



**THE LEGAL NATURE OF THE PRINCIPLE OF COLEGIALITY: A GENERAL
PRINCIPLE OF EU LAW?**

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Abstract:

This paper investigates the legal nature of the principle of collegiality as a principle of EU law. It mainly asks the following questions: what kind of legal principle is collegiality? Can it be considered as a general principle of EU law in its own right? And how does it integrate the EU legal system? Collegiality is the main principle according to which the college of Commissioners adopts decisions and as such it identifies a key feature of the Commission's internal decision-making. Yet its legal status has rarely been addressed by legal scholars and remains largely unexplored. The paper argues that collegiality constitutes a general principle of EU law in its full autonomy. However, because of its specific nature, its legal status is fundamentally affected by an underlying ambiguity, which resides in the dual functions performed by collegiality as a procedural principle of administrative law and as an institutional principle for the Commission's organisation. The Court has recognized concrete legal effects to the principle of collegiality as a procedural principle protecting the interests of individuals affected by the Commission's action. Beyond that, however, collegiality is also a broader principle determining the institutional articulation of the Commission's work both at the college and at the administrative level. It thus constitutes a key element of EU Governance.

Keywords: Principle of collegiality, general principles of EU Law, European Commission, constitutionalisation, institutional principle, Court of Justice of the European Union

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I. Introduction

Collegiality is the main principle according to which the college of Commissioners adopts decisions. It is congenial to the way in which the institution develops, implements and enforces policy in a multinational polity. It implies that all Commission's decisions are to be attributed to the college as a whole and that Commissioners are collectively responsible for them. The college acts as a single body with a single will; members stand together behind this will. As a legal principle of equality among Commissioners collegiality embodies a guarantee of independence 'founded on the equal participation of the members of the Commission in the adoption of decisions'.²

At first look the European Commission's collegial nature might not appear particularly surprising, especially when the Commission is considered in its executive functions. A certain degree of collegiality applies to most national executives, where the Council of Ministers acts as a collegial body in taking decisions. However, what is commonly known as 'governmental cohesion' is hardly comparable to the form of collegiality that applies to the Commission. Collegial decision-making in the Commission represents a key feature of its institutional identity and shapes the whole Commission's internal decision-making and organisation. It is no coincidence that open disagreement within the Commission is always perceived as a political scandal. In 2007, declarations by Guenther Verheugen, at that time in charge of the industry portfolio in the Barroso Commission, publicly siding with German car-makers against a cap on CO2 emissions from cars proposed by the Environment Commissioner Stavros Dimas, spurred great controversy, not only because Verheugen was accused to place national interest before the European one, but more importantly because he was infringing one of the key codes of conducts of a Commissioner: not voicing disagreement with the College's decisions.³ In sum, a non-collegial Commission would be a fully different institution. But why is it so? Why is the principle of collegiality so important for the Commission?

The collegial nature of the Commission's decision-making dates back to the very origins of the European project. From the early days of the Schuman declaration and the Treaties of Paris, the Commission (at the time the High Authority of the European Coal and Steel Community) was created as an independent,

² Case C- 5/85, *Akzo Chemie v. Commission* [1986] ECR 2585, para 30

³ D. Gow, *EU set to back down over emission limits*, The Irish Times, 31/01/2007 and S. Castle, *EU bows to car lobby on pollution limits*, Independent, 7/02/2007.

collegial body.⁴ The rationale of the project was to create the conditions for pulling together sovereign power in a way that could be acceptable to Member States. Decision-making was entrusted to a group of members, who would be appointed by Governments, but who would perform their duties in full independence. In many ways the High Authority's collective nature as a sort of "collegial directorate" acted as an institutional enabler of supranationalism. It provided a guarantee for both the institution itself and the Member States that the High Authority would perform its duties in full independence.⁵ As such, it fulfilled a re-assuring role: it allowed Member States to retain the right to appoint members, while establishing an internal system of checks and balances, whereby decisions could not be taken without the consent of the majority of the members. In other words, the collegial element was inherently linked to the supranational nature of the new organization and the consequent need to balance out national representation and independence of decisions.

Against this background, investigating the legal nature of the principle of collegiality is, in my opinion, a necessary undertaking and it is the main purpose of this paper. Yet this is no easy task. Despite representing a core principle of the Commission's decision-making, collegiality is a slippery legal concept with shifting meanings. It is commonly referred to as a principle, albeit with varying designations: principle of collegiate action, of collegiate decision-making or of collegial responsibility. At a closer look, the Treaties nowhere mention the term 'principle' in reference to collegiality and the notion of collegiality as such only appears once in Art. 17.6 of the Treaty on European Union (TEU) and only since the revision of Nice. Nevertheless, the Court of Justice of the European Union (CJEU) already in the eighties recognised collegiate responsibility as a principle of primary law deriving it from the Treaty provisions on majority voting.⁶ Collegiality thus first developed as an unwritten principle of Union law and only subsequently found its place in written provisions.

