Exercising EU External Competence in International Organisations of which the EU is not a Member: *European Commission v Council of the European Union ('IMO')* (C-161/20) EU:C:2022:260

Thomas Verellen*
Utrecht University

keywords to be inserted by the indexer

Introduction

European Commission v Council of the European Union was an action for annulment targeting a decision of the Committee of the Permanent Representatives of the Governments of the Member States to the European Union (COREPER), the gathering of the permanent representatives of the EU Member States to the European Union which prepares the meetings of the Council. COREPER had invited Croatia to submit a proposal to a working group established within the framework of the International Maritime Organisation (IMO). (Croatia held the rotating Presidency of the Council at the time.) The European Commission considered that, by issuing this invitation, COREPER had disregarded the EU's exclusive external competence as well as the Commission's exclusive competence to represent the EU externally. AG Szpunar had issued his Opinion on 25 November 2021.[1] The Grand Chamber of the Court of Justice issued its judgment on 5 April 2022.[2] The Advocate General had advised the Court to dismiss the action. The Court agreed.

The case is interesting for at least two reasons. Firstly, it further clarifies the role of the Commission and the Member States in the EU's external representation in international organisations of which the EU is not a member. In particular, the Court confirms that the Commission has an exclusive competence to represent the EU externally only in so far as the relevant international legal rules allow the EU to act. If this is not the case—for example, when membership of an international organisation is open only to states and not to other international organisations—Member States are free to decide who is to defend the interests of the EU on the international stage. This can be the Commission, but it can also be a Member State, or even several Member States—each in the name of and on behalf of the EU Member States, but in the interest of the EU.

The case is interesting, secondly, because it again highlights how difficult it is to apply the ERTA principle.[3] The Commission had argued that an 'ERTA effect' covered the EU's submission to the IMO working group, and that the EU thus held an exclusive external competence to make the submission. The

* Assistant Professor. This note builds on an earlier contribution written by the same author, in *SEW, Tijdschrift voor Europees en economisch recht* (forthcoming, in Dutch).

[1] Opinion of AG Szpunar in *European Commission v Council of the European Union* (C-161/20) EU:C:2021:957.

[2] *European Commission v Council of the European Union* (C-161/20) EU:C:2022:260; [2022] 3 C.M.L.R. 35 at [9].

[3] *Commission of the European Communities v Council of the European Communities (ERTA)* (22/70) EU:C:1971:32; [1971] C.M.L.R. 335.

Commission's argument highlights a problem that is inherent to the ERTA analysis: to examine whether the EU has acquired an exclusive external competence pursuant to the ERTA principle, a detailed and comprehensive comparison of the agreement/decision and pre-existing common EU rules has to be undertaken to determine whether the former risks affecting the latter—but how to conduct such an analysis when the agreement/decision at issue does not (yet) exist? The Court avoided the issue but Advocate General Szpunar's analysis gives a flavour of how difficult it is to conduct an ERTA analysis this early in the decision-making process at the international level.

This case note is structured as follows. I first summarise the procedural context, the relevant points of law, the Advocate General's Opinion and the judgment. In the comments section, I make two main points—one on the Commission's powers of external representation (second plea); another on the ERTA principle (first plea). Concerning the former, I discuss how the role of Member States in defending the EU position in international organisations in which the EU has no status should be understood. I draw attention to how the obligation of sincere cooperation imposes a two-fold duty on the Member States: not only must they act in their own name but in the interests of the EU to defend the EU position, they must also make an active effort to secure the EU's accession to the international organisation in question. Concerning the latter, I discuss the challenge of conducting an ERTA analysis in the absence of a final international agreement or decision against which pre-existing common EU rules can be assessed. I do so against the backdrop of recent Court of Justice case law that clarifies the normative implications of shared competence. This line of case law makes me wonder: what role, if any, does the ERTA principle play in the contemporary constitutional universe of EU foreign relations—a universe in which shared competence has become the general rule?

Context and legal questions

The action for annulment was directed against a decision of COREPER. As mentioned above, COREPER had mandated Croatia to submit a contribution to the IMO. The contribution was submitted in response to an invitation from an IMO working group. The task of the working group was to formulate proposals to reduce greenhouse gas emissions in shipping. All 'interested Member States and international organisations' could submit proposals. The EU was—and still is—not a member of the IMO. However, in 1974 the Commission—not the then European Economic Community—had concluded a 'cooperation arrangement' with the IMO. The judgment summarises the content of that arrangement as follows:

> 'That arrangement, which is still in force, essentially provides that the Secretariat of the IMO and the Commission will cooperate and consult with each other on matters of common interest in accordance with arrangements to be made from time to time between them, will exchange information and will keep each other fully informed of all projected activities and programmes of work which may be of interest to either party. In addition, under that arrangement, the Secretariat of the IMO is to invite the Commission to send observers to conferences convened by the IMO and to meetings of IMO organs which may have a bearing on subjects of interest to the European Union.'[4]

Mindful of the long-standing cooperation between the Commission and the IMO, the Commission considered that the invitation from the IMO working group was also addressed to it. The Commission wished to submit a contribution on behalf of the Commission and on behalf of the EU. The contribution had to be submitted on behalf of the EU, according to the Commission, because the subject of the contribution fell within the scope of the exclusive competence of the EU. After all, the contribution touched on internal EU rules. These rules had triggered an ERTA effect. By contrast, COREPER took a different view. It did not instruct the Commission, but rather the rotating Presidency of the Council (Croatia) to

