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The distortion theory in EU treaty-making: *Commission* v. *Council (Geneva Act)*

Case C-24/20, *Commission* v. *Council (Geneva Act)*, judgment of the Court (Grand Chamber) of 22 November 2022, EU:C:2022:911

1. Introduction

Commission v. *Council (Geneva Act)* is the latest in a line of case law in which the Court of Justice clarifies the ambiguities left in the Treaty rules on external action following the entry into force of the Lisbon Treaty, now nearly fifteen years ago. The controversies that have made their way to Luxembourg are constitutional in nature. They concern the division of competences between the EU and the Member States, and the institutional balance between the Council, Commission and Parliament as the EU concludes international agreements and participates in the decision-making processes of international organizations.[1] In political terms, they are revealing of, on the one hand, an insistence amongst Member States on remaining visible on the international stage and, on the other, what is elsewhere referred to in this case note as a strategy of "maximum exclusivity" in the EU's foreign relations being pursued by the European Commission.[2]

1. For earlier contributions that examine the Court's efforts to clarify the post-Lisbon Treaty rules on external action, see e.g. Heliskoski, "The procedural law of international agreements: A thematic journey through Article 218 TFEU", 57 CML Rev. (2020), 79–117, at 218; Koutrakos, "Institutional balance and sincere cooperation in treaty-making under EU law", 68 ICLQ (2019), 1–33; Kuijper, "Recent tendencies in the separation of powers in EU foreign relations: An essay" in Neframi and Gatti (Eds.), *Constitutional Issues of EU External Relations Law* (Nomos, 2018), pp. 201–229; Castillo de la Torre, "The Court of Justice and external competences after Lisbon: Some reflections on the latest case law" in Eeckhout and Lopez-Escudero (Eds.), *The European Union's External Action in Times of Crisis* (Hart, 2016), pp. 129–186; Gosalbo-Bono and Naert, "The reluctant (Lisbon) Treaty and its implementation in the practice of the Council" in Eeckhout and Lopez-Escudero, ibid., pp. 13–84; van der Mei, "EU external relations and internal inter-institutional conflicts: The battlefield of Article 218 TFEU", 23 MJ (2016), 1051–1076.

2. Verellen, "Exercising EU external competence in international organizations of which the EU is not a member", 48 EL Rev. (2023), 379, at 489. See similarly Chamon, "Verplicht gemengd optreden van de Unie en de lidstaten binnen de Canberra Conventie ondanks het bestaan van een gedeelde bevoegdheid", 67 SEW (2019), 250–258, at 258, referring to the Commission as being "obsessed in its continual search for exclusive competences" (translation by author).

Geneva Act adds to this line of case law in two ways. First, the Grand Chamber affirms that, as is the case for legislative acts, the Council is legally precluded from distorting a Commission proposal to conclude an international agreement. Distortion, if it occurs, constitutes a ground for annulment of the Council decision. Second, the Court makes clear that a Council amendment to allow for Member State accession to an international agreement alongside the EU in an area of EU exclusive competence, where the Commission expressed an intention for the EU to accede alone, necessarily distorts the Commission's initial proposal and thus falls outside the scope of the Council's right of amendment. This second point has an important institutional implication: it means that the Commission retains control over the use of the option offered by Article 2(1) TFEU for the Council to empower the Member States to act externally in areas of EU exclusive competence. By the same token, it prevents Member States from normalizing mixed external action in areas in which, as a general rule, only the EU may adopt legally binding acts.

This case note starts by introducing the case and by summarizing the Opinion of Advocate General Szpunar and the Court's judgment. For the sake of brevity, it will focus on the substance and pass over the admissibility of the action. In the comment section, the case is contextualized and the abovementioned two substantive points are developed further. It is argued that, by extending the distortion theory to the treaty-making sphere, the Court introduced an important *political* safeguard of "foreign relations federalism" in the EU. The final section briefly discusses the possibility explored by Advocate General Szpunar, but not discussed by the Court, that the use of Article 2(1) TFEU by the Council is subject to judicial review by the Court and could thus come to operate as an additional *judicial* safeguard of foreign relations federalism.

