



Reports of Cases

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 18 December 2014¹

Case C-409/13

Council of the European Union
v

European Commission

(Action for annulment — Law governing the institutions — Article 293 TFEU — Article 294 TFEU — Principle of the division of powers between the institutions of the European Union — Principle of institutional balance — Principle of sincere cooperation — Ordinary legislative procedure — Commission's right of initiative — Power to withdraw a proposal for a legislative act — Scope of judicial review of the act of withdrawal — Statement of reasons for that withdrawal)

I – Introduction

1. The present dispute between the Council of the European Union and the European Commission, which is constitutional in nature, is concerned with whether any power is conferred on the Commission to withdraw a legislative proposal and, if so, the scope and limits of that power. From the outset, I wish to point out that, although the parties to the present proceedings have chosen to use the expression 'right of withdrawal' to describe the contested power of the Commission, in this Opinion I intend to use the expression 'power of withdrawal'² since the exercise of that power affects the legal position of the co-legislator only in that it precludes the latter from pursuing the legislative procedure.

2. The Council's action relates to the Commission's decision of 8 May 2013 ('the contested decision') to withdraw the proposal for a framework regulation of the European Parliament and of the Council laying down general provisions for macro-financial assistance to third countries ('the proposal for a framework regulation'),³ which was taken during the first reading in the ordinary legislative procedure within the meaning of Article 294 TFEU and before the Council had formally adopted its position on that proposal.

3. The present action is based on three pleas in law alleging, respectively, infringement of the principle of conferral of powers laid down in Article 13(2) TEU and of the principle of institutional balance, infringement of the principle of sincere cooperation set out in Article 13(2) TEU and infringement of the obligation to state reasons provided for in the second paragraph of Article 296 TFEU.

1 — Original language: French.

2 — To accept the existence of such a power is, in my view, tantamount to conferring on the Commission legislative competence to decide to withdraw or maintain its legislative proposal without requiring explicit or implicit consent from the other institutions.

3 — COM(2011) 396 final.

4. Given that this is the first case in which the Court has been called on to assess the validity of an act of the Commission withdrawing a legislative proposal, the present proceedings require the adoption of a position of principle concerning that power and the manner in which it may be exercised, and concerning the scope of any judicial review of an act of withdrawal. In that regard, I would point out at the outset that the Commission's power of withdrawal is a novel subject. Not only is it barely dealt with in the case-law and legal literature, but, furthermore, where it does appear, it is neglected, because of confusion with the Commission's right of initiative and with the principle of institutional balance.

5. For those reasons, the present Opinion will endeavour to distil the essence of the power of withdrawal as such, while proposing, in the spirit of the principle of simplicity, also known as 'Ockham's Razor',⁴ a solution based on a distinction between the formal aspect of the power of withdrawal, on the one hand, and an analysis of the merits of the act of withdrawal adopted by the Commission in the context of the ordinary legislative procedure, on the other. It is on the basis of that distinction that I intend to determine the limits of the judicial review of that power of withdrawal.

II – Background to the dispute and the contested decision

6. Macro-financial assistance is macro-economic financial aid granted to third countries experiencing short-term balance of payments difficulties. Initially, it was granted, on a case-by-case basis, by Council decisions adopted on the basis of Article 352 TFEU.⁵ Since the entry into force of the Treaty of Lisbon, Article 212 TFEU constitutes a specific legal basis for decisions to grant macro-financial aid, which must be adopted by the European Parliament and the Council in accordance with the ordinary legislative procedure, without prejudice to the urgency procedure laid down in Article 213 TFEU in the context of which the Council may act alone.

7. According to the information in the file, the proposal for a framework regulation was submitted by the Commission on 4 July 2011, on the basis of Articles 209 TFEU and 212 TFEU. Article 7 of that proposal related to the procedure for granting macro-financial assistance. Under Article 7(1), any country wishing to be granted such assistance was to submit a written request to the Commission. Article 7(2), read in conjunction with Article 14(2), provided that, if the conditions referred to in Articles 1, 2, 4 and 6 were met, the assistance requested would be granted by the Commission in accordance with the 'examination' procedure established by Article 5 of Regulation (EU) No 182/2011, the 'comitology' regulation.⁶

8. After several meetings of the Working Party of Financial Counsellors, the proposal for a framework regulation formed the subject-matter of a general approach of the Council, approved by the Permanent Representatives Committee (Coreper) on 15 December 2011. In that general approach, the Council proposed, in particular, as regards Article 7(2) of that proposal, to replace the conferral of implementing powers on the Commission with the application of the ordinary legislative procedure.

9. At the plenary sitting of 24 May 2012, the Parliament adopted, by partial vote at first reading, the report containing 53 proposed amendments to the proposal for a framework regulation. That report proposed, in particular, using delegated acts rather than implementing acts for the purposes of granting macro-financial assistance.⁷

4 — Attributed to William of Ockham, the 14th century philosopher, the principle of simplicity can be applied in the sciences in so far as it states that 'the simplest adequate hypotheses are the most probable ones'. This seems to me to be applicable to the legal reasoning to be adopted in the present case.

5 — Formerly Article 308 EC and Article 235 of the EC Treaty.

6 — Regulation of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ 2011 L 55, p. 13).

7 — 2011/0176(COD) of 24 May 2012. Text adopted by the Parliament, by partial vote at first reading/single reading (OJ 2012 C 264 E).

10. Three informal trilogues were held between the Parliament, the Council and the Commission on 5 and 28 June and 19 September 2012. It was clear from those trilogues that, notwithstanding differences between them concerning the procedure to be followed for the purposes of granting macro-financial assistance, neither the Parliament nor the Council supported the Commission's proposal to use implementing acts.

11. On 10 January 2013, the Commission presented, for the purpose of the fourth trilogue, a 'non-paper' entitled 'Landing zone on implementing acts, delegated acts and co-decision in the MFA Framework Regulation', which proposed a compromise solution with regard to the procedure for granting macro-financial assistance. That consisted of a 'combination of (i) detailed conditions for [macro-financial assistance] ..., (ii) informal consultation mechanisms upstream [from the proposed decision-making process], (iii) the inclusion of up to four delegated acts, (iv) the selected use of comitology and (v) the various reporting and evaluation mechanisms'.

12. Following the fourth trilogue on 30 January 2013, the Parliament and the Council proposed another compromise solution, which involved applying the ordinary legislative procedure for the adoption of a decision to grant macro-financial assistance, using an implementing act for the adoption of the memorandum of understanding with the beneficiary country and delegating to the Commission the power to adopt certain acts linked to the assistance thus granted.⁸

13. During the fifth trilogue of 27 February 2013, the representatives of the Parliament and of the Council confirmed that they intended to continue use of the ordinary legislative procedure for the purposes of granting macro-financial assistance. According to the application, the Commission representative stated at that stage that the Commission questioned whether such an approach might distort its proposal, and pointed out that it could, if appropriate, withdraw the latter on the grounds of infringement of its right of legislative initiative.

14. The approach of replacing the implementing act procedure with the ordinary legislative procedure was the subject of an agreement in principle between the Parliament and the Council, formalised during the sixth trilogue of 25 April 2013. On that occasion, the Commission representative officially expressed his disagreement with that approach. In a letter of 6 May 2013 addressed to Mr Rehn, Vice-President of the Commission, the Chairman of Coreper stated that he deeply regretted the announcement made by the Commission representative during the sixth trilogue. He asked the Commission to reconsider its position in the light, in particular, of the fact that agreement between the Parliament and the Council appeared very close.

15. By letter of 8 May 2013 addressed to the President of the Parliament and the President of the Council, which constitutes the contested decision, Mr Rehn stated that, at its 2045th meeting, the College of Commissioners had decided to withdraw the proposal for a framework regulation in accordance with Article 293(2) TFEU. The minutes of that meeting state, on this point, that '[t]he Commission approved the line set out in SI(2013)231'.⁹ It is clear from that note that the staff of the Commission considered that use of the ordinary legislative procedure constituted a distortion of the proposal for a framework regulation in that the procedure would become burdensome and unpredictable and, above all, in that decisions to grant assistance in the form of specific regulations would be at the same legislative level as a framework regulation. Furthermore, the note also referred to constitutional concerns relating to a restriction of the Commission's right of initiative.

8 — That solution was described in detail in a document of 19 February 2013 which was distributed to the members of the Working Party of Financial Counsellors, in which Commission representatives participated.

9 — That note, attached to the file by the Commission, is a study prepared by the Directorate General (DG) for 'Economic and Financial Affairs', under the authority of the Mr Rehn's cabinet, setting out the course of the negotiations on the proposal for a framework regulation and the grounds justifying the withdrawal.

16. The Parliament and the Council formalised their agreement in a joint statement, which was adopted on 9 July 2013.

III – Forms of order sought and procedure before the Court

17. By its action brought on 18 July 2013, the Council asks the Court to annul the contested decision and to order the Commission to pay the costs.

18. In its defence, the Commission asks the Court to dismiss the action as unfounded and to order the Council to pay the costs.

19. The Czech Republic, the Federal Republic of Germany, the French Republic, the Italian Republic, the Kingdom of the Netherlands, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland were granted leave to intervene in support of the form of order sought by the Council.

