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The Court of Justice in the Archives Project
Analysis of the *ERTA* case (22/70)

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Abstract

Scholars and practitioners interested in the genealogy of EU external relations law will hardly find a more precious source of inquiry than the revealing pages of the *ERTA dossier de procédure originale*. The value of the dossier's material primarily derives from the significance of the *ERTA* case for the evolution of the EU legal order. The case constitutes a fundamental moment for the definition and the development of the EU external relations law. More precisely, it inaugurated a complex strand of case law dealing with the delicate interactions between EU law and international law in the exercise of the international powers of the EU and Member States.

The case concerned the ascertainment of the Community external powers based on the interpretation of the Treaty framework and previously adopted internal rules. The judgment famously marked the inception of the Community's implied powers doctrine and the principle of parallelism. The *ERTA* dossier offers a rich picture to engage in the fascinating discovery of how the submissions of the parties were assessed by the Court in its legal reasoning to strike an equilibrium between the stances of the Commission and the Council.

Tellingly, *ERTA* was the first litigation that featured the Commission versus the Council. This dispute encapsulates the confrontation involving two different visions of Europe. On the one hand, the institutional vision, promoted by the Commission, and largely endorsed by the Court, stressed the autonomy and the distinctiveness of EU law and its institutional framework. On the other hand, the organic vision, defended by the Council, was premised on the assumption that the Community institutions could be considered as organs in the hands of the Member States. The ensuing compelling debate was characterised by various nuances within the standpoint of the very protagonists of this debate. The report highlights how the distinguished scholar and practictioner Pierre Pescatore, *judge rapporteur* in the *ERTA* case, embraced different perspectives on the issue of this debate depending on whether he was positioning himself in the scholarly debate or acting in an institutional capacity.

The reflection undertaken in this report reveals that many of the issues addressed in *ERTA* continue to be subject to litigation today. This is especially the case of the relationship between Articles 228 and 263 TFEU and the role of the decisions of the Member States acting within the Council. The paper shows that notwithstanding the constitutional maturity of today's EU legal framework, the initial oscillation by the Court between the institutional and organic visions of Europe present during the *ERTA* litigation still reverberates in the contemporary features of the EU legal order.

Keywords

EU external competences; doctrine of implied powers; nature of the contested act and admissibility for annulment; oscillation between the organic and institutional visions of Europe; *effet utile*; autonomy.

Acknowledgments

I am grateful to Elias Deutscher who carried out a first study of the *ERTA* dossier. His thorough analysis of the archival documents significantly facilitated my work. I am grateful also for his clarifications and comments on earlier versions of this report. I would also like to thank Professor Cremona for her helpful remarks on this report and the participants in the Court in the Archives seminars at the EUI for their useful comments. The usual disclaimers apply.

Executive summary

A. Insights into the legal issues and arguments

The *ERTA* dossier helps unravelling the arguments shaping two competing visions of Europe, the institutional and the organic. The former emphasises the autonomy of the EU institutional framework, the latter regards the EU institutions as common organs in the hands of the Member States. This report highlights how the judge rapporteur largely disregarded the Council's request to the Court to investigate the inherent nature (*nature propre*) of the contested act on the Member States' negotiation of the ERTA international agreement. The Council maintained that the contested proceedings had no legal effect and that it was only intended as a coordination of the international action of the Member States.

The principal value of the *ERTA* dossier lies in its precious insights on the dispute between the Commission and the Council on the nature of the contested act. It is contended that this dispute is a manifestation of a debate of a deeper essence, namely that on the nature of the EU legal order oscillating between two different visions of Europe. The dossier thus helps capturing broader issues on the nature of the EU legal order that go beyond the traditional accounts of the *ERTA* case focusing on the nature and exercise of the EU's external competences.

B. Insights into procedures and institutions

The procedure-related documents make up a considerable part of the dossier. However, in terms of content they provide no major insights. The documents submitted by the parties during the oral procedure indicate that the Court requested additional documents and invited the parties to clarify certain points, but the report of the oral hearing does not provide significant information in this regard. These documents are available in the dossier.

C. Insights int the actors

The way the judge rapporteur Pierre Pescatore handled the submission of the parties as emerging from the analysis of the dossier invite to reflect on the role of legal entrepreneurs of the European project in shaping the features of the EU legal order. As a scholar, Pescatore recognised that some proceedings issued by the Council could be regarded as having an international law nature. As the dossier shows, however, as a judge he was rather reticent in contemplating such a possibility that could undermine the autonomy of the EU legal order. He preferred instead to endorse an institutional vision of Europe.

D. The dossier as a document

The fact that about 22% of the material has been removed from the original file suggests that the dossier has been heavily redacted before it was opened for consultation. It is however not possible to identify the kind of documents that have been subject to redaction. The value of the dossier principally lies in the richness of the submissions of the parties that are not adequately reported in the publicly available materials and that offer precious insights into the legal arguments of the case and into the Court's judicial strategy.

Table of contents

List of tables and figures

1. Introduction

The *ERTA* judgment constitutes a defining moment in the development of the EU legal order. In law textbooks, it is usually associated with the judicial foundation of the principle of implied powers in the EU and with the progressive legal framing of the Union as an international actor.

The opening of the archives of the European Court of Justice (ECJ) has provided researchers with precious information and an extensive range of documents shedding light on the context and the development of the arguments of the parties, the Advocate General and the Court. This report has a twofold objective. The first is that of appraising the composition of the *dossier* by trying to map how the arguments submitted by the parties are situated by the Court in its reasoning. The second is that of offering an overview of the added value of the *dossier* to the understanding of the structure of the judgment, the legal reasoning put forward by the parties and the Court as well as the arguments' evolution in the subsequent case law.

This report starts with an overview of the *ERTA* Judgment and presents the facts of the case, summarises the arguments of the parties, the observation of the Advocate General, and the Court's findings (Section 2).

The report subsequently focuses on the added value of the *dossier*. By examining its composition and assessing the tenor of the parties' arguments, the report shows that the *dossier* offers many insights into the parties' submissions. It emerges that the Court assigned a very limited space to resolve the dispute between the Council and the Commission arising from the dubious nature of the contested proceedings and their linkage with the substantive and procedural legal bases in the Treaty. Moreover, the report illustrates that the Court went far beyond the Commission's submissions in the establishment of a strict parallelism between the internal and external Community powers (Section 3).

This work also engages in a review of the legal reasoning of the parties and of the Court and of the ensuing structure of the judgment. It focuses on the arguments introduced by the Court and the Advocate General. It points out the systemic interpretation of the Treaty framework adopted by the Court building upon the Commission's doctrine of the *effet utile* but going beyond it. It also gives an account of the fact that the textual and stricter interpretation of the Treaty's provisions suggested by the Council and endorsed by the Advocate General were not followed by the Court (Section 4).

Finally, the report reflects on the 'path not taken' in light of the omissions and posture of the Court. It gives some insights on how the judge rapporteur, Pierre Pescatore, and the Court handled the parties' submissions. These insights are put against the background of Professor Pescatore's scholarly work. It is posited that that the 'introversion of the legal argument'- or economy of the judicial reasoning- was used by the Court as a strategy to avoid introducing in the EU legal order arguments stemming from international law which could undermine the specificities of the EU legal system. The *dossier*'s analysis suggests that such an avoidance occurs especially with respect to the appreciation of the nature of contested proceedings adopted by the Council and their relationship with the Treaty framework. In this section, the Council's argument about the existence of the 'virtual competence' of the Community existing alongside the external competences of the Member States is also considered (section 5).

The concluding remarks set the main findings of the *dossier*'s analysis against the background of the EU's contemporary challenges characterising the EU's external relations case law. The inquiry highlights a certain oscillation in the Court's reasoning between two visions of the Community (the 'organic' endorsed by the Council and the 'institutional' promoted by the Commission) already in *ERTA*. Such an oscillation, reflecting a peculiar balance between principles and pragmatism, left us with uncertainties regarding the conception and the development of the EU legal order which continue to trigger litigation to this day. Indeed,

many issues raised in *ERTA* are still subject to dispute. They revolve around the nature of the EU competences, the definition of the acts within the meaning of Article 263 TFEU, and the modalities of joint exercise of the international law powers of the Member States and EU external competences. The concluding remarks identify a trend in the recent case law of progressive constitutionalisation of the EU's external action with an increasing emphasis on procedural legality. It is posited that this trend, albeit with exceptions in politically sensitive areas, aligns with the principled guidance offered by the Court in *ERTA*.

2. The ERTA Case: the foundations of EU's external relations law

2.1 The facts, the law, and the context

The *ERTA* case concerned a dispute started by the Commission on Member States' negotiations of *the European Agreement Concerning the Work of Crews of Vehicles Engaged in International Road Transport (ERTA).* The negotiations continued also after the adoption (in 1969) of Community Regulation No. 543/69 on harmonisation of social legislation relating to road transport[1] covering similar matters to those regulated by the international agreement. The Commission brought an action for annulment against the 'proceedings' of the Council's meeting taking place on 20 March 1970 relating the conclusion by the Member States of the ERTA agreement.

The attempt to regulate at an international level working conditions of crew of vehicles employed in international road transport dated back to the Convention proposed in 1939 by the International Transport Bureau. The Convention never entered into force. After subsequent endeavours, the United Nations Economic Commission for Europe in Geneva addressed the problem and in 1962 a first ERTA agreement was submitted for signature by the governments of several European States. The lack of the necessary ratification left the agreement on a dead-end track.

In 1967, the Community started to consider regulating the issue and this led to the resumption of negotiations in Geneva.[2] Already before the adoption of Community Regulation in 1969, the Council started to devise methods for common action by the six Member States in Geneva with a view to aligning the provisions of the ERTA agreement with the newly adopted Community Regulation. Therefore, notwithstanding that the subject matter of working conditions of crew engaged in international road transport had been covered by Community rules, the Member States continued to negotiate the ERTA agreement with some form of concertation within the Council of the Community.

2.2 The parties submissions

The Commission argued that Article 75 EEC (currently Article 91 TFEU) had also an external relations dimension, in spite of the absence of express indication in the Treaty. The Article at issue envisaged the laying down of 'any appropriate provision' to implement the common transport policy. In the Commission's view, the full effect (*effet utile*) of this provision would have been undermined if this had not included the conclusion of international agreements. Moreover, the Commission submitted that Article 3 of Regulation No 543/69, envisaging that

[1] Regulation (EEC) No 543/69 of the Council of 25 March 1969 on the harmonisation of certain social legislation relating to road transport [1969], OJ L77/49.

[2] Case C-22/70 *Commission v Council (ERTA),* ECLI:EU:C:1971:23, Opinion of the Advocate GeneralDutheillet de Lamothe, p 289.

'the Community shall enter into any negotiations with third countries which may prove necessary for the purpose of implementing this regulation', was adopted on the sole basis of Article 75. The Council, instead, maintained that express powers in the Treaty were needed to allow the Community to enter into international agreements. In particular, Article 75 could not be interpreted as bestowing upon the Community external powers. In the Council's understanding, Community powers would have been at most concurrent with the powers of the Member States.

