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# Introduction: The European Union as an International Actor

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# INTRODUCTION: THE EUROPEAN UNION AS AN INTERNATIONAL ACTOR

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The notorious *ERTA* decision by the European Court of Justice (ECJ), if viewed from a federalist perspective independently of its legal merits, represents an equilibrium: the quantity of the sovereignty transferred from European Community (EC) Member States to the Community at the internal (intra-EC) level equals the quantity of sovereignty that the Community can exercise on behalf of the EC Member States on the international scene.[1]

The ECJ's Opinion 1/94 casts some doubt upon this statement by restrictively interpreting the Community competence with respect to international trade negotiations.[2] Opinion 1/94, however, is not a drastic departure from the *ERTA* case law. It is not, in the Kuhnian sense of the term, a "paradigm shift."[3] Consequently, the *ERTA* paradigm still holds.

The equilibrium reflected in *ERTA* is, of course, an equilibrium with a specific time-dimension. There is an inherent dynamic aspect to it, in the sense that the equilibrium will shift whenever the Member States of the EC so decide. The EC Member States, the *Herren der Verträge* ("Masters of the Treaties"), will hopefully move (and on most occasions do) to enhanced cooperation every time they perceive gains from cooperation.[4]

Cooperation, of course, as the European experience shows, can take different forms: it can take the form of harmonization (every time the transaction costs argument prevails), and it can take the form of regulatory competition coupled with mutual recognition (when the perceived innovation gains are substantial). In the latter case, a safety net in the form of an EC common standard is quite often in place, reflecting the traditional EC (but not necessarily pan-European) "suspicion" of market forces and the tendency to anticipate market failures.

Viewed from this perspective, it is not surprising that the Editors of the *Columbia Journal of European Law* selected the papers that are featured in this Special Issue: all four papers have a clear intra-EC dimension which will, albeit in various forms, be reflected at the international plane. Moreover, there is one additional argument justifying (and indeed commending) the selections by the Editors: not only is the degree of intra-EC cooperation different in the four areas

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[1] Commission v. Council [ERTA], Case 22/70, 1971 E.C.R. 263.

[2] As Joseph Weiler correctly, to my mind, points out, this outcome is the counter-weight to the post-Maastricht EC decision-making process: the passage from unanimity to qualified majority. See Joseph H.H. Weiler, The Constitution of Europe, "Do the New Clothes Have an Emperor?" and Other Essays on European Integration (Cambridge University Press, 1999).

[3] The careful reader of the Opinion Pursuant to Article 228(6) of the EC Treaty, Opinion 1/94, 1994 E.C.R. I-5267, will notice that nowhere in its Opinion did the Court explicitly mention that it intended to reverse *ERTA*.

[4] This is true even in cases where gains from cooperation have been grossly overstated, like in the case of the infamous Cecchini Report of 1988 (published as Commission of the European Communities, Research on the Cost of Non-Europe: Basic Findings (1988)).

selected, but the degree of cooperation among the EC and its partners around the world also differs both *ratione materiae* (depending on the subject matter) and *ratione personnae* (depending on the identity of the partner).

Security and Defense is one of the least integrated areas in the EC architecture. It is hence primarily an intra-EC exercise, the eventual international aspect of which, though, is undeniable. The European Monetary Union (EMU) represents a more comprehensive structure than does Security and Defense at the intra-EC level. Three EC Member States have yet to join the EMU and the question as to whether the EC is an optimal currency area still occupies the first pages of economics journals. Most economists would argue that in the long run, a one-currency Europe is welfare-increasing. Many, though, (and most notably Paul Krugman, in a series of papers and books) have cast doubt upon the wisdom of the selection criteria for participation in the EMU. Antitrust cooperation takes place between the EC and only some domestic competition authorities. The quality and the quantity (frequency) of cooperation varies: the EC has been particularly insistent in drawing Central and Eastern European countries - candidates for accession to the EC - into the competition culture. Cooperation with these nations is, therefore, intense. However, what is popularly referred to as "globalization," that is, intense foreign direct investment and trade liberalization, makes the case for cooperation among competition authorities in the near future stronger.

The four papers included in this Special Issue offer elaborate opinions on these three issues.

Asteris Pliakos does not hide his feelings about the need to establish a genuine Common Foreign and Security Policy in the EC. His main argument is that the EC is a process on the road to a proper constitutional identity (a quasi-federation in Weiler's terminology). The EC identity, in a sense the autonomous EC identity, suffered, in the author's eyes, a serious drawback during the Kosovo crisis. The EC showed the limits of its current status by failing to provide a European solution to an essentially European problem. Kosovo, according to Pliakos, is a watershed that should in itself provide the necessary impetus to move on with the discussions for a genuine Security and Defense policy in the EC. Such a discussion, however, acknowledges one important internal hurdle: five EC Member states (Austria, Denmark, Finland, Ireland and Sweden), being traditionally neutral states, will not participate. However damaging this may be, Pliakos insists that it should not block the way. The challenge, of course, will be to find a way to accommodate the eventual European policy in this area with NATO and, I would add, the UN system for prevention and repression of acts of aggression.

