INSIGHT

The Distribution of Powers Between EU Institutions for Conducting External Affairs through Non-Binding Instruments

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ABSTRACT: The increasing tendency of the EU to resort to non-binding agreements in its external action raises the sensitive and still unclear question of the distribution of powers between EU institutions when adopting them. In light of the post-Lisbon provisions of primary law in the field of external action, this *Insight* attempts to clarify how to interpret Arts 16 and 17 TEU when demarcating the scope both of the external representation of the Union in the hands of the Commission, and that of the decision-making power of the Council, as regards the adoption by the Union of non-binding instruments. The Opinion of Advocate General Sharpston delivered in case C-660/13 serves as the guiding thread of this analysis. In this Opinion, it is suggested that the Court of Justice annul the Commission's decision to authorise the signature of an addendum to the EU-Switzerland Memorandum of Understanding on a Swiss financial contribution to the new Member States of the EU, due to the breach of the principle of distribution of powers between institutions, enshrined in Art. 13, para. 2, TEU, insofar that the Commission signed this political agreement without the Council's prior authorisation.

KEYWORDS: non-binding agreements – external representation of the Union – distribution of powers between EU institutions – principle of institutional balance – Art. 218 TFEU – Arts 16 and 17 TEU.

I. Introduction

Recourse to non-binding instruments in governing the relations of the European Union (EU) with the rest of the world is increasingly common. Action plans, agendas, memoranda of understanding, and joint declarations proliferate in the distinct fields of the EU external action. This can be observed, for instance, in the adoption of mobility partnerships and common agendas on migration and mobility in the external dimension of EU

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immigration policy;[1] in action plans and association agendas, typical of the European Neighbourhood Policy;[2] or in the diverse arrangements and memoranda used in the development of the external dimension of policies such as, amongst others, environment or energy.[3]

Emulating similar State practice, this increasing EU tendency to resort to non-legally binding agreements as a means of regulating cooperation with third States may respond to different reasons, such as the need to increase the efficiency of external action, to allow greater smoothness in negotiation and conclusion of the instrument, or to enhance the margin of discretion of the signatories in the fulfilment of commitments. In addition, non-binding agreements may be more suitable to the political sensitivity of the subject of the agreement or to its changing nature. In the case of the EU, it could further be argued that the signing of political instruments may forestall the complications inherent to the conclusion of mixed agreements.

However, the use of non-binding rather than legally-binding agreements by the EU can potentially be problematic, or at least controversial, with regard to the lack of legal certainty of international commitments, or the difficulties for enforcing individual rights. From an institutional perspective also, the issue of who within the EU has the power to adopt agreements with no binding force is far from clear. Given that Art. 218 of the Treaty on the Functioning of the European Union (TFEU) is applicable only to the conclusion of international binding agreements, the question requires clarification. This is particularly true in the light of the post-Lisbon provisions for primary law governing the allocation of powers between EU institutions in the field of external relations, which continue to be a source of considerable judicial activism in Luxembourg.[4] The Court of Justice (ECJ) has not encountered any cases related to the specific question of the power to conclude non-binding agreements with third parties since its well-known 2004 judgment in *France v. Commission*.[5] On that occasion, the Court acknowledged that it was down to the Council to conclude international agreements, and that the non-binding

[1] E.g. Joint Declaration 10055/3/14 establishing a Mobility Partnership between the Hashemite Kingdom of Jordan and the European Union and its participating Member States, 9 September 2014, or the Joint Declaration on a Common Agenda on Migration and Mobility between the Federal Republic of Nigeria and the European Union and its Member States, 12 March 2015.

[2] E.g. the EU-Georgia Action Plan of 2006 and the Association Agenda of 2014 replacing it, eeas.europa.eu.

[3] E.g. the Joint Declaration between the European Union and the Republic of India on a Clean Energy and Climate Partnership, 30 March 2016, and other instruments available at europa.eu/rapid, or the Memorandum of Understanding on Strategic Partnership on Energy between the European Union and the Arab Republic of Egypt, 2 December 2008, eeas.europa.eu/egypt/index_en.htm.

