The Role of the European Union and the Procedure of Conclusion of International Agreements After the Lisbon Treaty

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Abstract

The Treaty on the Functioning of the European Union (TFEU) in Article 218 includes all the institutions involved in the legislative decision-making of the Union, the Court of Justice and the High Representative of the Union for Foreign Affairs and Security Policy (HR). The article deals with all the different stages of the life of an international agreement – i.e. negotiations, signature, conclusion, some aspects of implementation, together with the suspension of treaty obligations undertaken by Europe. Article 218 TFEU sets out the general procedure that the European Union (EU) must follow when concluding international agreements with third countries and international organizations and will apply to all EU policies, while still maintaining an intergovernmental approach to the Common Foreign and Security Policy (CFSP). The EU's primary law, profoundly revised by the Treaty of Lisbon, reflects the EU's increasingly important and widespread activity as a treaty-maker. Article 218 TFEU makes an effort to promote and support a more transparent and democratic behavior of the EU's international relations, already providing important powers for the European Parliament in determining treaty instruments adopted by Europe.

Keywords: European Parliament inter-institutional conflict conclusion of international agreements, international negotiations, international representation of the European Unio, provisional application of treaties, soft law.

Introduction

Article 218 of the Treaty on the Functioning of the European Union (TFEU), provides for the binding of international agreements between the European Union and third

countries, as well as international organizations, dealing with the different stages of the life of an international agreement, negotiations, signature, termination,[1] some aspects of execution, as well as the suspension of contractual commitments signed by the European Union, which includes all the institutions of the legislative process of the Union, the Court of Justice and the High Representative for Foreign Affairs and Politics of Security.

The article establishes the discipline of a general nature, i.e. it applies to all policies of the Union, including the Common Foreign and Security Policy - in relation to which, however, the provision in question maintains a pronounced intergovernmental approach, focusing the negotiation and adoption of CFSP agreements on the High Representative and the Union Council.

The primary law already dedicated to the procedure of international agreements has been significantly expanded, compared to the original formulation of the Treaty of Rome of 1957, reflecting the increasingly important and wider activity of the Union as a treaty-maker, as well as the need to respond to various unresolved issues of a different political-institutional nature: in particular, it concerns in advance the role and determination of the major role of the European institutions, also to guarantee a clear representation of Union at the international level; and the need for greater involvement, for the democratic connotation of external relations, of the European Parliament.

Therefore, it seems more than appropriate to carry out an analysis of the primary law provision so significantly revised by the Treaty of Lisbon - which entered into force on December 1, 2009 - to verify its impact on the unitary representation of the Union in the special role of the Union in international relations and the dynamics of the European Parliament.(F. fincK, L'évolution de l'équilibre institutionnel de l'UE sous le prisme des relations extérieures depuis l'entrée en vigueur du Traité de Lisbonne, in RTD eur., 2012, pp. 594-I – 594-28)

Article 218 TFBE, provides for "international agreement". The Treaty of Lisbon, in fact, does not contain the definition of this source of international law. To fill this gap, we can undoubtedly refer to the jurisprudence of the Court of Justice: the latter, taking the notion of agreement expressed by international law, based on the principle of freedom of forms, provides that the constituent elements of the instrument of the treaty are the presence of two or more international subjects, the fulfillment of their wills in the sense of taking the choice of the common obligations of the parties and submitting to the common obligations of the parties. the law. Therefore, according to the Luxembourg judges, art. 218 TFEU "uses the expression 'agreement' in a general sense, to define any commitment of a binding character, entered into by the subjects of international law, regardless of its form."(CJEU, opinion 1/75 of 11 November 1975, OECD Agreement on local charges rules, in Coll., 1975, p. 1355, section TO.)

[1] Giuffrè, *The common commercial policy* Milan, pp. 95-19

Initiative to start the negotiation phase

Representatives of international entities interested in defining an agreement discuss and possibly agree on a text which is then signed and finalized - distributed by article. 218, par. 3 TFEU between the European Commission and the High Representative. The latter, in particular, is the only person competent to take action when the agreement to be negotiated relates exclusively or mainly to the CFSP. The subdivision provided for in the regulatory text seems to reflect the methodology of the Court of Justice for identifying the correct legal basis for EU acts, when it specifies that "[examination of a measure shows that it pursues a dual purpose or that it has a dual component and if one of them is identifiable as the main one, while the other on that basis should only be a legal act based on that single basis".(CJEU, judgment of 20 May 2008, case C-91/05, Commission v. Council (SALW), in Coll., 2008, p. I-3651, point 73)

