agreements, see D Thym, ‘Piracy and Transfer Agreements concluded by the EU’, in P Koutrakos and A Skordas (eds), *The Law and Practice of Piracy at Sea—EU and International Perspectives*, (Hart Publishing, 2013) 167.

<sup>80</sup> Case C-658/11 *European Parliament v Council*, para. 81.

<sup>81</sup> *Ibid*, para. 86.

<sup>82</sup> EU:C:2014:2025.

<sup>83</sup> EU:C:2016:435, para. 82.

treaty-making. Given the enhanced position of the Parliament and its willingness to use the powers with which it is endowed under the Lisbon Treaty in the conclusion of most other international agreements, to cut it off from information related to CFSP agreements would be counterproductive and detrimental to the smooth interactions between the institutions in other fields of external relations. In other words, to have encouraged the reluctance of the other institutions to engage with the Parliament in CFSP agreements would have risked a breakdown in inter-institutional relations in a policy area that can ill afford it. Viewed from this angle, the broad construction of the right to be informed under Article 218(10) TFEU also illustrates a good deal of pragmatism.

## **7. A similar approach to institutional balance and the duty of cooperation in the implementation of treaties**

The analysis so far has focused on how the principle of institutional balance and the duty of cooperation play out in the context of treaty-making. Once the treaty-making process has been completed, and the international agreement has entered into force, these principles are still relevant to the interaction between the institutions. In fact, the process of implementation may raise issues similar to those examined in the analysis so far. This has become apparent recently in the context of Article 218 (9) TFEU. This provision reads as follows:

The Council, on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, shall adopt a decision suspending application of an agreement and establishing the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.

A detailed analysis of this provision is beyond the scope of this article.<sup>84</sup> This section will tease out, instead, certain aspects from recent case-law that confirm our analysis of the Court's approach to institutional balance and the duty of cooperation.

The Court has recently highlighted the significance of Article 218(9) TFEU in the decision-making practice of the Union's institutions. In Case C-687/15 *Commission v Council (International Telecommunication Union, ITU)*, the Council set out the position that the EU would take at a meeting of the World Radiocommunication Conference 2015 of the International Telecommunication Union (ITU).<sup>85</sup> Consistently with its practice in the context of ITU for a number of years, the Council did so in the conclusions of its meeting, rather than a decision under Article 218(9) TFEU. The Grand Chamber, however, held that, in doing so, the Council had infringed the latter provision. Having relied upon the limits of the powers of the institutions and the principle of institutional balance reflected in Article 13(2) TEU, the Court pointed out that the Union's institutions do not enjoy any power to amend the decision-making procedures laid down in the Treaties. Failure to comply with Article 218(9) TFEU did not only amount to the exercise of a power that the Council did not possess under primary law, but it also gave rise to uncertainty as to the legal nature and scope of the measure actually adopted by the institution.

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<sup>84</sup> See Dashwood, n16 above at 227-246.

<sup>85</sup> EU:C:2017:803.

The *ITU* judgment illustrates a literal interpretation of the Treaty-based decision-making procedure which links the application of the latter with respect for the principle of institutional balance. We find this literal interpretation in relation not only to what falls within the scope of Article 218(9) TFEU, but also beyond it. A case in point is the Court's approach to the question who decides the Union's position before a tribunal established under an international agreement in which the EU is a party. On the one hand, Council argues that it has the power to adopt such a decision pursuant to Article 218(9) TFEU. On the other hand, the Commission claims that the right to decide the EU's position in a tribunal established under an international agreement in which the EU is a party is part of the general power to represent the EU with which it is endowed under Article 335 TFEU.<sup>86</sup>

These competing claims raise an issue 'of cardinal importance'<sup>87</sup> which was addressed for the first time in Case C-73/14 *Council v Commission (re: ITLOS)* in the context of the jurisdiction of the International Tribunal for the Law of the Sea (ITLOS), established under the United Nations Convention on the Law of the Sea (UNCLOS).<sup>88</sup> The Court held that it was for the Commission to represent the EU in such proceedings. Article 218(9) TFEU is confined to cases where the EU participates, either through its institutions or its Member States acting jointly in its interests, in the adoption of acts having legal effects. This is not the case regarding ITLOS, 'an international judicial body' the members of which are 'solely' responsible for rendering the advisory opinion in question 'acting wholly independently of the parties'.<sup>89</sup> The interpretation was borne out by the wording of Article 218(9) TFEU (it refers to positions adopted 'in' rather than 'before' a body set up by an international agreement), as well as its context and purpose (the simplified procedure laid down therein amounts to a derogation from the ordinary procedure about treaty-making set out in Article 218(1)-(8) TFEU).

As Article 218(9) TFEU is not applicable, the power of the Commission under Article 335 TFEU is triggered. This is construed broadly: it is related to the legal capacity of the EU, and covers representation both internally (that is in the Member States) and externally (hence before ITLOS).