[4] For recent case-law, see, for instance, Court of Justice, judgment of 16 July 2015, case C-425/13, *Commission v. Council*; Court of Justice, judgment of 28 April 2015, case C-28/12, *Commission v. Council*; Court of Justice, judgment of 24 June 2014, case C-658/11, *European Parliament v. Council*.

[5] Court of Justice, judgment of 23 March 2004, case C-233/02, *France v. Commission*.

character of the instrument signed by the Commission with the United States (US) was not sufficient to confer on the Commission the power to adopt it.[6] It did not however, clearly settle the demarcation of concluding powers between the latter and the Council.

Recently, the enlarged interpretation given by the Commission to Art. 17, para. 1, of the Treaty on the European Union (TEU), conferring on it the external representation of the EU, along with the increasing tendency of this Institution to sign non-legally binding instruments with third parties on behalf of the EU,[7] have created grounds for the ECJ to clarify further the applicable rules. In particular, case C-660/13, in which Advocate General (AG) Sharpston delivered her Opinion on 26 November 2015,[8] deals with an action for annulment which was submitted by the Council before the Court of Justice against the Commission's Decision of 3 October 2013 on the signature of an addendum to the Memorandum of Understanding of 27 February 2006, regarding a Swiss financial contribution to the new Member States of the EU (MoU 2006).[9] This addendum, aimed at taking into account the Croatian accession to the EU,[10] contains non-legally binding commitments between the EU and Switzerland. In spite of the Council and Member States' objections, the 2013 addendum was signed on 7 November 2013 by the Commission on the basis of the contested decision without the previous authorisation of the Council, the latter simply having authorised the Commission to negotiate it.[11]

This *Insight* will try thereby to shed some light on the distribution of powers between EU institutions for the adoption of international non-binding agreements on behalf of the EU, taking as a corollary the principle of institutional balance as reflected in Art. 13, para. 2, TEU. To this end, the Opinion of AG Sharpston delivered in case C-660/13 will be a guiding thread for analysis. We will firstly examine the question of admissibility, particularly whether decisions authorising the signature of non-binding agreements are supposed to deploy legal effects in the sense of Art. 263 TFEU. Secondly, we will attempt to clarify the delimitation of external powers between the Council and the Commission as

[6] *France v. Commission*, case C-233/02, cit., para. 40.

[7] Confirmed in the Council position 12498/13 on the arrangements 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 organisations, 18 July 2013. See also the position 5707/13 of its Legal Service, 1 February 2013.

[8] Opinion of Advocate General Sharpston delivered on 26 November 2015, case C-660/13, *Council v. Commission*.

[9] Decision C(2013) 6355 of the Commission on the signature of the Addendum to the Memorandum of Understanding on a Swiss financial contribution. The MoU of 2006 served as a compromise in exchange for the Swiss access to the enlarged internal market within the framework of the negotiations between the EU and Switzerland on the second series of bilateral agreements known as "Bilaterals II", which were signed in 2004.

[10] A first addendum to the MoU was signed, by the Presidency of the Council and the Commission, in 2008 in order to adapt the Swiss financial contribution to the accession of Bulgaria and Romania to the EU.

[11] The authorisation to negotiate it was adopted in the form of conclusions of the Council and the Member States meeting within the Council.

deduced from Arts 16 and 17 TEU, thus demarcating the boundaries between international representation and decision-making in external affairs.

II. Decisions authorising the signature of non-binding agreements as acts "intended to produce legal effects"

Actions seeking to annul decisions authorising the signature of non-binding agreements on behalf of the EU face one initial difficulty, i.e. how to tackle the very nature of this kind of decisions, and consequently the agreements themselves. This constitutes a substantial requirement, since it would help to determine whether to apply Art. 218 TFEU, but also a procedural demand, as acts with no legal effect cannot be reviewed by the ECJ under Art. 263 TFEU. In *France v. Commission*, the Court did not take a stance on the admissibility of the annulment action against the Commission's decision to sign with the United States the "Guidelines on Regulatory Cooperation and Transparency", since it decided to dismiss the action on the substance of the case. The manner in which the Court proceeded seems questionable, and all the more so when it can reasonably be argued that the fact that an agreement is not intended to be binding under international law does not exclude the possibility that signature decisions may produce legal effects. This is especially so if we take into account that the effects of the agreement under international law are different from the effects of the contested decision under EU law.[12]

