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The Case of Implied External Powers – The History of Pragmatism in the EU’s External Relations Law²

The Case of Implied Powers in External Relations – A History of Pragmatism

EU external relations law is not very much at the centre of the Hungarian EU legal discourse, so the matter of implied external competences may seem almost mystical. However, it is not mysterious at all, its development is rather evidence of the presence of pragmatism in the development of EU law, as the implied external powers were even used to extend competences in the period of the EEC. The aim the paper is to show how this pragmatism has been manifested from time to time in the development of the implied external competences. To do so, the paper also draws on Sinclair’s theory, who sees the phenomenon of the expansion of powers in the law of international organisations as a coherent process in some cases. Accordingly, the article describes case C-22/70. Commission v. Council (ERTA), including the main arguments made in the case, and the relevant circumstances as well. This is followed by the explanation of the expansion of the implied powers to highlight the appearance of its different aspects involved. Finally, the paper points out a “dialogue” that has been developed between the Member States and the Court of Justice during the process of the Constitutional Treaty and the Lisbon reforms.

Keywords: European Union law, EU external relations law, implied external powers, ERTA, development of law

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Introduction

The case of implied external powers may seem mystical from time to time. It seems *prima facie* that no one knows where it came from, under what circumstances it appeared, or what exactly its essence and function is. However, the topic itself is not mystical, but rather pragmatic, in its pure form. The aim of this paper is to shed some light on how this pragmatism emerged in the development of the implied external powers, and how it accompanied its development. This paper does not intend to highlight all the minor legal correlations of the power approach, since their number is infinite. Instead, the paper provides the context for pragmatism to the extent necessary.

To make this approach more understandable, the paper builds on Guy Fiti Sinclair's theoretical framework to present this dynamic development. In Sinclair's approach, there are international organisations that increase their powers beyond the initial legal framework provided by their Member States. On this basis, although their founding treaties contain the powers granted and their wording remains unchanged, their underlying content changes. International trends come to the attention of the relevant international organisation, to which it intends to respond. It incorporates these into its own legislation, which provides giving the organisation room for manoeuvre. It also shapes the powers of the Member States, which they accept. The international courts legitimise this process, often with the help of representatives of the relevant professions.³ As these features show similarities with the development of the Union, it may be worth approaching the emergence of the implied external power in EU law from this perspective.

On this basis, the study highlights some aspects of the development of implied external powers. Understanding the ERTA case is essential for this purpose. Consequently, this paper presents the circumstances of the case (going beyond a simple description of the facts, it highlights the approach taken by the Commission and the Court of Justice. This, of course, culminates in the arguments of the parties, which can be seen in the trial documents kept in the EU's historical archives. The interpretation of the ERTA case is followed by the Court of Justice's proliferation of ERTA cases, then by a presentation of the dialogue between Member States and the Court of Justice on Treaty reforms.

Historical background

The origin of the implied external powers

The phenomenon of implied external powers is not an EU-specific legal tool. The question is whether additional powers can be granted on the basis of already existing, explicit powers, if the former are necessary to carry out the latter.⁴ There are examples of this in the case law of the US Supreme Court, but also in public international law.⁵

³ SINCLAIR 2017.

⁴ SCHERMERS–BLOKKER 2018: 195, paragraph 233.

⁵ GADKOWSKI 2016: 45.



In the latter case, the Permanent Court of International Justice (hereinafter: PCIJ) first addressed the issue when it examined whether the International Labour Organisation (hereinafter: ILO) can adopt rules for workers in the agricultural sector. The PCIJ pointed out that the purpose of the ILO's establishment was to create a permanent international organisation that would adopt certain basic rules to improve the conditions of workers. Consequently, such an objective would be held back if the "most ancient industry" was left outside the scope of ILO rules.⁶ The International Court of Justice in The Hague (hereinafter: ICJ) later duly refers to the relevant decision of the PCIJ in its advisory opinion on reparation for injuries suffered in the service of the United Nations, and then stresses that the UN necessarily has the powers which, although not enshrined in the UN Charter, are necessary to enable it to carry out its functions.⁷ Later, before the ERTA case, the concept of implied powers was further clarified.⁸

The state of the European integration before ERTA

For a long time, European integration was not concerned with the external aspects of the nascent community, yet the changes in the international order had a significant impact at the time of its birth. The European Defence Community intended to find a solution to the Soviet threat, but it failed due to the resistance of its member states. The European Economic Community (hereinafter: EEC) thus took a more restrained approach, although in its case we cannot speak of military-defence powers.⁹ The Treaty of Rome, serving as a basis of the EEC, (hereinafter: Treaty establishing the European Economic Community) explicitly provided for powers concerning external relations, such as trade policy, accession of states and cooperation with states and international organisations.¹⁰