As for the duty of cooperation, its construction follows the pattern that was examined above in the article. On the one hand, the duty may not displace the role of the institutions granted under primary law (which is why the Commission is under no obligation to submit the content of its written statement to the Council for its approval). On the other hand, there is a procedural layer on how the Commission is expected to exercise its power (it has to consult the Council prior to expressing the EU's position before an international tribunal). In the judgment, the Court engaged closely with the facts in order to conclude that the duty of cooperation had been complied with: the Commission had submitted a working document to the Council and had revised it several times, whilst ensuring that the final version referred to the issue of the

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<sup>86</sup> It reads as follows: 'In each of the Member States, the Union shall enjoy the most extensive legal capacity accorded to legal persons under their laws; it may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings. To this end, the Union shall be represented by the Commission....'.

<sup>87</sup> AG Sharpston in her Opinion in Case C-73/14 *Council v Commission (re: ITLOS)* EU:C:2015:490, para. 49.

<sup>88</sup> EU:C:2015:663.

<sup>89</sup> Case C-73/14, para. 66.

jurisdiction of ITLOS in neutral terms in order to take into account the divergent views expressed by various Member States within the Council.

There are, therefore, threads that bring together the application of the principle of institutional balance and the duty of cooperation in the treaty-making process and the implementation of international agreements. This is also apparent in the style of the judgment. The line of reasoning is characterised by considerable economy. There is very little here about the Union's external competence, other than the agreement by all parties, acknowledged by the Court, that the subject matter of the request for an advisory opinion is about, 'at least in part', the conservation of marine biological resources, an area which falls within the EU's exclusive competence under Article 3(1)(d) TFEU.<sup>90</sup> There is also emphasis on the wording of Article 218(9) TFEU and a lack of general pronouncements about the role of the Commission in the EU's external relations or the practical and policy imperatives that the Commission's power would meet.<sup>91</sup>

In addition to the above threads, the judgment in *ITLOS* illustrates a broader point about the principle of institutional balance, namely its inherent limits as a clear rule on the allocation of tasks between institutions. A main tenet of the Court's line of reasoning is the distinction between policy-making and interventions in judicial proceedings: the submission of observations before ITLOS did not aim 'to formulate a policy ... but to present to ITLOS, on the basis of an analysis of the provisions of international and EU law relevant to that subject, a set of legal observations aimed at enabling that court to give, if appropriate, an informed advisory opinion on the questions put to it'.<sup>92</sup> There is, however, very little by way of reasoning about the distinction between policy-making and decisions on ITLOS proceedings in the judgment. Similarly, the concerns of the Council about the content of the Commission's statement (viewed as related to strategic or political choices about the ITLOS jurisdiction which were for the Council to make) and its wider political consequences were dismissed rather too swiftly. The Court, instead, held that those considerations were 'characteristic of participation before a court' and could not be regarded as policy-making within the meaning of Article 16(1) TEU.<sup>93</sup>

The subject-matter of the specific proceedings before ITLOS may justify the conclusion reached in the judgment. These were brought in the context of the application of UNCLOS and the United Nations Fish Stocks Agreement, an area where there is a considerable body of EU secondary legislation.<sup>94</sup> Viewed from this angle, it is not

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<sup>90</sup> Case C-73/14, para. 55. This was also the position taken by AG Sharpston, who considered the question whether the determination of the jurisdiction of ITLOS to deliver advisory opinions was a matter exclusively for the Member States or not irrelevant (Case C-73/14 *Council v Commission* EU:C:2015:490 paras 51-2 of her Opinion).

<sup>91</sup> This is contrast to AG Sharpston who had argued that a broader construction of Article 218(9) TFEU would impinge on the Commission's discretion to lodge and participate in WTO proceedings and would undermine the EU's ability to meet the strict procedural time limits laid down for international legal proceedings (EU:C:2015:490, para. 78).

<sup>92</sup> Case C-73/14, para. 71.

<sup>93</sup> Case C-73/14 *Council v Commission* EU:C:2015:663, para. 72-4.

<sup>94</sup> Including Regulation 1005/2008 on a system of rules and procedures aiming to prevent, deter, and eliminate IUU fishing [2008] OJ L 286/1, Regulation 1006/2008 on the authorization of fishing activities by EU vessels outside EU waters and the access of third country vessels to EU waters [2008] OJ L 286/33, Regulation 1224/2009 on the enforcement of the above rules by setting out an EU control system [2009] OJ L 343/1.

difficult to distinguish between policy-making (for which the Council is responsible under Article 16(1) TFEU) and representing the Union in international judicial proceedings (for which the Commission is responsible under Article 335 TFEU). This point, however, is not made clear in the judgment. And it by no means follows that the distinction between representation in international judicial proceedings and policy-making would be as tidy in any legal context as the judgment presents it here. After all, whilst more common than they used to be, proceedings before international judicial bodies are often policy-charged affairs which involve deeply politicized positions from the parties. Such positions may have repercussion for the broader standing of the parties in the organization.<sup>95</sup> This point was acknowledged by Advocate General Sharpston whose Opinion suggested a more thoughtful approach: whilst she concluded that participation in international judicial proceedings amounts ‘in most cases’ to representing prior policy choices, she was also ‘reluctant to accept that this will always be the case’.<sup>96</sup> She added:

Thus, it is not unforeseeable that, in the context of international judicial proceedings in which the EU has standing, the EU might need to take a position on an issue that is not yet covered either by existing EU commitments under international law which are to be interpreted (and applied) in those proceedings or by any other rules of international law on which the EU has already taken a position. In such circumstances, the Council’s prerogatives would need to be respected.

