Managing EU cooperation agreements, Council discretion and legal basis: Case C-180/20 *European Commission v Council of the European Union*, judgment of the Court (Grand Chamber) 2 September 2021, ECLI:EU:C:2021:658. Opinion of AG Pitruzzella, 17 June2021, ECLI:EU:C:2021:495.

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Abstract

This comment discusses case C-180/20 *Commission v Council (CEPA)* in which the Commission successfully challenged the legality of two Council decisions, adopted on the procedural legal basis of Article 218(9) TFEU, establishing a position to be adopted by the EU within the Partnership Council set up by the Comprehensive and Enhanced Partnership Agreement (CEPA) between the EU and Armenia. The judgment builds upon the Court's previous case law on the legal basis for the CFSP component of cooperation agreements and consolidates its approach to the place of the CFSP within the EU Treaty architecture. It also, more indirectly, prompts reflection on the power of the Council to decide the form and structure of EU external action, the interaction between the Council's policy-making prerogative and the procedural constraints under which it acts, and the procedural framework for the operation of mixed agreements.

In case C-180/20 *Commission v Council (CEPA)*[1] the Commission successfully challenged the legality of two Council decisions, adopted on the procedural legal basis of Article 218(9) TFEU, establishing a position to be adopted by the EU within the Partnership Council set up by the Comprehensive and Enhanced Partnership Agreement (CEPA) between the EU and Armenia.[2] The Partnership Council was to decide on its Rules of Procedure, and those of other bodies set up under the CEPA, and the Council's position therefore concerned the operation of the CEPA as a whole. The Commission contested the fact that the Council had chosen to adopt two decisions, one with a Common Foreign and Security Policy (CFSP) substantive legal basis which referred to Title II of the CEPA on cooperation in the field of foreign and security policy,[3] and the other based on Articles 91, 207 and 209 TFEU which referred to all other aspects of the CEPA.[4] The Commission's proposal had been for a single decision.[5] The Commission argued both that the CFSP legal basis (with its concomitant requirement of a unanimous vote in Council) was unnecessary and that the Council's adoption of two separate decisions was itself unlawful. The Court of Justice annulled both decisions, while

[1] Case C-180/20 *Commission v Council (CEPA)*, ECLI:EU:C:2021:658.

[2] Comprehensive and Enhanced Partnership Agreement (CEPA) between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Armenia, of the other part, OJ 2018 L 23/4. The CEPA was signed in 2018 and has been provisionally applied since 1 June 2018 (Decision 2018/104/EU, OJ 2018 L 23/1). It was concluded in January 2021 and came into force on 1 March 2021 (Council Decision 2021/270/EU, OJ 2021 L 61/1).

[3] Council Decision 2020/246/EU of 17 February 2020 for the application of Title II of that Agreement OJ 2020 L 52/5.

[4] Council Decision 2020/245/EU of 17 February 2020 for the application of that Agreement with the exception of Title II thereof OJ 2020 L 52/3.

[5] The original proposal, a joint proposal by the Commission and High Representative (JOIN (2018) 29, 29 November 2018), had included Article 37 TEU as a legal basis to cover the CFSP component, but following the *Kazakhstan* judgment discussed below the Commission adopted an amended proposal removing the CFSP legal basis: COM (2019) 345, 19 July 2019. The proposal was based on Articles 91, 100(2), 207 and 209 TFEU, in combination with Article 218(9) TFEU.

preserving their legal effects until a replacement decision could be adopted.[6] The judgment builds upon the Court's previous case law on the legal basis for the CFSP component of cooperation agreements,[7] and consolidates its approach to the place of the CFSP within the EU Treaty architecture following the 'the integration of CFSP provisions into the general framework of EU law' by the Lisbon Treaty.[8] It also, more indirectly, prompts reflection on the power of the Council to decide the form and structure of EU external action, the interaction between the Council's policy-making prerogative and the procedural constraints under which it acts, and the procedural framework for the operation of mixed agreements.[9]