In principle, this indicates that the EEC had considerable external relations powers from very early on. However, this conclusion would be unconvincing, because the Member States did not wish to grant powers of an uncertain nature and content to the EEC, especially in the field of external relations. The Council was careful not to conclude any trade policy agreements of unlimited duration, and the foreign policy of the Member States also had an impact on the EEC's external relations. An example of this was France's opposition to relations with the COMECON countries, Israel and Japan, but the same happened with regard to the Federal Republic of Germany in the case of the German Democratic Republic. In addition, one of the most important legal advisers in the Council, Jean Mégret took the view that any provision allowing the EEC to be an actor in its external relations must be interpreted expressly narrowly, which the Council has thus sought to defend in as many fora as possible. It is to be noted that this was not so blatant at the time: most lawyers back then considered that the EEC had

⁶ Competence of the ILO to Regulate Incidentally the Personal Work of the Employer 1926, Series B, no. 13.

⁷ Reparation for injuries suffered in the service of the Nations, Advisory Opinion, [1949] ICJ Rep 174, ICGJ 232 (ICJ 1949), 11th April 1949.

⁸ See Effect of Awards of Compensation made by the UN Administrative Tribunal, Advisory Opinion, [1954] ICJ Rep. 56–59.

⁹ NOËL 1975: 159–160.

¹⁰ LEOPOLD 1977: 56.



no significant powers in terms of concluding international treaties other than the few cases otherwise provided for by the provisions of the Treaty establishing the European Economic Community.¹¹

It is also true that other problems came to the fore when the EEC was born. The Member States were busy trying to create a better structure than the ECSC, leading to the creation of a common market. In the case of the concluded Treaty of Rome, however, they could not really determine whether it was an international treaty or a treaty that went beyond it and already included explicit rights and obligations for citizens. The Commission and Community law practitioners were much more concerned with the question of direct effect and the primacy of Community law, as well as the development of the common market.¹²

It can also be said that transport policy was the policy that represented the most the pursuit of Member State self-interests. Until 1973, there were no concrete political measures regarding the common transport policy, despite the fact that the Treaty establishing the European Economic Community defined it as a common policy; the Member States insisted on their own policy, and there was mainly an exchange of views at the relevant Council meetings.¹³ It is to be noted that the Commission had tried to do something about this before. In 1961, legislation was adopted to abolish transport charges that deliberately discriminated between Member States. The Commission strived to propose programmes that included provisions for technical, social and financial harmonisation. Between 1958 and 1967, the then Commissioner Lambert Schaus tried to liberalise the sector to end anti-competitive national measures, but ended up in almost endless discussions on the axis of liberalisation and harmonisation.¹⁴ The ERTA case arrived in this policy context, which agreement covered a particularly important element within transport policy.

The emergence of implied external powers: the ERTA case

The international convention on which the case was based was the European Agreement Concerning the Work of Crews of Vehicles Engaged in International Road Transport (ERTA) under the auspices of the United Nations Economic Commission for Europe, which never entered into force. The renegotiation of the convention resumed in 1967. In the case of the EEC, legislation was developed for this purpose. In 1969, Council Regulation (EEC) No. 543/69 on harmonisation of social legislation relating to road transport was adopted. The Council indicated to the Commission that it was necessary to amend the scope of the Regulation in order to bring it into line with the obligations set out in the Convention. Although the Commission was aware of the negotiations, it did not in any way indicate to the Council that the Commission alone was entitled to negotiate

¹¹ LEOPOLD 1977: 58–62.

¹² RASMUSSEN 2014: 140–151.

¹³ BUSSIÈRE et al. 2014: 369–370.

¹⁴ GWILLIAM 1980: 48–52.



in such a case and otherwise speak with one voice on behalf of the Community, but merely requested continuous information from the Council. However, the Commission subsequently brought an action for annulment before the Court of Justice.¹⁵

The Commission's position

Within the EEC, the issue was seen as less significant, as there was no intention within the Council to give the EEC a greater role in matters of external relations. No wonder that the Commission was noticeably opposed to the Council's behaviour. The initiation of the procedure by the college was led by Walter Munch and Gerard Olivier, who were then working in the Legal Service and wanted to pursue a pro-integration agenda like their predecessor, Michel Gaudet, former head of the Commission's Legal Service.¹⁶ Gaudet was head of the Legal Service until 1969, under whom arguments for explicitly deepening European integration were made (including his personal opinions) in the *Van Gend en Loos* and *Costa v. ENEL* cases.¹⁷ However, the decision to go to the Court of Justice was a personal one taken by the head of the Commission himself, Jean Rey.¹⁸