The quest, therefore, for certainty as to the nature of the intervention envisaged in Article 218(1) TFEU is elusive, a fact that the economy of the *ITLOS* judgment may not disguise. Put differently, and from a broader perspective, it is only so far that the principle of institutional balance can take us in our effort to determine the allocation of tasks between the institutions under primary law. After all, the context-specific nature within which specific disputes are raised, coupled with the broad wording of primary law, are not conducive to certainty and predictability.

## **8. Emerging threads**

### **8.1. A balanced approach to institutional balance**

The case-law examined in this article is not tilted towards a specific institution. Overall, the Court’s approach to the principle of institutional balance is rather balanced. Whilst the Commission has the power to represent the EU in international judicial proceedings and to withdraw a proposal, it may not sign even non-binding international agreements. The Council’s power to impose rigorous reporting duties on the Commission may not extend to impinging on the latter’s right to negotiate international treaties. Put differently, both the powers of the Commission to negotiate international agreements and of the Council to sign them is affirmed. As for the Parliament, the absence of a formal role in CFSP treaty-making may not lead to depriving the institution from its right to be informed promptly and at all stages of the treaty-making procedure. In fact, it is the Parliament that emerges as the clear winner in the institutional stakes, a conclusion that is hardly surprising given the significant enhancement of its position under the Lisbon Treaty. The case-law, furthermore, conveys a broader message: the procedures laid down in primary law have teeth, their scope is construed broadly, and,

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<sup>95</sup> This point was made by AG Sharpston (EU:C:2015:490, para. 84).

<sup>96</sup> *Ibid*, para. 91.

as the *Hybrid Decisions* judgment suggests, they may not be marginalized by the legal ingenuity of the Union's institutions and the Member States.

The volume, however, and intensity of inter-institutional disputes examined in this article are striking. For all its ambition to rationalize the Union's institutional structure and streamline decision-making, the Lisbon Treaty has not provided greater clarity as to the allocation of tasks to different institutions, neither has it reduced the institutions' appetite for legal disputes about turf wars.<sup>114</sup> This development may be understood in the light of the broader scope of Article 218 TFEU which, therefore, provides more scope for inter-institutional argument. It may also be due to the ambiguity of the relevant primary rules and the central role of open-ended principles that govern the Union's external action. Finally, the Union's inherently idiosyncratic constitutional set up is also relevant: the position, for instance, of CFSP in the EU's legal order provides ample scope for inter-institutional disputes,<sup>115</sup> especially given the merging of the objectives of the Union's external action in Article 21 TEU.<sup>116</sup>

If anything, the institutions' determination to test the limits of their powers appears unabated.<sup>117</sup> In fact, the case-law in this area suggests that there is little evidence of a principled stance in institutional interactions. The Commission's antagonism with the Council regarding the content of negotiating directives is a case in point. The Commission's eagerness to evade the constraints that would follow from its duty to inform the Council was in stark contrast to its position on interacting with the European Parliament. The interinstitutional agreement it drew up with the latter illustrated a generous approach to information-sharing: it covered, for instance, the definition of the negotiating directives and the commitment to take due account of the Parliament's comments and to facilitate the participation of Members of the European Parliament as observers in all relevant meetings.<sup>118</sup> Similarly, the Council's objection to these interactions between the Commission and the Parliament (it viewed them as modifying the institutional balance under the Treaties and conferring powers that do not exist in primary law)<sup>119</sup> are at odds with the close links which it sought to establish with the Commission in the process of negotiating international agreements.

Then again, any principled position that institutions have may well be trumped by their desire to buttress and expand their powers. Let us take the Commission as an example. Kuijper argues that it 'simply turns out to be the guardian of the treaties, old and new', whereas the Member States resist the application of the procedural changes introduced

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<sup>114</sup> For a similar assessment of the application of the Lisbon reforms in relation to internal decision-making, see M Chamon, 'Institutional Balance and Community Method in the Implementation of EU Legislation Following the Lisbon Treaty', (2016) 53 CMLRev 1501 who is critical of both the institutions and the Court for having failed to realise Lisbon's potential.

<sup>115</sup> See, for instance, P Koutrakos, *The EU Common Security and Defence Policy* (OUP 2013) Ch. 8, and H Merket, *The EU and the Security-Development Nexus* (Brill, 2016).

<sup>116</sup> See J Larik, *Foreign Policy Objectives in European Constitutional Law* (OUP, 2016).

<sup>117</sup> See P Van Elsuwege, 'The Potential for Inter-Institutional Conflicts before the Court of Justice: Impact of the Lisbon Treaty' in Cremona and Thies (eds), n10 above, 115.

