# Evaluating the Exclusive (and Implied) Competences of the European Union's External Relations Law Vis-à-vis Human Rights Obligations

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# ABSTRACT

The aim of this dissertation is to explore the continuum in the development of external competence in the EU vis-à-vis human rights obligations. The connection between the two is not altogether immediate but this work considers the conditions within which implied external competence were developed in light of the present legal and political frameworks. The work also observes, from a thorough examination of the case-law, the activist role played by the CJEU during and after *AERT,* and the emerging implications for the future of external relations in the EU. The three chapters of the dissertation represent a segment in the development of the EU legal order and explore the overarching question of how human rights and their protection has become an integral part of the European Union and how it can be reconciled with external relations law. This study reflects on the conditions that can enable an increased adherence to the inclusion of human rights in international agreements and considers the limits of those provisions that legitimise the protection of human rights in the EU. All the while, aware that the balance of power between the EU and the Members States must be maintained. In this sense, the examination of the development of implied external competence aligns itself with the reinforcement of a strong external relations law based on consistency and coherence in action and in law, one that is complementary with legal developments and respectful of national autonomy.

Keywords: EU law, External Relations, Human Rights, External Competence, Implied Competence, Complementarity.

# DEDICATION

To two wonderful, strong women, whose faith in me never faltered, whose good counsel is always freely given and whose friendship is unconditionally bestowed.

To friends, old and new,
and to my family.

To them I dedicate this work.

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I would not have imagined at the beginning of this work that I would have completed it in seclusion during a pandemic. The research process had to be adjusted to rely entirely on the availability of online sources and materials, which luckily is not scarce. Nonetheless, having had to endure this experience I would like to acknowledge the important contribution of libraries, Universities, academic hubs and research groups in carrying out academic studies. They exist for the purpose of diversifying and enriching academic work, and with the lack of physical academic spaces at my disposal, my research is certainly worse off.

Finally, I would like to thank my parents for being there – humble and human.

# LIST OF ABBREVIATIONS

| | |
|---|---|
| AERT | European Road Transport Agreement |
| CFSP | Common Foreign and Security Policy |
| CJEU | Court of Justice of the European Union |
| EC | European Community |
| ECHR | European Convention of Human Rights |
| ECJ | European Court of Justice |
| EU | European Union |
| TEC | Treaty establishing the European Community |
| TEU | Treaty of the European Union |
| TFEU | Treaty on the Functioning of the European Union |
| the Charter | The Charter of Fundamental Rights of the European Union |

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# INTRODUCTION

The main scope of this research is to understand more broadly how and why external relations law has come to constitute such a large aspect of EU law, and how in the future this can come to include an outwardly human rights-based approach. Thereby, this research study tries to answer the question of how external relations and human rights feature into the teleological objectives of the European Union. In the three chapters that follow, an exploration of the evolution of external relations in the EU from a primarily legal standpoint is presented. However, the arguments contained in each chapter account for the political narratives as well, for law and politics not only exert a direct influence on the subject matter but are two complementary, rather than mutually exclusive, narratives.

In this respect, Chapter One begins by providing an in-depth analysis of *AERT* judgement. Any discussion on external competence must consider this ruling not only for the fact that it has shaped external relations law since, but also because the premises outlined in the case are now legally binding in the Lisbon Treaty. For this reason, any arguments to be made on the future of external relations in the EU have to consider the wide-reaching effects of this ruling. Furthermore, Chapter One takes into consideration the political conditions and dynamics that were at play at the time. The Union of the 70s was geared towards expansion and integration, and while they remain stalwarts in the overall objectives of the EU, the mindset of the 70s that made an *AERT* judgement possible is vastly different from today's. Chapter Two then analyses the implications of the *AERT* ruling from a post-Lisbon perspective. The analysis considers both the newly introduced provisions, which allow for increased competence in external relations, and also the resolute position of the Court of Justice of the European Union (CJEU) – formally known as the European Court of Justice (ECJ) – since the Court has played an instrumental role in the development of implied competence. The second Chapter also takes into consideration the problematics that were brought out in post-*AERT* rulings, which gave rise to some tensions between the EU and its Member States.

Another objective of this research is to account for the important work and influence exerted by the CJEU in this field. This objective permeates into all segments of this work, but particularly in the first two chapters, where the aim is to outline the evolution of exclusive and implied competences in the EU's external relations. Traditionally, the Court's interpretation of external competence has been associated with being instrumental for the growth and development of the EU in international relations and international agreements. However, using a law-in-context and a critical analysis approach shows how the current state of affairs in external relations law within the EU has developed into one of the most important facets of EU law. By allowing and championing shared and joint competences agreements, the European Union could make way for a robust external relations strategy based on the principles enshrined within its Treaties.

Following an examination of the past and present of external relations in the EU, Chapter Three explores its future. Having established how external relations constitute such an important instrument for EU law and the expansion of the Union, in the third Chapter, the analysis shifts towards understanding how these components can be utilised to protect fundamental rights in the EU and beyond its border. This is done by taking into consideration how human rights and their protection have become an equally integral part of the EU project, whereby the conditions needed for an increased adherence to their inclusion in international agreements and obligations are brought out. Therefore, Chapter Three considers those provisions which legitimise the protection of human rights in the EU and the conditions required to protect them, while ensuring that balance is maintained between defending national autonomy and increasing EU possibilities in the international sphere.

## Methodology

The methodology adopted for this work is based on the understanding that furthering legal scholarship on the EU will enhance its integration prospects by rendering it more state-like. This notion has certainly fuelled early EU legal scholarship and some remnants of this idea

permeates into modern legal scholarship as well.[1] This mode of seeing legal scholarship has been challenged by the argument that EU Law is not merely concerned with 'doctrinal exposition' but also with 'how and why the law may be more than functional handmaiden of political actors.'[2] By taking the latter model, I try to show how the current state of affairs in EU external relations law has developed into one of the most important facets of EU law, and in so doing this role can be shown to be a useful contribution towards a robust EU human rights law in external borders. While external relations agreements are constantly subjected to scrutiny, with an extensive repertoire of works and scholarship to showcase its complexities, ambiguities and significance, the case-law related to human rights breaches in external relations is lacking.

