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*INTERINSTITUTIONAL AGREEMENTS – A DISCUSSION*<sup>1</sup>

SUMMARY: 1. Introduction. – 2. What are interinstitutional agreements? – 3. Hierarchy of norms. – 4. The principle of institutional balance. – 5. The *méthode communautaire*. – 6. Constitutional conventions. – 7. The new Interinstitutional Agreement on Better Law-Making. – 8. Conclusion.

## **1. Introduction.**

The aim of this article is to attempt to categorise interinstitutional agreements legally and in terms of the role they play in the constitutional system of the European Union. It seeks to argue that whereas IIAs might be regarded as a species of constitutional convention, they play in reality a necessary role in ensuring the principle of institutional balance provided for in Articles 4 and 5 of the Treaty on European Union (TEU), which the Court of Justice suggests plays the role in the EU system played by the separation of powers nationally, and in securing the *méthode communautaire*. In short, the argument is that institutional agreements are the necessary corollary of the principle of institutional balance and the *méthode communautaire*.

The latest Interinstitutional Agreement on Better Law-making will be prayed in aid in support of this argument.

## **2. What are interinstitutional agreements<sup>2</sup>?**

As long ago as 1964, the Council and the European Parliament reached an unpublished agreement at the initiative of the Dutch foreign minister, Joseph Luns, then president-in-office of the Council, in order to allow Par-

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<sup>1</sup> This article is based on a discussion paper presented by the author at LUISS Guido Carli University on 28 November 2017.

<sup>2</sup> See K. LENAERTS, P. VAN NUFFEL, *European Union Law*, London 2011, section 22-107 et seq.

liament to discuss any proposed association agreement before negotiations started, be kept informed of detailed progress in those negotiations, and be briefed on their outcome, before the final agreement was signed<sup>3</sup>. Whilst these first agreements sometimes took the form of a mere exchange of letters between the institutions concerned, subsequently, they tend to have been published officially. There were also specific Treaty provisions which allowed institutions to determine their relations by “common accord”. Interinstitutional agreements emerged from an institutional practice which was subsequently enshrined in the founding treaties of the EU with the entry into force of the Treaty of Lisbon. Now Article 295 of the Treaty on the Functioning of the EU (TFEU)<sup>4</sup> recognises that interinstitutional agreements may be concluded and that they may also be binding.

Whether or not such an agreement is binding depends on the intentions of the parties<sup>5</sup>. It should be noted that interinstitutional agreements may take on different names – declaration, *modus vivendi*, code of conduct or, simply, agreement – which may indicate whether or not they are intended to be binding. In addition, the legal force of an agreement may be derived from its content. Accordingly, if the content of an interinstitutional agreement is purely political it will probably not be binding. But other agreements do appear to lay down binding rules of conduct<sup>6</sup>. Moreover, an interinstitutional agreement can be binding in so far as it is an expression of the principle of sincere cooperation enshrined in Article 4(3) TEU<sup>7</sup>. On

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<sup>3</sup> The “Luns procedure” was extended in 1973 by the “Westerterp procedure”, to trade agreements, where (unlike association agreements) the European Parliament had no right of formal consultation. There is now the Interinstitutional Agreement of 20 November 2002 concerning access by the European Parliament to sensitive information of the Council in the field of security and defence policy, OJ C 298, 30.11.2002, p. 1.

<sup>4</sup> “*The European Parliament, the Council and the Commission shall consult each other and by common agreement make arrangements for their cooperation. To that end, they may, in compliance with the Treaties, conclude interinstitutional agreements which may be of a binding nature*”.

<sup>5</sup> The Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation, OJ C 73, 17.3.1999, p. 1, expressly provides that the guidelines set out therein “*are not legally binding*”.

<sup>6</sup> Point 2 of the Interinstitutional Agreement of 2 December 2013 between the European Parliament, the Council and the Commission on budgetary discipline, on cooperation in budgetary matters and on sound financial management, OJ C 373, 20.12.2013, p. 1 states that “*The Agreement is binding on all the institutions for as long as it is in force*”.

