



ARTICLES

USING THE HISTORICAL ARCHIVES OF THE EU TO STUDY CASES OF THE CJEU – FIRST PART

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ERTA AND US: SHIFTING CONSTITUTIONAL *EQUILIBRIA* ON THE VISIONS OF EUROPE

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ABSTRACT: The *ERTA* case marks the constitutional inception of EU external relations. It laid the foundations for the legal framework governing the exercise of the EU's external competences and is often associated with the development of the doctrine of implied powers. The main tenets of the Court's pronouncement continue to define the fabric of the EU's external action. As the first Commission v Council litigation, *ERTA* encapsulates a still perceivable tension between two visions of Europe. One emphasises the autonomy of the EU institutional framework, the other regards the EU institutions as common organs in the hands of the Member States. *ERTA's dossier de procédure* constitutes a unique laboratory to assess the development of the EU as a legal order and an international actor. Its precious documents offer new sources to appreciate the abovementioned tension and unravel the shifting constitutional equilibria emerging from the interplay between EU and Member States treaty-making powers. Building on the archival research, this *Article* reflects on the inner working of the Court's judicial strategy. It seeks to shed novel light on the genealogy of the fascinating debate on the constitutional underpinnings of EU external relations.

KEYWORDS: legal nature of the Council decisions – nature of the EU legal order – institutional and organic visions of Europe – sincere cooperation – *effet utile* – autonomy.

I. INTRODUCTION

It is difficult to overestimate the significance of the *ERTA* case for the development of EU external relations law. *ERTA* involved a dispute arising from the Member States' negotiations

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of the *European Agreement Concerning the Work of Crews of Vehicles Engaged in International Road Transport (ERTA)*. Negotiations continued also after the adoption of Community Regulation 543/69 on harmonisation of social legislation relating to road transport¹ covering similar matters to those regulated by the international agreements. The Commission brought an action for annulment against the “proceedings” of the Council’s meeting relating to the negotiation and the conclusion by the Member States of the ERTA agreement. Indeed, notwithstanding that the subject matter of working conditions of crews employed in international road transport had been covered by Community rules, the Member States continued to negotiate the ERTA only with some concertation within the Council.

In *ERTA* the Court defined the constitutional underpinning of the EU external action. Departing from the advice of the Advocate General (AG), the Court established that the scope of the EU’s international capacity was not limited to expressly conferred competences. Indeed, it introduced the principle of parallelism between the Community’s internal and external powers: “With regard to the implementation of the provisions of the Treaty the system of internal Community measures may not therefore be separated from that of external relations”.²

Moreover, the Court sanctioned the existence of the Community external competence while simultaneously characterizing it as exclusive:³ “[...] each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules”.⁴

In its interpretation of the Treaty system, the Court largely followed the arguments of the Commission. It established, however, that in this specific case, the Council had not infringed its Community law obligations. The Court also found that the Member States, in carrying on the negotiations and concluding the agreement in the manner decided on by the Council, acted in accordance with their obligations under art. 5 [now art. 4(3) TEU] of the Treaty.⁵ The Commission thus lost the case.

II. A CONSTITUTIONAL MOMENT: ADMISSIBILITY SUBORDINATED TO COMPETENCE

The analysis of the *dossier* enables a different perspective on this landmark judgment bringing to the fore revealing elements of the Court’s judicial strategy. The *dossier* highlights the reticence of the Court in engaging with the submission of the Council on the

¹ Regulation (EEC) 543/69 of the Council of 25 March 1969 on the harmonisation of certain social legislation relating to road transport.

² Case 22/70 *Commission v Council (ERTA)* ECLI:EU:C:1971:32 para. 19.

³ P Eeckhout, *EU External Relations Law* (Oxford University Press 2012) 74.

⁴ *ERTA* cit. para. 17.