Since the coming into force of the Lisbon Treaty we have seen a steady flow of litigation as the institutions engage with its restatement of external policy competences and decision-making processes and test its recalibration of institutional balance.[10] One notable dimension of this institutional debate has concerned, in a variety of contexts, the Council's ability to exercise political choice over the management of whether and how the European Union acts externally. This is not so much a matter of making substantive policy choices, but rather of decisions such as the use of one policy competence rather than another[11] and choice of legal basis,[12] the decision that the EU should act alone where competence is shared,[13] or via a mixed agreement,[14] the decision that the EU should exercise its competence only partially when concluding an agreement,[15] and different ways in which the Council may attempt to orchestrate Member State action alongside that of the EU in the conclusion of an agreement.[16]

The Council must, of course, act within the limits of its powers,[17] but it is not always clear to what extent the Council has a political discretion on a specific issue, and what are the legal constraints on its political choice. In the *COTIF* case, for example, the possibility of what has become known as

[6] This is a common solution where international agreements are concerned, primarily on grounds of legal certainty. Interestingly, in this case the Court referred not only to the risk of disturbing the functioning of the agreement but also the impact on the credibility of the EU's commitment to its implementation: case C-180/20, note 1, para 63.

[7] See especially case C-244/17 *Commission v Council (Agreement with Kazakhstan)*, EU:C:2018:662, discussed below.

[8] Case C-134/19P *Bank Refah Kargaran v Council*, EU:C:2020:793, para 47. Article24(1) TEU refers to the 'specific rules and procedures' that govern the CFSP; these include the exclusion of legislative acts, unanimous voting as the default, a limited role for the European Parliament and the restricted jurisdiction of the Court of Justice. See further M Cremona, 'The Position of the CFSP/CSDP in the EU's constitutional architecture' in S Blockmans and P Koutrakos (eds) *Research Handbook on the EU's Common Foreign and Security Policy,* Edward Elgar, 2018.

[9] Article 16(1) and (6) TEU; case C-660/13 *Council v Commission (MoU with Switzerland)*, EU:C:2016:616, paras 31-33.

[10] P Van Elsuwege, 'The Potential for Inter-Institutional Conflicts before the Court of Justice: Impact of the Lisbon Treaty' in M Cremona and A Thies (eds) *The European Court of Justice and External Relations Law - Constitutional Challenges*, Hart Publishing 2014.

[11] Case C-130/10 *European Parliament v Council*, EU:C:2012:472.

[12] Case C-263/14 *European Parliament v* Council *(Tanzania)*, EU:C:2016:435; case C-244/17 (*Kazakhstan)*, note 7; case C-180/20 (*CEPA*), note 1.

[13] Case C-600/14, *Germany v Council (COTIF)*, EU:C:2017:935.

[14] Opinion 2/15 (Agreement with Singapore), EU:C:2017:376.

[15] Opinion 1/19 (Istanbul Convention), EU:C:2021:832.

[16] Case C-28/12 Commission v Council, EU:C:2015:282; Opinion 1/19, note 15; case 24/20 *Commission v Council (Geneva Act)*, pending.

[17] Article 13(2) TEU; case C-73/14 *Council v Commission (ITLOS)*, EU:C:2015:663, para 61.

facultative (optional) mixity was re-confirmed and the Court, by referring to voting within the Council as the determinant factor appeared to accept that where shared competence extends over the whole agreement, mixity is a matter of political choice.[18] In *Opinion 1/19* the Court somewhat problematically accepted the Council's political choice to limit EU participation in the Istanbul Convention to certain specific aspects of that agreement, leaving others to the Member States.[19] On the other hand, the Council is bound by the procedural rules of Article 218 TFEU: these procedural rules 'are not at the disposal' of the institutions or of the Member States.[20] And while choice of legal basis may have important political consequences,[21] that choice should be based on 'objective factors' amenable to judicial review, including the aim and content of the measure: the predominant purpose or component (centre of gravity) of the act will indicate its legal basis, a separate legal basis not being justified for purely 'ancillary' or 'incidental' components, however politically sensitive.[22] This 'classic' approach to legal basis is applied to the conclusion of international agreements as well as legislative acts and more recently, as in the *CEPA* case, also to decisions adopted under Article 218(9) TFEU – that is, to decisions of the Council establishing the position to be adopted by the Union in bodies set up by international agreements.[23]