Erich Vranes, in probably the most technical paper in the Special Issue, discusses an EC issue that is, in principle, internal, but that has undeniable external effects: the relationship between "in" (that is, participating) and "out" (that is, non-participating) EMU-states. In his view, the one currency system was "the logical complement of a true common market" (a statement with which no one can disagree; if any, disagreements might arise as to whether the EC, at the moment when the EMU came into being, was a "true common market"). He goes on to provide an excellent institutional account of the EMU, accurately describing the distribution of competence among the various organs that are called upon to give "flesh and bone" to the EMU. He then spends a substantial part of his analysis discussing the special status of Denmark and the United Kingdom. In my opinion, the issue merits his

energy. The EMU is, in fact, although this is a politically incorrect statement, evidence of a multi-speed Europe. Whatever name one gives to it (multi-speed; variable geometry; concentric circles), the fact of the matter is that some EC Member States have "widened and deepened" their integration process *inter se* more than with respect to their relations with other EC Member States: hence the "in" and "out" states.

Now this observation in itself is quite important for its eventual external effects: as the author accurately points out, most analysts agree that none of the candidate countries for accession to the EC meet the criteria for accession to the EMU. This means that when they enter, they will be at a level (circle?) of integration other than that of the EMU. This quasi-fact invites a follow-up question: will the EMU provide the single benchmark for a multi-speed Europe in the future as well? This question will be answered at a positive level only through future experience.

Vranes finally points out that between "ins" and "outs" there is nothing like an institutional firewall: in fact, the former are called upon to ensure that the EMU will function in a way that respects the interests of the EC as a whole. Once again, only future experience can tell whether this has indeed been the case.

The papers by János Volkai and Barry Rodger deal with the issue of antitrust cooperation at different levels: Volkai's interest is in cooperation among the EC and Hungary, a candidate for accession to the EC; Rodger focuses on antitrust cooperation at a more general level, that is, with all potentially interested authorities. Volkai's point of departure is a very interesting legal event: the fact that the Hungarian Constitutional Court found two key provisions of the Hungary-EC Agreement to be unconstitutional, leaving a vacuum which the author aims to fill through an imaginative proposal.

To me, though, his paper had a different impact: it made me consider whether insistence on direct effect is warranted. Public choice would suggest that, because governments and private parties have different incentive structures, some private parties' interests might be sacrificed only if governments have *locus standi* before jurisdictions. This much is true. Economists, however, have also argued that sometimes discretion at the government level might be welfare-enhancing, as some private actions could be potentially detrimental to the overall general public interest. The by now well-known Levy/Srinivasan model is evidence of this statement.

From a legal perspective, the issue could be presented as follows: is direct effect the only way to ensure compliance with international treaties that touch upon private parties' rights? In this line of argument, I note a very interesting provision in the WTO Agreement on Government Procurement (GPA):[5] Art. XX (Challenge Procedures) obliges WTO member signatories of the GPA to establish domestic procedures that enable private parties to challenge actions of governments that allegedly contravene their international obligations. The question of direct effect is circumvented but the outcome is comparable to a direct effect outcome.

Rodger reviews the implications of "globalization" for competition policy. He first goes through various European competition policy traditions to persuasively make the case that there is not a one-minded Europe on this issue. On issues such as when to intervene (Easterbrook's false positives and negatives or the economists

[5] Agreement on Government Procurement, Apr. 15, 1994, Final Texts of the Uruguay Round Agreements Including the Agreement Establishing the World Trade Organization, Annex 4(b), available at <http://www.wto.org/english/tratop_e/gproc_e/agrmnt_e.htm>.

Type 1 and Type 2 errors), how "regulatory" competition law should be, or how many extra-antitrust concerns should be reflected in antitrust analysis, Europe offers a variety of approaches. The single EC-wide competition policy did not put an end to this discussion, although it did contribute to the shaping of an EC approach. With the current decentralization of EC competition policy, next to the undeniable gains from innovation, we might see a re-emergence (hopefully centrally controllable) of national approaches.

Decentralization of EC competition policy must, in turn, be viewed in the context of a world where national frontiers are continuously shrinking. As the author points out, this phenomenon does not make a persuasive case for one global competition authority applying one global antitrust law, but instead encourages states to keep in mind that cooperation can be achieved through other channels as well.

In a nutshell, these four thought-provoking papers provide a very appropriate forum to review the current state of Europe's international dimension and reflect upon the future. The Editors undoubtedly did not aim to provide the last word on the subject. Indeed, it is impossible to provide the last word on an ever-evolving subject. This Special Issue is a meaningful contribution to an ongoing discussion. Its success should be measured by the reactions it has caused. This contribution is the first in a long run of future reactions.