The EU legal scholarship has only rarely addressed the Commission's collegial nature, further adding to this ambiguity. In law manuals and books collegiality is not included among the key principles of EU law. It is not treated as a written principle codified by the Treaties, such as the principles of proportionality and

⁴ M. Gilbert, *European Integration. A Concise History*, (Rowman & Littlefield Publishers 2012)

⁵ P. Reuter, 'Aux origines du Plan Schuman', in *Mélanges Fernand Dehousse*, (F. Nathan, Labor, 1979)

⁶ Art 17 of the *Merger Treaties* - now Art. 250 of the *Treaty on the Functioning of the European Union* [2008] OJ C 115/47; Case C- 5/85, *Akzo chemie v. Commission*, [1986] ECR 2585, para 30

subsidiarity. Nor is it considered as a general principle of EU law indirectly derived by the Court from the Treaties, such as the principle of loyal cooperation or of institutional balance. Yet, collegiality is invariably recognised as a principle of the Commission's decision-making, when it comes to describing the powers, functions and rules of procedures of the Commission.⁷

The current paper addresses the legal nature of collegiality from the perspective of a principle of EU law. It mainly asks the following questions: what kind of legal principle is collegiality? Can it be considered as a general principle of EU law in its own right? And how does it integrate the EU legal system? The paper argues that collegiality constitutes a general principle of EU law in its full autonomy. However, it also shows that, because of its specific nature, collegiality's legal status is fundamentally affected by an underlying ambiguity, which resides in the dual functions performed by collegiality as a procedural principle of administrative law and as an institutional principle for the Commission's organisation. The Court has recognized concrete legal effects to the principle of collegiality as a procedural principle protecting the interests of individuals affected by the Commission's action.⁸ Beyond that, however, collegiality is also a broader principle determining the institutional articulation of the Commission's work both at the college and at the administrative level. In other words, a unitary principle happens to be used and interpreted in two different ways. Thus, the legal analysis of the principle of collegiality needs to account for the distinction between collegiality as legal procedural requirement and collegiality as 'institutional mechanism' governing the Commission's internal functioning.

The paper starts off by delimiting its research remit via some methodological remarks on the more general issue of the '*general principle of EU law*' and how collegiality relates to this debate (section two). In section three, it then turns to explain the evolution of collegiality from a rule of procedure to a constitutional principle. Section four locates collegiality among the institutional principles of EU law and sketches out how collegiality behaves compared to other institutional principles. Sections five and six address the dual nature of collegiality as, respectively, procedural principle of administrative law protecting the rights of

⁷ J-P. Jacqu , *Droit institutionnel de l'Union Europ enne* (8th edn, Dalloz 2015)

⁸ Case C- 5/85, *Akzo Chemie v. Commission*, [1986] ECR 2585

individuals and institutional principle related to the Commission's decision-making. The conclusions draw the final consequences of the analysis and point to further research perspectives.

II. On 'being a principle': some methodological remarks on collegiality as a principle of EU law

Principles, legal principles, general principles of EU law: the academic debate on legal principles is large and intricate and scholars' attempts to define and categorise the different types of principles within the EU legal system abound. How does the collegiality principle relate to this debate? The issue becomes even more intriguing if one considers that collegiality is generally known as a principle, yet its principled nature has never been addressed in a comprehensive manner despite the flourishing literature dedicated to the general principles of EU law. In fact, collegiality has always been commonly known as a 'principle'. Scholars have simply taken for granted that what we call 'principle of collegiality' needs to be, in a way or in another, a principle, without further inquiring into why it is so. Under these circumstances a further look into the premises under which we define collegiality 'a principle of EU law' is necessary to define the legal implications of collegiality and its place within the EU legal system.

Yet, it is arguably very difficult to agree on a comprehensive definition of the notion of 'principle' in general and even more so when it comes to principles in EU law. As noted by O. Wiklund and J. Bengoetxea, the very concept of principle is unclear and the variety in which this term is used in EU law does not allow for a uniform interpretation. Already two decades ago the two scholars had performed a comprehensive analysis of the use of the term 'principle' in the Treaties, showing a general lack of consistency.⁹ To similar conclusions have come scholars and practitioners examining the terminology employed by the CJEU in its case-law involving principles and general principles, which in several instances has been found to lack a coherent and systematic approach.¹⁰ Advocate General Trstenjak in her opinion on the *Audiolux* case

⁹ O. Wiklund, J. Bengoetxea, 'General Constitutional Principles of Community Law', in U. Bernitz, J. Nergelius (eds), *General Principles of European Community Law* (Kluwer 2000) 119-142

¹⁰ B. De Witte notices this with regards to institutional principles; but this issue is acknowledged more broadly by L. Sevón, former ECJ Judge, with regards to the way the ECJ approaches general principles: 'The task of the Court is to decide cases ... The Court is not involved in an effort to create a general theory on the general principles'. B. de Witte, 'Institutional Principles: A Special Category of General Principles of EC Law' in Bernitz and Nergelius (eds) (n 8) 159; L. Sevón, 'General Principles of Community Law – Concluding Remarks', in Bernitz and Nergelius (eds) (n 8) 220.