⁵ *Ibid.* para. 90.

ascertainment of the very nature (*nature propre*) of the Council's contested proceedings. The contested act, against which the Commission brought an action for annulment, pertained to the Member States' negotiation of the ERTA international agreement. The importance of the ascertainment of the nature of the act, which constituted a primary aspect of the Council's defence, does not sufficiently emerge from the reading of the judgment alone. As will be discussed in the next section, the ascertainment of the different nature attributed to the contested act entails entering into the debate on different visions of Europe. In this respect, the institutional disagreement arose regarding the relationship between the art. 173 EEC [263 TFEU] and art. 189 EEC [288 TFEU]. The Council contended that its proceedings of 20 March 1970 did not constitute an act within the meaning of art. 173 of the EEC Treaty, against which proceedings could be instituted.⁶ It posited a strict relation between art. 173 and 189 EEC. Neither on the basis of form nor content could the contested proceedings be considered a regulation, directive or decision within the meaning of art. 189. Therefore, the combined reading of arts 189 and 173 did not allow an action for annulment against the contested act.⁷

Interestingly, the Council contemplated the possibility of art. 173 EEC being broader in scope than art. 189 EEC hence admitting that actions of annulment could be brought against acts that are not envisaged in art. 189. In this case, however, the Council stressed the necessity to assess the very nature⁸ of the contested proceedings and whether they could be assimilated, on the basis of their legal tenor and effects, to regulations, directives, or decision or to recommendations and opinions. According to the Council if, as it claimed, the proceedings were to be found to have no legal effects, no action for annulment could be brought.⁹ Furthermore, the Council clarified that the proceedings were intended to express political approval of this agreement. The contested "act" thus merely represented the acknowledgment that the endeavours of the Member States to adopt a common position had a specific outcome.¹⁰

The Commission engaged in an analysis of the nature of the act under review, underlining the legal effects of the proceedings. It maintained that the Council did not confine itself to recognising the coordination existing between the Member States.¹¹ The deliber-

⁶ *Dossier de Procédure Original ERTA* HAEU CJUE-1171, Council's objection for inadmissibility, 1; *Dossier de Procédure Original ERTA* HAEU CJUE-1171 cit., report of the oral hearing, 4; *ERTA* cit. 267 and para. 34.

⁷ *Dossier de Procédure Original ERTA* HAEU CJUE-1171, Council's objection for inadmissibility cit. 8-10 and 12; *ERTA* cit. para. 35.

⁸ *Ibid.* 10 (*nature propre* in the original version).

⁹ *Ibid.* 9-12.

¹⁰ *Ibid.* 16-17; *ERTA* cit. 267 and para. 35.

¹¹ *Dossier de Procédure Original ERTA* HAEU CJUE-1171 cit., Council's application for annulment, 6; *Dossier de Procédure Original ERTA* HAEU CJUE-1171, report of the oral hearing cit. 8; *ERTA* cit. 268.

ations it adopted had at the very least to be regarded as amounting to approval. Moreover, actual directives on the negotiations were issued to the Member States.¹² As a matter of fact, the Council proceedings resulted in the lack of any Community involvement in the formulation and conclusion of the ERTA as the participation in this agreement was left to the Member States alone. Furthermore, as was clear from various passages of the Council's contested proceedings, the Member States accepted an ERTA treaty text which was incompatible with Regulation 543/69.¹³ The Commission also questioned the logic of the Council's arguments, highlighting two instances of *petitio principii*. First, the premise of the Council's argument was that the only purpose of its deliberation was to recognise the coordination between the States. The conclusion was that annulment of that deliberation would not affect the reality of such coordination.¹⁴ Secondly, it contested the reasoning according to which, since the Council was not competent to authorise the Member States to negotiate and conclude the ERTA, its act had no legal effect. This would have involved, paradoxically, that Community institutions could never initiate proceedings on the ground of lack of competence.¹⁵

Interestingly, the Court decided to subordinate the foregoing considerations on admissibility to the assessment of Community powers. The Court maintained that in order to ascertain the legal nature of the Council's proceedings, a preliminary assessment should be carried out on whether at the date of the proceedings, the power to conclude ERTA was vested in the Community or in the Member States. The Court therefore decided to tackle first the question on substance casting it in terms of powers and competences, and not in terms of the legal nature of the act. It thus left the issue of admissibility for a subsequent stage. These insights help to better appreciate the defining constitutional moment brought about by the Court's judicial strategy.

In powerful commentary on the *ERTA* judgment, McNaughton qualified the decision as a defining "foundation stone of the "new legal order of international law" referred to by the ECJ in its *Van Gen den Loos* decision". In domains covered by EU competence, "*ERTA* established the supremacy of EU law over Member States' law externally, in the same

¹² *Dossier de Procédure Original ERTA* HAEU CJUE-1171, Commission's response to the objection of inadmissibility, 14-15; *Dossier de Procédure Original ERTA* HAEU CJUE-1171, report of the oral hearing cit. 7; *ERTA* cit. 268. Not explicitly referred to by the Court but relied upon in *ERTA* cit. para. 53.