The parties' arguments in this respect

The Commission and the Council gave completely different arguments in the case. The Commission's position was that the Community is entitled to conclude an international convention in relation to powers in certain circumstances where it would otherwise hold such power in the context of internal relations. It is to be noted that the Commission did not rely on the primacy of Community law in its reasoning on the merits of the case, but took a different approach instead. It argued that Article 75, which is the basis of the transport policy, also has an external relations aspect, which is not mentioned in the Treaty establishing the European Economic Community. The adopted Regulation (EEC) No. 543/69 created the legal basis for this.¹⁹

The Commission pointed out, of course, that it is not that the Member States have lost all power in the field of transport policy, but rather that the nature of transport policy is much more dynamic compared to other policies. The provision contains Community powers, but it implies that they must be interpreted in the light of their dynamic development.²⁰ If this external aspect were not recognised, it would be contrary to the provision itself, and such a result would be meaningless in the case of Community law, which would necessarily lead to contradictions. This does not mean that there is a strict parallelism between internal and external powers, since this would be contrary to the nature of Community rules. In the case of transport policy, Member States retained power

¹⁵ KNAPP 2019: 80–81.

¹⁶ MCNAUGHTON 2017: 136–137.

¹⁷ RASMUSSEN 2012: 377.

¹⁸ MCNAUGHTON 2017: 141–142.

¹⁹ PETTI 2021b: 5–6, 11–12.

²⁰ European Commission 1970: 26–32.



for internal matters as long as the Community had not exercised its powers. However, the Commission pointed out that, as the EEC had constantly adopted new rules, these external powers had gradually become exclusive.²¹ The Commission underlined that the Treaty establishing the European Economic Community does not contain any provision allowing the EEC to act autonomously in foreign policy, but that this is present in certain common policy areas, which may even affect more sensitive areas of Member States' sovereignty.²² Although the Council had discretionary power to decide on agreements with third countries, once the Community-level rules were adopted, this discretion did not extend to whether to proceed through intergovernmental or Community channels.²³

It is to be noted that the Council's argument was more a reaction to the admissibility of the Commission's action than to its substantive arguments. Accordingly, the Council procedure did not constitute an act under Article 173 Treaty establishing the European Economic Community (on the challengeability of Community acts) for which such a procedure could be initiated. In its argument, the Council indicated in the context of Article 189 of the Treaty establishing the European Economic Community that since such an act of the Council cannot be considered a regulation, directive or decision, one cannot talk about such here. It also considered the possibility that the relevant provisions of the EEC Treaty could be interpreted more broadly, but in this case it suggested that the nature of the act in this case should be evaluated. The relevant act was therefore also only intended to express political acceptance of the agreement.²⁴ For the other part of the argument, the Council proposed a stricter scope of admissibility for the EEC institutions compared to claims brought by individuals.²⁵

Opinion of the Advocate General

Advocate General Dutheillet de Lamothe also discussed the merits of the case, in addition to the admissibility of the action. It is to be noted that the Advocate General proposed the analysis of Article 116 of the Treaty establishing the European Economic Community as a possible legal basis. According to this article, from the end of the transitional period, Member States may act only jointly in the framework of any international organisation in issues concerning the common market.²⁶ The Advocate General stressed that this approach was not even mentioned in the submission, nor was the reference to the fact that the EEC is a legal person (as laid down in Article 210). It is to be noted that the Advocate General was already ambivalent about the Commission's approach, which was specifically related to implied powers. Based on the wording of the opinion, the Advocate General was clearly in a difficult position, which was apparent from the

²¹ European Commission 1970: 25–26.

²² European Commission 1970: 28.

²³ European Commission 1970: 28–29, 37–46.

²⁴ PETTI 2021a: 571.

²⁵ European Commission 1970: 8.

²⁶ Opinion of Advocate General Dutheillet de Lamothe in Case C-22/70 Commission v. Council, ECLI:EU:C:1971:32, 290.



terms and phrases used,²⁷ presumably also because he himself felt the risk involved. He pointed out that, if the Court of Justice were to recognise the existence in Community law of the implied external powers, it would in fact be enacting Community law itself in an arbitrary manner, by which the Court would be exceeding its own limits.²⁸ Consequently, it did not propose to the Court of Justice to recognise their existence under Community law.