observes that ‘even today the concept of general principles is a thorny issue. The terminology is inconsistent both in legal literature and in the case-law’.¹¹

In sum, the landscape of the EU legal principles is scattered and proves challenging to systematically deal with it. As C. Flaesch-Mougin notes:

The principles mentioned in the Union’s documents and those, of an even greater number, invoked by the scholarship, point to a great frequency, but also to a certain facility (almost a laxity) in the use of the term. It is sometimes equivalent to central idea, to fundamental norm, to general prescription, to standard, to concept, to value...It appears in its full plurality and the domains identified through its use are different.¹²

My attempt to situate collegiality in the general landscape of the principles of EU law therefore starts from there: the difficulty, virtual impossibility, to pin down a set of features that would cover the whole range of principles of EU law, determining which ones should be included or excluded from this category. In practice, every principle seems to behave differently and is characterised by an evolutive nature. When it comes to general principles of Union law, moreover, their very rationale as judge-made principles developed over time implies that the role they play in the EU legal system cannot be acknowledged as a static circumstance but follows a dynamic logic.¹³ Collegiality is no exception, as it will be argued in the following parts of the paper.

The theoretical premises of the scholarly debate on legal principles in EU law cannot be discussed at length here, nor can the role played by general principles in the hierarchy of norms and their jurisprudential development. My analysis will limit itself to sketch the boundaries within which a meaningful analysis of collegiality as a principle of EU law necessarily moves. To do so I will situate collegiality within already developed conceptual frameworks.

¹¹ Case C-101/08, *Audiolux and Others*, [2009] ECR I-09823, Opinion of AG Trstenjak, para 67

¹² Catherine Flaesch-Mougin, ‘Typologie des principes de l’Union Européenne’, in *Le droit de l’Union européenne en principes. Liber amicorum en l’honneur de Jean Raux* (Editions Apogée 2006) 104 (translation by the author). Original version: « Les principes présents dans les documents de l’Union et ceux, encore plus nombreux, évoqués par la doctrine témoignent d’une grande fréquence mais aussi d’une certaine facilité, d’un laxisme parfois même, dans l’utilisation du terme: tantôt synonyme de notion-clé, de règle fondamentale, de prescription Générale, de standard, de concept, de valeur., le principe apparaît pluriel et les réalités recouvertes diverses.»

¹³ G. De Burca, ‘Proportionality and Subsidiarity as General Principles of Law’, in Bernitz and Nergelius (eds) (n 8) 112

As a starting point for my argumentation I will rely on B. De Witte's definition of the general principles of Union law as 'unwritten principles, recognised by the CJEU, that have a status of higher law by the fact that they may be invoked as a standard for review of Community acts'.¹⁴ The essence of these principles therefore boils down to two main elements: a) their unwritten nature - and the resulting role played by the CJEU in their definition and b) the fact that they represent a separate source of community law and therefore have primary law rank - thus constituting a standard of review in litigation. Furthermore, De Witte points to an additional category of principles, called 'institutional principles', that exists alongside the general principles of EU law, albeit with very specific features. Institutional principles are defined as 'unwritten and judge-made principles', that 'do not serve to protect the position of the individual, but rather to regulate the relations between the institutions'.¹⁵ This category includes for instance principles such as the principle of proportionality, of sincere cooperation and of institutional balance.¹⁶ At a first outlook, collegiality too can be subsumed under this category, as per its definition it is a principle inherently linked to the institutional structure of the Union.

Within this theoretical framework the subsequent sections of the paper will investigate whether and in how far the principle of collegiality can in fact be considered a) as a general principle of EU law – e.g. judge-made and constituting a standard of review (section III); and b) as a general principle of EU institutional law – that is regulating institutional relations rather than protecting the position of the individuals (section IV).

III. Collegiality as a general principle of EU law: from rule of procedure to constitutional principle.

Collegiality, as most principles of EU law, has a dynamic nature. Its legal status has developed over time, following a trend of gradual formalization distinctive of EU law and common to a number of general

¹⁴ De Witte (n 9) 143

¹⁵ Ibid 142

¹⁶ Ibid 143-159; It has to be noted that this area of principles is subsumed by many authors within the more general domain of 'structural principles' governing the EU institutional architecture. See e.g. J. Nergelius, 'General Principles of Community Law in the Future: Some Remarks on their Scope, Applicability and Legitimacy' in Bernitz and Nergelius (n 8) 223-233; and C. Blumann, in *Le droit de l'Union européenne en principes. Liber amicorum en l'honneur de Jean Raux* (n 8), 56-57