2. Facts and procedure

"Geneva Act" is short for the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications.[3] It is an international agreement that aims to modernize the existing Lisbon Agreement for the Protection of Appellations of Origin and their International Registration – not to be confused with the EU's own Lisbon Treaty.[4] Appellations of origin and

3. O.J. 2019, L 271/15.

4. The Lisbon Agreement for the Protection of Appellations of Origin and their International Registration is a treaty signed on 31 Oct. 1958, revised at Stockholm on 14 July 1967 and amended on 28 Sept. 1979, *United Nations Treaties Series*, Vol. 923, No. 13172, p. 215.

geographical indications: this is the world of intellectual property rights. In this area, the EU has an exclusive competence to act as part of its trade policy competence under Article 207 TFEU in so far as, to quote the ECJ in the 2013 *Daiichi Sankyo* case, the EU's action "relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade".[5] In a 2017 judgment, the Court of Justice had confirmed that the EU's exclusive competence to conduct a common commercial policy extends to the revised Lisbon Agreement.[6] Relevant, for the purposes of this case note, is that the Geneva Act allows for the accession of regional organizations such as the EU. The *Geneva Act* case arose from the Council's decision not only to approve the accession of the *European Union* to the Geneva Act, but also to authorize all interested *Member States* to accede to the Geneva Act along with the EU.[7] In so doing, the Council had amended the Commission's proposal, which provided only for the EU's accession to the Act.

In the present case, the Commission brought an annulment action against the abovementioned Council decision, which it considered to be illegal. To make this point to the Court, the Commission put forward two pleas. In a first plea, the Commission argued that the Council's amendment had distorted its initial proposal and had thus gone beyond its power to amend a Commission proposal. Instead, the Commission argued the Council had adopted an altogether new decision. Since it had done so without a new Commission proposal, the Council had violated Article 293(1) TFEU as well as Article 13(2) TEU, the Commission held. The latter provision contains the principle of institutional balance. The former provides:

> "Where, pursuant to the Treaties, the Council acts on a proposal from the Commission, it may amend that proposal only by acting unanimously, except in the cases referred to in paragraphs 10 and 13 of Article 294, in Articles 310, 312 and 314 and in the second paragraph of Article 315."

In a second plea, the Commission also considered that the Council had violated Article 2(1) TFEU, which allows the Council to empower the Member States to act in areas of EU exclusive competence. In the Commission's view, this possibility is subject to constitutional limits, which the Council had failed to respect. Since the Council had not given any reasons

5. Case C-414/11, *Daiichi Sankyo Co. Ltd, Sanofi-Aventis Deutschland GmbH* v. *DEMO Anonimos Viomikhaniki kai Emporiki Etairia Farmakon*, EU:C:2013:520, para 51.

6. Case C-389/15, *Commission* v. *Council (Revised Lisbon Agreement)*, EU:C:2017:798.

7. Council Decision (EU) 2019/1754 of 7 Oct. 2019 on the accession of the European Union to the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications, O.J. 2019, L 271/12.

as to why it was permissible, in its view, to empower the Member States to act, the Commission also considered that the Council had failed to comply with its duty to state reasons.

3. Opinion of the Advocate General

Advocate General Szpunar advised the Court to annul the contested Council decision which not only approved of the accession of the EU to the Geneva Act, but also authorized all interested Member States to accede.[8] In the Advocate General's view, the first plea of the Commission should be upheld. And in the event the Court did not share the Advocate General's view on the first plea, he advised the Court to uphold the second plea in so far as the Council authorized all Member States to accede to the Geneva Act, rather than only the seven Member States who were already a party to the Lisbon Agreement in the past.

On the first plea, the Advocate General argued that the power of the Council to amend Commission proposals by unanimity, which finds its legal basis in Article 293(1) TFEU, is not limited to proposals adopted by the Commission to start the procedure for the adoption of (internal) legislative acts. The text of the provision makes clear, the Advocate General advised, that Article 293(1) TFEU is of general application and applies to all proposals adopted by the Commission, including in the external context.[9] In so doing, the Advocate General rebutted the argument advanced by Italy that the scope of application of Article 293(1) TFEU is limited to proposals adopted by the Commission *qua* Commission, i.e. proposals that can only be adopted by the Commission. This is to be distinguished from Article 218(6) TFEU, where the Treaties empower the "negotiator" to adopt a proposal. This may be the Commission, but does not have to be.[10]

That preliminary point made, the Advocate General went on to explain how Article 293(1) TFEU should be read in light of the competing responsibilities of the Commission and the Council, as well as the requirements that all institutions practise sincere cooperation and must respect, at all times, the institutional balance. The responsibility of the Commission, in this regard, consists in promoting the general interest, as per Article 17(1) TEU, whereas that of the Council consists in representing the interests of the Member States, the Advocate General contended, citing Belgian law professor Sean Van

8. Opinion in Case C-24/20, *Commission* v. *Council (Geneva Act)*, EU:C:2022:404.
9. Ibid., para 61.
10. Ibid., para 56.