The position of the Court of Justice

Even before the ERTA case, the Court of Justice had interpreted the powers of the ECSC and the EEC. In the case of the ECSC, the Court of Justice even held in the *Fédéchar* case that powers include the rules on the measures necessary to achieve the objectives laid down in the founding treaty.²⁹ In addition, in the cases *Italy v. High Authority* and the *Netherlands v. High Authority*, the question arose, also in the transport sector, of whether the High Authority was entitled to make price lists and conditions of sale public. In its decision, the Court of Justice pointed out that neither the nature of the policy, nor the fundamental principles of the Treaty imply that the High Authority is entitled to exercise such powers in the absence of an express provision.³⁰ The main issue in the case of the *Netherlands v. High Authority* was whether it could follow from Article 70 – which provides that tariffs and other relevant tariff regulations for coal and steel transport must be published and brought to the attention of the High Authority – that the High Authority may publish them. In this case, the Court of Justice confined itself strictly to a linguistic interpretation of that provision, from which it concluded that, in the absence of an express enabling provision, the High Authority was not entitled to exercise such a power.³¹

The Court of Justice, on the other hand, had to decide in the ERTA case whether the Community was entitled to conclude an international convention. The first important point of the Court's argument is that the Community is a legal person, and therefore is entitled to enter into contractual relations with third countries. In order to establish the necessary powers, it is necessary to take into account the system of the Treaty establishing the European Economic Community and its material provisions.³² This points to the fact that, while the Court of Justice previously analysed powers on the basis of

²⁷ For example: "I shall not conceal from the Court that I was momentarily persuaded to the view that authority in external matters can be transferred to the Community through the adoption of a Community regulation and it is with some regret that upon reflection I must finally suggest that this view should not be accepted." ECLI:EU:C:1971:32, 291.

²⁸ PETTI 2021b: 5–6.

²⁹ Judgment of the Court of Justice of 16 July 1956, *Fédération Charobinnere de Belgique (Fédéchar) v. ECSC High Authority*, ECLI:EU:C:1956:11.

³⁰ Judgment of the Court of Justice of 15 July 1960 in Case C-25/59 *Italy v. ECSC High Authority* ECLI:EU:C:1960:33.

³¹ Judgment of the Court of Justice of 15 July 1960 in Case C-25/59 *Kingdom of the Netherlands v. ECSC High Authority* ECLI:EU:C:1960:34.

³² Judgment of the Court of 31 March 1971 in Case C-22/70 *Commission v. Council*, ECLI:EU:C:1971:32, paragraphs 13 to 15.



the wording of the provisions, it now examines the entire Treaty system, in addition to its provisions. Recognising the Advocate General's dilemma, it stresses that such powers may derive not only from explicit provisions but also from other provisions of the Treaty establishing the European Economic Community and acts adopted by the institutions.³³ It stresses that, once common rules are introduced, the Community alone will be entitled to conclude agreements with third countries containing international obligations in these areas.³⁴ In essence, the Court is pointing out that not only on the express provisions of the Treaty establishing the European Economic Community, but also on other provisions or even other Community acts may serve as legal bases for such an agreement.

The Court also deduced that there are cases where this also results in exclusive competences for the Community.³⁵ The Court of Justice first of all points out that, where Community rules are adopted for the purpose of achieving the objectives of the Treaty, Member States may not, outside the framework of the institutions, assume obligations that may affect those rules or alter their scope.³⁶ The Court also notes in this regard that, since the entry into force of the regulation in question, the relevant part of transport policy belongs to the (exclusive) powers of the Community. In this context, the Court's indecisiveness is perhaps even somewhat felt in the argument when it points out that paragraphs 74 and 75 of the Treaty establishing the European Economic Community (i.e. the transport policy provisions) do not explicitly provide for the Community's power to conclude international agreements.³⁷ It is to be noted that, at the end of the argument, even in landmark decisions such as *Van Gend en Loos* or *Costa v. ENEL*, the uniformity of the Community market and the uniform implementation of Community law are invoked.³⁸

The Court itself was clearly aware of the pragmatic side of this issue. In a letter to Antonio Tizzano (the then young law professor who would later become Vice-President of the Court of Justice), the rapporteur (and a very pro-integrationist judge), Pierre Pescatore wrote that the controversy surrounding the judgment showed that not everyone had yet accepted the logic of the new legal order, which was rather different from international law. However, Pescatore stressed that he is aware of the depth of the transformation. Pescatore's determination presumably also influenced the other judges.³⁹ This personal opinion was later reflected in his writings and speeches. In his later work (including his lectures at the Hague Academy of International Law programme), he stressed the need to clarify the depths of the Community's legal personality, in the course of which it is necessary to clarify the (greater) powers of the Community, including the importance of the ERTA case. He also stressed, however, that his idea would probably be frowned upon by other Member States.⁴⁰

³³ ECLI:EU:C:1971:32, paragraphs 16 to 18.

³⁴ ECLI:EU:C:1971:32, paragraph 17.

³⁵ ECLI:EU:C:1971:32, paragraphs 8 to 11.

³⁶ ECLI:EU:C:1971:32, paragraph 21.

³⁷ ECLI:EU:C:1971:32, paragraphs 23 to 25.

³⁸ ECLI:EU:C:1971:32, paragraph 31.

