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Commission's right of withdrawal of proposals: Curtailment of the Commission's Right or Acceptance by the Court of the Commission's long-standing position?

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By ACELG's [P.J. Kuijper](#)

It is interesting to note that recent blogposts commenting on Case C-409/13 (Council v Commission) by Steve [Peers](#) and Laurens [Ankersmit](#) largely take the perspective of the Council and the intervening Member States by presenting this as a constraint upon or a curtailment of the Commission's presumably unfettered right to withdraw its proposals, irrespective of how far the legislative power (Council and Parliament) have proceeded along the path to a regulation or a directive. However, it corresponds better to reality to interpret this judgment as a vindication of the Commission's long standing position on the limits on the legislative power in the Union to take a Commission proposal and run with it, thereby straying so far from its original object

and purpose that the proposal itself is fundamentally perverted.

In order to understand this, it is important to know that there have been discussions about this problem between the Commission and the Council, and in particular between their Legal Services, since time immemorial. In this discussion it was always understood that a new Commission (which nowadays goes with a new Parliament) has the right to withdraw proposals of its predecessor shortly after acceding to power. Moreover, the Commission generally had the right to withdraw proposals to which the legislator had shown no meaningful reaction for a considerable period of time. The withdrawal of proposals, which had gone a long way through the legislative process, was considered by both sides in the debate to be the crucial problem. In response to that problem the services of the Commission developed the so-called theory of what with a French term was called "dénaturation". The Commission considered its proposal to have been "dénaturé", i.e. distorted or perverted, by the legislator, if the objective or essential elements of the proposal were threatened to be modified by the proposed amendments of the legislator to such an extent that it was transmogrified into its opposite and could not possibly reach its purpose as originally conceived by the Commission. The Council never accepted this position, but the moment that the Commission's view could be tested in front of the Court somehow never came until Case C-409/13 on the Framework Regulation on Macro-Financial Assistance to third countries went to Court.^[1]

Reading paragraph 56 and 57 of the judgment, which summarize the main part of the Commission's

pleadings, one will easily recognize the theory of “*dénaturation*”. The Commission, for instance, said that it was not striving to act as the “third branch of the EU legislature” by withdrawing the proposal, but because the co-legislators were about to adopt an act that constituted “a distortion (in the French version of the text: *dénaturation*) of its proposal for a framework regulation”. In addition the Commission remarked that the EU legislature did not have the “unfettered power to adopt an act which would fundamentally change the sense of its proposal or remove the proposal’s *raison d’être*.”

From the Court’s judgment in paragraph 83 and following it is clear that the Court is in broad agreement with this theory of the Commission. It states *inter alia* that

“[i]t must be accepted that, where an amendment planned by the Parliament and the Council distorts (Fr: *dénature*) 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.”

There could hardly be a better statement of the Commission’s old theory of “*dénaturation*”. That is all the more remarkable as A-G Jaaskinen would not have any of it. He dismisses the discussion between the Council and the Commission on the latter’s theory with a “plague on both your houses”, characterizing the arguments from both sides on this score as “ineffective”. He believed that most of the problems that the Commission would cure by the application of its theory, could and should be solved by actions for annulment between the institutions after the adoption of the “perverted” act. He showed himself to be a proponent of a strict construction of the provisions of Articles 293 and 294 TFEU, coming to the conclusion that the Commission can amend its own proposal only until the moment that the Council communicates its position at first reading to the Parliament and hence *a fortiori* it can only withdraw it until that point in time as well (Art. 294(5) TFEU). Since the Council had not yet stated its position at first reading at the moment the Commission withdrew its proposal, the Council lost that point.^[2] The rest for Jaaskinen was a question of whether the Commission had infringed the duty of sincere cooperation and breached the requirement of giving reasons for its withdrawal. On both of these points he interpreted the facts and advanced arguments that were later broadly shared by the Court and in line with the arguments of the Commission.

The above approach to Case C-409/13 gives rise to four final points that the other blogs have largely left to one side.

The Court implicitly rejected the formalistic approach advanced by AG Jaaskinen. He would impose simply a deadline on the Commission by which it would have to decide on withdrawal, but for which no substantive criteria would have to be satisfied, only a simple explanation of why the withdrawal took place. The Court accepted the Commission’s approach according to which substantive criteria would have to be respected for the withdrawal, but remained mum on the question whether there was a point in the legislative procedure beyond which the Commission, even when satisfying the criteria for “*dénaturation*”, could not go. Could the Commission even withdraw during the third stage of the legislative procedure? There is no indication in the Court’s judgment that it could not. Or would that be a breach of the duty of sincere cooperation inherent in the limited role of the Commission at this stage as laid down in Article 294(11) TFEU? What is true in any case is that the bicephalous legislature of the Union is not fully sovereign, since the proposal of the Commission substantively limits its margin of amendment in the Court’s view. Is this another example of an international organization like the EU being different from a State, as the Court remarked in Opinion 2/13?

It bears pointing out that this is one of those (in)famous cases in which the first and third stages of the legislative procedure have been conflated. Tripartite meetings are held without the procedure formally having gone beyond the first stage, as the Council has not officially rejected the Parliament’s amendments

and defined its position at first reading. Lots of objections have been leveled against such attempts to speed up the EU legislative machinery. Seen in that light, it is important that the Commission henceforth has a recognized weapon in hand, if the enthusiasm of the co-legislators to come to an agreement (too) quickly and at the expense of the fundamental intentions of the Commission underlying its proposal carries them too far.

Moreover, it must be recalled that this was a case of the application of the provisions on legislative delegation and on implementation powers of the Treaty of Lisbon in an area of EU law, external relations, which even before the Treaty of Lisbon was notorious for its lack of discipline with respect to what was then called "comitology". Many basic regulations in the field of trade and development aid and assistance to other countries had severely modified comitology rules and some had none at all. This has now changed. Nearly all important basic regulations have been adapted to the regime of either Article 290 and its implementing regulation or that of Article 291 or a combination of both. This means a major improvement in the position of the Commission as a true executive in the field of EU external relations compared to the past situation. Small wonder that this became the first case in which the theory of "dénaturation" could be tested for the first time. And it is of no small significance either that the Commission now knows that, if delegated or implementation powers are an important component of the core of its proposal, their elimination by the co-legislators may justify the withdrawal of such proposal.

Finally, it is important for practitioners and academics alike to understand that this is not a case in which the Commission performed a purely politically motivated and far reaching withdrawal of its proposal at the last minute, thus frustrating an important compromise reached by the democratically legitimized co-legislators so that its right of withdrawal needed to be constrained by the Court. It is a case rather of the Commission exercising its right of withdrawal, according to a conception which had been developed over many years and which took account of the late stage in which this had to be done, by itself subjecting the withdrawal to a number of serious conditions expressed in the so-called theory of "dénaturation" and got it accepted by the Court. Thus it obtained a limit to the powers of amendment of the co-legislators, which would safeguard the essence of its right of proposal.

[1] In footnote 21 of his Opinion A-G Jaaskinen refers to a number of examples that the Commission had given of the exceptional cases in which recently it had withdrawn proposals for "dénaturation", next to its "normal practice", as mentioned in the text.

[2] See paras 85 and 86 of the Opinion of the A-G.



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