Raepenbusch.[11] This means, in this context, that the Council has a right to amend Commission proposals. However, this right should not be abused: it does not extend so far as to allow the Council to "distort" the initial Commission proposal.[12] If the Council distorts the Commission proposal, the ensuing Council decision can no longer be deemed an amended version of the initial Commission proposal. Rather, it constitutes a new decision – one that, accordingly, has been adopted unlawfully because of the lack of an initial Commission proposal.

In this case, the Advocate General advised the Court to rule that by not only approving the EU's accession, but also authorizing the accession of all interested Member States, the Council had in fact distorted the initial Commission proposal.[13] How to tell whether a Council decision distorts a Commission proposal? For this to be the case, the Advocate General explained, the "Council's amendment [must go] beyond the limits determined by the Commission as regards the subject matter, purpose and content of the act it proposed".[14] And more specifically, it is necessary to determine whether the contested authorization "produces effects which are so far removed and so distinct from those envisaged by the decision proposal that the adoption of an act producing them would have required a separate initiative from the Commission".[15] This threshold was met in this case, the Advocate General contended. By creating a situation in which the Member States act alongside the EU as independent subjects of international law, the Council had infringed on the constitutional principle that requires the Member States not to act in areas of exclusive competence, unless the EU decides otherwise and empowers the Member States to do so. Such empowerment, the Advocate General considered, by definition requires a new Commission proposal given that it is a significant exception to a constitutional rule.[16] There is only one circumstance in which a new Commission proposal would not be necessary; namely, when the EU is not in a position to act itself for reasons of international law.[17] This would be the case, for example, when the constitution of the international organization concerned only allows States to become a member. The EU did not find itself in such a circumstance, however, as the Geneva Act allows regional organizations to accede in so far as at least one of

11. Ibid., para 71. In particular Van Raepenbusch, *Droit institutionnel de l'Union européenne* (Éditions Larcier, 2016).
12. Opinion, para 71.
13. Ibid., para 77.
14. Ibid., para 72.
15. Ibid., para 76.
16. Ibid., para 79.
17. Ibid.

its members was a party as well. For this reason, the Advocate General concluded that the Council had distorted the initial Commission proposal.[18]

In the event that the Court were to disagree with him on the first plea, the Advocate General also addressed the second plea. The Commission's second plea concerned Article 2(1) TFEU – the provision that authorizes the EU to empower the Member States to act in areas of exclusive competence. The Advocate General considered here that the power of the EU to empower Member States to act should be considered an exception to the general rule that in areas of EU exclusive competence, only the EU may act. Because of its exceptional nature, objective justifications must exist to warrant making use of the possibility offered by Article 2(1) TFEU. Such justifications must pursue a legitimate aim, they must be suitable to attain the aim, and they must not go further than is necessary to do so.[19] They must, in other words, be proportionate.

In this case, the Advocate General agreed with the Council that the legitimate aim was twofold and the means chosen by the Council were suitable. First, by empowering Member States to accede along with the EU, the Council made sure the EU would be in a position to cast a vote. This would be the case, as the Geneva Act only authorizes regional organizations to cast a vote if at least one of their members is a party to the Act.[20] Second, by empowering Member States to accede along with the EU, the Council made sure that the protection of appellations of origin registered under the old Lisbon Agreement would be continued.[21] There seemed to have been some uncertainty surrounding the EU's ability to ensure such continuity on its own under the Geneva Act regime. It seemed, also, that this uncertainty could be resolved by authorizing those seven Member States that were already a party to the (old) Lisbon Agreement and which had registered appellations of origin under the Lisbon Agreement regime to accede to the Geneva Act along with the EU. For these reasons, authorizing the accession of those seven Member States would be a suitable means to attain a legitimate aim.