³⁹ PETTI 2021b: 21.

⁴⁰ FRITZ 2020: 592.



Partial conclusions

In the light of the above, it can be concluded that the ERTA case is another milestone in the case law of the Court of Justice. It is also clear, however, that at the time it was perhaps only the Court of Justice that assessed the magnitude of this change:

Firstly, it is true that the Commission presented very convincing argumentation that deepened integration. However, it can be seen that the arguments do not display the elements that were necessary for the thesis itself to work properly. For this, the Court of Justice was necessary. In addition, the Court of Justice ruled in favour of the Council and not the Commission, despite the fact that the Commission presented evidence to the Court of Justice on numerous occasions that it objected to the Council's action.⁴¹

Secondly, the Advocate General assessed the significance of the issue. This is also apparent from the fact that he did not agree with the Commission that the provisions in question confer on the EEC the power to conclude an international agreement. However, it is also clear from the language of the Advocate General's opinion that he was in fact completely puzzled as to what to do. In this respect, it relied much more on the Court's earlier reasoning based on a grammatical approach to the interpretation of powers.

Thirdly, it is clear from the argument that the Court struggled to provide a convincing reasoning. Not considering the grammatical interpretation sufficient (which would have led to the opposite conclusion, based on the Advocate General's reasoning), it had to rely on the system of the Treaty establishing the European Economic Community and a somewhat teleological approach, such as the common market and the uniform implementation of Community law.⁴² Of course, it acknowledged that Member States were entitled to conduct negotiations, but its actual position on the situation of powers was innovative. This led to a rather pragmatic (and quite constitutional law-like) argument. The Court was presumably able to appreciate the importance of the case. It is no coincidence that Craig argues that a court generally resorts to teleological interpretation of the law when there are significant cases when the "stakes are high", both in principle and in practice.⁴³ However, it is also true that the Court could not see the system as a whole at the time. This is so only because only one of the cases of implied external powers covered ("in so far as its conclusion may affect common rules or alter their scope") is dealt with, the other provisions (including paragraph 18 on powers in general) not indicating that other cases had been examined by the Court. This is a significant finding, since there are approaches that assume this degree of discretion on the part of the Court of Justice in the ERTA case. No wonder, since in other cases it is assumed that the Court could understand the situation in a relevant key case (such as the *Dassonville* case). Consequently, in the decision, the concept itself was assessed, but its precise nature could not be identified by the Court at that time. This took place later. However, it is also true that the teleological interpretation used and the concise, yet somewhat imprecise wording favoured later evolution.

⁴¹ See: C-22/70.

⁴² BUTLER-WESSEL 2021.

⁴³ CRAIG 2014: 213.



Elaborating the implied external powers until the Lisbon Treaty

Necessity for the implied external powers

The very first case before the Court of Justice that dealt with this option was Opinion 1/76 on a draft agreement on a European fund for the temporary decommissioning of inland waterway vessels. The proposed agreement would have involved the six EEC Member States and Switzerland to eliminate the disruption caused by the excess capacity of the inland waterways in the Rhine and Moselle basins and the excess capacity of the Dutch and German inland waterways in the Rhine basin.⁴⁴ The agreement would necessarily have affected the decision-making and judicial powers of the Community institutions, so the Commission consulted the Court of Justice on the draft. Although the Court reiterated the position it had taken in the ERTA case, it was clear that, since Switzerland was a member of the Convention, it was not possible to establish this by internal rules, but only by an international treaty.⁴⁵ This was also confirmed by the Council before the Court of Justice, which in its argument ruled out in advance that the eventuality in the ERTA case would apply, since there were no Community rules on the subject at the time.⁴⁶ On this basis, the Court of Justice ruled that the EEC may enter into international obligations with third States even if the Treaty establishing the European Economic Community authorises it to adopt internal rules on such matters, subject to the condition that its participation is necessary for a Community objective to be attained.⁴⁷ Knapp also points out that it is to be considered that the conclusion of an international treaty was the only instrument that made it possible to achieve the objective in this case. It can be seen that, in this case, the Court of Justice has also presumably not fully grasped the complexity of the implied powers, although it has used the ERTA case as a reference, in a necessarily pragmatic manner.

Obligation to conclude contracts imposed by a legislative act of the Union

This case was based on Opinion 1/94 on the conclusion of international treaties on services and the protection of intellectual property. In the case of the GATS, the Commission argued that there was no area within GATS where the Community did not have appropriate power; it covers the freedom of establishment and the freedom to provide services⁴⁸. However, the Court of Justice (referring back to the ERTA case) pointed out

⁴⁴ KNAPP 2019: 82.

⁴⁵ Opinion 1/76 of the Court of Justice of 26 April 1977, ECLI:EU:C:1977:63, paragraph 7.