<sup>7</sup> 3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

that basis, the Court of Justice has recognised the binding nature of arrangements concluded between the Commission and the Council to decide on the participation of the Union and the Member States in international organisations where, the subject-matter of an agreement or convention falls partly within the competence of the Community and partly within that of its Member States and it is essential to ensure close cooperation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into. That obligation to cooperate flows from the requirement of unity in the international representation of the Community<sup>8</sup>.

The institutions tend to use interinstitutional agreements to simplify the implementation of procedures laid down in the Treaties, without actually amending those procedures or altering the balance as between the institutions<sup>9</sup>. Such agreements were initially designed mainly to improve Parliament's access to information and to increase its participation in decision-making<sup>10</sup>. In the meantime, agreements have been reached on other matters, institutional and otherwise<sup>11</sup>.

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*The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.*

*The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives. See also Article 13(2) TEU: Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation.*

<sup>8</sup> *Commission v Council*, C-25/94, ECLI:EU:C:1996:114, paras 48-49.

<sup>9</sup> See also Declaration (No 3), annexed to the Nice Treaty, discussed *infra*.

<sup>10</sup> In the past, the following in particular were concluded between the European Parliament, the Council and the Commission: Joint Declaration of the European Parliament, the Council and the Commission concerning the institution of a conciliation procedure between the European Parliament and the Council, OJ C 89 of 22.4.1975, p. 1; the Joint Declaration of 30 June 1982 and the Interinstitutional Agreements of 29 June 1988, 29 October 1993, 6 May 1999 and 7 November 2002 on budgetary procedure (no longer in force); the Joint Declaration on the implementation of the new co-decision procedure (replaced), the Joint Declaration on the Socrates decision of 4 March 1995 (no longer in force) and the Interinstitutional Agreement of 16 July 1997 on the financing of the CFSP (no longer in force). Between the European Parliament and the Commission codes of conduct were concluded in 1990 and on 15 March 1995 and a framework agreement on relations between the European Parliament and the Commission on 26 May 2005.

<sup>11</sup> See, for example, the Joint Declaration of the European Parliament, the Council and the Commission of 5 April 1977 on fundamental rights, the Joint Declaration against racism

Following the agreement concluded between the Commission and the European Parliament on 5 July 2000<sup>12</sup>, a declaration (No 3), was annexed to the Nice Treaty, on Article 10 of the Treaty establishing the European Community, stating that interinstitutional agreements “*may be concluded only with the agreement of these three institutions* [Parliament, Council and Commission]”. That declaration went on to state that “[*s*]uch agreements may not amend or supplement the provisions of the Treaty”. According to that declaration, such an agreement should not be possible in the future, since it stated that agreements “*may be concluded only with the agreement of these three institutions*”. Nevertheless, the interinstitutional agreement of 5 July 2000 was revised in 2005<sup>13</sup>. Thereupon the Council entered a statement in its minutes and published it in the C series of the Official Journal<sup>14</sup> stressing that “*the undertakings entered into by these institutions cannot be enforced against it in any circumstances. It reserves its rights and in particular the right to take any measure appropriate should the application of the provisions of the framework agreement impinge upon the Treaties’ allocation of powers to the institutions or upon the institutional equilibrium that they create*”<sup>15</sup>.

### 3. Hierarchy of norms.

In order to be able to talk about this subject in a lawyerly way, it is useful to start by discussing the hierarchy of norms, that is to say, the ranking

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and xenophobia of the European Parliament, the Council, the representatives of the Member States, meeting in the Council, and the Commission of 11 June 1986, the Interinstitutional Declaration of 25 October 1993 on democracy, transparency and subsidiarity, the Interinstitutional Agreement of 20 December 1994 on the codification of legislation, the Interinstitutional Agreement of 28 November 2001 on a more structured use of the recasting technique for legal acts, the Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation, the Interinstitutional Agreement of 25 May 1999 concerning internal investigations by the European Anti-fraud Office (OLAF), the Interinstitutional Agreement of 28 February 2002 on the financing of the Convention on the future of the European Union and the Interinstitutional Agreement of 16 December 2003 on better law-making. As between the Commission and the Council, see, for example, the Code of Conduct of 6 December 1993 on public access to documents.