[4] *European Commission v Council of the European Union* (C-161/20) EU:C:2022:260 at [9].

submit a proposal—not on behalf of the *European Union*, but on behalf of the *Member States* and the Commission.[5]

This brings us to the heart of the dispute between the Commission and the Council. The Commission considered that it alone could submit the contribution to the IMO working group on its own behalf and on behalf of the EU as the contribution fell within the exclusive competence of the EU. The Council, on the other hand, considered that it was free to entrust anyone with submitting the proposal to the IMO working group. The Commission relied on art.17(1) TEU, which empowers the Commission to represent the EU externally. The Council submitted that the mandate to submit the contribution to the IMO working group fell outside the scope of art.17(1) TEU because the EU was not in a position under international law to act itself.

The Opinion of AG Szpunar

The Advocate General first examined the plea alleging a breach of art.17(1) TEU concerning the Commission's external power of representation, notwithstanding the fact that the Commission's first plea alleged a breach of art.3(2) TFEU, and only its second plea related to art.17(1) TEU. It was appropriate to deal with the second plea first, according to the Advocate General, because the nature of the EU's competence would not determine the outcome of the case. After all, there were reasons to believe that the proposal could in any case not be submitted by the EU.[6]

The second plea, alleging a breach of Article 17(1) TEU (external representation powers of the Commission)

The Advocate General advised the Court to dismiss the second plea. In the view of the Advocate General, COREPER—and therefore the Council—had not infringed art.17(1) TEU by instructing Croatia to submit the proposal to the IMO working group. The EU has no status within the IMO, and the IMO working group's invitation to 'all interested member states and international organisations' cannot be understood as an open invitation. On the contrary, it should be seen as an invitation to Member States and international organisations that participated in the work of the IMO. Even though, as mentioned above, the Commission maintains links with the IMO, the EU itself does not participate in the work of the IMO. Consequently, the invitation of the IMO Working Group was not addressed to the EU.[7]

Since the EU itself does not participate in the work of the IMO, the EU cannot itself submit a proposal to the IMO working group, according to the Advocate General. What does this mean for the scope of art.17(1) TEU, which gives the Commission exclusive competence to represent the EU externally? The Advocate General formulates the question as follows:

> 'The essential question is therefore whether the scope of [Article 17 TEU] is limited to those situations in which the Union acts in its own name or whether it also encompasses situations where the Union, prevented from exercising its external competence in its own name, exercises it through the intermediary of the Member States.'[8]

The Advocate General believed the first option to be the correct one. In his view, '[t]he only logical interpretation of the sixth sentence of art.17(1) TEU is that this provision applies to situations in which the Union, as the subject of international law, may act in its own name.'[9]

[5] *European Commission v Council of the European Union* (C-161/20) EU:C:2022:260 at [21].
[6] *European Commission v Council of the European Union* (C-161/20) EU:C:2021:957 at [50].
[7] *European Commission v Council of the European Union* (C-161/20) at [78].
[8] *European Commission v Council of the European Union* (C-161/20) at [81].
[9] *European Commission v Council of the European Union* (C-161/20) at [83].

Since the EU cannot act in its own name in the IMO working group, art.17(1) TEU does not apply, the Advocate General considered. Consequently, COREPER was not obliged to mandate the Commission to submit the proposal to the IMO working group. Instead, it was up to the Council to appoint someone—a Member State, several Member States, all Member States, or even the Commission—to submit the proposal *on behalf of* the Member States but *in the interest of* the EU. After all, if the EU is unable to exercise the powers conferred on it—for example because of obstacles under international law, as in this case—the Member States can act as 'administrators' for the EU. Since the Commission (only) ensures the external representation of the Union under art.17(1) TEU, there is no guaranteed role for the Commission when it is not the EU but the Member States that are acting. In such a constellation, the Commission can still act as a representative, but as a representative of the *Member States*, and not of the *EU*. Customary international law permits such 'acting by proxy', according to the Advocate General.[10]

The duty of sincere cooperation further required that the designated administrator—Croatia—had to make it known to the IMO working group that Croatia was acting *in the interest of the EU*. Croatia had fulfilled this duty of loyalty in this case, the Advocate General argued.[11] Croatia had indicated in the e-mail it had sent to the IMO working group that the proposal was sent by a Member State holding the Presidency of the European Union and described the signatories of the proposal as Member States of the European Union.[12]

The first plea in law, alleging an infringement of Article 3(2) TFEU (the exclusive competence of the EU)

Even though the Advocate General considered that the nature of the EU's competence in this case was irrelevant, it behoves the Advocate General to advise the Court on both pleas since it is possible that the Court does not agree with the Advocate General and that the Court nevertheless sees a role for the first plea in the assessment of the case.

The Advocate General recommended that the Court dismiss the first plea alleging a breach of art.3(2) TFEU. There had been neither an ERTA effect, nor had the EU acquired an exclusive external competence on the basis of the so-called principle of complementarity (art.3(2) TFEU codifies the ERTA principle by stating that the EU acquires an exclusive external competence if the conclusion of an international agreement 'may affect common rules or alter their scope',[13] and it codifies the principle of complementarity in stating that the EU acquires the same exclusive competence 'if [the conclusion of the relevant international agreement] is necessary to enable the Union to exercise its internal competence.')