2.3 The opinion of the Advocate General

The Advocate General followed the Council's line of arguments, highlighting that if the Court had recognised the existence of external powers not explicitly conferred upon the Community, it would have engaged in 'a discretionary construction of the law' upholding 'a judicial interpretation far exceeding the bounds which the Court [had] hitherto set regarding its power to interpret the Treaty".[3] In fact, the AG contemplated that the Court could undertake a 'more audacious' path of interpretation of the Treaty recognising the implied external powers of the Community but advised the Court against adopting such an approach.[4] As suggested by some commentators, however, a closer look at the AG's opinion may indicate a more nuanced stance on this issue. Arguably, the AG seemed to invite the Court to adopt the more audacious approach it ultimately embraced in establishing the existence of implied powers.[5]

2.4 The judgment of the Court

In *ERTA*, the Court departed from the interpretative construction of the Treaty framework advanced by the Advocate General and established that the scope of the EU's international capacity was not limited to expressly conferred competences. In fact, the Court introduced the principle of parallelism between the Community 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.[6]

The Court established the existence of the Community external competence while simultaneously characterising it as exclusive:[7]

> […] 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.[8]

In the Court's interpretative stance, the laying down of Community rules entailed that international agreements on subject matters covered by those rules excluded concurrent powers on the part of the Member States. In these circumstances, 'the Community alone [was] in a position to assume and carry out contractual obligations towards third countries affecting

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[3] ibid.

[4] ibid 294.

[5] Anne McNaughton, 'Acts of Creation: The ERTA Decision as a Foundation Stone of the EU Legal System' in Fernanda Nicola and Bill Davies (eds), *EU Law Stories* (Cambridge University Press 2017) 144 see also fn 62 therein.

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

[7] Piet Eeckhout, *EU External Relations Law* (2nd ed., Oxford University Press 2012) 74.

[8] *ERTA* (n 6) para 17.

the whole sphere of application of the *Community legal system'*.[9] Besides, 'any steps taken outside the framework of the Community institutions would be incompatible with the unity of the Common Market and the uniform application of Community law'.[10]

Although the Court followed the arguments of the Commission in its interpretation of the Treaty system, it established that in this specific case the Council had not infringed its Community law obligations. Furthermore, it found that the Member States, in carrying on the negotiations and concluding the agreement simultaneously in the manner decided on by the Council, acted in accordance with their obligations under Article 5 [now Article 4(3) TEU] of the Treaty.[11] Therefore, the Commission lost the case.

2.5 The importance of the judgment in the evolution of the law

In Cremona's words, *ERTA* 'heralded a decade in which the Court of Justice delineated both the extent and the nature of external Community competence in a series of cases progressively developing the doctrines of implied powers and exclusivity in a characteristically incremental manner'.[12] Moreover, the judgment established two bases for the existence of implied powers for the conclusion of international agreements that would be developed further in subsequent case law: the existence of previous Community legislation in the field and the attainment of Community objectives in the implementation of Community policies.[13]

In addition to this, *ERTA* inaugurated a rich line of cases showing how 'within the Community […] issues of competence are intimately connected with both the inter-institutional and the institution-Member State balance of power'.[14] In this respect, the *dossier* analysis shows that an interesting and often neglected aspect of the *ERTA* case is the dispute regarding the relationship between Articles 263 and Article 288 TFEU (respectively 173 and 189 EEC). In particular, a significant part of the *ERTA* litigation revolved around the interpretation of the notion of an 'act' within the meaning of Article 263 TFEU, and therefore the nature of the legal measures that could be subject to actions for annulment. As this report will point out, the parties' submissions in *ERTA* on the legal nature of the contested act were based on different interpretations of Community competences and inter-institutional and institution-Member States balance of power. These issues have continued to be matters of contestation in more recent disputes.

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[9] ibid 18 (emphasis added).

[10] ibid 31.

[11] ibid 90.

[12] Marise Cremona, 'External Relations and External Competence of the European Union: The Emergence of an Integrated Policy' in Paul Craig and Gráinne De Búrca, *The evolution of EU law* (Second edition, Oxford University Press 2011) 220.

[13] *Opinion 1/03* [2006] ECLI:EU:C:2006:81 [114–15]..

[14] Cremona, 'External Relations and External Competence of the European Union: The Emergence of an Integrated Policy' (n 12) 218.

Explanatory Box: the principle of parallelism and pre-emptive exclusivity

The Court's Judgment inaugurated a complex and copious strand of case law governing the contours and the interplay between the principle of parallelism and pre-emptive exclusivity.

The principle of parallelism primarily answers the questions of the existence and the scope of the EU's powers. In ERTA the Court for the first time drew a parallel between internal and external powers by affirming that 'the implementation of the provisions of the Treaty the system of internal Community measures may not […] be separated from that of external relations'. The principle was further developed in Opinion 2/91. Here, the Court established that given that the Community enjoyed legislative competence in the area of social policy, 'consequently' the International Labour Organisation (ILO) Convention No 107 fell within the Community area of competence.[15] In other words, the Community internal competences may imply Community external competences even though these are not expressly envisaged in the Treaty.

The existence of implied external competence is distinct from the question of the nature of these competences. In *ERTA*, the Court established the existence of implied external competences and at the same time sanctioned their exclusivity. The Court therefore started to shape what would be subsequently called pre-emptive exclusivity of external competences, now regulated by Article 3(2) TFEU. The operation of pre-emptive exclusivity renders external competences progressively exclusive when the Community has adopted legislation in a given matter. In other words, pre-emptive exclusivity arises from the 'occupation of the field' by the Community with the adoption of internal rules. This is the reasoning behind the famous *ERTA* passage according to which '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'. Although in subsequent case law the Court attempted to clarify the condition of pre-emptive exclusivity in the external realm,[16] the initial conflation of the issues of the existence and the nature of Community competence in *ERTA* engendered a rather convoluted case law which, in turn, resulted in a rather problematic Treaty codification.[17]

[15] Opinion *2/91 ILO* ECLI:EU:C:1993:106, para 17. Robert Schütze, *Foreign Affairs and the EU Constitution: Selected Essays* (Cambridge University Press 2014) 196.

[16] *Lugano* (n 13).

[17] Marise Cremona, 'Defining Competence in EU External Relations: Lessons from the Treaty Reform Process' in Alan Dashwood and Marc Maresceau (eds), *Law and practice of EU external relations : salient features of a changing landscape* (Cambridge University Press 2008).

3. Unfolding the *dossier*

3.1 Composition of dossier

The *ERTA dossier* is composed of six categories of documents, namely:

- Submissions of the parties: i.e. written submissions of the parties during the written procedure;
- Evidence: i.e. documents submitted by the parties upon request of the Court, or on their own initiative;
- Process-related documents: namely, correspondence between the Court (Registrar) and the parties, orders by the President of the Court appointing the chamber and reporting judge, as well as setting the dates of the procedure;
- Report of the Oral Hearing by the *juge rapporteur* (Pescatore);
- Opinion of the Advocate General;
- Final Judgment of the Court;
- Documents of the original file that are not available to the public.

The table below provides a quantitative overview of the composition of the *dossier*:

Table 1: Composition of the *dossier*

Category of Document	**Number of Documents**	**% of number of documents (n=84, annexes included)**	**number of pages**	**% of the *dossier* (513 p)**	**% of the original file (660 p)**
Submissions by the parties	5	6	121	24	18
Evidence	17	20	229	46	35
Procedure-related documents	59	71	64	13	10
Report of the Oral Hearing	1	1	18	4	3
Opinion of the Advocate General	1	1	32	6	5
Final Judgment	1	1	34	7	6
Documents not available to public			147		23

3.1.1 Evidence

The largest portion of the *dossier* is made up of documentary evidence which has been submitted by the parties, namely:

- Minutes of the proceedings of several Council meetings regarding the negotiation of ERTA;

- Working documents of the Commission and the COREPER regarding the negotiation of ERTA;
- Correspondence between the Commission and the Council regarding ERTA;
- The draft proposal of the ERTA agreement;
- Legal opinion by the United Nation's Legal Service regarding the participation of the Community (EEC) in the negotiation of international agreements within the UN fora.

3.1.2 Documents submitted by the parties

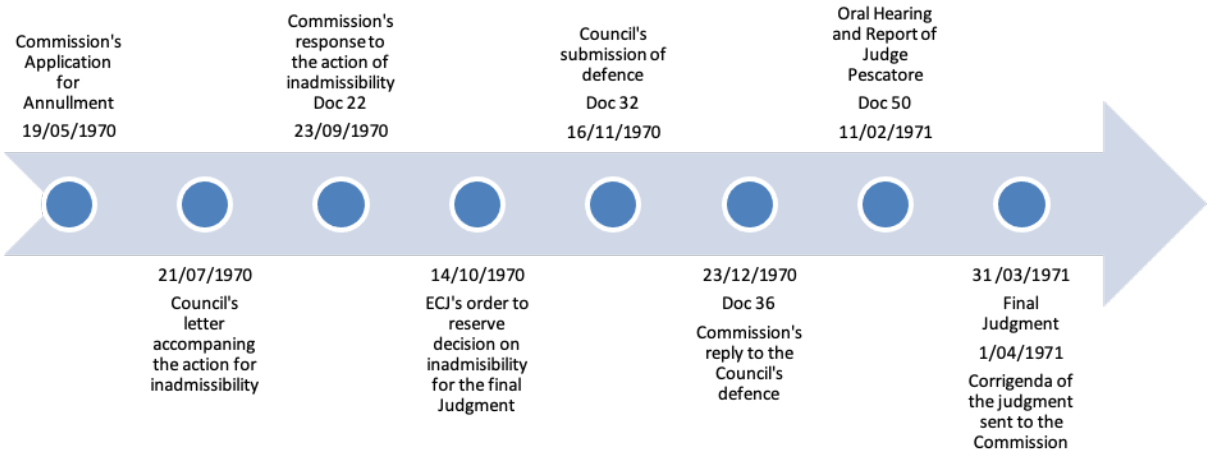
The submissions of the parties constitute the second-largest part of the *dossier*. They encompass in total five documents:

- **Doc 1** the application for the annulment of the proceedings of the Council of 20 March 1970 regarding the negotiation and conclusion of the ERTA agreement by the Member States of the EEC lodged by the Commission;
- **Doc 14** the preliminary objection lodged by the Council requesting the Court to declare the Commission's application inadmissible on procedural grounds;
- **Doc 22** the reply by the Commission requesting the Court to dismiss the Council's preliminary objection or at least to reserve its decision for the final judgment. (The Court followed the Commission's request and decided by an order to reserve the decision on the Council's preliminary objection for the final judgment);
- **Doc 32** defence statement by the Council;
- **Doc 36** reply by the Commission.

3.1.3 Procedure-related documents

The procedure-related documents make up a considerable part of the *dossier* (in terms of number of documents it is even the largest). However, in terms of content they provide no major insights. The *dossier* only contains the written submissions of both parties, but no transcripts of the oral hearings. As a matter of fact, the only (released) document relating to the content of the oral hearings is the report of the *juge rapporteur* which was reproduced in the final judgment. The documents submitted by the parties during the oral procedure indicate that the Court requested additional documents and invited the parties to clarify certain points, but the report of the oral hearing does not provide significant information in this regard.