However, the Advocate General continued, authorizing not just those seven Member States to accede, but all Member States, went beyond what was necessary.[22] It was not necessary to ensure the abovementioned continuity in the protection of pre-existing appellations of origin. And, while it may have been necessary to ensure that the EU has the highest possible amount of votes in the international organization, the contested Council decision nonetheless

18. Ibid., para 81.
19. Ibid., para 99.
20. Ibid., para 103.
21. Ibid., paras. 104–107.
22. Ibid., paras. 109–118.

in no way suggested this was part of the Council's rationale for authorizing all Member States to accede.[23] All the measure aimed to achieve, the preamble suggested, was to avoid the EU finding itself in the situation that it could not cast any votes at all. To avoid this risk, an accession of one Member State was sufficient, and accession by all Member States went beyond what was necessary. For this reason, the Advocate General concluded that, in his view, the contested decision infringed Article 2(1) TFEU in so far as the contested provisions authorize not only the seven Member States concerned, but all Member States to accede to the Geneva Act.[24]

4. Judgment of the Grand Chamber

The Grand Chamber, with Lucia Serena Rossi acting as rapporteur, annulled the contested Council decision. The Court agreed with the Advocate General on the first plea. For this reason, it did not have to assess the second plea.

On the first plea, the Court's reasoning mirrored that of the Advocate General. The Court agreed with the Advocate General that Article 293(1) TFEU on the Council's right to amend Commission proposals, extends to proposals for the adoption of external acts such as Council decisions to approve the accession of the EU to an international agreement.[25] And the Court agreed with the Advocate General in its characterization of Article 293 TFEU as introducing a number of safeguards to protect the Commission's power of initiative. In line with earlier case law on the subject of the Commission's power to withdraw proposals,[26] the Court reiterated that the "Council's power of amendment cannot extend to enabling it to distort the Commission's proposal in a manner which would prevent the objectives pursued by the proposal from being achieved and which, therefore, would deprive it of its *raison d'être*…"[27]

In this case, the Court held – as the Advocate General had advised – that the Council's amendment would affect the modalities of the exercise of EU exclusive competence. In particular, the decision "expresses a specific political choice between two alternatives, namely, on the one hand, that the European Union alone exercises an exclusive competence conferred on it by the Treaties in a specific area and, on the other hand, that the Member States

23. Ibid., para 114.
24. Ibid., para 120.
25. Judgment, paras. 76–82.
26. In particular Case C-409/13, *Council* v. *Commission (Macro-financial assistance to third countries)*, EU:C:2015:217.
27. Judgment, para 93.

are empowered to exercise that competence".[28] This "specific political choice", the Court held, was the Commission's to make; it forms part of the latter's assessment of the general interest of the European Union.[29] By empowering all Member States to accede along with the EU to the Geneva Act – an international agreement that falls within EU exclusive competence – the Council's amendment distorted the initial Commission proposal, which only envisaged the accession of the EU, not that of the Member States. The considerations related to the voting rights under the Geneva Act and the need to protect the seniority and continuity of the appellations of origin that existed under the old Lisbon Agreement did not detract from that conclusion, the Court added.[30]

Consequently, the Court upheld the first plea and annulled the Council decision. It maintained the decision's effects for a period not exceeding six months, and only in so far as they relate to Member States that had already made use of the possibility offered by the decision to accede to the Geneva Act.

5. Comment

The *Geneva Act* judgment is interesting for at least two reasons. First, it confirms that the "distortion theory" – or in (the original) French: the *dénaturation* theory[31] – applies not only to the adoption of legislative acts, but extends to treaty-making. Second, it makes clear that a Council amendment to allow for Member State accession along with the EU in an area of EU exclusive competence, where the Commission expressed an intention for the EU to accede alone, necessarily distorts the Commission's initial proposal. Both reasons will be looked at in turn, and a brief comment will be given on the second plea based on Article 2(1) TFEU.

5.1. *The distortion theory extends to treaty-making*

The distortion theory precludes the Council from amending a Commission proposal to the point of depriving it of its original rationale.[32] In its *Macro-financial assistance to third countries* judgment, the Court reaffirmed the theory in the legislative context. It held that the Council had distorted a

28. Ibid., para 103.
29. Ibid., para 104.
30. Ibid., paras. 109–112.
31. Kuijper, op. cit. *supra* note 1, at p. 223.
32. Ibid., at p. 223.