¹³ *Dossier de Procédure Original ERTA* HAEU CJUE-1171, Commission's response to the objection of inadmissibility cit. 16; *Dossier de Procédure Original ERTA* HAEU CJUE-1171, report of the oral hearing cit. 8; *ERTA* cit. 268. Not explicitly referred to by the Court but relied upon in *ERTA* cit. paras 54-55.

¹⁴ *Dossier de Procédure Original ERTA* HAEU CJUE-1171, Commission's response to the objection of inadmissibility cit. 20-21; *Dossier de Procédure Original ERTA* HAEU CJUE-1171, report of the oral hearing cit. 9; *ERTA* cit. 268-269. Not explicitly referred to by the Court but endorsed in *ERTA*, cit. paras 60-61.

¹⁵ *Dossier de Procédure Original ERTA* HAEU CJUE-1171, Commission's response to the objection of inadmissibility cit. 18-20; *Dossier de Procédure Original ERTA* HAEU CJUE-1171, report of the oral hearing cit. 8; *ERTA* cit. 268.

way that *Costa* established the supremacy of EU law over national law within the EU".¹⁶ It is indeed a distinct constitutional moment from *Costa* and *Van Gen den Loos* which is precisely characterised by the prominence of the competence discourse in the establishment of the EU as an international actor. The Court could have reached the same results by applying a rule of primacy.¹⁷ The judicial strategy on the subordination of the admissibility issue to that of substance reinforces this constitutional reading of *ERTA*.

Additional elements emerging from the *dossier's* analysis shed light on the Court's constitutional stance. In particular, the *dossier* reveals how the Court's elaboration of the principle of parallelism goes well beyond the submissions of the parties. The Council claimed that the Commission's thesis, according to which confining the scope of Community action to unilateral internal measures would have required a specific provision, amounted to a claim that the Community enjoys external powers whose scope reflects the scope of its internal powers. Instead, the Council claimed that it was apparent that there were subject matters that fell within the scope of the Treaty without entailing competence transfers for external affairs.¹⁸ The Commission, however, maintained that it had never argued the existence of a "parallelism between the Community's internal and external competences".¹⁹ Instead, it highlighted the need to rely on such general principles of interpretation of the Treaty as *effet utile* and the effectiveness and uniformity of Community law.²⁰

Moreover, the *dossier* illustrates that the Court introduced on its own initiative the principle of sincere cooperation in the appraisal of the circumstances of the case. Indeed, the principle was not mentioned in the submissions of the parties nor in the Opinion of the Advocate General. The use of the principle of sincere cooperation epitomises a typical attitude of the Court that has been defined as principled and pragmatic.²¹ In its principled reasoning, the Court referred to sincere cooperation to highlight the duties of Member States "to take all appropriate measures to ensure fulfilment of the obligations arising out of the Treaty or resulting from action taken by the institutions" and the duty "to abstain from any measure which may jeopardise the attainment of the objectives of the Treaty".²² Referring to the principle of sincere cooperation, the Court then pragmatically ruled that the Member States, following the instructions of the Council, had acted in conformity with art. 5 EEC and therefore the Council did not fail in its obligations arising from art. 75 and 228.²³

¹⁶ A McNaughton, 'Acts of Creation: The *ERTA* Decision as a Foundation Stone of the EU Legal System' in F Nicola and B Davies (eds), *EU Law Stories* (Cambridge University Press 2017) 135.

¹⁷ P Eeckhout, 'Bold Constitutionalism and Beyond' in MP Maduro and L Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 219.

¹⁸ *Dossier de Procédure Originale ERTA* HAEU CJUE-1171 cit., Council's submission of defence, 5.

¹⁹ *Dossier de Procédure Originale ERTA* HAEU CJUE-1171 cit., Commission's reply to the Council's defence.

²⁰ *Dossier de Procédure Originale ERTA* HAEU CJUE-1171, Council's submission of defence cit. 5.

²¹ P Eeckhout, *EU External Relations Law* cit. 75.

²² *ERTA* cit. para. 21.

²³ *Ibid.* para. 91.