<sup>12</sup> Framework Agreement on relations between the European Parliament and the Commission, *OJ C* 121 of 24 April 2001, p. 122.

<sup>13</sup> Framework Agreement on relations between the European Parliament and the Commission, *OJ C* 117E of 18 May 2006, which was followed by a further framework agreement in 2010, *OJ L* 304 of 20 November 2010, p. 47.

<sup>14</sup> *OJ C* 161 of 1 July 2005, p. 1.

<sup>15</sup> Emphasis supplied.

order of legal rules in the legal order of the EU. Neither the primacy of Union law<sup>16</sup> nor the relationship between its sources is expressly laid down in the Treaties<sup>17</sup>. Nevertheless, the authors of the Treaties always assumed the existence of a hierarchy of norms, which is borne out by the powers of judicial review conferred on the Court of Justice.

At the top of the pyramid, there is primary EU law, that is to say the provisions of the Treaties themselves, together with fundamental rights and the general principles of law (which may include principles enshrined in customary international law or in international agreements), which are used to assist in interpreting and applying the provisions of the Treaty and other rules of EU law.

The next tier is secondary or derived Union law, with legislative acts adopted by the institutions taking precedence over delegated acts and implementing acts (see Articles 290 and 291 TFEU).

As for interinstitutional agreements, they are obviously contractual in nature and, even before the Lisbon Treaty, they always could be binding on the institutions concerned by virtue of the principle that an authority is

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<sup>16</sup> See *Costa v ENEL*, 6/64, ECLI:EU:C:1964:66: “the integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty” means that it is “impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity”; “the precedence of Community law is confirmed by Article 189 [now Article 288 TFEU], whereby a regulation ‘shall be binding’ and ‘directly applicable in the Member States’”.

<sup>17</sup> However, Declaration 17 concerning primacy annexed to the Treaty of Lisbon states as follows: “The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law. The Conference has also decided to attach as an Annex to this Final Act the Opinion of the Council Legal Service on the primacy of EC law as set out in 11197/07 (JUR 260): Opinion of the Council Legal Service of 22 June 2007.

It results from the case law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (*Costa/ENEL*, 15 July 1964, Case 6/641 [1] there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice.

[1] It follows (...) that the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question”.

bound by rules which it has itself adopted (*patere legem quam ipse fecisti*). It is difficult to see how they could have legal effects that third parties could enforce. Indeed, in *Stauner v. Commission*<sup>18</sup> the Court of Justice held that a framework agreement on the forwarding of confidential information was limited to governing relations between the Commission and the Parliament and did not alter the legal position of Members of the Parliament acting individually.

#### 4. The principle of institutional balance.

The principle of institutional balance is both a constitutional principle that must be respected by the institutions and the Member States and a means of describing the way in which the relationship between the institutions is organised<sup>19</sup>. It reflects Article 13(2) TUE, according to which, “Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation.”

This means that one institution may not extend its powers unilaterally to the detriment of another, which explains why Declaration No 3 was added by the Intergovernmental Conference to the final act of the Nice Treaty as a result of the European Parliament and the Commission making an interinstitutional agreement excluding the Council and the Commission’s reluctance to commit itself in advance to taking up Parliament’s proposals for legislation under Article 225 TFEU as this would detract from its monopoly legislative initiative<sup>20</sup>.

In *Meroni’s* case<sup>21</sup> the Court of Justice saw in “*the balance of powers which is characteristic of the institutional structure of the community a fundamental guarantee granted by the Treaty in particular to the undertakings and associations of undertakings to which it applies*”. According to Jacqu  <sup>22</sup> the

<sup>18</sup> *Stauner and Others v. Commission*, T-236/00, ECLI:EU:T:2002:8.

<sup>19</sup> See J.-P. JACQU  , *The Principle of Institutional Balance*, in *Common Market Law Review* 41, 2004, p. 383-394.

<sup>20</sup> *The European Parliament may, acting by a majority of its component Members, request the Commission to submit any appropriate proposal on matters on which it considers that a Union act is required for the purpose of implementing the Treaties.*

<sup>21</sup> *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community*, 9/56, ECLI:EU:C:1958:7.