20. At the hearing, which was held on 23 September 2014, the Czech Republic, the Federal Republic of Germany, the French Republic, the Italian Republic, the United Kingdom, the Council and the Commission presented oral argument.

IV – Admissibility

21. It is necessary, first of all, to determine whether the contested decision is a measure against which an action may be brought for the purposes of Article 263 TFEU. It seems to me that that issue must be examined by the Court of its own motion in order to establish whether it has jurisdiction to hear and determine the action.

22. According to settled case-law, all measures adopted by the institutions, whatever their nature or form, which are intended to have binding legal effects constitute acts open to challenge for the purposes of Article 263 TFEU.¹⁰ In order to ascertain whether a measure produces such effects, it is necessary to look to its substance and to the intention of its author.¹¹ Therefore, the form of an act or decision is in principle irrelevant as regards the admissibility of an action seeking the annulment of that act or decision.¹²

23. The present case concerns a non-typical act,¹³ namely a letter from the Vice-President of the Commission addressed to the President of the Parliament and the President of the Council, by which the Commission informs them of the decision of its College of Commissioners to withdraw the proposal for a framework regulation in accordance with Article 293(2) TFEU.

24. It follows that, by the contested act, the Commission concluded the legislative procedure, thus depriving the Parliament and the Council of any means of action. As pointed out by the Council, the contested act affected its legal position, by preventing it from adopting the proposal which had previously been referred to it.

10 — See judgments in *Commission v Council*, known as ‘ERTA’ (22/70, EU:C:1971:32, paragraph 42); *Parliament v Council and Commission* (C-181/91 and C-248/91, EU:C:1993:271, paragraph 13); and *Commission v Council* (C-27/04, EU:C:2004:436, paragraph 44).

11 — See judgment in *Netherlands v Commission* (C-147/96, EU:C:2000:335, paragraph 27).

12 — Order in *Makhteshim-Agan Holding and Others v Commission* (C-69/09 P, EU:C:2010:37, paragraphs 37 and 38).

13 — See also, on the admissibility of a decision adopted by the representatives of the Member States acting as representatives of their governments, and not as members of the Council, judgment in *Commission v Council* (C-114/12, EU:C:2014:2151, paragraphs 38 to 40).

25. In the present case, it should therefore be concluded that the contested decision produced legal effects in the relations between the institutions. Consequently, the contested decision is indeed intended to have binding legal effects. It follows that the action for annulment of that decision is admissible.

V – Infringement of the principle of conferral of powers and of the principle of institutional balance

A – Arguments of the parties

26. In the context of its first plea, the Council, supported by the intervening Member States, while highlighting the link between the principle of conferral of powers and the principle of institutional balance,¹⁴ submits that there is no explicit reference in the Treaties to a general prerogative of the Commission authorising it to withdraw the proposals which it presents to the legislature.

27. The Council disputes the existence of a ‘right’ of withdrawal symmetrical to the right of initiative laid down in Article 17(2) TEU, which would be almost absolute in that it would be discretionary. The Commission’s right of withdrawal must, instead, be limited to objective circumstances, including: the passage of time, or the emergence of new circumstances or of technical or scientific data, which renders the legislative proposal obsolete or pointless; a lasting lack of notable progress in the legislative procedure for a considerable time, presaging failure; or the existence of a common strategy shared with the legislature in a spirit of sincere cooperation and observance of the institutional balance.¹⁵ Thus, the role of the Commission in the context of the ordinary legislative procedure is confined to that of an honest broker.¹⁶

28. A general prerogative of withdrawal cannot therefore be conferred on the Commission on the basis of Article 293(2) TFEU without disregarding both the wording and the purpose of that provision, which seeks to facilitate the legislative process. Furthermore, conferring on the Commission a general prerogative of withdrawal would effectively render redundant the Council’s right, laid down in Article 293(1) TFEU, to amend the Commission’s proposal within the limits of its subject-matter and purpose.¹⁷

29. Furthermore, the Council submits that the discretion to withdraw whenever the Commission disagrees with the amendments agreed between the co-legislators or is not satisfied with the final outcome of negotiations would amount to granting the Commission an unjustified means of exerting pressure on the conduct of legislative work and a right of veto over legislative action on the basis of considerations of political expediency; this would place the Commission on an equal footing with the co-legislators and would thus result in the ordinary legislative procedure being misused, the legislative

14 — See, in that regard, judgments in *Meroni v High Authority* (9/56, EU:C:1958:7, p. 152); *Meroni v High Authority* (10/56, EU:C:1958:8, p. 173); *Roquette Frères v Council* (138/79, EU:C:1980:249, paragraphs 33 and 34); *Wybot* (149/85, EU:C:1986:310, paragraph 23); *Parliament v Council* (C-70/88, EU:C:1990:217, paragraph 22); and *Parliament v Council* (C-133/06, EU:C:2008:257, paragraph 57).

15 — The Council refers in that regard to Article 7(2) and (3) of the Protocol (No 2) on the application of the principles of subsidiarity and proportionality, annexed to the Treaty on European Union and the FEU Treaty (‘the protocol on subsidiarity’).

16 — See, to that effect, points 13, 17, 22, 24 and 27 of the Joint Declaration of the European Parliament, the Council and the Commission on practical arrangements for the co-decision procedure (Article 251 of the EC Treaty) (OJ 2007 C 145, p. 5, ‘the 2007 Joint Declaration’).

17 — Judgments in *ACF Chemiefarma v Commission* (41/69, EU:C:1970:71); *Commission v Council* (355/87, EU:C:1989:220, paragraph 44); and *Eurotunnel and Others* (C-408/95, EU:C:1997:532, paragraph 39).

power reserved to the Parliament and the Council by Articles 14(1) TEU and 16(1) TEU being encroached upon, and the Commission being allowed to exceed its power of initiative. Conferring on the Commission discretion to withdraw is also contrary to the separation of powers and to the principle of democracy for the purposes of Article 10(1) and (2) TEU.¹⁸

30. In its observations,¹⁹ the Federal Republic of Germany adds that, in the light of the enhanced role of the Parliament in the context of the legislative procedure and of the importance attached by the EU institutions to the informal negotiation procedure within the trilogues, the Commission can no longer, on pain of infringing the principle of sincere cooperation, withdraw its legislative proposal from the moment an agreement is reached between the co-legislators suggesting that the legislative act concerned will be adopted.

31. In its defence, the Commission submits that the withdrawal of a legislative proposal constitutes, like the presentation or alteration of such a proposal, one of the expressions of its right of initiative in the general interest of the European Union, which is laid down in the first sentence of Article 17(1) TEU. Consequently, just as it is for the Commission alone to decide whether or not to present a legislative proposal and whether or not to alter its initial proposal or a proposal which has already been altered, it is for the Commission alone, until its proposal has been adopted, to decide whether to maintain or withdraw it.²⁰ Article 7 of the protocol on subsidiarity demonstrates that the authors of the FEU Treaty intended the Commission's right of withdrawal to be a general right.

32. The well-established practice of the Commission ensures due regard for the powers of the other EU institutions and for the principle of sincere cooperation. Apart from cases of periodic withdrawals on a group basis, the Commission makes ad hoc withdrawals where it finds that there is a lack of political support for its initiative.²¹

33. As regards the present case, the Commission disputes, in the first place, that it has encroached on the powers of the EU legislature.²² In adopting the contested decision, it assumed its responsibilities in the context of the legislative procedure, which, under Article 17(1) TEU, require it to take appropriate initiatives to promote the general interest of the European Union and to do so throughout the procedure. The Commission disputes that the contested decision infringes Article 293(1) TFEU and states that that provision constitutes a rule of procedure and not the expression of any general principle that the Council is entitled to adopt an act in all circumstances, in disregard of the obligation laid down in Article 13(2) TFEU. Nor does Article 293(1) TFEU prohibit the Commission from withdrawing a legislative proposal.

34. Article 293(2) TFEU illustrates the fact that the Commission's role in the legislative procedure continues throughout that procedure and consists not only in promoting contact between the co-legislators in order to reconcile their respective positions but also, in the context of the trilogues, in assuming its own responsibilities by defending its position, if need be by withdrawing its initial proposal in circumstances such as those in the present case.

18 — The Council refers to the case-law according to which that principle finds expression both in the Parliament and in the fact that Council members belong to governments which are politically accountable to their respective national parliaments. See, in that regard, judgments in *Roquette Frères v Council* (EU:C:1980:249, paragraph 33); *Maizena v Council* (139/79, EU:C:1980:250, paragraph 34); and *Commission v Council* (C-300/89, EU:C:1991:244, paragraph 20).

19 — It is true that this argument is presented by the Federal Republic of Germany in the context of the second plea, relating to infringement of the principle of sincere cooperation. Nevertheless, the response to that criticism is fundamental for the purposes of establishing whether there exists a power of withdrawal as such.

20 — See, to that effect, judgment in *Fediol v Commission* (188/85, EU:C:1988:400, paragraph 37).

21 — The Commission adds that, between 1977 and 1994, in the rare cases in which it was not possible to find a solution consistent with EU law, it withdrew its legislative proposal on the ground that the legislature was planning to adopt an act which would have distorted its proposal, seriously undermined the institutional balance or been manifestly unlawful. See Commission Work Programmes for 2011, 2012 and 2013 (respectively COM(2010) 623 final, COM(2011) 777 final and COM(2012) 629 final).