When a decision authorises the conclusion of a legally binding agreement, the act, adopted according to the procedure described in Art. 218 TFEU, clearly produces legal effects by expressing the Union's consent to be bound by that agreement in international law and will therefore be subject to annulment under Art. 263 TFEU. However, the operation of identifying whether we are effectively before a treaty or an act of international soft law is not always self-evident. For the ECJ, the intention of the parties "must in principle be the decisive criterion",[13] although relevance must also be given to other complementary evidence such as the actual terms and content of the instrument, its official publication, and the subsequent conduct of the parties, among other indicators.[14] In this case, as AG Sharpston explains, the 2013 addendum was not an international agreement, but rather a "concurrence of wills" in the form of guidelines, using non-mandatory terminology and clearly reflecting a lack of intent by the parties to be bound by international law.[15]

[12] Opinion of Advocate General Sharpston, case C-660/13, cit., para. 69.

[13] *France v. Commission*, case C-233/02, cit., para. 42.

[14] See the outstanding work of A. Remiro Brotóns, *De los tratados a los acuerdos no normativos*, in *La celebración de tratados internacionales por España: problemas actuales*, Madrid: Ministerio de Asuntos Exteriores, 1990.

[15] Opinion of Advocate General Sharpston, case C-660/13, cit., para. 67.

If we start by considering the possible effects on international law, it is acknowledged that the Union is bound by the international consequences of the conclusion of an agreement even if this is by itself non-binding.[16] International soft law is indeed apt to produce legal effects in the international legal order, on the basis of the principle of good faith, and it will generate, at the least, expectations between the parties with regard to the compliance with those political agreements.[17] In this case, it cannot be underestimated that the 2006 MoU, and also its addenda, served as a compromise underlying the conclusion of the sectoral agreements between the EU and Switzerland. The addenda was also intended to specify the conditions for the signature of implementing treaties between Member States and the third country.

With regard to EU law, and in spite of the non-binding character of a given agreement, the decision to authorise its conclusion and the agreement itself - the Commission's decision and the 2013 addendum in this case - may have legal effects on EU institutions and Member States alike. The need to ensure the unity of the Union's external representation and the principle of sincere cooperation between the Union and Member States, and specifically among EU institutions, is valid even in relation to political agreements with third States. It leads to obligations on the part of EU institutions and Member States to cooperate with the end of achieving the Union's goals and to abstain from jeopardising such action.[18] In addition, the impingement by the Commission on the scope of the foreign relations powers assigned to the Council is, by itself, a legal effect – the usurpation of powers of an Institution – which, as AG Sharpston concludes in this case, may render an action for annulment admissible under Art. 263 TFUE.[19]

III. Clarifying the respective scope of Arts 16 and 17 TEU

Going on to the substantive question of the respective powers of EU institutions to conclude non-binding agreements, a first controversial feature of the Commission's decision authorising the signature of the 2013 addendum between the EU and Switzerland refers to its legal basis, Art. 17 TEU. AG Sharpston very accurately points out that the principle of the distribution of powers between EU institutions would have been infringed by the Commission if Art. 17 TEU had not conferred on the latter a power to approve and authorise the signature of the addendum. However, even were the Court to consider that this principle was not violated, the contested decision could still be a

[16] *Ivi*, para. 69.

[17] See P. Daillier, M. Forteau, A. Pellet, *Droit international public*, Paris: LGDJ, 2009, p. 30. For a critical approach, A. Mazuelos Bellido, *Soft law: ¿mucho ruido y pocas nueces?*, in *Revista Electrónica de Estudios Internacionales*, 2004, p. 23 *et seq.*

[18] Opinion of Advocate General Sharpston, case C-660/13, cit., para. 71.