Figure 1: ERTA case timeline



3.1.4 Documents contained in the *dossier* already available before

The three documents which are also published in European Court Reports (ECR), i.e. the report of the *juge rapporteur*, the Advocate General's opinion and the Court's final judgment, make up about 10% of the *dossier*. The report by the *juge rapporteur* is the only document which summarises the oral hearing. In *ERTA* it has been reproduced almost verbatim as statement of facts and law in the final judgment.

3.1.5 Documents not available to the public

The fact that about 22% of the material has been removed from the original file suggests that the *dossier* has been heavily redacted before it was opened for consultation. It is however not possible to identify the kind of documents that have been subject to redaction. The *dossier* does not provide any information regarding the type or the authorship of the withheld documents.

3.2 The submissions of the parties

The *ERTA* case was the first instance of a judicial dispute between the Commission and the Council before the European Court of Justice. The case featured no intervenors. The Advocate General noticed that the 'unusual and exceptional nature' of the dispute, which pitted the two most prominent institutions of the European Community against one another. His remarks suggested that this case was an exception to 'the fundamental good relationship' of this 'curious "ménage"' of institutional and legislative activity of the Community.[18] From then on, the juxtaposition of the words *Commission v Council* became a recurring event in EC (and then EU) institutional litigation.

In *ERTA*, the Commission put forward an interpretation of the Treaty whereby the EC's powers to enter into international commitments in a given subject matter may derive from the presence of Community rules in that domain. In the Commission's view, Member States might exercise their competences so long as the Community had not adopted common provisions. The Commission submitted that Community competences ought to be interpreted as

[18] *ERTA AG Opinion* (n 2) 284.

progressively exclusive when the Community adopted Community rules in a certain field. According to the Commission, this dynamic progression of the exclusivity of Community competences operated also in the law of Community external relations.[19] In the case at issue, given the adoption of Regulation 543/69, actions by Member States outside the framework of the Treaty had to be regarded as violations of Community law. In this specific case, however, the Commission did not challenge the action of the Member States but the act of the Council for infringement of the Treaty. In the Commission's view, given the adoption of Community Regulation 543/69, the Council could not approve the actions of the Member States to conduct the negotiations of the ERTA agreement. The Agreement had to be negotiated by the Community pursuant to Article 75 as the substantive legal basis and Article 228 as the procedural legal basis. The contested proceedings of the Council, which were not adopted on any of the Treaty legal bases, infringed the Treaties.[20]

The Council questioned the very admissibility of the action for annulment of the contested 'act'. It argued that the proceedings challenged before the Court were not an act in the sense of Article 189 EC and therefore not subject to an action under Article 173 EC. In the alternative, the Council submitted that if its conclusions were to be considered as an act, they did not possess sufficiently legal effects and were therefore not subject to an action for annulment. The Council argued that the contested proceedings represented political approval for the cooperation established among Member States for the negotiations of the ERTA agreement.[21]

The Council also categorically excluded the possibility that the Community enjoyed treaty-making powers coextensive with its internal powers.[22]

The argumentation of the parties can be schematised around the following issues:

- admissibility and interpretation of the term 'act' within the meaning of Article 173 EEC (263 TFEU),
- competence of the Community under, and breach of Articles 75(1)(c) (91(1)(d) TFEU) and Article 228 EEC (216 and 218 TFEU),
- competence of the Community under, and breach of Article 235 EEC (352 TFEU),
- other complaints, regarding the incompetence, breach of procedural and formal requirements by the Council.

The arguments included in the report of the hearing are essentially those addressed by the Court in the judgment.

3.3 Analysis of the arguments of the parties reflected in the publicly available materials read in light of the dossier

It is interesting to notice how the parties' arguments and claims are fashioned by the *rapporteur* and by the Court with a certain detachment from the factual developments, the evidence, and the previous case law relied upon by the parties with a view to granting a full appraisal of the contentious issues.

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[19] Council of the European Communities, 'Application for Annulment- Doc 1, ERTA Dossier de Procédure Original' 6; European Commission, 'Reply to the Council's Defence - Doc 36, ERTA Dossier de Procédure Original' 25–6..

[20] Council of the European Communities, 'Application for Annulment' (n 19) 6–9..

[21] Council of the European Communities, 'Objection for Inadmissibility- Doc 14, ERTA Dossier de Procédure Original' 16–17.

[22] Council of the European Communities, 'Submission of Defence - Doc 32, ERTA Dossier de Procédure Original' 4,6; Judge Pierre Pescatore, 'Report of the Oral Hearing, Doc 50, ERTA, Dossier de Procédure Original' 13.

3.3.1 The issue of admissibility

Council

The Council submitted that its proceedings of 20 March 1970 did not constitute an act within the meaning of Article 173 of the EEC Treaty against which proceedings might be instituted.[23] It developed this claim from an analysis of previous case law,[24] putting forward two main points.

First, it posited a strict relationship between Articles 173 and 189 EEC. The contested proceedings could not be considered a regulation, directive or decision within the meaning of Article 189 in its form or content. Therefore, the combined reading of Articles 189 and 173 prevented an action for annulment against the contested act.[25]

Interestingly, the Council contemplated the possibility that Article 173 EEC might be broader in scope than Article 189 EEC and hence appeared to accept that actions for annulment could be brought against acts that were not envisaged in Article 189. In this case, however, the Council stressed the necessity to assess the very nature (*nature propre*)[26] 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 contended, the proceedings were to be found to have no legal effects, no action for annulment could be brought.[27] With regard to the subject matter and effect of the disputed proceedings, the Council rejected the Commission's stance that the Council's deliberation empowered the Member States to negotiate and conclude ERTA.[28] The Council clarified again that the proceedings intended to express political approval for 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.[29] The specific point on the necessity to ascertain the *nature propre* of the proceedings, however, is not adequately reflected in the publicly available materials where this issue is only cursorily reported.[30]

Secondly, the Council maintained that the special place that the treaty framework assigned to the EEC institutions suggested a stricter and more rigorous range of admissibility for actions for annulment in comparison to those brought by individuals. Indeed, the Commission benefited in various ways from its ability to defend its stance during the decision-making of Council proceedings. Actions for annulment brought by other institutions should be brought

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[23] Council of the European Communities, 'Objection of Inadmissibility' (n 21) 1; Judge Pierre Pescatore (n 22) 4; *ERTA* (n 6) 34.

[24] Joint Cases 1/57 and 14/57 *Société des usines à tubes de la Sarre vs Haute Autorité* ECLI:EU:C:1957:13, Joined cases C 16/62 and 17/62 *Confédération nationale des producteurs de fruits et légumes and others v Council* ECLI:EU:C:1962:47, Joined Cases 8 to 11-66 *Société anonyme Cimenteries and others v Commission*, ECLI:EU:C:1967:7.

[25] Council of the European Communities, 'Objection of Inadmissibility' (n 21) 8-10;12; *ERTA* (n 6) para 34.

[26] Council of the European Communities, 'Objection of Inadmissibility' (n 21) 10.

[27] ibid 9–12.

[28] ibid 16; Judge Pierre Pescatore (n 22) 5; *ERTA* (n 6) 267.

[29] Council of the European Communities, 'Objection of Inadmissibility' (n 21) 16–17; *ERTA* (n 6) 267–35.

[30] Cf p-267 of the *ERTA* Judgment where the Council's argument is reported: "if the proceedings in dispute were to be considered as one of the measures referred to in Article 189 they do not constitute, whether with regard to their form, objective or content, a regulation, decision or directive and thus are not an act, within the meaning of Article 173, against which proceedings may be brought; on any view they have not conferred any right, imposed any obligation or altered any legal situation; since they have no binding legal effect no action may be brought in respect of them" see also Judge Pierre Pescatore (n 22) 5.

only against acts properly emanating from the institutions, whose material existence is beyond doubt.[31]

The Council also stressed that the proceedings could not be considered as a document capable of empowering or requiring the Member States to negotiate and conclude the ERTA agreement, irrespective of whether the authority to conclude the agreement had to be intended to be bestowed upon the Community or the Member States.[32] Moreover, the analysis of the effects to be produced by the annulment of the proceedings of the Council of 20 March 1970 confirmed that they had in fact no legal effect as the annulment would only invalidate the Council's acknowledgment of coordination, but not the actual fact of the coordination. Therefore, this would not allow the Commission to attain its objective.[33]

Commission

The Commission also relied on the Court's previous pronouncements to ascertain the legality of a measure which derived 'above all from its object and content' (Cases 20/58, 16 and 17/62, as well as 8 and 11/66). It pointed out that according to the case law, whenever an institution determined unambiguously the approach it would henceforth take when certain conditions were fulfilled, there existed a decision against which an action for annulment could be brought.[34] The Commission also argued that there was no justification for the assertion that the admissibility of an action brought by an institution should be more strictly reviewed than that of one brought by an individual.[35] In addition, it posited that the analysis of the case law did not support a strict correspondence between the first paragraph of Article 173 and of Article 189.[36]

The Commission engaged in an analysis of the nature of the act under review, underlining the legal effects of the proceedings. It pointed out that the Council did not confine itself to recognising the coordination between the Member States.[37] The deliberations 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.[38] 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 it 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.[39]

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[31] Council of the European Communities, 'Objection of Inadmissibility' (n 21) 8; Judge Pierre Pescatore (n 22) 4; *ERTA* (n 6) 267.

[32] Council of the European Communities, 'Objection of Inadmissibility' (n 21) 18–19; Judge Pierre Pescatore (n 22) 5–6; *ERTA* (n 6) 267.

[33] Judge Pierre Pescatore (n 22) 6; Council of the European Communities, 'Objection of Inadmissibility' (n 21) 16,19; *ERTA* (n 6) 267.

[34] Council of the European Communities, 'Application for Annulment' (n 19) 6; *ERTA* (n 6) 268.

[35] European Commission, 'Response to the Objection of Inadmissibility - Doc 22, ERTA Dossier de Procédure Original' 8–9; Judge Pierre Pescatore (n 22) 7; *ERTA* (n 6) para 41.

[36] European Commission, 'Response to the Objection of Inadmissibility' (n 35) 10–11; Judge Pierre Pescatore (n 22) 7; *ERTA* (n 6) 268.

[37] Council of the European Communities, 'Application for Annulment' (n 19) 6; Judge Pierre Pescatore (n 22) 8; *ERTA* (n 6) 268.

[38] European Commission, 'Response to the Objection of Inadmissibility' (n 35) 14–15; Judge Pierre Pescatore (n 22) 7; *ERTA* (n 6) 268.. Not explicitly referred to by the Court but relied upon in Judgment in para 53.

[39] European Commission, 'Response to the Objection of Inadmissibility' (n 35) 16; Judge Pierre Pescatore (n 22) 8; *ERTA* (n 6) 268.Not explicitly referred to by the Court but relied upon by the Court in paras 54- 55.