<sup>118</sup> Framework Agreement on relations between the European Parliament and the European Commission [2010] OJ L 304/50, paras 23, 25 and Annex III. On the implications of the Agreement for the secrecy that international negotiations entail, see D Curtin, 'Official Secrets and the Negotiation of International Agreements: Is the EU Executive Unbound?', (2013) 50 CMRev 423.

<sup>119</sup> Council of the EU, Doc. 15018/10, 18 October 2010.

at Lisbon.<sup>120</sup> Viewed, however, against the background of the case-law examined in this article, the Commission does not appear any less eager than other institutions to expand its powers: the claim, for example, that its information-sharing obligation to the Council should be kept to a minimum did not follow from the Treaties; and it is difficult to see how the argument about signing non-binding international agreements was not an aggressive effort to expand its powers beyond those bestowed by primary law.

The desire to expand their powers is inherent in any institution, and the complex institutional structure that EU primary law has established in order to reflect the Union's *sui generis* constitutional order does not do much to curtail it. It is this complexity that the principle of institutional balance has sought to capture. Whilst it argued that the principle has retained its elusive quality, this article also revealed an overarching constraint on the willingness of the institutions to test the limits of their powers. This constraint has to do with the procedural rules laid down in the Treaty. They matter: they are enforced rigorously and may not be ignored for reasons of political or practical expediency. Viewed from this angle, strict compliance with Treaties-based procedures imposes an inherent constraint on how far the elusive character of institutional balance may feed inter-institutional antagonism. Quite how effective this constraint is depends on the rigour with which the Court is prepared to use it and the willingness of the institutions to spend less time and energy on turf wars and show more openness to working out what the duty of cooperation requires that they should do in practice. These factors will be explored below.

## 8.2. The elusive quality of the duty of cooperation

The judgments examined in this article shed light on a dimension of the duty of cooperation that had been underdeveloped. It is recalled that the duty has attracted considerable attention in the context of the relationship between the EU and the Member States, in particular regarding the obligations imposed on the latter under mixed agreements. This case law<sup>121</sup> is, therefore, somewhat one-dimensional in its emphasis.<sup>122</sup> The new formulation of Article 13(2) TEU at Lisbon has brought the inter-institutional dimension of the principle to the fore and has enabled the Court to rule on the specific duties that it imposes on the Union's institutions.

The cases discussed in this article highlight the starkly different views of the institutions about what the duty of cooperation entails in practice. In the *EU-Australia Greenhouse Gas Emissions Agreement* (Case C-425/13 *Commission v Council*), for instance, the positions of the Council and the Commission could not have been farther apart: what the former viewed as an information-sharing arrangement was deemed by the latter as an unacceptable encroachment on its power to negotiate. The wording of Article 13(2) TFEU and the inherently indeterminate scope of the principle of cooperation may not

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<sup>120</sup> PJ Kuijper, 'From the Board: Litigation on External Relations Powers after Lisbon: The Member States Reject Their Own Treaty', (2016) 43 LIEI 1 at 12.

<sup>121</sup> Case C-459/03 *Commission v. Ireland* EU:C:2006:34, Case C-246/07 *Commission v. Sweden* EU:C:2010:203, and Case C-45/07 *Commission v Greece* EU:C:2009:81

<sup>122</sup> In Case C-600/14 *Germany v Council* EU:C:2017:935, the duty cooperation between the EU institutions and the Member States was explored in the context of Article 218(9) TFEU. The Grand Chamber examined the progress of the decision-making process that led to the adoption of a decision about the Union's position regarding the revision of the Convention concerning International Carriage by Rail (COTIF), and held that the Council had not acted in violation of the duty of cooperation (para. 107 of the judgment).

constrain such extravagantly opposing views. Similar issues are raised in cases where the principle of cooperation is expressed in more specific terms, for instance in relation to the powers of the European Parliament under Article 218(10) TFEU. While the wording of the latter provision is more specific, the disputes in the *EU-Tanzania Transfer Agreement* (Case C-263/14 *Parliament v Council*) and *EU-Mauritius Transfer Agreement* (Case C-658/11 *Parliament v Council*) cases reveal considerable differences in how the institutions construe their obligation to interact. In all these cases, the question remains: for the EU institutions, at what point does their duty to cooperate end and where does it begin to amount to an infringement of other institutions' prerogatives?

In addressing this question, three threads emerge from the case-law examined in this article. The first is that the duty of cooperation may not sanction a deviation from the procedures laid down in primary law. In other words, the limit to what the duty entails is to be found in the specific provisions that articulate the role of the EU institutions in the Union's external representation in general and in treaty-making procedures in particular. This position may appear to restrain the appetite of certain institutions to engage in an overly creative construction of their powers. The relevant primary rules, however, are often not specific enough to tackle the elusive quality of the duty of cooperation. They are tested, instead, by the legal ingenuity of the warring institutions and require interpretation themselves by the Court which is, therefore, called upon to rule in a series of increasingly context-specific disputes.