Methodologically speaking, the field of EU Law is multi-disciplinary in nature, making it harder to identify a clear methodology to adopt in research studies. However, by using a law-in-context and critical analysis approaches, a thorough evaluation on external competences in external relations can be conducted. The contextual analysis allows for a new perspective on traditional areas of EU law. In fact, by situating current problematics within their legal, political and historical narratives encourage the researcher to make use of other disciplines and material to unroot and explore legal issues and concerns, which is more fruitful than a mere 'exposition of legal rule'. Taking into consideration the extensive context and baggage of European Union law in general and external relations law in particular, understanding legal problematics through different lenses not only offers a broader picture of the matter, but can further enrich arguments on the subject matter. The three chapters of this research represent specific entry points into the evolution of the EU, which are broadly reflected as the past, present and future.

As Cryer, Hervey, Sokhi-Bully and Bohm have pointed out 'academic studies are part of an ongoing conversation, that occurs in some ways within the mores of day, even though they can (and the best examples do) transcend the concerns of the time in which they were

[1] See Jo Hunt and Jo Show, *Fairy Tale of Luxembourg? Reflections on Law and Legal Scholarship in European Integration* (Springer 2009) 93-108.
[2] See Francis Snyder, *New Directions in European Community Law* (1990) in Droit et société, n°15, Le changement juridique dans le monde arabe: jalons théoriques, 238.

conceived.'[3] This implies that EU legal research should not be constrained to a contextual analysis. Taking into consideration fluctuations and the novelty of EU legal scholarship, a contextual analysis on its own is not enough. Particularly, because EU case-law is based on Treaties that have seen substantial changes over the past 60 years and are often the source of extensive legal and political debates. Situating each chapter within a specific period in the development of EU law has allowed to take into consideration not only legal considerations, which are many and varied, but also to account for the dynamics that have spurred their evolution and development, complementing a multi-disciplinary approach.

Indeed, as it is often pointed out, the CJEU's interpretation of the Treaties can at times diverge from their original intentions. Or, rather, it has been argued that the court has frequently expanded the scope of the competence of the EU through its rulings and opinions. In external relations law, this is particularly important because the legitimacy of implied competence remains a source of contention. The need for a critical analysis is therefore complementary to a law-in-context review. Here, a 'critical analysis' is used to explain a form of engagement through critique with the legal concerns at hand. Adopting this approach allows a better understanding of how and why external relations law has developed in line with Union's emphasis on protecting fundamental rights and making these principles part of EU law.

Furthermore, the lack of a theoretical canon in European legal scholarship makes it harder to situate the present question within an already established theoretical framework, which gives rise to another issue. Any attempt to situate European legal scholarship within a theoretical framework or a canon will be met with a confluence of theoretical approaches without an identifiable EU legal canon. In fact, much of the attention given to theoretical developments within EU law has been to European integration, making it difficult to refer to an established theoretical and methodological framework for European legal research. The lack of EU legal canon notwithstanding, the working assumption is that law does inform European integration, and by default all areas of law are important for the development of

[3] Robert Cryer, Tamara Hervey, Bal Sokhi-Bully and Alexandra Bohm, *Research Methodologies in EU and International Law* (Hart Publishing 2011) 18.

the European Union. This is more so for the development of EU human rights law and the international obligations which are extended on the Union as a result.

To this end, to explore the research question and its scope, the implications of a number of salient case-law are explored from a pre and post-Lisbon narrative, which in turn determines the current state of affairs of external relations, bearing in mind that the scope of the research is to delineate a possible trajectory for the future of external EU policy. Adding to this, this methodology enables an understanding of how and when certain steps were taken to formalise efforts into creating the legal framework for external relations law. Furthermore, situating the case-law within a chronological framework allows for an in-depth analysis and review of its development while keeping in mind the limitations of such an exercise, namely that while a chronological exposition of the case-law in question is helpful in clarifying and putting things into perspective, it does not altogether reflect the extent and complexity of the research question, which is why engaging critically with the case-law will give way for more comprehensive and meaningful discussion.

## Literature Review

Given the importance of the subject matter, the literature on the evolution of external relations is extensive. In preparation for this research my first source of reference was *EU Law: Text, Cases and Materials* by Craig and de Burca (2011). The content and clarity of the book allows the reader to grasp and understand the basic foundations and issues in the field of EU law. This enabled the researcher to have a holistic understanding of the framework, within which the research question can be posited and explored further. The second step to substantiate the research question of this study was to turn towards primary sources. In this case, both Treaty provisions and case-law, past and present, constitute a large part of the research guiding this study. A meaningful engagement with the research question on the development of the exclusive and implied external competences in relation to human rights obligations, necessitated a thorough understanding of the case-law from *AERT* to *Open Skies*, *Opinion 2/94, Opinion 1/13* and *Kadi*, among others. The myriad of case-law has not only conditioned the development of exclusive competence in external relations but also

shaped the Treaty provisions. Indeed, a substantial amount of case-law has been codified within the Lisbon Treaty. Furthermore, taking into consideration the relative youth of EU law, the case-law represents the basis of its foundations, and legal framework. In fact, cases such as *AERT* and *Commission v Greece* not only substantiate the present discussion but inform the whole field. Therefore, in order to give a comprehensive understanding of the evolution of EU external relations in relation to human rights, it was important to summarise and take into consideration the main constitutional changes that were brought about with the introduction of the Lisbon Treaty and how these were/are being interpreted in lieu of external competences.

As a main point of reference, Treaty provisions such as Article 21 TEU, Article 3 TFEU, Article 207 TFEU are instrumental to understand the development of the Treaty provisions themselves, and to understand their intent, scope and limitations. For example, Article 21 TEU lays down, for the first time, the legal foundations for all EU external policies. The provision specifies that external relations agreements shall be guided on the principles laid out in the Treaty provisions of Article 3(5) of the TEU; namely that external action needs to be based on the proviso that it promotes and enhances democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, and respect for human dignity. While Article 21 TEU is not frequently referenced in the text, its bearing on the implementation of external relations is a predominant feature as it sets the limits with which the EU is allowed to legislate outside its borders. In this sense, the Lisbon Treaty provides for the most current legal provisions underlining the exclusive competence of EU in external relations.

