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ERTA, ECHR and *Open Skies*: Laying the Grounds of the EU System of External Relations

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Introduction

This Chapter looks back at the EC external relations case law formulated by the European Court of Justice in its *ERTA*, *ECHR*, and *Open Skies* pronouncements.³⁹ It underlines the continuing relevance of the rules on external competence allocation that this case law encapsulates. It also points to other notions which those verdicts evoke, namely the notions of ‘compliance’ and ‘coherence’. These have been featuring more prominently in the Court’s external relations jurisprudence, and appear to supplement its primary focus on articulating and policing the distribution of competence between the Member States and the Community.

Three Layers in the EC External Competence Construct

The three rulings of the Court reflect different, though complementary, judicial approaches to the rules on allocation of external competence between the Member States and the Community.⁴⁰

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³⁹ Respectively: Case 22/70 *Commission v Council* [1971] ECR 263; Opinion 2/94 *ECHR* [1996] ECR 1759; and Case C-466/98 *Commission v United Kingdom* [2002] ECR I-9427, Case C-467/98 *Commission v Denmark* [2002] ECR I-9519, Case C-468/98 *Commission v Sweden* [2002] ECR I-9575, Case C-469/98 *Commission v Finland* [2002] ECR I-9627, Case C-471/98 *Commission v Belgium* [2002] ECR I-9681, Case C-472/98 *Commission v Luxembourg* [2002] ECR I-9741, Case C-475/98 *Commission v Austria* [2002] ECR I-9797, and Case C-476/98 *Commission v Germany* [2002] ECR I-9855). For a detailed analysis of this case law see R Holdgaard, *External Relations Law of the European Community—Legal Reasoning and Legal Discourses* (Alphen aan den Rijn, Kluwer Law International, 2008); D Scannell, ‘Trespassing on sacred ground: The implied external competence of the European Community’ (2001) 4 *Cambridge Yearbook of European Legal Studies* 343, A Dashwood and J Heliskoski, ‘The classic authorities revisited’ in A Dashwood and C Hillion (eds), *The general law of EC external relations* (London, Sweet & Maxwell, 2000) 3.

⁴⁰ The EU system of external relations is also governed by rules on allocation of competence between the Member States and the EU *qua* CFSP & PJCCM, and between the EC and the EU *qua* CFSP & PJCCM; see

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In its *ERTA* judgment, the Court introduces its famous *implied powers* doctrine. Through a purposive interpretation of the Treaty provisions on the EC international legal personality, the Court enables the Community to negotiate and conclude external agreements over the whole range of its broadly defined objectives. It also makes this power potentially exclusive, in the sense of a progressive limitation of Member States' autonomous power on the international scene to the benefit of the Community.⁴¹

Held in the aftermath of the transitional period foreseen in the Treaty for setting the Common Commercial Policy, the *ERTA* decision catalyses the on-going emergence of the Community as law-making actor on the global stage, particularly in the GATT context. It also typifies the role the Court of Justice has played in policing the boundaries between the Member States' and the Community's external competence,⁴² by reference to the *effet utile* of Community policies rather than through a textual interpretation of the EEC Treaty.⁴³

While the '*ERTA* doctrine' itself is no longer contested, the conditions of its application remain contentious, to the extent that, as rightly recalled by Marise Cremona, they are still 'the subject of both academic discussion, institutional debate and new case law'.⁴⁴ Such disagreement is itself aggravated by a changing and more diverse Member States' 'ideology' with respect to the European integration. Indeed, since the implied powers doctrine was established, notions of conferred powers, subsidiarity and proportionality have been inserted into the Community constitutional fabric, both as express organising principles of the EC legal order,⁴⁵ and implied in the formulation of various new EC power-conferring provisions.⁴⁶ At the same time, new modes of co-operation (eg CFSP) have

further C Hillion, *The European Union and its Eastern European Neighbours: A Laboratory for the Organisation of EU External Relations* (Oxford, Hart Publishing, 2010, forthcoming).

⁴¹ The Court found that the competence of the Community to conclude international agreements arises not only from an express conferment by the Treaty but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions; that in particular, 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, Member States no longer have the right, acting individually or even collectively, to undertake obligations with non-member countries which affect those rules; that, as and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards non-member countries affecting the whole sphere of application of the Community legal order; and that, to the extent to which Community rules are adopted for the attainment of the objectives of the Treaty, Member States cannot, outside the framework of the Community institutions, assume obligations which might affect those rules or alter their scope.