In *Kazakhstan*, the Court applied this legal basis reasoning in the context of such an Article 218(9) decision, notably concluding that the provisions of the agreement relating to the EU's Common Foreign and Security Policy (CFSP) were ancillary and did not justify a separate legal basis.[24] *Kazakhstan* thus complemented the *Tanzania* case,[25] confirming that standard legal basis reasoning would be applied to cases involving the CFSP, whether the CFSP dimension is the predominant component (as in *Tanzania*) or ancillary (as in *Kazakhstan*). When it came to the proposal for a similar decision relating to the Partnership Agreement with Armenia, the Commission responded to the *Kazakhstan* judgment by removing the CFSP legal basis from the proposal. The Council, as we have seen, reacted by adopting two separate decisions, one of which was limited to the CFSP component of the agreement.[26] What practical difference did this make? As the procedural basis for both decisions was Article 218(9) TFEU, the CFSP legal basis did not affect the powers of the European Parliament;[27] however voting in Council for the CFSP-based decision was subject to unanimity according to Article 218(8) TFEU.[28] Was the adoption of two separate acts simply a

[18] Case C-600/14, *Germany v Council (COTIF)*, note 13, para 68.
[19] Opinion 1/19, note 15, paras 252, 278-283.
[20] Case C-28/12 *Commission* v *Council*, note16, para 42.
[21] E.g. whether or not an opt-out Protocol will apply, the powers of the European Parliament, the exclusivity or otherwise of EU competence, and voting within the Council.
[22] Case C-377/12 *Commission v Council (agreement with Philippines)*, EU:C:2014:1903; case C-244/17 *Commission v Council (Agreement with Kazakhstan)*, note 7, paras 36-37.
[23] See e.g. case C-370/07 *Commission v Council (CITES Convention), EU:C:2009:590*; case C-399/12 *Germany v Council (OIV),* EU:C:2014:2258; case C-600/14 *Germany v Council (COTIF),* note 13; case C-626/15 *Commission v Council (Antarctic MPAs),* EU:C:2018:925.
[24] C-244/17 *Commission* v Council *(Agreement with Kazakhstan),* note 7.
[25] Case C-263/14 *European Parliament v* Council *(Tanzania)*, note 12.
[26] See note 2.
[27] The Parliament is not formally involved in decision-making under Article 218(9)TFEU, except for the general requirement to keep it informed (Article218(10) TFEU), which also applies in the context of the CFSP: case C-263/14 *European Parliament v* Council *(Tanzania)*, note 12.
[28] According to Article 218(8) TFEU, the Council 'shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of a Union act'.

legitimate political choice for the Council, each act then being subject to the standard determination of legal basis, or was it a decision that should have been governed by legal factors?

As so often, the Court's answer was shaped by the structure of its reasoning. The judgment is in fact constructed almost entirely in terms of legal basis argumentation, but by doing so the Court indirectly answers the question just posed. The Court concluded (as it did in *Kazakhstan*) that the CFSP component of the agreement being ancillary, a CFSP legal basis was unnecessary; it therefore annulled the second, CFSP-based, Council decision and went on to annul the first decision as well, on the ground that it excluded from its scope, without justification, the CFSP component of the agreement.[29] As a result it did not need to discuss the Commission's second plea, that the Council's division of the Commission's proposal into two decisions was unlawful; however its ruling on the first plea makes it clear that the appropriate legal basis required only one decision. It is the thus (legal) criteria for determination of legal basis that drives the decision as to whether two decisions are necessary. If we unpack this reasoning several points emerge.