<sup>22</sup> See n. 20.

principle was a substitute for Montesquieu's separation of powers in so far as it enabled a guarantee to be given to undertakings that a modification of the institutional balance would not call into question the decision-making process envisaged by the Treaties. However, in the *Vreugdenhil* case<sup>23</sup>, the Court of Justice held that the Union (then the Community) could not be held liable to traders merely because there had been a failure to observe the interinstitutional balance, a measure would have to have been adopted which also, in its substantive provisions, disregarded a superior rule of law protecting individuals.

In contrast, the importance of the principle of interinstitutional balance is reflected in the attention the Court – and the legislative institutions – pay to the choice of the legal basis for legislative acts, since the legal basis determines the procedure for adopting the act in question (the ordinary legislative procedure, consultation, consent, etc.). As Jacqué points out, this was the reason that the Court held that the European Parliament should have the right to bring an action for annulment in defence of its prerogatives, a right now conferred by the Treaty<sup>24</sup>.

However, the institutional balance is not static, but dynamic, and the European Parliament has often used its rules of procedure to advance its own vision of the extent of its powers. Over the years power has shifted, but the trend has been for the Commission to lose power to the European Parliament, particularly as a result of the tendency to adopt legislation under the ordinary legislative procedure by first- and second-reading agreements between the Council and the Commission.

The emergence of the European Council as an institution post Lisbon has posed problems in the legislative context<sup>25</sup> and will doubtless raise further questions in connection with interinstitutional balance.

## 5. The *méthode communautaire*.

This consists of a number of ingredients. First, the Commission as guardian of the treaties has virtually the exclusive right to initiate legislation. The

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<sup>23</sup> *Vreugdenbil BV v Commission*, C-282/90 ECLI:EU:C:1992:124.

<sup>24</sup> *Parliament v. Council*, 70/88, ECLI:EU:C:1991:373

<sup>25</sup> See Article 15(1) TEU: “*The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof. It shall not exercise legislative functions*” [emphasis supplied].



corollary of this is the power to amend and withdraw legislative proposals. Secondly, there is qualified-majority voting in the Council, which co-legislates most of the time with the European Parliament. Third, there is the central position of the democratically elected European Parliament, which now has extensive powers to co-legislate with the Council. Fourth, there is the Court of Justice which ensures the uniform interpretation and application of Union law and respect for the rule of law<sup>26</sup>. As commentators have pointed out, the Lisbon Treaty may be regarded as constituting a “return” to the Community method while extending it to trade policy, agriculture and fisheries and in the area of freedom, security and justice<sup>27</sup>. Nevertheless, there still remain differences between the institutions as regards key aspects of the institutional system, especially delegated and implementing acts, access to information, and so on. In so far as interinstitutional agreements are used to fill the gaps in Treaty law and regulate the relations between the three institutions under the principle of institutional balance and on the basis of the principle of sincere cooperation, they are used to clarify how the *méthode communautaire* is to be implemented in the day-to-day life of the institutions.

## 6. Constitutional conventions.

A. V. Dicey<sup>28</sup> was the first to talk of “*conventions, understandings, habits, or practices that – though they may regulate the conduct of the several members of the sovereign power, the Ministry, or other officials – are not really laws, since they are not enforced by the courts. This portion of constitutional law may, for the sake of distinction, be termed the ‘conventions of the constitution’, or constitutional morality*”. In countries following the Westminster system, most government functions and indeed the distribution of competences are guided by such informal procedural agreements. The question is to what extent interinstitutional agreements at the level of the European Union could be categorised as “constitutional conventions”.

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<sup>26</sup> See B. SMILDERS, K. EISELE, *Reflections on the Institutional Balance, the Community Method and the Interplay between jurisdictions after Lisbon*, College of Europe, Research Paper in Law 04/2012.

<sup>27</sup> See J. DUTHEIL DE LA ROCHÈRE, *The Lisbon Compromise: A Synthesis between Community Method and Union acquis*, in *Fordham International Law Journal* 31, 2007, p. 1143-1160.