Second, the Court construes the duty of cooperation by reference to the specific factual and legal context within which it is called upon to adjudicate. Whilst it tells us what the duty may not entail in a specific case, the Court is distinctly reluctant to offer a glimpse of what the duty may, in fact, be about. This approach is tied in with the theme of economy that underpins the case-law as a whole (and which will be examined further below in Section 8.3). There is, however, one aspect that emerges clearly from these judgments, namely the rigorous construction of information-sharing and reporting at the core of the duty of cooperation. This approach appears in different contexts. It is particularly important for the European Parliament, not only because it is laid down in Article 218(10) TFEU, but also because it applies to areas where it has no other input (such as the CFSP). This is all the more so, given the institution's central role in the conclusion of most international agreements by the Union. Information-sharing, however, has been developed by the Court as an essential counterweight to the negotiating power of the Commission and in order to protect the position of the Council. It is interesting that the latter institution, which was most resistant to sharing information with the Parliament, should now become the beneficiary of a rigorous obligation that the Court imposed on the Commission in the process of treaty negotiations. Whilst broad, the duty to inform is by no means unlimited, as it may not impinge on the decision-making power of an institution. This limit brings us back to the general constraint on the duty of cooperation, that is primary law setting out the powers of the institutions and the procedures governing treaty-making.

The third thread of this case-law follows from the above and is about the elusive quality of the duty of cooperation. In the words of Advocate General Jääskinen, even though the principle 'makes it possible to resolve the uncertainties arising from "grey areas" of

the Treaties, ... its content cannot be precisely defined'.<sup>124</sup> This is by no means peculiar to the relations between the institutions. The scope of the duty of cooperation that binds the Member States in the context of mixed agreements is similarly elusive: whilst shedding some light in the specific context within which it has arisen, the relevant case-law has merely alerted the legal advisors in the foreign affairs ministries of the Member States to the far-reaching implications of the duty of cooperation. It has not brought clarity, let alone certainty, as to what it may entail generally in external relations.

The elusive quality of the duty of cooperation has two implications. The first is about the policy-making institutions: their good will is essential for the principle of cooperation to become a workable tool for their interactions, rather than an opportunity for constant skirmishes. This may be viewed as a leap of faith on their part. The legal framework, however, set out in primary law is sufficiently flexible to grant institutions leeway and accommodate concerns the latter may have about the essence of their powers, provided that they reign on their maximalist urges. This is part of what, in another context, Dashwood has called 'the wonderful adaptability of the ... Union ... [that] is surely the mark of a constitutional order well equipped for Darwinian survival'.<sup>125</sup> In interpreting institutional balance and the duty of cooperation, the case-law examined in this article illustrates a balanced and pragmatic approach. The institutions could do a lot worse than show pragmatism themselves and avoid wasting energy and time that they can ill afford in turf-wars.

The second implication is about the role of the Court of Justice: already considerable in the development of EU external relations law, it becomes central when it comes to the interpretation of principles that underpin every aspect of what the EU institutions do in the world. This is explored in the following section.

### 8.3. A pragmatic Court and the rigorous enforcement of procedural rules

The analysis of the case-law in this article tells an interesting story not only about the style of reasoning on the basis of which the principle of institutional balance and the duty of cooperation are interpreted, but also about the role of the Court of Justice in the area. There is emphasis on literal interpretation and a degree of economy in the judgments, as if they sought to address only the specific issues raised by the parties and say no more than necessary to answer the specific questions. There is a distinct emphasis on the specific legal and factual context within which each case reached the Court. The judgments largely avoid abstract pronouncements and suggest a distinct reluctance to elaborate on the practical implications of broad principles (such as the duty of cooperation), unless by reference to specific examples raised in the case before the Court. They are also devoid of an analysis of competence issues. There is a striking difference, for instance, between the approach underpinning the case-law examined in this article and the *Mox Plant* case, in which the Court handed down 12 years ago a pivotal judgment on the duty of cooperation, albeit in the different context of national obligations towards the EU.<sup>126</sup> This judgment was an example of a sensible conclusion

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<sup>124</sup> Case C-409/13 *Council v Commission (Macro-Financial Assistance to Third Countries)* EU:C:2014:2470, para. 98.

<sup>125</sup> A Dashwood: 'The Institutional Framework and the Institutional Balance' in M Dougan and S Currie (eds), *50 Years of the European Treaties – Looking Back and Thinking Forward* (Hart Publishing, 2009) 1 at 17.

<sup>126</sup> Case C-459/03 *Commission v. Ireland* EU:C:2006:34.

let down by a convoluted line of reasoning: it engaged in an esoteric examination of what the conclusion of UNCLOS had actually signified for the Union's competence, an approach that was neither warranted by the facts of the case, nor necessary in order to apply the duty of cooperation. The case-law examined in this article, on the other hand, avoided this path and reached its conclusion by following the most direct route possible.