Another important aspect to this work is the enormous contribution to the scholarship made by EU legal academics. An extremely important source has been the work of Marise Cremona. In her report '*External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law'* (2006), Cremona takes into consideration the relatively recent developments in external relations law. Even though the report has a wider scope, it has allowed me to critically engage with the case-law affecting how exclusive and implied competence in external relations are interpreted by the Court. The report also elucidates how different areas of law and policy

are perceived and viewed through different lenses, affecting how and when exclusive competence is attributed to external relations. Furthermore, Cremona has been instrumental in helping me identify alternative arguments to exclusive EU external competence. In her chapter, *Defending the Community Interest: the Duties of Cooperation and Compliance*, she argues that by giving excessive focus to exclusivity other forms of competence have been overshadowed. Her work is drawn upon, particularly in Chapter Three, as it informs the discussion of the relation between external relations and human rights. This has allowed me to question whether exclusivity in external relations procedures can truly reinforce human rights obligations. In this regard, the work of Emily Reid on environmental protection has also proved important in shaping my arguments on the role of human rights in external relations. Thus, secondary sources posit a unique way to provide critical insights, a contemporary engagement with the issue, and consolidate the presented arguments.

Other works, which I have consulted in order to formulate the research question were, Allan Rosas' *EU External Relations: Exclusive Competence Revisited*, and Rosas and Barbara Brandtner's '*Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice*', Paul James Cardwell's *EU External Relations Law and Policy in the Post-Lisbon Era*, and Craig and de Burca's *The Evolution of Law.* While these works do not feature prominently in this work, nevertheless they provided a concise and elucidatory explanation of the main arguments in this field. Cardwell's work on situating external competence within the wider context of the development of the Lisbon Treaty has brought new insights to the complex relation between Members States and the EU's exclusivity in external relations competence. On the other hand, Rosas' work, as a jurist and CJEU Judge, offers a unique perspective on the issue at hand, and his arguments of exclusive external competence bring a more practical element to the research. Indeed, the essay in question was written in lieu of the introduction of the Lisbon Treaty and it provided for a clear evaluation of exclusive, shared and mixed competence in international agreements. He also stipulated that the question of exclusive external competence has a significant implication both from a theoretical and practical standpoint. By referring to Cremona, Reid and many others, the researcher hopes to provide a clear elucidation on the different facets and dichotomies of EU external relations law.

While bearing in mind the limited nature of this research, the use of these sources were utilised to build a solid argument on the evolution of EU external competence and their future implication for the protection of human rights within the EU.

# 1

# Implied External Competence and its Bearing on the Future of External Relations

## 1.0 Introduction

External Relations posit a complex, multi-dimensional sphere within EU law. The complexity of the case-law in this area outlines the difficulties in determining a clear demarcation in exclusive and implied competences attributed to the EU external relations. This first Chapter will explore the early narratives which have come to determine the framework for an EU external relations policy. In so doing, the discussion is unavoidably based on how implied external competence were advanced by the ECJ in the 1970s through the *AERT* judgement. The implications from this case have generated decades long enquiries and, to date, it remains a yardstick for external competence.

In this respect, by showing examples from the case-law, the question of how and why EU external relations law has come to play such an important role in the development and expansion of the Union, will be explored in same depth. This will be done by outlining the chronological progression of the most salient case-laws and bringing forth the problematics associated with it. As the competences of external relations have an inherent bearing on the expansion of the Union, this first chapter will be primary focused on pre-Lisbon argumentations. Making the distinction between pre and-post Lisbon (see Chapter 2 for a post-Lisbon analysis) will bring out more clearly the nuanced shift in external competence discourse. In this chapter, the analysis will be focused on this trajectory by exploring the continuum between explicit and implied external competence, and the many shades of grey in between.

Furthermore, although the case-law is vast, at times ambiguous and even contradictory, throughout the years, the EU has managed to build a network where it is able to influence

international affairs. In this sense, this chapter serves as an opportunity to explore the activist role played by the ECJ in shaping the margins of power within which the EU can negotiate externally. Therefore, the main aims of this chapter will be to, first, understand more clearly how implied external competences were established and how they gave way to exclusive competences in this field, and secondly to outline the role played by the ECJ in defining and widening the authority and scope of EU external relations.

## 1.1 Widening the Scope of External Competence: The Principle of Implied Competence

The distinction between explicit and implied competence needs bearing in mind. In fact, the EU derives its external competence from two sources: the first are explicit, directly stated in the Treaties; whereas the others are implied. When the EU has exclusive competence over an area that Member States no longer retain the right to legislate, negotiate or finalised agreements with third countries and/or international organisations. The prohibition of these actions is also applicable to agreements carried out between Members States. Member States are therefore not at liberty to pursue these areas. In these cases, it is the EU alone that retains that right. Moreover, since international negotiations often produce comprehensive agreements covering a wide range of issues that go beyond the economical, international agreements often fall within the category of shared competence, which is, so to speak, the middle way. In areas of shared competence, the EU and Member States must coordinate together until a consensus is reached. This distinction between the different types of competences is important to keep in mind – as it will resonate in Chapter Three on the place of human rights in external relations.

At the creation of the European Economic Community (EEC) in 1957, the Union had almost non-existent explicit competences in external relations, safe for two explicit competences referenced in the Treaty Establishing the Community (TEC), which covers the Common Commercial Policy (CCP) and the conclusion of association agreements, enforced by Article 113 and Article 238 respectively. The lack of explicit competences was problematic given that at the time the Community relied heavily on external relations to conclude even internal

agreements.[4] In those early days of the EU, external relations competence was necessarily implied since their explicit countenance was omitted from the Treaties. In this case, the activist role played by the CJEU (ECJ at the time) is undisputed, particularly in developing implied external competence. The Court, aware that the reduced ability to legislate in external affairs restricted the EU from obtaining its objectives, sought to clarify the entanglement.