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. Therefore the annulment of the Council's deliberation would have no legal effect. The deliberation was only intended to coordinate the Member States' position and this coordination had already taken place.[40] 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 agreement, its act had no legal effect. This would have involved, paradoxically, that Community institutions would never have the right to initiate proceedings on the ground of lack of competence.[41]

3.3.2 Infringement of Articles 75 and 228 EEC

Commission

- Community treaty-making powers

The Commission submitted that the entering into force of Regulation No 543/69 giving shape to the common transport policy entailed that the Community alone could negotiate and conclude the ERTA as it regulated relevant transport matters.[42] Moreover, the Commission argued that the substantive legal basis of an agreement such as the ERTA should be based on Article 75(1) of the Treaty with a procedural legal basis in Article 228.[43] It further maintained that it would have been unreasonable to provide for a common policy in a domain as extensive as transport without granting the Community the capability to act on the external plane.[44] It based this argument on an interpretation of Article 75(1), founded on the common sense, *ratio legis,* and *effet utile.*[45] To corroborate its contention, the Commission emphasised that Article 3 of Regulation No 543/69, adopted on the sole basis of Article 75, expressly provided that 'the Community shall enter into any negotiations with third countries which may prove necessary for the purpose of implementing this regulation'.[46]

- Material conflicts between the Regulation and ERTA and possible consequences of Member State powers on the Union legal order

The Commission pointed out differences in the legal regimes of the of the Community Regulation on the one hand and of the ERTA international agreement on the other. These pertained to the principles underpinning the legal instruments (based on territoriality in the case of the Community Regulation and on nationality in the case of ERTA), and to substantive

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[40] European Commission, 'Response to the Objection of Inadmissibility' (n 35) 20–21; Judge Pierre Pescatore (n 22) 8; *ERTA* (n 6) 268–9. Not explicitly referred to by the Court but endorsed in paras. 60 – 61.

[41] European Commission, 'Response to the Objection of Inadmissibility' (n 35) 18–20; Judge Pierre Pescatore (n 22) 8; *ERTA* (n 6) 268.

[42] Council of the European Communities, 'Application for Annulment' (n 19) 6; European Commission, 'Reply to the Council Defence' (n 19) 18; Judge Pierre Pescatore (n 22) 10. Endorsed by the Court in paras. 17, 30, 31.

[43] Council of the European Communities, 'Application for Annulment' (n 19) 6; Judge Pierre Pescatore (n 22) 10; *ERTA* (n 6) 269 and para 6.

[44] Council of the European Communities, 'Application for Annulment' (n 19) 7. 'sans donner à la Communauté les moyens d'action appropriés dans le domaine des relations extérieures'. In the English translation of the Judgment the more literal translation 'means of action' is put forward but 'capability to act' appears to be more accurate. ibid; Judge Pierre Pescatore (n 22) 11; *ERTA* (n 6) 269. Not explicitly referred to by the Court but endorsed in paras 26-7.

[45] Council of the European Communities, 'Application for Annulment' (n 19) 7.

[46] ibid; European Commission, 'Reply to the Council Defence' (n 19) 26,32; Judge Pierre Pescatore (n 22) 11; *ERTA* (n 6) paras 28–29.

provisions of the ERTA displaying inconsistencies with the corresponding provisions of the Regulation (namely, minimum age requirements, professional suitability, certificates, driving time, recreation time, control and sanctions).[47]

The divergence in scope between the two legal instruments could have posed problems in the choice and reliance upon the rules. Furthermore, even if the Community Regulation and the ERTA were in harmony, such harmony could be preserved only by subordinating amendments to the Community system to the unanimous agreement of the Member States in violation of the fundamental rules underpinning the functioning of the Community. Finally- and perhaps more importantly in light of the development of the future case law on autonomy- this would lead to a situation whereby identical texts within the Community would be interpreted by different authorities, namely the Court of Justice for the Community Regulation and national jurisdictions or ministers of foreign affairs in the case of the ERTA.[48]

- The nature of the Community competence and the principle of parallelism

In its argument, the Commission engaged in an appraisal of the nature of the Community competence. The Commission claimed that Article 75 would confer upon the Community (what we may call now) *a priori* exclusivity in the agreements covering the field of transport. It also clarified that it had never contended, as the Council appeared to maintain,[49] that there was strict parallelism between the internal and external competences of the Community.[50] The Commission, instead, argued in favour of a Treaty scheme whereby external competences become progressively exclusive upon the adoption of Community rules. The Commission noted that for internal matters Member States retained competence to adopt domestic legislation as long as the Community had not exercised its competences, as the Court had found in Case 40/69.[51] It posited that the same principle should govern the relationship between Member States competences and community competences in the context of agreements with third countries.[52] Although the Council enjoyed discretion in deciding whether to enter into agreements with third countries, after the adoption of internal Community rules, such discretion did not extend to deciding whether to proceed through intergovernmental or Community channels,[53] contrary to what the Council had maintained.[54]

The *dossier*'s analysis allows us to grasp how the principle of parallelism emerged from the confrontation between the parties. The Council claimed that the Commission's thesis, according to which a specific provision would have been required to restrain the scope of action of the Community to unilateral internal measures, would amount to contending that the Community enjoys external powers of a scope that would mirror the scope of its internal powers. Instead, it was apparent that there were subject matters that fell within the scope of

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[47] European Commission, 'Reply to the Council Defence' (n 19) 19–23, 36; Judge Pierre Pescatore (n 22) 12–13; *ERTA* (n 6) 270–71.

[48] European Commission, 'Reply to the Council Defence' (n 19) 20–23; Judge Pierre Pescatore (n 22) 12–13; *ERTA* (n 6) 270–71. Relied upon in the Judgment , para 31.

[49] Council of the European Communities, 'Submission of Defence' (n 22) 5.

[50] European Commission, 'Reply to the Council Defence' (n 19) 24.

[51] Case C-40/69 *Hauptzollamt Hamburg Oberelbe v Bollmann* ECLI:EU:C:1970:12.

[52] European Commission, 'Reply to the Council Defence' (n 19); Judge Pierre Pescatore (n 22) 12; *ERTA* (n 6) 270., confirmed in paras 8, 17-18, 30-31.

[53] European Commission, 'Reply to the Council Defence' (n 19) 28–29, 37–46; European Commission, 'Response to the Objection of Inadmissibility' (n 35) 12; *ERTA* (n 6) 270, confirmed in the Judgment in para 70.

[54] Council of the European Communities, 'Submission of Defence' (n 22) 7,10-11; Judge Pierre Pescatore (n 22) 15; *ERTA* (n 6) 271.

the Treaty without entailing competence transfers for external affairs.[55] The Commission, however, maintained that it never argued the existence of a 'parallelism between the Community's internal and external competences'.[56] Instead, it highlighted the need to rely on the general principles of interpretation of the Treaty as the *effet utile* and the effectiveness and uniformity of Community law as repeatedly stressed by the Court in its case law.[57]

- Other Submissions (Article 235 EEC)

The Commission claimed that, even if the substantive legal basis for concluding the ERTA could not be found in Article 75 EEC, the Council should have relied on Article 235 (352 TFEU) to negotiate and conclude the ERTA Agreement in the EU institutional framework. The Commission contended that Article 235 left no room for a policy decision as to whether it is better to act through intergovernmental or Community channels: Community objectives should be pursued through Community Channels. In this case, both of the conditions for recourse to Article 235 were met. First, the action of the Community was necessary to attain one of the objectives of the Community; secondly, the Treaty did not expressly envisage the necessary powers.[58]

The Council contested this view by stating that the Commission had failed to submit a proposal for the use of Article 235 as this provision required.[59] Moreover, the Council argued that 'joint action' by the Member States in concert with the Community institutions (exercising internal powers in the same sphere) was sufficient to avoid any difference between the two sets of rules.[60] The Court, along the lines of the AG opinion, stated that Article 235 did not create a Council obligation. Rather, it gave the Council the option to act.[61]

The Commission also questioned the absence of the legal basis for the contested proceedings and of the statement of reasons establishing the connection between the contested act and the Treaty.[62] The Council reiterated its view of the political nature of the act whose function was limited to acknowledging the coordination among Member States.[63] Interestingly, the Court established that the requirements of legal basis and the statement of reasons were only imposed with respect to regulations, directives and decisions and could not be extended to measures of a 'special nature' such as the proceedings of 20 March 1970.[64]

3.4 The sources and the evidence in the argumentation

The *dossier*'s analysis sheds light on the significance of documents and minutes brought as evidence of the nature of the contested Council's decision for grasping the tenor of the Council's defence. The Council initially questioned the material existence of an 'act' within the meaning of Article 173 EEC. To this end, it argued that the documents submitted by the Commission had not been authorised by the Council and did not adequately report the content

[55] Council of the European Communities, 'Submission of Defence' (n 22) 5.

[56] European Commission, 'Reply to the Council Defence' (n 19) 24.

[57] ibid 24–25.

[58] Council of the European Communities, 'Application for Annulment' (n 19) 8; Judge Pierre Pescatore (n 22) 16.

[59] Council of the European Communities, 'Submission of Defence' (n 22) 11–12; Judge Pierre Pescatore (n 22) 16.

[60] Council of the European Communities, 'Submission of Defence' (n 22) 12; Judge Pierre Pescatore (n 22) 15–16.

[61] European Commission, 'Response to the Objection of Inadmissibility' (n 35) para 94.

[62] ibid 90; Judge Pierre Pescatore (n 22) 17; *ERTA* (n 6) 272.

[63] Council of the European Communities, 'Submission of Defence' (n 22) 16; Judge Pierre Pescatore (n 22) 18; *ERTA* (n 6) 272.

[64] *ERTA* (n 6) paras 98–99.

of its proceedings. Indeed, only the document featuring in Annex III to the Commission's request for annulment[65] described the content of the contested proceedings. The Council further stressed that it was a working document which had not been approved by the Council.[66] Similar motives of contestations were raised by the Council with respect to Annex I to the Commission's action for annulment which was brought against a press release of the Council meeting on 20 and 21 March, and to Annex II, amounting to a list of decisions taken by the Council at the meetings. The Council therefore pointed out that the evidence relied upon consisted of 'documents', not 'acts' emanating from the Council.[67] The confrontation pertaining to the admissibility and interpretation of the submitted documents, and in particular of Annex III, was not specifically referred to by the Court in the judgment.[68] The issue, however, constituted a significant part of the dispute between the two institutions.

The Commission rejected the Council's argument on the material inexistence of the act. It maintained that the language of the annexes to the Commission's action for annulment ('decision', 'conclusion', 'mandate') suggested that the Council's deliberation had a decisional character and was susceptible to review.[69] In addition, it posited that insofar as access to the only document which had been approved by the Council (namely the minutes of the session of 20 March 1970) was precluded, the Commission could only rely on other available documents to establish the content and nature of the act.[70] Once the minutes were made available after the request of the Court, the Council contended that the minutes at issue made the discussions on the exact content of the deliberations 'outdated'. The minutes should have been the sole point of reference, since they were the only document originating from the Council and whose deliberations constituted the matter in dispute.[71] The Commission, in turn, noticed that the minutes produced by the Council had changed the terminology employed in the other documents relating to the meeting that took place on 20 March 1970. While the report of decisions of the Council (Annex I of the action for annulment) used the expression 'decision' (Annex III of the complaint pages 4 and 5), the minutes used the term 'position' or 'solution'.[72] During the procedure, the Commission also lodged a complaint about the difference in language between the minutes of the Council meeting on 20 March 1970 and the list of the decisions of the same meeting.[73]

While the Advocate General repeatedly quoted from the minutes of the proceedings of 20 March 1970[74] and closely analysed their language, [75] the Court referred only twice explicitly to

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[65] Council of the European Communities, 'Application for Annulment' (n 19) 1.