This approach has been criticized as 'minimalist' and unhelpful in terms of contributing to 'future process efficiency'.<sup>127</sup> Given the elusive character of the duty of cooperation, outlined above, should the Court be more assertive and spell out more clearly what the duty of cooperation is about? Minimalism is not necessarily a bad thing. It is recalled that the notion of judicial minimalism, as articulated by Sunstein, is identified with the avoidance of abstractions and the 'focus on the particular question at hand, not on other questions, even though it would be possible to resolve them too'.<sup>128</sup>

There are good reasons for such an approach in the context discussed here. Questions about the duty of cooperation are raised in Luxembourg in a specific legal and factual context and with reference to a specific course of action by the institutions involved. To construe the duty of cooperation rigorously (as the Court did, for instance, in the *PFOS* case by imposing, in effect, a duty of abstention on a Member State in the context of mixed agreements)<sup>129</sup> is one thing; to suggest an alternative to what the institutions and the Member States did (which is what it was criticised for in the *Hybrid Decisions* case,<sup>130</sup> examined above in Section 5) is quite another. The argument for a more active approach in this area assumes a role for the Court that the latter has not claimed for itself and which it may be ill-suited to carry out. It is not for the Luxembourg judges to provide elaborate analyses aiming to address all the questions that practitioners and academics may have about specific areas of law. To do so would amount to construing legal principles in the abstract and would risk becoming akin to law-making. It would also be bound to fail, as it would seek to capture an endless range of legal possibilities without anchoring them to a specific set of facts. That is not to say that the reasoning in judgments should be deficient. Closer attention, however, should be paid to the legal and factual context within which specific disputes are raised and within which judgments are rendered.

The sense of balance that was pointed out above in relation to the Court's approach to the institutional balance also characterizes the Court's own role as it emerges from this case-law. On the one hand, the procedural powers of the Union's institutions are construed without unsettling the overall institutional scheme that is designed to reflect the Union's constitutional order. On the other hand, the procedural rules governing treaty-making are interpreted in a dynamic manner: they have teeth and the Court is

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<sup>127</sup> V Demedts and M Chamon, 'The Commission back on the leash: No autonomy to sign non-binding agreements on behalf of the EU: *Council v. Commission*', (2017) 54 CMLRev 245 at 254.

<sup>128</sup> C R Sunstein, *Legal Reasoning and Political Conflict* 2<sup>nd</sup> ed (Oxford: Oxford University Press, 2018), 44. See also *id.*, *One Case at a Time – Judicial Minimalism on the Supreme Court* (Cambridge, Mass: Harvard University Press, 1999), and the criticism in his 'Beyond Judicial Minimalism', (2008) 43 Tulsa L. Rev. 825.

<sup>129</sup> Case C-246/07 *Commission v. Sweden* EU:C:2010:203 where Sweden made a unilateral proposal that certain substances become subject to the regulatory regime laid down in the Stockholm Convention in Persistent Organic Pollutants (a mixer agreement). It had failed to convince the EU to put forward this proposal. See the analysis in Koutrakos, n65 above, at 191-6 and A Delgado Casteleiro and J Larik, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations', (2011) 36 ELRev 524.

<sup>130</sup> EU:C:2015:282.

prepared to construe and enforce them rigorously. Viewed from a broader perspective, this approach complements the recent emphasis on the procedural rules that governs EU external relations case-law: by taking procedural rules seriously, the case-law illustrates another arena for the institutions and the Member States to fight their battles, away from the competence-centred tensions that shaped the development of this area of law.

The emphasis on the rigour of procedural rules provides an interesting contrast to the pragmatic stance that the Court has adopted recently in high profile substantive policy areas that have exercised both the EU and national policy-makers. In other words, the more pragmatic the Court has become in dealing with the substance of heavily politicized and sensitive legal disputes, the more confident it is in enforcing the procedural rules that govern the interactions between the Union's institutions. Before developing this argument further, however, a clarification is necessary: this analysis does not suggest that a general trend of judicial restraint is emerging from the case-law, neither does it claim that the EU's Judges defer to the EU's decision-makers without exception. Bold judgments are handed down in areas of considerable interest, such as the Common Foreign and Security Policy where the Court has interpreted its jurisdiction in broad terms.<sup>131</sup> Consider, too, the rigorous interpretation of the principle of autonomy in the recent Case C-284/16 *Achmea*.<sup>132</sup> The argument here is, instead, about a recent trend in relation to substantive policy issues in heavily politicised policy fields

There are three such areas where a distinctly realist streak has emerged in the Court's approach to the main policy challenges that have divided the Union's electorate. These include access of EU citizens to benefits, the management of the euro-crisis, and the movement of refugees. In relation to citizenship, there is a shift of emphasis in the last few years towards a stricter construction of the rights to which non-economically active citizens are entitled pursuant to EU secondary legislation.<sup>133</sup> As for the euro-crisis, the Court has been loathe to challenge the legal ingenuity of the EU institutions and the Member States pursuant to which they have sought to stave off sovereign default in the Eurozone.<sup>134</sup> Finally, the Court has been so keen to preserve the principle of mutual trust that underpins the EU rules on asylum procedures that it has risked a lingering

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<sup>131</sup> See Case C-455/14P *H v Council*, ECLI:EU:C:2016:569 and Case C-72/15 *Rosneft* ECLI:EU:C:2016:381. It is noteworthy, however, that even in these cases, when it came to the substance of the case, the Court acknowledged the wide discretion of the legislature, and exercised its jurisdiction cautiously (see the analysis in P Koutrakos, 'Judicial Review in the EU's Common Foreign and Security Policy', (2018) 67 ICLQ 1).