To this effect, three types of implied powers where developed as a result of judgements issued by the CJEU. The first implied power was derived from the *AETR* judgement (1970) when the question was raised as to whether the EU had the authority to negotiate and finalise an external agreement even when it did not fall within the explicit competence of the Union. The court argued that in cases where a consensus has already been reached internally the EU is inherently authorised, and thereby given implied competences, to finalise external agreements on the subject: '[t]he use of the internal competence, in other words, had created an (implied) external competence.'[5] Given the importance of the *AETR* judgement to this field, its merits are explored in more depth in the next section as this achieves another aim, which is to reflect on the aftermath of the judgement.

Before the Treaty of Lisbon was conceived, the Union strived to create an international presence – arguably having previously done so even without the legal provisions to substantiate its cause. As Cremona points out, *Opinion 1/76* is one of such cases.[6] Notoriously, Treaty provisions did not explicitly state that European Union had an international personality outside of its expressed competences as was otherwise and implied by the ECJ. Incidentally, *Opinion 1/76* gave rise to the second regime of implied powers. In *Opinion 1/76*, the court maintained that the EU has implied powers in external relations, if and when, the attainment of a specific objectives in accordance with Treaty provisions required external actions for its completion.[7] In their *Opinion*, the ECJ explained

[4] Armin Cuyvers, *External Relations and the EU* in Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger and Armin Cuyvers (eds), East African Community Law (Brill 2017) 196.
[5] ibid. 199.
[6] Marise Cremona, *External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law* [2006] FIDE Report, 3.
[7] *Opinion 1/76 Laying-up fund*, par. 3; Cf *Opinion 1/03* [2006] ECR I-01145, par. 115.

that 'that authority to enter into international commitments may not only arise from an express attribution by the Treaty, but equally may flow implicitly from its provisions'[8] thereby legitimising the notion of implied competence.

The third category of implied powers derives from Article 352 TFEU, which recognises the EU's subsidiary powers granting the Union implied subsidiary competence to attain a specific Treaty objective – even though Article 352(4) specifically excludes the CFSP from these allowances. However, while the CFSP is resolutely concerned with external relations it is categorised distinctly from other aspects of external relations, as it is strictly more political in nature, and while a discussion is warranted on the issue of external competence, and the role of the CFSP in relation to human rights obligations, delving into this discussion would be beyond the scope of this work. Despite the exclusion of the CFSP, Article 352 represents an important instrument for implied external competence. Indeed, Article 352 TFEU (ex: Article 308 TEC) was conceived as a flexibility clause to allow the Community significant leeway in dealing with grey areas where the allocation of competence was unclear.[9] The clause was retained and consolidated in the Lisbon Treaty despite giving the EU substantial unqualified powers:

> If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures.[10]

This provision has, in a nutshell, eased the integration process. It has endowed the EU with a mechanism to provide safeguards where and when it was deemed that the European project was in jeopardy, and while it required Council unanimity for its implementation, it still provides the EU with subsidiary external competence. The development, and later on refinement, of these implied competences goes to show that the EU has developed an arsenal of legal instruments with wide-reaching effects on the expansion of external

[8] ibid. *Opinion 1/76*.
[9] European Commission, *The Role of the 'Flexibility Clause': Article 352*, https://ec.europa.eu/commission/sites/beta-political/files/role-flexibility-clause_en.pdf Accessed on: 30/07/2020.
[10] Article 352(1) TFEU.

relations law, but perhaps none have exerted the same influence on external competence as the *AERT* case. For one, all concepts of implied competence are reactionary to the doctrine established from the case.

In the *AERT (ERTA)* case, the participating Member States had concluded the European Transport Road Agreement, 'this agreement regulated the work of crews engaged in international transport and was signed in 1970 under the auspices of the UN Economic Commission for Europe.'[11] This was also the first time that implied external competence were introduced by the Court. In the *AERT* case, the ECJ ruled that the EU (the EC back then) does in fact enjoy an international legal personality, the judgment held that the Commission had the implied competence to enter into agreement(s) with third parties/countries.[12] Furthermore, the EU had the competence to negotiate international agreements provided they fell within its explicit competence. In this particular case, the ECJ determined that the Community can also negotiate agreements in those instances when the EU had already settled on a common internal position even when competences were not explicitly defined by the Treaties. This stance has been noted to have far-reaching consequences. The judgement implies that in order for the EU to establish its place as a meaningful and effective global actor, it needs to build a stronger and more coherent international presence, which is seemingly the *raison d'être* of the ruling, but in so doing it has arguably usurped its conferred powers. The judgement stated that:

> Although it is true that Articles 74 and 75 do not expressly confer on the Community authority to enter into international agreements, nevertheless the bringing into force, on 25 March 1969, of Regulation No. 543/69 of the Council on the harmonization of certain social legislation relating to road transport necessarily vested in the Community power to enter into any agreements with third countries relating to the subject-matter governed by that regulation. This grant of power is moreover expressly recognized by Article 3 of the said regulation which prescribes that: 'The Community shall enter into any negotiations with third countries which may prove necessary for the purpose of implementing this regulation'.[13]

[11] Panos Koutrakos, *EU International Relations Law* in Modern Studies in European Law (Vol.9) (Hart Publishing 2006) 77.
[12] Case 22/70 *Commission v Council (AERT)* [1971] ECR 263.
[13] Ibid. paras [28–31].