[19] *Ivi*, para. 62.

wrongful act for lacking an appropriate legal basis.[20] Indeed, decisions to conclude international agreements on behalf of the Union need to combine a procedural basis with a substantive legal basis related to the material competence of the EU.[21]

Although the question of which material competences the EU is exercising when concluding an agreement precedes that regarding the allocation of powers between EU institutions,[22] the truth is that, whichever material competence the Union exercises, the core question which the ECJ must clarify remains that of whether the Commission is empowered, under EU Treaties, to exercise any sort of decision-making power in external relations, since the substantive legal basis should be consistent with the general distribution of powers deduced from Arts 16 and 17 TEU.

In this regard, it clearly emerges from ECJ case law that the adoption of legally-binding international commitments by the Union requires that it respect the procedure foreseen in Art. 218 TFEU,[23] which mirrors the usual distribution of powers between EU institutions for the exercise of internal competences, as the Commission has the power both to recommend the opening of negotiations,[24] and to negotiate agreements.[25] Meanwhile, the Council is entrusted with authorising the opening of these negotiations, adopting negotiating directives, and deciding on the signature, conclusion – with the previous approval or consent of the Parliament – and provisional application of the agreement. In particular, the Court had confirmed in its judgment of 1994, in *France v. Commission*, that the Commission is not bestowed with the power to conclude international treaties, but that this prerogative pertains to the Council.[26]

As far as international non-binding agreements are concerned, the fact that Art. 218 TFEU is not applicable does not mean that the distribution of powers between EU insti-

[20] *Ivi*, paras 74-75.

[21] See, for instance, Opinion of Advocate General Kokott delivered on 26 March 2009, case C-103/07, *Commission v. Council*, para. 47.

[22] Opinion of Advocate General Sharpston, case C-660/13, cit., paras 75-76. The Commission had presented a proposal for a Council decision on the conclusion of the MoU 2006, which was based on former Art. 159 EC related to economic, social and territorial cohesion (now Art. 175 TFEU).

[23] Court of Justice, judgment of 9 August 1994, case C-327/91, *France v. Commission*, para. 41; *France v. Commission*, case C-233/02, cit., para. 45.

[24] As far as non-Common Foreign and Security Policy (CFSP) issues are concerned, since Art. 218, para. 3, TFEU grants the right of initiative in CFSP matters to the High Representative.

[25] Although Art. 218, para. 3, TFEU no longer specifies who must be the negotiator of EU international agreements, it is generally understood that the Commission will be the negotiator for non-CFSP agreements precisely in accordance with the general distribution of powers between EU institutions and, specifically, with the conferral on the Commission of the Union's external representation, a task that includes the function of negotiation. See P. EECKHOUT, *EU External Relations Law*, Oxford: Oxford University Press, 2011, p. 196, and also M. GATTI, P. MANZINI, *External representation of the European Union in the Conclusion of International Agreements*, in *Common Market Law Review*, 2012, p. 1708.

[26] *France v. Commission*, case C-327/91, cit., paras 33-37.

tutions and the principle of institutional balance should not be respected;[27] this principle requires that each institution must exercise its powers with due regard for the powers of the other institutions.[28] Although in its judgment of 2004 in *France v. Commission* the Commission's adoption of the "Guidelines on Regulatory Cooperation and Transparency" with the US was accepted, the Court acknowledged that the non-binding character of the instrument was not in itself sufficient to confer a power of conclusion on the Commission.[29] It appears that only the special circumstances of the case allowed the Court to agree to the adoption of the Guidelines by the Commission, the judgment having emphasized that constant contact had been maintained between the Commission, the Council, and the Committee on Trade Policy during the negotiations of the instrument.[30] However, a degree of uncertainty remained, which, together with the Lisbon reform on the provisions governing the inter-institutional distribution of powers in the field of external relations, mean there is a need to further clarify the rules for the adoption of non-binding agreements. Another kind of agreement would be administrative arrangements, which can be subscribed to by any EU institution, body or agency with similar authorities within third States, by virtue of the principle of administrative autonomy enshrined in Art. 335 TFEU.[31] This allows, for instance, the Commission to bind itself – not the EU – vis-à-vis the administration of a given third country.[32]

Thus focusing on non-binding agreements, Art. 16, para. 1, TEU entrusts the Council, with the task of policy-making, especially the Foreign Affairs Council as regards EU external action,[33] while Art. 17, para. 1, TEU empowers the Commission to hold the external representation of the Union, except for the CFSP where external representation is attributed to the President of the European Council and to the HR/VP.[34] The explicit attrib-

[27] *France v. Commission*, case C-233/02, cit., para. 40.

