COMMON MARKET LAW REVIEW

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Aims
The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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The Common Market Law Review was established in 1963 in cooperation with the British Institute of International and Comparative Law and the Europa Instituut of the University of Leyden.The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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IMPLIED EXCLUSIVE POWERS IN THE ECJ'S POST-LISBON JURISPRUDENCE: THE CONTINUED DEVELOPMENT OF THE *ERTA* DOCTRINE

MERIJN CHAMON*

Abstract

Already early on in the EU integration process the ECJ accepted the idea of implied exclusive powers: in ERTA, it ruled that Member States may lose the power to conclude international agreements if and when the EU has acted internally on the matter. This idea of "supervening exclusivity" was further developed in subsequent ECJ case law and finally recognized in primary law through codification in Article 3(2) TFEU. The present article reconstructs the Court's pre-Lisbon jurisprudence using different building blocks: the telos and nature of supervening exclusivity, the species of "common rules" and the notion of "affecting". Reconceptualizing the ERTA doctrine, the article argues that the ERTA effect is a form of obstacle pre-emption. In a second part, the article looks at the (dis)continuity of the application of the ERTA doctrine in the Court's post-Lisbon case law, finding that there is coherence in the sense that obstacle pre-emption is still a valid prism through which to look at the ERTA doctrine but at the same time the threshold for finding an EU exclusive competence has been lowered.

1. Introduction

One of the many significant changes introduced by the Lisbon Treaty, going back to the Constitutional Treaty, was the recognition of the EU's implied exclusive external competence, which finds its origins in the Court's seminal *ERTA* judgment.[1] The mechanism of supervening[2] exclusivity now foreseen

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1. Case 22/70, *Commission* v. *Council* (*ERTA*), EU:C:1971:32.

2. Following authors such as Dashwood and Rosas, the term "supervening exclusivity" is used here to denote "implied exclusive competence". See Dashwood, "Mixity in the era of the Treaty of Lisbon", in Hillion and Koutrakos (Eds.), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart Publishing, 2010), p. 360; Rosas, "Exclusive, shared and

in Article 3(2) TFEU triggers an exclusive power for the EU to conclude international agreements when the EU has exercised its competences internally.

The Lisbon codification raised a number of questions. A first is whether and to what extent Article 3(2) TFEU provides for a proper codification of the *ERTA* line of cases. This is linked to a complicating factor in that not only the Treaty authors but also the Court itself engaged in codifying the *ERTA* doctrine. The case in point here is Opinion 1/03[3] delivered by the Court during the "reflection period" between the rejection of the Constitutional Treaty and the negotiations on the Lisbon Treaty. When the latter finally entered into force, two *ERTA* codifications existed, and the one provided for in Article 3(2) TFEU was in a sense already outdated, since it could only take into account pre-Lisbon developments up until Opinion 1/00.[4] As a result, a second question, and one on which the second part of this article will focus, is how the Treaty codification has been applied by the Court in its post-Lisbon case law on supervening exclusivity. These questions are of no small importance, since one of the key aims of the Lisbon Treaty was to contain EU competence (creep).[5] The aim to codify and contain was all the more daunting in respect of *ERTA* since it has proved to be one of the most impenetrable doctrines in EU law, even for the keenest legal minds. As noted below, this not only has to do with the Court's often elliptic reasoning, but also with its seemingly oscillating approach to supervening exclusivity.

In this regard commentators generally point towards a restrictive turn in the Court's case law in the 1994 WTO Opinion and the 2002 *Open Skies* cases, and a subsequent return to the more generous standard in the 2006 Lugano Opinion.[6] To fully appreciate the Court's post-Lisbon case law, it is therefore necessary to conceptualize the *ERTA* doctrine in the Court's pre-Lisbon case

national competence in the context of EU external relations: Do such distinctions matter?", in Govaere, Lannon, Van Elsuwege and Adam (Eds.), *The European Union in the World: Essays in Honour of Marc Maresceau* (Martinus Nijhoff, 2014), p. 18.

3. Opinion 1/03, *Lugano Convention*, EU:C:2006:81.

4. Opinion 1/00, *European Common Aviation Area*, EU:C:2002:231.

5. Craig, "Competence: Clarity, conferral, containment and consideration", 29 EL Rev. (2004), 323–344.

6. See Mengozzi, "The EC external competencies: From the *ERTA* case to the Opinion in the Lugano Convention", in Maduro and Azoulai (Eds.), *The Past and Future of EU Law* (Hart Publishing, 2010), pp. 213–217. Lavranos noted a "shift by the Court from the rather static and restrictive approach it developed in Opinion 1/94 and the *Open Skies* judgments, i.e. the 'largely harmonized' test, towards the more flexible, dynamic 'effect on Community law' test." See Lavranos, "Opinion 1/03, Lugano Convention", 43 CML Rev. (2006), 1087–1100, 1095; Flaesch-Mougin, "Premières décisions relatives à la compétence exclusive de l'Union au titre de l'article 3, paragraphe 2, TFUE: La Cour confirme la pertinence des critères jurisprudentiels issus de l'arrêt AETR pour caractériser 'l'affectation des règles communes", (2015) RTDE, 220.

law. As will be shown, this doctrine has undeniably been subject to change over the years,[7] but if one scratches off the veneer of the specific factual context and the specific phrasing of the legal questions put before the Court in each individual case,[8] there is consistency in the Court's rulings on supervening exclusivity. The latter may be seen as preventing the Member States from acting on the international plane if otherwise the objectives pursued by common EU rules might be frustrated.

In what follows, the hypothesis that supervening exclusivity may be conceptualized as obstacle pre-emption will first be proposed. Subsequently, the pre- and post-Lisbon case law will be deconstructed and reconceptualized,[9] looking at (i) both the telos and nature of the constitutional mechanism of supervening exclusivity, (ii) the species of common rules that may trigger exclusivity, (iii) the pivotal notion of "affecting" and (iv) the Court's approach in testing whether EU law is affected. Juxtaposing the pre- and post-Lisbon case law then allows for preliminary conclusions on continuity and discontinuity in applying the *ERTA* doctrine.

2. Supervening exclusivity as obstacle pre-emption

While the Court itself never refers to the concept of pre-emption, and that concept has been hard to trace both in the context of US federal law and even more so when exported to the EU context, it will be argued here that it may still help in interpreting and understanding the case law.[10] While the pre-emptive nature of supervening exclusivity is indeed more or less accepted

7. Ontologically, the view taken here is that the Court in cases such as the ILO Opinion, WTO Opinion, *Open Skies,* Lugano Opinion, etc. has built on and elaborated one rather than several doctrines or principles. Contra, see *inter alia* Klamert, *The Principle of Loyalty in EU Law* (OUP, 2014), pp. 106–107; Delgado Casteleiro, "On the scope of EU's exclusive competence after the Lisbon Treaty – Comment of the Opinion 1/13 of the Court"', 51 Rev.der.Com.Eur (2015), 669–684, 677.

8. The argumentation invoked by the parties of course also plays a role. In Opinion 1/94, the main question which the Commission had asked was whether "the European Community has the competence to conclude all parts of the GATS and TRIPs". Probably because of the Commission's focus in its argumentation on an exclusive EU competence, the Court actually answered the question whether "the European Community alone has the competence to conclude all parts of GATS and TRIPs".

9. For more traditional chronological discussions, see works cited *infra* note 20; Castillo de la Torre, "The Court of Justice and external competences after Lisbon: Some reflections on the latest case law", in Eeckhout and Escudero (Eds.), *The European Union's External Action in Times of Crisis* (Hart Publishing, 2016), pp. 142–157.

10. Observing this in general terms, see Timmermans, "ECJ doctrines on competences", in Azoulai (Ed.), *The Question of Competence in the European Union* (OUP, 2014), p. 155.

in legal doctrine,[11] it is possible, but not straightforward,[12] to qualify it more precisely as obstacle pre-emption, necessarily including rule pre-emption, without going as far as equating field pre-emption. These three types have been identified by Schütze, drawing from the US federal experience, and may be described as follows: rule pre-emption occurs when there is an outright conflict between a national and an EU rule. In contrast, obstacle pre-emption is when a national rule frustrates the realization of the objectives or purpose of an EU rule. While obstacle pre-emption also encompasses outright conflicts, a conflict of rules is not required. The threshold lies at a more abstract level, requiring that the realization of the objectives pursued by EU legislation are frustrated. Finally, field pre-emption does not require any kind of conflict of rules or frustration of objectives and simply shuts out the exercise of national competence when and if the EU has "occupied the field" in a certain matter.[13]

What are the practical implications of this doctrinal qualification? This is easiest illustrated by taking the perspective of the two actors that typically find themselves at opposing ends before the ECJ: for the Member States it means that they cannot claim the power to exercise a competence simply by demonstrating that there is no normative conflict between a(n) (envisaged) international agreement and the relevant act of EU secondary legislation. Instead they have to show that the legal regime set up under EU law can in no

11. See *inter alia* Metz, *Die Aussenbeziehungen der Europäischen Union nach dem Vertrag über eine Verfassung für Europa: Eine Untersuchung aus kompetenzrechtlicher Sicht* (Duncker und Humblot, 2007), p. 361; Hahn and Dudenhöfer, "Auswärtige Annexkompetenzen interner Politiken", in Von Arnauld (Ed.), *Europäische Außenbeziehungen* (Nomos, 2014), p. 864; Eeckhout, "Exclusive external competences: Constructing the EU as an international actor", in *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case law* (TMC Asser Press, 2013), pp. 626–628; Cremona, "EU external competence – Rationales for exclusivity", in Garben and Govaere (Eds.), *The Division of Competences between the EU and the Member States: Reflections on the Past, the Present and the Future* (Hart Publishing, 2017), pp. 144–145; Le Bot, "Précisions sur les compétences externes implicites après le Traité de Lisbonne", (2014) R.A.E., 633–640, 636; Dony, "Les accords mixtes", in Louis and Dony (Eds.), *Le droit de la CE et de l'Union européenne: Relations extérieures* (Bruylant, 2005), p. 174. *Contra* however, see Timmermans, op. cit. *supra* note 10, p. 163. More dubiously, Konstadinidis refers to *ERTA* as a doctrine of pre-emption, but qualifies pre-emption as "the external axiom of the principle of EU law primacy"; see Konstadinidis, "EU foreign policy under the doctrine of implied powers: Codification drawbacks and constitutional limitations", 39 EL Rev. (2014), 511–530, 515. On pre-emption, see also Louis and Brückner, *Le droit de la communauté économique européenne: Relations extérieures* (Presses universitaires de Bruxelles, 1980), p. 110; Lang, "The *ERTA* judgment and the Court's case law on competence and conflict", 6 YEL (1986), 183–218, 200.

12. E.g. Delgado Casteleiro argues that rule pre-emption is at issue when the EU has engaged in complete harmonization; see Delgado Casteleiro, op. cit. *supra* note 7, 680–681. This seems questionable since rule pre-emption requires an actual conflict of rules, something which the Court, in instances of complete harmonization, is not actually interested in.

13. See Schütze, "Supremacy without pre-emption? The very slowly emergent doctrine of community pre-emption", 43 CML Rev. (2006), 1023–1048, 1034 et seq.

way be affected in the sense that the attainment of the ultimate objectives of the EU legal act in question may be frustrated. Conversely, the Commission cannot simply claim an exclusive competence over a field by showing the EU has already adopted an act in that area. Instead it has to show that a *specific* exercise of (shared) competence by the Member States will frustrate the functioning of the legal regime set up by a *specific* act of EU secondary legislation. In addition, finding supervening exclusivity will not readily result in the exclusion of the Member States from the *entire* field, since they are only pre-empted from adopting certain specific acts. In order to effectively exclude them from the entire field, the EU must have *completely* exhausted its legislative competence in that field. As will be shown below, the Court has also accepted that Member States are excluded from the field if the EU has *almost* completely exhausted its competence to legislate, i.e. if the field is largely covered by EU common rules.

The above already shows how finding supervening exclusivity may be a rather subjective affaire. For instance, even if the Member States show that a certain EU legal regime may continue to function perfectly while Member States exercise their (shared) competences in parallel, the Court might still find an *ERTA* effect by identifying the more abstract (and therefore less tangible) risk of the objectives of the EU legal regime being jeopardized. Similarly, in order to exclude Member States from the field, the Commission will (only) have to show that EU law has largely covered the area, which in itself is an imprecise standard.

3. The genesis of implied exclusive powers

The *ERTA* ruling dates from the "foundational period" in EU integration in which the ECJ constitutionalized the relationship between the Union and the Member States (a relation hitherto presumed to be governed by international law).[14] Since volumes have already been filled on the *ERTA* judgment itself, it will not be presented again here. It suffices to note instead that in the very first inter-institutional dispute before the Court, the judges found that there was no need for an express provision in the Treaties granting the EU the competence to conclude international agreements. Rather, such a competence could flow *implicitly* from a Treaty provision or even from secondary law measures.[15] Without properly distinguishing between the *existence* and the *nature* of a competence, the Court added that when common rules are adopted through secondary legislation, the Member States lose the power to assume obligations

14. Weiler, "The transformation of Europe", 100 *The Yale Law Journal* (1991), 2413–2417.
15. Case 22/70, *Commission* v. *Council (ERTA)*, para 16.

which affect those common rules or alter their scope.[16] The Court could be brief on the issue of the regulation being affected since the basic set-up and several provisions of the *ERTA* agreement were in direct conflict with it.[17] Based on the *ERTA* case itself, one could argue that supervening exclusivity is the result of rule pre-emption (two rules being in outright conflict), but as will be noted below, the Court later clarified that supervening exclusivity does not require a conflict of rules.