First, the initial step in the Court's reasoning on legal basis is crucial. In identifying the predominant aim and content of the act the Court addressed itself to the Partnership Agreement rather than to the Council decisions. This has become such an accepted practice that it is taken for granted, but in the context of this case it is significant. As far back as the *Haegeman* case the Court equated the decision concluding an agreement with the agreement itself, in determining its interpretative jurisdiction under what is now Article 267 TFEU.[30] Similarly, choice of legal basis for a decision on signature or conclusion of an agreement is based on the aim and content of the agreement itself.[31] In the case of a decision adopted under Article 218(9) TFEU, on the Union's position within institutional structures established by an agreement, the context varies. Where the position is concerned with a specific aspect of the agreement, the legal basis of the decision will correspond to that aspect.[32] However in this case the Union's position concerned the operation of the agreement as a whole: the adoption of the rules of procedure of the Partnership Council and other committees established by the CEPA. The separation made by the Council between Title II and the rest of the CEPA was, as AG Pitruzzella points out, not reflected in the Union position itself, which was a single position, or in the proposed decision of the Partnership Council.[33] The Court therefore concluded that

> 'even though those decisions formally concern different titles of the Partnership Agreement with Armenia, the field that they cover and, hence, the substantive legal basis of the

[29] Case C-180/20 (CEPA), note 1, para 58.
[30] Case 181/73 *Haegeman*, EU:C:1974:41,paras 3-6. 'The Athens agreement was concluded by the Council ... This agreement is therefore, in so far as concerns the Community, an act of one of the institutions of the Community within the meaning of subparagraph (b) of the first paragraph of Article 177. The provisions of the agreement, from the coming into force thereof, form an integral part of community law. Within the framework of this law, the Court accordingly has jurisdiction to give preliminary rulings concerning the interpretation of this agreement.'
[31] See, among many examples, case C-377/12 *Commission v Council (agreement with Philippines)*, note 22.
[32] See, e.g., Decision 2020/1583 OJ 2020 L 362/23, on the position to be adopted on behalf of the EU within the CEPA Partnership Committee on the appointment of arbitrators, which has Article 207 TFEU as a substantive legal basis.
[33] Council doc. 15226/19, 6 February 2020. Case C-180/20, opinion of AG Pitruzzella, EU:C:2021:495, para 75.

European Union external action at issue must be assessed with regard to that agreement as a whole.'[34]

The reference here to 'the field that they cover' recalls, no doubt deliberately, the wording of the second subparagraph of Article 218(8) TFEU: voting in the Council is to be unanimous 'when the agreement covers a field for which unanimity is required for the adoption of a Union act.' The Court, linking the application of the voting rule in Article 218(8) to the substantive legal basis of the agreement, characterised the whole agreement as 'the field.' This step paved the way for the application of standard legal basis reasoning by identifying the predominant purpose or centre of gravity of the agreement.

Second, in applying the centre of gravity test to the CEPA the Court both affirmed the approach it had taken in *Kazakhstan* and built upon it. As in *Kazakhstan*, the Court simply assumed that the CFSP dimension of an agreement should be treated in the same way as any other in determining the agreement's centre of gravity. In the absence of a specific rule or exception the CFSP is – post-Lisbon – subject to 'the general framework of EU law'[35] and the 'specific rules and procedures' which apply to CFSP decision-making do not require the CFSP to be treated differently for legal basis purposes. The 'neutrality' of the centre of gravity approach to legal basis reflects the balance between CFSP and non-CFSP powers established by Article 40 TEU.[36] In order to establish the centre of gravity of an agreement the Court will analyse both its aims and its content, and the aims and content of a specific component are also relevant in determining whether it requires a separate legal basis. A broad agreement such a development cooperation agreement may cover a wide variety of issues without each needing its own legal basis, as long as (first limb) the *aim* of each component falls within the objectives of the policy representing the agreement's predominant component (its 'essential object'); and provided that (second limb) in terms of *content* the obligations are not extensive enough to distinguish it from that predominant component.[37]

In this case, the Commission, unsurprisingly, relied on the earlier *Kazakhstan* ruling, arguing the CFSP component of the two agreements were similar and in each case ancillary. The Council's arguments were essentially two-fold; first, it argued that the Commission's approach (and, by implication, the Court's) emphasised the content of the agreement at the expense of its aims.[38] Second, it sought to distinguish the *Kazakhstan* case, arguing that Title II of the CEPA on foreign policy cooperation was more substantial than the equivalent in the agreement with Kazakhstan and that its specific political and security context should be taken into account (in particular the geopolitical context of 'regional crises, such as the conflict in the Nagorno-Karabakh'[39]).