principles, such as proportionality or the principle of EU law primacy.¹⁷ As such, it mirrors a general path of development of EU constitutional law, that increasingly tends to use codification as a means of constitutionalization. ‘We live in an era of legislative general principles’ observed T. Tridimas as a premise to his systematic analysis of the general principles, and by this paradox he pointed to the strive to formalise in written text values and principles recognised by the Court, even when their primary law rank is already safely protected by the jurisprudence. ‘Enshrinement of values in constitutional texts seeks to achieve protection, legitimacy, legal certainty and historical continuity’.¹⁸ In the dialectic between the Member States and the CJEU, codification generally means recognition of the Court’s jurisprudence and acceptance of the resulting legal consequences. However, codification does not per se ‘replace’ the Court’s jurisprudence. On the contrary, in many cases the Court continues to provide the main interpretative reference to assess the legal effects of the principle. For instance, when it comes to principles sharing a double mandate (developed by the Court but then codified by the Treaties), such as the principle of proportionality, the jurisprudence often refers to the unwritten norm rather than to the Treaty-based provision.¹⁹

The principle of collegiality shares this evolutionary trend. It was first identified and developed by the CJEU and only subsequently entrenched by Treaty amendments. In a two-step process it thus passed from a rule of procedure to a general principle recognised by the Court and from that to a constitutional principle enshrined in primary law. However, if Treaty codification arguably allowed to achieve *legitimacy* and *historical continuity*, it was through the jurisprudence of the Court that collegiality acquired increased *legal certainty* and took the shape of a legal protection tool. Let us now look in details into the consequences of this two-folded formalisation process.

a. First formalisation step: from rule of procedure to general principle

In practice, collegiality has always existed as a key element of the Commission’s institutional identity and has informed its decision-making from the very beginning. The Commission was born as a collegial

¹⁷ T. Tridimas, *The General Principles of EU Law* (Oxford University Press 2006) 11

¹⁸ *Ibid* 12

¹⁹ B. De Witte, ‘General principles of Union Law’, forthcoming.

institution²⁰. From the early days, collegiality has been part of the Commission's Rules of Procedures, which in Art. 1 stated that the Commission 'shall act collectively [...]'.²¹ However, the first step towards recognition of collegiality as a primary legal norm only happened in the eighties, when the CJEU elevated collegiality to a proper constitutional principle with direct effects. In the pivotal rulings *Akzo vs European Commission*, the Court derives the principle of collegiality from the Treaty-based rules on majority voting. In the words of the Court:

It must first be pointed out that that principle is to be traced to Article 17 of the Merger Treaty according to which 'the Commission shall act by a majority of the number of members provided for in Article 10. A meeting of the Commission shall be valid only if the number of members laid down in its rules of procedure is present.'²²

The connection established by the Court between collegiality and majority voting is interesting from both a substantial and a formal perspective. From a substantial point of view, this connection is indeed not obvious. One could be inclined to think that decisions taken unanimously are per definition collegial and that therefore collegial decision-making has more to do with consensus than with majority. And yet the Court's statement points in the opposite direction: majority voting ensures that decisions are collegial not merely because all members agreed upon them but because decisions are attributed to the institution as a whole – and to all its members indistinctively - even if not all of them agreed. If under unanimity collective decisions are a tautological necessity, majority voting points to a deeper conception of deliberating together.²³ The fact that decisions taken by majority are issued by the Commission as a single body and bound all its members is tantamount to recognising that decisions are taken on a collegial basis.

From a formal point of view, more importantly, the Court's argumentation implicitly treats collegiality as an unwritten norm of primary law rank. It derives the principle from the Treaties and uses it as a standard to decide on the legality of community acts. Indeed, after having defined the origin of the principle of

²⁰ The High Authority of the European Coal and Steel Community, the predecessor of the European Commission, was created as a collegial entity. For more information see M. Dumoulin (ed.), *The European Commission, 1958-72. History and Memories* (European Communities 2007)

²¹ European Commission, *Rules of Procedures of the Commission*, Official Journal of the European Communities, 31 January 1963.

²² Case C- 5/85, *Akzo Chemie v. Commission*, [1986] ECR 2585, para 30

²³ See for this concept J.H.H. Weiler, 'The Transformation of Europe' (1991) 100-8 *The Yale Law Journal* 2461. Weiler notes that 'reaching consensus under the shadow of the vote is altogether different than reaching consensus under the shadow of the veto'

collegiality the Court proceeds to analyse whether a system of delegation of authority within the Commission infringes or not the requirement of collegiality. The Court's consideration of collegiality as a higher norm against which to review the legality of adopted decisions resonates in the terminology used by the Court when it addresses the 'compatibility of that system [of delegation] with the principle of collegiate responsibility'.²⁴ This approach also finds confirmation in subsequent rulings. In the judgement *European Commission vs BASF* the Court states that 'decisions finding infringement of Article 85 cannot, without offending against the principle of collegiality, be the subject of a delegation of authority'.²⁵ Collegiality is here the reference norm determining the legality of delegation rules. The interplay between rules and principle equally emerges in the conclusions of *Commission vs Germany*, where the Court notes that 'in those circumstances, it must be held that the Commission complied with the rules relating to the principle of collegiality when it issued the reasoned opinion with regard to the Federal Republic of Germany and brought the present action'.²⁶ Collegiality is addressed as a principle creating rules, with which the Commission's acts and procedures (in this case in the field of State Aid) need to comply.