The Lisbon Treaty *partially* (see further below) codified the *ERTA* doctrine in Article 3(2) TFEU, spelling out that the "Union shall also have exclusive competence for the conclusion of an international agreement … in so far as its conclusion may affect common rules or alter their scope." Even if the Court in its case law indeed refers to exclusive *competences*, the codification remains problematic since the competences at issue in an *ERTA* test are actually *shared* competences (and remain so),[18] while the exercise of these competences by the Member States may be pre-empted, i.e. the *power* being exclusively vested in the EU.[19] As will be shown below, this issue is more than a mere legal nicety or clever semantics and instead has significant repercussions for the vertical delimitation of competences in the EU.

4. Pre-Lisbon development and reception of the *ERTA* doctrine

To understand how the Court has engaged with the *ERTA* codification in Article 3(2) TFEU, it is necessary to set out how the doctrine had developed prior to the Lisbon Treaty. Rather than following a chronological sequence,[20] the Court's case law will be presented along thematic lines: what are the telos

16. Ibid. para 17.

17. The Regulation's scope was determined territorially, while that of *ERTA* is (still) determined on a nationality basis. The UN Economic Commission for Europe is still working on the alignment of both instruments. See ECE Inland Transport Committee, "*AETR* discussion paper (Roadmap)", 20/12/2011, ECE/TRANS/2012/3.

18. *Contra*, see Castillo de la Torre, op. cit. supra note 9, pp. 158 and 162; Timmermans, op. cit. *supra* note 10, pp. 162–163.

19. For one of the few other commentators making this point, see Truë, "Das System der EU-Kompetenzen vor und nach dem Entwurf eines Europäischen Verfassungsvertrags", 64 ZaöRV (2004), 391–427, 414–415. For the critical distinction between powers and competences, see Constantinesco, *Compétences et pouvoirs dans les Communautés européennes: Contribution à l'étude de la nature juridique des communautés* (Librairie Générale de Droit et de Jurisprudence, 1974), pp. 82–83.

20. For such an account of the development of the *ERTA* jurisprudence, see *inter alia* Neframi, *L'action extérieure de l'Union européenne: Fondements, moyens, principes* (LGDJ, 2010), pp. 59–67; Holdgaard, *External Relations Law of the European Community: Legal Reasoning and Legal Discourses* (Kluwer Law International, 2008), pp. 97–116.

and nature of supervening exclusivity; what are "common EU rules"; what is meant by common rules being "affected" and how does the Court test this?

4.1. *The telos of the mechanism of supervening exclusivity*

Looking at supervening exclusivity as a constitutional mechanism that coordinates the external action of the national and EU levels of government,[21] raises the question what the purpose of this mechanism is. In *ERTA,* the ECJ was not entirely clear on this, referring to the need to safeguard "the unity of the Common Market and the uniform application of Community law."[22] In Opinion 1/03 the Court was explicit, finding that the "purpose … is *primarily* to preserve the *effectiveness of Community law and the proper functioning of the systems established by its rules*."[23] Yet, if that were indeed the ultimate telos of the *ERTA* doctrine, Eeckhout and De Baere argue that the Court in *ERTA* might also have opted for a simple application of the principle of primacy,[24] leaving the Member States the freedom to pursue external relations and only afterwards striking down any problematic agreements, thereby requiring them to resolve any legal issues arising under international law. Arguably there should therefore be something more to the *ERTA* doctrine.

According to Bourgeois, *ERTA* thus also served "to safeguard the Community 'legislators' freedom to alter [common EU] rules or to regulate the field further."[25] In Opinion 2/91, however, the Commission's plea for an exclusive EU competence in order to safeguard the future development of EU law was rejected by the Court, this concern being relegated to the status of a

21. See Schütze, *Foreign Affairs and the EU Constitution: Selected Essays* (Cambridge University Press, 2014), p. 173.

22. Case 22/70, *ERTA*, para 31.

23. Opinion 1/03, *Lugano Convention*, paras. 128 and 131 (emphasis added). See also *infra* note 33.

24. De Baere, *Constitutional Principles of EU External Relations* (OUP, 2008), p. 43; Eeckhout, *EU External Relations Law* (OUP, 2011), p. 76. In contrast, Kovar noted that "la contradiction entre une réglementation interne à la Communauté et des engagements internationaux souscrits par les Etats membres pourrait, difficilement, être réglée par le recours au principe de la primauté du droit communautaire." See Kovar, "L'affaire de l'A.E.T.R. devant la Cour de Justice des Communautés européennes et la compétence internationale de la C.E.E.", 17 *Annuaire Français de Droit International Année* (1971), 386–418, 404.

25. Bourgeois, "Some comments on the practice", and for other authors who stressed the need for exclusivity to safeguard the future development of EU law, Pescatore, "Contribution to the discussion", both in Timmermans and Völker (Eds.), *Division of Powers between the European Communities and their Member States in the Field of External Relations* (Kluwer, 1981), p. 104 and p. 75 respectively; Lenaerts, "Les répercussion des compétences de la Communauté européenne sur les compétences externes des Etats membres et la question de 'preemption'", in Demaret (Ed.), *Relations extérieures de la Communauté européenne et marché intérieur: Aspects juridiques et fonctionnels* (Story-Scientia, 1986), p. 59; Louis and Brückner, op. cit. *supra* note 11, p. 111.

practical difficulty that cannot affect the competence question.[26] Nonetheless, in the *Open Skies* cases, Advocate General Tizzano also identified a prospective purpose of the *ERTA* doctrine by citing, questionably,[27] almost verbatim from the Court's 1/75 Opinion.

Advocate General Tizzano thus ruled out a competence on the part of the Member States to "adopt positions which differ from those which the [EU] *intends* to adopt."[28] The Court only slightly picked up on this in its Opinion on the Lugano Convention when it clarified that an *ERTA* effect should not simply be assessed taking into account the current state of the law "but also its future development, insofar as that is foreseeable at the time of that analysis."[29] The addition that future developments ought to be foreseeable underscores that the forward-looking perspective only informs the analysis of EU law being possibly affected allowing the Court to take into account political agreements in Council but probably not mere Commission proposals not the purpose of the *ERTA* doctrine. After all, any prospective function of the *ERTA* doctrine would be based on the assumption that spill-back in EU integration is (at the most) a theoretical possibility. Following the Lisbon Treaty, however, Article 2(2) TFEU *inter alia* provides that in areas of shared competence, the "Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence."[30]

26. Opinion 2/91, *ILO Convention*, EU:C:1993:106, paras. 19–20; Opinion 2/00, *Cartagena Protocol*, EU:C:2001:664, para 41; Opinion 1/94, *GATS and TRIPs*, EU:C:1994:384, para 107; Opinion 1/08, *GATS*, EU:C:2009:739, para 127. In Ruling 1/78 (under the Euratom Treaty), the Court did take into account the risk of compromising the subsequent development of Euratom law, but only to find that Euratom ought not to be excluded from the IAEA convention on the Physical Protection of Nuclear Materials – not to find an exclusive Euratom competence. See Ruling 1/78, *Draft Convention of the International Atomic Energy Agency on the Physical Protection of Nuclear Materials, Facilities and Transports*, EU:C:1978:202, para 23. However, relying on Ruling 1/78 to argue that *ERTA* preserves the future action of the EU, see Castillo de la Torre, op. cit. *supra* note 9, p. 164.

27. The reference seems misplaced since Opinion 1/75, *Local cost standard,* EU:C:1975:145, dealt with the Common Commercial Policy which the Court confirmed in that Opinion comes under an *a priori* exclusive competence.

28. Opinion of A.G. Tizzano in Case C-466/98, *Commission* v. *UK*, EU:C:2002:63, para 64 (emphasis added).

29. Opinion 1/03, *Lugano Convention*, para 126. Not all commentators had noted this addition to the *ERTA* doctrine, but see McLean, "ECJ advisory Opinion 1/03", in Pocar (Ed.), *The External Competence of the European Union and Private International Law* (CEDAM, 2007), pp. 34–35. It may further be noted that in Opinion 1/94, *GATS and* TRIPs, the Court dismissed the relevance of proposed EU legislation; see para 103.

30. Edjaharian thus correctly notes that the pre-emption resulting from the adoption of EU law under shared competences is never definitive. See Vérane Edjaharian, "Les compétences dans le Traité de Lisbonne: La constitutionnalisation de l'Union européenne interrogée", in Brosset, Chevalier-Govers, Edjaharian and Schneider (Eds.), *Le Traité de Lisbonne: Reconfiguration ou déconstitutionnalisation de l'union européenne* (Bruylant, 2009), p. 239.

Taking into account the possible future development of EU law might then be turned into an argument for mixity instead of supervening exclusivity.[31]

One way to make sense of supervening exclusivity in legal terms is to argue that ensuring the "effectiveness of Community law and the proper functioning of the systems established by its rules"[32] and protecting the integrity of a coherent and uniform legal space which is (being) built in the EU legal order require exclusivity.[33] While these values might in theory also be safeguarded by a vigorous enforcement of the principle of supremacy, it would be ineffective (i.e. disproportionate) to rely simply on primacy. This "cloak of proportionality" is necessary for it to become a legal argument, given that the Court consistently rejects practical arguments as immaterial to solve competence questions.[34] The more severe repercussions for Member States' competences prescribed by Article 3(2) TFEU, compared to those prescribed by Article 2(2) TFEU,[35] are then to be understood in light of the different nature of international agreements compared to internal national laws.[36]

4.2. *The nature of supervening exclusivity*

A related question which has received less attention in legal doctrine, and none whatsoever by the Court, relates to the nature of supervening exclusivity, assuming that it is not simply an application of the supremacy principle (see

31. This since to take into account the possibility that the exercise of a shared competence returns to the national level (and no affected EU rules would exist), Members States would have to be involved (next to the EU) in the conclusion of the international agreement.

32. In his discussion of Opinion 1/03, *Lugano Convention*, McLean notes that the Court uses different variations on this mantra throughout its Opinion. See McLean, op. cit. *supra* note 29, pp. 32–33.

33. Post, "Constructing the European polity: *ERTA* and the *Open Skies* judgments", in Maduro and Azoulai, op. cit. *supra* note 6, p. 242.

34. See *supra* note 26.

35. Both provisions prescribe a pre-emption of Member State action, but Art. 2(2) TFEU recognizes that Member States still have a competence, whereas Art. 3(2) TFEU denies any competence for the Member States. According to Metz, both provisions govern the same issue. See Metz, op. cit. *supra* note 11, p. 361. Eeckhout and Rosas argue that both are similar but that Art. 3(2) TFEU constitutes a *lex specialis;* see Eeckhout, op. cit. *supra* note 11, pp. 627–628, and Rosas, op. cit. *supra* note 2, p. 23, note 22. As Cremona notes however, the relation between these two provisions is not spelled in the Treaties; Cremona, op. cit. *supra* note 11, p. 145. This also left the necessary scope for the Court to rule in Case C-114/12, *Commission* v. *Council* (*Neighbouring Rights),* EU:C:2014:2151, that Protocol No. 25 is immaterial for the purpose of applying Art. 3(2) TFEU, see *infra* note 117. Disagreeing with Metz and emphasizing that exclusivity under Art. 3(2) TFEU is different from Art. 2(2) TFEU, see Timmermans, op. cit. *supra* note 10, p. 163.

36. Castillo de la Torre, op. cit. *supra* note 9, pp. 158–160.

above).[37] Although this is ignored by the majority of commentators,[38] the Court in *ERTA* borrowed its language from earlier case law when defining the trigger for exclusivity. In the 1970 *Bollmann* case, the Court noted that "all Member States … unless otherwise expressly provided, are precluded from taking steps, for the purposes of applying the regulation [on the common organization of the market in poultry meat], which are intended to *alter its scope* or supplement its provisions … Member States [are not permitted] to adopt any internal measures *affecting the scope* of the regulation itself."[39] As the Court did not emphasize any substantive conflict between the national and EU measure,[40] its finding in *Bollmann* can be qualified as a typical application of legislative field pre-emption.[41] Where *Bollmann* was an internal case on the Common Agricultural Policy, Lenaerts also qualified the exclusivity resulting from the *ERTA* doctrine as field pre-emption.[42] Both Bourgeois and Weiler have argued that the *ERTA* doctrine constituted *ab initio* something between field pre-emption and simple supremacy: supervening exclusivity was not a matter of excluding Member State action from the entire field in which an EU act had been adopted, neither was it restricted to pushing out only those national measures in direct conflict with the EU act.[43] Precisely identifying the nature of supervening exclusivity ultimately depends on when the Court finds EU law (not) to be affected. The analysis on the latter issue (see below) points towards obstacle pre-emption, i.e. supervening exclusivity is required since Member State action would interfere with the proper

37. However, Heliskoski does find that the *ERTA* effect comes down to primacy. See Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States* (Kluwer Law International, 2001), pp. 30 and 68.

38. See however Louis and Brückner, op. cit. *supra* note 11, p. 110; Lang, op. cit. *supra* note 11, 200.

39. Case 40/69, *Bollmann*, EU:C:1970:12, paras. 4–5 (emphasis added).

40. Berardis, "The Common Organization of Agricultural Markets and National Price Regulations", 17 CML Rev. (1980), 539–551, 540.