⁴² In this regard: see, eg, Opinion 1/75 *Local Cost Standard* [1975] ECR 1355; Joined Cases 3, 4 and 6/76 *Kramer* [1976] ECR 1279; Opinion 1/76 *Laying-up Fund* [1977] ECR 741; Opinion 1/78 *Natural Rubber* [1979] ECR 2871; Case 804/79 *Commission v United Kingdom* [1981] ECR 1045; Case 45/86 *Commission v Council (GSP)* [1987] ECR 1493; Opinion 2/91 *ILO* [1993] ECR I-1061.

⁴³ E Stein writes that 'contrary to the prevailing learned opinion, and to the consternation of some Member Governments, the Court of Justice rejected the principle of enumerated powers in favor of the doctrine that Community power should be coextensive with its internal powers'; E Stein and L Henkin, 'Part I: the International Dimension' in M Capelletti, M Seccombe and J Weiler (eds), *Integration Through Law—Europe and the American Federal Experience* (vol 1, book 3; Berlin/New York, Walter de Gruyter, 1986) 43.

⁴⁴ M Cremona, 'Defining competence in EU external relations: lessons from the Treaty reform process', in A Dashwood and M Maresceau (eds), *Law and Practice of EU External Relations* (Cambridge, Cambridge University Press, 2008) 50; M Cremona, 'External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law' (2006) European University Institute: LAW Working Paper 22/06, 2. Michel Petite also points out that reading *ERTA* 'may appear an easy task—applying it in practice is, however, more tricky'; M Petite, 'Current Legal Issues in the External Relations of the European Union' (2006) *EUI LAW Working Paper* 38/06, 7. See also R Holdgaard, 'The European Community's Implied External Competence after the *Open Skies* Cases' (2003) 8 *European Foreign Affairs Review* 370.

⁴⁵ Art 5 EC.

⁴⁶ Eg EC Articles on culture, public health, and development co-operation.

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been introduced in the European integration process, alongside and as an alternative to the Community method. Member States, qua *pouvoir constituant*, have thus sought to harness that process and limit the almost proverbial ‘competence creep’⁴⁷ phenomenon that it was found to engender, and which was catalysed notably by the Court’s competence jurisprudence.

Those efforts bore fruit, notably at judicial level as epitomised by Opinion 2/94 on the Community accession to the ECHR. This *Avis* provides evidence of a new layer in the Court’s jurisprudence on competence allocation in the then newly emerging EU system of external relations. Here, the Court explicitly refers to the TEU principle of conferred powers to limit the reach of both EC implied and residual powers based on Article 308 EC,⁴⁸ an approach it averted in *ERTA*, despite explicit requests from the Council and AG Dutheillet de Lamothe.⁴⁹

This pronouncement confirms the earlier *WTO* Opinion,⁵⁰ which embeds the Community’s implied and residual powers into the new EU legal framework. Indeed, the Court’s external competence case law post-1/94 appears to be coloured by the tones of the Treaty of Maastricht,⁵¹ by its interpretation by the Member States’ judiciary,⁵² and perhaps by the difficulties that riddled its ratification. This evolving jurisprudence may have been equally tainted by the imminent 1996 Inter-Governmental Conference (IGC), aimed notably at discussing the possible *communitarisation* of areas of intergovernmental co-operation introduced by the Maastricht Treaty.⁵³ Observing the division of tasks between the judiciary and primary law makers, the European judges may have found it more apposite to send signals to the ‘Masters of the Treaties’ than to pre-empt the outcome of their discussions.

The Court of Justice thus not only acts as the *garant* of the Community interest against individual Member States’ encroachment, it also preserves, at another (meta) level, the Member States’ powers as primary law makers of the EU. Having ensured the unity of the common market and the uniform application of Community law in *ERTA*,⁵⁴ the Court also seemingly upholds the EU institutional integrity against Community’s abuse of its implied and residual powers, and the substantive and procedural limits to its competence, prescribed by the Treaty. The Court thereby safeguards the overall balance of powers

⁴⁷ S Weatherill, ‘Competence creep and competence control’ (2004) 23 *Yearbook of European Law* 1; A Dashwood, ‘The Limits of European Community Powers’ (1996) 21 *EL Rev* 113.