b. Second formalisation step: from general principle to constitutional norm

The second formalisation step followed almost twenty years later with the Treaty revision of Nice, that explicitly mentioned collegiality as an essential element of the Commission's modus operandi. Since then, the Treaties openly refer to the collegial nature of the Commission and currently Art 17.6 TEU establishes that the Commission shall act 'consistently, efficiently and as a collegiate body'²⁷. However, it can be interesting to note that this 'promotion' of collegiality to primary law is more formal than substantial. It certainly reinforces the claims considering collegiality a principle of primary law; yet at a closer look the Treaties simply point to the Commission as a collegial body without determining the principle's legal nature. Collegiality is indeed associated with general requirements such as consistency and efficiency, although in legal terms infringements of collegiality have been recognised by the Court concrete procedural consequences. The invitation to act as a collegiate body does not *per se* correspond to the recognition of a

²⁴ Case C- 5/85, *Akzo Chemie v. Commission*, [1986] ECR 2585, para 35

²⁵ Case C-137/92 P *Commission v BASF and Others* [1994] ECR I-2555, para 71

²⁶ Case C-191/95, *Commission v Federal Republic of Germany*, [1998] ECR 5449, para 50.

²⁷ *Consolidated version of the Treaty on the European Union*, [2008] OJ C 115/13 Art. 17.6.

principle with constitutional value and direct legal effects. Therefore, the jurisprudence of the Court remains essential to qualify collegiality as a principle of EU law and to determine the consequences of its violations. Ultimately, the dynamics of the formalisation process, e.g. the combination of Court's jurisprudence and Treaty amendments, led to the evolution of collegiality from unwritten norm to written EU constitutional principle governing the Commission's decision-making. The formalisation into the statutory text on the one hand constitutes an opportunity to change the nature of the norm, by enshrining it into written provisions of primary law. On the other hand, it leaves a wide domain still open to the interpretation of the Court, since Treaty provisions do not specify the substance of the Commission's collegial nature. As a result, collegiality, despite direct Treaty reference, for several aspects retains the nature of a general principle. In other words, it is the Court's qualification of this principle in its case-law that determines its place in the Union's legal system as a principle of a general nature, against which concrete rules can be reviewed. Yet, in many ways collegiality is a peculiar general principle and it features several elements of a special nature, that are hardly comparable to other general principles. The next section will elaborate on the nature of collegiality as an institutional principle in a comparative perspective.

IV. Collegiality as an institutional principle

At first sight, as noted in section 2, collegiality can be subsumed under the category of institutional principles – that is structural principles governing the EU institutional architecture.²⁸ They comprise an heterogeneous set of principles ranging from unwritten principles such as the principle of loyal cooperation or of institutional balance, developed by the CJEU but not directly contained in the Treaties, to judge-made principles later incorporated in the Treaties, such as proportionality. The principle of subsidiarity, however, can also be considered part of this category, although it finds its origin in and is governed by detailed Treaty provisions.²⁹ Under this respect, as was shown just yet, the principle of collegiality behaves partly as a Treaty-based principle and partly as a judge-made unwritten principle.

The heterogeneity of the category of institutional principles makes it even harder to locate collegiality in this space. At the risk of incurring in generalisations, however, comparing collegiality to some broad

²⁸ De Witte (n 9) 143-144

²⁹ De Burca (n 12) 103

categories of institutional principles can greatly help further define its legal nature. Interestingly, from the comparison collegiality emerges as a special case, unveiling *sui generis* features not resembling most institutional principles.

Generally, structural principles tend to be interinstitutional, such as the principles of loyal cooperation and of institutional balance, or at least general principles binding all institutions in their decision-making processes, such as the principles of transparency and sound administration. Conversely, the principle of collegiality is proper to one institution only, the Commission. It obviously has interinstitutional consequences, since the way the Commission acts may indirectly affect the position of the other institutions and the Member States, but it applies and binds the Commission only.

Moreover, unlike general principles of EU law, institutional principles ‘do not serve to protect the position of the individual, but rather to regulate the relations between institutions’.³⁰ In other words, they concern the institutions and not the individuals and cannot directly be invoked as ground for review of a legal act. In this regard collegiality represents an exception, in that it undoubtedly bears legal consequences that can be invoked as ground for annulment. Under this perspective, collegiality can be associated with the principle of proportionality. Born as a principle of administrative law aiming at protecting individuals, proportionality has evolved beyond this remit to also govern the vertical relations between institutions. It protects the autonomy of Member States as well as the position of individuals.³¹ Similarly, collegiality shows a dual function, as a procedural principle of administrative law of concern to individuals and as an institutional principle governing the Commission’s internal decision-making.