[66] See along these lines the submission in Council of the European Communities, 'Objection of Inadmissibility' (n 21) 5; 12–14.

[67] ibid 13.

[68] Only a cursory reference is made in the statement of the Council's claims in p. 267 of the Judgment.

[69] Council of the European Communities, 'Application for Annulment' (n 19) 4–51; European Commission, 'Response to the Objection of Inadmissibility' (n 35) 14–15; Judge Pierre Pescatore (n 22) 8..

[70] European Commission, 'Response to the Objection of Inadmissibility' (n 35) 5; ibid 12.

[71] Council of the European Communities, 'Submission of Defence' (n 22) 1.

[72] European Commission, 'Reply to the Council Defence' (n 19) 10..

[73] European Commission, 'Complaint on the Differences in the Language of the Minutes of the Council Meeting on 20/03/1970 and the List of Decisions of the Same Meeting (Submitted upon Request of Judge Pescatore)- Doc 51, ERTA Dossier de Procédure Original'.

[74] Council of the European Communities, 'Certified Copy of the Minutes of the 107th Meeting of the Council on 20/03/1970 Sent to the Commission. Doc 30, ERTA Dossier de Procédure Original'.

[75] *ERTA AG Opinion* (n 2) 286–7.

them, without however providing any precise reference.[76] In particular, the AG quoted a passage from the minutes where the Council asked the Commission to amend Regulation No 543/69 to let the Member States fulfil the obligations arising from the ERTA.[77]

The Court, however, directly relied on the minutes of the Council Meeting of 20 March only when it established that the Council had adopted provisions capable of derogating from the procedures laid down by the Treaty with respect to negotiations with third countries.[78] Apart from the minutes of Council's proceedings on 20 March 1970, no other evidence was referred to or evidently reported in the judgment.

The Court, in its reply to the Commission's defence, scrutinised the minutes of the Council's meeting of 30 March 1970, and pointed out the Council members' remarks on the difficulty of allowing the Community to take part in the UN Economic Commission for Europe. It affirmed that the President of the EEC Commission did not see an insurmountable obstacle and referred, by way of example, to some recent positive developments in Community participation in international organisations, especially in the agricultural domain.[79] Indeed, on the occasion of the Council meeting of 17 and 18 March 1969, he highlighted that appropriate arrangements could have guaranteed the participation of the Community in the ERTA agreement alongside the Member States.[80] The Court did not address this issue in the judgment, albeit during the procedure of the case the Council, in reply to a question from the Court in the oral hearings, submitted evidence on the arrangements for the participation of the Community in the UN Commodities Conference.[81]

4. The legal reasoning

The *dossier* analysis provides fruitful elements for assessing the parties' interpretative posture in light of their litigation strategy and the legal reasoning they suggested that the Court should endorse.

As several other subsequent litigations between the Commission and the Council, *ERTA* featured two diverse interpretations of the Treaty framework. The Commission favoured an extensive and purposive interpretation of the term 'act' under Article 173 EEC. Therefore, it put forward a teleological interpretation of the Community's competences pursuant to Articles 75

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[76] *ERTA* (n 6) para 50; p 88.

[77] *ERTA AG Opinion* (n 2) 285.

[78] *ERTA* (n 6) para 54 probably referring to Council of the European Communities, 'Certified Copy of the Minutes of the 107th Meeting of the Council on 20/03/1970 Sent to the Commission. Doc 30, ERTA Dossier de Procédure Original' (n 74) 14–15.

[79] European Commission, 'Reply to the Council Defence' (n 19) 2.

[80] Council of the European Communities, 'Minutes of the Council's Session on 17-18/03/1970, Annex III to Certified Copies of Requested Documents Transferred to the Court- Doc 48, ERTA Dossier de Procédure Original' 3.'la conclusion d'un accord avec le pays tiers portant sur cette matière ne peut être effectuée que par la Communauté en tant que telle, ce qui n'exclut pas que par des formules appropriées les états membres puissent en devenir Partie contractantes en même temps que la Communauté.' See moreover Council of the European Communities, 'Certified Copy of the Minutes of the 107th Meeting of the Council on 20/03/1970 Sent to the Commission. Doc 30, ERTA Dossier de Procédure Original' (n 74) 8.: one of the Member of the Council affirmed that it was possible that the political evolution in the subsequent years would lead to the recognition of the EEC by eastern European Countries and the Community could join the Economic Commission for Europe alongside its Member States.

[81] Council of the European Communities, 'Minutes of the Council's Session on 17-18/03/1970, Annex III to Certified Copies of Requested Documents Transferred to the Court- Doc 48, ERTA Dossier de Procédure Original' (n 80); Council of the European Communities, 'Submission of Evidence in Response to to a Question by the Court during the Oral Hearing -Doc 56, ERTA Dossier de Procédure Original'.

EEC and 235 EEC, dwelling on the '*effet utile* doctrine' in its reasoning on the external implications of Article 75 EEC. The Commission also crucially insisted on the necessity for the uniformity and effectiveness of Community law in its warning against the negative consequences of a conflict between ERTA and Regulation 543/69.

The Council, instead, advocated for a restrictive and textual interpretation of Articles 173, 75, 228 and 235 EEC. It suggested a reasoning by analogy with similar terminology in different provisions of the Treaty, especially in the relationship between Article 173 and 189 EEC. Furthermore, it warned against the recognition of implied Community competence to enter into international agreements underlining the significance of the principle of conferral in the Treaty framework as well as the intentions of the Treaty drafters.

The Council's stance was apparently embraced also by the Advocate General. In his view, a doctrine of implied powers could only be construed through an 'audacious method of interpretation' which would entirely disregard the 'intentions of the authors of the Treaty and of the States which signed and accepted it'.[82]

It is worth highlighting some aspects of the Council and the Commission's attempts to undertake a comparative analysis of the EEC with the ECSC and EURATOM. First, the Council drew attention to the fact that the EEC and the Euratom treaty did not include provisions analogous to those of Article 38 of the ECSC Treaty, allowing for legal actions against the deliberations of the Council and the Assembly. This, in the Council's view, was intended not to undermine free exchange of views and the well-functioning of the institutions.[83] The Commission contested this, noting that judicial control of the acts of the Council in the ESCS treaty was built upon the idea that usually the Council only issued opinions to the High Authority and that it would not adopt decisions that might create obligations for individuals.[84] More interestingly, the Commission pointed out that the EURATOM Treaty expressly envisaged the possibility for the EURATOM Community to enter into agreements with third countries. In the Commission's words, it would be 'rather unreasonable that two Treaties negotiated and signed during the same period would have been inspired by two totally divergent doctrinal conceptions'.[85] The Court did not dwell on this matter. For the Advocate General, instead, the different provisions of the EURATOM Treaty and the EEC Treaty indicated that the drafters of the latter envisaged external powers only when the Treaty so provided.[86]

4.1 The Commission: winner in principle but a scapegoat in practice?

The Court sided with the Council and the Advocate General in holding that the Commission had failed to submit a formal proposal (under Article 75 EEC or 116) or to require the application of Article 228 (1) EEC to exercise its right to negotiate ERTA in the name of the Community.[87] The Court, however, did not address the Commission's numerous arguments and submissions of evidence. The *dossier* shows that the Commission consistently voiced its objections against the Member States negotiating ERTA after the adoption of Regulation 543/69 and asked the Council to get involved in the negotiations. In light of the Council's reticence in complying with the Commission's requests, it is doubtful that the Commission failed to exercise its right to negotiate the ERTA agreement pursuant to Article 228 EEC. The

[82] *ERTA AG Opinion* (n 2) 294.

[83] Council of the European Communities, 'Objection of Inadmissibility' (n 21) 8–9 and fn 1.

[84] European Commission, 'Response to the Objection of Inadmissibility' (n 35) 10.

[85] European Commission, 'Reply to the Council Defence' (n 19) 34–35.

[86] *ERTA AG Opinion* (n 2) 294.

[87] European Commission, 'Response to the Objection of Inadmissibility' (n 35) 88–89..

documents in the *dossier* thus cast doubt on whether the Court was right in holding that the Commission's failure relieved the Council from responsibility for violating Articles 75 and 228 EEC.

The Court's reliance on the Commission's failure to engage in inter-institutional cooperation is also inconsistent with its previous holding on admissibility. While the Court held that the Commission's alleged errors and omissions did not affect the question of admissibility of its action for annulment under Article 173 EEC, [88] it did not elaborate on why the Commissions' shortcomings were nonetheless relevant to ascertain whether the Council had infringed Articles 75 and 228 EEC.

4.2 Legal arguments introduced by the Court

The analysis of the *dossier* reveals that the Court introduced some legal arguments on its own initiative into the final judgment. The Court, for instance, relied upon the principle of sincere cooperation laid down in Article 5 EEC as part of its systematic interpretation of the Treaty by means of which it constructed the exclusive nature of the Community's implied treaty making competence.[89] In addition, the principle of sincere cooperation also served as a basis for the assessment of the Council's alleged infringement of Articles 75 and 228 EEC.[90] The principle, however, was not mentioned in either of the parties' submissions or in the Advocate General's Opinion. The same also applies for Article 15 of the 1965 Treaty merging the executives of the three Communities (ECSC, EEC, Euratom) which the Court cited when assessing the Council's compliance with Articles 75 and 228 EEC.[91]

4.3 Legal arguments introduced by the Advocate General

The influence of the Advocate General's Opinion is not only confined to the structure of the final judgment. To a certain extent, it also affects the Court's substantive analysis. The Advocate General suggested the analysis of Article 116 EEC as a potential legal basis for the Community's competence to enter into international agreements. This argument was – as the Advocate General noted – completely absent from the parties' submissions.[92] Even though the Advocate General raised doubts about the suitability of Article 116 EEC as a legal basis for a Community competence to conclude the ERTA agreement,[93] the same provision can be traced amongst the provisions that the Court took into account when deciding on whether the Council had failed to comply with its obligations under the Treaty.[94] Likewise, the Court also affirmatively referred to the Community's legal personality enshrined in Article 210 EEC, which only appeared in the Advocate General's Opinion,[95] and cannot be traced back to the parties' submissions.[96]

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[88] *ERTA* (n 6) para 63.

[89] ibid 21.

[90] ibid 90.

[91] ibid 87.

[92] *ERTA AG Opinion* (n 2) 290.

[93] ibid.

[94] *ERTA* (n 6) paras 76, 80,88.

[95] *ERTA AG Opinion* (n 2) 294.

[96] *ERTA* (n 6) para 13.

4.4 The structure of the judgment

The Court held that the question of admissibility, namely whether the Council's proceedings constitute an act susceptible to review within the meaning of Article 173 EEC (263 TFEU), could only be decided after the question of competence had been clarified.[97] While doing so, the Court largely followed the analytical pattern suggested by the Advocate General. AG Dutheillet de Lamothe contended that the issue of admissibility had to be addressed after having ascertained whether the contested proceedings were an act of the Council in its capacity as a Community institution or as a unifying agency of the Member States. This assessment depended on whether the matter fell within the scope of the Treaty. The Court therefore decided to tackle first the question on substance that it framed in terms of competences, and not in terms of the legal nature of the act (as suggested by the Council) and on this basis it turned to the issue of admissibility at a subsequent stage.