Commission proposal for a framework regulation that would have laid down general provisions for macro-financial assistance to third countries.[33] In *Geneva Act*, the Court now confirms that the theory extends to the treaty-making sphere as well.

While the Court's arguments based on the text of the provision are persuasive, the point cannot be considered entirely self-evident. After all, Article 293 TFEU is not situated in the chapter of the FEU Treaty that deals with the negotiation and conclusion of international agreements. Instead, it is placed immediately before Article 294 TFEU, which sets out the ordinary legislative procedure. Had the Treaty framers wished for the Council's right of amendment in the treaty-making context to be exercised by unanimity, it would have been helpful if they had incorporated this rule in Article 218 TFEU.

That said, Article 293 TFEU applies to those situations where "pursuant to the Treaties, the Council acts on a proposal from the Commission". When the Council adopts a decision to conclude an international agreement in the sphere of the common commercial policy – as was the case here – it undeniably acts on a proposal from the Commission, as only the Commission can negotiate international agreements in this area.[34] Yet, by this same logic, had not the Commission, but the Council Presidency or the High Representative, for example, negotiated the agreement, there would not have been a Commission proposal on the table.[35] Indeed, as Italy did not fail to mention in the proceedings, Article 218 TFEU holds that "[t]he Council, on a proposal *by the negotiator*, shall adopt a decision concluding the agreement".[36] It seems to follow that had, for example, the Council Presidency rather than the Commission negotiated the agreement, the Council would have been able to amend the negotiator's proposal, not by unanimity, but by qualified majority vote. This is the general rule under Article 218 TFEU,

33. Case C-409/13, *Macro-financial assistance to third countries*. For an earlier example, see Case C-408/95, *Eurotunnel SA and Others* v. *SeaFrance*, EU:C:1997:532, paras. 35–39.

34. Art. 207(3) TFEU.

35. Art. 207(3) TFEU provides that "[t]he Commission shall conduct these negotiations", whereas Art. 218(3) TFEU provides that the Council shall "nominat[e] the Union negotiator or the head of the Union's negotiating team". This provision is a *lex specialis* vis-à-vis Art. 17 TEU, which holds that the Commission "shall ensure the Union's external representation" – a provision that seems to suggest that only the Commission can negotiate on behalf of the EU, but which should be understood as applying only to acts of external representation other than the negotiation of international agreements. An example would be the submission of a proposal to an international body. As the Court made clear in a recent judgment, provided the EU is able to act as a matter of international law, the Commission has the exclusive competence to submit such a proposal. See Case C-161/20, *Commission* v. *Council (IMO)*, EU:C:2022:260, para 76, speaking of an "exclusive" Commission competence.

36. Art. 218(5) TFEU (emphasis added).

because the unanimity requirement laid down in Article 293 TFEU applies only to proposals made by the Commission. Is this what the Treaty framers intended? Difficult to tell. It is in any event hard to think of any reason why the threshold to override the negotiator's proposal should differ depending on the identity of the negotiator.

5.2. *The distortion theory as a political safeguard of foreign relations federalism in the EU*

The *Geneva Act* judgment also makes clear that a Council amendment to allow for Member State accession alongside the EU in an area of EU exclusive competence, where the Commission expressed an intention for the EU to accede alone, necessarily distorts the Commission's initial proposal. Or, to put the point somewhat more succinctly: in areas of EU exclusive competence, the Council cannot turn what the Commission wanted to be an "EU-only" agreement into a "mixed" agreement. Indeed, by categorically classifying such a decision as a distortion of the initial Commission proposal, the Court makes it clear that a shift from EU-only to mixed action in areas of EU exclusive competence cannot be made without Commission approval. To make such a shift, a new Commission proposal is needed as such a decision falls outside the scope of the Council's right of amendment.