41. Schütze, op. cit. *supra* note 13, 1040–1041.

42. In this regard, Lenaerts stressed that the Court in *ERTA* prohibited the Member States from taking *any* steps outside the EU framework. According to Lenaerts the original *ERTA* doctrine was to be understood as precluding Member State competence related "au sense le plus large au même domaine, même si l'objet précis d'un engagement international que voudrait contracter un Etat membre avec un pays tiers, n'est pas couvert par l'objet ou la portée de l'action communautaire." However he also foretold that the Court might attenuate the doctrine with regard to its most severe repercussions for national competence, see Lenaerts, op. cit. *supra* note 25, pp. 58–60. Also referring to field pre-emption, see Verellen, "The *ERTA* doctrine in the post-Lisbon era: Note under judgment in *Commission* v. *Council* (C-114/12) and Opinion 1/13", 21 CJEL (2015), 383–410, 407, note 80.

43. Bourgeois, op. cit. *supra* note 25, p. 105; Weiler, "The external legal relations of non-unitary actors: Mixity and the federal principle", in O'Keeffe and Schermers (Eds.), *Mixed Agreements* (Kluwer, 1983), p. 72.

functioning or the realization of the objectives of EU legislation.[44] Conversely, looking at the *ERTA* effect as resulting from obstacle pre-emption helps understand why the Court finds supervening exclusivity even in cases where EU law is not affected in the ordinary sense of the word.

4.3. *The species of common rules that may be affected in the sense of ERTA*

In its original ruling, the Court found an exclusive EU competence because *common EU rules* adopted to implement one of the *common policies* were affected. This *inter alia* raised the questions when a rule constitutes a "common" rule in the sense of the *ERTA* and whether the ruling only applied to rules adopted under the two "common" policies foreseen in the EEC Treaty.[45] As regards the latter, doctrine and practice already early on argued against such a restrictive interpretation of the ruling[46] and the Court later followed suit.[47] In its Opinion 2/91, the Court refuted a restrictive reading put forward by some of the Member States and confirmed that the "common rules" in *ERTA* were to be understood as all secondary legislation.[48] This clarification has been codified by the Lisbon Treaty, since Article 3(2) TFEU limits itself to referring to "common rules" omitting any reference to the field in which these are adopted.

Although the Court in *ERTA* noted that "the form these [common rules] may take" is irrelevant,[49] it remains unclear whether, apart from typical internal secondary legislation, an international agreement itself could

44. Schütze has defined this type of pre-emption for the EU's internal sphere. See Schütze, *European Constitutional Law* (Cambridge University Press, 2012), p. 366; Schütze, op. cit. *supra* note 13, 1041.

45. Louis and Brückner, op. cit. *supra* note 11, pp. 97–98.

46. Hardy, "Opinion 1/76 of the Court of Justice: The *Rhine* case and the Treaty-making powers of the Community", 14 CML Rev. (1977), 561–600, 588–589. See also Timmermans who argued that the EEC had become a party to the Bonn Convention for the protection of the Rhine against Chemical pollution because this convention affected the provisions of a directive adopted pursuant to Art. 352 TFEU. See Timmermans, "Division of external powers between Community and Member States in the field of harmonization of national law – A case study", in Timmermans and Völker, op. cit. *supra* note 25, pp. 17–19. *Contra* see authors cited in Kovar, "La contribution de la Cour de Justice au développement de la condition internationale de la communauté européenne", 14 CDE (1978), 527–573, 536.

47. However, Michel argues that while the aspect of common rules is not relevant for determining the existence of an external competence it still is for determining the nature of that competence, see Michel, "Les compétences externes implicites: Continuité jurisprudentielle et clarification méthodologique", 10 *Europe* (2006), para 10.

48. Opinion 2/91, *ILO Convention*, paras. 10–11.

49. Kovar notes that some even argued that the common rules could only be regulations (and not directives or decisions); see Kovar, op. cit. *supra* note 46, 537.

constitute a common rule.[50] On the one hand, that would seem logical since the Court in *Haegeman* found that agreements concluded by the EU form an integral part of EU law.[51] However, the *Inland Waterway* cases could be read against this view[52] and it might also result in what has been termed a reverse *ERTA* effect – which Member States have sought to preclude by insisting on EU agreements being concluded as mixed agreements.[53] Restrictively interpreting the notion of "common rules" may then assuage this fear of the Member States and could also contribute to distinguishing Article 2(2) TFEU from Article 3(2) TFEU.

A second question is whether the legal basis used to adopt the common rule in question is in any way relevant. Looking at the *ERTA* doctrine as resulting in exclusive competence one would at first be inclined to answer this question affirmatively: a competence cannot be exclusive, unless it exists and whether it exists is determined by a legal basis.[54] In Opinion 1/03 however, the Court found that the legal basis is "irrelevant in determining whether an international agreement affects Community rules: the legal basis of internal legislation is determined by its principal component, whereas the rule which may possibly be affected may be merely an ancillary component of that legislation."[55] The Court's (correct) finding thereby underscores that *ERTA* is about obstacle pre-emption rather than exclusive competence as such. After all, a common EU rule may pursue different objectives but the legal basis, under the absorption doctrine, will be determined only by the act's main objective.

50. See Klamert, op. cit. *supra* note 7, p. 186. Cremona, Gilsdorf, Groux and Dashwood and Heliskoski have argued that this is possible. See Cremona, "EU external relations: Unity and conferral of powers", in Azoulai (Ed.), op. cit. *supra* note 10, p. 70; Dashwood and Heliskoski, "The classic authorities revisited", in Dashwood and Hillion (Eds.), *The General Law of EC External Relations* (Sweet & Maxwell, 2000), p. 14; Groux, "Le parallelisme des compétences internes et externes de la Communauté européenne", 14 CDE (1978), 1–31, 24; Gilsdorf, "Die Außenkompetenzen der EG im Wandel – Eine kritische Auseinandersetzung mit Praxis und Rechtsprechung", 31 EuR (1996), 145–166, 149.

51. See Case 181/73, *Haegeman*, EU:C:1974:41, para 5. See Heliskoski, op. cit. *supra* note 37, p. 43.

52. In these infringement cases the Court ruled that Germany and Luxembourg had not violated any EU exclusive competence (see *infra* note 66), despite the Council having mandated the Commission to enter into international negotiations with the same third countries on the same policy issue. Of course, the fact that for the *ERTA* test the future development of EU law also needs to be taken into account was only clarified by the Court in Opinion 1/03, ruled one year later than the *Inland Waterway* cases.

53. Dashwood, "Why continue to have mixed agreements at all?", in Bourgeois (Ed.), *La Communauté européenne et les accords mixtes* (Presses interuniversitaires européennes, 1997), p. 96.

54. See *inter alia*, Holdgaard, op. cit. *supra* note 20, pp. 106–107.

55. Opinion 1/03, *Lugano Convention*, para 131.

A third question is whether *ERTA* would also be triggered when a Treaty provision (i.e. primary law) would be affected.[56] These issues were not clarified by the codification in Article 3(2) TFEU since the latter simply borrows the Court's terminology, referring to "common rules" that may be affected or the scope of which is altered.

4.4. *The notion of "affecting"*

It follows from *ERTA* that a concurrent exercise of external competence by the Member States is ruled out when the (envisaged) international agreement affects existing EU rules or alters their scope.[57] It was a matter of debate however whether this meant that Member States were barred from concluding international agreements when the EU had acted in an area or whether a concurrent competence in the same area could still be exercised by the Member States insofar as EU rules were not *effectively* affected or their scope not being *effectively* altered.[58] As noted above, whether *ERTA* resulted in field pre-emption depended on how the Court would understand the notions of affecting and altering.[59] In turn, the answer to that question is informed by the telos of the mechanism of supervening exclusivity,[60] which the Court in its Lugano Opinion identified as the preservation of the effectiveness of EU law and the proper functioning of the systems established under EU law,[61] or, more abstractly, protecting the integrity of a coherent and uniform EU legal space.

Following *ERTA*, the Court clarified in its Opinion 1/94 and *Open Skies* cases, that affecting is a legal notion in the sense that it will have to be shown that the full application of EU law may be affected.[62] That economic activity and competition in the internal market may be affected by Member States

56. Arguing that it would, see Gilsdorf, op. cit. *supra* note 50, 147; Louis, "La compétence de la CE de conclure des accords internationaux", in Louis and Dony, op. cit. *supra* note 11, p. 60.

57. Case 22/70, *ERTA*, para 22. As Dashwood and Heliskoski note, "altering the scope" does not add anything to the notion of EU law being affected, see Dashwood and Heliskoski, op. cit. *supra* note 50, p. 5.

58. Emiliou, "Towards a clearer demarcation line? The division of external relations power between the Community and Member States", 21 EL Rev. (1994), 76–86, 84.

59. Several authors had addressed this question, see *inter alia* Kovar, op. cit. *supra* note 24, 401; Lang, op. cit. *supra* note 11, 200 et seq.

60. See for instance Bourgeois, op. cit. *supra* note 25, p. 101.

61. Opinion 1/03, *Lugano Convention*, para 128.

62. Also in Opinion 2/91, *ILO Convention,* para 18. Lang correctly noted that, strictly legally speaking, national law cannot "affect" EU law and it should therefore be understood as meaning "'affect in practice' or 'affect the operation of'." See Lang, op. cit. *supra* note 11, 201. It is therefore only a legal notion insofar as we make abstraction of the principle of primacy.

concluding incongruent international agreements cannot trigger an exclusive power on the part of the EU.[63]

Because different Member States had exchanged (in parallel with each other) fifth freedom rights with the US (i.e. the right to transport passengers between those Member States and another EU Member State on flights to or from the US) the Commission argued in *Open Skies* that the EU regulations on air carrier licences and access to intra-EU air routes were affected. *Practically* speaking, the Commission was of course correct. It seems nonsensical to define a set of rules governing EU air carriers' access to EU air routes if afterwards all Member States may bilaterally grant access to (part of the) EU air routes to third country air carriers. Legally speaking however, a nonsensical system can still function properly and the bilateral agreements *in casu* did not constitute an obstacle to the proper implementation of the EU rules in question.[64] The *Inland Waterways* infringement cases against Germany and Luxembourg provide further support for viewing supervening exclusivity as obstacle pre-emption. In these cases, the Commission had argued that the EU had acquired an exclusive competence to negotiate and conclude international agreements on cabotage, since the EU legislature had laid down common rules in Regulation 3921/91. In essence, the Court dismissed this assertion by noting that the Regulation only pursued the objective of harmonizing the conditions of cabotage by EU companies.[65] Agreements or undertakings in relation to non-EU companies to carry on cabotage then could not undermine the Regulation's aim and hence no effect in the legal sense of *ERTA* could be found. While the Court's reasoning in these cases may appear excessively legalistic, it may be squared with obstacle pre-emption, since the Court focused on whether there would be any interference with the purpose for which the common EU rules *in casu* were adopted. Of course, had the Court defined the purpose of the common rules at a more abstract level, it could well have found an obstacle.

The Court arguably extended the *ERTA* doctrine in *Commission* v. *Greece* to also cover the submission to an international body of proposals on the proper implementation of existing international agreements.[66] At first sight, a mere

63. Opinion 1/94, *GATS and TRIPs*, paras. 78–79; Case C-467/98, *Commission* v. *Denmark* ("*Open Skies*"), EU:C:2002:625, para 85.

64. In Opinion 1/94, *GATS and TRIPs*, the Court did not even reach this stage in its reasoning since it found (in relation to GATS) that not all transport matters were covered by existing EU rules in the first place and (in relation to TRIPs) that EU harmonization had been partial at best. See Opinion 1/94, paras. 77 and 103.

65. Case C-266/03, *Commission* v. *Luxembourg*, EU:C:2005:341, para 46; Case C-433/03, *Commission* v. *Germany*, EU:C:2005:462, para 48.

66. Cremona, "Extending the reach of the *AETR* principle: Comment on *Commission* v. *Greece* (C-45/07)", 34 EL Rev. (2009), 754–668, 768.

proposal[67] for the adoption of binding or non-binding measures can hardly affect EU law. However, if one looks at the *ERTA* effect in light of obstacle pre-emption, the outcome of the case looks more natural. *In casu* the Commission had objected to Greece submitting proposals to the IMO in its own capacity, arguing it had thereby violated the EU's exclusive competence (in light of the EU Regulation on enhancing ship and port facility security). The Court agreed with the Commission, noting that Greece had set in motion a procedure that could lead to the adoption of new rules[68] and that such new rules would have an effect on EU legislation since the latter incorporated the relevant IMO measures into EU law.[69] While this incorporation means that any change to the international agreement automatically affects EU legislation,[70] it does not settle the question why the mere possibility of an amendment should be equated with an actual amendment. In fact, the key to this issue is provided more cogently by Advocate General Bot than by the Court itself, as he found that by adopting the relevant EU regulation "the [EU] legislature intended that the objective of ensuring [the security of EU shipping] should be met by common rules at [EU] level",[71] and that the Regulation itself foresees that it is "intended to provide a basis for the harmonized interpretation and implementation and [EU] monitoring of the [relevant IMO measures]."[72] In light of this, Member States are simply pre-empted from taking any action that could be an obstacle to the realization of the Regulation's objective.

For the purpose of applying the *ERTA* doctrine then, Member State action affects common EU rules when such action jeopardizes the attainment of the objectives or the realization of the aims or purpose of those common rules. For the actual *ERTA* test, this formulation already highlights two points: (i) identifying the objectives, aims and purpose of a common rule is not a purely objective matter and judges might be required to second guess the

67. The fact that it had only submitted a proposal was evidently emphasized by Greece, and surely was convincing if the Court were to focus on EU law being *actually* affected. See also Boisson, "Compétences respectives de l'UE et des États membres en matière de sécurité maritime", (2010) *Droit maritime français*, 671–676, 673.