As regards the ERTA principle, the Advocate General had to advise the Court on whether a *future* instrument can trigger an ERTA effect and, if possible, how the ERTA analysis should be carried out. On the basis of the text of the invitation of the IMO working group? Or on the basis of the COREPER proposal that Croatia had submitted to the IMO working group on behalf of the EU Member States? The Advocate General considered that the COREPER proposal was leading. The COREPER proposal may give a first impression of what the future international instrument will look like. It is therefore appropriate to focus the ERTA analysis on the COREPER proposal.

The question then arose as to whether the future instrument, as envisaged in the COREPER proposal, met the conditions to bring about an ERTA effect. In order to determine whether an ERTA effect has occurred, the scope of the future international instrument and that of the existing internal EU rules should

[10] *European Commission v Council of the European Union* (C-161/20) at [85].
[11] *European Commission v Council of the European Union* (C-161/20) at [86]–[90].
[12] *European Commission v Council of the European Union* (C-161/20) at [90].
[13] The Advocate General did not use the term 'principle of complementarity.' I borrow the term from Geert De Baere. See G. de Baere, "EU External Action" in C. B. and S. Peers (eds), *European Union Law*, 2nd edn (Oxford: Oxford University Press, 2017), p.713.

be considered. If the scope of the two systems of rules overlap to an important extent, it should be further examined whether the future international decision would have a 'tangible effect' on existing internal EU rules, the Advocate General said.[14]

Without entering into the details of the ERTA analysis, it is sufficient to point out that, according to the Advocate General, the first question should be answered in part positively and in part negatively: the scope of the future international instrument would overlap with some existing EU internal rules, but not with all of the rules invoked by the Commission. The second question also had to be answered negatively as regards the EU rules that overlap with the future international instrument: there were not sufficient indications that the future international instrument would have a 'tangible effect' on already existing EU rules.[15] The EU legislator *could* adapt the EU rules in the light of the future international instrument, but that was by no means certain, according to the Advocate General.[16] Consequently, 'there are no reasons … to find that the future international instrument, as currently envisaged, is capable of undermining the uniform and consistent application of EU rules and the proper functioning of the system which they establish',[17] and 'it cannot be found that this international instrument may have an effect on the meaning, scope and effectiveness of EU rules.'[18] The Advocate General concluded: no ERTA effect.

In addition to the ERTA principle, the Commission had also invoked the principle of complementarity to argue that the EU had exclusive external competence. The principle of complementarity is the principle according to which the EU has exclusive external competence when the exercise of such external competence is necessary to enable the EU to exercise an internal competence. The classic example is that of *Opinion 1/76*, in which the Court ruled that the EU had exclusive external competence to conclude a treaty with Switzerland to regulate traffic on the Rhine, because regulating the Rhine without involving Switzerland would be pointless. In the case I discuss in this note, AG Szpunar considered that the Commission had not demonstrated that the exercise of an external competence is necessary in order to exercise an internal competence. It was therefore not possible to establish exclusive external competence on that ground either, according to the Advocate General.[19]

In summary, the Advocate General advised the Court to dismiss both pleas in law put forward by the Commission. The Council had breached neither art.17(1) TEU nor art.3(2) TFEU; it had disregarded neither the Commission's prerogatives on the EU's external representation nor the EU's exclusive external competence.

The judgment

The Court followed the Opinion of the Advocate General. It rejected the first plea on the grounds that, as the Advocate General had also advised, the EU could under no circumstances have itself submitted the contribution to the IMO working group.[20] It also rejected the second plea, because, as the Court stated at [76] of the judgment, 'aside from the exceptions expressly referred to in art.17(1) TEU, that provision confers on the Commission exclusive competence to ensure only the representation of the European Union and not that of the Member States, including when they are acting jointly in the interest of the European Union.'[21] It followed that

[14] *European Commission v Council of the European Union* (C-161/20) EU:C:2021:957 at [118].
[15] *European Commission v Council of the European Union* (C-161/20) at [128] and [132].
[16] *European Commission v Council of the European Union* (C-161/20) at [153].
[17] *European Commission v Council of the European Union* (C-161/20) at [154].
[18] *European Commission v Council of the European Union* (C-161/20).
[19] *Re Opinion 1/76 Draft agreement on the establishment of a European Inland Waterway Transport Backing Fund)* EU:C:1977:63; [1977] 2 C.M.L.R. 279.
[20] *European Commission v Council of the European Union* (C-161/20) EU:C:2022:260 at [80].
[21] *European Commission v Council of the European Union* (C-161/20) EU:C:2022:260 at [76].