The Commission or the High Representative for CFSP issues submit their recommendations for the opening of negotiations to the Union Council, which must take a decision on the matter, appointing at the same time, "depending on the subject of the envisaged agreement, the negotiator or the head of the Union's negotiating team."(Article 218, par. 3 TFEU)Thus, this new expression "Union negotiating text" appears in the Union negotiating text or Union chapter. Especially in the initial stage of art interpretation and implementation. 218 TFEU, there was no lack of confusion about this articulation, fearing that it would mean an erosion of the powers of the Commission in the delicate phase of negotiations of the Union's international commitments, which would have been preserved only by referring to the common commercial policy agreements, considering that the article. 207, par. 3 TFBE expressly reserves the initiative and conduct of negotiations to the Commission, demanding from this institution the commitment to "make every effort to ensure that the negotiated agreements are in accordance with the internal policies and rules of the Union." (Giuffrè, Milan, 2004, pp. 141-167)

However, the doctrinal reconstruction on the basis of which the lexical innovations of art. 218 TFEU should be considered as intended to allow only the joint indication of the Commission and the High Representative for the purpose of defining their functions in the conclusion of international agreements. In fact, from the general examination of the Treaties it is clear that the Council, called to show the "negotiator" of the Union, will be able to choose only the issue and the representative, from time to time the High Commission, while the High Commission will be able to choose, from time to time, its representative, the High Commission, based on art. 219 TFBE, the power to negotiate agreements on the monetary or exchange regime.

In fact, it should be considered that, based on the article. 17, par. 1 TEU, the European Commission is required to "[ensure] the external representation of the Union, with the exception of the common foreign and security policy and for other cases provided for by the treaties", with the consequence that the deviation from the representation of the Union at the negotiating table

must be expressly provided for by the primary law, which happens for agreements on monetaryor currency regimes for CF and currency regimes.

Moreover, it should also be taken into account that the international commitments undertaken by the Union must be consistent, and therefore fully applicable, within the broad framework of the acquis of the European Union: and this quality of the international agreements signed can only be effectively guaranteed by the participation of the Commission in the negotiations, given that this institution has the task of «[overseeing by the handlers] the implementation of the implementation of the institution. Union law", always "under the control of the Court of Justice of the European Union".(Article 17, par. 1 TEU)

Interpretation of art. 218, par. 3 TFEU leads to the conclusion that the Commission continues to be the main negotiator of the Union, with the exception of agreements on monetary and currency matters, in relation to which the Council "determines the methods for negotiation and conclusion" - although the Commission is "fully associated" with the negotiations - and agreements that concern exclusively or mainly the Supreme Council, due to the CF. It is this institutional figure that has the task of "representing the Union on issues pertaining to the common foreign and security policy" pursuant to Article. 27, par. 2 TEU.

Therefore, "depending on the scope of the envisaged agreement", the Council will have to choose between the Commission (for all agreements except the CFSP) and the High Representative (for contractual instruments dealing exclusively or mainly with foreign policy), while the negotiation of agreements related to PPSP matters and other than the CFSP, will have to be entrusted to the High Commission, not being a representative of the High Commission. Thus, it can be said that the identification of the negotiator, the representative of the Union at the consultation table, does not belong to a discretionary competence of the Council, but is directly directed by the primary law: the intergovernmental institution is called from time to time to verify the object of the agreement, from which the Lisbon Treaty automatically follows who will represent the Union in the negotiations.

The Council "can issue directives to the negotiator and designate a special committee which must be consulted in the conduct of the negotiations." The guidelines of the negotiations, which formally should be confidential, although they often enter the possession of the media, usually have a generic scope, and often their content is already anticipated at the time of the recommendation that the Commission or the High Representative address to the intergovernmental institution to start the discussion for the drafting of a new international agreement.