In these passages, the ECJ established that a harmonisation process on road transport was already underway and deduced that the inevitable conclusion was to confer legislative powers – competence – to the EU. To this day, *AERT* doctrine remains 'the basis and starting point of the Court's reasoning on exclusivity in relation to implied powers.'[14] Therefore, in its ruling the court sought to regulate external representation, particularly on issues where the EU had already agreed on a common internal policy, even when these practices did not fall directly within the EU's express competences. The court determined that since there was an implicit agreement on the way forward and procedures were already in force, the Community has an implied competence to negotiate and finalised an external agreement on the subject.[15] This principle was again confirmed in the *Kramer* case, with the court arguing once again that the Union's authority to negotiate and enter into international agreements were not only instigated from the Treaty's expressed competence but also from the recognition that other provisions contained in the Treaty may give rise to implied competences.[16]

## 1.2 Doctrinal Uncertainty in *AERT*: Tensions between the EU and Member States

The institutional landscape of the EU foreign affairs is rather complex and multifaced. In an anecdotal story, Henry Kissinger has been reported saying 'if I want to talk to Europe, who do I call?[17] The tell-tale signs of an exaggerated account are there, but the root of the issue perhaps not. Even with a number of early seminal judgements, there is no single clear authority on external relations, and to the external world the procedural mechanism of the EU remains an enigma. The European Commission, The European Council, The Council of Ministers and The Common Foreign and Security Policy (CFSP) all have stakes in foreign relations –and rightly so given that the subject matter is placed within an international context that affects the internal dynamics, international organisations and third countries. The inter-governmental dominance in the field is also an acknowledged fact that has

[14] Cremona (n 6) 10.
[15] Paul Craig and Grainne de Burca, *EU Law: Text, Cases and Material* (6th edn) (Oxford University Press 2015) 325.
[16] Case 6/76 *Kramer* [1976] ECR 263, para. [82].
[17] Cuyvers (n 1) 196.

remained steadfast since early on.[18] As Duke writes, 'historically there is evidence of at least concern, if not tension, between the predominant Community aspects of external relations and the European Political Cooperation (EPC) process that emerged in 1970'.[19] The EPC is now obsolete – replaced all together with the CFSP but in the 1970s, when the EPC was still in operation, the pressures to develop a cohesive EU external policy were real, causing the residual tensions to permeate across European Institutions.

As this section seeks to explore the expansion of EU external relations law through implied external competence, it is also important to note how these judgements, particularly *AERT*, were not without their repercussions. *AERT* had created a quasi-permanent doctrinal uncertainty that resulted in strains between the Union and its Member States. Particularly, the inclusion of this paragraph from the ruling is noteworthy both for its ambiguity and far-reaching consequences: 'the Community alone is in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the Community legal system'.[20] Not only does this imply an unobstructed license to carry out external agreements but it does so without giving further clarifications as to its reasoning and conclusions.

Another point of contention derives from the judgement's seemingly misconstrued reading of the principle of conferral. The principle of conferral, indelibly inscribed in the Treaty of the European Union, clearly states that '[t]he Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.'[21] This bounds the EU to exercise its powers only in those areas where it is expressly permitted and empowered to do so by its Member States. This thereby confines and contains its legislative powers with specific obligations beyond which the EU is, strictly speaking, not allowed to engage, special provisions notwithstanding. The implications of the *AERT* ruling seems to have at best altered slightly and at worst completely overturned the limits set by the principle. Therefore, the principle of conferral ascribes powers to the EU according to the

[18] Cuyvers (n 1) 197.
[19] Simon Duke, *Areas of Grey: Tensions in EU External Relations Competences*, (2006) EIPASCOPE 2006/1, 21-27, 21.
[20] *AERT* (n 12) para. [15].
[21] Article 5(2) TEU.

Treaty and the specific objectives of the EU, it is also resolutely significant in defining the conditions within which the European Union is given the authority to exercise its powers. Following *Case 22/70* and *Opinion 1/76*, the ECJ decided that it is appropriate for the Union, in the absence of expressed powers in external affairs, to take into consideration the existence of implied conferred powers. As the Case and Opinion indicated, the existence of implied powers offered renewed dynamism to external relation law, as the EU's conferred powers now seemed unbound by accepting and enforcing the premise that the Union has implied external competence.[22]

However, the doctrinal merits and the reasoning behind the rulings have been put into question. Furthermore, in the *AERT* judgement the Court saw to clarify the ambiguity by making a clear distinction between the EU 'capacity' to negotiate agreements and its 'authority' to negotiate said agreements.[23] The distinction between 'capacity' and 'authority' refers to the EU's autonomy to legislate according to the explicit competences recognised by the Treaties in the former, and the EU legal *potential* to negotiate in the latter. While the distinction was included in the deliverance of the judgement, it did not quite succeed in satisfying the many loopholes in the argument.

Nevertheless, the importance of implied powers to expand European integration cannot be ignored even in light of these shortcomings but neither can one overlook the tensions between the EU and the Members States.[24] External competences posit a political and legal quagmire. Owing to the many players and lack of overall authority in the field, conflicting tensions are bound to occur, which the Court is not immune to ignore.[25] In this regard, issues can manifest in two ways. As Villalta Puig and Darcis point out:

> Member States maintain that the EU is an international organisation whose powers come from its Member States and that any attempt to redraw the precise delineation of powers entertains a violation of their national sovereignty in the field of foreign affairs. On the other

[22] Gonzalo Villalta Puig and Cédric Darcis, *The Development of European Union Implied External Competence: The Court of Justice and Opinion 1/03* (2009) A.E.D.I., vol. XXV, 503.
[23] Koutrakos (n 8) 79.
[24] See Martijn Holterman, *The Importance of Implied Powers in Community Law* (LLM Thesis, Rijks Universiteit Groningen, 2005).
[25] Villalta Puig and Darcis (n 22) 503.

> hand, the EU maintains that extensive implied external powers are necessary in order to enable its institutions to achieve the aims and objectives of the EC Treaty across frontiers.[26]

This implies a disturbance between observing the principle of conferral and respecting national sovereignty. In fact, the *AERT* ruling seems guilty of attempting to do precisely that – overruling the delineation of powers set by Member States in favour for a cohesive EU external relation law and policy. It is not at all surprising to observe friction between national sovereignties set in motion by the continued efforts to advance the European integration. As subsequent case-law will attest, despite these inconsistencies the ruling did not prohibit Member States from entering into international agreements – 'its deficient reasoning and problematic structure notwithstanding, the judgment in *AETR* made it clear that, in its international relations, the exclusive nature of the Community's implied competence would not necessarily exclude the Member States from negotiating and concluding international agreements'.[27] This provides the appearance that powers are balanced between the Member States and the EU. However, given the importance of the case, the persistent issue remains on how to provide a balanced, contextualised and reasoned understanding of the *AERT* doctrine that can justify its enforcement. *Opinion 1/03,* over thirty years later, attempted to do precisely that.