The structure of the judgment thus develops in an opposite order to that put forward by the Commission and followed by the Council. The parties addressed the issue of admissibility before the issue of competence. An analysis of the *dossier* sheds light on the fact that the peculiar interplay and sequence of the issues of admissibility and competence featured also in the parties' disputes. In many instances, indeed, the Commission questioned the line of argumentation of the Council depicting it as 'confusing the issues of admissibility and substance'.[98]

Table 2: Matrix of the legal arguments of the parties

Position of actors	**Admissibility/ legal nature of the Council's 'Proceedings' - 'act' Article 173 EEC [263 TFEU] relationship with Article 189 EEC [288 TFEU]**	**Competence of the Community– Articles 75(1)(c) [91(1)(d) TFEU] and Article 288 EEC [216 and 218 TFEU]; principle of parallelism**	**Flexibility clause – Article 235 EEC [532 TFEU]**
Commission	a) there is no strict correspondence between Article and 173 and Article 189 EEC b) the Council's Proceeding was not only intended for coordination but had a decisional nature.	Internal competence entails external competence. Moreover, as it happens internally, external competences become progressively exclusive after the Community has adopted common rules.	Even the use of Article 75 as a legal basis was not viable, the Council should have had recourse to Article 235 EC as the attainment of Treaty objectives was at stake.
Council	a) The contested proceedings are not to be considered as a regulation, directive or decision in the meaning of Article 189	Albeit Article 75 (1) (c) may confer on the Community external competence, this competence is incidental, and the Council shall determine	The Commission failed to submit a proposal for the use of Article 235 as

[97] ibid 3–5.

[98] European Commission, 'Reply to the Council Defence' (n 19) 44; European Commission, 'Response to the Objection of Inadmissibility' (n 35) 4.

	therefore Article 173 does not apply. b) the contested proceedings only acknowledged coordination among the Member States	whether the agreement must be concluded by the member states or the Council.	this provision required.
AG	The nature of the Council's Proceeding could be determined only by ascertaining whether the Council acted as an EC Institution or as 'organe de la collectivité des États membres' [unifying agency of the Member States]	Establishing the existence of implied powers would amount to 'a discretionary construction of the law' and 'a judicial interpretation far exceeding the bounds which the Court [had] hitherto set regarding its power to interpret the Treaty'. A careful reading of the Opinion may suggest a more nuanced stance.	Even if it is conceded that it is applicable to the Community's external relations, it only empowers the Council to extend the Community's authority in this sphere.
Court	The Court interestingly affirmed that in order to ascertain the legal nature of the Council proceedings, an assessment should be carried out on whether at the date of the proceedings the power to conclude ERTA was vested in the Community or the Member States. Admissibility follows competence.	A peculiar balance of principle and pragmatism. In principle, it established external exclusive competences of the Community based on the adoption of internal rule, going even beyond what the Commission posited in its submissions. In practice, albeit the powers to conclude ERTA were vested upon the Community, the MS acted in the interest of the Community	Article 235 EEC offers an option to the Council not an obligation to take 'appropriate measures' in pursuance of Treaty obligations.

5. Reflections on the path not taken

While examining the admissibility question, the Advocate General introduced some crucial considerations pertaining to the dual role of the Council as a Community institution and as a venue for intergovernmental cooperation among the Member States. He advocated for terminological clarity since the confusion in the use of terms ('decisions' instead of 'proceedings', for instance) could hide a 'disregard of the powers and procedures prescribed by the Treaty'.[99] He 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's external authority. Only under these circumstances could the application be considered as admissible. Otherwise, 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'.[100]

[99] *ERTA AG Opinion* (n 2) 288.

[100] ibid 289.

This argument introduced by the Advocate General did not explicitly emerge from the parties' submissions. Notwithstanding this, analysis of the *dossier* reveals that the Commission and the Council, moving from different premises, hinted at the activities of the Member States in the framework of the Council. In particular, some contestation revolved around the Council's claim that the Commission should have initiated proceedings against the Member States if it believed they were infringing the Treaty while they were negotiating ERTA.[101] The Commission disagreed, maintaining that the Council 'drove the case from start to finish,' and that the Council had decided all the most important aspects of the negotiations. It therefore criticised the Council's attempt to hide itself behind the Member States when it maintained that the Commission should have pursued an infringement action against the Member States.[102] In a similar vein, the Commission denounced the Member States for hiding behind the Council, by arguing that the deliberation of 20 March constituted a decision by the Council which had not been challenged in due time by the Commission.[103]

The Court only cursorily addressed these considerations on the linkage between the nature of the act and Community competence in connection with the role of the Member States within the Council. It limited its findings to acknowledging the 'special nature' of the Council proceedings.[104] The ECJ established that the proceedings 'dealt with a matter falling within the power of the Community and that the Member States could not therefore act outside the framework of the common institutions'.[105] Besides, the proceedings had 'definite legal effects both on relations between the Community and the Member States and on the relationship between institutions'.[106] In sum, the Court found that the proceedings had legal effects but located them neither in the category of a legal acts provided for in the Treaty (in particular Article 189 EEC) nor in the broader spectrum of the sources of EU law.

An additional noteworthy argument submitted by the Council concerned the nature of the external competence that the Community might possess on the grounds of Article 75 EEC. In the Council's view, the competence at issue could not be exclusive but would be a 'virtual competence' existing 'alongside the normal competence of the Member States'. According to the Council's submissions, such a virtual competence could be exercised after an appreciation by the Council of whether the Member States or the Community should enter into an international agreement in the field of transport pursuant to Article 75(c). A decision that the Community should act, however, had to be adopted in conformity with the procedure laid down in Article 75 EEC (which had not occurred in this case).[107] The Court did not address this matter specifically in relation to the contested proceedings, since in its view the Community's competence in the field was exclusive. The concept of a virtual, or latent, external competence which becomes exclusive on the decision to exercise it, is one which has been influential in later cases.[108]

The 'Introversion of the legal argument' and the systemic guidance

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[101] Council of the European Communities, 'Objection of Inadmissibility' (n 21) 4.

[102] European Commission, 'Response to the Objection of Inadmissibility' (n 35) 4.

[103] ibid 3–4.

[104] *ERTA* (n 6) para 98.

[105] ibid 52.

[106] ibid 55.

[107] Council of the European Communities, 'Submission of Defence' (n 22) 7; see also European Commission, 'Reply to the Council Defence' (n 19) 25–26 referring to 'une competence potentielle'.

[108] See e.g. Case C- 600/14 *Germany v Council*, Opinion of the Advocate General Szpunar, EU:C:2017:296, paras 76-78.

In light of the foregoing, it is worth assessing how the Court handled the submissions relating to the nature of the act, which for the Council amounted to nothing more than the acknowledgment of the coordinated action of Member States in the negotiation of the ERTA. As mentioned before, this led the Commission to maintain that the Council was hiding behind the Member States. Moving from analogous premises, the Advocate General suggested that the Court should ascertain whether the Council was acting as a Community institution or as a 'unifying agency of the Member States' (more telling, in this respect, the original French version: 'Conseil agissant comme *organe de la collectivité des États membres'*).[109]

The Council's submission on the nature of the act given by the *judge rapporteur* and the Court, together with the suggestions put forward by the Advocate General should be read against the background of the lively academic discussions that took place during the years immediately preceding the delivery of the *ERTA* judgment. It is widely agreed that the *judge rapporteur* is 'a key figure in the process of deliberation'.[110] In the *ERTA* case, Pierre Pescatore acted in this capacity. In his lifetime, he served as director of political affairs at the Luxembourg ministry of foreign affairs, as professor of law, and judge. He played a crucial role in shaping the drafting of legal norms in European negotiations, the doctrinal conceptualisation of the law of European integration,[111] and the evolution of the EU legal system ensuing from the interpretation of norms. As a rather unique 'legal entrepreneur', he contributed as few others of his contemporaries to 'European legal politics' and displayed a 'skilful combination of legal flair and political insights'.[112] To borrow from Rask Madsen words when defining the group of influential players in the construction of the EU, he was one of the leading figures of 'the select group of legal actors' who were 'centrally placed both in the event and process politics of fundamental European law, that is […], central to both treaty making and the broader processes of constitutionalisation'.[113]

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'*.[114] 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 were not part of the system of acts emanating from the institutions. Indeed, 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.[115] As a judge, instead, he preferred not to dwell on the relationship between international law acts of the

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[109] *ERTA AG Opinion* (n 2) 289.

[110] Anthony Arnull, *The European Union and Its Court of Justice* (2nd ed., Oxford University Press 2006) 9.

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

[112] Mikael Rask Madsen, 'The Power of Legal Knowledge' in Antoine Vauchez and Bruno de. Witte, *Lawyering Europe : European law as a transnational social field* (Portland, Oregon 2013) 210.

[113] ibid 200.

[114] Pierre Pescatore, "Remarques Sur La Nature Juridique Des 'Décisions Des Représentants Des Etats Membres Réunis Au Sein Du Conseil,'" *SEW* 14, no. 10 (1966): 582.

[115] 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. Pierre Pescatore, 'Remarques Sur La Nature Juridique Des "Décisions Des Représentants Des Etats Membres Réunis Au Sein Du Conseil"' (1966) 14 *SEW* 579–80.

Member States and Community acts. The Court's pronouncement is indeed silent on this issue. Against the backdrop of Pescatore's previous scholarly work on the *nature juridique des decisions,* 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.

There appears therefore to be a remarkable restraint, partly originating from the *judge rapporteur*'s account, with respect to the Council's request to the Court to investigate the *nature propre* of the act that was left in the background. A subsequent scholarly work by Pescatore helps to make sense of this restraint exercised by the Court 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'.[116] As rightly 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.[117] Along these lines, Pescatore stressed that the Court wanted to react against a contractual conception of the Community intended as a 'common organ'[118] serving the need to represent determined interests of a group of Member States.[119] 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.[120]

In the judgment, one perceives judicial restraint also in the comparison with other legal systems. Whereas the Advocate General explicitly mentioned that a reasoning premised upon the assumption that Community external powers not expressly conferred by the Treaty may derive from internal ones would resemble the US law doctrine of 'implied powers', in the judgment there is no explicit reference at all to the notion of 'implied powers'. This may have been again due to the willingness to stress the distinctiveness of Community law from other legal systems. Remarkably, the Advocate General addressed the issue of implied powers just

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[116] Diese *Zurückhaltung* hat mancherlei Grunde, 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 Anderung 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 einzuführe. (emphasis added)* Pierre Pescatore, 'Die Rechtsprechung Des EuGH Zur Innergemeinschaftlichen Wirkung Völkerrechtlicher Abkommen :' in Rudolf Bernhardt and others (eds.), *Völkerrecht als Rechtsordnung. Internationale Gerichtsbarkeit Menschenrechte.* Festschrift Für Hermann Mosler (Springer-Verlag 1983) 663 fn 5.

[117] Daniel Thym, 'Foreign Affairs' in Armin von Bogdandy and Jürgen Bast, *Principles of European constitutional law* (2nd rev. ed., Hart 2010) 320–1. See also Matthias Kottmann, *Introvertierte Rechtsgemeinschaft : Zur Richterlichen Kontrolle Des Auswärtigen Handelns Der Europäischen Union* (Springer 2014).

[118] See the AG Opinion in ERTA referring repeatedly to the possibility identifying the Council as '*an organe de la Communauté'*.