68. Amendments to the IMO's ISPS code can either be binding (incorporation in part A) or non-binding (incorporation in part B). However, the EU Regulation requires EU Member States to adhere to both parts A and B.

69. Case C-45/07, *Commission* v. *Greece*, EU:C:2009:81, paras. 21–22.

70. This is a fourth case in which an *ERTA* effect can be automatically assumed in addition to the three examples identified by the Court in Opinion 1/03, *Lugano Convention.*

71. Opinion of A.G. Bot in Case C-14/07, *Commission* v. *Greece*, EU:C:2008:642, para 32.

72. Art. 1(2), Regulation (EC) 725/2004 of the European Parliament and of the Council of 31 March 2004 on enhancing ship and port facility security, O.J. 2004, L 129/6.

intention of the legislature; (ii) the determination whether objectives, aims or purpose are *jeopardized* adds a further layer of subjectivity.[73]

4.5. *Testing and finding an ERTA effect*

In some cases, testing for an *ERTA* effect is a straightforward affaire. It follows from the Court's case law that there are instances in which EU law is *necessarily* affected and other instances in which this may be categorically ruled out.

4.5.1. *Per se (no) ERTA effect*

Thus, in its Opinion 2/91 the Court definitively threw out the idea that *ERTA* amounted to full-blown field pre-emption by finding that the ILO Convention (laying down minimum rules) could not affect existing EU directives in the sense of *ERTA,* since the purpose of these directives was to define a level of minimum harmonization,[74] an objective that could not be frustrated by international agreements providing a more generous level of protection.[75]

As a mirror image of this, the Court in Opinion 1/94 on GATS and TRIPs found that when the EU legislature has enacted exhaustive harmonization measures,[76] EU competence in this area becomes exclusive,[77] the objective of such measures typically being to define one single set of rules. The Court further added that EU rules necessarily result in exclusive EU competence when they contain provisions on the treatment of third country nationals or

73. The fact that the Court has a significant margin of discretion in testing for an *ERTA* effect would seem inevitable in light of the *ERTA* doctrine amounting to obstacle pre-emption. In relation to pre-emption in the US, Lenaerts has also noted the subjectivity and opaqueness of the Supreme Court's decisions. See Lenaerts, *Constitutie en Rechter: De rechtspraak van het Amerikaanse Opperste Gerechtshof, het Europese Hof van Justitie en het Europese Hof voor de Rechten van de Mens* (Kluwer, 1983), pp. 146–154. In the US however, the subjectivity results from the difficult task of identifying the intent of Congress when it adopts federal legislation. In the EU however, the ECJ seems less concerned with the intent of the EU legislature, though that does not make the identification of the objective of EU legislation any less subjective.

74. Opinion 2/91, *ILO Convention*, para 18.

75. Conversely, the ILO Convention also only set a minimum level of protection, ruling out the risk that Member States would be forced (under the Convention) to go below the level of protection defined in the EU directives.

76. This situation was at issue in Opinion 1/03 where the Court, following a questionable interpretation of Art. 4 of the Regulation, could rule that the Brussels Regulation formed a uniform, unified and coherent system of rules. See Opinion 1/03, *Lugano Convention*, para 151. See however Mengozzi who concludes that the Court found exclusive EU competence because the Regulation "includes 'provisions relating to the treatment of nationals of non-member countries'", in Mengozzi, op. cit. *supra* note 6, p. 217.

77. Opinion 1/94, *GATS and TRIPs*, para 96; Opinion 2/92, *Third Revised Decision of the OECD on national treatment*, EU:C:1995:83, para 33; Case C-467/98, *Commission* v. *Denmark,* para 84.

empower the EU institutions to negotiate with third countries.[78] In Opinion 1/03, the Court clarified that these three situations are only examples.[79] It may be argued that the Court in *Commission* v. *Greece* added a fourth such situation,[80] i.e. when EU legislation incorporates international law instruments,[81] as was arguably also at issue in the post-Lisbon *OIV* case.[82] In the last three scenarios, the international component is elevated to an objective of the common EU rules itself, which will automatically result in obstacle pre-emption. The Lisbon Treaty stopped short of codifying these different scenarios since only the third one may be found in Article 3(2) which provides for an exclusive competence "for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union."

4.5.2. *A methodology for finding an ERTA effect*

In other cases, where the risk that EU law is affected cannot automatically be assumed to exist, further analysis is needed. In didactic fashion, the Court in Opinion 1/03 codified its *ERTA* case law and expounded for the first time on the methodology of the *ERTA* test. Thus, "any competence, especially where it is exclusive and not expressly conferred by the Treaty, must have its basis in conclusions drawn from a specific analysis of the relationship between the agreement envisaged and the Community law in force and from which it is clear that the conclusion of such an agreement is capable of affecting the Community rules."[83] That analysis will require the Court to look into the subject area covered by the international agreement to verify whether there is a counterpart in EU law. While the nominal qualification of the area

78. Opinion 1/94, *GATS and TRIPs*, para 95; Opinion 2/92, *Third Revised Decision of the OECD on national treatment*, para 33; Case C-467/98, *Commission* v. *Denmark*, para 83.

79. Opinion 1/03, *Lugano Convention*, para 121.

80. Case C-45/07, *Commission* v. *Denmark,* para 22.

81. In *Intertanko*, such an incorporation was also at issue, but the ECJ first found that the EU was not bound by MARPOL since there had not been a full transfer of powers from the Member States to the EU, and noted that the incorporation of certain MARPOL provisions in Directive 2005/35 did not alter this. See Case C-308/06, *Intertanko*, EU:C:2008:312, paras. 49–50. However, *Intertanko* predates Case C-45/07, *Commission* v. *Greece*. In addition, *Intertanko* centered on the question whether the legality of an EU directive could be reviewed in light of an international agreement to which the EU was not a party. A.G. Kokott distinguished this question from the question of exclusivity; see Opinion of A.G. Kokott in Case C-308/06, *Intertanko*, EU:C:2007:689, paras. 42–43.

82. The ECJ was not explicit on this, since it was only asked by Germany to deal with the procedural issue of whether the Council could have relied on Art. 218(9) TFEU. However, the Council seemed to assume an exclusive competence was at issue, see Case C-399/12, *Germany* v. *Council*, EU:C:2014:2258, para 43. So did the A.G., although he explicitly noted that he could "leave open here the question whether the European Union does have exclusive material competence in the present case." See Opinion of A.G. Cruz Villalón in Case C-399/12, *Germany* v. *Council*, EU:C:2014:289, note 83.

83. Opinion 1/03, *Lugano Convention*, para 124.

concerned may seem important at first sight, it does not seem determinative for the subsequent assessment of finding an *ERTA* effect. For instance, when the Court in Opinion 1/94 verified whether the TRIPS agreement affected EU law, it did not define the relevant area in general as "trade-related aspects of intellectual property rights" but instead went into more detail, following which it could find that there were no relevant EU measures in areas such as patents and industrial designs.[84]

4.5.3. *EU law may be affected without there being a conflict of rules*

Just as it rejected the idea of wholesale field pre-emption, the Court in Opinion 2/91 also clarified that *ERTA* is not simply about rule pre-emption, even if an outright conflict, such as in the original *ERTA* case, would also result in an *ERTA* effect. Although it noted a certain misalignment between the ILO Convention and existing EU law,[85] it found explicitly against the need for the provisions of an international agreement to contradict the common EU rules for the latter to be affected in the *ERTA* sense. Instead, a finding of overlap was sufficient insofar as it could not be excluded that the realization of the directives' objectives could be frustrated by applying the Convention. This indeed linked with the language used in (part of) the original *ERTA* ruling where the Court put forward the *possibility* of EU law being affected as the relevant threshold.[86]

Conceptualizing the *ERTA* effect as a form of pre-emption at the same time explains why the Court finds it immaterial that provisions are inserted in the international agreement (to be) concluded by Member States that confirm the primacy of EU law or lay down a disconnection clause.[87] The pre-emptive effect emanates from the common EU rules themselves, denying the Member

84. Similarly in Opinion 2/92, the Court was able, without defining the precise area, to find that EU law was not affected as it was "undisputed that [the common EU] measures do not cover all the fields of activity to which the Third [OECD] Decision relates." See Opinion 2/92, *Third Revised Decision of the OECD on national treatment*, para 34. The OECD Decision related to national treatment of foreign undertakings in relation to all economic field of activities, only some of which (e.g. air transport, access to local credit, fiscal harmonization, public contracts, etc.) had been the subject of common EU rules.

85. The EU rules in certain respects granted more extensive rights to workers than the ILO Convention, while the latter in turn had a broader scope than the EU rules. According to Raux, the Court was preoccupied with the risk that the scope of the EU rules would be altered. See Raux, "L'avis de la Cour du 19 mars 1993 (Avis 2/91) à propos de: La Convention n° 170 de l'OIT concernant la sécurité dans l'utilisation des produits chimiques au travail", (1994) RMC, 45–52, 50. See also Case C-467/98, *Commission* v. *Denmark*, para 82.

86. Case 22/70, *ERTA*, compare para 22 with para 17.

87. Case C-467/98, *Commission* v. *Denmark*, para 105; Opinion 1/03, *Lugano Convention*, para 130. In the latter case, the Court did stress the special nature of a disconnection clause in an international private law convention, but it seems difficult to restrict the Court's reasoning to this type of agreements.

States any authority to agree on provisions to which (e.g.) a disconnection clause would subsequently be applied.

4.6. *Drawing consequences from finding an ERTA effect*

Although it would appear so from the Court's case law, the finding that EU law is affected in itself is rarely the final step in an enquiry. Since the Court found against field pre-emption, the consequence of finding an *ERTA* effect is not simply an exclusive competence over the entire field (and thus the international agreement in question). Instead, the subsequent question to be addressed is whether Member States may still retain competence for parts of the agreement that do not come under the common EU rules that are affected.[88] In Opinion 2/91, the Court came to a nuanced position by finding that there may be an exclusive EU competence for the whole of (a part of) the agreement also when the EU counterpart largely (but not entirely) covers the area in question.[89]

While the "area largely covered" test thus helps in determining the consequences of a finding of an *ERTA* effect, the ECJ in its subsequent rulings confused its own test by suggesting that the test could be applied to determine whether EU law is affected itself (i.e. if the area is largely covered by EU rules, the latter would be affected).[90] The Court seemed to imply as such in *Open Skies*.[91] This would come dangerously close to equating the simple existence of EU rules with a finding of an *ERTA* effect, something later ruled out by the Court in *Mox Plant*,[92] and would have indicated an evolution towards field

88. Evidently this is different for those cases (typically brought pursuant to Art. 258 TFEU) where Member States have acted on their own. Here the question is not how extensive EU exclusive competence is, but merely whether there is such competence.

89. This is clear in the original Opinion where the Court had to determine whether the *ERTA* effect resulted in an exclusive competence for the whole of the third part of the Convention: Opinion 2/91, *ILO Convention*, paras. 25–26; Case C-467/98, *Commission* v. *Denmark*, para 82.

90. While para 34 of Opinion 2/92, *Third Revised Decision of the OECD on national treatment,* could be read as meaning that any *ERTA* effect (even if it had been found) would not result in an exclusive competence for the entire decision, it could also be read as constituting part of the test for finding an *ERTA* effect itself.

91. Case C-467/98, *Commission* v. *Denmark*, para 82. Similarly in Opinion 2/00, *Cartagena Protocol*, the Court ruled out that the EU had exclusive competence since the common EU rules covered "only a very small part" of the area of biosafety, para 46. While the ECJ had only remarked this for the sake of completeness (the Commission's only claim being that the Convention (partially) came under the Common Commercial Policy), the statement could have been read as suggesting that there is no *ERTA* effect unless the area is largely covered.

92. Case C-495/03, *Commission* v. *Ireland*, EU:C:2006:345, paras. 104–106.

pre-emption.[93] In the proceedings on Opinion 1/03, the UK therefore invited the Court to do away with the test all together.[94] The Court did not act upon the UK's invitation, but noted that before drawing conclusions, any "assessment must be based not only on the scope of the rules in question but also on their nature and content. It is also necessary to take into account not only the current state of Community law in the area in question but also its future development, insofar as that is foreseeable at the time of that analysis."[95] Unfortunately rather than relying on the area largely covered test to determine the necessary conclusions from a prior finding of EU law being affected, the Court thereby still presented the test as a way to determine whether EU law is affected.[96] This would of course be wrong on purely logical grounds and in light of the ILO Opinion: if the area regulated by a hypothetical international agreement is largely covered by EU rules but both the agreement and the common EU rules provide for minimum harmonization, EU law is not affected by definition.

Still, even if such an area is not largely covered by common EU rules, this does not mean that finding an *ERTA* effect is rendered irrelevant.[97] This is foremost so in cases where Member States are alleged to have disregarded an EU exclusive competence,[98] in contrast to those cases in which (typically) the Commission claims an exclusive EU competence for the whole of the agreement. As was already apparent from Opinion 2/91,[99] the Court in *Open Skies* again confirmed that testing for an *ERTA* effect is not necessarily a question of finding exclusive EU authority for the whole of the agreement. Instead it went into some detail defining the different subject matters covered by the Member States' bilateral agreements, identifying specific areas such as the setting of fares and rates, the conditions for offering or using computerized reservation systems and the allocation of slots at airports, as matters subject to common EU rules.[100] Thus, even if most of the agreements' provisions did not affect EU law, the fact that a limited number of provisions did, meant that the Member States could not conclude the agreements without the EU. To reverse a well-known metaphor: one tiny element of *ERTA* effect as a result of

93. Reading it as field pre-emption indeed, see Delgado Casteleiro, op. cit. *supra* note 7, 677.

94. Opinion 1/03, *Lugano Convention*, paras. 47 et seq.

95. Opinion 1/03, *Lugano Convention*, para 126. See also *supra* note 30. As noted above, this should be restrictively interpreted since if it were to include mere Commission proposals, the Commission could unilaterally influence an ERTA assessment.