<sup>28</sup> A.V. DICEY, *Introduction to the Study of the Law of the Constitution*, republished by Oxford University Press 2013.



## 7. The new Interinstitutional Agreement on Better Law-Making.

In May 2015, the Commission presented a proposal for a new Interinstitutional Agreement on Better Regulation (the IIA) to replace the 2003 Interinstitutional Agreement. Whereas the 2003 agreement had been dealt with by the Legal Affairs Committee, competent for better law-making under the auspices of its chair, Klaus-Heiner Lehne, who was also chair of the Conference of Committee Chairs, the Conference of Presidents (CoP) gave the task of conducting negotiations on the Parliament's behalf to the ALDE Group leader, Guy Verhofstadt, which reflected the delicacy of the negotiations.

The chairs of the Legal Affairs Committee and the Constitutional Affairs Committee attended meetings of the CoP in order to follow the negotiations and report back to their respective committees. The Legal Affairs Committee drew up a non-paper with a view to influencing the negotiations. Following the conclusion of the agreement, the Legal Affairs and Constitutional Affairs Committee held a series of meetings to monitor how the administration was implementing the agreement and a report on the application and interpretation of the IIA was drawn up by co-rapporteurs from the two committees. The new Interinstitutional Agreement on Better Law-Making was signed on 13 April 2016 and entered into force on the same day<sup>29</sup>. The European Parliament's Rules of Procedure have been revised to reflect the new IIA.

The structure of the IIA roughly follows the phases of the policy cycle. It contains provisions regarding, inter alia, common objectives, programming, better law-making tools (impact assessment, stakeholder consultation and ex-post evaluation), legislative instruments, delegated and implementing acts, transparency, implementation and simplification.

The agreement first of all sets out the common commitment of the three institutions to promote simplicity, clarity and consistency in Union legislation as well as utmost transparency in the legislative process. The agreement envisages strengthened cooperation between the three institutions with regard to multiannual and annual programming. The latter is to encompass (early) exchanges of views both before and after the adoption of the

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<sup>29</sup> Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, *OJ L* 123, 12 May 2016, p. 1.

Commission Work Programme, as well as interinstitutional consultations on Commission plans to withdraw any legislative proposal. The agreement requires the Commission to provide reasons for such withdrawals and to take due account of the co-legislators' positions when doing so.

The agreement further calls upon the Commission to "*give prompt and detailed consideration*" to requests made by the Parliament and the Council for the Commission to present proposals for legislation on the basis of Articles 225 and 241 TFEU respectively, and to reply to such requests within three months, including giving reasons when it makes no subsequent proposal.

The IIA emphasises the positive contribution of better law-making tools to better quality legislation, including ex-ante impact assessment (IA), stakeholder consultation and ex-post evaluation of legislation. The final agreement explicitly reaffirms that impact assessment is a tool for taking well-informed decisions and not a substitute for political decision-making. Departing from the notion in the Commission's initial IIA proposal that all substantial amendments should be subject to impact assessment, the final text provides that the European Parliament and the Council may carry out impact assessments of their substantial amendments "when they consider this to be appropriate and necessary". One innovation contained in the final text is a commitment on the part of the Commission to carry out impact assessments of delegated and implementing acts with significant potential impacts. The IIA further stresses the important role of stakeholder input in ensuring well-informed decision-making, and calls upon the Commission to encourage direct participation of "end users" of legislation, in particular SMEs.

When proposing legislative instruments, the Commission is to explain and justify, *inter alia*, its choice of the legal basis and the proposal's compliance with the principles of subsidiarity and proportionality. The IIA now also explicitly provides for a trilateral exchange of views in case there is a suggestion of modification of the legal basis, entailing a change from the ordinary legislative procedure to a special legislative procedure or a non-legislative procedure.