<sup>132</sup> Case C-284/16 *Slovak Republic v Achmea BV* EU:C:2018:158.

<sup>133</sup> See Case 333/13 *Dano* EU:C:2014:2358, Case C-67/14 *Alimanovic* [2014] EU:C:2015:597, Case C-308/14 *Commission v United Kingdom* [2016] EU:C:2016:436. From the voluminous literature on the topic, see G. Davies, 'Migrant Union Citizens and social assistance: trying to be reasonable about self-sufficiency', *College of Europe Research Papers in Law* 2 (2016), N. Nic Shuibhne, "'What I tell you three times is true"- Lawful Residence and Equal Treatment after *Dano*' [2016] 23 *MJ* 908, D. Thym, 'The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens' [2015] 52 *CMLRev* 17.

<sup>134</sup> See Case C-370/12 *Pringle* EU:C:2012:756, Case C-370/12 *Gauweiler* ECLI:EU:C:2015:400. See, amongst others, P Craig, '*Gauweiler* and the legality of outright monetary transactions', (2016) 41 *ELRev* 4.

confrontation with the European Court of Human Rights.<sup>135</sup> The realist approach of the Court to the issue of the management of the refugee crisis has been illustrated recently in Case C-638/16 PPU *X and X*.<sup>136</sup> contrary to the much-publicized advice by Advocate General Mengozzi, the Court held that EU law did not require a Member State to grant, outside its territory, a humanitarian visa to third-country nationals so that the latter would be able to travel to the Member State concerned in order to apply for asylum.

In the three areas mentioned above, the Union's judiciary has either adjusted its interpretation of EU secondary legislation in order to reflect more accurately its wording and context (citizens rights), or has shied away from unpacking complex legal arrangements introduced by the EU institutions and the Member States in order to tackle policy areas of extraordinary political sensitivity (euro-crisis, refugees). While understandable from a practical point of view, this pragmatic stance raises challenges for the Court itself. A case in point is a set of three Orders by the General Court in which an action for annulment of the EU-Turkey Statement of 18 March 2016 on refugees was dismissed as inadmissible.<sup>137</sup> The General Court reached this conclusion because, whilst it referred expressly to the European Union and the Members of the European Council, the Statement was, in fact, a document adopted by the Heads of State or Government of Governments of the Member States. As it was not adopted by the European Council, its adoption could not be challenged under Article 263 TFEU. Tackling the refugee crisis has challenged not only the Union's policy-makers,<sup>138</sup> but also its judiciary. It is hardly surprising that the General Court would be reluctant to unpack the sensitive and controversial arrangements reached at the highest level in an area of profound political significance. The reasoning, however, of the Orders in question is striking, not least for the absence of any analysis of the content of the Statement and the ensuing question whether the latter ought to have been adopted by the EU institutions in accordance with Article 218 TFEU. This is not about whether the Statement amounts to a legally binding agreement – the General Court did not even get to that point, as it was satisfied that the references to the EU and its institutions in the Statement itself were erroneous.

It is not only in relation to the main policy areas outlined above that the theme of the Court as a realist actor emerges. In relation to the Lisbon reform of the implementation of EU secondary legislation, the Court's approach has been viewed as timid. It is recalled that, in introducing the new provisions of Articles 290 and 291 TFEU, the Lisbon Treaty distinguishes between delegation and implementation and provides for the involvement of either the legislature or the Member States.<sup>139</sup> Considering it a drastic and promising innovation, the proponents of this system have been distinctly underwhelmed by its interpretation by the Court of Justice.<sup>140</sup> For instance, the institutions have been granted wide discretion to resort to delegated or implementing

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<sup>135</sup> See Case C-411/10 *NS* EU:C:2011:865, Case C-4/11 *Puid* EU:C:2013:740, Case C-394/12, *Abdullahi* EU:C:2013:813. For a brief comment, see P Koutrakos, 'ECJ, Strasbourg and national courts: an exercise in guesswork?', (2015) 45 *ELRev* 641.

<sup>136</sup> Case C-638/16 PPU *X and X* EU:C:2017:173.

<sup>137</sup> See T-192/16 *NF* EU:T:2017:128, T-193/16 *NG* EU:T:2017:129, and T-257/16 *NM* EU:T:2017:130.

<sup>138</sup> D Thym, 'The "refugee crisis" as a challenge of legal design and institutional legitimacy', (2016) 53 *CMLRev* 1545.

<sup>139</sup> See the analysis in C F Bergström and D Ritleng (eds), *Rulemaking by the European Commission* (OUP, 2016).