However, this does not mean that the negotiator – be it the Commission or the High Representative – actually has sufficient freedom in the conduct of the negotiations. On the contrary, above all following some highly contested aspects of the outcome of the Uruguay Round (on the part of France, the Blair House agreement of 1992 on the agricultural file; on the part of the Federal Republic of Germany, the framework

agreement on bananas introduced at the extreme in the package of agreements), the Commission is constantly and Marrakesh[1]

The Commission is continuously and – above all – actively supported by "special committees", which, as mentioned above, may be appointed by the Union Council and are composed of representatives of the Member States. It is emphasized that the negotiations in the field of the common commercial policy, as provided by the article. 207, par. 3 TFEU, see the continued presence of the consolidated, important and influential former "Committee 113" - now the Trade Policy Committee, or Trade Policy Committee - where the senior officials of the Ministries for foreign trade of the Member States sit, and which meets on a systematic and regular basis with the Commission to discuss the many issues related to the full composition of the Union, in the formula of the Union's economic relations. the representatives of the Member States are the general directors of the national ministers).

Of course, the special committees appointed by the Council cannot directly interfere in the conduct of the negotiations; however, they are working groups composed of officials and/or national experts, who, based on art. 218, par. 4 TFEU, "they must [constantly] be consulted" during the negotiation phase of Europe's international commitments. Therefore, the combination of special committees with the activity of the Union negotiator makes the latter a double negotiator, since in most cases he will find himself mediating and determining a point of balance both between the member states of the Union and with the negotiating counterpart.

Signing and concluding agreements

When diplomats, usually in the person of the head of the delegation, consider the text drawn up during the negotiations to be satisfactory from their point of view, they add their initials (initials, or initials) to the text. Then we move to the signature phase which, in the solemn procedure for concluding international agreements, validates the text of the proposed agreement at the end of the negotiations, and shows the willingness of the signatory states to submit the text of the draft agreement to the competent national authorities for approval In these circumstances, the signing of the agreement does not constitute the manifestation of the signatory subject's consent to be bound by the international commitments provided for in the draft agreement, but implies the obligation not to remove the object and purpose of the treaty before its entry into force. This obligation represents an articulation of the principle of good faith in international relations, codified in Art. 18 of the Vienna Convention on the Law of Treaties of May 23, 1969, which the jurisprudence of the European Union has defined as "a consequence, in public international law, of the principle of protection of legitimate expectations, which (...) is part of the legal order of the Community", with the consequence of the impossibility of approving, but which have already entered

[1] E. Baroncini, *The treaty-making power of the European Commission, Scientific editorial, Naples, 2008, pp. 82-83*

into force with international agreements, which have already entered into force with international agreements. where the latter are likely to be directly effective.(CFI, judgment of 22 January 1997, case T-115/94, Opel Austria GmbH v. Council of the European Union, in Coll., 1997, p. II- 39, point 93) In the European Union system, the signature is decided by the negotiator appointed by the Council, who, by initialing each page of the negotiated document with his initials, indicates, under his personal responsibility and without legal consequences for the Union, the text determined at the end of the negotiation discussions. The signing of the agreement, on the other hand, is authorized by a decision approved by the Council of the Union, with the proposal of the negotiator (art. 218, par. 5 TFEU.) In practice, the person authorized to sign representing the Union is the member of the Commission responsible for the policies covered by the agreement, or a Minister of the rotating Presidency of the Union; and, for CFSP agreements, the High Representative.

Of course, the joint reading of art. 218, par. 5 TFEU with Articles 17 and 27 TEU, which reserve the international representation of the Union to the Commission and the High Representative, may lead to the exclusion of the incoming Presidency from the signature phase, forcing the Council to choose whether to authorize the Commission, the High Representative (for CFSP agreements), or both, when an agreement has to be signed. However, the pre-Lisbon signature practice, to date, continues to find confirmation in the Council's decisions. Of course, when the signature concerns a mixed draft agreement, which is therefore within the competence of the member states, the latter will also show their representative to sign the text of the agreement.

EU law does not distinguish between the solemn procedure and the simplified procedure of international agreements, therefore it may happen that the Council approves the decision authorizing the signing and termination of the agreement at the same time (it is emphasized here that the term "conclusion" should be understood, in the European legal order, as an expression of the will of the Union to undertake the technical decision, as the author of the international agreement provides) where the binding of the agreement ends precisely with its signature. Therefore, the Council of the Union is always the competent European institution to approve, again on the negotiator's proposal, the decision to conclude a Union (art. 218, par. 6 TFEU) agreement. however, the discussion mechanism that the intergovernmental institution must adhere to varies.