⁴⁶ HODUN 2015.

⁴⁷ KNAPP 2019: 84.

⁴⁸ Opinion 1/94 of the Court of Justice of 15 November 1994, ECLI:EU:C:1994:384, paragraphs 73–74.



that even within the field of transport, common rules do not always apply.⁴⁹ In the case of the freedom of establishment, the Court of Justice has also held that the sole purpose of the relevant chapter of the Treaty is to guarantee the Member States the freedom of establishment and the freedom to provide services, and that it cannot be inferred from these chapters that the Community has exclusive competence with regard to relations with other States.⁵⁰ However, the Commission (presumably erroneously referring to Opinion 1/76) suggested that where Community law conferred powers on the institutions to achieve specific objectives, according to the Commission, the power to conclude such an agreement followed from this.⁵¹ It is to be noted that the Commission also mentioned that the Community remains inactive on these issues in the international arena. The Court of Justice could have used this more or less faulty reasoning (on the basis of which it sought to prove necessity).⁵²

Fine-tuning the ERTA doctrine

The vagueness of competences

In addition to the foregoing, however, the conclusion reached in the ERTA case was continued. The case right after the ERTA case took the same approach further. The Kramer case was based on accusations that Dutch fishermen were in breach of the North-East Atlantic Fisheries Convention on the limitation of catches of sole and plaice. The defendants defended that the convention was contrary to the provisions of Community law, of which almost all states were members except Luxembourg.⁵³ Here the Court of Justice also began by stating that the Community has legal personality, and then made the determination of the exclusive external power of the EEC conditional upon the examination of the system of provisions of the Treaty establishing the European Economic Community. Here, too, the Court of Justice not only referred to certain provisions of the Treaty establishing the European Economic Community, but also to secondary legislation in order to establish power. The Court of Justice first established that the Community has exclusive competence for the biological conservation of marine resources.⁵⁴ Since this means an exclusive competence (which, moreover, according to the Court, follows from the nature of things), the external aspect of this necessarily also results in implied external powers, with which the Court drew a parallel with its conclusions in the ERTA case.⁵⁵ Here, however, it is already suggested that, in the present case, an exclusive inter-

⁴⁹ Opinion 1/94 of the Court of Justice of 15 November 1994, paragraph 81.

⁵⁰ Opinion 1/94 of the Court of Justice of 15 November 1994, paragraphs 73 to 74.

⁵¹ Opinion 1/94 of the Court of Justice of 15 November 1994, paragraphs 95 to 96.

⁵² HODUN 2015: 173–174.

⁵³ Judgment of the Court of 14 July 1976 in joined cases C-3-76, C 4-76 and C-6-76 Cornelis Kramer and Others ECLI:EU:C:1976:114.

⁵⁴ ECLI:EU:C:1976:114, paragraphs 42 to 43.

⁵⁵ ECLI:EU:C:1976:114, paragraph 20.



nal power replaced the exclusive implied external powers, whereas previously this was only the case with regard to a shared competence.⁵⁶

Nevertheless, in Opinion 2/91, the Court of Justice was again faced with the distinction between exclusive and shared competences. The subject of Opinion 2/91 was the International Labour Organisation Convention No. 170, which aims to protect workers from the harmful effects of the use of chemicals in the workplace and contains rules on various topics such as the handling of chemical products from origin to use, the rights and obligations of employers and workers, and health and safety requirements for the export of hazardous chemicals.⁵⁷ The Commission argued that the subject matter of the Convention falls within the power of the Community. Germany, Spain and Ireland argued, referring to the ERTA case, that such power can only be established in the case of common policies.⁵⁸ As ILO Convention 170 focuses on social issues, this approach cannot be used. The Court of Justice stressed that, contrary to the arguments of the Member States in question, such powers are not limited to common policies, since this would allow Member States to enter into international commitments that could affect or change their scope. It logically follows that it is possible to apply the ERTA doctrine also in the case of shared competence.⁵⁹ It is to be noted that the Court of Justice stresses that this can be established even if the Community rules are otherwise not contrary to the rules of the international agreement.⁶⁰

The above also suggests that the Court of Justice already strived at that time not to allow the ERTA doctrine to shake the foundations of the division of powers. In the case of Opinion 2/91, the Commission argued that Member States might be inclined not to adopt provisions better suited to the specific social and technical conditions of the Community. Since such an approach would jeopardise the development of integration and Community law, the Community should therefore have exclusive competence to conclude an ILO convention, but the Court of Justice rejected this argument.⁶¹

The vagueness of common rules

The issue of common rules has also been steadily broadened by the post-ERTA case law. It is also significant in the Kramer case that, although the Court of Justice again took the Council's side at the end of the ruling, the Court's decision only confirmed the establishment of the ERTA doctrine. The Court decided to clarify the ERTA case – although it could have, given the narrow interpretation sought by Denmark and the United Kingdom in the case – insofar as it made clear that the creation of the implied powers does not require that the internal rules and the subject matter of the envisaged agreements are identical.⁶² This approach was also followed by the Court of Justice in Opinion 2/91,

⁵⁶ Lock 2022: 82–84.