A new Commission proposal is needed to allow for Member State accession even if EU-only access is precluded by international law, for example because the international organization concerned only allows States to accede. The Advocate General had suggested that in the presence of such international legal obstacles, a Council amendment to make Member States accede along with the EU would not distort the initial Commission proposal, and would thus fall within the scope of the Council's right to amend the initial proposal.[37] The Court, however, did not take up the Advocate General's suggestion. Instead, it held in categorical terms that "an amendment by the Council seeking to empower Member States to exercise an exclusive competence of the European Union would distort the very purpose of a Commission proposal reflecting the choice according to which the European Union alone should exercise that competence".[38]

To appreciate just exactly how important this second point really is, it is useful to keep in mind the broader interinstitutional context in which cases such as *Geneva Act* come before the Court. As mentioned in the introduction, ever since the entry into force of the Lisbon Treaty, Member States – and their institutional emanation at the EU level, the Council – have undertaken efforts

37. Opinion, para 74.
38. Judgment, para 105.

to exploit the ambiguities left by the Treaty framers in pursuit of the abovementioned aim of staying visible externally and making sure that individual Member States retain a veto over decisions taken at EU level. They have done so in different ways. For example, they have argued before the Court that the Lisbon Treaty codified a narrower conception of the scope of the EU's ERTA-type exclusive competence than the one espoused by the Court of Justice in its pre-Lisbon case law. They have done so both by merging and by splitting decisions in an effort to ensure that, for all practical purposes, Council decision-making continues to take place by unanimity rather than by qualified majority vote. And, lastly, they have done so by advancing a theory that the EU cannot exercise its external shared competence in the absence of pre-existing internal EU legislation. Each of these practices and theories have been rejected by the Court of Justice.[39]

The above examples give a sense of Commission-Council relations in the foreign relations sphere. They make clear why commentators have occasionally used military metaphors to describe the relationship – a relationship which, the Treaties set out, should be characterized by mutual sincere cooperation.[40] *Geneva Act* builds on these earlier cases by making clear that, in the interinstitutional "warfare" surrounding the EU's competences to conclude international agreements, the Commission has meaningful weaponry of its own. By focusing on Article 293(1) TFEU and the distortion theory, the Commission asked the Court to affirm that the Treaties put in place a political safeguard of foreign relations federalism, which allows the Commission to act when the Council risks abusing its power to empower the Member States to act in areas of EU exclusive competence.[41] This strategy has turned out to be successful. Following *Geneva Act*, we now know that the Council does not have a unilateral power to provide for Member State accession to an international agreement in an area of EU exclusive competence if the Commission only envisaged EU accession. Rather, the Council must pass through the Commission, which must adopt a new

39. See respectively Case C-114/12, *Commission* v. *Council (Neighbouring Rights)*, EU:C:2014:2151, para 70; Case C-28/12, *Commission* v. *Council (US Air Transport Agreement)*, EU:C:2015:282; Case C-180/20, *Commission* v. *Council (Agreement with Armenia)*, EU:C:2021:658, para 40; Case C-600/14, *Germany* v. *Council (OTIF)*, EU:C:2017:935, para 68.

40. E.g. van der Mei spoke of the "battlefield" of Art. 218 TFEU, whereas Koutrakos spoke of "turf wars" between the institutions. See respectively van der Mei, op. cit. *supra* note 1, 1051–1076; Koutrakos, op. cit. *supra* note 1, at 22.

41. In the US, where the term originated, political federalism safeguards are institutional mechanisms that ensure that the federal government is mindful of State interests when it makes laws or takes decisions. See the references to the literature in Verellen, *Foreign Relations Federalism. The EU in Comparative Perspective* (OUP, 2023), at p. 129. In EU foreign relations, political federalism safeguards also serve the purpose of protecting the interests of the "federal" (i.e. EU) level of governance.

proposal. Crucially, not even a unanimous Council can override the Commission. A new proposal is needed, regardless of the majority in favour of Member State accession to the agreement.

It will be interesting to see whether *Geneva Act* will have implications beyond the sphere of EU exclusive competence. In *Geneva Act*, the Court put much emphasis on the fact that the Council was acting in an area of exclusive competence in which EU-only action is the constitutional norm.[42] Perhaps this emphasis suggests that, outside the sphere of exclusive competence, it will be difficult or even impossible for the Commission to argue convincingly that amending its proposal so as to avoid exercising shared competence constitutes distortion. However, an equally plausible argument can be made that, just as in areas of exclusive competence, the choice to propose to the Council that it exercise EU shared competence is itself a "political choice", which the Commission makes in the "general interest" of the EU, as is required by Article 17(1) TEU. If the Council disagrees with the Commission on the breadth of shared competence the EU should exercise, it would have to invite the Commission to put forward a new proposal. And if the Commission refuses, there would be no Council decision.[43]