⁴⁸ *ECHR*, para 23. Indeed, the Court points out in para 30 that Article 308 ‘being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define the tasks and the activities of the Community’.

⁴⁹ According to AG Dutheillet de Lamothe: ‘[i]t appears clear from the general scheme of the Treaty of Rome that its authors intended strictly to limit the Community’s authority in external matters to the cases which they expressly laid down’; Case 22/70 *Commission v Council* [1971] ECR 263 at 293.

⁵⁰ Opinion 1/94 *WTO* [1994] ECR I-5267.

⁵¹ As pointed out by Dashwood, ‘in the era of the Maastricht Treaty, there is a clear legal duty to apply Article [308] consistently with the principle of attribution of powers’; A Dashwood, ‘Commentary’ in A Dashwood and S O’Leary (eds), *The Human Rights Opinion of the ECJ and its Constitutional Implications* (1996) CELS Occasional Paper No 1, Centre for European Legal Studies, Cambridge, 18.

⁵² Most notably by the BvG in its *Brunner* decision, and particularly its para 99.

⁵³ Art B TEU.

⁵⁴ See para 31 of the judgment.

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envisaged by the then recent TEU, in due respect of the perceived original intent of the primary law makers.⁵⁵ This new layer of case law exemplified by *ECHR* thus supplements the initial *ERTA* jurisprudence.

These two strands of the Court's external competence case law are at work in the *Open Skies* judgments. In line with *ECHR*, these judgements reflect that the external powers case law is coloured by the EU organising principles. The Court here turns its attention to the question of *necessity* of an EC external action in areas of shared competence, in *casu* air transport. Having confirmed its earlier WTO dictum that necessity based on Opinion 1/76 jurisprudence is restricted to the demonstration that the internal competence may be effectively exercised only at the same time as the external competence, the Court questions the necessity of an *ERTA*-based external action.

As a preliminary step, it examines the formulation of the EC power conferring provisions (in *casu*, Article 80(2) EC) to determine the applicability of the *ERTA* doctrine to the domain at hand, thus suggesting that the *ERTA* effect is not automatic but instead a function of the nature of the powers conferred on the Community.⁵⁶ Recalling the proverbial rationale of that doctrine, the Court nonetheless finds that the *ERTA* doctrine is in principle applicable to the area of air transport:

If the Member States were free to enter into international commitments affecting the common rules adopted on the basis of Article 84(2) of the Treaty, that would jeopardise the attainment of the objective pursued by those rules and would thus prevent the Community from fulfilling its task in the defence of the common interest.

...

It follows that the findings of the Court in the *AETR* judgment also apply where, as in this case, the Council has adopted common rules on the basis of Article 84(2) of the Treaty.⁵⁷

There follows a meticulous analysis of relevant Community rules to determine whether they could be affected by Member States' international commitments.⁵⁸ The Court thereby checks to what extent the *ERTA* effect operates in view of internal Community rules. And in this respect, it clearly defers to the political choices made by the EC law-making authorities upstream, holding that the Council did not intend to establish a complete package of legislation. Equally, the Court shows deference to the *external* policy choices. Hence, having emphasised the Council's power to decide on the extent and the procedure of Community involvement in air transport (Article 80(2) EC), the Court notes that in practice, 'the Council declined to give effect' to the Commission's early initiatives to

⁵⁵ In this regard, see Case T-306/01 *Yusuf* [2005] ECR II-3533, and Case T-315/01 *Kadi* [2005] ECR II-3649, where the Court of First Instance shows deference to the Union's constitutional architecture set out by the TEU; see also Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* (3 September 2008, nyr).

⁵⁶ Para 78. Further: R Holdgaard, 'The European Community's Implied External Competence after the *Open Skies* Cases' (2003) 8 *European Foreign Affairs Review* 385; and the annotation of J Dutheil de la Rochère and PJ Slot (2003) 40 *CML Rev* 697. Indeed, the EC provisions on development co-operation and humanitarian aid (as well as Art 133(6) EC) suggest that the *ERTA* effect cannot apply to those areas; as indeed confirmed by the Court: eg Joined cases C-181 and 248/91 *Parliament v Council (Bangladesh)* [1993] ECR I-3685 (Humanitarian aid) and Case 316/91 *Parliament v Council (EDF)* [1994] ECR I-625 (development co-operation), and Case 91/05 *Commission v Council (ECOWAS)* (20 May 2008, nyr).