⁵⁷ Opinion of the Court of Justice of 21 August 1991, No 2/91, ECLI:EU:C:1993:106, paragraphs 73–74.

⁵⁸ Opinion of the Court of Justice of 21 August 1991, No 2/91, paragraphs 1–6.

⁵⁹ Opinion of the Court of Justice of 21 August 1991, No 2/91, paragraphs 9 to 11.

⁶⁰ Opinion of the Court of Justice of 21 August 1991, No 2/91, paragraphs 16 and 18.

⁶¹ Opinion of the Court of Justice of 21 August 1991, No 2/91, paragraphs 1–6.

⁶² Joined Cases 3/70, 4/70 and 6/70, paragraphs 44–45.



where the Court took a further step. As this was a case of shared competence, only minimal harmonisation rules could be adopted in this area. In doing so, it rejected the objections of the Council, Spain, Denmark, France, the Netherlands and Belgium.⁶³

It is to be noted that the development of case law has also clarified the fact that, if the common rules cover a given power, Member States cannot conclude any international treaty on that subject. According to the Advocate General's opinion in the Open Skies decision, this also applies in cases where the provisions of the international treaty in question are otherwise in line with the rules of the common market. Their very existence is incompatible with the common market itself.⁶⁴

Lack of common rules

Finally, it is worth mentioning the lack of common rules separately. In the Kramer case, the institutions were only granted authority to adopt internal substantive rules, in other words, it was not even necessary that these internal rules had already been adopted, contrary to the UK's argument to this end. The delegation itself was sufficient to create this competence.⁶⁵

Codification of the implied external powers

The Constitutional Treaty and the Court's "response"

It is to be noted that an attempt was also made to codify the case of implied external powers in the Constitutional Treaty. This is not new to the extent that they wanted to include not only this power issue in the document, but a complete and clear catalogue of powers.⁶⁶ Accordingly, the Constitutional Treaty tried to codify existing case law. Article III-323 of the draft provided that the Union may conclude an agreement with one or more third countries or international organisations where (1) the Constitution so provides or where (2) the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Constitution, or (3) is provided for in a legally binding Union act or (4) is likely to affect common rules or alter their scope. The Constitutional Treaty also seeks to codify the sub-case of exclusive competence of the implied external powers in Article I-13(2).⁶⁷ It is to be noted, however, that there is no implied external shared competence under the text, only exclusive, and no one proposed an amendment to this effect at the time.⁶⁸

⁶³ Opinion of the Court of Justice of 21 August 1991, No 2/91, paragraphs 16 and 18.

⁶⁴ Opinion of Advocate General Tizzano in Joined Cases C-466-76/98 Commission v. United Kingdom and other Member States, 31 January 2002 ECLI:EU:C:2002:63, paragraph 72.

⁶⁵ Joined Cases 3/70, 4/70 and 6/70, paragraphs 39–40.

⁶⁶ European Union 2001: 3–4.

⁶⁷ Treaty establishing a Constitution for Europe, 16.12.2004/C 310/1, Article I-13(2) and Article III-323.

⁶⁸ HODUN 2015: 192–194.



Although the Constitutional Treaty was not adopted, it is worth comparing it with the subsequent case law of the Court of Justice. Opinion 1/03, in which the Court of Justice examined the question of whether the Community has exclusive competence to conclude the new Lugano Convention replacing the 1988 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, seems innovative in relation to the text. In this respect, the Court of Justice in a way “codified” the existing ERTA case law, in terms of in which cases such power may exist.⁶⁹ It stressed, however, that there are several possible cases of exclusive competence other than the case law to date, and that, consequently, the Court’s findings to date are “based only on the specific contexts taken into account by the Court”.⁷⁰ It should be stressed that the purpose of exclusive competence is to ensure the effective application of Community law and the proper functioning of the system established by the legislation. In this context, it stressed that Member States are not entitled to conclude international treaties containing obligations affecting Community provisions. This requires “a comprehensive and concrete analysis”, which must not only take into account the existing situation, but also future trends in development, which are foreseeable at the time of the analysis.⁷¹ In this context, it is to be noted that, following the Constitutional Treaty, Opinion No. 1/03 of the Court of Justice confirmed the institution of implied external powers, and even allowed the Court of Justice to extend it. In doing so, the Court sent a clear message to the Member States that it disagreed with the wording of the Constitutional Treaty (which adopted a restrictive interpretation compared to Opinion 1/03 and the preceding case law).⁷²