[28] Court of Justice, judgment of 14 April 2015, case C-409/13, *Council v. Commission*, para. 64.

[29] Recall how AG Tesauro and AG Alber considered that the possibility of identifying in the Commission a general executive power with functions similar to States' governments, including the power to conclude international agreements, would be contrary to the principle of institutional balance. Opinion of Advocate General Tesauro delivered on 16 December 1993, case C-327/91, *France v. Commission*, paras 33-34; Opinion of Advocate General Alber delivered on 25 September 2003, case C-233/02, *France v. Commission*, para. 66.

[30] See P.J. KUIJPER, *The Case Law of the Court of Justice of the EU and the Allocation of External Relations Powers. Whither the Traditional Role of the Executive in EU Foreign Relations?*, in M. CREMONA, A. THIES (eds), *The European Court of Justice and External Relations Law. Constitutional Challenges*, Oxford: Hart Publishing, 2014, pp. 109-110.

[31] See Opinion of Advocate General Tesauro, cit., para. 22, in which these arrangements are qualified as concerted practices between authorities that lack the power to bind the State, not being governed by international law.

[32] And thus possibly explaining the non-annulment of the Commission-US Guidelines in *France v. Commission*, C-233/02, cit.

[33] Art. 16, para. 6, TEU.

[34] Art. 15, para. 6, TEU.

ution of this power, operated by the Lisbon Treaty, to the Commission has broadly speaking clarified and simplified the question of the external representation of the Union, by eliminating the distorting power retained by the rotating Presidency of the Council. The external representation of the EU is anchored on a criterion of material delimitation between CFSP and non-CFSP issues rather than on a delimitation based on the level of the representatives involved, though this is only applicable when demarcating the respective functions of the President of the European Council – at the level of Heads of State and Government – and the High R. Vice P. – at ministerial level – for CFSP issues.[35]

While the clarifications in primary law regarding the external representation of the Union may not be fully satisfactory, they have generated a change of strategy within the Commission. In previous cases, this institution has attempted to claim a power to conclude international agreements on the basis of the terms included in former Art. 300 of the Treaty Establishing the European Community (EC) ,[36] but following the Lisbon reform, the Commission has tried to stretch the scope of application of Art. 17 TEU as far as possible; a tendency perceivable in very distinct fields such as environment[37] or migration. Indeed, at the launch of a dialogue on migration issues between the EU and Russia, the controversies between the Commission and the Member States were related not only to the leading role the Commission was seeking in the conduction of the dialogue with the Russian authorities,[38] but also to the fact that the Commission intended to sign the terms of reference of this dialogue - thus claiming the power of decision-making in external affairs with regard to an instrument of a clear political nature. The case under discussion here seems to be part of a similar strategy, albeit with some nuances, since the Commission offers the view that its competence to sign the 2013 ad-

[35] On recent controversies regarding the division of responsibilities for the Union's external representation between the Commission and the European Council in the field of migration, see P. García Andrade, *Who is in charge? The External Representation of the EU on Dialogues on Immigration and Asylum with Third Countries*, in *OMNIA Blog*, 13 January 2016, eumigrationlawblog.eu.

[36] Recall that Art. 300, para. 2, EC conferred on the Council the power to sign and conclude international agreements "subject to the powers vested in the Commission in this field", a provision interpreted not as a general power granted to the Commission but only in specific cases, such as agreements on the recognition of Community laissez-passer or the conclusion of arrangements to ensure the maintenance of appropriate relations with other international organisations. See Opinion of Advocate General Tesauro, cit., and Opinion of Advocate General Alber, cit., para. 66.