In principle, "throughout the procedure" - that is, for the authorization of the opening of negotiations, the determination of negotiating directives, the signing and conclusion of agreements, and, as will be seen, the temporary implementation and suspension of agreements, and the determination of the positions to be presented on behalf of the Union (Article 218, par. 8, second sentence, TFEU) in the joint bodies created by the agreements, the Council must act unanimously "when the agreement concerns an area for which unanimity is required for the adoption of an act of the Union" - in practice, these are almost all CFSP agreements, the majority voting

hypothesis for acts of this policy of exceptional nature, and agreements that are included in sectors such as indirect taxation, energy, (art. 113 TFEU) discrimination, personal origin, age, origin, age and age. or sexual orientation, of which art. 19 TFBE. Also in the procedure related to the association agreements and the agreements referred to in the article. 212 TFBE with the candidate states for membership, i.e. for the so-called economic, financial and technical cooperation agreements with third countries, except developing countries, the Council must vote unanimously. Finally, unanimity for the intergovernmental institution is required "for the agreement on the accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms."(article 218, par. 8, second sentence, TFEU)

The decision to join the ECHR, moreover, due to the delicacy in the political-institutional level that distinguishes it, must be preceded by its approval by the member states, "in accordance with the relevant constitutional provisions".

Suspension of an international agreement

It is always the Council, "on a proposal from the Commission or the High Representative", that adopts "a decision to suspend the implementation of an agreement"(Article 113 TFEU). The choice to suspend the effectiveness of an agreement is characterized by its highly political nature. In particular, for the European Union, it is a need that has often come to the fore in relation to the non-respect of a) basic rights by contracting third countries, as well as, b) in general, with the goals of cooperation based on the agreements that these countries have signed with the Union. Formally, the Treaty of Lisbon does not foresee a role for the European Parliament in the procedure of suspension of agreements, a clear sign of the constant reluctance of the Member States to ensure that the Assembly can "intervene" decisively and easily in matters that can be assessed as purely foreign policy, and this despite the fact that the issue of respecting and promoting the parliament has always been defended by the institution.

But even in this circumstance, the Assembly is not overlooked. In fact, as mentioned above, the framework agreement on relations between the Commission and the Parliament provides - in Annex III, par. 8- that "the Commission informs the Council and the Parliament at the same time and at the right time of its intention to propose to the Council the suspension of an international agreement", explaining the reasons for this.

Recently, following very serious human rights violations committed by the Syrian regime against its own population, the Council decided to partially suspend the cooperation agreement of 18 January 1977 between Syria and the then European Economic Community. (See Regulation (EEC) no. 2216/78 of the Council of 26 September 1978 concerning the conclusion of the cooperation agreement between the European Economic Community and the Syrian Arab Republic, in Official Journal L269/1 of 27 September 1978.) References, in the reasons for the two suspension decisions, in Art. 3, par. 5 TEU, according to which "in relations with the rest of the

world the Union ... contributes to peace, security and the protection of human rights and to the strict respect and development of international law, in particular to the respect of the principles of the Charter of the United Nations"; to art. 21, par. 1 TEU, which requires the Union to base its action on the international scene "on the principles that have guided its creation, development and expansion", i.e. "democracy, the rule of law, the universality and indivisibility of fundamental human rights and freedoms, respect for human dignity, the principles of equality and solidarity and respect for the principles of the Charter of International Law of the United Nations" and, finally, for the purposes of the EU-Syria cooperation agreement "ba based on the mutual will of the parties to maintain and consolidate friendly relations in accordance with the principles of the United Nations Charter."(V.Council Decision of 2 September 2011 n. 2011/523/EU which partially suspends the application of the cooperation agreement between the European Economic Community and the Syrian Arab Republic, in Official Journal L228/19 of 3 September 2011, recital no. 2. See also Cooperation Agreement between the European Economic Community and the Syrian Arab Republic, cit., recital no.1)

The Council therefore suspended the agreement on imports, exports, transit and financial operations to support trade in crude oil, petroleum products, gold, diamonds and precious metals. These assets have been selected to pass the negative effects of the suspension on to the Syrian authorities - who benefit most from their availability, supporting the repressive policies of Bashar Al-Assad's regime thanks to them - thus avoiding inflicting further hardship on the Syrian people.

(Council Decision of 2 September 2011 n. 2011/523/EU cited; Council Decision of 27 February 2012 n. 2012/123/CFSP amending decision 2011/523/EU which partially suspends the application of the cooperation agreement between the European Economic Community and the Syrian Arab Republic, in OJ L54/18 of 28 February 2012.)

