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INFORMATION NOTE

From:	Legal Service
To:	Permanent Representatives Committee (Part 2)
Subject:	Case before the Court of Justice of the European Union: - Judgment of the Court (Grand Chamber) in Case C-660/13, <i>Council of the European Union v. European Commission</i>

I. INTRODUCTION

1. On 28 July 2016 the Court of Justice of the European Union (CJEU), in its Grand Chamber formation, issued its judgment in Case C-660/13 *Council of the European Union v European Commission*. The judgment annulled Commission Decision C(2013) 6355 final of 3 October 2013, on the signature of an Addendum -concerning Croatia- to the Memorandum of Understanding on a Swiss financial contribution ("the annulled Decision"), while maintaining its effects until it is replaced.

2. The CJEU ruled that the Commission had acted illegally by not seeking prior approval from the Council before adopting the annulled Decision (which authorised two Commission members to sign the Addendum on behalf of the Union) and proceeding to signature. In so doing, the Court has clarified the procedures for negotiating and signing non-binding instruments between the Union and third parties.
3. The Commission argued that if the content of such an instrument reflected an existing EU policy position, its signature did not require prior approval by the Council. Even where the content of the instrument did not reflect an existing EU position, the Commission considered that it had to seek the Council's approval on the content of the instrument, but not on its signature as such. The Commission thus considered that it was entitled to autonomously sign any such instrument on behalf of the Union on the sole basis of Article 17(1) TEU.
4. The Council's position was that the decision to sign a non-binding instrument with a third party was *in itself* an act of policy-making so that prior approval of the signature by the Council was necessary, whether or not the content of the instrument corresponded to existing policy.
5. The Court of Justice upheld the position of the Council, holding that the annulled Commission Decision exceeded the limits of the Commission's powers, in breach of Article 13(2) TEU.

II. BACKGROUND

6. The Council sought the annulment of the annulled Decision while seeking to maintain its effects until such time as it is replaced. The Council invoked the following two grounds in support of its claim:
 - infringement by the Commission of the principle of distribution of powers between the institutions and, consequently, of the principle of institutional balance by adopting the contested decision without prior approval by the Council; and
 - infringement by the Commission of the principle of loyal cooperation by its course of action leading to the adoption of the decision and to the signature of the Addendum.
7. Ten Member States (FR, CZ, DE, PL, NL, GR, UK, HU, FI, LT) intervened in support of the Council.
8. Advocate General Sharpston had concluded in her opinion of 26 November 2015 that the Commission Decision should be annulled for infringement of the principle of institutional balance.

III. THE JUDGMENT

9. In paragraphs 37-39 of the judgment the CJEU holds that in order to proceed to the signature of a non-binding instrument the Commission needs an explicit authorisation given by the Council in that respect. In other words, the Commission does not have the right, on the basis of its power of external representation of the Union under Article 17(1) TEU, to sign such an instrument. The decision to sign such an instrument requires an assessment to be made by the Council of the Union's interests in the context of its relations with the third party concerned, in compliance with the strategic guidelines laid down by the European Council and the principles and objectives of the Union's external action.

10. In paragraph 40 of the judgment, the CJEU goes on to say that a decision to sign a non-binding instrument is, always and in itself, an act of policy making, which therefore needs to be established by the Council, in accordance with Article 16(1), second sentence, TEU and Article 16(6), third subparagraph, TEU.
11. In paragraphs 41 and 43 of the judgment the CJEU holds that such an act of policy-making requires an assessment by the Council of whether the agreed instrument still reflects the interests of the Union, on the basis of the text of the non-binding instrument resulting from the negotiations.
12. Consequently, the CJEU holds in paragraph 43 of the judgment that the mere fact that the content of the non-binding instrument as resulting from the negotiations corresponds to the negotiating mandate previously given by the Council is irrelevant when it comes to deciding on its signature, so that this fact can never be understood as implying an authorization for the Commission to sign the instrument. This reasoning applies *a fortiori* if the content of the instrument allegedly corresponds to other policy positions previously established by the Council in different contexts.
13. Finally, in paragraph 42 (read together with paragraphs 39 and 40) the Court holds that the assessment and definition by the Council of the Union's interests, as part of the formulation of the Union's external policy, include deciding on the opening of the negotiations of a non-binding instrument. Any meaningful decision on the opening of negotiations must necessarily include the counterparties with which it is considered appropriate to negotiate and the issue or issues to be covered by such instrument.

IV. CONSEQUENCES

14. The Commission will now need to adopt a new decision; however, the Addendum remains in force and can continue to be applied.
 15. More generally, it has now been confirmed by the CJEU that, as part of its policy-making role, the Council always needs to give an explicit authorization for the Union to open negotiations on a non-binding instrument with a specific third party (even where such instrument reflects established Union policy); an explicit decision by the Council is equally needed at the end of the negotiations to authorize signature of the instrument on behalf of the Union.
 16. The judgment relates to the powers of the Council in general. While it has been given in the context of a bilateral instrument with a third country signed by the Commission, it applies to bilateral *and* multilateral non-binding instruments; agreed with third countries *and* with international organizations; and regardless of whether the Commission *or* the HR (including the EEAS) represents the Union in the negotiations.
 17. This judgment applies to all non-binding instruments which by virtue of their content involve the Union, regardless of whether such instruments are presented as having been entered into by the Union or by a particular institution or service.
 18. Further reflection is needed to determine the full implications of this judgment, both practical and otherwise.
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