If the distortion theory were to play a role outside the exclusive competence sphere, its operation may very well be less categorical. In *Geneva Act*, the Court held that any decision to re-empower the Member States to act requires a Commission proposal. In a context of shared competence, a more case-by-case approach may be needed whereby the Court plays a less deferential role vis-à-vis the Commission. Take the recent practice of the Council to authorize the conclusion of an international agreement only for those provisions covered by EU exclusive competence, but not those covered by EU shared competence.[44] If the Commission were to make it clear in its proposal – as it should[45] – that it envisages a full accession of the EU covering

42. Judgment, paras. 98–104.

43. Raising the same question, see already Chamon, Op-Ed: "Reinforcing the Community Method – the Commission as a veto player in EU external relations", available at <eulawlive.com/op-ed-reinforcing-the-community-method-the-commission-as-a-veto-player-in-eu-external-relations-by-merijn-chamon/> (last visited 19 Sept. 2023).

44. The practice came to light in Opinion 1/19, *Istanbul Convention*, EU:C:2021:832.

45. An anonymous reviewer helpfully pointed out that in cases of facultative mixitiy, neither the Commission proposal nor the Council decision refer to the mixed nature of the proposed agreement. In other words, the Commission does not formally "propose" mixity or an EU-only agreement, it simply proposes EU conclusion. To make the distortion theory work in this context, it would be necessary for the Commission to clearly indicate in its proposal to sign or conclude the international agreement at issue that it is aiming for an EU-only agreement, and thus a "broad" accession of the EU that involves the EU exercising all relevant shared competence. It is only by making this objective clear to the Council, that an argument could be made that a Council refusal to exercise shared competence distorts the Commission's proposal.

all provisions of the agreement, an amendment by the Council to accede only in part could arguably also distort the Commission's proposal. This is particularly true if by doing so the Council transforms what the Commission aimed to be an EU-only agreement into a mixed agreement.

To be clear, applying the distortion theory in the sphere of shared external competence would come with its own difficulties. In Opinion 1/19 on the accession of the EU to the Istanbul Convention, for example, the Court made clear it considers the choice of the Council to exercise EU shared competence, and the extent to which it chooses to do so, to be a matter of "political discretion".[46] Such a statement seems to foreclose the possibility that an amendment by which the Council chooses not to exercise EU shared competence could constitute distortion. In fact, the statement could be construed as suggesting that the decision is not subject to judicial review at all, and would thus constitute what US lawyers refer to as a "political question" that is simply deemed not to be subject to any legal standards that a court can enforce.[47] Such a reading would, however, not sit well with the Court's own insistence that the principle of the rule of law requires judicial review by the Court,[48] or with the principle of institutional balance that imposes on each institution – including the Council – an obligation to have due regard to the rights and powers of the other institutions.[49] This "due regard" requirement arguably requires the Council, when it exercises its right to amend a Commission proposal, to do so in a way that would still enable the proposal to achieve its objective(s).

In this regard, the Commission's power to withdraw proposals indeed offers a useful parallel. In the abovementioned *Macro-financial assistance to third countries* case, the Court made it clear that the power of the Commission to withdraw a proposal "cannot . . . confer upon [the Commission] a right of veto in the conduct of the legislative process, a right which would be contrary to the principles of conferral of powers and institutional balance".[50] Rather, the Commission's use of its power to withdraw is subject to judicial review by the Court, which enables the Court to assess whether in exercising this power the Commission did indeed have due regard to the powers of the other institutions, as required by the principle of institutional balance.[51] In similar

46. Opinion 1/19, *Istanbul Convention*, para 252.

47. In favour of transplanting the theory to the EU context, see e.g. Butler, "In search of the political question doctrine in EU law", 45 LIEI (2018), 26.

48. See in a different context Case C-134/19 P, *Bank Refah Kargaran* v. *Council*, EU:C:2020:793, para 36, where the Court holds that "[t]he very existence of effective judicial review designed to ensure compliance with provisions of EU law is of the essence of the rule of law".

49. See the references to case law in Koutrakos, op. cit. *supra* note 1, at 4–5.

50. Case C-409/13, *Macro-financial assistance to third countries*, para 75.

51. Ibid., para 83.

fashion, perhaps the Council's power can be a matter of "political discretion" while at the same time remaining subject to judicial review? In EU law, the former does not necessarily exclude the latter.