96. *Contra*, and equating the area largely covered test with finding an *ERTA* effect, see Nowak and Masuhr, "'EU only': Die ausschließlichen impliziten Außenkompetenzen der Europäischen Union", 50 EuR (2015), 189–205, 201–203.

97. See Castillo de la Torre, op. cit. *supra* note 9, p. 162.

98. See also *supra* note 88.

99. See *supra* note 89.

100. Case C-467/98, *Commission* v. *Denmark*, paras. 98, 103 and 106.

obstacle pre-emption in an agreement that otherwise would come under exclusive Member State competence, prevents a Member State from concluding the agreement on its own.

5. Development of the *ERTA* case law following the Lisbon Treaty

In light of the Laeken Declaration's call to "clarify, simplify and adjust the division of competence between the Union and the Member States,"[101] the Treaty of Lisbon introduced Articles 216(1) and 3(2) TFEU on the existence and nature of the EU's competence to conclude international agreements. Both provisions aimed to codify the Court's jurisprudence on implied competences in external relations.[102]

Article 216(1) TFEU	**Article 3(2) TFEU**
The Union may conclude an international agreement – where the Treaties so provide – where this is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties – when a legally binding Union act provides so – when the agreement is likely to affect common rules or alter their scope.	The Union has exclusive competence to conclude an international agreement – when its conclusion is provided for in a legislative act of the Union [Opinion 1/94] – if the agreement is necessary to enable the Union to exercise its internal competence [Opinion 1/76] – or insofar as its conclusion may affect common rules or alter their scope [*ERTA*]

Ever since both Articles were first drafted for inclusion in the abandoned Constitutional Treaty, they have been the subject of much academic critique. First, the scenarios foreseen in both Articles are described similarly, which blurs the fundamental difference between the existence and nature of EU external competence,[103] even more so given the lack of any cross-referencing

101. Conclusion of the Laeken European Council, SN 300/1/01 REV 1, 21.

102. Passos and Marquardt, "International agreements – Competences, procedures and judicial control", in Amato, Bribosia and de Witte (Eds.), *Genèse et destinée de la Constitution européenne – Genesis and destiny of the European Constitution* (Bruylant, 2007), p. 891.

103. Cremona, "The Union's external action: Constitutional perspectives", in Amato, Bribosia and de Witte, op. cit. *supra* note 102, pp. 1184–1189. Schütze, "Lisbon and the federal order of competences: A prospective analysis", 33 EL Rev. (2008), 709–722,5, 713–714; Metz, op. cit. *supra* note 11, pp. 367–371. Michel also made this observation but evaluated this positively, see Michel, "Article I-13", in Burgorgue-Larsen (Ed.), *Traité établissant une Constitution pour l'Europe. Parties I et IV: Architecture constitutionnelle: Commentaire article par article* (Bruylant, 2007), pp. 223–224.

between the two Articles.[104] Second, the Treaty authors' intent to simplify and clarify the complex case law on implied exclusive competences came at the expense of precision,[105] *inter alia* leading to the observation that the EU's external competences might be extended compared to the status quo.[106] Perhaps the most outspoken critique on Article 3(2) TFEU came from Dashwood, who disputed that the Court's case law had been *faithfully*[107] codified, and even suggested that no second paragraph should have been added to Article 3 TFEU in the first place: "AETR and Opinion 1/76 represent an application of the principle of loyal cooperation … and they would be perfectly well preserved through … Article [4(3) TFEU]."[108]

While the above objections are all well-founded, the criticism itself seems too harsh in light of the purpose pursued by the Treaty authors in drafting Article 3(2) TFEU. In essence, Article 3(2) TFEU makes clear (to the citizen) that there are situations in which the EU (exceptionally) acquires an exclusive entitlement to act at the expense of the Member States as subjects of international law in their own right. Such an explicit recognition is indispensable if one is to give a complete picture of the EU's federal order of

104. Cremona, op. cit. *supra* note 103, p. 1188; Fassbender, "Die Völkerrechtssubjektivität der Europäischen Union nach dem Entwurf des Verfassungsvertrage", 42 Arch. VR (2004), 26–43, 33–34. In addition to confusing the existence with the nature of external competence, Kuijper criticized the codification in Art. 216(1) TFEU because it did not capture the full breadth of *ERTA*. See Kuijper, *Of Mixity and Double-hatting: EU External Relations Law Explained* (Vossiuspers UvA, 2008), pp. 16–17.

105. This lack of precision has also been qualified as an erroneous codification of the case law; see Schütze, op. cit. *supra* note 103, 714. Dutheil de la Rochère went as far as claiming that "[ces dispositions] *ne reflètent pas* la jurisprudence de la Cour", see Dutheil de la Rochère, "Fédéralisation de l'Europe? Le problème de la clarification des compétences entre l'Union et les États", in Beaud (Ed.), *L'Europe en voie de constitution: Pour un bilan critique des travaux de la Convention* (Bruylant, 2004), p. 326 (emphasis added).

106. Craig, op. cit. *supra* note 5, 330–331; Cremona, op. cit. *supra* note 103, pp. 1185–1186; Michel, op. cit. *supra* note 103, p. 223; Dutheil de la Rochère, op. cit. *supra* note 105. Epiney noted this specifically for the necessity-scenario, see Epiney, "Außenbeziehungen von EU und Mitgliedstaaten: Kompetenzverteilung, Zusammenwirken und wechselseitige Pflichten am Beispiel des Datenschutzes", 74 ZaöRV (2014), 465–503, 482. Nettesheim on the other hand found this to be the case for the scenario where the conclusion is provided for in a legislative act, see Nettesheim, "Die Kompetenzordnung im Vertrag über eine Verfassung für Europa", 39 EuR (2004), 511–546, 532–533. See also Schütze, op. cit. *supra* note 103, 713.

107. The Praesidium of the Convention had boldly asserted current Art. 3(2) TFEU "faithfully reflects Court of Justice case law on the Union's exclusive competence to conclude international agreements." See Secretariat of the European Convention, Draft Constitution – Volume I, CONV 724/1/03 REV 1, 71.

108. Dashwood, "The relationship between the Member States and the European Union/European Community", in McDonnell (Ed.), *A Review of Forty Years of Community Law: Legal Developments in the European Communities and the European Union* (Kluwer Law International, 2005), p. 55. Explicitly concurring with Dashwood, see Cremona, op. cit. *supra* note 103, p. 1186.

competences and how these are concretely exercised. In this regard, no constitutional charter could fulfil the promise of presenting a complete, accurate and veracious picture.

In the meantime the relationship between Articles 3 and 216 TFEU has partially been clarified by the ECJ.[109] In its Opinion on the Singapore FTA, the Court held that the last scenarios foreseen in both Articles are indeed one and the same.[110] That this does not apply for the scenario in which EU action is necessary in the sense that it contributes to the realization of the objectives of the TFEU, was made explicit by the Court in both its Singapore Opinion and *Germany* v. *Council*.[111] An (external) act may be necessary to achieve the EU's objectives, without being necessary to allow the EU to exercise its internal competences.

5.1. *Article 3(2) TFEU as a (partial) codification of ERTA?*

In the first cases on Article 3(2) TFEU, a number of Member States, similarly to the UK in Opinion 1/03, sought to interpret the Treaty provision as a restrictive interpretation of *ERTA* to the effect that its "area largely covered" component could not be applied anymore. Different Advocates General were unimpressed by this,[112] and so was the Court when it ruled in Case C-114/12, *Neighbouring Rights,* that the provision "must … be interpreted in the light of the Court's explanation with regard to them in the judgment in *ERTA* and in the case law developed as from that judgment."[113] As a result, just like in Opinion 1/03, the Member States failed to have the Court overturn this elaboration of *ERTA* by Opinion 2/91.[114] Of course, the Court's laconic statement will not have convinced many of its sceptics, and it exposes the Court to the evident critique that it somehow treats its own (pre-Lisbon) case law as a supra-constitutional norm.

109. A different debate is whether Art. 216(1) TFEU could serve as a (material) legal basis for concluding international agreements, see Govaere, "Setting the international scene: EU external competence and procedures post-Lisbon revisited in the light of Opinion 1/13", 52 CML Rev. (2015), 1277–1307, 1288. Arguing for, see Konstadinidis, op. cit. *supra* note 11, 521–522. Arguing against, see Cremona, op. cit. *supra* note 11, p. 135.

110. Opinion 2/15, *Singapore FTA*, EU:C:2017:376, paras. 171–172.

111. Ibid., paras. 237–239; Case C-600/14, *Germany* v. *Council*, EU:C:2017:935, paras. 50 and 58.

112. Opinion of A.G. Kokott in Case C-137/12, *Commission* v. *Council*, EU:C:2013:441, para 112; Opinion of A.G. Sharpston in Case C-114/12, *Commission* v. *Council (Neighbouring Rights)*, EU:C:2014:224, para 96; View of A.G. Jääskinen in Opinion 1/13, *The Hague Convention*, EU:C:2014:2292, paras. 68–70.

113. Case C-114/12, *Commission* v. *Council (Neighbouring Rights)*, para 67.

114. The Court in Case C-114/12, *Neighbouring Rights* simply rejected the Member States' restrictive reading of Art. 3(2) TFEU without arguing why; see para 72.

Case C-114/12, *Neighbouring Rights* also revealed a more fundamental, and as a result more problematic, issue regarding the codification of the *ERTA* doctrine: it is clear that the internal "common rules" are adopted pursuant to shared competences,[115] resulting in a pre-emption of external Member State action. Yet the Treaty authors had focused on the language of the Court's judgments and thus inserted the codifying provision in Article 3 TFEU, which deals with exclusive competences. As a result, when the Member States invoked Protocol No. 25 in which they had clarified that the exercise of shared competences does not result in field pre-emption,[116] the Court could easily dismiss this argument noting that the Protocol refers to the exercise of shared competences under Article 2(2) TFEU. Since the *ERTA* test had been codified in Article 3(2) TFEU, the Protocol was irrelevant in an *ERTA* assessment.[117] Here the Court clearly followed the letter of the Treaty in disregard of the mechanism underlying supervening exclusivity and the fact that it actually involves *shared* external competences. A further practical consequence of this qualification relates to the principle of subsidiarity which becomes inapplicable if competences are qualified as exclusive.[118] This is not to say that there are no practical merits to the Court's decision on this point. As noted above, the Court was actually confronted with a lack of clarity in the EU Treaties themselves. Its decision has now made clear that for the assessment of external action, only Article 3(2) TFEU is relevant.[119]

5.2. *The telos and nature of supervening exclusivity*

In its post-Lisbon case law, the Court seems to have crystalized the telos of supervening exclusivity in a standardized test elaborated from the one in Opinion 1/03, referring to supervening exclusivity as asking the question

115. See Opinion of A.G. Sharpston in Case C-114/12, *Neighbouring Rights,* para 140; Case C-66/13, *Green Network*, EU:C:2014:2399, para 35.

116. The sole Article of Protocol No. 25 reads: "With reference to Art. 2(2) of the Treaty on the Functioning of the European Union on shared competence, when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area."

117. Case C-114/12, *Neighbouring Rights,* para 73. A.G. Kokott, A.G. Sharpston and A.G. Jääskinen agreed on this point with the Court, see Opinion of A.G. Kokott in Case C-137/12, *Commission* v. *Council*, para 115. Opinion of A.G. Sharpston in Case C-114/12, *Neighbouring Rights*, para 93; View of A.G. Jääskinen in Opinion 1/13, *The Hague Convention*, paras. 71–72. Agreeing with the Court but equally noting that both Arts. 2(2) and 3(2) TFEU prescribe a form of pre-emption, see Le Bot, op. cit. *supra* note 11, 636.

118. Discussing in greater detail the possible application of the principle of subsidiarity to Art. 3(2) TFEU, see Bosse-Platière, "L'application du principe de subsidiarité dans le cadre de l'action extérieure de l'Union européenne", in Neframi and Gatti (Eds.), *Constitutional Issues of EU External Relations* (Nomos, 2018).

119. I would like to thank the reviewers for drawing my attention to this.

"whether the agreement is capable of undermining the uniform and consistent application of the EU rules and the proper functioning of the system which they establish."[120] As far as the nature of supervening exclusivity goes, the Court's post-Lisbon case law confirms that the Court will essentially look for obstacle pre-emption. This is not to say there is no further development on this point. Indeed, the Court seems to define the objectives pursued by secondary legislation more abstractly, resulting in the threshold for obstacle pre-emption being met more easily.

In *Green Network* the Court found that even if the directive at issue left the Member States significant leeway to work out support schemes for renewable energy, it still barred them from concluding bilateral agreements with third countries since that would ultimately undermine the directive's objective of increasing renewable energy production *in the EU*.[121] This part of the Court's reasoning, looking beyond the actual rules laid down in the "common rules" and by focusing on the objectives, reconfirmed that supervening exclusivity requires a test of obstacle pre-emption.[122]

Similarly, in its Opinion 1/13, the Court found that there was a risk of the Hague Convention affecting the relevant EU regulation (i) given the overlap and the close connection between the two and (ii) because the regulation laid down uniform rules.[123] The first reason identified by the Court is problematic since it essentially repeated the Court's earlier finding that the regulation covered the Convention to a large extent.[124] However, and as already noted, such a finding in itself is insufficient to result in an *ERTA* effect.[125] This underscores the importance of the second reason identified by the Court, i.e. that the regulation defined a uniform system. This reason is akin to the case of exhaustive harmonization: if the EU legislature intended to define a uniform system, any overlap with an international law instrument will result in an *ERTA* effect, given that the latter does not require a conflict of rules.