22 — See, to that effect, judgment in *Eurotunnel and Others* (EU:C:1997:532, paragraph 39).

35. Lastly, the Commission denies that the contested decision affects the principle of democracy, stating that, like the other EU institutions, it has its own democratic legitimacy, in particular under Article 17(7) and (8) TEU, and political legitimacy before the Parliament.

B – Analysis (existence, scope and exercise of the power to withdraw a legislative proposal in the context of the ordinary legislative procedure within the meaning of Article 294 TFEU)

1. Introduction

36. Although the parties to the present proceedings appear to be in agreement as to the assumption that EU law allows the Commission to withdraw a legislative proposal, they disagree as to the constitutional basis and scope of such a power. Therefore, I will seek, first, to identify the legal basis and the substance of the Commission's power of withdrawal, before considering, secondly, the specific legal nature of the decision to withdraw in the light of the scope of the judicial review to be carried out in relation to such an act.²³

2. Constitutional basis of the power of withdrawal

37. While pleading an infringement of the principle of conferral of powers, the Council clearly sets out, in its first plea, the concerns linked to conferring on the Commission powers under which the latter could block the legislative activity of the European Union and act as a co-legislator with a legislative veto, thus depriving the Parliament and the Council of their prerogatives. At the same time, the Council accepts that the ability to withdraw a legislative proposal has, in practice, always been conferred on the Commission, as a corollary of the right of initiative, though it cannot be inferred from this that there exists a 'right' of withdrawal.

38. I take the view, however, first, that those concerns are not justified, since the existence of a power to withdraw the legislative proposal for a limited period in accordance with Article 294 TFEU contributes, in itself, to maintaining the institutional balance for the purposes of Article 13(2) TEU, in so far as it means that each of the institutions exercises its powers in compliance with those of the others.²⁴ Furthermore, the approach under which it is sought, on the one hand, to argue that the Commission has an ad hoc ability to withdraw, 'restricted to objective situations, independent of the Commission's specific interests', and, on the other hand, to dispute the existence of such a power on the part of the Commission seems to me to be vitiated by an internal contradiction.

39. Nevertheless, nor do I concur, on the other hand, with the position which appears to be supported by the Commission when it submits that a decision to withdraw is subject to the same rules as the presentation of a legislative proposal. I consider that the provisions of the Treaties are not underpinned by an approach based on a perfect symmetry between the right of legislative initiative and the power of withdrawal. On the contrary, the power of withdrawal is a competence which, although important, has its own characteristics and specific limits.

40. It is common ground that the Treaties do not expressly provide for the existence of a power to withdraw a legislative proposal of the Commission or, *a fortiori*, lay down the manner in which that power may be exercised. However, in accordance with a well-established tradition, the Commission withdraws legislative proposals on an individual or group basis by way of an 'administrative

23 — In any event, this analysis relates only to the exercise of the Commission's prerogatives in the context of the ordinary legislative procedure and is confined to relations with the other institutions in that context.

24 — Judgment in *Parliament v Council* (EU:C:1991:373, paragraph 20).

clean-up’.²⁵ In the case-law of the Court, the possibility of withdrawal appears merely incidentally. According to the case-law, ‘the Commission is free to amend or [to] withdraw its proposal ... if, as a result of a new assessment of the interests of the Community, it considers the adoption of [the] measures [at issue] superfluous’.²⁶ The possibility of withdrawal is also accepted under the protocol on subsidiarity, which provides for the withdrawal of draft legislation on the basis of doubts expressed by the national parliaments as regards compliance with the principle of subsidiarity.

41. In that regard, I wish to point out from the outset that the legitimacy of the European Union is based on the fact that the founding Treaties are regarded as a constitutional charter giving rise to a legal order the subjects of which are the citizens of the European Union.²⁷ That legitimacy means that the rules regarding the manner in which the Community institutions arrive at their decisions, laid down in the Treaties, ‘are not at the disposal of the Member States or of the institutions themselves’.²⁸ In particular, the limits of the powers conferred on the Commission by a specific provision of the Treaty are to be inferred not from a general principle, but from an interpretation of the particular wording of the provision in question.²⁹

42. Thus, under Articles 14(1) TEU and 16(1) TEU, read in conjunction with Article 289(1) TFEU, the task of ‘legislating’ is entrusted to the Parliament and the Council. That task is performed jointly by them. However, under Article 17(2) TEU, legislative acts may be adopted only on the basis of a Commission proposal, except where the Treaties provide otherwise. The Commission, under Article 17(1) TEU, is to promote the general interest of the European Union and take appropriate initiatives to that end.

43. The idea of making the Commission responsible for discerning the general interest of all the Member States and proposing suitable solutions for furthering it has resulted, in the Community system, in the Commission being granted a near-monopoly of legislative initiative.³⁰ While reference is sometimes made to the political erosion of the Commission’s power in that regard, it is essential to point out that successive reforms of the institutional framework have not amended *the content* of the Commission’s right of initiative.³¹

25 — The Commission undertakes such a clean-up either at the start of the College’s term of office or annually as part of an overall review, taking into account binding objectives, the progress of the legislative procedure and verification of compliance with current requirements relating to improvement of legislation. See, for example, the Commission communication entitled ‘Outcome of the screening of legislative proposals pending before the Legislator’, (COM(2005) 462 final, point 1). As to the issue of self-limitation of legislative power by the Commission for political reasons, namely to avoid the distortion of a proposal, the most recent example of which was back in 1994, see Ponzano, P., ‘Le droit d’initiative de la Commission européenne: théorie et pratique’, *Revue des affaires européennes*, 2009-2010/1, p. 27 et seq. (accessible at the following Internet address: <http://ddata.over-blog.com/xxxxxy/2/48/17/48/Fichiers-pdf/Europe/Droit-d-initiative-de-la-Commission.pdf>, p. 11), which refers to Rasmussen, A., ‘Challenging the Commission’s right of initiative’, *West European Politics*, Vol. 30, No 2, 244 to 264, March 2007. Lastly, see the Commission’s answer of 23 January 1987 to written question No 2422/86 from Mr Fernand Herman to the Commission: withdrawal of a Commission proposal (OJ 1987 C 220, p. 6.)

26 — Judgment in *Fediol v Commission* (EU:C:1988:400).

27 — See, to that effect, Opinion 1/91 (EU:C:1991:490, paragraph 21) and judgment in *Van Gend & Loos* (26/62, EU:C:1963:1, p. 12).

28 — Judgment in *United Kingdom v Council* (68/86, EU:C:1988:85, paragraph 38) and Opinion of Advocate General Poiras Maduro in *Parliament v Council* (C-133/06, EU:C:2007:551, point 29).

29 — Judgment in *France and Others v Commission* (188/80 to 190/80, EU:C:1982:257, paragraph 6).

30 — See contribution from Mr Barnier and Mr Vittorino, members of the Convention: ‘The Commission’s right of initiative’, The European Convention, Brussels, 3 September 2002, CONV 230/02. It is common ground that that right is no longer exclusive, in particular in the light of Articles 7 TEU, 11(4) TEU, 129(3) and (4) TFEU, the first sentence of Article 252 TFEU and the third paragraph of Article 308 TFEU.

31 — See, in particular, studies by Soldatos, P., ‘L’urgence de protéger le pouvoir d’initiative législative de la Commission européenne’, *L’Union européenne et l’idéal de la meilleure législation*, Editions Pédone 2013, pp. 175 to 190.

44. In that respect, while the impact of the evolution of EU law on the concept of the ‘Community method’ is to be acknowledged,³² that method nevertheless remains applicable and corresponds to an original system of division of powers³³ leading to decision-making processes which distinguish the European Union from any other State entity or international inter-governmental organisation. That method is therefore a *sui generis* characteristic of the supranational legislative mechanism established by the Treaties.

45. It would therefore be wrong, in my view, merely to treat the task fulfilled by the Commission in that context in the same way as an attribute of the executive function in the strict sense of the term.³⁴ The Commission is required to take a view not merely as the body which will in the future implement the legislative provisions to be adopted by the Parliament and the Council, but also as the custodian of the general interest of the European Union, indeed as the institution in a position to state what it is.³⁵

46. The Commission’s responsibility, under Article 17(1) TEU, to promote the interest of the European Union is, in my view, the main basis for conferring on it a power to withdraw a legislative proposal.

47. It is true that the Treaty on European Union does not raise the Commission to the level of co-legislator. However, its participation in the legislative process is clear from its power of initiative as provided for in Article 17 TEU, from the clause laid down in Article 293(1) TFEU, under which the Council may alter a proposal from the Commission only by acting unanimously, and from Article 293(2) TFEU which allows it to alter the legislative proposal as long as the Council has not acted. Consequently, the power of withdrawal stems from the role conferred on the Commission in the context of the legislative process and is therefore based on Article 17(1) and (2) TEU in conjunction with Article 293(1) and (2) TFEU.