By deciding to address the issue of admissibility after its pronouncement on the substance of the dispute, the Court made a constitutional move. It defined the constitutional underpinnings of the EC external relations based on competences and more specifically on the parallelism between the exercise of internal and external competences. At the same time, it pragmatically mitigated this bold constitutional stance by stressing the principle of sincere cooperation to govern the articulation of Community and Member States' external powers.

III. THE TENSION BETWEEN THE INSTITUTIONAL AND THE ORGANIC VISIONS OF EUROPE: THE NATURE OF THE CONTESTED ACT

The foregoing considerations do not give justice to the reasons behind the Court's reticence in addressing the issue of admissibility; this requires closer scrutiny of the legal nature of the Council's proceedings. It is worth highlighting that *ERTA* was the first instance of a judicial dispute arising between the Commission and the Council before the European Court of Justice. The Advocate General himself underlined the "unusual and exceptional nature" of the dispute bringing the two most prominent institutions of the European Community (at that time) against each other.²⁴ (Since then, of course, this has become a familiar feature of external relations litigation.) A closer look at the submissions of the Council and the Commission reveal how they encapsulate two different visions of Europe. On the one hand, the Council seemed to embrace an organic vision of the Community, premised on the assumption that the Community institutions could be considered as organs in the hands of the Member States. On the other hand, the Commission, largely followed by the Court, promoted an institutional vision of the Community stressing the autonomy and the distinctiveness of the Community legal framework.²⁵

These two visions of Europe resulting from the various submissions of the parties available in the *dossier* help to better understand the crucial considerations introduced by the Advocate General. AG Dutheillet de Lamothe invited the Court to answer the question of whether the contested deliberation of the Council could be considered an act of an institution of the Community. This would be the case if the negotiation of the *ERTA* fell within the scope of one of the Treaty articles relating to the Community external authority. Only under these circumstances could the application be considered as admissible. In the latter case, instead, the contested proceedings should be considered not as an "act of a Community authority but of the Council as unifying agency of the Member States [*comme organe de la collectivité des États membres*]"²⁶

²⁴ Case 22/70 *Commission v Council (ERTA)* cit., opinion of AG Dutheillet de Lamothe 284.

²⁵ For a reflection on the tension between the organic and institutional visions of the EU see L Azoulai, 'The Many Visions of Europe' in M Cremona and A Thies (eds), *The European Court of Justice and External Relations Law: Constitutional Challenges* (Hart Publishing 2014).

²⁶ *ERTA*, opinion of AG Dutheillet de Lamothe, cit. para. 289.

The dispute about the nature of the act, not adequately accounted for in the publicly available materials, and about the admissibility of the action for annulment displays its significance if put against the background of the lively academic discussions taking place during the years immediately preceding the delivery of the *ERTA* judgment. In this respect, it is worth reviewing the scholarly works of the *juge rapporteur*, a function that is described as that of “a key figure in the process of deliberation”.²⁷ In *ERTA*, the *juge rapporteur* was Pierre Pescatore, who, in his lifetime, served as director of political affairs at the Luxembourg ministry of foreign affairs, as professor of law and judge. He thus played a crucial role in shaping the drafting of legal norms in European negotiations, the doctrinal conceptualisation of the law of European integration.²⁸

In 1966, he authored an inspiring contribution entitled *Remarques sur la nature juridique des “décisions des représentants des états membres réunis au sein du Conseil”*.²⁹ Here, he pointed out that the Council, in some circumstances, does not act as a Community institution in the strict sense (*une institution proprement communautaire*) but as a diplomatic venue of the representatives of the Member States (*reunion diplomatique des Représentant des Etats membres*). In these circumstances, he noticed, the acts of the Council would not be part of the system of the acts emanating from the institutions. In fact, although these acts rely upon the *structure organique* created by the Treaty, they do not derive their legal force from Community competence but from the international competence of the Member States.³⁰ Pescatore *qua* judge, instead, preferred not to dwell on the relationship between the international law actions of the Member States and Community acts. The Court’s pronouncement is indeed silent on this issue. In light of Pescatore’s previous scholarly work on the *nature juridique des décisions*, judge Pescatore, and the Court, could have interpreted the contested proceedings as being of an international law nature and originating from the international law powers of the Member States acting within the Council.