> 'the Member States remain free to decide on a case-by-case basis on the modalities of their own external representation, including when acting jointly in the interest of the European Union. For those purposes, there is nothing to prevent those States from mandating, from among themselves, the Member State which holds the Presidency of the Council, in so far as that Member State is acting neither individually nor in the name of the European Union.'[22]

The reasoning followed by the Court in deciding that the second plea in law should be rejected follows that of the Advocate General. The Court first stated that the EU had no status in the IMO—neither on the basis of the IMO Convention, nor on the basis of the invitation that the IMO working group had addressed in a somewhat ambiguous manner to 'all interested Member States and international organisations.' Because the EU must always exercise its powers in accordance with applicable international law, the EU cannot submit a proposal to the IMO working group, the Court decided.[23] However, this was not the end of the story. Indeed,

> 'where the European Union is not a member of an international organisation and is therefore precluded by the relevant international law from exercising its external competence within that organisation, that competence may be exercised, inter alia, by the Member States acting jointly, under the duty of sincere cooperation referred to in Article 4(3) TEU, in the interest of the European Union.'[24]

In that context, the Court continued, 'the Member States cannot be prevented from transmitting submissions to that organisation, whether these concern areas falling under the exclusive competence of the European Union or a competence which it shares with the Member States.'[25] The Council therefore correctly assumed that it did not have to instruct the Commission to submit the proposal to the IMO working group on behalf of the EU, and that the contribution could be submitted by the Member States in their own name, acting jointly in the interest of the Union.[26]

The Court added two further clarifications. First, it held that a Member State cannot unilaterally enter into international commitments which are liable to affect EU rules adopted in order to achieve the objectives of the Treaty. This is an application of the duty of sincere cooperation—hence the reference to the judgment in *Commission v Greece*.[27] Second, as the Advocate General had also pointed out, the Court clarified that 'the Member States would have been able to give the Commission the task of ensuring their representation in their joint exercise, in the interest of the European Union, of an external competence which the European Union was precluded from exercising under the applicable rules of the IMO Convention.'[28]

The Court concluded that the Council had not infringed art.17(1) TEU. The Commission has a prerogative to represent the EU externally. However, at issue in this case was not the external representation of the EU. Since the EU could not act under international law, the Member States had to act *in their own name* but *in the interests of* the EU. COREPER, and therefore the Council, had instructed the Member States to do so, on the basis of the duty of sincere cooperation of the latter. Member States could then, in turn, mandate an individual Member State, or even the Commission, to actually deliver the contribution to the IMO working group. They had chosen to mandate Croatia to do so. No problem, the Court concluded.

[22] *European Commission v Council of the European Union* (C-161/20) EU:C:2022:260 at [77].
[23] *European Commission v Council of the European Union* (C-161/20) at [53] and [57].
[24] *European Commission v Council of the European Union* (C-161/20) at [69].
[25] *European Commission v Council of the European Union* (C-161/20).
[26] *European Commission v Council of the European Union* (C-161/20) at [71].
[27] *Commission of the European Communities v Greece* (C-45/07) EU:C:2009:81; [2009] 2 C.M.L.R. 38.
[28] *European Commission v Council of the European Union* (C-161/20) at [74].

Comment

Both the Advocate General's Opinion and the judgment raise questions. For example, the Court's choice not to deal with the substance of the first plea on the ERTA principle is not convincing. A breach of the rules governing the division of competences is sufficient to annul an act.[29] Whether or not the plea relating to the nature of the EU's competence (the first plea) has an impact on the merits of another stand-alone plea (the second plea), as the Advocate General and the Court seem to indicate, should not matter. In the same vein, if the contested decision did not contain a clear procedural legal basis—which is impossible to verify as COREPER decisions are not published in the Official Journal—COREPER and thus the Council would have breached an essential procedural requirement. The Court must examine such a breach on its own initiative.[30] I also wonder whether the Council should not have acted by means of a decision on the basis of art.218(9) TFEU rather than by means of a COREPER decision.[31] This question has to do with the procedural legal basis. This issue, too, should have been dealt with by the Court on its own initiative. The choice of a COREPER decision rather than a formal Council decision is part of a wider trend towards increasingly informal forms of external action.[32] Such informalisation has negative consequences, in particular for parliamentary oversight as the European Parliament is not informed of the adoption of COREPER decisions, whereas art.218(10) TFEU, which also applies to art.218(9) TFEU decisions, requires the Parliament to be 'immediately and fully informed.'[33]

While each of these questions warrant further discussion, as mentioned in the introduction, in the following I focus on the Court's treatment of the merits of the first and second pleas—the first plea related to the ERTA principle and the second to the powers of external representation of the Commission. Following the structure of the Court's judgment, I start with the latter and then move to the former.

The limits of the Commission's powers of external representation

The Court rejected the second plea on the ground that the Commission's exclusive competence to represent the EU externally only applies if the EU can actually be represented externally. This makes sense. The wording of art.17 TEU clearly states that the Commission's competence applies only 'to the external representation *of the Union*.'[34] When the EU cannot act externally, as in the IMO where the EU has no status, the Member States should act in the interests of the EU. Member States, in turn, may appoint an administrator, but this does not have to be the Commission. art.17(1) TEU does not apply here.

There is little to criticise about the Court's reasoning with regard to the second plea. It is in line with previous case law—in particular in *Germany v Council* on the EU's involvement in the International Organisation of Vine and Wine[35] as well as *Commission v Greece*, also on the EU's role in the IMO.[36] In these cases, the Court confirmed that, where the EU cannot act externally for reasons related to the international framework within which the EU is to exercise its competences, Member States should act

[29] See by analogy *SV Capital OÜ v European Banking Authority (EBA)* (C-577/15 P) EU:C:2016:947 at [32].