48. Furthermore, in the light of the case-law relating to institutional balance, since the Treaties grant the Commission a constitutional prerogative conferring on it the power to assess, entirely independently, the appropriateness of a legislative proposal or of an amendment to such a proposal, no other institution may require the Commission to adopt an initiative where the latter sees in that initiative no interest of the European Union.³⁶ Exercise of the power of withdrawal may therefore be regarded as the ultimate manifestation of the Commission’s monopoly on initiating legislation taken as an expression of its role as guardian of the interest of the European Union.

32 — Referring to the building of Europe, Jean Monnet considered that ‘its keystone is the constant dialogue which [the Community] organises between the national and Community institutions, the objectives of which are linked and which can only advance together ... That dialogue which cannot be separated from decision-making is the very essence of Community life and gives it its originality among modern political systems’, Monnet, J., *Mémoires*, Paris, 1976, p. 626. In the legal literature, inter alia, Dehousse, R., ‘La méthode communautaire, a-t-elle encore un avenir?’, *Mélanges en hommage à Jean-Victor Louis*, Vol. I (2003), p. 95. Manin, P., ‘La méthode communautaire: changement et permanence’, *Mélanges en hommage à Guy Isaac*, volume 1 (2004), pp. 213 to 237. On the Community method as the ‘heart’ of European integration in the context of the Communities, in contrast with more ‘intergovernmental’ methods, see also the Opinion of Advocate General Mazák in *Commission v Council* (C-440/05, EU:C:2007:393).

33 — See White Paper on Governance (COM(2001) 428), according to which the method is based on the principles that: ‘[(1)] The European Commission alone makes legislative and policy proposals. Its independence strengthens its ability to execute policy, act as the guardian of the Treaty and represent the Community in international negotiations. [(2)] Legislative and budgetary acts are adopted by the Council of Ministers (representing Member States) and the European Parliament (representing citizens). ... Execution of policy is entrusted to the Commission and national authorities. [(3)] the European Court of Justice guarantees respect for the rule of law’.

34 — Treating it in such a way would arise from parallels with traditional parliamentary systems in which the right of legislative initiative belongs to the sovereign. However, historically, that prerogative of the sovereign was affected by the power to propose amendments conferred on national parliaments, which were later granted their own right of legislative initiative.

35 — Roland, S., *Le triangle décisionnel communautaire à l’aune de la théorie de la séparation des pouvoirs*, Bruylant, 2008, (quote from Mr Troper), p. 315.

36 — See, to that effect, judgment in *Parliament v Council* (EU:C:1990:217, paragraph 19).

49. For that reason, it is my view that, as EU law stands at present, conferring on the Commission, or indeed confirming that it has, a power of withdrawal is not liable to undermine the principle of conferral of powers for the purposes of Article 13(2) TFEU. Rather, it is a specific expression of that principle, without prejudice to the manner in which the aforementioned power is exercised, which is itself, in some circumstances, liable to undermine the constitutional balance, a matter which requires examination below.

50. In that regard, it is necessary to acknowledge the value of Article 293 TFEU,³⁷ which is the instrument intended to ensure the balance between the powers of the Council and those of the Commission.³⁸ That provision, the wording of which has hardly changed since the signing of the EEC Treaty, contains two closely-linked provisions, namely one which precludes the Council from adopting a text without the consent of the Commission and another which allows the Commission easily to alter its own proposal at any time, so that the Council is not required to vote unanimously.³⁹ Nevertheless, successive amendments to the Treaty have limited the use of Article 293(1) TFEU, in particular since the widespread use of co-decision, and later of the ordinary legislative procedure as provided for by the Treaty of Lisbon. Article 293(1) TFEU does not apply where a Conciliation Committee is set up, where there is a third reading within the meaning of Article 294 TFEU, or in the context of the budgetary procedure, as those situations fall under specific provisions.

51. Lastly, it is necessary to examine the argument relating to the principle of democracy, raised by the German Government from the perspective of strengthening the role of the Parliament as co-legislator. That government proposes interpreting Article 293(2) TFEU as referring, in particular, to the progress of negotiations between the Parliament and the Council. Such an interpretation appears to start from the premiss that, once a political agreement has been reached between the legislators, the Commission is unable to exercise its prerogatives with regard to the legislative proposal, which confirms its role as mediator for the legislature (honest broker).

52. While accepting that the Parliament's participation in the legislative procedure reflects the fundamental democratic principle that the people should take part in the exercise of power through the intermediary of a representative assembly,⁴⁰ I take the view that adopting from the outset a principle of preference for maximising the Parliament's participation in the decision-making process is tantamount to altering the institutional balance laid down by the Treaties.⁴¹ Furthermore, such a debate should be placed back into its correct constitutional context, namely that of a dispute concerning the legal basis of an act to be adopted. However, the present case raises the distinct question of the constitutional basis for the power to withdraw legislative proposals. In any event, the case-law of the Court does not support the approach advocated by that government.⁴²

37 — The legal literature stresses the fact that Article 293 TFEU reflects, in itself, the strength of the Commission's right of initiative. See, to that effect, Grabitz/Hilf/Nettesheim, Krajewski/Rösslein, *Das Recht der Europäischen Union*, 53. Ergänzungslieferung 2014, AEUV Art. 293 Kommissionsvorschlag; Änderungsrecht, Rn. 1.

38 — As a reminder, under Article 293 TFEU: 1. 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 TFEU, in Articles 310 TFEU, 312 TFEU and 314 TFEU and in the second paragraph of Article 315 TFEU. 2. As long as the Council has not acted, the Commission may alter its proposal at any time during the procedures leading to the adoption of an EU act.

39 — Petite, M., 'Avis de temps calme sur l'article 189 A, paragraphe 1', *Revue du Marché Unique Européen*, 1998/3, p. 197.

40 — See, to that effect, judgments in *Commission v Council*, 'titanium dioxide judgment' (C-300/89, EU:C:1991:244, paragraph 20); *Parliament v Council* (C-65/93, EU:C:1995:91, paragraph 21); and *Parliament v Council* (C-155/07, EU:C:2008:605, paragraph 78).

41 — I therefore share the view expressed by Advocate General Póitres Maduro in *Commission v Parliament and Council* (C-411/06, EU:C:2009:189, footnote 5). While accepting the importance of directly democratic representativeness as a measure of European democracy, he pointed out that European democracy also entails achieving a delicate balance between the national and European dimensions of democracy, without either one necessarily prevailing over the other. This is why the European Parliament does not have the same power as national parliaments in the legislative process and, although an argument could be made for stronger powers for the European Parliament, it is for the peoples of Europe to make that decision through treaty amendment.

42 — According to the Court, to acknowledge that an institution can establish secondary legal bases, whether for the purpose of strengthening or easing the detailed rules for the adoption of an act, would also enable the institution concerned to undermine the principle of institutional balance. See, to that effect, judgment in *Parliament v Council* (EU:C:2008:257, paragraphs 56 and 57).

53. Furthermore, since the entry into force of the Treaty of Lisbon, the Parliament has become, as co-legislator, the Council's equal in the context of the ordinary legislative procedure, which, in my view, is a fundamental sign of the enhanced role of the Parliament at the current stage of development of EU law. In particular, the importance of the relationship between the Parliament and the Council and the corresponding lessening of the role of the Commission are very clear from a comparison between the first reading and subsequent readings of the legislative procedure for the purposes of Article 294 TFEU.⁴³ Thus, the second reading no longer relates to the Commission's proposal, but relates to amendments to the Council's position, in relation to which the Commission may either express its agreement or a negative opinion.⁴⁴ The procedure then continues with a third reading based on the text adopted by the Parliament and the Council.⁴⁵

54. It is true that, from the first reading, the importance of negotiations between the Parliament and the Council is acknowledged. Thus, the Council benefits from the adoption of 'the general approach' which is regarded *de facto* as the basic element of negotiations.⁴⁶ However, there is nothing in the wording of Articles 293 TFEU and 294 TFEU to support the view that formal or informal political agreement between the Parliament and the Council has absolute predominance over the Commission's exercise of the right of initiative at the first reading stage. On the contrary, the exercise of that power is an expression of the institutional balance. In that regard, the German Government itself accepts that, in some cases, the Commission may withdraw its proposal under a supplementary, unwritten, right.

55. In the light of all of the foregoing considerations, it is clear that the Commission's power of withdrawal must be qualified in that such a power may be exercised, in view of its effects, only in compliance with the limits laid down by the Treaties and the general principles of law. I therefore fully concur with the view of the Council where it points out that the power of withdrawal cannot be exercised improperly.⁴⁷ It is therefore necessary to define the limits of the power of withdrawal.

3. The essence of the Commission's power of withdrawal

56. First of all, it seems to me indisputable that the existence of the power of withdrawal and above all its exercise by the Commission affect the legislative position of the other institutions participating in the legislative procedure. Being founded on the Commission's responsibility under the Treaty on European Union to promote the interest of the European Union, its exercise prevents the co-legislators from pursuing the legislative procedure. As the power of withdrawal definitively affects their legal position, it cannot be unlimited.