As far as the first limb of the test is concerned, the Court accepted the importance of the political aims of the agreement, but in its view these are fully within the scope of a development cooperation agreement. In this the Court was reaffirming earlier case law, including pre-Lisbon case law, on the

[34] Case C-180/20 (CEPA), note 1, para 38.
[35] See note 8.
[36] See case C-180/20, opinion of AG Pitruzzella, note 33, para 35, citing the opinion of AG Kokott in case C-244/17 *Kazakhstan*, note 7, para 50.
[37] C-377/12 *Commission v Council (Philippines agreement)*, note 22, para 39; Case C-180/20 (CEPA), note 1, para 45.
[38] Case C-180/20 (CEPA), note 1, para 21.
[39] Case C-180/20 (CEPA), note 1, para 26.

breadth of development cooperation policy objectives.[40] While the provisions on development cooperation state that its 'primary objective' is 'the reduction and, in the long term, the eradication of poverty,'[41] they also refer to the general external objectives set out in Article 21 TEU,[42] which include preserving peace, preventing conflict, and strengthening international security. Although these general political objectives may appear to be specially connected to the CFSP,[43] they may (and should) be furthered by other external policies, including development cooperation.

In *Kazakhstan*, the Court assessed the second (content) limb of this test both quantitively (the relative proportion of the agreement) and qualitatively (the significance of the obligations), and it did so again here. The CFSP-related aims, it held, are not 'accompanied by any programme of action or concrete terms governing cooperation in that field, which may be capable of establishing that the CFSP constitutes one of the distinct components of that same agreement, outside the scope of those aspects connected with trade and development cooperation.'[44] (para 52). As a result 'the CFSP cannot be regarded as constituting a distinct component of that agreement but is, on the contrary, incidental to the principal components referred to above [trade and development cooperation].'[45] The Court then shifted focus to the contested decisions themselves, referring to the fact that they are directly concerned, not with operationalising the substantive content of the agreement but with the functioning of the institutions set up by the CEPA.[46] Despite the agreement as a whole acting as the reference point for determining competence and legal basis, the context of the specific decision and its relation to that agreement also play a part.

It is perhaps not surprising that in these two cases the CFSP component was not found to justify a separate legal basis. The provisions are primarily concerned with establishing a framework for cooperation and the principles upon which political dialogue will be based. But the Council has a point: given the nature of cooperation in the field of CFSP and the absence of 'hard' commitments (in contrast, say, to trade provisions), it is unlikely that any probable CFSP content in a broad cooperation agreement would in practice meet the second limb of the legal basis test and justify a separate CFSP legal basis. Before the Lisbon Treaty, the provisions of an EC cooperation agreement dealing with political and foreign policy cooperation would be regarded as a justification for Member State participation (that is, for the agreement to be mixed). Now, although the agreement – like the CEPA – may be still be mixed, the political component of the agreement will not form the basis for a CFSP legal basis and consequent unanimous vote in Council.

Third, we may turn back to the question of the Council's choice to adopt separate decisions. Such a choice 'can be justified only if the agreement, considered as a whole, contains distinct components corresponding to the different legal bases used for the adoption of those decisions.'[47] The choice is

[40] Case C-180/20 (CEPA), note 1, para 49; C-268/94 *Portuguese Republic* v *Council*, EU:C:1996:461; C-91/05 *Commission v Council (small arms),* EU:C:2008:288; C-377/12 *Commission v Council (Philippines agreement),* note 22.
[41] Article 208(1) TFEU.
[42] Article 209(2) TFEU. C-377/12 *Commission v Council (Philippines agreement)*, note 22, para 37.
[43] Although they now appear among the general external objectives of Article 21 TEU, they are derived from the CFSP-specific objectives of the (pre-Lisbon) Article 11 EU; see also AG Bot in case C-658/11 *European Parliament v Council*, EU:C:2014:2025, para 87.
[44] Case C-180/20 (CEPA), note 1, para 52.
[45] Case C-180/20 (CEPA), note 1, para 53.
[46] Case C-180/20 (CEPA), note 1, para 55.
[47] Case C-180/20 (CEPA), note 1, para 40.