[119] See for instance, Pierre Pescatore, 'Some Thoughts on the Allocation of Power in the External Relations Field' in Albert Bleckmann, *Division of powers between the European communities and their member states in the field of external relations : colloquium, 30 and 31 May 1980, Amsterdam* (Kluwer 1981) 75. Pierre Pescatore, 'Les Communautés En Tant Que Personnes de Droit International' in JW Ganshof van der Meersch, *Les Novelles : droit des Communautés européennes* (Larcier 1969) 113.

[120] Loïc Azoulai, 'The Many Visions of Europe' in Marise Cremona and Anne Thies (eds), *The European Court of Justice and external relations law : constitutional challenges* (Hart Publishing 2014). Loïc Azoulai, 'Appartenir à l'Union européenne', in Christian Mestre (ed.) *Europe(s), droit(s) européen(s) : une passion d'universitaire : Liber amicorum en l'honneur du professeur Vlad Constantinesco*, (Bruylant, 2015), 33.

after his analysis of the flexibility clause enshrined in Article 235.[121] The Court did not follow this line of argumentation as it only cursorily addressed the function of Article 235 in the Treaty system.

The restraint in the exposition of its legal reasoning, however, did not impede the Court from driving the Community legal order down a new (and exceptional) path of international law. It is striking in this respect to notice how the Court fostered an interpretation of the Treaty framework going far beyond the parties' submissions when it established the principle of parallelism between internal and external powers. As it emerges from the *dossier*, not even the Commission was audacious enough to claim the existence of a parallel between internal and external powers.

More than focusing on the submissions and evidence in the specific case, the Court chose to give guidance for the future external action of the Community. Indeed, it upheld the status quo in the specific circumstances of the case, establishing that the Member States had fulfilled their duties under Article 5 EEC (now article 4(3) TEU – duty of sincere cooperation) and that the Council had not infringed Articles 75 and 228 EEC when 'deciding […] on *joint action* by the Member States'.[122] At the same time, it offered an interpretation of the Treaty system that was destined to modify the usual patterns of the conduct of international relations by the Member States. The *dossier* reveals that the Council made frequent reference to the 'usual procedures' adopted by the Member States in the negotiations of the ERTA, in close association with the Community institutions.[123] While maintaining that the Council and the Member States had, in the specific circumstances of this case, acted in conformity with the Treaty, the Court stressed that the 'Council's proceedings dealt with a matter falling within the power of the Community, and that the Member States could not therefore act outside the framework of the common institutions'.[124] This interpretation thus reconfigured the way the Member States could frame their external contractual and diplomatic relations and therefore the usual negotiating procedures.

It is worth highlighting that the Court at this stage was not interested in changing the perceptions of the Community's external interlocutors with regard to the apportioning of competence between the EU and the Member States.[125] It focused on defining the internal system of relations among the Community actors and institutions, marking its distinctiveness. It is for this internal systemic focus that *ERTA* could be defined as an 'act of creation' of the Community and as the 'third foundational stone of the "new legal order of international law" referred to by the ECJ in its *Van Gend en Loos* decision'.[126]

6. Concluding remarks

This report has emphasised that the legacy of the *ERTA* case is not limited to introducing the competence discourse in EU external relations law. Indeed, a parallel process of constitutionalisation occurred. It was aimed at shielding the specific characteristics of EU law from international law elements in the EU decision-making process that may result from the

[121] *ERTA AG Opinion* (n 2) 293.

[122] *ERTA* (n 6) 91 (emphasis added).

[123] Council of the European Communities, 'Application for Annulment' (n 19). Annex III, 4; Council of the European Communities, 'Submission of Defence' (n 22) 14.: The Council refers to 'coordination habituelle' et 'coordination sur place'.

[124] *ERTA* (n 6) para 52.

[125] ibid 86.

[126] McNaughton (n 5) 134–5.

intrinsic composition of the Council and from the international law powers resting with the Member States. As the *ERTA* case shows, however, reconciling the principled constitutional attempt with the Member States' international prerogatives finds no easy solutions.

In *ERTA*, the Court's reasoning displays an oscillation between the institutional and the organic vision of the Community. The Court embraced two different conceptions of the Community at the same time. This is particularly evident regarding the 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 the ERTA. Besides, the harmony between those set of rules would depend on the willingness and the discretion of the Member States.[127] 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.[128]

The Court's attitude in this case has been famously portrayed as 'principled and pragmatic'.[129] In fact, it fostered a compromise between the parties' stances more than contributing to the overall coherence of its findings. While establishing that the Member States had not infringed the Treaty provisions in this specific case, the Court seemed to embrace, for reasons of pragmatism, the organic vision of the Community put forward by the Council. When it defined in principle the existence and exclusivity of the Community external powers, it embraced the institutional vision, therefore 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* are still subject to contestation. The submission of the Council, alluding to a 'virtual' Community external competence operating alongside that of the Member States and whose exercise depends on the margins of appreciations of the Council on whether to pursue the Community channels of cooperation or intergovernmental channels is still an issue that informs the Member States' actions today. Certainly, the exceptions to the institutional conception of the EU upheld by the Court are not frequent,[130] but many aspects of the oscillation between the organic and institutional vision of the EU on the issues raised in *ERTA* endure in today's legal practice.

To be sure, in the current more mature constitutional phase of the EU, the Court has endeavoured to reduce the gap between principles and pragmatism. In the *neighbouring rights of broadcasting organisations* case,[131] the Commission initiated an action for annulment of the Council 'hybrid' decision adopted by the Council and the 'Representatives of the Member States meeting in the Council' authorising the opening of negotiations on the possible establishment of a Council of Europe Convention on the protection of neighbouring rights of broadcasting organisations. The Council asked the Court to also examine whether the act at issue was subject to judicial review under Article 263 TFEU as the measure could be considered as being adopted by the members of the Council in their capacities as representatives of their respective governments. The Court ruled in favour of the Commission's argument, stressing that since the subject matter of the prospective Convention was largely

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[127] European Commission, 'Reply to the Council Defence' (n 19) 20–23; Judge Pierre Pescatore (n 22) 12–13.

[128] Council of the European Communities, 'Submission of Defence' (n 22) 16; Judge Pierre Pescatore (n 22) 13.

[129] Eeckhout (n 7) 75.

[130] See for instance Case C-316/91 *Parliament vs Council [Lomé],* ECLI:EU:C:1994:76, Joined Cases *C*-181/91 and C-248/91 *Parliament v Council and Commission [Bangladesh],* ECLI:EU:C:1993:271, Case C-370/12 *Thomas Pringle v Government of Ireland [Pringle],* ECLI:EU:C:2012:756.

[131] Case C-114/12 *Commission v Council* [Broadcasters' neighbouring right], ECLI:EU:C:2014:2151.

covered by EU rules and therefore the Convention liable to affect EU law or alter its scope, the EU enjoyed an exclusive competence to conclude the agreement pursuant to the *ERTA* principle codified in Article 3(2) TFEU.[132] The contested act was therefore annulled.

This attempt to constitutionalise appears particularly evident in the context of the practice of mixed agreement where the joint participation of the EU and the Member States in the negotiation and the conclusion of international agreements inevitably includes an international law component in the decision-making process. Indeed, hybrid decisions, whereby both the Council as an institution and the Member States meeting within the Council deliberate in their respective international capacities, appear to have been ruled out by the post-Lisbon case law. This happens also in circumstances where the subject matter covered by the envisaged agreements does not fall under EU exclusive competence, as was the case in the *Air Transport Agreement*.[133] Here, 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 Article 218 TFEU (similarly to what the Commission argued in *ERTA* for then-Article 228 EEC) and that the infringement of those rules amounted to a violation of the principle of sincere cooperation. As in *ERTA*, the Council questioned the admissibility of the action on the grounds 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 could be brought pursuant to Article 263 TFEU (in *ERTA* 173 EEC).

The Court resolved the dispute largely along the lines suggested by Advocate General Mengozzi. The AG 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'.[134] This stance is clearly reminiscent of Pescatore's scholarly work cautioning against the introduction of international law arguments into the EU legal system, which might turn into trojan horses and the oscillation between organic and institutional visions of the EU. As noticed by Verellen, the case law on unity in the international representation of the Union revolves increasingly around horizontal issues within the EU institutional structure rather than at the vertical level between the EU and the Member States.[135]

An argument could be made that this shift from the vertical to the horizontal axis, and therefore from the vertical apportioning of competence to issues of procedure and institutional balance of powers, is a product of the constitutional maturity of the EU's external action. Procedural issues play an increasingly crucial role in the assessment of the legality of EU acts in the external relations domain. In the evolution of the *ERTA* case law relating to the posture of the EU legal system with respect to the international powers of Member States, the Court has undertaken an incremental path of constitiutionalisation, which aims to preserve the institutional characteristics of EU law and EU autonomy.

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[132] Ibid. para 102.

[133] Case C-28/12 *Commission v Council* [*Air Transport Agreement*] ECLI:EU:C:2015:282.

[134] Case C-28/12 *Commission v Council [Air Transport Agreement],* Opinion of the Advocate General Mengozzi, ECLI:EU:C:2015:43, para 80.

[135] Thomas Verellen, 'On Hybrid Decisions, Mixed Agreements and the Limits of the New Legal Order: Commission v. Council ("US Air Transport Agreement")' (2016) 53 Common Market Law Review 741.

The first development was the Court's choice in *ERTA* to employ the competences discourse when it could have based its reasoning on primacy.[136] A further development in this process of constitutionalisation is the widening of the functional scope of the principle of sincere cooperation. The principle is a recurring element in the *ERTA* line of cases also post-Lisbon. The principle may result in a duty imposed on the Member States not to act individually or jointly outside the Union channels.[137] In the categorisation offered by Cremona, the duty of sincere cooperation could be defined as a structural relational principle of external relations law. It governs indeed the way the process of decision-making is carried out, contributing to defining the structure of the EU. Moreover, it is relational since it is concerned with the relations between institutional components of the Union.[138]

In its constitutional maturity, the principle of sincere cooperation performs also an increasingly systemic function. Indeed, the Court's emphasis on procedural requirements in matters of shared competences also deriving from the principle of sincere cooperation, as suggested by AG Mengozzi in the *Air Transport Agreement* case,[139] amounts to preserving the autonomy of the decision-making of the EU institutions. This reinforces the systemic nature of the duty of sincere cooperation as it safeguards the autonomy of the EU from competing (national and international) legal system. It also strengthens the rising concerns of the EU institutions for decision-making autonomy[140] and highlights an attempt to bridge the gap between principles and pragmatism in a way that was hardly conceivable at the time *ERTA* was decided.

Yet, the complexity of the EU's external action still displays 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. Similarly to what happened in *ERTA*, the very legal nature of the statement as an act that could be subject to judicial review under Article 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.[141] Here, the institutional conception of the Union seems again challenged and the Court upholds the contractual vision of Europe described by AG Dutheillet de Lamonthe in *ERTA* when he identified the possible role of the Council as an unifying agency of the Member States or by the Court in the *Bangladesh* case when it recognised that the representatives of the Member States meeting in the Council were exercising the powers of the respective states and not acting in the capacity of a Community institution.[142]

Analysis of the *ERTA dossier* sheds light on the nature and the evolution of contested issues of EU law especially revolving around the intricate relationship between the EU as 'a new legal order of international law' and the EU Member States' international powers. It opens new paths

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[136] Piet Eeckhout, 'Bold Constitutionalism and Beyond' in Miguel Poiares Maduro and Loïc Azoulai (eds), *The Past and Future of EU Law : The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (1st edn, Hart Publishing 2010) 219.