In the judgment no mention is made of this tension and of its implications. Such a reticence is striking if one takes into account that this issue is a salient feature in the various submissions of the Council accessible in the *dossier*. There appears therefore to be a remarkable restraint on the part of the Court originating from the Judge’s report where the Council’s request to the Court to investigate the *nature propre* of the act was

²⁷ A Arnall, *The European Union and Its Court of Justice* (Oxford University Press 2006) 9.

²⁸ Monumental his P Pescatore, *The Law of Integration: Emergence of a New Phenomenon in International Relations, Based on the Experience of the European Communities* (Sijthoff 1974).

²⁹ P Pescatore, ‘Remarques sur la nature juridique des ‘décisions des représentants des Etats Membres réunis au sein du Conseil’ (1966) *Sociaal-economische wetgeving* 582.

³⁰ Il s’agit d’actes à caractère diplomatique (ou international), complémentaires à la fois des traités eux-mêmes et du système d’actes institutionnels que ceux-ci ont mis en place; bien que ces “décisions” s’appuyent sur la structure organique créée par les traités européens, ils ne sont pas, pour autant, couverts formellement par les attributions de pouvoir prévues par ces traités. Ces actes relèvent non pas de la compétence communautaire, mais bien plutôt de la compétence internationale des états membres. P Pescatore, ‘Remarques sur la nature juridique’ cit. 579–580.

left in the background. Arguably, a subsequent scholarly work by Pescatore helps to make sense of this Court's prudent attitude in addressing matters of international law. He explained that reliance on criteria and arguments deriving from international law could lead to a "disintegration" of the Community legal order by introducing into the Community "trojan horses loaded with such thoughts".³¹

As convincingly highlighted by German scholarship reflecting on the work of the prominent Luxembourgish judge and scholar, this "introversion of the legal argument" – or economy of judicial reasoning – amounted to a strategy of judicial restraint aimed at marking the distinction between international law and Community law.³² Along these lines, Pescatore stressed that the Court wanted to react against a contractual conception of the Community intended as a "common organ"³³ serving the need to represent determined interests of a group of Member States.³⁴ The Court wished to promote, instead, an institutional vision of the Community giving prominence to its autonomy and distinctiveness especially in the external relations domain.³⁵ However, as the next section shows, the oscillation between the principled embracing of the institutional vision and the pragmatic choice for the organic vision brought uncertainties in the development of the EU legal order.

In light of the foregoing, one may wonder when the juxtaposition of the two visions of Europe originated. Although it is rather hard to find a definitive answer to this question, it should be noticed how the original French version of the judgment refers to the *cadre*

³¹ "Diese Zurückhaltung hat mancherlei Gründe, von denen der eindeutigste wohl in der Sorge besteht, das Gemeinschaftsrecht durch Einführung völkerrechtlicher Wertmaßstäbe nicht desintegrieren zu lassen. [...] Daraus geht nämlich hervor, daß Dinge wie: formlose Änderung und Aufhebung der Verträge, Außerkraftsetzung des Gemeinschaftsrechts durch widersprechende staatliche Gesetze und, in *gravierenden Konfliktsituationen* der Vorrang der staatlichen Macht vor dem Recht im Völkerrecht immerhin erwägenswerte Fragen sind. Wenn solche Denkweisen, in der Tat für völkerrechtliche Argumentation repräsentativ sind, muß man verstehen, daß der Gerichtshof es vermeidet, ein mit solchen Ideen befrachtetes trojanisches Pferd in das Gemeinschaftsrecht einzuführen" (emphasis added): P Pescatore, 'Die Rechtsprechung des Europäischen Gerichtshofs zur innergemeinschaftlichen Wirkung völkerrechtlicher Abkommen' in R Bernhardt, WK Geck, G Jaenicke and H Steinberg (eds), *Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte. Festschrift für Hermann Mosler* (Springer-Verlag 1983) 663 footnote 5.

³² D Thym, 'Foreign Affairs' in A Von Bogdandy and J Bast, *Principles of European Constitutional Law* (Hart Publishing 2010) 320-321. See also M Kottmann, *Introvertierte Rechtsgemeinschaft: Zur Richterlichen Kontrolle Des Auswärtigen Handelns Der Europäischen Union* (Springer-Verlag 2014).

³³ See the AG in *ERTA* referring repeatedly to the possibility identifying the Council as an "organe de la Communauté".