[30] See here *European Commission v Council of the European Union* (C-687/15) EU:C:2017:803, in which the Court annulled Council conclusions on the ground that they did not contain a procedural legal basis.

[31] See here the analysis of AG Kokott in *European Commission v Council of the European Union* (C-626/15 and C-659/16) EU:C:2018:362 at [64].

[32] Over this subject, See Andrea Ott, 'Informalization of EU Bilateral Instruments: Categorization, Contestation, and Challenges' (2021) 39 *Yearbook of European Law* 569.

[33] To this effect, see AG Cruz Villalon's Opinion in *Germany v Council of the European Union* (C-399/12) EU:C:2014:289 at [113].

[34] Emphasis added.

[35] *Germany v Council of the European Union* (C-399/12) EU:C:2014:2258; [2015] Q.B. 419.

[36] *Commission of the European Communities v Greece* (C-45/07) EU:C:2009:81.

in the interest of the EU.[37] The legal basis for this duty can be found in art.4(3) TEU, which codifies the duty of sincere cooperation. The alternative view defended by the Commission in this case was at odds with existing case law and with the text of art.17(1) TEU itself. The EU Treaties do not contain a legal basis requiring *Member States* to issue a mandate to the Commission when Member States act externally *on their own behalf*. Even if the EU exercises its exclusive competence, it must still call on the Member States to defend the EU's position within the IMO—precisely because the EU has no status within the IMO.

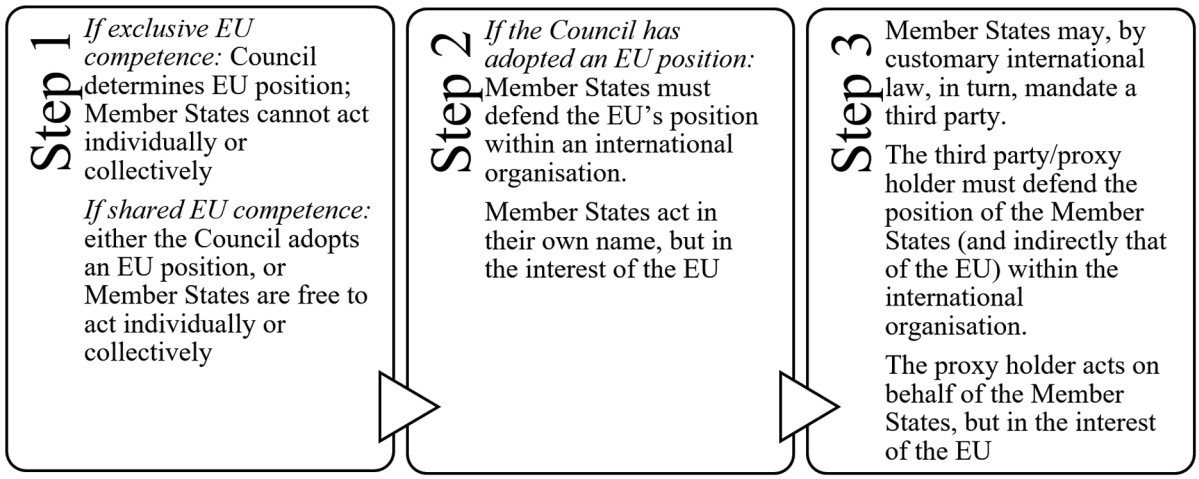
Within international organisations in which the EU has no status, the EU's external representation is therefore potentially carried out in as many as three steps:

- *Step 1:* First, the Council determines the EU's position. If the subject matter of the act falls within the *exclusive* competence of the EU, then only the EU can act and the Council must determine the EU's position. If the Council does not act, there is no EU position. Member States cannot act individually in such a case. (This is what exclusivity means: Member States should never act without EU authorisation.[38]) If the subject-matter of the act falls within the *shared* competence of the EU, the Council may adopt an EU position. If the Council does not adopt an EU position, for example because a qualified majority cannot be found to adopt an EU position, Member States can act themselves—individually or collectively—defending the position they themselves determine.
- *Step 2:* If the Council adopts an EU position—on the basis of exclusive or shared EU competence—the Member States must defend the EU position on the international stage in their own name. They do this in their own name and not in the name of the EU, because the actions of the Member States should not be understood as those of a proxy holder. Acting as a proxy presupposes that the EU itself has a status within the international organisation, which is not the case.
- *Step 3:* Member States can defend the EU position themselves, or they can appoint someone to do so on their behalf. If they appoint someone, this third party acts as proxy holder on behalf of the Member States, but in the interest of the EU.

The figure below—which should be read from left to right—summarises the abovementioned framework.

[37] *Germany v Council of the European Union* (C-399/12) EU:C:2014:2258 at [52] and *Commission of the European Communities v Greece* (C-45/07) EU:C:2009:81 at [5].

[38] Article 2(1) TFEU.