57. First, the power of withdrawal constitutes, first and foremost, a prerogative conferred on the Commission for a limited period of time. In the context of the ordinary legislative procedure, the Commission has been entrusted with important functions as guardian of the general interest at the various stages of the procedure; this results in it seeking political compromises between the institutions, while preserving its own independence. The role of the Commission changes considerably

43 — Article 294(1) to (6) TFEU is worded as follows: '1. Where reference is made in the Treaties to the ordinary legislative procedure for the adoption of an act, the following procedure shall apply. 2. The Commission shall submit a proposal to the European Parliament and the Council. *First reading* 3. The European Parliament shall adopt its position at first reading and communicate it to the Council. 4. If the Council approves the European Parliament's position, the act concerned shall be adopted in the wording which corresponds to the position of the European Parliament. 5. If the Council does not approve the European Parliament's position, it shall adopt its position at first reading and communicate it to the European Parliament. 6. The Council shall inform the European Parliament fully of the reasons which led it to adopt its position at first reading. The Commission shall inform the European Parliament fully of its position.'

44 — Under Article 294(7)(c), TFEU, '[i]f, within three months of such communication, the European Parliament ... proposes, by a majority of its component members, amendments to the Council's position at first reading, the text thus amended shall be forwarded to the Council and to the Commission, which shall deliver an opinion on those amendments'.

45 — Under Article 294(11) TFEU, '[t]he Commission shall take part in the Conciliation Committee's proceedings and shall take all necessary initiatives with a view to reconciling the positions of the European Parliament and the Council'.

46 — See Jacqué, J.P., 'Le Conseil après Lisbonne', *Revue des affaires européennes*, 2012/2, p. 213 et seq.

47 — Paragraph 62 of the application.

during the legislative procedure. The same must also be true of the power to withdraw legislative proposals, which must not be confused with the right of legislative veto, a prerogative of the executive, generally conferred on the Head of State in order to prevent, with suspensory or definitive effect, the entry into force of a legislative act adopted by the institution invested with legislative power.

58. That is the reason why Article 293(2) TFEU, under which the Commission retains the power to alter the proposal, must also be regarded as entailing a time-limit for the purpose of exercising the power of withdrawal.

59. A comparison between the various readings provided for by Article 294 TFEU demonstrates that, at the first reading stage, the Commission exercises its power of initiative subject to compliance with general principles, while at the second and third reading stages its constitutional prerogatives are increasingly diminished.

60. After the Council has adopted 'its position at first reading' within the meaning of Article 294(5) TFEU, it has 'acted' within the meaning of Article 293(1) TFEU, so that the role of the Commission is then restricted, under Article 294(7)(c) TFEU in conjunction with Article 294(9) TFEU, to delivering an opinion on the amendments proposed by the Parliament at second reading in respect of the position of the Council at first reading. Thus, the division of legislative powers between the Parliament and the Council, which originates in the former cooperation procedure, does not enable the Commission to go so far as to alter or, *a fortiori*, to withdraw its proposal after the Council has formally adopted its position. The Commission continues, however, to be fully involved in the procedure until its end. The Commission's opinion on those amendments must have been referred to the Council, before the latter may take a view on the Parliament's position.⁴⁸

61. Consequently, inasmuch as the power of withdrawal is one manifestation of the responsibilities entrusted to the Commission under the Treaties, and in particular of its power of legislative initiative, Article 294(5) TFEU should be interpreted as establishing a time-limit beyond which the Commission is no longer entitled to withdraw the proposal for a legislative act.⁴⁹

62. The specific situation of withdrawal resulting from the protocol on subsidiarity also supports such an interpretation of the time-limits of the power of withdrawal. If, despite the doubts of national parliaments, expressed under Article 6 of that protocol, as to whether a draft legislative act complies with the principle of subsidiarity, the Commission maintains its proposal, the legislator is required, under Article 7(3)(a) of that protocol, to determine whether the principle of subsidiarity has been observed before concluding the first reading. That means that any objections by the national parliaments and the Commission's decision as regards the withdrawal, maintenance or alteration of the proposal must take place at an earlier stage and, in any event, before the conclusion of the first reading.

63. Furthermore, such a determination of the time-limits confirms the legality of the withdrawals on a group basis carried out to date by the Commission. In the absence of mandatory time-limits in the context of the first reading, the Commission remains responsible for the fate of legislative proposals at that stage. Since the first reading is not subject to any time-limit, the discussions may continue for as long as the institutions consider appropriate, and even several years. Against that background, it therefore seems consistent to confer on the Commission the power, or even the obligation, to

48 — For details, see the Guide to the ordinary legislative procedure, 2010 Council brochure available at the Internet address: <http://consilium.europa.eu/uedocs/cmsUpload/QC3109179ENC.pdf>.

49 — Naturally, if the Council approves the Parliament's position within the meaning of Article 294(4) TFEU, the Commission may no longer exercise its power of withdrawal.

withdraw its proposal where it is no longer convinced that the act in question is still in the general interest of the European Union. However, during the second or third readings, the mandatory time-limits, which are very short,⁵⁰ are to be strictly applied and it is the co-legislators who become ‘masters’ of the act to be adopted.

64. Lastly, circumscribing the power of withdrawal by a provision of the Treaty meets the basic requirement of legal certainty. In that respect, the argument put forward by the German Government⁵¹ that it is the formalisation of an agreement between the Parliament and the Council in the form of the outcome of the trilogues which precludes the Commission’s withdrawal of the legislative proposal cannot succeed. It is true that it is necessary to acknowledge the two dimensions of the legislative procedure, which is not only legal but also political, the latter being decisive in so far as it enables a consensus to be reached.⁵² Nevertheless, the need for legal discipline stemming from the constitutional principle of representative democracy, a principle which requires transparent procedures in the context of the adoption of a legislative act, prevails in so far as a basis for consensus must subsequently be found in a provision of the Treaty, or else the legislator’s action runs the risk of being unlawful.⁵³

65. Secondly, within the temporal framework described above, the power of withdrawal is subject to a fundamental limit resulting from the need to comply with the principle of sincere cooperation referred to in Article 13(2) TEU. In the context of the inter-institutional dialogue on which the legislative procedure is based, the institutions are subject to the same reciprocal duties of sincere cooperation as govern relations between the Member States and the EU institutions.⁵⁴

66. Lastly, the power of withdrawal is limited by the fact that its use may form the basis of an action for failure to act for the purposes of Article 265 TFEU. Indeed, the withdrawal of a legislative proposal may constitute, on the part of the Commission, a failure to comply with a duty to act.⁵⁵

4. The nature of the decision to withdraw the legislative proposal and the limits of the review carried out by the EU judicature

67. In its defence, the Commission submits that it adopted the contested decision on the ground that the legislative act which the co-legislators sought to adopt despite its warnings constituted a distortion of its proposal and seriously undermined the institutional balance as a result of the agreement in principle between the Parliament and the Council to replace, in Article 7 of the proposal for a framework regulation, the conferral of implementing powers on the Commission with the use of the

50 — Under the ordinary legislative procedure, the first stage consists of a first reading, which is not subject to any time-limit, then a second reading, subject to a twofold time-limit of three months plus one month for the second reading of the Parliament and three months plus one month for the second reading of the Council. The Conciliation Committee is subject to a time-limit of six weeks (without prejudice to any extension under Article 294(14) TFEU). Next, as regards the third reading of the Parliament and of the Council, that same time-limit of six weeks is applicable.

51 — In the context of the second plea, the German Government, while disputing the lawfulness of a withdrawal in the cases listed by the Commission, proposes in the alternative that Article 293(2) TFEU be interpreted as meaning that, having regard to the principle of sincere cooperation, the last possible moment for the Commission to exercise its right of alteration and, *a fortiori*, its unwritten power of withdrawal is when an agreement is reached between the Parliament and the Council.

52 — I will return to the status of inter-institutional agreements in the context of the second plea.

53 — See, in that regard, concerning the requirement for transparency, Article 16(8) TEU under which the Council is to meet in public when it deliberates and votes on a draft legislative act, that is to say when its acts as legislator. Transparency in that regard contributes to strengthening democracy by enabling citizens to review all of the information which constituted the basis of a legislative act. See, to that effect, in particular, judgment in *Sweden and Turco v Council* (C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 46).

54 — See, *mutatis mutandis*, judgment in *Parliament v Council* (EU:C:1995:91, paragraph 23).

55 — See, in that regard, order in *Parliament v Commission* (C-445/93, EU:C:1996:283). That aspect is strictly linked also to the fact that the power of withdrawal is limited by Article 241 TFEU, in so far as the Commission must be able to set out the reasons underpinning a decision to withdraw if the Council asks the Commission to submit to it any appropriate proposal under that article. The reasons in question must, in particular, demonstrate that any legislative proposal would not further an interest of the European Union for the purposes of Article 17(1) TFEU. That also reflects the issue of the *de jure* and *de facto* right of initiative. See Convention document entitled ‘The Commission’s right of initiative’ (CONV 230/02, p. 4).

ordinary legislative procedure, to the detriment of the objectives of effectiveness, transparency and consistency pursued by that proposal. It adds that the other provisions of the proposal for a framework regulation, which sought to define its implementing powers, would have been deprived of any legal effect by the amendment to which the Parliament and the Council agreed.