³⁴ See for instance, P Pescatore, 'Some Thoughts on the Allocation of Power in the External Relations Field' in A Bleckmann, *Division of Powers Between the European Communities and Their Member States in the Field of External Relations: Colloquium, 30 and 31 May 1980* (Kluwer 1981) 75; P Pescatore, 'Les Communautés en tant que personnes de droit international' in JW Ganshof van der Meersch, *Les Nouvelles: droit des Communautés européennes* (Larcier 1969) 113.

³⁵ L Azoulay, 'Appartenir à l'Union européenne. Liens institutionnels et relations de confiance entre Etats membres de l'Union' in C Mestre (ed), *Europe(s), droit(s) européen(s): une passion d'universitaire: Liber amicorum en l'honneur du professeur Vlad Constantinesco* (Bruylant 2015) 33.

des institutions communes that is different in meaning from the official English translation reading "framework of Community institutions"; with the latter being legally sounder.³⁶ Azoulai contends that the ambiguity of the original version might be considered deliberate. Indeed, the Court "borrow[ed] and slightly alter[ed] an expression used in competing theories [those considering the institutions as "common organs"³⁷ in the hands of the Member States] in order to underline the difference with its own position".³⁸

IV. ERTA AND US: CONTESTED EQUILIBRIA BETWEEN THE TWO VISIONS OF EUROPE

The foregoing reflection emphasizes that the legacy of the *ERTA* case is not limited to introducing the competence discourse in the EU external relations law. The submission of the parties available in the *dossier* allows us to capture broader issues of the debate on the nature of the EU legal order that go beyond the traditional competence-based analysis of the case. Indeed, a related process of constitutionalisation occurred, aimed at shielding the specific characteristics of EU law from international law elements in the EU decision-making process that may result from the intrinsic composition of the Council and from the international law powers resting with the Member States. However, establishing an equilibrium between the principled constitutional attempt and the Member States' international prerogatives finds no easy solutions.

The Court's reasoning in *ERTA* displays an oscillation between the institutional and the organic vision of the Community. Indeed, the Court embraced two different conceptions of the Community at the same time. This is particularly evident from the Court's findings of the exclusivity of the Community competences where two visions of the *effet utile* of Community law are contemplated and simultaneously endorsed. According to the Commission, conceding that Member States still enjoyed external powers in the domains covered by Community law would open the road to material conflicts between the Community rules and the rules originating from *ERTA*. In the Council's view, instead, the Member States' concerted action in close association with the Community institutions was adequate to preserve the *effet utile* of Community law.³⁹

The Court's attitude in this case fostered a compromise between the parties' stances more than contributing to the overall coherence of its findings. When establishing that the Member States had not infringed the Treaty provisions in the specific case, the Court seemed to embrace, for reasons of pragmatism, the organic vision of the Community put

³⁶ L Azoulai, 'The Many Visions of Europe' cit. 173.

³⁷ D Anzilotti, 'Gli organi comuni nelle società di Stati' (1914) RivDirInt 605. Here Anzilotti engaged in a debate with Fusinato on the legal nature of the International Institute of Agriculture. See more recently: C Santulli, 'Retour à la théorie de l'organe commun' (2012) RGDI 565.

³⁸ L Azoulai, 'The Many Visions of Europe' cit. 174.

³⁹ See *Dossier de Procédure Original ERTA* HAEU CJUE-1171, Council's submission of defence cit. 6; *Dossier de Procédure Original ERTA* HAEU CJUE-1171, report of the oral hearing cit. 13.

forward by the Council. When it defined in principle the existence and exclusivity of the Community external powers, it embraced the institutional vision, thus also endorsing the Commission's view.

It is perhaps due to this ambiguous oscillation between principles and pragmatism that some of the issues raised in *ERTA* continue to be subject to contestation. Certainly, the exceptions to the institutional conception of the EU upheld by the Court are not numerous. They exist primarily when the EU institutions were used to coordinate and oversee funds stemming from the financial capacity of the Member States.⁴⁰

The contested equilibria between the two visions of Europe emerging from the study of the *ERTA dossier* continue to inform the contemporary case law. The contestation of the nature of the act in *ERTA* could be interpreted as a manifestation of a debate of a deeper essence of the Union as a legal order oscillating between the institutional and organic visions of Europe, a debate that is still a live one. Indeed, in the *Air Transport Agreement* case,⁴¹ the Commission brought an action for annulment against a Council "hybrid" decision on the signature of an agreement on the accession of Norway and Iceland to the EU-US Open Sky Agreement. The contested act was adopted by the Council and the "Representatives of the Member States meeting in the Council". The Commission claimed that the Council had infringed the procedural rules for the signature and conclusion of international agreements, namely art. 218 TFEU (similarly to what the Commission held in *ERTA* for the then art. 228 EEC) and that the infringement of those rules amounted to a violation of the principle of sincere cooperation.