## 1.3 Refocusing Implied External Competence post-*AERT*: The *Open Skies* Cases[28]

Another important implication which derives as a direct result of the case-law is that the EU considers international agreements superior to national secondary legislation.[29] This implies that the introduction of international agreements can, at the very least, affect national legislation, and at most render it obsolete. The Member States' reluctance to waive away

[26] Villalta Puig and Darcis (n 22) 503.
[27] Koutrakos (n 8) 88.
[28] *Open Skies* comprises of the following cases: Case C-467/98 *Commission v Denmark* [2002] ECR I-9519; Case C-468/98 *Commission v Sweden* [2002] ECR I-9575; Case C-469/98 *Commission v Finland* [2002] ECR I-9627; Case C-471/98 *Commission v Belgium* [2002] ECR I-9681; Case C-472/98 *Commission v Luxembourg* [2002] ECR I– 9741; Case C-475/98 *Commission v Austria* [2002] ECR I– 9797; and Case C-476/98 *Commission v Germany* [2002] ECR I– 9855.
[29] See Joined Cases 21 to 24/72 *International Fruit Company NV and Others v Produktschap voor Groenten en Fruit* [1972] ECR 1219.

their competence in external relations is partially symptomatic of this issue. This problematic also raises obvious questions on the productivity and reliability of the EU as an international actor. The contentions between Member States and the EU hinders the overall process of negotiating, finalising and implementing international agreements, and that is nothing to say on how difficult the process can be for third countries to enter and finalise agreements with the EU.[30] In this context, following *AERT*, the Court sought to consolidate its previous judgements by providing a number of clarifications in subsequent case-laws. One issue with this approach is that, despite the need for sorely needed elucidations after *AERT*, any derivations made from case-law can only be reactionary to a specific case, thereby confined to a specific area. Nonetheless, the Court provided ample examples which not only tested the limits of *AERT,* but also put the principle into practice.[31]

One such occasion was provided in *Opinion 1/03*. In *Opinion* 1/03, the ECJ had to determine whether the Lugano Convention fell within the exclusive external competence of the EU. The Court took this opportunity to look into the extensive case-law which had accumulated post-*AERT*. *Opinion 1/03* is significant because it sought to codify and clarify once and for all the issue of external competence.

> *Opinion 1/03* redefined the concept of exclusivity. The new definition not only takes into account the respective subject matter of international agreements and EU rules, but it also examines the content, nature, and future foreseeable development of EU law in order to determine whether the relevant international agreements will affect it.[32]

Here, Villalta and Darcis take into account how AG Rosas uses the *AERT* doctrine to reinforce its jurisdiction by providing a number of clarifications to its teleological functions.

In the *Open Skies* cases, seven Member States were charged with violating the premise of exclusive external competence after having finalised a set of bilateral agreements with the United States 'to establish a single air transport market'. The agreement was negotiated without the involvement of the EU, which the Commission contested, arguing that the Commission had previously petitioned with the Council for a mandate to negotiate an EU-

[30] Villalta Puig and Darcis (n 22) 503.
[31] See *Opinion 2/91* [1993] ECR I-01061; and *Opinion 1/94* [1994] ECR I-05267.
[32] Villalta Puig and Darcis (n 22) 504.

US agreement on sea and transport, which stated that 'the Council may, acting by a qualified majority, decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport.'[33] Because of this explicit mandate the Commission produced Council Regulation (EEC) No. 2407/92 of 23 July 1992 (on the licensing of air carriers), Council Regulation (EEC) No. 2408/92 of 23 July 1992 (on access for EU air carriers to internal air routes), and Council Regulation (EEC) No. 2409/92 of 23 July 1992 (on fares and rates for air services). The defence line adopted by the EU claimed that since it had already produced secondary legislation on the subject matter, as per *AERT* doctrine, the EU has *authority* over the area of air transport. Through the *Open Skies* cases the Commission took the opportunity to solidify its position on external competences by reaffirming the same provisions made in *AERT*. In *Commission v Belgium*, one of the cases in *Open Skies*, the Court issued the following:

> […] the Community's competence to conclude international agreements arises not only from an express conferment by the Treaty but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions; […] the Member States no longer have the right, acting individually or even collectively, to undertake obligations towards non-member countries which affect those rules or distort their scope; and that, as and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards non-member countries affecting the whole sphere of application of the Community legal system.[34]

The parallels with *AERT* are easily discernible, and the line of argumentation follows closely from that previously made not only in *AERT* but also in *Opinion 1/76*. Particularly, the reference to implied external competence that stems from secondary legislation resonates with the conditions allowing the EU to negotiate and finalised international agreements in a specific area. However, *Commission v Belgium* goes a step further since, in this instance, the Court specified the conditions necessary to infer implied competence.

> According to the Court's case-law, […] the Court has held that Member States may not enter into international commitments outside the framework of the Community institutions, even if there is no contradiction between those commitments and the common rules (*Opinion 2/91*, paragraphs 25 and 26). Thus it is that, whenever the Community has included in its internal legislative acts provisions relating to the treatment of nationals of non-member

[33] Article 80(2) TEC.
[34] Case C-471/98 *Commission v Belgium* [2002] ECR I– 9681, para. [90].