Although the Court's reasoning on the second plea is thus convincing, including with regard to the loyalty obligations on the Member States when they act in the interest of the EU, it is unfortunate that the Court did not say anything about the obligation of the Member States as part of their duty of sincere cooperation to facilitate the EU's accession to international organisations. To explain how the duty of sincere cooperation imposes a twofold obligation on the Member States as they act externally when the EU is unable to do so, it is useful to look back to *Kramer*.[39] In that case, the Court made it clear that Member States must make every effort to secure the EU's accession to international organisations.

The preliminary ruling procedure in *Kramer* dates back to 1975. Dutch fishermen had violated rules adopted by the Dutch legislature to comply with the North-East Atlantic Fishing Convention (the Fisheries Convention). All the Member States of the then European Economic Community (EEC) were parties to the Fisheries Convention; the EEC itself was not. Within the framework of the Fisheries Convention, a committee had been set up—the Fisheries Commission. The Fisheries Commission was empowered to take binding measures with regard to the quotas of fish that could be caught. Before the Dutch court, questions were raised about the competence of the EEC Member States to act within the Fisheries Commission, given that fisheries policy had in the meantime become an EU competence. The Court of Justice replied to the Dutch court that, once the transitional period was over, the Member States should act collectively within the Fisheries Commission on the basis of their duty of sincere cooperation. The Court added that 'it is further clear that … these institutions and the Member States are obliged to use all available legal and political means to ensure that the Community accedes to the Convention on Fisheries and to other similar agreements.'[40]

In *Kramer*, the Court thus made clear that the duty of sincere cooperation on the part of the Member States in the context of the EU's external representation in international organisations in which the EU has no status has two components. On the one hand, the Member States should act in their own name but in the interest of the EU within the international organisations of which they are members. On the other hand, they are obliged to make every effort to facilitate the EU's accession to the international organisation in question.

As far as this second component of the duty of loyalty is concerned, Member State compliance leaves something to be desired. In 2002, the Commission had invited the Council to give it a mandate to start

[39] *Officier van Justitie v Kramer* (3/76, 4/76 and 6/76) EU:C:1976:114; [1976] 2 C.M.L.R. 440.
[40] *Kramer* (3/76, 4/76 and 6/76) EU:C:1976:114 at [44].

negotiations with the IMO to allow the EU to become a full member of the latter.[41] The Council has never responded to this invitation. One could argue that this is the Council's prerogative: in the absence of the required majority to give the Commission a mandate, no decision to that effect has been taken. However, the issue is not purely political; it has an important constitutional dimension as well. The EU's international status should be reconciled with the internal division of competences: where the EU has competences, it should also be able to exercise them externally. By not taking the necessary steps in that direction, the Council—as the Court made clear in *Kramer*—fails to live up to its commitments under the duty of sincere cooperation.

It is quite possible that this second aspect of the duty of loyalty on the part of the Member States was not mentioned during the debates before the Court in the present case. That said, the point is of wider importance: if the EU is not a member of an international organisation, it is not visible, even if the organisation in question is active in areas where the EU has external competence. This lack of visibility can undermine the effectiveness of EU foreign policy. Member States may also not be eager to give up their privileged role within international organisations. It is therefore important that the Commission and Parliament keep up the pressure and encourage the Council to facilitate the EU's accession to international organisations.

Revisiting the ERTA principle in a world of shared competence

As mentioned, AG Szpunar had advised the Court to not fully examine the first plea concerning art.3(2) TFEU because the merits of the first plea in any case could not affect the Court's assessment of the second plea concerning art.17(1) TEU. The Court followed the Advocate General. As mentioned, this conclusion is questionable as a breach of Treaty rules on the division of competences should lead to the annulment of the contested act. That said, it did allow the Court to avoid having to conduct a full ERTA analysis—a luxury the Advocate General did not enjoy.[42]

Conducting an ERTA analysis was difficult because of the moment in time when the analysis had to be conducted, i.e. at the very beginning of the decision-making process at the international level. It is particularly difficult to conduct an ERTA analysis at this juncture. An ERTA analysis requires a comprehensive and detailed analysis of the relationship between the international instrument envisaged and the EU law in force.[43] It is difficult however to perform this type of comparison when one component of the analysis—the final international agreement or decision—does not yet exist. To be clear, any division of competence analysis at the outset of international negotiations is bound to be difficult as it inevitably involves an element of prospection. Negotiations may unfold differently from what the EU had in mind.[44] They may extend beyond what was initially envisaged and thereby extend into other areas of EU competence than those covered when the mandate was given to start negotiations. Or, conversely, in the search for a compromise, ambitions may be lowered, and the scope of the final agreement or decision may turn out to be narrower than what the EU had initially hoped for. This may mean that the end result covers less areas of EU competence than initially envisaged.

However, compared to the analysis of whether the EU has the necessary express external competence to act, the ERTA principle is particularly difficult to apply because of the need to dive into the

[41] "Recommendation from the Commission to the Council in order to authorise the Commission to open and conduct negotiations with the International Maritime Organization (IMO) on the conditions and arrangements for accession by the European Community" SEC(2002) 381 final.

[42] *European Commission v Council of the European Union* (C-161/20) EU:C:2021:957 at [112]–[154].

[43] AG Szpunar summarised the case law in his *European Commission v Council of the European Union* (C-161/20) EU:C:2021:957 at [115].