thus not simply political: it is necessary first to assess the substantive legal basis for the agreement as a whole, before consideration of whether separate decisions may be possible or necessary.[48] But a further question then arises: would the option of separate decisions be available in any case where separate legal bases are justified, i.e. in the case of equally predominant components, such as (theoretically) Articles 207 and 209 TFEU?[49] Or does a separation need to be justified by a specific legal necessity, an 'objective need' such as the incompatibility of different legal bases or different voting rules where an opt-out Protocol applies?[50]

We may argue, by extension from the legal basis case law, which – as we have seen – requires the use of a single legal basis where possible, that there is a rationale for using a single decision where possible. However, the rationale for that case law is the principle of conferral: legal basis is there in order to ground competence and should not be included where not necessary for that purpose.[51] This rationale does not apply to the Council's choice to adopt separate decisions. The Commission in the CEPA case argued that the adoption of separate decisions rendered the decision-making process needlessly more burdensome and was a breach of Article 13(2) TEU.[52] AG Pitruzzilla, on the other hand, took the view that had the use of Article 37 TEU been justified, then the Council's choice to adopt two decisions would not have been a breach of either procedural rules or the duty of cooperation under Article 13(2).[53] The Council in such a case, he argued, could not be said to have circumvented the rules on choice of legal basis or voting. The Court did not answer the question since the pre-condition (the justification for a separate CFSP legal basis) was not fulfilled.[54] In Opinion 1/19, decided a month later, the Court suggested in the context of the decision to conclude an agreement that two decisions are only justified where there is an 'objective need', citing the different voting arrangements applicable where an opt-out Protocol applies.[55] But somewhat unhelpfully it also cites a paragraph in the CEPA judgment which simply states that a pre-condition for the adoption of separate decisions is the need for separate legal bases.[56] We might build on these rulings to suggest that the Council's adoption of separate decisions should indeed be conditioned by an objective need, and not simply a matter of political choice. That need may indeed flow from the EU's procedural and voting rules, or from the nature of the EU position or voting within the agreement's institutions. Certainly, in the CEPA case there seemed to be no such need: as we have seen, the Union position itself was not divided and the decisions concerned the operation of the agreement a whole.

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[48] C.f. the Court's approach to the application of Protocols 21 and 22 on the AFSJ 'opt-outs' for the UK, Ireland and Denmark in C-656/11 *UK v Council,* EU:C:2014:97, para 49; C-137/12 *Commission* v *Council*, EU:C:2013:675, para 73; Opinion 1/15, EU:C:2017:592, para 108.

[49] As in the case of the CEPA; there is however no likely political reason why separate decisions would be considered desirable in such a case.

[50] Opinion 1/19, note 15, paras 330-334.

[51] See e.g. Opinion 1/19, note 15, para 199.

[52] C-180/20, opinion of AG Pitruzilla, note 33, para 72.

[53] C-180/20, opinion of AG Pitruzzilla, note 33, para 76.

[54] Case C-180/20 (CEPA), note 1, para 58.

[55] Opinion 1/19, note 15, paras 330-337, citing Opinion 1/15,note 48, para 109 referring to incompatible voting rules.

[56] Opinion 1/19, note 15, para 331, citing case C-180/20 (CEPA), note 1, para 40, 'the adoption of two separate decisions of the Council, based on different legal bases … can be justified only if the agreement, considered as a whole, contains distinct components corresponding to the different legal bases used for the adoption of those decisions.'

We may end with one final comment. The CEPA case shows the Court insisting on applying (legal) criteria for choice of legal basis despite the Council's attempt to pre-empt (or circumvent) that choice by using separate decisions. In Opinion 1/19, on the other hand, the Council was able effectively to determine the applicable legal basis by deciding that the EU's participation in the Istanbul Convention would be limited to certain of its components. Both international agreements are mixed. But the flexibility as to EU participation which might perhaps be possible in the case of a multilateral mixed agreement such as the Istanbul Convention would surely not be possible in the case of a bilateral agreement such as the Partnership Agreement with Armenia. That such questions may be posed illustrates the extraordinary degree to which EU participation in mixed agreements still lacks a clear procedural framework.