While applying the distortion theory in the sphere of shared external competence thus raises a set of new questions, doing so at the level of general principle would be a good idea. The distortion theory could operate as a welcome check on the Council, which, as representative of the Member States, is institutionally biased towards mixed as opposed to EU-only external action.[52] Just as in *Geneva Act* the Court put a stop to unfettered "de-Europeanizing" EU exclusive competence by requiring the Council to obtain Commission support for its plan to re-empower Member States to act externally, it may in some instances also be necessary to preserve the EU's ability to exercise its shared competences.

5.3. *Article 2(1) TFEU as an additional judicial safeguard of foreign relations federalism?*

The second strategy, pursued by the Commission in its second plea, was *judicial* rather than *political* in its orientation (in the language of federalism safeguards: the Commission was arguing for the introduction of a *judicial* as opposed to a *political* safeguard of foreign relations federalism[53]). As the Advocate General argued in his Opinion, contrary to the arrangements in the shared competence context following *OTIF*, the authority to empower the Member States to act in areas of EU exclusive competence is not a discretionary authority in the hands of the Council. Rather, as an exception to the general rule of EU-only action in areas of EU exclusive competence, the Council can only empower Member States to act in the presence of an objective justification. By analogy with Member States enacting measures that restrict any of the four fundamental freedoms, this justification must have a legitimate aim; it must be suitable and not go beyond what is necessary to attain the aim. Whether there is indeed an objective justification is ultimately for the Court of Justice to assess, as part of its responsibility to ensure that in the application of the Treaties the law is observed.

The Court did not reach the second plea as it upheld the first plea. This is sensible from a judicial economy perspective, but too bad for academic commentators who may have been interested in learning about the Court's views on the matter. The Advocate General's reading of Article 2(1) TFEU is

52. See here already Costonis, "The treaty-making power of the European Economic Community: The perspectives of a decade", 5 CML Rev. (1968), 421–457, at 452.

53. Drawing this distinction, see Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (OUP, 2009), at Ch. 5.

persuasive. If anything, recognizing that use of Article 2(1) TFEU's option to empower Member States to act in areas of EU exclusive competence is subject to constitutional limits that are reviewable by the Court, opens up the possibility for the Court to act as an additional safeguard – a judicial back-stop – against abuse of this option by the Member States in the Council. This could be useful, in particular, in a situation in which the Commission – for reasons of political expediency, which may change over time – itself proposes to empower the Member States to act in an area of EU exclusive competence, despite there being no objective justification for doing so. In such a scenario, the distortion theory does not come into play as the Council is in no way depriving the Commission's proposal of its *raison d'être*.

However, this judicial safeguard of foreign relations federalism does have an important weakness, which makes the Court's acceptance of the first plea all the more important. Who will bring the case to Luxembourg, if not the Commission? The European Parliament is an option, but given the partisan dynamics of parliamentary decision-making, it is difficult for the Parliament to bring an action on an issue that does not immediately affect its institutional prerogatives (it is interesting, in this regard, that the Parliament did not support the Commission in this case). An individual Member State could bring a case, but is unlikely to do so as all Member States will likely have agreed with the decision to let Member States accede along with the EU. Individuals cannot bring a case because a Council decision of this type is very unlikely to directly and individually concern any individual as per Article 263(4) TFEU. Given this incentive structure, the political safeguard of foreign relations federalism recognized in *Geneva Act* is likely to operate as the main instrument to ensure that in areas of EU exclusive competence, EU-only remains the norm.

6. Conclusion

There is a need for safeguards against abuse in the area of treaty-making. The judgment in *Geneva Act* marks an important step towards fulfilling this need. As the abovementioned examples of Member State strategies to protect and indeed strengthen their own position on the international stage demonstrate, the good faith of Member State cannot be taken for granted – even if it is constitutionally mandated. It remains necessary to put in place effective safeguards against Member State efforts to renationalize powers that have been allocated to the EU. That the Council decision called on Member States to act "in full respect of EU exclusive competence", and that, while empowering Member States to accede to the Geneva Act, it also mandated the Commission to act on behalf of both the EU and the Member States, does not

mean much, in this regard. As an Arabian proverb has it: if the camel once gets his nose in the tent, his body will soon follow.

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