<sup>140</sup> See, for instance, Chamon, n114 above, and C Tovo, 'Delegation of Legislative Powers in the EU: How EU Institutions Have Eluded the Lisbon Reform', (2017) 47 *ELRev* 677.

legislation<sup>141</sup> or even to endow agencies, rather than the Commission, with considerable powers.<sup>142</sup> In the light of this approach, the Court has been criticised for undermining the effectiveness of the Lisbon reform and for having ‘missed opportunities to structure the political process’.<sup>143</sup>

Whilst it is not for this article to address this criticism, it is worth-pointing out that such arguments are underpinned by a clear conception of what the Court ought to be doing in the Union’s constitutional order: it should be interventionist and read into the opaque Treaty provisions on rule-making a more powerful role for the Commission, hence promoting the ‘Community’ approach to policy-making. This view, however, is driven by a specific conception of how the EU legal order should evolve and does not take sufficient account of the policy context within which procedural choices are made.<sup>144</sup> After all, even in areas less politically sensitive than, say, the management of the euro-crisis, the Union’s legislature has been given wide discretion.<sup>145</sup> Be that as it may, the judiciary’s approach to Articles 290 and 291 TFEU is faithful to the wording of the Treaty and does not override the policy choices of its drafters. Viewed from this angle, this area of law has something in common with the Court’s approach to the procedural rules governing treaty-making. In both cases, there is reluctance to upset the carefully calibrated institutional balance as reflected in primary rules.

## 9. Conclusion

The case-law examined in this article suggests that the law on EU external relations is reaching a level of maturity. Rather than being confined to its exhausting competence-centred adolescence, it expands gradually by engaging more with the procedural arrangements that govern how the EU may act in the world and exploring the limits of what can be done with the legal armoury provided for in primary law. Our understanding of this area of law benefits from this development, as a number of important procedural questions with constitutional implications are being addressed. This age of maturity is all the more welcome in the post-Lisbon institutional landscape where the application of the procedural rules on treaty-making is not burdened by institutional harmony, and the appetite of the institutions for turf wars has by no means waned.

In its analysis of the relevant case-law, this article put forward the following arguments. First, the principle of institutional balanced has been applied in a balanced way and with acute awareness of the specific factual and legal context within which disputes are raised. The powers granted under the Treaties have been construed with due regard to the overall constitutional character of the Union’s structure and without tilting the carefully calibrated equilibrium in favour of a specific institution. Whilst the role of the

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<sup>141</sup> See Case C-427/12 *Commission v Parliament and Council (Biocides)* EU:C:2014:170 and Case C-88/14 *Commission v Parliament and Council (Visa Reciprocity)* EU:C:2015:499.

<sup>142</sup> See Case C-270/12 *UK v Council and Commission (ESMA)* EU:C:2014:18.

<sup>143</sup> Chamon, n114 above, at 1543.

<sup>144</sup> For instance, Everson argues that, to have ruled otherwise in *ESMA* (n140 above), the Court would have shown ‘foolish judicial disregard for the vital need to ensure continuing financial stability within Europe’: ‘European agencies: Barely legal’ in M Everson, Monda and E Vos (eds), *European Agencies in between Institutions and Member States* (Kluwer Law International, 2014) 50.

<sup>145</sup> For the need for discretion in ensuring the financial stability of the Eurozone, see K Lenaerts, ‘EMU and the EU’s constitutional framework’, (2014) 39 *ELRev* 753.

Parliament has been enhanced significantly, this reflects faithfully its increased powers under the Lisbon Treaty.

Second, the duty of cooperation has been construed with a strong procedural dimension that aims to strengthen the interactions between the institutions in treaty-making. And yet, for all its prominence under the current constitutional arrangements, its content remains somewhat elusive. This is a characteristic that the duty of cooperation between the institutions shares with its sibling, that is the principle of sincere cooperation which binds Member States in their actions on the external plane, and which is unlikely to dissipate.

Third, in its interpretation of the principle of institutional balance and the duty of cooperation, the Court of Justice has adopted a careful and balanced approach, often on the basis of a literal interpretation of primary law, therefore complementing the pragmatic streak that characterises the Court's recent case-law in areas of acute political sensitivity. In relation to the duty of cooperation in particular, the Court has refrained from either articulating its scope in the abstract or from providing alternatives as to how institutions could comply with it.

Finally, it is not the above approach that is responsible for the continuing tensions in inter-institutional relations. In fact, it is sensible that the Court of Justice should be keen to steer clear of making suggestions about policy choices. Neither are these tensions due to the articulation of the principle of institutional balance and the duty of cooperation in primary law. After all, there is an inherent limit to what constitutional law may achieve in this area. It is the practice of the Union's institutions that is paramount, and it is the Council, the Commission and the Parliament that should reflect on how they relate to each other. In effect, the case-law examined in this article places a heavier burden on the Union's institutions. Rather than viewing it as yet another opportunity for power grabbing, they should take a leap of faith: they should take the principle of institutional balance seriously, and approach the duty of sincere cooperation in the EU's treaty-making conduct in a constructive spirit. The less time and energy they waste on turf wars about their procedural powers, the greater their contribution to increasing the efficiency of the Union's treaty-making practice.<sup>146</sup>

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<sup>146</sup> This argument was made in the context of competence-based disputes in P Koutrakos, 'Legal Basis and Delimitation of Competence in EU External Relations' in Cremona and De Witte (eds), n12 above, 171.