> countries or expressly conferred on its institutions powers to negotiate with non-member countries, *it acquires an exclusive external competence in the spheres covered by those acts* (emphasis added) (*Opinion 1/94*, paragraph 95; *Opinion 2/92*, paragraph 33).[35]

By way of explaining the ruling, three primary conditions must be met for the EU to acquire exclusivity in external issues. The first condition is that the international agreement in question must fall within the scope of the EU's objectives. The second condition is that references to any internal agreement must fall within an area that is already covered by EU rules. The third condition is that the relevant international agreement must fall within an area where the EU has achieved complete harmonisation.[36]

This new mechanism, introduced to complement *AERT*, signifies the EU's preoccupation for coherence and consistency within its legal order, as will be made clearer in the next Chapter. The continued reinforcement of external implied competence has provided the needed grounding to implement an effective external relations policy, while strengthening its legal basis. In fact, in one of her papers, Cremona cautions against a new interpretation of external competence from the *Open Skies* cases: '*Opinion 1/03* should not be regarded as opening the door to a new wider reading of the scope of exclusivity, but rather as a signal that the approach to be adopted should focus on the overall effect and nature of an agreement on the Community legal order.'[37] Cremona rightly points out that *Open Skies* do not signal a new point of departure in the understanding of external competence but it should be seen as an indication that the CJEU is now giving more attention to the overall impact of international agreements and their effects on the future of the EU, as opposed to merely focusing on the issue of competence.

## 1.4 Conclusion

The influence exerted early on by the Community on the field of external relations begot from the assumption that express competences in external relations were a necessary

[35] *Commission v Belgium* (n 34) paras [94 – 96].
[36] Villalta Puig and Darcis (n 22) 508.
[37] Cremona, *External Relations of the EU and the Member States* (n 6) 5.

means to expedite European integration. Indeed, taking the *AERT* judgement within its context, it looks as an attempt by the ECJ to define its supranational authority. When viewed from this angle, the *AERT* judgement is reminiscent of the *Van Gend en Loos*[38] and *Costa*[39] judgements, where the Court primed the principles of supremacy and direct effect in the respective cases. *Case 22/70* (*AERT*) took place within the same time frame and, taking into consideration the legal mindset of the time, the judgement should not be seen as a disproportionate response. However, what is surprising is that the principle of implied competence is defined by a number of inconsistencies. At the time of the ruling, Pescatore wrote that:

> [i]t appears, on balance, that though the Court does by no means disregard the fact that a given agreement may in some of its parts pertain to the province of the Community and in part to the jurisdiction of the Member States, there is no place in the system for the construction of "concurrent" or "parallel" powers. In other words, whenever, and so far as, the matter belongs to the Community's sphere, jurisdiction over it is exclusive of any concurrent power of Member States'.[40]

Incidentally, Pescatore had defended a more restrictive approach towards external competence.[41]

The seminal rulings of *AERT*, *Kramer*, *Opinion 1/76* and *Open Skies*, amongst others, shaped the legal language of EU external relations law. They have defined and inspired a generation of EU legal thought and enabled the EU not only to expand and protect its external interests but to fortify its policy to the extent that EU is now widely recognised as an influential global player, particularly in trade agreements, but even trade agreements have become increasingly comprehensive to include clauses of a socio-political nature – clauses on the protection of human rights, observance of democratic principles and rule law are now a fixture in international agreements. As a whole, the development of implied external competence can be read as an attempt bore out of the need to solidify the doctrinal foundations of the EU and provide coherence to its policy. In this respect, the scope of

[38] Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.
[39] Case 6/64 *Costa v ENEL* [1964] ECR 585.
[40] Pierre Pescatore, *External Relations in the Case-Law of the Court of Justice of the European Communities* (1975) 12 CML Rev 615, 624.
[41] Koutrakos (n 8) 87.

Chapter One was to situate the discussion within its legal and political framework, preparing the reader for an analysis on the current state of play of external relations, which takes place in the next Chapter. It is also worthy of consideration to note that EU law is now more overarching, which might render previous rulings in external affairs obsolete but not the *AETR* ruling. As will be explained in the next Chapter the *AETR* judgement remains a defining legal instrument, even post Lisbon.

# 2

# Edging Towards an Impasse? External Competence Post-Lisbon

## 2.0 Introduction

In a post-Lisbon scenario, the EU retains its capacity to act as a legal subject in external affairs. To a large extent, its role in international relations has been solidified by the introduction of the Lisbon Treaty but the EU's competence in external matters is not unqualified. In this respect, this chapter explores the implications of the introduction of the Lisbon Treaty and the continuation of case-law in the area of external relations law. This enables a discussion and comparison of pre and post-Lisbon external relations law. The overall scope is to be able to use this discussion as a segue into the effective implementation of the EU's human rights obligations in the final Chapter.

The primary aim of the first chapter of this research has been dedicated to the introduction and application of implied external competences by the ECJ. In a post-Lisbon scenario, the quagmires that were noticeable before are still present. Despite the extensive case-law, the CJEU has yet to establish a clear balance of powers between the EU and Member States in external relations. The main, obvious difference will come through the Treaties, as now implied competences are legally acknowledged in the Lisbon Treaty. To this effect, the first section of this chapter explores the intricacies and implications that the Lisbon Treaty has introduced to the language of external relations. In the following sections my attention will be directed more specifically to the case-law, paying particular attention to *Opinion 1/13* as a marked reflection of post Lisbon case-law on external competence. While none of the post-Lisbon case-law has been as ground-breaking as the *AETR* judgement, as will be made clearer below, external competence case-law saw a dramatic increase in recent years, so while the external competences now have a legitimate legal basis, they still raise a number

of issues. The scope of this chapter is therefore to analyse and critique the reasons behind the increase in the case-law and present potential arguments in moving forward.

## 2.1 Codifying and Clarifying External Competence in the Lisbon Treaty: A Failed Success?

Given the volatile nature of politics, to say that the political and inter-institutional dynamics of the 1970s has changed would be an understatement. The spirit with which early EU integrationists approached its expansion is today unceremoniously put into question. The supranational power of the EU is seen all the more as a threat to national power and, to this effect, the change in dynamics has a direct bearing on the future of the EU in general and more specifically on its policy and priorities. In external relations, this quagmire is more pronounced for reasons already explored in Chapter One. The Lisbon Treaty, in scope and in method, remains an attempt to lay these dichotomies to rest by presenting a Treaty which was for the members and by the members. In this respect, this section is an exploration of those provisions in the Lisbon Treaty that are most at play in external competence in order to understand whether the Court has been able to clarify the disambiguation introduced by the *AETR* doctrine.