The delegation to the negotiator to approve changes to an international agreement on behalf of the Union

As has just been reported, the simplified decision-making mechanism for Council decisions on the common positions of the Union in the bodies set up by a given agreement cannot have as its object "acts that supplement or modify the institutional framework of the agreement."（Art. 218, par. 9 TFUE). In fact, in this case, since the measure to be adopted in a council or committee of an agreement involves new rules or revisions of the originally agreed contractual structure, it will be necessary to go back over the ordinary decision-making process, which, most of the time, involves the Parliament. Where, however, the amendment or integration of the text of the agreement concerns minor aspects, the art. 218, par. 7 TFEU contemplates a further simplified procedure, consisting of a delegation to the Commission or to the High Representative: therefore, «[a]nce the conclusion of an agreement, the Council, by way of derogation from par. 5, 6 and 9, may authorize the negotiator to approve the

amendments to the agreement on behalf of the Union if the latter provides for their adoption with a simplified procedure or by a body set up by the agreement itself (...) possibly accompanying this authorization with specific conditions." It is one of the few legal bases of primary law that expressly delegates to the Commission - and, in this specific case, also to the High Representative - the treaty-making power of the European Union. An eloquent example of the valuable role that can clearly be entrusted to the Commission thanks to this legal basis is what is outlined in the proposal to the Council (This proposal has already obtained the favorable opinion of the parliamentary rapporteur Kovács: cf. A7-0275/2012, Recommendation concerning the draft Council Decision on the conclusion of the Agreement between the Government of the United States of America and the European Union for the coordination of energy efficiency labeling programs for office equipment, Rapporteur: Béla Kovács, 20 September 2012) concerning the conclusion of the agreement with the United States for the coordination of energy labeling and energy efficiency programs for office equipment. (OM(2012) 108 final, Proposal for a Council Decision on the conclusion of the Agreement between the Government of the United States of America and the European Union for the coordination of energy efficiency labeling programs for office equipment, 15 March 2012.) Given the rapid evolution that characterizes the office equipment market in terms of their energy efficiency, the proposal in question reserves to the Commission the power to contribute to the review and updating of the technical annexes of the agreement on the Energy Star program (therefore, the naming and the common Energy Star logo, the directives for their correct use, the common specifications of the products that can boast the Energy Star logo), defining the position of the Union with regard to the decisions that the entities managing the agreement must adopt to amend the technical annexes in question. (Art. 4 of the proposed decision, in COM (2012) 108 final, cit.)

Conclusions

As illustrated in this paper, in the first years of the validity of Article 218 TFEU there was certainly no lack of uncertainty or even divergence, in relation to which the European system, in any case, has managed to produce compromise solutions, or awaits the decisions of the Court of Justice to clarify with authority the configuration of the new institutional balance desired by the Treaty of Lisbon for the external behavior of the Union.

By strengthening the powers of the European Parliament, art. 218 TFEU brings greater democracy, as well as transparency, to European international action. In particular, it was possible to ascertain how the Assembly, in order to protect its prerogatives, was so significantly strengthened by art. 218 TFBE The parliamentary institution promises to define the foreign policies of the Union, which, thanks to a greater involvement of the Assembly, manages to effectively follow the respect and promotion of the ambitious principles established by the Treaty of Lisbon for

European action "in relations with the rest of the world" (Articles 3, paragraph 221, 5, TEU and paragraph 5).

In recent years, there has been a significant proliferation of soft law measures in defining the objectives and methods of international cooperation in which the Union is a protagonist. For example, there are over fifty structured dialogues between the European Commission and the Chinese government, through which the Union and the People's Republic have created a dense network of cooperation in the most diverse sectors, from competition to the fight against climate change[1], from the protection of intellectual property rights to labor and social policies, with numerous negotiations taking place (Memorandum of Understanding between the Ministry of Labour and Social Security of the People's Republic of China and the European Commission, 5 September 2005) The Assembly should promote a mandatory notification mechanism for all soft law acts through which the international action of the Union is expressed. Recognizing the possibility of informal measures for the timely, dynamic and effective management of international relations, however, it is necessary to organize the continuous control and monitoring of these measures, so that they do not end up in bypassing the demanding decision-making procedures already defined by the article. 218 TFBE for the conclusion of international agreements and to systematically verify whether these agreements, dialogues, memoranda and partnerships respond to the value orientation required by the Treaty of Lisbon for the international action of the Union.

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