[37] E.g. the controversial negotiations of a legally-binding instrument on mercury within UNEP and the position SEC (2010) 1145 of the Commission, 30 September 2010, point 4, *in fine*.

[38] This dissension also requires to clarify that Art. 17 TEU entrusts the Commission with the external representation of the Union, not that of the Union and its Member States. Member States may decide how to be represented in fields of their exclusive power or concurrent competences still not exercised by the EU, having the option to be represented by themselves, by the rotating Presidency of the Council or even by the Commission in order to comply with the requirement of unity in the international representation of the EU. In this regard and on the controversies on this migration dialogue, see P. García Andrade, *La acción exterior de la Unión Europea en materia migratoria: un problema de reparto de competencias*, Valencia: Tirant lo Blanch, 2015, p. 501 *et seq*.

dendum is based on the fact that the political instrument reflects an existing Union position, and therefore that its signature is an act of external representation on a political position already fixed by the Council.[39]

As a consequence, demarcating the respective roles of the Commission and the Council requires further interpretation of the exact scope of Arts 16 and 17 TEU, taking into account that Art. 218 TFEU reflects the general distribution of powers under those provisions. In this regard, as AG Sharpston reminds us, Union policies are formulated by the European Council – which sets out the strategic objectives of the EU in external relations[40] – and the Council; in particular the Foreign Affairs Council, which is in charge of elaborating and defining the Union's external action on the basis of those guidelines. Consequently, without the prior intervention of the Council, the Commission – in charge merely of adopting the measures to give effect to the policy defined by the Council – cannot know which Union policy to represent externally.[41] What is more, once the Council has decided, at the start of negotiations with a third State, to pursue a given objective on the international plane, the representation power of the Commission does not end with the policy-making power of the Council, which will have the final say on whether or not the Union should engage in the agreement resulting from the negotiations and thus deciding on its signature.[42]

The external representation granted to the Commission by Art. 17 TEU does not therefore encompass a decision-making power in any of the subsequent stages following the negotiations.[43] AG Sharpston even indicates that "the mere fact that the content of the agreement reached corresponds to the negotiating mandate given by the Council does not mean that the Commission can disregard the Council's powers under Article 16, para. 1, TEU to decide whether or not to become party to an agreement such as the 2013 addendum".[44] Once the negotiations are over, it is for the Council, on the basis of Art. 16 TEU, to verify the content and form of the agreement and to decide on the need for the Union to become party to it. This applies to binding and non-binding agreements alike, as Art. 218 TFEU does nothing more than specify the principles enshrined in Arts 16 and 17 TEU. Nonetheless, it is important to note in this case that, as the Opinion highlights, the 2013 addendum did not even correspond to the content of the negotiating directives

[39] Opinion of Advocate General Sharpston, case C-660/13, cit., para. 94.

[40] Art. 22, para. 1, TEU.

[41] Opinion of Advocate General Sharpston, case C-660/13, cit., paras 104-106.

[42] *Ivi*, paras 112-113.

[43] As stated in M. GATTI, P. MANZINI, *External Representation of the European Union in the Conclusion of International Agreements*, cit., p. 1733, Union representation in the conclusion of non-binding instruments is not distant from the procedure of Art. 218 TFEU, although the negotiator's margin of manoeuvre is considerably wider.

[44] Opinion of Advocate General Sharpston, case C-660/13, cit., para. 113. See a slightly different view in T. RAMOPOULOS, J. WOUTERS, *Charting the Legal Landscape of EU External Relations Post-Lisbon*, Working Paper no 156, KU Leuven, March 2015, p. 14, ghum.kuleuven.be/ggs/publications.

given by the Council, which shows how political choices were actually made by the Commission.[45] This course of action entails – even more clearly – an infringement of Art. 13, para. 2, TEU, since the Commission exceeded its powers as granted by Art. 17 TEU and encroached upon the powers conferred upon the Council by Art. 16 TEU. For these reasons, AG Sharpston recommends that the Court uphold the first plea of the Council based on the principle of distribution of powers of Art. 13, para. 2, TEU.[46]