[44] Pointing to this difficulty, see the Opinion of AG Sharpston in *European Commission v Council of the European Union* (C-114/12) EU:C:2014:224 at [117].

abovementioned 'comprehensive and detailed' analysis. This arguably is a more challenging exercise than assessing whether a proposed international instrument fits within the contours of, say, art.3(1)(e) on the EU's exclusive competence to conduct a common commercial policy—even if that exercise is not without its own difficulties.[45] To conduct an ERTA analysis without a final text requires a proxy for that final text. AG Szpunar turned to the EU submission to the IMO working group, but why should the EU's own views on how the ensuing international decision should look like guide the analysis of whether the EU has an exclusive competence over that decision? Relying on the EU's submission as a proxy for the final decision introduces an element of circularity in the competence analysis: how the EU frames its ambitions for the ensuing international decision may either broaden or reduce the scope of a possible ERTA effect. This will, in turn, affect the balance of power between the EU and the Member States as they negotiate the international decision within the international body concerned.[46]

There are no easy solutions to address this issue—an issue which arises both in the negotiation of international agreements and the EU's involvement in international bodies. Path dependencies and a reluctance to amend the Treaties seem to stand in the way of abolishing ERTA exclusivity altogether and embracing a constitutional framework based on shared EU competence whereby the duty of sincere cooperation guides the interactions between the EU and the Member States.[47]

Yet such a shared competence-focused approach has much going for it. In recent case law, the Court has further clarified what it means for an (external) competence to be shared. Ever since the initial *ERTA* judgment, the Commission has pursued a strategy of 'maximum exclusivity, minimum mixity' to ensure that the EU speaks with one voice on the international stage.[48] Member States, by contrast, have pursued the opposite strategy, which we could call one of 'minimum exclusivity, maximum mixity'. Their goals were opposite to those of the Commission: less exclusivity means more shared competence, and shared competence, in turn, means mixed EU-Member State external action. Member States like mixed action as it grants them a veto power, even when the Treaties empower the Council to exercise its external competence by means of qualified majority. As Robert Schütze put it over a decade ago: 'mixity extends the Luxembourg Compromise to the external sphere'.[49] In their search for a constitutional theory to support existing institutional practice, Member States have been advocating a theory that in areas of shared competence, the EU can only act externally after it has made use of its internal competence. In the 2017 case of *OTIF*, the Court debunked that theory.[50] It held that the EU can exercise its shared competence alone if the required majority to do so can be obtained in the Council.[51] More recently still, in *Opinion*

[45] See in particular *Re Opinion 2/15 (EU-Singapore Free Trade Agreement)* EU:C:2017:376; [2017] 3 C.M.L.R. 36.

[46] In the abovementioned *European Commission v Council of the European Union* (C-114/12) EU:C:2014:224, AG Sharpston mentioned that, should the scope of negotiations change during the negotiation process, a new ERTA analysis could be conducted. See her Opinion mentioned in fn.43 of that case at [120]. While this may be true, negotiations already conducted cannot be undone. Insofar as the outcome of the ERTA analysis affects who negotiates and the power balance between those parties—e.g. the Commission and the Council Presidency—the initial ERTA analysis has irreversible legal consequences.

[47] In favour of such a framework, see P. Eeckhout, "Bold Constitutionalism and Beyond" in M. Maduro and L. Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Oxford: Hart Publishing, 2010), pp.220–221. On the same topic, see also T. Verellen, "Convergence and Divergence in EU External Action : The Very Slowly Emerging Doctrine of Shared Competence" in M. Kos et al. (eds), *The Dialectics in Multilevel Systems - Mechanisms of Divergence and Convergence* (Oxford: Hart Publishing, 2023).

[48] *Commission of the European Communities v Council of the European Communities (ERTA)* (22/70) EU:C:1971:32.

[49] R. Schütze, "Federalism and Foreign Affairs: Mixity as a (Inter)National Phenomenon" in C. Hillion and P. Koutrakos (eds), *Mixed Agreements Revisited: the EU and its Member States in the World* (Oxford: Hart Publishing, 2010), p.82.

[50] *Federal Republic of Germany v Council of the European Union* (C-600/14) EU:C:2017:935.

[51] *Federal Republic of Germany v Council of the European Union* (C-600/14) EU:C:2017:935 at [68].

1/19 on the EU's accession to the Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention), the Court added that a simple majority of Member States can force the Presidency of the Council to hold a vote on whether or not the EU should exercise its shared competence.[52] If all Member States agree to act only by 'common accord', they are free to do so, the Court held, but if a qualified majority wants to act, it cannot be barred from doing so.

OTIF and *Opinion 1/19* not only refuted the aforementioned Member State theory, they also blew a hole in the Commission's rationale for pursuing a maximum exclusivity strategy. Following these two rulings, it is now clear that shared EU competence does not necessarily imply mixity and, along with it, unanimity amongst the Member States. As a matter of EU law, it is as easy—or as difficult, depending on your perspective—for the EU to exercise exclusive competence as it is to exercise shared competence. For both categories of competence, the EU can act if the required majorities in the Council can be found. To be clear, this approach raises questions of international law—questions which are not unique to the EU, it should be added.[53] Moreover, external factors may in specific cases preclude the EU from exercising its shared competence. Bilateral agreements, in particular, sometimes stipulate that all Member States must have ratified the agreement before the EU can do so, thereby effectively codifying the abovementioned Luxembourg compromise in the text of the international agreement concerned.[54] Yet these problems may ultimately be more political than legal: the EU may very well be able to convince its treaty partners not to insist on complete mixity on the EU side, and the EU could be careful not to include in international negotiations issues that fall outside of the scope of EU competence altogether. In so doing, the EU can avoid being held internationally responsible when it lacks the internal competence to act.