In Opinion 3/15, the Court based its finding of EU exclusive competence *inter alia* on the consideration that the discretion which the Member States *did*

120. See *infra* note 153.

121. Case C-66/13, *Green Network*, para 60.

122. This reasoning was even clearer in the A.G.'s Opinion, see Opinion of A.G. Bot in Case C-66/13, *Green* Network, paras. 69–71.

123. Opinion 1/13, *The Hague Convention*, EU:C:2014:2303, paras. 85–86.

124. Ibid., para 83.

125. The issue in Opinion 1/13 was different from the *IMO* case because Regulation 725/2004 itself incorporates the ISPS as binding under EU law on the Member States even if it is non-binding under international law, see *supra* note 69. In contrast, Regulation (EC) 2201/2003 of 27 Nov. 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) 1347/2000 (O.J. 2003, L 338/1) simply supplements the Hague Convention, see View of A.G. Jääskinen in Opinion 1/13, *The Hague Convention*, para 84.

enjoy under the EU directive could not "be used in such a way as to compromise the *objectives* of Directive 2001/29 which relate … to the establishment of a high level of protection for authors and to the *smooth functioning of the internal market*."[126] This element, just like the ones mentioned above all confirm that the Court will essentially look for a potential risk that the objectives of common EU rules will be frustrated and that supervening exclusivity results from obstacle pre-emption.

While this essentially confirms pre-Lisbon case law, the Court seems increasingly inclined to rule in favour of finding supervening exclusivity (see below) – as is also illustrated by the above quotation from Opinion 3/15: by qualifying the telos of supervening exclusivity itself as the objective pursued by the directive, the Court sets up a circular reasoning destined to find an *ERTA* effect.[127] Yet it needs no further explaining that not only the Member States but also the persuasiveness of the Court's own reasoning would benefit from a more rigorous approach that identifies specific objectives for the common EU rules in play which are more concrete than the overarching abstract telos of supervening exclusivity itself.

As noted above, one should not hope, following the Court's assessment of the relevance of Protocol No. 25 in *Neighbouring Rights*, that the Court itself will recognize that supervening exclusivity results from pre-emption rather than being concerned with an actual exclusive competence.[128] After all, recognizing it as pre-emption results in the finding that the power but not the competence is exclusive.[129] Putting this point differently: under the principle of conferral, both the existence and nature of EU competences are static and fixed in the Treaties. The dynamic aspect of the *ERTA* doctrine lies in its pre-emptive effect, barring Member States from exercising a shared competence, reserving the exercise of this competence (i.e. the power) exclusively to the EU.

The Court's disregard of the pre-emptive nature of its own *ERTA* doctrine also required it to perform legal acrobatics in the *Green Network* case: while Italian law made the recognition of Swiss certificates dependent on the conclusion of a bilateral agreement between both countries, such an agreement had not actually been concluded yet. But if Italy had not actually exercised an external competence, how could it have infringed the EU's exclusive competence? Advocate General Bot, followed in this by the Court, conjured up the idea of EU rules being theoretically affected, in addition to the

126. Opinion 3/15, *Marrakesh Treaty*, EU:C:2017:114, para 124 (emphasis added).

127. See also the Court's finding in Case C-114/12, *Commission* v. *Council* (*Neighbouring Rights)* that the EU directives at issue constitute "a harmonized legal framework which seeks, in particular, to ensure the proper functioning of the internal market", para 79.

128. Case C-114/12, *Neighbouring Rights;* see also *supra* note 10.

129. For the distinction between power and competence, see *supra* note 19.

possibility of EU law being potentially affected.[130] Yet the issue is much less confused if looked at through the lens of pre-emption: by adopting Directive 2001/77 the EU legislature had pre-empted any external action by Member States, a power which they evidently could not re-arrogate to themselves under national law. This also explains a further development of *ERTA* in *Green Network*, where the Court ruled that not only the Italian State was precluded from concluding an international agreement with Switzerland, but that both countries' electricity grid managers were also precluded from concluding an agreement between themselves.[131] This extension of *ERTA* is straightforward in light of the doctrine's pre-emptive nature, but much less so in light of the actual wording of Article 3(2) TFEU.

A further interesting issue surfaced in *Pringle* where the Member States had concluded an *inter se* agreement. Advocate General Kokott rejected the relevance of Article 3(2) TFEU, finding that supervening exclusivity is only in play when international agreements with third countries or international organizations are concluded.[132] The Court in contrast brushed over the issue and ruled that Article 3(2) TFEU could pre-empt *inter se* agreements, but found that there was no *ERTA* effect *in casu*. In light of the telos of supervening exclusivity it is clear that the Advocate General's conclusion was the better of the two, the legal effects of the agreement being contained within the larger European legal order – even if this does not rule out that the EU Council adopting the EFSM Regulation might still have pre-empted Member State action (a question not addressed by the Court, see further below). While not so much comforted by the telos of the *ERTA* doctrine, the Court's approach was still consistent with the actual text of Article 3(2) TFEU which simply refers to "international agreements".[133]

5.3. *The species of common rules*

The Court in *Neighbouring Rights* took care to note that "[t]he assessment of the existence of a risk that common EU rules will be adversely affected, or that

130. Opinion of A.G. Bot in Case C-66/13, *Green Network,* para 83; Case C-66/13, *Green Network,* para 38.

131. Case C-66/13, *Green Network,* paras. 69–73.

132. View of A.G. Kokott in Case C-370/12, *Pringle*, EU:C:2012:675, para 98. Agreeing with the A.G., see de Witte and Beukers, "The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order: *Pringle*", 50 CML Rev. (2013), 805–848, 835.

133. That Art. 3(2) TFEU requires these international agreements to be concluded *by the Union* cannot be held against the Court, since international agreements only need to be concluded by the Union when EU law is affected. When the Court found that EU law is not affected in the sense of Art. 3(2) TFEU it could conclude that that provision does not apply and that the Member States had retained full competence to conclude the ESM.

their scope will be altered, by international commitments cannot be dependent on an artificial distinction based on the presence or absence of such rules in one and the same instrument of EU law."[134] The common EU rules may thus be spread over a number of instruments. However, from the perspective of obstacle pre-emption this observation seems wholly superfluous. The only relevant question is whether there is a risk that the realization of common EU rules' objectives are frustrated. The Court's statement, in contrast, suggests that it is looking for an area that is (largely) covered by EU common rules in order to infer therefrom a form of field pre-emption.

A more important, and controversial, clarification of the species of common rules that may be affected came in Opinion 2/15 on the Singapore Free Trade Agreement. Earlier, in *Pringle*, the Court had suggested that a provision of primary law could be qualified as a "common rule", since it had ruled that "[t]he establishment of the ESM does not affect the power of the Union to grant, on the basis of Article 122(2) TFEU, ad hoc financial assistance to a Member State."[135] Of course, the precedential value of this finding would always have been limited, giving the exceptional circumstances in which *Pringle* was ruled and the consequences thereof for the Court's odd application (to say the least) of the *ERTA* doctrine. In the quoted passage, for instance, the Court refers to a power of the EU not being affected, something which *ERTA* or obstacle pre-emption is not concerned with. Instead, the Court should have assessed whether the EFSM Regulation itself could be affected by the ESM Treaty. The issue was therefore only really addressed in Opinion 2/15, where the Commission had argued that the provisions on foreign non-direct investment in the FTA were subject to an exclusive EU competence since these provisions would affect Article 63 TFEU which prohibits restrictions on the free movement of capital between the Member States and third countries.[136] The Council and Member States on the other hand argued that a primary law provision could not be qualified as a "common rule" in the sense of the *ERTA* case law.[137] Both Advocate General Sharpston and the Court rejected the Commission's reasoning, referring back to the original

134. Case C-114/12, *Commission* v. *Council (Neighbouring Rights)*, para 82.

135. Case C-370/12, *Pringle*, EU:C:2012:756, para 104. The Court linking this (in para 105) to the fact that the EU does not have a specific competence to establish a mechanism such as the ESM was referred to as sibylline by Weiß and Haberkamm, "Der ESM vor dem EuGH – Widersprüchliche Wertungen in Luxemburg und Karlsruhe?", (2013) EuZW, 95–99, 96.

136. Opinion 2/15, *Singapore FTA*, para 16. For an earlier argument by the Commission to this effect, see COM(2010)343, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Towards a comprehensive European international investment policy, 8.

137. Opinion 2/15, *Singapore FTA*, para 25.

ERTA ruling.[138] By doing so however, the *ERTA* judgment itself is (again) beatified into a supra-constitutional norm overriding Article 3(2) TFEU itself.

In addition, the Court postulated that such broad construction of the notion of common rules would also go against the reasoning underlying supervening exclusivity.[139] The Court subsequently seems confused when it notes that

> "in the light of the primacy of the EU and FEU Treaties over acts adopted on their basis, those acts, including agreements concluded by the European Union with third States, derive their legitimacy from those Treaties and cannot, on the other hand, have an impact on the meaning or scope of the Treaties' provisions. Those agreements accordingly cannot 'affect' rules of primary EU law or 'alter their scope', within the meaning of Article 3(2) TFEU."[140]

This passage ignores the point that *ERTA* addresses the problem of agreements concluded by *Member States* (not by the EU institutions) that affect EU law, and that the primacy of EU primary law cannot be used as an argument against supervening exclusivity.[141] As noted above, a full enforcement of the primacy of secondary EU law would obviate the need for supervening exclusivity in the first place.[142] Finally, the Court's decision on this point leads to the ironic consequence that a provision of primary law that is *self-executing*, in the sense that it does not even require the adoption of further secondary legislation for facilitating the realization of its objectives,[143] does not pre-empt Member State external action, while non-self-executing provisions of primary law indirectly do, if and when secondary legislation is adopted. Perhaps the strongest argument in favour of the Court's finding is that otherwise supervening exclusivity pursuant to Article 3(2) TFEU and *a priori* exclusivity under Article 3(1) TFEU would be conflated (also for non-self-executing provisions).[144] This risk would seem especially real given that the Court has been more keen on finding exclusivity pursuant to Article

138. Opinion of A.G. Sharpston in Opinion 2/15, *Singapore FTA*, EU:C:2016:992, para 352; Opinion 2/15, *Singapore FTA*, para 233.

139. Opinion 2/15, *Singapore FTA*, para 234.

140. Ibid., para 235.

141. See also Verellen, "Het Hof van Justitie en het EU-Singapore handelsakkoord, of de kunst van het koorddansen", 66 SEW (2018), 31–33, 31–32.

142. Cremona seems to ignore this when she notes that the Court's reasoning on this point is legally stronger than its reference to the original *ERTA* ruling; see Cremona, "Shaping EU trade policy post-Lisbon: Opinion 2/15 of 16 May 2017", 14 EUConst (2018), 231–259, 248.

143. Here, self-executing thus implies but does not equate with directly effective. See *inter alia* Case 2/74, *Reyners*, EU:C:1974:68, paras. 29–31; Case 33/74, *Van Binsbergen*, EU:C:1974:131, paras. 21 and 26.

144. See also Opinion of A.G. Sharpston in Opinion 2/15, *Singapore FTA*, para 358. I would like to thank the external reviewers for drawing my attention to this.

3(2) TFEU. The Court's decision on this point may then have been a trade-off for effectively lowering the bar for finding an *ERTA* effect.

5.4. *Testing and finding an ERTA effect*

5.4.1. *Per se no ERTA effect*

The obvious approach for Member States to take in cases where the Commission claims EU exclusive competence is to argue that one of the scenarios in which the Court earlier found there to be (*per se*) no *ERTA* effect also applies *in casu*. Indeed, in Opinion 1/13 the Member States refuted the Commission's claim that the EU regulation would be affected if Member States could individually decide on third countries' adhesion to the Hague Convention by arguing that the resulting inconsistencies between the Member States would merely amount to practical difficulties.[145] Similarly, one of the arguments of the Member States in *Neighbouring Rights* and Opinion 3/15 was that the common EU rules invoked by the Commission only constituted minimum harmonization

However, on both occasions in which the latter argument was made, the Court relied on an interpretation similar to the one it employed in Opinion 1/03,[146] whereby EU provisions that *prima facie* leave discretion to the Member States are read as provisions through which the EU legislature exhaustively regulates an issue (even if in an open ended manner).[147] In *Neighbouring Rights*, Member States claimed that the relevant EU directive only foresees an exclusive right for wireless retransmission, while the Convention under negotiation could also create such a right for retransmission by wire or cable. To the Advocate General, this meant that EU law only provided for minimum harmonization, leaving the necessary legal space for the Member States to adopt rules on other means of retransmission (be it at national or international level).[148] The Court, by contrast, interpreted the directive as laying down an exhaustive definition of the right of retransmission, meaning any other (or even identical) definition in the convention would affect the directive.[149] In Opinion 3/15, the Member States relied on the fact that the relevant directive gave them the freedom to limit copyright protection for the benefit of persons with disabilities, an option which they could choose to exercise (in national law or) by adhering to the

145. Opinion 1/13, *The Hague Convention*, para 64. See *supra* note 26.
146. See *supra* note 76.
147. Opinion 1/03, *Lugano Convention*, paras. 148–149.
148. Opinion of A.G. Sharpston in Case C-114/12, *Commission* v. *Council (Neighbouring Rights)*, para 150.
149. Case C-114/12, *Neighbouring Rights*, paras. 91–92.