If endorsed by the Court, this would be a different response to the one given in the International Tribunal for the Law of the Sea (ITLOS) case, in which both AG Sharpston and the Court endorsed the Commission's position. In that case, the interpretation that can be deduced from the tandem made up of Arts 16 and 17 TEU stays the same, but its application to the subject of the case differs. Submissions to be made by the EU in international judicial proceedings, such as those made before the ITLOS in the case in issue, rather correspond to the power of representation of the Commission and are not deemed to infringe Art. 16 TEU. The intention of the statements to be submitted before ITLOS, in this case at least, was not to formulate policy-making choices,[47] which would have been previously made by the Council within the framework of United Nations Convention on the Law of the Sea.[48]

IV. Concluding remarks

In her Opinion in case C-660/13, AG Sharpston makes it clear that it is for the Council to decide on the signature of a non-binding international agreement with a third State, and that its decision-making power in external relations not only includes the authorisation to open negotiations in order to achieve a Union objective, but also to take the decision about whether the Union should become party to the instrument resulting from those negotiations. The AG also underlines that the external representation of the Union conferred on the Commission does not allow it to disregard the decision-making

[45] Opinion of Advocate General Sharpston, case C-660/13, cit., para. 114.

[46] *Ivi*, para. 117. A second plea of the Council in this case relates to an infringement of the principle of sincere cooperation of Art. 13, para. 2, TEU, since the Commission would have rendered ineffective the Council's efforts to correct the situation created by the Commission and affected the unity in the external representation of the Union. In AG Sharpston's view, this plea should not be upheld, since the lack of good faith and active cooperation shown by the Commission before the adoption of the contested decision does not vitiate the decision in itself. Otherwise, the Council's argument against the Commission's conduct after adopting the decision could only be the basis for an action for failure to act under Art. 265 TFEU.

[47] Opinion of Advocate General Sharpston delivered on 16 July 2015, case C-73/14, *Council v. Commission*, para 85 *et seq.*; Court of Justice, judgment of 6 October 2015, case C-73/14, *Council v. Commission*, paras 71-75. The Court has mostly followed the AG Opinion. For an in-depth comment, see S.R. Sánchez-Tabernero, *Swimming in a Sea of Courts: The EU's Representation Before International Tribunals*, in *European Papers – European Forum*, *Insight* (forthcoming), www.europeanpapers.eu.

[48] Opinion of Advocate General Sharpston, case C-73/14, paras 86-89.

power of the Council even when the content of the agreement reached corresponds to the negotiating mandate.

It is now up to the Court to have its say on the scope of the respective tasks granted to the Commission and the Council in the development of the EU external action, a clarification which is particularly needed with regard to the rather contentious conclusion of non-legally binding instruments on behalf of the EU. This is all the more so when soft law is increasingly a feature of the external action of the Union. The existing options appear to lie either in supporting the extensive reading made by the Commission of the external representation function granted by Art. 17 TEU, or in endorsing a stricter interpretation of that power, reserving policy-making options for the Council according to Art. 16 TEU. What is evident is that the recourse to non-binding instruments does not exempt from respecting the principles of distribution of powers and institutional balance enshrined in the Treaties. In this respect, attention should also be paid to the role of the European Parliament. The right to information and the power of consultation or approval vested in it by Art. 218 TFEU would only be applicable to truly international treaties, although as regards non-binding agreements, neither should the European Parliament's function of political control as stated in Art. 14, para. 1, TEU be overlooked.

The challenge to be faced by the forthcoming judgment lies in any case in whether or not it can put an end to the excessive interinstitutional controversies which affect both the external image of the EU and the coherence, unity and efficiency of its international actions. As they have been for decades, EU external relations continue to be the perfect battlefield for supranationalism and intergovernmentalism, although the current struggles, and the negative perceptions they spread over the wider world, are perhaps particularly detrimental in the tumultuous times the project of European integration is living through.