What, then, is the added value of ERTA in a post-*OTIF* and post- *Opinion 1/19* world? As Eeckhout already pointed out over ten years ago, ERTA is no longer needed to safeguard the role of the EU institutions since in many instances the Council can act if the majority required by the treaties can be found.[55] Moreover, ERTA exclusivity is not needed to protect the full effectiveness of pre-existing internal EU rules. While at the time of *ERTA* in the early 1970s, it was not clear whether the primacy of EU law extended to Member State international agreements, today the point is uncontroversial.[56] The *Achmea* case is instructive in this regard: this was not a case about the (lack of) competence of Member States to conclude and maintain bilateral investment agreements with each other. Rather, it concerned a conflict between the Dutch-Slovak BIT on the one hand, and a provision of EU law, on the other. Following *Achmea*, Member State courts

[52] *Re Opinion 1/19 (Istanbul Convention)* EU:C:2021:198 at [253]–[255].

[53] In particular, a risk arises that the EU accedes to an international agreement on the basis of the external competences available to it. However, from an international law perspective, accession can, certain limited exceptions notwithstanding, not be partial. The EU could thus be held liable for non-compliance with the entire international agreement, even though internally it lacks the competence to implement the agreement. Discussing the issue, see G. Kübek, "Facing and Embracing the Consequences of Mixity: Opinion 1/19, Istanbul Convention" (2022) 59 C. M. L. Rev. 1465, 1482. A similar problem arises also in Canada, where the federal government can make treaties on issues outside of the federal Parliament's legislative powers. See *Attorney General for Canada v Attorney General for Ontario (No. 100 of 1936)* [1937] A.C. 326.

[54] See e.g. the trade agreement with Canada, CETA, which requires in its Article 30.7.2 that the 'Parties' have completed their respective internal procedures to ratify the agreement. The 'Parties' on the EU side are the EU and the Member States. See Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part [2017] OJ L11/23.

[55] Pointing to this rationale for the initial *ERTA* case, which was decided shortly after the Empty Chair crisis: Eeckhout, "Bold Constitutionalism and Beyond" in *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (2010), p.220.

[56] Writing in 1982, see M. Cremona, "The Doctrine of Exclusivity and the Position of Mixed Agreements in the External Relations of the European Community" (1982) 2 *Oxford Journal of Legal Studies* 393, 397–398: 'The difficulty of resolving, in the external sphere, possible conflicts between, on the one hand treaties entered into by Member States, and on the other, either internal Community laws or international agreements to which the Community itself is a party, has been recognized but is by no means resolved.'

are required to disapply the conflicting provisions of the bilateral investment agreements they have concluded with each other.[57] The duty of sincere cooperation moreover requires them to terminate the agreements altogether. Finally, ERTA also has an important negative effect on interinstitutional relations.[58] Member States dislike the ERTA principle as an ERTA effect—at its heart a conflict prevention mechanism[59]—leads to a permanent loss of Member State external competence. Such fears may explain why Member States in the Council often refuse to exercise EU shared competence: against the EU's maximum exclusivity strategy, they place a maximum mixity strategy which aims to ensure that Member States retain their veto powers. Absent ERTA, Member States might become less reluctant to exercise EU shared competences, and a process of (re)building trust between the EU institutions as they engage in foreign relations could perhaps be put in motion.

Conclusion

The *Commission v Council* case is interesting because of the clarifications the Court brings to the doctrine of the EU's external representation in international organisations of which the EU is not a member. As discussed, the Court builds on previous case law and the ruling in this case is not surprising. That being said, the case was a good opportunity for the Court to further clarify the precise contours of the Commission's exclusive external representation competence. The legal landscape is complex: the EU treaties only provide for the Commission to represent the EU. If the EU cannot act for reasons beyond its control, the Member States act—not in the name of the EU but in their own name, albeit in the interest of the EU. Member States may then, in turn, mandate a third person acting on their behalf, but still in the interest of the EU. The duty of sincere cooperation operates as the normative foundation for the obligations of the Member States in this area. In addition, the case again makes clear how difficult it is to apply the ERTA principle, in particular in the early phases of international negotiations. These difficulties raise complicated questions: how to apply ERTA? Or rather: why keep ERTA?

[57] *Slovak Republic v Achmea BV* (C-284/16) EU:C:2018:158; [2018] 2 C.M.L.R. 40.

[58] Discussing the bad vibes between Council and Commission see e.g. R. Gosalbo-Bono and F. Naert, "The Reluctant (Lisbon) Treaty and its Implementation in the Practice of the Council" in P. Eeckhout and M. Lopez-Escudero (eds), *The European Union's External Action in Times of Crisis* (Oxford: Hart Publishing, 2016).

[59] See here T. Verellen, *Foreign Relations Federalism* (Oxford: Oxford University Press, forthcoming), Ch.4.