Marrakesh Treaty. The Court inverted this reasoning by finding that this discretion (on the part of the Member States) was not the result of a negative choice of the EU legislature (i.e. deciding not to decide and leave a matter to the Member States).[150] The EU legislature's positive choice then pre-empted the Member States from acting on the international plane.

5.4.2. *Codifying the methodology for finding an ERTA effect*

As far as methodology goes, the Court in its post-Lisbon cases has introduced a novel step since it is typically required to first determine which of the different scenarios listed in Article 3(2) TFEU is the relevant one to test *in casu*.[151] In its first cases on Article 3(2) TFEU, the Court also significantly built further on its own codification in Opinion 1/03 by developing its standard test as follows:

> "any competence, especially where it is exclusive, must have its basis in conclusions drawn from a comprehensive and detailed analysis of the relationship between the envisaged international agreement and the EU law in force. That analysis must take into account the areas covered by the EU rules and by the provisions of the agreement envisaged, their foreseeable future development and the nature and content of those rules and those provisions, in order to determine whether the agreement is capable of undermining the uniform and consistent application of the EU rules and the proper functioning of the system which they establish."[152]

At first sight, this single statement simply brings together the different elements of the Court's pre-Lisbon jurisprudence. However, it must be noted that the Court originally introduced the assessment of the "scope, nature and content" of the common EU rules in Opinion 1/03 only in relation to the "area largely covered test".[153] Now this assessment is generalized,[154] and if this rewording of the methodology is interpreted as correcting the Court's earlier suggestions that the "area largely covered test" may be used to find an *ERTA* effect itself (see above), it is indeed to be welcomed.[155] Showing a remarkable sense of consistency then, the Court has repeated verbatim its standardized

150. Opinion 3/15, *Marrakesh Treaty*, para 119.

151. Opinion 1/13, *The Hague Convention*, para 70; Case C-114/12, *Neighbouring Rights*, para 65; Opinion 3/15, *Marrakesh Treaty*, paras. 102–104.

152. Opinion 1/13, *The Hague Convention*, para 74. Similarly, see Case C-114/12, *Neighbouring Rights*, para 74; Case C-66/13, *Green Network*, para 33; Opinion 3/15, *Marrakesh Treaty*, para 108.

153. Opinion 1/03, *Lugano Convention*, para 126.

154. Noting the very same change but drawing different conclusions, see Verellen, op. cit. *supra* note 42, 406–407.

155. Contra and very critical, see Verellen, op. cit. *supra* note 42, 406–408.

test in all post-Lisbon cases,[156] up until Opinion 2/15 when it disappeared again from the Court's *ERTA* assessment.

In her Opinion in *Neighbouring Rights*, Advocate General Sharpston proposed a further development of the methodology by arguing that the "analysis always involves examining (in sequence): (i) the scope and content of the envisaged international agreement; (ii) whether the European Union has already exercised an internal competence and, if so, the scope and content of EU law; and (iii) whether the conclusion of that international agreement may affect EU rules or alter their scope."[157] In her Opinion on the Singapore FTA, Advocate General Sharpston tweaked her approach by noting that the first step also requires defining the area concerned by the international agreement, in order to verify in a second step whether the area is fully harmonized or largely covered by EU secondary legislation.[158]

This again shows some confusion over the role of the "area largely covered test".[159] On the one hand, the Advocate General rightly notes that meeting this test does not in and of itself mean there will be exclusive competence, a further analysis always being required.[160] Yet, unless the position is taken that "largely covering the area" is a necessary but insufficient condition for finding an *ERTA* effect, applying the test in the second step of her approach is pointless for finding such an effect in itself.[161] In this regard, it would have been useful if the Advocate General had made explicit that she relied on the test as the starting point of her analysis,[162] because the Commission did not simply claim EU exclusive competence for some provisions of the chapter, but for the entire chapter. The latter claim indeed requires (i) EU law to be affected and (ii) the chapter to be at least largely covered by EU rules, whereas the former claim only requires the first of these two conditions to be met.

156. See cases cited *supra* note 152.

157. Opinion of A.G. Sharpston in Case C-114/12, *Commission* v. *Council (Neighbouring Rights*) para 89.

158. Opinion of A.G. Sharpston in Opinion 2/15, *Singapore FTA*, paras. 122–125.

159. For an interpretation alternative to the present one, see Castillo de la Torre, op. cit. *supra* note 9, 165.

160. Opinion of A.G. Sharpston in Opinion 2/15, *Singapore FTA*, para 130; Opinion of A.G. Sharpston in Case C-114/12, *Neighbouring Rights*. Nowak and Masuhr disagree with A.G. Sharpston on this point, see Nowak and Masuhr, op. cit. *supra* note 96, 203.

161. See in this regard also Le Bot's reading of Case C-114/12, *Neighbouring Rights*, who argues that the Court first verified whether the area in question was largely covered, so as to find that EU law was affected, and subsequently looked for alteration of EU law by those elements not yet covered by EU rules. This of course begs the question why the test for finding an *ERTA* effect would be one of "largely (rather than completely) covering the area", Le Bot, op. cit. *supra* note 11, 638–640.

162. Opinion of A.G. Sharpston in Opinion 2/15, *Singapore FTA*, para 231.

5.4.3. *Finding an ERTA effect post-Lisbon*

Although the standardized test suggests that the Court has not fundamentally altered its approach to testing for an *ERTA* effect, a closer scrutiny of the post-Lisbon cases reveals that the Court may have lowered the required threshold to trigger supervening exclusivity. In its test, the Court now consistently refers to a *risk* of EU law being affected rather than to establishing a finding that EU law is actually affected.[163] Although the Court in *Neighbouring Rights* referred to the *Open Skies* cases on this point, the aspect of a *risk* of EU law being affected is absent in the reasoning of the Court in those cases.[164] For this change in emphasis the Opinion of Advocate General Kokott in *Conditional Access* seems to have been instrumental: since Article 3(2) TFEU refers to agreements that *may* affect common rules or alter their scope, she stressed that the relevant threshold was that of a *risk*.[165]

Of course, it may be that this change of emphasis is only semantics which do not change the outcome of the test. Yet, post-Lisbon the Court also seems more keen on finding exclusivity then hitherto. In *Green Network*, the Court implicitly reversed part of its ruling in *Open Skies,* since it first found that it was clear from Article 5 of Directive 2001/77 that "the guarantees of origin … concern exclusively electricity produced in sites under [Member States'] jurisdiction and not electricity produced in third States."[166] In light of *Open Skies*, where EU legislation also only dealt with EU carriers, one could then assume that the Court would *mutatis mutandis* declare that the EU system of guarantees of origin could not be affected, even if Member States conclude bilateral agreements with third countries whereby the latter's guarantees of origin (in *Open Skies*: granting third countries fifth freedom rights) are

163. Case C-66/13, *Green Network*, para 29; Opinion 1/13, *The Hague Convention*, para 71; Case C-114/12, *Neighbouring Rights*, para 68; Opinion 3/15, *Marrakesh Treaty*, para 105; Opinion 2/15, *Singapore FTA*, para 180.

164. It can however, be traced back to the original *ERTA* case, in which the Court both referred to EU law being actually affected (in para 17) and the possibility of EU law being affected (in para 22). It may not be a coincidence then that the Court in Case C-114/12, *Neighbouring Rights* (para 66) referred to para 22 rather than para 17 of the *ERTA* judgment in interpreting Art. 3(2) TFEU.

165. Opinion of A.G. Kokott in Case C-137/12, *Commission* v. *Council,* para 100. The Court itself did not have to take a position in that case, since it ruled that Art. 207 TFEU constituted the proper legal basis for the Convention at issue. Advocates General Bot and Jääskinen picked up on A.G. Kokott's lead in their Opinions in Case C-66/13, *Green Network* and Opinion 1/13, *Accession of Third States to the Hague Convention*. In contrast, in the fourth major post-Lisbon case in which Art. 3(2) TFEU figured, i.e. Case C-114/12, *Neighbouring Rights*, A.G. Sharpston did not yet refer to this risk but in her Opinion on the Singapore FTA she did; see Opinion of A.G. Sharpston in Opinion 2/15, *Singapore FTA*, para 128.

166. Case C-66/13, *Green Network,* para 41.

recognized. Questionably though,[167] the Court relied on the Directive's mutual recognition clause to find that a bilateral agreement such as that envisaged in Italian law would extend the scope of the Directive and thereby affect it.[168]

The Court's willingness, some might say eagerness, to find exclusivity was also clear in *Neighbouring Rights,* where there was uncertainty as to the precise content of the future Convention. Following the Court's standardized test would suggest that such uncertainty should result in finding against exclusive competence,[169] and Advocate General Sharpston indeed noted that the manner in which the "open issues" would ultimately be addressed in the Convention would have a bearing on the exclusivity question.[170] The Court, in contrast, restricted itself to the possible solutions listed in the Convention's preparatory documents, finding that since the options that might result in shared competence had not been mentioned as such in those documents, it had to be assumed that the common rules would be affected.[171] This sits uneasily with the Court's own finding that it is for the party asserting the existence of an exclusive competence to demonstrate it.[172]

The Court's ruling in Opinion 2/15 provides the latest indication of the Court's relaxed standard towards finding supervening exclusivity. The case in point is the assessment of the EU's competence to conclude the chapter on transport services, in particular the provisions on maritime and inland waterway transport, in the Singapore FTA, where the difference in assessment by Advocate General Sharpston and the Court were the most salient.[173] While

167. The reasoning was questionable since Art. 5(4) of the Directive only requires mutual recognition of guarantees of origin issued in accordance with Art. 5(2) of the Directive, i.e. guarantees of origin issued by EU Member States. As noted by A.G. Bot, there was no guarantee that the guarantees of origin would only be granted (under the agreement) to Swiss green electricity meeting the definition of the Directive. See Opinion of A.G. Bot in Case C-66/13, *Green Network*, para 68. As a result, there would be no EU obligation, under the mutual recognition clause, on the other Member States to recognize such guarantees of origin.

168. Case C-66/13, *Green Network*, paras. 46–48.

169. This is because the standardized test starts from the premise that EU competence, especially if it is exclusive, cannot be presumed. See Case C-114/12, *Neighbouring Rights*, para 75.

170. Opinion of A.G. Sharpston in Case C-114/12, *Neighbouring Rights*, paras. 155–156.

171. See Case C-114/12, *Neighbouring Rights,* paras. 95, 99 and 101. It is no doubt relevant in this regard that the Court set out its analysis by noting that the Convention would be based on the EU acquis. This would imply that the default situation was one of an *ERTA* effect. See Case C-114/12, *Neighbouring Rights*, para 84.

172. Case C-114/12, *Neighbouring Rights*, para 75. Emphasizing this novelty in the Court's approach to testing the *ERTA* doctrine, see Abner, "Qui a le droit de négocier les accords internationaux? – Clarification de la jurisprudence *AETR*", 3 R.A.E. (2014), 641–648, 645.

173. In relation to transport by road and rail, the A.G. and the Court came to the same conclusion in their assessment of the *ERTA* doctrine. In relation to air transport, the A.G. held that this area was not largely covered by EU rules (para 250) while the Court held that the

both the Advocate General and the Court differentiated between the different modes of transport, only the Advocate General consistently checked the different modes of supply for each mode of transport. In relation to maritime transport, she found, just like the Court itself, that modes 1 and 2 (cross-border supply and consumption abroad) were covered by common EU rules. In relation to modes 3 (establishment) and 4 (presence of natural persons), the Advocate General held that these were not or only to a limited extent covered by rules of secondary EU legislation, and as a result the chapter's provisions on maritime transport services did not wholly come under EU exclusive competence.[174]

The ECJ in contrast essentially downplayed the relevance of the commitments in relation to modes 3 and 4. As regards mode 3, the Court noted that under the specific commitments most Member States were not required to allow Singaporese undertakings to establish themselves and fly the flag of those Member States. In relation to mode 4, the Court ruled that there was no further liberalization since the specific commitments allowed the EU to impose nationality requirements for ships' crews. The Court subsequently held that since common EU rules would be affected and because the area of maritime services was largely covered by those EU rules, the EU had exclusive competence. One can only surmise how the ECJ took into account the commitments under modes 3 and 4, but it appears that the Court found these limited commitments insufficiently substantial to "broaden" the area that needed to be covered by common EU rules.[175] While both the Advocate General and the Court therefore referred to the same "nominal" area, i.e. that of "maritime transport services", the areas actually defined were different in scope.

For the area of inland waterway transport, the Commission had argued that given the EU's and Singapore's geographic location, the commitments entered into were negligible and therefore there was no real exercise of EU competence and no need to show its exclusive nature.[176] Advocate General Sharpston rejected this line of reasoning and held that a decision not to

aircraft repair and maintenance services and the services for the sale, marketing or reservation of air transport services covered by the agreement were not inherently linked to air transport, and therefore did not come under Art. 207(5) TFEU but under the CCP itself. As noted by A.G. Sharpston however (see para 218) the Court in Opinion 1/08 qualified the very same services as air transport services coming under the exception of (current) Art. 207(5) TFEU. See Opinion 1/08, *GATS*, para 169.

174. Opinion of A.G. Sharpston in Opinion 2/15, *Singapore FTA*, paras. 239–241.

175. According to Dony however, the Court simply ignored the fact that the common EU rules did not cover the aspect of establishment. See Dony, "L'avis 2/15 de la Cour de justice: Un 'jugement de Salomon'?", (2017) RTDE, 525–554, para 15.