The provisions regarding delegated and implementing acts contain a few important novelties. In a move to safeguard the Council's interests, the IIA further commits the Commission to conduct consultations of Member States' experts, as well as public consultations prior to the adoption of delegated acts. The Parliament and the Council are to have equal access to information regarding such expert consultations and, importantly, system-

atic access to the meetings of such expert groups. The IIA envisaged further negotiations between the institutions with a view to establishing delineation criteria for delegated and implementing acts and, finally, provided for establishing a joint register of delegated acts by the end of 2017. Moreover, the agreement called upon the Commission to make proposals by the end of 2016 for the alignment of existing legislation, which still needs adapting to the new legal framework created by the Lisbon Treaty (i.e. the new hierarchy of norms, including delegated and implementing acts), in particular acts which provide for use of the “regulatory procedure with scrutiny”. On delegated acts, the annex to the agreement sets out a revised “common understanding” of the three institutions, in particular setting some principles for the Commission’s preparation of delegated acts.

The IIA reaffirms the principle of sincere cooperation between the institutions, including information sharing and dialogue, and emphasises that the Parliament and the Council, as co-legislators, are to exercise their powers on an equal footing. The agreement contains a commitment to enhanced transparency, which is to include “*appropriate handling of trilateral negotiations*” (trilogues). To this end, the institutions agree to “*improve communication to the public during the whole legislative cycle*”, and commit to identifying “*ways of further developing platforms and tools*” to “*facilitate the traceability of the various steps in the legislative process*”.

The new IIA stresses the need for swift and correct application of Union law at national level, and calls upon the Member States to “*communicate clearly*” to their citizens when transposing Union legislation. In particular, with the aspiration to tackle “gold-plating”, the IIA provides that, whenever Member States choose to add elements that are in no way related to Union legislation, they should make such additions identifiable through the transposing acts or associated documents. The IIA further calls for inter-institutional cooperation with the aim of updating and simplifying existing Union legislation, as well as the avoidance of administrative burdens without, however, compromising the objectives of the legislation in question.

Although the title of the IIA refers to better law-making, it could equally have had a title referring to institutional balance or the *méthode communautaire* in so far as the preponderant concerns are in fact to do with how these ideas are put into practice.

The first such aspect is better cooperation between the three institutions with regard to multiannual and annual programming, where the European Parliament has certainly made some inroads.

The second relates to where the Commission plans to withdraw a leg-

islative proposal. Here the IAA codifies the judgment in Case C-409/13 *Council v. Commission*<sup>30</sup>, where the Court held that “*where an amendment planned by the Parliament and the Council distorts the proposal for a legislative act in a manner which prevents achievement of the objectives pursued by the proposal and which, therefore, deprives it of its raison d’être, the Commission is entitled to withdraw it*”. It may however do so only after having had due regard to Parliament’s and Council’s concerns behind their wish to amend the proposal. The IIA requires the Commission to provide reasons for such withdrawals and to take due account of the co-legislators’ positions when doing so. This definitely confirms and qualifies a key aspect of the *méthode communautaire*.

Thirdly, the undertaking to “give prompt and detailed consideration” to requests made by the Parliament and the Council for the Commission to present proposals for legislation under Articles 225 and 241 TFEU is a victory for the European Parliament, while conceding nothing from the *méthode communautaire*.

Fourthly, the reference to justifying the choice of legal basis and compliance with the principles of subsidiarity and proportionality may be regarded as warning shot to the Commission, whilst the trilateral exchange of views in case of a proposed change in the legal basis, entailing a change from the ordinary legislative procedure to a special legislative procedure or a non-legislative procedure must be regarded as a victory for the Council, in that it may allow it to avoid litigation. In any event, it certainly has to do with the principle of institutional balance.

Fifthly, the provisions regarding delegated and implementing acts are certainly of constitutional importance. They herald more work in the future but contain major concessions to the Council and the European Parliament.

Lastly, the reference to the principle of sincere cooperation between the institutions, including the fact that the Parliament and the Council, as co-legislators, are to exercise their powers on an equal footing are also manifestly about institutional balance.

## 8. Conclusion.

Whether the expression “constitutional convention” is entirely appropriate in the context of the European Union may be doubted given the

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<sup>30</sup> ECLI:EU:C:2015:217.

very different context. However, it would seem clear that interinstitutional agreements, and particularly the latest one on better law-making, play a similar function in supplying the gaps in primary law and institutional agreements may be regarded as a necessary corollary of the principle of institutional balance and the *méthode communautaire*.