As was the case in *ERTA*, the Council also questioned the admissibility of the action relying on the fact that the contested act was not to be considered an act having legal effects and that it was not an act of the Council against which an action for annulment might be brought in pursuance to art. 263 TFEU (in *ERTA* 173 EEC). The Court resolved the dispute largely along the lines suggested by Advocate General Mengozzi to annul the decision at issue.⁴² The AG had argued that the "merger" of EU and intergovernmental channels could constitute "a dangerous precedent of contamination of the autonomous decision-making process of the institutions that is liable, therefore, to cause damage to the autonomy of the EU as a specific legal system".⁴³ This stance impressively recalls Pescatore's scholarly work on the caution towards international law arguments introduced into the EU legal system capable of becoming trojan horses and the oscillation between organic and institutional visions of the EU.

⁴⁰ See for instance joined cases C-181/91 and C-248/91 *Parliament v Council and Commission (Bangladesh)* ECLI:EU:C:1993:271; case C-316/91 *Parliament v Council (Lomé)* ECLI:EU:C:1994:76; case C-370/12 *Thomas Pringle v Government of Ireland and Others* ECLI:EU:C:2012:756.

⁴¹ Case C-28/12 *Commission v Council* ECLI:EU:C:2015:282.

⁴² *Ibid.* para. 49.

⁴³ *Commission v Council* cit., opinion of AG Mengozzi, para. 80.

The complexity of the EU's external action continues to display a certain ambiguity when it comes to the joint exercise of EU and Member States powers in politically sensitive domains. This occurs, for instance, in the case of the EU-Turkey Statement on the Syrian refugee crisis. Here, along similar lines of the admissibility dispute in *ERTA*, the very legal nature of the statement as an act that could be subject to judicial review under art. 263 TFEU was contested. The Court found that the statement, published by means of a press release was adopted by the Heads of State and Government of the members of the European Union in their international law capacity and not by the European Council acting as a European Institution.⁴⁴ Again we find support for an organic vision of Europe whereby the Council, or the European Council are considered more as a unifying agency in the hands of the Member States than the institutions of the EU. This vision has been recently endorsed in the context of the review of the decision for nominating the members of the EU Courts. Indeed, the act of appointment of a EU judge is considered as "adopted by representatives of the Member States, acting not in their capacity as members of the Council of the European Union or of the European Council but as representatives of their governments" and thus not subject to judicial review by the EU Courts.⁴⁵

V. CONCLUDING REMARKS

The study of the *ERTA dossier* brings a novel perspective in the analysis of the underlying tensions between the EU actions and the exercise of Member States powers. It offers new prisms of analyses to assess the shifting equilibria between different conceptions of Europe that are of particular relevance today in times of contestation of the constitutional tenets of the Union and its integration project. In particular, the study of the submissions of the parties available in the *dossier* allows us to make sense of an articulated institutional litigation revolving around the nature of the acts of the institutions that can be regarded as a proxy for the debate on the nature of the EU as a legal order. These findings hence broaden the perspective on the traditional accounts of the *ERTA* judgment focusing prominently on competences.

The *Article* has showed how the balance between principle and pragmatism is a manifestation of an equilibrium of a deeper essence, that of the tensions between two visions of Europe that characterises the development of the EU still today. In the constitutional maturity of the EU, while the Court promotes the institutional vision through a consistent emphasis on procedural rules, the organic vision of the EU sporadically emerges in politically sensitive issues or more generally when the EU's genetic and operational dependence on the powers of the Member States challenges the autonomy of the EU legal order.

⁴⁴ Case T-192/16 *NF v European Council* ECLI:EU:T:2017:128 para. 69.

⁴⁵ Case T-550/20 *Sharpston v Council* ECLI:EU:T:2020:475 para. 34. I am grateful to Marise Cremona for signalling this point to me.