⁵⁷ Paras 79–80; this quote refers to the pre-Amsterdam numbering of Article 80(2) referred to earlier in this Chapter. See also paras 74–75, case C-523/04 *Commission v the Netherlands* [2007] ECR I-326.

⁵⁸ Paras 90–93, *Open Skies*.

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conclude a comprehensive air transport agreement with the USA,⁵⁹ and that it subsequently adopted only 'a limited mandate to negotiate with that country'.⁶⁰ The Council's assessment of expediency of an EC external action is thus unquestioned,⁶¹ particularly in view of the powers it is granted by the Treaty.⁶² The Court thereby suggests that the necessity of a Community external action in the field of shared powers is to be determined by taking account of the formulation of the power-conferring basis, as well as by the actual exercise of that power by the EC political institutions.

The EU judicature thus not only polices the confines of the Community external competence by reference to the principle of conferred powers as it did in *ECHR*, it also oversees the *exercise* of those Community powers, by reference to the notion of necessity, which in turn relates to subsidiarity. Indeed, the Court's assessment of the necessity criterion is seemingly strict, as suggested by its finding that distortions to the flow of services in the internal market which might arise from Member States' bilateral agreements 'do not in themselves affect the common rules adopted in that area', and are 'not (therefore) capable of establishing an external competence of the Community'.⁶³

In that, the *Open Skies* judgments confirm *ECHR* which embedded the external powers case law in the EU legal and institutional framework. This Court's approach may also be related to the fact that they were decided in the aftermath of the 'Laeken Declaration' which led to the convening of the Convention on the Future of Europe, in charge of clarifying notably 'the division and definition of powers' as well as the Union's 'institutional set-up'. Again, the Court may have exercised some self-restraint in order not to interfere with the Convention's constitutional mandate.⁶⁴

That said, the *Open Skies* judgments suggest that a balance is being sought between the post-TEU external competence case law that embeds the external powers jurisprudence in the EU constitutional framework (*ECHR* and *WTO* Opinions), and Member States' obligation of loyalty derived from Article 10 EC, and which underpins the *ERTA* doctrine. The Court not only recalled the basic rationale of its *ERTA* doctrine in order to apply it to air transport,⁶⁵ its detailed analysis of EC rules to determine whether they could be affected by Member States' bilateral commitments also ends up, almost surprisingly, with a conspicuous reminder of *ERTA* and its foundations:

⁵⁹ Para 18.

⁶⁰ Para 19. See also para 60, where the Court recalls that the Treaty entrusts the Council with the tasks of deciding whether it is appropriate to take action in the field of air transport and to define the extent of Community intervention in that area. The Court also points out that it was after the exercise of the internal competence, that the Council authorised the Commission to negotiate an air transport agreement by granting it a restricted mandate, while taking care to make clear that the system of bilateral agreements would be maintained until the conclusion of a new agreement binding the Community.

⁶¹ The Council's ability to decide whether it is expedient to enter into an agreement with third countries was acknowledged by the Commission in the field of transport in the *ERTA* case; see para 70 of the judgment.

⁶² Tizzano AG also insists on the 'necessity' of the Community agreement being assessed by the competent institutions, and following the procedures prescribed; adding that the contrary would lead to uncertainty, arbitrariness into the division of powers between the Community and Member States, and could distort the procedures and the interinstitutional balances set out by the Treaty; paras 51–53.

⁶³ Para 95: cf the Court's approach to Community harmonising powers based on Art 95 TEU, eg Case 376/98 *Germany v Council and Parliament (Tobacco Advertising)* [2000] ECR I-8419; Case C-491/01 *British American Tobacco* [2002] ECR I-11453; Case C-380/03 *Germany v Parliament and Council* [2006] ECR I-11573.

⁶⁴ Indeed, the specific Convention's Working Group 'External Action' had not yet submitted its final report.

⁶⁵ See paras 79–80 quoted above.

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Article [10] of the Treaty requires Member States to facilitate the achievement of the Community's tasks and to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty.