The Lisbon reforms

With the Lisbon reforms, the Treaty on the Functioning of the European Union also introduced the case of implied external powers in the text of the Treaty (in the case of Article 216 TFEU and Article 3(2) TFEU). Despite the fact that it was adopted and sought to eliminate the pillar structure as a significant change,⁷³ it can be said that the scope of the two articles is almost the same, and, consequently, the content of the ERTA case and Opinion 1/76 were declared. Although it is unclear from the imperfect wording, presumably Article 216(1) TFEU is intended to explore the question of the implied external powers in general terms (including both exclusive and shared cases), whereas Article 3(2) TFEU only covers the conditions for exclusive competence (since it is located in Article 3 TFEU, otherwise containing exclusive competences).⁷⁴ The Lisbon Treaty took over the text used in the Constitutional Treaty in its entirety. Perhaps most importantly, however, despite the fact that the meaning of these provisions remains

⁶⁹ Opinion of the Court of Justice of 7 February 2006, No 1/03, ECLI:EU:C:2006:81, paragraphs 122–123.

⁷⁰ Opinion of the Court of Justice of 7 February 2006, No 1/03, paragraph 121.

⁷¹ Opinion of the Court of Justice of 7 February 2006, No 1/03, paragraph 133.

⁷² HODUN 2015: 198.

⁷³ KAJTÁR 2010: 3–5.

⁷⁴ Treaty on the Functioning of the European Union, J C 326, 26.10.2012: 47–390, Articles 3(2) and 216.



uncertain, a practice declared by the Court of Justice became part of primary EU law (as opposed to, for example, an explicit declaration of the primacy of EU law).

Another answer from the Court: new case law

In the late case-law it is typical that the Council tried to limit the phenomenon of implied external powers, somewhat. This is also due to the fact that the question was again raised as to what extent a catalogue of powers succeeded in limiting the extension of powers. Govaere stresses that, in Case C-114/12 and Opinion 1/13, the Council argued that if the Court of Justice were to infer exclusive competence for the Union in the absence of common rules, it would unlawfully extend the scope of Article 3(2) TFEU, violating the principle of conferral of powers itself.⁷⁵ In both cases, the Court of Justice firmly rejected the idea that the Lisbon reforms had only created a definitive version of the implied external powers through a partial codification. The Court stressed that the opinions on the ILO and the Lugano Convention did not create new tests in the context of ERTA, but merely explained the original ERTA test.⁷⁶ The pre-Lisbon practice continues to apply without any restriction after Lisbon.

Conclusions

The development of implied external powers shows several clearly visible features. Based on these, the following conclusions can be made:

Firstly, applying Sinclair's theoretical approach, one can see that the case of implied external powers is not an EU invention: implied powers already appear in the case law of the United States of America and the International Court of Justice in The Hague.

Secondly, reviewing the circumstances, it is most certain that, despite the early formulation of the case of deepening integration, the application of implied external powers does not follow directly from the provisions of the Treaty establishing the European Economic Community. Neither the provisions on external relations, nor those on transport policy justified its existence. The agenda was different for the practitioners of Community law, so it was necessary to find the right moment for such a decision.

Thirdly, the Commission's reasoning has some novel features, but the Court's conclusions and stated doctrines were also necessary for the ERTA doctrine to emerge. This was not really recognised by the Member States at the time, as they did not bring any arguments against its actual application. In addition, although the Advocate General recognised its importance, he did not agree with the introduction of its application. At the same time, the Commission and the Court of Justice almost deliberately sought to

⁷⁵ GOVAERE 2022: 18–19.

⁷⁶ GOVAERE 2022: 18–19; Judgment of the Court of Justice of 16 July 1956 in Case C-114/12 Commission v. Council, ECLI:EU:C:2014:2151, paragraphs 66–67; Opinion of the Court of Justice of 14 October 2014, No 1/13, ECLI:EU:C:2014:2303, paragraphs 70–73.



create a fairly effective instrument for securing competences. This approach follows from the spirit of the Commission at the time, as well as from Pescatore's later statements.

Fourthly, it is also clear that the ERTA doctrine does not express the entirety of the implied external powers, as it contains only one case of such powers, and they are not always traceable back in their entirety to the ERTA case. It is no coincidence that, in its Opinion No. 1/03, the Court of Justice, in response to the Constitutional Treaty, set it out in its then (and open-ended) entirety. Here, the further pragmatism of the Court of Justice necessarily appears, leading to a further development of the doctrine.

Finally, even after codification, the Court of Justice to a large extent pragmatically insisted on the completeness of the implied external powers, and did not allow Member States to limit them. As a result, the Court maintained this approach.

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