Finally, the principle of collegiality might be associated with broader principles of decision-making, such as transparency. However, collegiality is less general in nature as it identifies a clear requirement of decision-making – e.g. that all decisions be adopted by the full college of Commissioners. Collegiality is not a general principle applying to all institutions but a particular procedure governing the decision-making of a single institution. It is therefore principle and procedure. It is principle of organisation and procedure of decision-making, similarly to qualified majority voting or simple majority for the Council and the Parliament. How

³⁰ B. De Witte (n 9) 143

³¹ Ibid 149-150

can a procedure be by the same token a principle of EU law? This ambiguity finds its origin in the above mentioned dual nature of collegiality. It is both a principle of administrative law protecting the position of individuals and an institutional principle, protecting institutional decision-making (yet it protects the decision-making of one institution only and not the interinstitutional relations between several institutions as it is the case for most institutional principles). This dual function performed by collegiality is also reflected in the way the CJEU and the General Court (GC) have approached the justiciability of the principle.

The principle of collegiate responsibility thus laid down is founded on the equal participation of the members of the Commission in the adoption of decisions and it follows from that principle, in particular, that decisions should be the subject of a collective deliberation and that all the members of the college of Commissioners bear collective responsibility on the political level for all decisions adopted.³²

This Court's statement perhaps represents the most developed interpretation of what collegiality is and what its legal consequences are. First, collegiality is a rule of procedure for the legality of adopted acts: Commission's decisions need to be adopted by the full college. This rule, however, finds its foundation at the political level, upon the fact that Commissioners must be equal and carry collective responsibility for all decisions adopted. In addition to a procedural requirement, collegiality is also a political principle of decision-making and, as such, it informs the internal organisation of the Commission well beyond the formal adoption of legal acts only. In subsequent rulings, the Court has consistently confirmed this interpretation of collegiality as a procedural principle, which is however also co-substantial to the Commission's decision-making.

Therefore, collegiality identifies a principle of administrative law bearing concrete legal effects on the individuals (section V) as well as an institutional principle of EU decision-making (section VI). The rest of the paper will further investigate these two aspects of the legal dimension of collegiality, unveiling the dual function of the principle through the prism of the Courts' jurisprudence. The inherent tension between the two sides of collegiality emerges in particular when it comes to striking a balance between collegiality and other interests, such as efficiency or transparency.

³² Case C- 5/85, *Akzo Chemie v. Commission*, [1986] ECR 2585, para 30

V. Collegiality as procedural principle for the legality of adopted acts

Wiklund and Bengoetxea's classification of principles of EU law identifies collegiality as a principle of administrative law.³³ Indeed, the jurisprudence of the CJEU has recognized concrete legal effects to the principle of collegiality and has elevated it to a substantial procedural requirement for the legality of adopted acts. Respect of collegiality is of direct concern to individuals, as already mentioned in section III.³⁴

In her analysis of litigation on collegiality, E. Neframi argues that collegiality represents both a procedural flaw and a procedural right of the individuals under administrative EU law. Under the perspective of administrative law collegiality is closely related to the need to ensure the impartiality of the Commission's action and can be said to operate in conjunction with the principle of sound administration³⁵. At the very least, collegiality contributes to good governance by ensuring that decisions are taken equitably and impartially. Respect of collegiality thus happens to be an important element in ensuring the protection of individuals affected by the decisions adopted by the college, who 'must be sure that those decisions were actually taken by the college of Commissioners and correspond exactly to its intention'³⁶.

The principle of collegiality, however, hardly constitutes a stringent standard of review. The Court appears to be rather reluctant to accept violations of collegiality as grounds for annulment and it has recognized a breach of collegiality in a very limited number of cases.³⁷ An analysis of case-law involving collegiality shows that, whereas the principle of collegiality is invoked as a ground for annulment in a very high number of cases, this number falls sharply if one considers only the cases in which the Court seriously considers this claim as a valid legal argument. For instance, the acts of the Commission are covered by the presumption of validity. Therefore, according to the Court, the Commission is not bound by any obligation to provide proof or justification of compliance with the principle of collegiality, as the obligation to state reasons on

³³ Wiklund and Bengoetxea (n 8) 133

³⁴ Case C-137/92 P *Commission v BASF and Others* [1994] ECR I-2555, para. 64

³⁵ E. Neframi, 'Le principe de collégialité devant le juge de l'Union Européenne' in J.-J. Menuret and C. Reiplinger (eds), *La collégialité, valeurs et significations en droit public* (Bruylant 2012) 151

³⁶ Case C-137/92 P *Commission v BASF and Others* [1994] ECR I-2555, para. 64

³⁷ To my knowledge the Court of First Instance has annulled two decisions in the cases T-80/89, *BASF AG and others v Commission*, [1995] ECR II-00729, and T-33/01 *Infront v Commission* [2005] ECR II-5897 on the ground of a violation of collegiality, whereas the CJEU has recognised a breach of collegiality but has annulled the contested decision for failure to authenticate the decision in the case C-137/92 *Commission v BASF and Others* [1994] ECR I-2555

which basis legal acts are adopted does not extend to collegiality.³⁸ The review of conformity with collegiality only happens in the presence of elements clearly hinting to the possibility that the act at stake does not properly reflect the will of the college.