In the area of external relations, the Court has held that the Community's tasks and the objectives of the Treaty would be compromised if Member States were able to enter into international commitments containing rules capable of affecting rules adopted by the Community or of altering their scope (see Opinion 2/91, paragraph 11, and also, to that effect, the *AETR* judgment, paragraphs 21 and 22).⁶⁶

That discernible conciliation between the two strands of the ECJ external competence case law becomes more evident in its Opinion on the New Lugano Convention.⁶⁷ Here, the Court confirms its post-TEU jurisprudence by emphasising that 'Community enjoys only conferred powers and ... accordingly, any competence, especially where it is exclusive and not expressly conferred by the Treaty, must have its basis in conclusions drawn from a specific analysis of the relationship between the agreement envisaged and the Community law in force and from which it is clear that the conclusion of such an agreement is capable of affecting the Community rules'. Building on its *Open Skies* approach, the Court undertakes a 'comprehensive and detailed analysis' to determine whether the Community has the competence to conclude an international agreement and whether that competence is exclusive.⁶⁸

At the same time, the Court's detailed analysis is not simply 'quantitative'⁶⁹ as it was in the *WTO* Opinion. Building on *Open Skies*,⁷⁰ it takes account 'not only of the *area covered* by the Community rules and by the provisions of the agreement envisaged but also of the *nature and content* of those rules and those provisions, to ensure that the agreement is not capable of undermining the *uniform and consistent application* of the Community rules and the *proper functioning of the system* which they establish' (emphasis added). Moreover, the Court opines that its scrutiny must include not only the current state of Community law but also 'its future development'.⁷¹

While relying on its post-TEU jurisprudence, the Court reinvigorates its *ERTA* doctrine as well, based on concerns of effectiveness of Community rules.⁷² Indeed, it acknowledges the Community exclusive powers to conclude the new Lugano convention, an unusual outcome since the entry into force of the TEU.

⁶⁶ Paras 110–111, *Open Skies*. See also paras 74–75, case C-523/04 *Commission v the Netherlands* [2007] ECR I-326.

⁶⁷ Opinion 1/03 *New Lugano Convention* [2006] ECR I-1145.

⁶⁸ A distinction that had been blurred by the Court *Open Skies* judgments, and which was not explicitly made in *ERTA*.

⁶⁹ An expression used by F Hoffmeister, in his case note on *Open Skies* (2004) 96 *American Journal of International Law* 567.

⁷⁰ Para 124, Opinion 1/03.

⁷¹ Para 126, emphasis added.

⁷² P Eeckhout, 'General Report', FIDE 2006.

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From Adjudicating Competence Allocation to Ensuring Compliance and Coherence in EU External Relations

The external relations' case law embodied in *ERTA*, *ECHR* and *Open Skies* has thus far been envisaged through the prism of *competence allocation*, and its significance in the organisation and functioning of the EU system of external relations. However, other and arguably undervalued facets to this case law ought to be looked at. In particular, those pronouncements also hint at the Court's increasing attention to Member States' *compliance* with their Community obligations, including obligations derived from the principle of *co-operation* expressed in Article 10 EC.⁷³

In the *Open Skies* verdicts, the Court found that in the exercise of their air transport powers, the Member States had failed to fulfil a number of their obligations under Community law. In *casu*, the clause on ownership and control of airlines, included in the bilateral *Open Skies* agreements, breached Article 43 EC on the freedom of establishment, for it introduced an unlawful discrimination against other Community nationals by preventing them from benefiting from the treatment which the host state accords to its own nationals.⁷⁴ Each Member State concerned therefore had to revise its *Open Skies* agreement to ensure their compliance with the EC provisions on freedom of establishment. The Court thereby recalled that, when they act within the remit of their powers, the Member States are bound to ensure that their international commitments are consistent with Community law in general.⁷⁵

In the aftermath of the *Open Skies* judgments, the Community adopted a regulation that establishes a procedure for the notification and authorisation of bilateral negotiations conducted by the Member States in the field of air transport.⁷⁶ Under this new procedure, Member States' (re)negotiation of their bilateral air transport agreements has been supervised by the Commission for the purpose of ensuring their *consistency* with Community law. But this regulation is more than merely ensuring consistency between Member States' commitments and EC law, it also purports to guarantee *co-operation* between the Member States and the Community institutions in an area where they share competence. Indeed, the preamble of the regulation recalls the Court's well-established jurisprudence on the 'duty of cooperation':