[137] For a critical assessment see: Andrés Delgado Casteleiro and Joris Larik, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations?' (2011) 36 European Law Review 524.

[138] Marise Cremona, 'Structural Principles and Their Role in EU External Relations Law' in Marise Cremona (ed), *Structural principles in EU external relations law* (Hart Publishing 2018).

[139] Opinion AG Mengozzi, *Air Transport Agreement* (n 134).

[140] Niamh Nic Shuibhne, 'What Is the Autonomy of EU Law, and Why Does That Matter?' (2019) 1 Nordic Journal of International Law 1.

[141] Case T-192/16 *NF v European Council* ECLI:EU:T:2017:128, para 69.

[142] *Bangladesh* (n 130)*,* para 25.

of inquiry to assess the balance between various visions of Europe in today's EU external action. A balance that tends to favour the institutional conception of the EU and its process of constitutionalisation, albeit arrangements of a more contractual nature, continue to exist, especially in turbulent times as the cases of the migration[143] and financial crises[144] demonstrate.

[143] *NF v European Council* (n 141); Joined Cases C-208/17 P to C-210/17 P *NF and Others v European Council* ECLI:EU:C:2018:705.

[144] Case C-62/14 *Gauweiler and Others v Deutscher Bundestag* ECLI:EU:C:2015:400; *Pringle* (n 130).

Annex 1: List of documents

	Type of document	**Institution**	**Reference number**	**Number of pages**
Written procedure				
Doc 1	Application of annulment	Commission	19/05/1970	10
Annexe I	Press release on the 107th meeting of the Council on 20 and 21/03/1970		21/3/1970	2
Annexe II	Note - List of decisions adopted by the Council during its 107th meeting on 20 and 21/03/1970			1
Annexe III	Conclusions reached by the Council 107th meeting on 20 and 21/03/1970			8
	Report regarding the negotiations of the ERTA during the session of the Sub-Committee on road Transports of the Economic Commission for Europe on 1-3/04/1970			IV (4)
Doc 2	Power for attorney for Mr. Gérard Oliver to represent the Commission as agent	Commission	11/03/1970	1
Doc 3	Letter informing the Commission that case has been lodged in the Registry	Registrar of the Court	20/05/1970	1
Doc 4	Certified copy of the application for annulment sent to Council	Registrar of the Court	20/05/1970	1
Doc 5	Appointment of Judge Pescatore as *juge rapporteur*	President of the Court,	21/05/1970	1
Doc 6	Assignment of the case to the 2nd Chamber	President of the Court,	21/05/1970	1
Doc 7	Power for attorney for Mr. Ernst Wohlfarth and M. Jean-Pierre Puisschet to represent the Council as agents	Council	08/06/1970	1
Doc 8	Request for extension of deadline to submit the defence	Council	18/06/1970	1

Doc 9	Extension of the deadline to submit the defence	President of the Court	22/06/1970	1
Doc 10	Request of extension of the deadline to submit the response (holiday reasons...)	Commission		1
Incident				**1**
Doc 11	Extension of deadline to submit defence	Registrar	24/06/1970	1
Doc 12	Extension of deadline to submit response	Registrar	24/06/1970	1
Doc 13	Letter accompanying the action for inadmissibility	Council	21/07/1970	1
Doc 14	Objection of inadmissibility	Council	20/07/1970	21
Doc 15	Certified copy of the objection of inadmissibility sent to Commission	Registrar	27/07/1970	1
Doc 16	Letter informing the Commission about extension of deadline for response	Registrar	27/07/1970	1
Doc 17	Letter informing the Council about extension of deadline for response granted to Commission	Registrar	27/07/1970	1
Doc 18	Request for extension of the deadline for response (holidays)	Commission	10/08/1970	1
Doc 19	Extension of the deadline	President of the Court	14/08/1970	1
Doc 20	Letter informing the Commission about extension of the deadline	Registrar	14/08/1970	1
Doc 21	Letter informing the Council about the extension of the deadline granted to Commission	Registrar	14/08/1970	1
Doc 22	Commission's response to the objection of inadmissibility	Commission	23/09/1970	26
Annexe I	Working document of the Commission regarding ERTA negotiation t	Commission	15/04/1969	6

Annexe II	Letter by President of Commission (M. Rey) to the President of the Council (M-Thorn)	Commission	05/06/1969	2
Annexe III	Working Document summarizing the concerns expressed by the Commission during the examination of the results of the negotiations of the ERTA treaty	Commission	16/01/1970	8
Doc 23	Certified copy of the Commission's response to the objection of inadmissibility sent to Council	Registrar	02/10/1970	1
Doc 24	Communication of the date of the oral hearing to the Commission	Registrar	08/10/1070	1
Doc 25	Communication of the date of the public audience of the oral procedure to the Council	Registrar	08/10/1970	1
Pages 123 – 128 of the original file are missing				**5**
Doc 26	Order of the Court to reserve the decision on the preliminary objection of inadmissibility for the final judgment		14/10/1970	2
Written Procedure continuation				**1**
Doc 27	Setting the date for submission of defence by the Council	President of the Court	15/10/1970	1
Doc 28	Letter informing the Commission about the Court's order to reserve the decision on the preliminary objection of inadmissibility for the final judgment and date for submission of defence by the Council	Registrar	15/10/1970	1
Doc 29	Letter informing the Council about the Court's order to reserve the decision on the preliminary objection of inadmissibility for the final judgment	Registrar	15/10/1970	1

	Invitation to submit minutes of the 107th meeting of the Council on 20/03/1970			
Doc 30	Certified copy of the minutes of the 107th meeting of the Council on 20/03/1970 sent to the Court	Council	28/10/1970	1
Annex	Certified copy of the minutes of the 107th meeting of the Council on 20/03/1970			82
Doc 31	Certified copy of the minutes of the 107th meeting of the Council on 20/03/1970 sent to Commission	Registrar	03/11/1970	1
Doc 32	Submission of defence	Council	16/11/1970	17
Annex	Corrigenda of defence	Council		2
Doc 33	Setting the date for submission of reply by the Commission	President of the Court	?	1
Doc 34	Certified copy (and corrigenda) of submission of defence sent to Commission	Registrar	20/11/1970	1
Doc 35	Letter informing the Council about the date of submission of reply by the Commission	Registrar	20/11/1970	
Doc 36	Reply by the Commission	Commission	23/12/1970	47
Annex	Draft proposal of the ERTA agreement			37
Doc 37	Setting the date of submission of rejoinder by the Council	President		1
Doc 38	Certified copy of the Commission's reply sent to the Council	Registrar	28/12/1970	1
Doc 39	Letter informing the Commission about the date of submission of the rejoinder by the Council	Registrar	28/12/1970	1
Doc 40	Corrigenda of Commission's reply	Commission	04/01/1971	1
Doc 41	Certified copy of the corrigenda of the Commission's reply sent to the Council	Registrar	07/01/1971	1

Doc 42	Decision of the Council not to submit a rejoinder	Council	12/10/01	1
Instruction				
The pages from 332 to 341 of the original file are not available for public consultation				**1**
Oral procedure				
Doc 43	Certified copy of the Council's decision not to submit a rejoinder sent to the Commission; Court informing the Commission that it intends to set the date for the Oral Hearing on 11/02/1971	Registrar	14/01/1971	1
Doc 44	Court informing the Council that it intends to set the date for the Oral Hearing on 11/02/1971	Registrar	14/01/1971	1
Doc 45	Commodity Conferences – Question of the Reconciliation of United Nations Rules Concerning Participation in Such Conferences and the Institutional Arrangements of The European Economic Community governing the Negotiation of Agreements (Opinion prepared for the UN Sugar Conference, 1968) United Nations Juridical Yearbook 1968, 201 (in French)	unkown		2
Doc 46	Letter confirming the 11/02/1971 as date of the Oral Hearing and inviting the Commission to clarify in its pleading why it has not yet followed the Council's invitation to submit a proposition to adapt the regulation 543/69 proposition to ERTA	Registrar	21/01/1971	2

Doc 47	Letter confirming the 11/02/1971 as date of the Oral Hearing and asking the Council to submit additional documents	Registrar	21/01/1970	2
Doc 48	Certified copies of requested documents transferred to the Court	Council	01/02/1970	1
Annexe I	Minutes of the meeting of the Council on 13 and 14/12/1967			7
Annexe II	Minutes of the meeting of the Council on 18 and 19/07/1968			34
Annexe III	Minutes of the session of the Council on 17-18/03/1969			17
Annexe IV	Working document of COREPER proposing a common position for the ERTA negotiations (18/03/19709			12
Doc 49	Certified copies of the submitted documents sent to the Commission	Registrar		1
Doc 50	Report of the Oral Hearing	Juge rapporteur Pescatore	11/02/1971	19
Telex	Timing of the Oral Hearing	Registrar		2
Pages 443 to 576 of the orginal file are not available to public				**1**
Oral Procedure				
Doc 51	Complaint about the differences in the language of the minutes of the Council meeting on 20/03/1970 and the list of decisions of the same	Commission	21/10/1970	1

	meeting (submitted upon the request of Judge Pescatore)			
Doc 52	Letter informing the Council about the date of the Opinion of the Advocate General	Registrar	15/02/1971	
Doc 53	Letter informing the Council about the date of the Opinion of the Advocate General	Registrar	15/02/1971	1
Doc 54	Letter informing the Council about the change in date of the Opinion of the Advocate General	Registrar	17/03/1971	1
Doc 55	Letter informing the Commission about the change in date of the Opinion of the Advocate General	Registrar	17/03/1971	1
Doc 56	Submission of evidence in response to a question by the Court during the Oral Hearing	Council	22/02/1971	1
Annex I	Commodity Conferences – Question of the Reconciliation of United Nations Rules Concerning Participation in Such Conferences and the Institutional Arrangements of The European Economic Community governing the Negotiation of Agreements (Opinion prepared for the UN Sugar Conference, 1968) United Nations Juridical Yearbook 1968, 201			2
Annex II	Additional document on participation of EEC in international agreements (title not specified)			2
Doc 57	Certified copy of letter and documents of the Council sent to Commission	Registrar	24/02/1971	1
Doc 58	Opinion of the Advocate General	AG Dutheillet de Lamothe	10/03/1971	32
Doc 59	Letter informing the Commission about the date of the final judgment	Registrar	23/03/1071	1

Doc 60	Letter informing the Council about the date of the final judgment	Registrar	23/03/1071	1
Doc 61	Final Judgment of the Court	Court (2nd Chamber)	31/03/1971	34
Doc 62	Certified copy of the final judgment sent to Commission	Registrar	31/03/1971	1
Doc 63	Certified copy of the final judgment sent to Council	Registrar	31/03/1971	1
Doc 64	Corrigenda of final judgment sent to Commission	Registrar	01/04/1971	1
Doc 65	Corrigenda of final judgment sent to Commission	Registrar	01/04/1971	1