In addition, the scrutiny of the Courts considers the impact of legal consequences on individuals and to what extent individuals are affected by the Commission's action. Individuals are particularly affected by e.g. decisions on infringement of competition rules, decisions issuing directions to undertakings and imposing pecuniary sanctions upon them,³⁹ in which case the judge appears to be stricter in the review of collegiality. In the case *Commission v Germany* the CJEU states that 'the formal requirements for effective compliance with the principle of collegiality vary according to the nature and legal effects of the acts adopted by that institution'.⁴⁰ The Court seems to privilege a case-by-case approach to the determination of the actual violations of collegiality that takes into account the type of act at stake, its legal effects, and who is affected by them. Interestingly, in her analysis of the principle of proportionality, G. De Burca reports a similar approach by the Court, noting that 'there was no single 'way' in which the proportionality test was applied. Rather, it appeared as a sliding scale of scrutiny whose intensity altered considerably depending on a range of variables: on the importance and clarity of the legal right restricted, on the importance and nature of the public or other interest for which the right was being limited, and a range of other considerations'.⁴¹

The interpretation given by the Courts is of a 'functional' type, avoiding categorization of acts or situations in which violation of collegiality can be systematically established. The principle of collegiality is recognized as a central principle of the Commission's functioning. Yet, judicial review by the CJEU is limited to the formal expression of collegiality. The Court tends to mainly treat collegiality as a procedural requirement for the protection of the right of individuals to have their decisions taken in the most impartial and effective way. The examination of the Court focuses on the formal conditions of the adoption of the act by the college, on the control of the procedural legality of the delegation of authority and on the control on the

³⁸ Case C-377/98, *Netherlands v Parliament and Council* [2001] ECR I-7079 and case T-308/94, *Cascades SA v Commission of the European Communities*, [1998] ECR II-00925. In the absence of any evidence or specific facts the presumption of validity of community acts apply.

³⁹ Case C-137/92 P *Commission v BASF and Others* [1994] ECR I-2555, para. 65.

⁴⁰ Case C-191/95, *Commission v Federal Republic of Germany*, [1998] ECR 5449, para. 41.

⁴¹ De Burca (n 12) 97.

nature of the act involved. Under this regard collegiality appears in its nature of procedural rule for the adoption of acts.

VI. Collegiality as an institutional principle for the Commission's organisation

In addition to represent a procedural rule for the adoption of the Commission's acts, collegiality can more broadly be considered as a general principle governing the Commission's internal decision-making and determining its agenda and organisation. As such, it embodies an institutional principle, that is not targeted to the protection of the position of individuals but concerns the Commission as institution. Although the Court has so far never explicitly addressed collegiality in this way, some references to the institutional nature of collegiality can be spotted in its jurisprudence, especially when collegiality is considered in the light of the balance of interests. Precisely as part of the objective of ensuring good administration, the principle of collegiality can potentially conflict with opposing interests, such as the need to ensure efficiency and transparency of the decision-making.

First, as regards efficiency, the Court has set clear limits to the compatibility of power delegation with the principle of collegiality. Delegation of authority is required in some instances for the sake of ensuring the efficiency of the Commission's procedures and avoiding an overload of the college but it should be limited to specific categories of measures of management or administration, thus excluding by definition decisions of principle. Only in the case of non-political decisions of administrative and technical nature, the Commission is authorised to suspend the collective approach to decision-making, by delegating its authority to a single Commissioner or Director-General. The Court thus explicitly recognizes the need to re-balance the scope of the principle of collegiality against the imperative of efficient decision-making. In the *Akzo* ruling it states that 'such a system of delegations of authority appears necessary, having regard to the considerable increase in the number of decisions which the Commission is required to adopt, to enable it to perform its duties'.⁴² The argument of the Court points to collegiality as a principle essential to the Commission's administrative procedural legality, yet it circumscribes the scope of application to protect the

⁴² Case C- 5/85, *Akzo Chemie v. Commission* [1986] ECR 2585, para. 37

Commission as an institution by avoiding turning collegiality into an obstacle to smooth and efficient decision-making.