Where it is apparent that the subject-matter of an agreement falls partly within the competence of the Community and partly within that of its Member States, it is essential to ensure close cooperation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into. That obligation to cooperate flows from the requirement of unity in the international representation of

⁷³ For a detailed analysis of the requirements of compliance and co-operation, see M Cremona, 'Defending the Community Interest: the duties of cooperation and compliance' in M Cremona and B de Witte (eds), *The Constitutional Fundamentals of EU external relations* (Oxford, Hart Publishing, 2008); C Hillion, 'Mixity and Coherence in EU external relations: the significance of the Duty of Cooperation' in C Hillion and P Koutrakos (eds), *Mixed Agreements Revisited* (Oxford, Hart Publishing, 2009, forthcoming).

⁷⁴ Paras 131–133.

⁷⁵ Also in this sense: Case C-124/95 *Centro-Com* [1997] ECR I-81.

⁷⁶ See Regulation 847/2004; OJEU 2004 L 157.

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the Community. The Community institutions and the Member States should take all necessary steps to ensure the best possible cooperation in that regard.⁷⁷

The same preamble also points out that the system the Regulation establishes aims at 'ensur(ing) that a Member State conducting negotiations takes account of Community law, broader Community interests and ongoing Community negotiations'. As a spin-off, the *Open Skies* judgments have therefore led to the setting-up of an EC monitoring mechanism of Member States' bilateral negotiations, as a specific codification of the duty of co-operation in the field of air transport.

The case law similarly points to Member States' obligations flowing from the principle of co-operation, expressed in Article 10 EC, for the purpose of ensuring not only the consistency, but also the *coherence* of the Community's external action. Such obligations were made particularly prominent in two Court judgments of 2005, involving infringement proceedings against Luxembourg and Germany.⁷⁸ The Council had authorised the Commission to negotiate a Community agreement in the field of inland waterways transport with several third European States. Despite invitations from the Commission to refrain from doing so, Luxembourg and Germany concluded bilateral agreements in the same area, with the same third countries, while the Commission was itself negotiating.

Having rejected the other Commission's contention that the Community had exclusive external competence in the area concerned, the Court of Justice held that by failing to co-operate or consult with the Commission, those Member States had compromised the achievement of the Community's task and the attainment of the objectives of the Treaty,⁷⁹ in violation of their 'duty of genuine cooperation'. The Court further pointed out that:

The adoption of a decision authorising the Commission to negotiate a multilateral agreement on behalf of the Community marks the start of a concerted Community action at international level and requires, for that purpose, if not a duty of abstention on the part of the Member States, at the very least *a duty of close cooperation between the latter and the Community institutions in order to facilitate the achievement of the Community tasks and to ensure the coherence and consistency of the action and its international representation*.⁸⁰

Hence, prior to the existence of common rules, and thus before any *ERTA* effect occurs in an area of shared powers, Member States are nonetheless bound by specific obligations to ensure that their autonomous actions,⁸¹ though not in conflict with EC substantive law,⁸² 'do not prevent the Community from fulfilling its tasks in the defence of the common interest'. What is more, their action ought to facilitate the achievement of the Community's tasks and 'ensure the coherence and consistency of the action and its international

⁷⁷ This formulation is typical of the Court's pronouncements related to mixed agreements; see, eg, Opinion 2/91 *ILO* [1993] ECR I-1061; Opinion 1/94 *WTO* [1994] ECR I-5267.

⁷⁸ C-266/03 *Commission v Luxembourg* [2005] ECR I-4805; C-433/03 *Commission v Germany* [2005] ECR I-6985.

⁷⁹ See also Opinion of Maduro AJ, 1st October 2009 in Case C-246/07 *Commission v Sweden (PFOS)* (pending).

⁸⁰ Emphasis added.

⁸¹ See also the Court's judgment in C-459/03 *Commission v Ireland ('MOX plant')* [2006] ECR I-4635.

⁸² As pointed out by Dashwood, the scope of EC competence differs from the scope of application of the EC Treaty: Dashwood, above n 51 at 22; A. Dashwood, 'The Limits of European Community Powers' (1996) 21 *EL Rev* 113.