68. In the Commission's view, the distortion of the proposal for a framework regulation results not so much from the refusal to entrust it with the power to adopt individual decisions to grant macro-financial assistance but from the desire of the co-legislators to continue to use the ordinary legislative procedure. It states that the choice, in accordance with Parliament's initial suggestion, to use delegated acts as provided for in Article 290(2) TFEU would not in its view have constituted such a distortion. Furthermore, it considers that the co-legislators preferred to seek to amend the Commission's proposal in a way which would not only have required it to present a legislative proposal in each individual case where the conditions for granting macro-financial assistance had been met, but would also have determined to a very large extent the actual content of its future proposals. Its right of initiative would have been entirely pre-determined and circumscribed.

69. The Council submits that, even accepting that a distortion of the legislative proposal or serious harm to the institutional balance constitutes a valid ground for withdrawal, neither of those situations applies in the present case.

70. Having regard to the terms of the debate, it is essential to determine at the outset the exact nature of a decision to withdraw.

71. A decision to withdraw the legislative proposal sent to the Parliament and to the Council takes place during the legislative procedure, which is a particular form of inter-institutional dialogue.

72. In the present case, it is clear from the documents before the Court that that decision, viewed in terms of the reasons which led the Commission to interrupt the legislative procedure, must be analysed at two levels, which will constitute the starting point of my analysis. It is therefore necessary to draw a distinction between, on the one hand, the formal level relating to the exercise of the power of withdrawal (it is necessary here to establish compliance with the very essence of that power as defined above) and, on the other hand, the substantive level relating to the merits of the decision to withdraw in a specific case (namely the substantive justifications which led the Commission to withdraw the specific proposal).

73. I take the view that only the first aspect of the decision to withdraw is subject to review by the Court. By contrast, the second aspect, relating to the merits, falls under the review of the legality of the definitive act, which could be adopted only if the Commission were not to exercise its power of withdrawal or if it were to exercise it improperly. Moreover, having regard to that distinction, the decision to withdraw does not, in my view, have to meet the obligation to state reasons referred to in Article 296 TFEU, since the reasons underpinning the adoption of the act fall under the substantive review of the definitive act. I will return to this in the context of the third plea.

74. On the other hand, if the Court were to carry out a review of the merits of the Commission's decision to withdraw, this would effectively not only circumvent the system of legal remedies established by the Treaty — since the Court would be carrying out an *ex ante*⁵⁶ judicial review of the legality of a legislative act — but also involve carrying out an indirect review of the legality of a legislative act *in statu nascendi* which has not yet been adopted, and therefore has no legal existence.

⁵⁶ — The only situation in which an *ex ante* review may be carried out is laid down in Article 218(11) TFEU. See, recently, judgment in *Council v In 't Veld* (C-350/12 P, EU:C:2014:2039, paragraph 58).

75. Thus, I would note that, in the present case, the aspect relating to the merits of the contested decision encompasses a political analysis of the expediency of the measure to be adopted and a review of the special features of the application of the act at issue, in particular the detailed arrangements for macro-financial assistance, the choice of legal basis, the issue of the division of powers from the point of view of the delegation of the Commission's implementing powers and, more generally, the issue of whether the regulation to be adopted may be unlawful. However, at the end of the ordinary legislative procedure, these various questions may be put before the Court as part of an action for annulment against the final act.

76. Thus, the Commission submits that the contested decision was taken not on the basis of considerations of expediency or political choice which it allegedly sought to make prevail by wrongly considering itself to be a co-legislator, but because of the concern that the act adopted by the co-legislators might conflict with the interests of the European Union. However, in my view, the Court cannot rule on the legality of such an argument before the adoption of the legislative measure at issue without running the risk of exceeding the powers conferred on it by the Treaties.

77. In that context, particular importance must be attached to review of the infringement of the principle of the division of powers.

78. First of all, the argument based on an alleged distortion of the legislative proposal must, in my view, be examined in the context of the review of the definitive act, since distortion by the co-legislator of a Commission proposal is tantamount to acting without having received a proposal and therefore to infringing the Commission's right of initiative. In that situation, it is the definitive measure which is vitiated by illegality.⁵⁷

79. Furthermore, infringement of the prerogatives of the institutions traditionally results from an incorrect choice of legal basis. The choice of legal basis for an EU measure must rest on objective factors amenable to judicial review, including in particular the aim and the content of the measure.⁵⁸ The requirement of legal certainty means that the binding nature of any act intended to have legal effects must be derived from a provision of EU law which prescribes the legal form to be taken by that act and which must be expressly indicated therein as its legal basis.⁵⁹ However, that case-law does not apply *before* the adoption of the act whose merits are contested in the context of proceedings preliminary to the principal act.

80. In any event, assuming that the Court is able to review the merits of the decision to withdraw, the question that arises is what the legal effect would be of such a judgment of the Court, in particular in terms of the force of *res judicata* which would be attached to that judgment.

81. Thus, if the Court upheld the complaints directed against the reasons for the decision to withdraw on a substantive level and ruled that the Commission was wrong to consider the action of the co-legislators to be a distortion of its initial proposal, the legislative procedure could continue. Inasmuch as, under Article 278 TFEU, actions brought before the Court are not to have suspensory effect except where the Court considers that it is necessary to order suspension, the procedure should recommence in its entirety, which would require the Commission to present a new legislative proposal. The question would therefore arise as to what extent the judgment of the Court binds the Commission by limiting the exercise of its right of initiative in that the Commission could no longer present its

57 — See Petite, M., *op. cit.*

58 — See titanium dioxide judgment (EU:C:1991:244, paragraph 10) and judgment in *Huber* (C-336/00, EU:C:2002:509, paragraph 30).

59 — See judgment in *Commission v Council* (C-370/07, EU:C:2009:590, paragraphs 37 to 39).

initial proposal, or a proposal which departs from the position of the co-legislators, ‘validated’ by the Court. By sanctioning the Commission in this way, the Court would depart, in my view, from the above case-law according to which the prerogatives of the institutions are one of the elements of the institutional balance created by the Treaties.⁶⁰

82. The same would be true if the Court confirmed the decision to withdraw, for example on the ground that the legal basis proposed by the co-legislators was erroneous in relation to that on which the Commission’s proposal was based. It should be pointed out that, under the rules of the FEU Treaty governing the legislative activity of the EU institutions, the Parliament and the Council, acting together, have, *inter alia* under Article 294(7)(a) and (13) TFEU, the option of altering, in the course of the legislative procedure, the legal basis chosen by the Commission.⁶¹

83. It seems to me, therefore, that the Court would thus arrogate to itself the task of *arbitrator par excellence* in the context of an ongoing legislative procedure.

84. Consequently, for all the reasons set out above, I propose that the Court should not rule, in the context of the present action, on the reasons put forward by the Commission in support of its decision to withdraw. I would point out, in that regard, that the Commission submits that it would be able to withdraw the proposal, *inter alia*, in the case of serious distortion, serious harm to the institutional balance or where the proposal involved manifest unlawfulness. The Commission also states that it favours the possibility of withdrawal based on the lack of powers of the European Union or on a ground relating to infringement of the principle of subsidiarity. However, those seem to me to be aspects which fall, on a case-by-case basis, under the review of the legality of a definitive act adopted at the end of the legislative procedure.

85. Thus, I propose that the arguments put forward both by the Council and by the Commission regarding the merits of the contested decision should be considered ineffective and that the judicial review should be limited solely to elements at the formal level concerning the essence of the right of withdrawal, as set out in points 56 to 65 of the present Opinion.

86. In the light of all of the foregoing, I propose that the first plea of the Council should be rejected. Since it is clear from the file that the Commission withdrew its proposal before the Council had acted, for the purposes of Article 294(5) TFEU, it is necessary to examine the Council’s second plea relating to the infringement of the principle of sincere cooperation.

VI – Infringement of the principle of sincere cooperation within the meaning of Article 13(2) TEU

A – Arguments of the parties

87. By its second plea, the Council submits that the Commission failed to comply in this instance with the principle of sincere cooperation, which, in accordance with case-law codified in the last sentence of Article 13(2) TEU, is also imposed on the EU institutions⁶² including in the context of the ordinary legislative procedure.⁶³

60 — Judgment in *Parliament v Council* (EU:C:1990:217, paragraph 20).

61 — Judgment in *Commission v Council* (C-63/12, EU:C:2013:752, paragraph 62).

62 — See, to that effect, judgments in *Greece v Council* (204/86, EU:C:1988:450, paragraph 16) and *Parliament v Council* (EU:C:1995:91, paragraphs 23 and 27).

63 — See, to that effect, the 2007 Joint Declaration.

88. The Council and the Member States intervening in support of it submit that, rather than expressing reservations, in particular at the stage of the adoption of the general approach of the Council or of the debates on the Parliament's report, the Commission stated that that report constituted a good basis for subsequent discussions. In November 2011, one of its officials informed a Council official that a number of amendments distorted the substance of its proposal for a framework regulation, without referring specifically to the amendment of Article 7 of that proposal. The Commission's 'non-paper' of January 2013 also did not refer to the possibility that its legislative initiative might be withdrawn. Despite its constant presence at the Council's working sessions and at the trilogues, the Commission did not officially manifest its intention to withdraw the proposal until a late stage, namely during the trilogue of 25 April 2013. Its internal note SI(2013)231 shows that it rushed to withdraw its proposal on the very day that the Parliament and the Council were to initial the agreement which they had reached.