176. Opinion of A.G. Sharpston in Opinion 2/15, *Singapore FTA*, paras. 172–173.

commit also requires a competence.[177] The Court on the other hand determined, again on the basis of the reservations set out in the schedule of specific commitments, that the FTA would not change the status quo and that the provisions on inland waterway transport could therefore not have a bearing on the competence question.[178] While the Court was more explicit here than on modes 3 and 4 of maritime transport, it may be argued that the same reasoning was essentially at play. The Court's assessment of the provisions on maritime and inland waterway transport illustrate how finding an exclusive EU competence remains a subjective affair: by qualifying commitments as insufficiently significant they can be excised from the area that needs to be covered by common EU rules. The more that area can be narrowed down, the easier it will be for EU secondary legislation to cover the area to a large extent which, when an *ERTA* effect is found, results in the EU holding exclusive competence over the whole agreement. The Court thereby facilitates EU exclusivity by applying the well-established absorption doctrine, not to the horizontal (intra-EU) question of the legal basis, but to the vertical division of competences.[179]

6. Supervening exclusivity in the post-Lisbon era: A first assessment

Just before the entry into force of the Lisbon Treaty, Kuijper noted that "the *ERTA* doctrine has become so complicated as to be almost useless to the political institutions of the Community as guidance for further actions."[180] As a corollary to the issue of continuity or discontinuity in the application of *ERTA* post-Lisbon, this raises the question whether it has become more predictable, contributing to greater legal certainty. The analysis above shows that the latter is indeed the case, albeit mainly as a result of the Court having lowered the threshold for finding supervening exclusivity.[181]

Indeed, despite a *prima facie* continuity, resulting from (i) the Court's finding that the *ERTA* line of cases remains relevant in interpreting Article 3(2) TFEU and (ii) the standard test elaborated from the Lugano Opinion,

177. Ibid. para 226.

178. Opinion 2/15, *Singapore FTA*, paras. 214–217.

179. Chamon, "Constitutional limits to the political choice for mixity", in Neframi and Gatti (Eds.), *Constitutional Issues of EU External Relations* (Nomos, 2018), pp. 140–144. Arguing against such a vertical application, see A.G. Kokott in Joined Cases C-626/15 and C-659/16, *Commission* v. *Council*, EU:C:2018:362, para. 82.

180. Kuijper, op. cit. *supra* note 104, p. 9.

181. Arguing that the *ERTA* doctrine remains unpredictable in its application, see Verellen, op. cit. *supra* note 42, 409.

there is a general consensus that the Court in post-Lisbon cases is more easily swayed both into finding an *ERTA* effect and finding exclusivity for the whole of an agreement.[182] In this regard, especially the Court's standard test may have misled some commentators. In any event it seems to have wrong-footed Advocate General Sharpston in her Opinions in *Neighbouring Rights* and on the Singapore FTA when she acted much more faithfully on the Court's own instructions (in Opinion 1/03) than the Court would do itself.

The analysis above has revealed the techniques employed by the Court that firstly lead to an easier finding of an *ERTA* effect and further lead to a finding that an area is largely covered by EU rules, which this articles argues is a prerequisite for concluding that the *whole* of an agreement (or a whole section of it) comes under EU exclusive competences. However, on this last issue there does not seem to be any consensus in legal doctrine; and the Court's post-Lisbon case law has perhaps only exacerbated the confusion on the precise function of the "area largely covered test".[183]

In terms of finding an *ERTA* effect, there is firstly a semantic and methodological shift to finding a *risk* that EU law is affected. Secondly, and perhaps pointing to a differentiation between Articles 2(2) and 3(2) TFEU,[184] the Court systematically qualifies provisions in EU law that leave a certain regulatory discretion to Member States as an explicit and conscious choice of the EU legislature, thus preventing Member States from relying on this freedom to argue against pre-emption. Thirdly, the Court has not shied away from defining the objective and purpose of the set of EU common rules at issue in such an abstract way that it almost equates with the telos of the mechanism of supervening exclusivity itself. The outcome of such a circular reasoning cannot of course be anything else than finding that EU law is affected and competence exclusive. Fourthly, in cases where the international law instrument builds on or is supposed to interact with the common EU rules, the ECJ effectively (but not explicitly) reverses the default situation to one of EU law being affected: although the Court explicitly finds that EU competence, let alone EU exclusive competence, cannot be presumed, its actual reasoning seems to point in the opposite direction. Turning to the area

182. Rosas, "EU external relations: Exclusive competence revisited", (2015) *Fordham International Law Journal*, 1073–1096, 1087; Delgado Casteleiro, op. cit. *supra* note 7, 680–681; Kleimann and Kübeck, "The signing, provisional application, and conclusion of trade and investment agreements in the EU: The case of CETA and Opinion 2/15", 45 LIEI (2018), 13–45, 39. In more veiled terms, Cremona notes that the Court has not shown "any reluctance towards reaching a finding of exclusive competence", see Cremona op. cit *supra* note 11, p. 146.

183. Compare for instance the present assessment with those of Delgado Casteleiro, op. cit. *supra* note 7, 680–681; Verellen, op. cit. *supra* note 42, 406–409; Le Bot, op. cit. *supra* note 11, 638–640; Castillo de la Torre, op. cit. *supra* note 9, pp. 162–168.

184. See *supra* notes 35 and 53. The Court could read these provisions in secondary law differently depending on whether internal or external Member State action is at issue.

largely covered test, the contentious issue is rarely how to define the relevant area in a nominal sense, rather the deciding factors are how the area is substantively composed and when the "largely" threshold is met. In Opinion 2/15, the ECJ and the Advocate General both referred to the same areas to be covered (modes of transport), but the Court effectively defined them more narrowly, facilitating a passing of the test. Further, even if the areas are defined identically both in nominal and substantive terms, the fact that they merely need to be *largely* covered leaves a significant degree of discretion which it would be surprising for the Court not to exploit.

Given the ongoing development of EU secondary legislation (or positive harmonization) and the requirement to also take into account the future development of EU law when conducting an *ERTA* test, it seems inevitable that the Court, pursuant to its lenient approach, will ultimately take exclusive competence as a rule rather than the exception.[185] The Court's post-Lisbon case law is therefore not simply an unrestricted continuation of its established *ERTA* jurisprudence,[186] but also an unrestricted *further development* thereof. While the Court's post-Lisbon case law may still be explained and interpreted in terms of obstacle pre-emption, it appears that the Court is more willing to find "obstacles" that effectively trigger the pre-emptive effect.

Space does not permit a discussion of why the Court is so keen on finding exclusivity in the post-Lisbon era. Suffice to note that the outcome of the Court's case law was not predetermined by the new Treaty rules. In this regard, Azoulai noted that the Court would have broadly three options: a return to the original "integrative institutionalism", i.e. the original *ERTA* reasoning, a continuation of the practice-inspired "associative institutionalism", *inter alia* favouring reliance on mixed agreements, or a third way where the Court cedes the field to Member States, given a context of "deep and widespread concern about the efficiency and the legitimacy of the Union's actions both internally and externally."[187] The latter was indeed plausible given the background of Brexit, rising populism and even revolt from the highest national judicial benches.[188] In a bold move however, the Court has gone for a renewed integrative institutionalism.

185. Azoulai also observed the ever increasing body of EU legislation, but concluded from this that a generous *ERTA* jurisprudence would be hard to maintain; see Azoulai, "The many visions of Europe: Insights from the reasoning of the European Court of Justice in external relations law", in Cremona and Thies (Eds.), *The European Court of Justice and External Relations Law: Constitutional Challenges* (Hart Publishing, 2014), p. 176.

186. Nowak and Masuhr, op. cit *supra* note 96, 191.

187. Azoulai, op. cit. *supra* note 185, pp. 181–182.

188. See the Czech Constitutional Court in the *Landtova* saga, 2012/01/31 - Pl. ÚS 5/12: *Slovak Pensions* XVII; the German Bundesverfassungsgericht's preliminary reference in *Gauweiler*, 14 Jan. 2014, *BVerfGE* 134, 366; the Danish Supreme Court's decision in *Ajos*, 6 Dec. 2016, Case 15/2014.

The doctrinal merits and vices of the Court's post-Lisbon case law have been commented upon above, leaving the question how this jurisprudence should be evaluated from a policy perspective. There seems to be a consensus on the activist role played by the Court, but the reviews thereof are mixed. While the Court is accused by some of maintaining a confused test for the strategic use thereof by the Court itself,[189] others applaud the Court for its search for EU exclusive competence, strengthening the EU's international role and limiting recourse to mixity with its well-known "handicapping" features.[190] The two constitutional mechanisms of mixity and supervening exclusivity are indeed communicating vessels,[191] and the ultimate question then becomes how the Court's application of Article 3(2) TFEU is received by the Member States.

Reinforcing EU exclusive powers at first sight indeed strengthens the EU's international standing, but it may be ineffectual or even counterproductive if the result is a chilling effect whereby Member States block the adoption of further EU secondary legislation that would pre-empt them from acting externally, or when it results in a backlash with Member States insisting on optionally mixed external EU action.[192] At the same time, as Cremona has noted, exclusivity only rules out unilateral, uncoordinated, Member State action, but still allows Member States to pursue external action within a European framework.[193] Conversely, the EU may still be an effective international player together with the Member States if all actors involved act in accordance with the principle of loyal cooperation. If the past is anything to go by, the next phase in the Court's case law would indeed see two types of cases: (i) after resolving the post-Lisbon competence questions, issues involving loyal cooperation may come to the forefront again[194] and (ii) depending on the Commission's appetite, it could try to enforce the recalibrated *ERTA* doctrine in individual cases, as it did in *Open Skies* and *Inland Waterways*. In these cases the "area largely covered test" is not as relevant, since the finding in an international agreement concluded by a Member State of only one provision affecting common EU rules will still

189. Verellen, op. cit. *supra* note 42, 409–410.

190. Flaesch-Mougin, op. cit. *supra* note 6.

191. Dashwood, op. cit. *supra* note 2, p. 362.

192. Identifying such a "chilling" effect of too sweeping a push for exclusivity, see Weiler. op. cit. *supra* note 43, p. 72. See also A.G. Dutheillet de Lamothe in Case 22/70, *ERTA*, EU:C:1971:23, p. 292.

193. Cremona, "EU external relations: Unity and conferral of powers", in Azoulai, op. cit. *supra* note 10, pp. 74–77.

194. I would like to thank Christophe Hillion for drawing my attention to this.

result in the finding that the Member State concerned could not have concluded that agreement autonomously.[195]

7. Conclusion

In the Court's post-Lisbon *ERTA* case law, the pendulum has continued to swing (from Opinion 1/03) in a direction favouring EU exclusivity. The "restrictive" codification of *ERTA* in Article 3(2) TFEU has not hindered the Court in doing so, but instead has actually supported this development – not merely because of its concise and imprecise language, but also because it erroneously qualifies the *ERTA* doctrine as one of exclusive competence rather than pre-emption of shared external competence. One immediate practical effect of this is that the Court in *Neighbouring Rights* could dismiss Protocol No. 25 as being irrelevant when testing *ERTA*.

Other than that, the codification in the Lisbon Treaty is as good as it could possibly get: *ERTA* is a complex judge-made doctrine which does not lend itself to a perfect codification in one or two lines. What Article 3(2) TFEU does is make it clear to the EU citizen that, in some instances, the EU acquires an exclusive "competence" to act externally when a body of EU law has been adopted internally and it sanctions this judge-made law, allowing its further development by the ECJ. At least formally the Court itself does not consider Article 3(2) TFEU as a breaking point and instead emphasizes the continuity of its pre-Lisbon case law through the standardized test which it elaborated from its own codification in Opinion 1/03.

In terms of further development, the relevant questions then become whether the ECJ applies Article 3(2) TFEU in a doctrinally convincing and coherent manner and whether in doing so it has adequately sensed the political, economic and social context in which it acts as a constitutional court for the EU legal order. As to the first question, a sufficient degree of coherence may indeed be noted, since the Court's post-Lisbon case law can still be interpreted from the prism of obstacle pre-emption. The only somewhat anomalous decision in this regard is the Court's rejection in Opinion 2/15 of the qualification of a provision of primary law as a "common rule" in the sense of *ERTA*. Otherwise, looking at supervening exclusivity as resulting from obstacle pre-emption helps understand the Court's post-Lisbon case law. Nonetheless, testing for an *ERTA* effect is inherently a subjective affair. It requires the proper definition of the subject matter covered by international and EU rules, the identification of the objective of the EU rules in question, the assessment whether the subject matter has been fully harmonized under

195. See *supra* note 88.

EU law or whether, instead only minimum harmonization is at play, the assessment whether the objectives of the relevant EU rules risk being jeopardized in a legal but not in a practical sense, etc. A further element of obscurity is the precise function of the area largely covered test: does it test an *ERTA* effect or does it test whether a whole agreement is covered by EU exclusive competence? Under obstacle pre-emption it can only be the latter, but the Court would do well to clarify this.

Whether the Court's reasoning in its post-Lisbon case law has been convincing in every instance is a more contentious question. Clearly the Court has set up new strands of reasoning that more easily result in a finding of EU exclusivity. The Court has been activist, but this in itself cannot be a reason for critique. Rather, the Court has played its legitimate role, under the Community Method, as a constitutional actor safeguarding EU integration. Whether this new judicial affirmation of EU exclusive external competences will also herald a new stage in EU external action, will ultimately depend on how the Court's reading of Article 3(2) TFEU is received by the Member States and how it feeds into the EU decision-making process.

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