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representation'.⁸³ As the two judgments mentioned above demonstrate, and as it has been confirmed since, such Member States' obligations are enforceable.⁸⁴

Arguably, the Court's concern for the defence of the common interests by way of co-operation among external relations actors, rather than simply through the assertion of exclusive Community powers, could already be detected in *ERTA*. While it is the cradle of the implied powers doctrine, it also contains various other expressions of the duty of co-operation which binds the actors of the external relations system, particularly where the vesting of powers in the Community has not (yet) fully taken effect.⁸⁵ For instance, the Court emphasised in broad terms that 'wherever a matter forms the subject of a common policy, the Member States are bound in every case to act jointly in defence of the interests of the Community'.⁸⁶ It also pointed out that in the specific circumstances of the case, the Council and the Commission had 'to reach an agreement ... on the appropriate methods of cooperation with a view to ensuring most effectively the defence of the interests of the Community'. The Court thereby posits that each actor in the external relations system, namely the Member States, the Commission and the Council, are bound to contribute, through co-operation, to the fulfilment of the Community objectives, and to the defence of its interests.

In the two infringements proceedings mentioned above, the Court goes further by explicitly setting out obligations stemming from the duty of co-operation, and by asserting that these can be enforced. More than policing competence allocation, and ensuring that Member States comply with EC substantive rules, the Court now engages in fostering the coherence and consistency of the Community's external action.⁸⁷

This co-operation jurisprudence suggests a growing Court's acceptance of the plurality that characterises the EU system of external relations. It could also contribute to the development of a more mature legal order, less determined by the usual competence grabbing instinct than by a genuine Community reflex.

Conclusion

The *ERTA*, *ECHR* and *Open Skies* pronouncements encapsulate the core principles of the Court's jurisprudence on competence allocation in the EU system of external relations. The paper suggested that far from being outdated, this composite case law endures in its essentials,⁸⁸ as recently demonstrated by Opinion 1/03.⁸⁹ Indeed, much of the external relations litigation continues to revolve around those competence-related principles and

⁸³ Further on the link between the duty of co-operation and the requirement of coherence: C Hillion, 'Tous pour un, un pour tous! Coherence in the external relations of the European Union' in M Cremona (ed), *New developments in EU external relations* (Oxford, Oxford University Press, 2008).

⁸⁴ Eg C-459/03 *Commission v Ireland* ('*MOX plant*') [2006] ECR I-4635.

⁸⁵ Para 81.

⁸⁶ Paras 77 and 78, *ERTA*. Although that obligation was partly derived from the provisions of former Art 116 EEC (para 76), which since then has been deleted from the EC Treaty, the Court only referred to this article 'as a subsidiarity point', thereby suggesting that Member States' obligation still stands.

⁸⁷ Further: Hillion, above n 83.

⁸⁸ Dashwood and Heliskoski, above n 39. To be sure, the Member States have attempted to codify that composite jurisprudence, as suggested by the TCE and the Reform Treaty. Further: M Cremona, 'The draft Constitutional Treaty: external relations and external action' (2003) 40 *CML Rev* 1347; A Dashwood, 'The relationship between the Member States and the European Union/European Community' (2004) 41 *CML Rev*

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the conditions of their application. Yet it has become clear, in recent years, that establishing the exclusive competence of the Community is a complex and often unsuccessful enterprise, for legal and/or political reasons. In the EU system of external relations, essentially based on shared powers, the effectiveness of Community policies also depends on compliance with Community law, including with procedural obligations of genuine co-operation.

355 (2004); B De Witte, 'The Constitutional law of external relations' in I Pernice and M Poiares Maduro (eds), *A constitution for the European Union: first comments on the 2003 draft of the European Convention* (Baden-Baden, Nomos Verlagsgesellschaft, 2004) 95.

⁸⁹ See also the Court's analysis of the competence question in its ruling in Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakat International Foundation v Council and Commission* (3 September 2008); on the continuing reference to *ERTA* see, eg, Case 45/07 *Commission v Greece (IMO)* (12 February 2009, nyr); and on the defence of the Community interest, see Case C-205/06 *Commission v Austria*, and Case C-249/06 *Commission v Sweden* (3 March 2009, nyr).