89. At the meeting of the Working Party of Financial Counsellors of 7 May 2013, the Commission, despite an express invitation by the Presidency of the Council to inform the delegations whether it intended to withdraw the proposal for a framework regulation, made no reference whatsoever to the fact that that issue was on the College of Commissioners' agenda for the following day.

90. The Commission's failure to comply with the principle of sincere cooperation is reinforced by the fact that it did not exhaust the procedural means laid down in Articles 3(2) and 11(1) of the Council's Rules of Procedure,⁶⁴ in order to verify whether the unanimity required by Article 293(1) TFEU to amend its proposal for a framework regulation was achieved in the present case, and that it also failed to request indicative voting within the Council preparatory bodies.⁶⁵

91. The Czech Republic and the Federal Republic of Germany submit that the Commission has committed an abuse of rights.⁶⁶ The Italian Republic and the United Kingdom submit that, irrespective of the point at which the Commission withdrew the proposal for a framework regulation, it excluded from the outset any discussion or negotiation with the co-legislators on the content of Article 7 of that proposal, whereas the co-legislators shared a common approach in that regard.

92. The Commission observes, as regards the contention that the withdrawal took place belatedly, that it clearly stated, at the meetings of the Working Party of Financial Counsellors on 15 and 22 November 2011, that the amendments proposed by the Council distorted its proposal for a framework regulation. When the Council's general approach was adopted on 15 December 2011, the Commission did not consider it necessary to express a formal reservation since that 'general approach' was merely the position which the Presidency of the Council was going to support in the context of the trilogues. In any event, it was not, at that stage, certain that that position would prevail, in particular since the Parliament had not yet adopted its position and, when it adopted it in May 2012, it advocated decision-making based on the adoption of delegated acts. Subsequently, in its 'non-paper' of January 2013, the Commission reiterated its objections as regards the Council's position, while suggesting a number of ways of breaking the deadlock.

64 — Council Decision 2009/937/EU of 1 December 2009 adopting the Council's Rules of Procedure (OJ 2009 L 325, p. 35, 'the Council's Rules of Procedure').

65 — See, to that effect, judgment in *Parliament v Council* (EU:C:1995:91, paragraphs 27 and 28).

66 — See, in particular, judgment in *Emsland-Stärke* (C-110/99, EU:C:2000:695, paragraphs 39, 52 and 53).

93. The Commission states, secondly, that, directly after the trilogue of 30 January 2013, during which it became apparent that there was a risk that the proposal for a framework regulation might be distorted, and immediately after being authorised to do so by the College of Commissioners, its representatives, at consecutive meetings, informed the co-legislators of the fact that it might withdraw that proposal.⁶⁷ It was only when it became apparent to the Commission, at the beginning of May 2013, that it could not convince the co-legislators of the need to review their common position that it assumed its responsibilities by adopting the contested decision.

94. The Commission asserts, thirdly, that when internal note SI(2013)231 was drafted the date of the next trilogue was not yet known. The fact that the contested decision was adopted on the day on which the co-legislators were to finalise an agreement was a coincidence. The Commission adds that a premature reference, on its part, to the possibility that the proposal for a framework regulation might be withdrawn would have disturbed the serenity of the inter-institutional discussions and the smooth running of the legislative procedure.

95. As regards, in the second place, the failure to use other procedural possibilities under the Council's Rules of Procedure, the Commission states that its participation in all the work of the Council's Working Party of Financial Counsellors led it to conclude that the positions of the Member States were perfectly clear and that a formal vote would not have changed the situation.

B – *Assessment*

96. First of all, in order to identify correctly the scope of the issue of the principle of sincere cooperation, it is necessary to point out that the very first limit placed on the exercise of the power of withdrawal results from the prohibition of the misuse of powers. According to settled case-law, an act is vitiated by misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence, to have been taken with the exclusive or main purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the FEU Treaty for dealing with the circumstances of the case.⁶⁸

97. Consequently, any infringement of the principle of sincere cooperation cannot be equated with a misuse of powers.

98. In that regard, I would point out, first, that the principle of sincere cooperation makes it possible to resolve the uncertainties arising from 'grey areas' of the Treaties, such as the uncertainty surrounding the manner in which the power of withdrawal may be exercised. Secondly, although it is applicable to informal cooperation between the EU institutions, its content cannot be precisely defined.⁶⁹

99. The principle of sincere cooperation codified under Article 13(2) TEU relates to respect for the division of the respective powers and for the institutional balance.⁷⁰ In that connection, Article 295 TFEU provides that, in order to make arrangements for their cooperation by common agreement, the Parliament, the Council and the Commission may conclude inter-institutional agreements, if appropriate, of a binding nature.

67 — The Commission refers to the meeting of the Working Party of Financial Counsellors of 26 February 2013, the trilogue of 27 February 2013 (it is clear from the file that the Commission sent the e-mail of 12 April 2013 requesting correction of the 'summary table' produced after that trilogue), the meetings of the Working Party of Financial Counsellors of 9 April and 2 May 2013, and the trilogue meeting of 25 April 2013.

68 — See, in particular, judgments in *Spain v Council* (C-310/04, EU:C:2006:521, paragraph 69 and the case-law cited) and *Spain v Council* (C-442/04, EU:C:2008:276, paragraph 49 and the case-law cited).

69 — See, for a more in-depth analysis, Blumann, C., 'Caractéristiques générales de la coopération interinstitutionnelle', *L'Union européenne carrefour de coopérations*, LGDJ, 2000, pp. 29 to 61.

70 — Judgments in *Parliament v Council* (EU:C:1995:91, paragraph 23) and *Greece v Council* (EU:C:1988:450, paragraph 16).

100. By its plea, and in view of the timing of the facts of the case, the Council complains, in essence, that the Commission expressed its intention to withdraw the proposal only at a very late stage of the trilogues, when the agreement between the Parliament and the Council to use the ordinary legislative procedure was imminent. The Council thus appears to start from the premiss that the fact that the trilogue was scheduled for the same day as the day on which the contested decision was adopted precluded the Commission from exercising its power of withdrawal.

101. However, while acknowledging the importance of a trilogue⁷¹ as an expression of inter-institutional cooperation, as I have already done in the context of the examination of the first plea, the political dimension of the legislative procedure cannot prevail over its legal dimension.

102. Trilogues take place in an informal context and may be held at all stages of the procedure and at different levels of representation, depending on the nature of the expected discussions.⁷² Like the Conciliation Committee in the context of the ordinary legislative procedure (and previously the co-decision procedure), trilogues have an arbitration role in disputes which may emerge between the institutions and are intended to find agreements between them.

103. However, unlike the Conciliation Committee, no specific reference is made to trilogues in the FEU Treaty, and they do not constitute a legally binding stage of the legislative procedure.⁷³ That is also clear from the 2007 Joint Declaration, according to which a letter is to indicate the Council's willingness to accept the outcome of a trilogue, subject to legal-linguistic verification, should the outcome be confirmed by the vote in plenary.⁷⁴ On that ground, I take the view that the contention based on the claim that the contested decision was communicated 'belatedly' cannot succeed.

104. In that context, it seems to me to be essential to point out that the withdrawal must be preceded and followed by extensive communication between the Commission and the co-legislators. Withdrawal cannot come as a surprise, or take place in breach of the requirement of good faith.

105. In that regard, the wording of the inter-institutional agreements may provide useful guidance. Thus, it is clear, in particular, from the framework agreement dated 20 November 2010, concluded between the Parliament and the Commission, that the Commission is required to provide a detailed explanation in due time before withdrawing any proposals on which the Parliament has already expressed a position at first reading.⁷⁵ Furthermore, under the 2007 Joint Declaration, the institutions are to endeavour to cooperate in good faith throughout the procedure, while fully respecting the political nature of the decision-making process.

106. In the present case, the Commission does not appear to have fully complied with its obligation to communicate extensively and in a timely fashion with other institutions. In particular, a simple exchange of e-mails between Commission and Council officials dated 25 November 2011, referring to distortion of the Commission's proposal, does not suffice in that regard. It is clear, none the less, from the file that, from February 2013, the Commission referred to the possibility of withdrawal on several occasions and at high level.

71 — This is an important forum, established in the 1980s, trilogues having been introduced by the Joint declaration by the European Parliament, the Council and the Commission on various measures to improve the budgetary procedure (OJ 1982 C 194, p. 1).

72 — Point 8 of the 2007 Joint Declaration.

73 — They are, none the less, referred to in the 2007 Joint Declaration, adopted before the Treaty of Lisbon, from which it is clear (in point 14) that if an agreement is reached at the stage of first reading in the Parliament through informal negotiations in trilogues, the chair of Coreper is to forward it in the form of amendments to the Commission proposal.

74 — See point 14 of the 2007 Joint Declaration.

75 — Framework Agreement on relations between the European Parliament and the European Commission (OJ 2010 L 304, p. 47). That agreement is incorporated into the Parliament's Rules of Procedure (as Annex XIII).