Secondly, as collegiality implies a certain degree of confidentiality, it can run against the principle of public access to documents and transparency. Unsurprisingly the Commission has advocated in several occasions the safeguard of collegial decision-making as an argument justifying its refusal to grant access to internal documents. EU Courts have been careful to balance out the interest of the public in obtaining access to the documents at stake against the risk to undermine the Commission's decision-making process. In doing so they have implicitly treated collegiality just like an institutional principle. For instance, in the case *MyTravel Group plc v Commission* the General Court has been very defensive of the Commission's interest to protect its internal decision-making process, stating that disclosure of internal documents related to a working group report would risk seriously undermining the decision-making freedom of the Commission with respect to the collegial adoption of decisions. Such an action

would carry the risk not only that the possibly critical opinions of Commission officials might be made public, but also that the content of the report – which is a preparatory document containing the views and recommendations of the working group – could be compared with the decisions ultimately taken on those points by the Member of the Commission responsible for competition matters or within the Commission and, accordingly, that that institution's internal discussions would be disclosed.⁴³

Conversely, in the case *Commission v Agrofert Holding*, the balance is struck in favour of the individual interest to be granted access to documents. In this case the company Agrofert Holding had requested the Commission to grant access to the unpublished documents concerning an acquisition procedure that had been authorised by the Commission. The Commission had refused access and argued inter alia that disclosure would have undermined its decision-making process, alleging specifically the need to protect the collegiate nature of the decision-making, the trust within the services and independent expression of opinion⁴⁴. Both the GC and the CJEU however held that even in the case of internal documents covered by a restriction on access, the Commission needed to demonstrate that access to documents 'was likely

⁴³ Case T-403/05, *MyTravel Group plc v Commission*, [2008] ECR II-2027, para 51

⁴⁴ Case C-477/10 P - *Commission v Agrofert Holding* [2012] ECR 394, para 51

specifically, actually and seriously to undermine protection of the decision-making process of the institution concerned and that that risk was reasonably foreseeable and not purely hypothetical'.⁴⁵

The cases show the inherent tension between the interests of collegial decision-making and transparency. The contrast has grown in importance in recent times, due to the increasing attention given to transparency as an instrument to enhance legitimate and democratic decision-making. As a result, the confidentiality required by collegial decision-making has been put under pressure. EU judges have recognised this trend by limiting the cases in which the Commission can legitimately withhold public disclosure of documents. However, in doing so, they have continued considering the need to protect the Commission's institutional integrity as a collegial body, addressing collegiality as an institutional principle governing the Commission's decision-making.

VII. Conclusions

The principle of collegiality has emerged as a *sui generis* general principle of EU law. It is an institutional principle of the EU legal system, yet it governs the functioning of a single institution. It is halfway between an unwritten principle of EU law and a codified principle of the Treaties. It is at the same time a general principle of the Commission's decision-making and a specific rule of procedure. It affects the position of individuals and therefore represents a principle for the protection of their interests, yet it also aims at governing institutional decision-making. As such, it can be considered a multifaceted principle of an almost chameleonic nature, as it changes its qualifications depending on the perspective and the environment it is looked upon.

The paper has attempted to put some order in this rather intricate issue. The issue is intricate for at least two reasons. The first one is that there is barely any literature available on the matter: collegiality is broadly addressed as a principle but its legal nature as a principle remains unexplored. The second reason is that, although there is only one single principle of collegiality, there appears to be at least two ways to look at it: as a principle of administrative law governing the procedure of formal adoption of acts and as an institutional principle governing the way in which the Commission operates and organises its work. In this

⁴⁵ Ibid, para 23

second sense, the role of collegiality in decision-making acquires a broader meaning, pertaining to the way the Commission works at the administrative and political level. Ultimately, this second interpretation of collegiality touches upon the role and function that this principle is called to play as a guarantee of the Commission's independence, impartiality and ultimately supranational mission.

The CJEU in its jurisprudence on collegiality seems to at least confirm that there can be several reading levels of the role performed by collegiality in decision-making. However, judicial review by the CJEU is limited to the formal expression of collegiality and is restricted to the specific legal actions that have been brought to the Court. Beyond the formal respect of the principle of collegiality it remains to be explored why and how this principle informs the decision-making of the Commission in practice. In this light collegiality emerges as the fundamental principle of Commission's decision-making, the principle that at best reflects the uniqueness of the Commission's identity as a supranational institution with extensive decision-making powers. The key role played by collegiality in the EU institutional governance, however, also threatens its capacity to hold in the light of emerging doubts over the legitimacy of EU institutions in general - and of the Commission in particular. Can collegiality, as the principle *par excellence* of an independent institution, resist the erosion of the Commission's "independent", administrative and expert-based role by the growing political leadership and quasi-governmental functions that the Commission has increasingly been assuming?⁴⁶ Defining the legal nature of collegiality is in this perspective the first step towards shedding light on this often forgotten principle and its impact on the EU institutional and inter-institutional setting.

This analysis of collegiality as a principle of EU law does not pretend to be exhaustive. On the contrary, it is thought as a first, initial contribution to a possibly unexplored field of research. The first part of the paper has sketched out a comparative analysis between collegiality and other institutional principles in order to derive the main features of collegiality and the legal consequences of its 'being a principle'. Although this preliminary analysis suggests that collegiality in fact represents a special and possibly unique type of principle, there might on the contrary be other principles behaving alike. If this is the case, the analysis of the legal status of collegiality opens the door to further research directions and reflection opportunities.

⁴⁶ N. Nugent and M. Rhinard, *The European Commission* (Palgrave Macmillan 2015) 247