107. Thus, at the Financial Counsellors' meeting of 26 February 2013, the Commission representative stated that the proposed approach would distort the Commission's proposal, which could lead it to consider withdrawing its proposal.⁷⁶ During the fifth trilogue, the institutions, and in particular the Parliament, were clearly aware of the risk of withdrawal since the rapporteur Mr Kazak asked the Commission to maintain and not to withdraw the proposal.⁷⁷ Subsequently, at the Financial Counsellors' meeting of 9 April 2013, the Commission clearly reiterated the possibility of withdrawal if the ordinary legislative procedure were to be used for MFA decisions.⁷⁸ Furthermore, at the meeting of 2 May 2013, the Commission not only made reference to the risk of withdrawal, but conceded that that possibility was being considered by the Commission's staff at the highest level.⁷⁹

108. Consequently, on the basis of the facts before the Court, it is not possible to find that the Commission infringed the principle of sincere cooperation.

109. As regards, lastly, the issue of the Commission's failure to exhaust all the procedural possibilities offered by the Council's Rules of Procedure, I would point out that the rules of procedure of the institutions are atypical acts which govern the principles of organisation for each of those institutions. As regards the effects that may be produced in relation to other institutions, the rules of procedure may refer only to the arrangements for cooperation between the institutions. Thus, it seems to me to be undeniable that they are able to affect the conduct of another institution, in particular, by making it subject to a specific requirement or by conferring on it a specific power. That is true of Article 3(2), in conjunction with Article 11(1), of the Council's Rules of Procedure, under which the Commission is entitled to request that the agenda should include an item that requires a voting procedure. However, nothing in that provision entails an obligation on the part of the Commission.

110. Furthermore, the judgment in *Parliament v Council*, cited by the Council in support of its plea,⁸⁰ sought to sanction not the Parliament's failure to exhaust procedural remedies, but the fact that its decision was based on reasons unrelated to the act at issue and, most importantly, did not take into account the urgent nature of the procedure and the need to adopt the regulation before the date put forward, with good reason, by the Council.

111. Consequently, in the light of the principle of institutional balance which entails autonomy of the institutions, the argument that the Commission is required by the provisions of the Council's Rules of Procedure to request a vote before withdrawing its legislative proposal must be rejected.

112. In any event, I would note that the Treaties have established a clear division between the duties and the powers of the political institutions of the European Union. It follows from this that each of them may legitimately adopt its own policy guidelines and use the means of action available in order to exercise an influence over the other institutions. Accordingly, communication given in advance about a possible withdrawal, like that given by the Commission at the fifth trilogue of 26 February 2013, cannot in any way amount to an improper threat constituting a misuse of powers.

113. Consequently, I propose that the second plea should be rejected.

76 — See document sent by the Commission, entitled 'Report: Financial Counsellors WG of 26 February 2013, ECFIN/D2/NL/SN324590' (p. 3).

77 — Ibid. (p. 6): 'He asked COM to encourage and not to withdraw its proposal'.

78 — Document sent by the Commission, entitled 'Report: Financial Counsellors WG of 9 April 2013 on MFA, ECFIN/D2/NL dl Ares(2013)' (pp. 1 and 5).

79 — Document sent by the Commission, entitled 'ECFIN/D2/NL/ dl Ares (2013) Report: Financial Counsellors WG of 2 May 2013 on the MFA' (p. 2).

80 — Judgment in *Parliament v Council* (EU:C:1995:91, paragraphs 27 and 28).

VII – Infringement of the obligation to state reasons

A – Arguments of the parties

114. While accepting that the contested decision is an ‘atypical’ act, the Council submits, by its third plea, that a decision to withdraw a legislative proposal is an act subject to judicial review. Consequently, such a decision to withdraw should comply with the obligation to state reasons laid down in the second paragraph of Article 296 TFEU, as interpreted by the case-law,⁸¹ irrespective of whether that decision constitutes a decision within the meaning of Article 288 TFEU.⁸²

115. However, the contested decision did not result in any explanation or publication and it makes no reference to the reasons for the withdrawal.

116. The Commission argues that the Council confuses the specific obligation laid down in Article 296 TFEU to state the reasons for EU legal acts as referred to in Article 288 TFEU, by inserting a statement of reasons into the actual text of the act concerned, with the general principle expressed in Article 41(2)(c) of the Charter of Fundamental Rights of the European Union, according to which any decision by an institution must be based on reasons to be communicated, in whatever form, to the interested parties.

117. It submits that a decision to withdraw such as the contested decision is an internal procedural decision and not a legal act for the purposes of Article 288 TFEU. Such a decision has no addressee, for the purposes of the fourth paragraph of Article 263 TFEU or Article 288 TFEU. It does not contain a title, citations, recitals or articles. It need not be notified or published, for the purposes of Article 297(2) TFEU, to take effect. Therefore, the obligation to state reasons laid down in Article 296 TFEU does not apply to such a decision.⁸³

B – Analysis

118. While acknowledging the constitutional value of the obligation to state reasons as interpreted by the Court,⁸⁴ the nature and the context of the adoption of the contested act lead me to conclude that the contested decision does not fall within the scope of the obligation to state reasons referred to in Article 296 TFEU.

119. In the present case, it is clear from the wording of the letter from the Vice-President of the Commission that the contested decision establishes in an unequivocal and definitive fashion the Commission’s position,⁸⁵ which reflects the Commission’s intention to interrupt the legislative process. It is therefore a procedural decision internal to the institutions.

81 — See, in particular, judgments in *Council v Bamba* (C-417/11 P, EU:C:2012:718, paragraph 50) and *Kendrion v Commission* (C-50/12 P, EU:C:2013:771, paragraphs 41 and 42).

82 — See, to that effect, judgments in *Commission v Council* (EU:C:2009:590, paragraph 42) and *Commission v Council* (EU:C:2013:752, paragraph 28).

83 — Furthermore, the fact that the reasons for a procedural decision do not appear in the reference which, under Articles 8(4) and 16 of the Rules of Procedure of the Commission (OJ 2010 L 55, p. 61), must be made to such a decision in the minutes of a meeting or in the summary of acts adopted does not constitute an infringement of the obligation to state reasons.

84 — See, in particular, judgments in *Commission v Council* (EU:C:2009:590, paragraphs 37 to 39 and 42) and *Switzerland v Commission* (C-547/10 P, EU:C:2013:139, paragraph 67).

85 — For case-law which does not accept that a letter from a Competition Commissioner and correspondence between the DG and a Member State constitute acts open to challenge on the ground that they are merely proposals to lessen the restrictive effect of an agreement between undertakings, see judgment in *Nefarma v Commission* (T-113/89, EU:T:1990:82).

120. In that regard, I would point out that the Court has already accepted, in the context of inter-institutional dialogue, an oral statement by a Commissioner describing the Commission's proposal as a valid stage of the legislative procedure. In the Court's view, the fact that that amended proposal of the Commission was not in writing is of no consequence. Indeed, 'Article 149(3) of the Treaty [now Article 293(2) TFEU] does not require those amended proposals necessarily to be in writing. Such amended proposals are part of the Community legislative process, which is characterised by a certain flexibility, necessary for achieving a convergence of views between the institutions. They are fundamentally different from the acts which are adopted by the Commission and are of direct concern to individuals. In those circumstances strict compliance with the formalities prescribed for the adoption of acts of direct concern to individuals cannot be required for the adoption of such proposals'.⁸⁶

121. That analysis applies *a fortiori* for the purpose of holding that a letter from a Commissioner expressing the view of the College is not subject to the obligation to state reasons, since it forms part of the legislative process, as defined by the Court.

122. Furthermore, if the Court agrees to restrict the review of the lawfulness of the *sui generis* act at issue in the main proceedings only to the formal level relating to the essence of the right of withdrawal, it is clear that the obligation to state reasons for the purposes of Article 296 TFEU, based on the principle that the measure at issue must disclose in a clear and unequivocal fashion the reasoning followed by the author of that measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the EU Court having jurisdiction to exercise its power of review,⁸⁷ is irrelevant.

123. In fact, since the Commission remained within the limits, as defined above, of the essence of the power of withdrawal, there is no obligation to state reasons if the co-legislators were duly informed of the grounds for the withdrawal during the inter-institutional trilogues and those grounds are closely related to the role carried out by the Commission in accordance with Article 17(1) TEU.

124. Consequently, the third plea should be rejected.

125. Lastly, with regard to liability for costs, I would point out that, by bringing the present action, the Council has legitimately brought a matter before the Court in order to obtain clarification on the scope of the Commission's constitutional power of withdrawal, which could automatically justify the apportionment of costs between the two institutions. Nevertheless, under Article 138(1) of the Rules of Procedure of the Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Council has been unsuccessful, the Council must be ordered to pay the costs.

VIII – Conclusion

126. For all of the reasons set out above, I propose that the Court should:

- dismiss the action of the Council of the European Union and order it to pay the costs; and
- order that, under Article 140(1) of the Rules of Procedure of the Court, the intervening Member States bear their own costs.

⁸⁶ — See judgment in *Germany v Council* (C-280/93, EU:C:1994:367, paragraph 36).

⁸⁷ — Judgment in *Deutsche Telekom v Commission* (C-280/08 P, EU:C:2010:603, paragraphs 130 and 131).