The point of departure for this discussion is to situate the Lisbon Treaty in a context. The Treaty does not exist in a vacuum, and as such it must be read as an attempt to codify and clarify not only the case-law but also to pacify the political players. It was thereby an attempt to establish a balanced relation between the Union and its Member State. However, maintaining that balance has become increasingly difficult even after the Treaty has been in place for almost eleven years. Interestingly enough, while the institutions which are more political in nature continue to struggle with this balance, the CJEU on the other hand has stood remarkably unobstructed, its positions have not diverted substantially, and while it is a largely sweeping statement to make, the CJEU has maintained an quasi-apolitical stance – or as apolitical as it can be, protecting only those interests that affect the EU legal order. The Court has demonstrated an ability to codify, systematise and clarify early case-law and translate it into a proper EU external relations law. In this sense, the CJEU has perhaps served

as an arbiter between the EU institutions by carefully maintaining a balance between the interests of Member States and interests professed by EU integrationists.

At present, external action is governed by a number of Treaty articles sanctioning external action and regulating external competence, exclusive or otherwise. Article 216 TFEU and Article 3 TFEU stand as being immediately recognisable and important legal instruments for this discussion, whereas Articles from 2-6 TFEU are significant in so far as they list the areas of exclusive and shared competence, which the EU is allowed to legislate externally.[42] The general conditions for the EU to act externally are laid down in Article 216(1) TFEU. The article refers to both the expressed competence and the implied competence inferred from *AETR*, surmising, if not very clearly, the scenarios where implied competence can be invoked:

> The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.[43]

The wording of the Article above is important since post Lisbon case-law is mired by a number of uncertainties that have resulted precisely from the language used in this article. The line 'where the Treaties so provide or where the conclusion of an agreement is necessary' encompasses to a large extent the previous fifty years-worth of case-law in external relations. This provision not only reaffirms the external character of the European Union, but it does so by legitimising implied competence even though their mere existence has been systematically contested since their introduction in *AETR*. Adding to this, Article 216(1) not only seeks to codify the case-law but also to clarify the 'existence' of external competence. Indeed, the article determines when and where the EU is given external power to act. The issue of external competence is then compounded by Article 3(2) TFEU:

[42] Ramses A. Wessel and Joris Larik, *EU External Relations Law: Texts, Cases and Materials* (Hart Publishing 2020) 63.
[43] Article 216(1) TFEU.

> The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.[44]

As the provision explains, Article 3(2) TFEU lays out the scope and reasons which allow the EU to act externally. The two articles – Article 216(1) and 3(2) – make up the 'existence' and 'scope' of EU external competence. While Article 216(1) is concerned with delineating how and when the Union is to infer external powers, Article 3(2) covers the nature and scope of EU external powers in concluding international agreements. Before the EU can enter into such agreement the nature and scope of the agreement must be determined whether it falls within the EU's explicit competence thereby granting the EU a mandate to negotiate on its own. Alternatively, an international agreement can fall under shared competence which necessitates the approval of both EU and its Member States. After the nature of the agreement is determined, the aim of the agreement is explored to establish whether the EU has competence to engage in the agreement from a legal standpoint, as stated in Article 3(2).[45]

Adding to this, as explained in Chapter One, the Union's power to engage in external relations relies entirely on the understanding that it can do so on the basis of conferral. The principle of conferral carries with it an obligation to act only in matters where the EU is granted the power to do so. In this sense, unlike Member States, the European Union cannot do away with legislating externally without proper justification. What the Lisbon Treaty has introduced is by no means a revolutionary mechanism for external relations; rather it has provided a synthesis of over fifty years of EU jurisprudence. The Lisbon Treaty has successfully managed to systematise existing case-law and EU core principles, as a byway of achieving the necessary solid foundations for a constitutional framework – the introduction of which failed to gain consensus. The clarification and codification of external competence was one of the main scopes of the Lisbon Treaty, and by and large, it has been a successful pursuit. However, with regards to the clarification of external competence, the Lisbon Treaty is found to be somewhat lacking.

[44] Article 3(2) TFEU.
[45] Wessel and Larik (n 42) 64.

The issue of competence is an age-old problem. While the Lisbon Treaty is the EU's most concise and meticulous legal document to date, it arguably fails to clarify the grey areas of external competences. In the build-up to the Lisbon Treaty, the *Laeken Declaration* of 2001 speaks at length how the 'new' Treaty – referring to the proposed Lisbon Treaty – is meant to simplify and clarify how competences are divided between the EU and its Member States.[46] While the intention of the Lisbon Treaty was meant to create a homogenous legal document, nearly eleven years after its introduction, it appears that it has failed to provide the necessary elucidations to secure a seamless 'division of labour' with regards to external competences.[47] The exorbitant number of cases on external competence that have been heard before the CJEU (and almost always before the grand Chamber) attest to this.

The contested issue results from a misconstrued understanding of Article 216(1) and Article 3(2). Despite their intended aim to create a cohesive system for external competences, owing to the misfortunate wording of the two clauses, they raise a number of unnecessary overlaps. For one, as was the case in *AETR,* the existence of external competences is often decided on arbitrary conditions, specific and technical in nature, determined on a case by case basis. A method that has failed to provide for a holistic understanding and interpretation of external competence. Adding to this, implied competences also remain somewhat questionable by their very definition. As Andrea Ott points out, in the Lugano Convention case (*Opinion 1/03*)[48], it took the CJEU five pages to systematically explain the complexity of external competence.[49] According to these measures, Article 216(1) and Article 3(2) are not nearly comprehensive enough to account for the nuanced complexity of external competence, and this lack of clarity in the Treaty accounts for the increase in cases on external competence.

[46] European Council, *Laeken Declaration on the future of the European Union* (14 and 15 December 2001) Bulletin of the European Union. 2001, No 12. Luxembourg: Office for Official Publications of the European Communities. "Presidency Conclusions of the Laeken European Council, 19-23.
[47] Wessel and Larik (n 42) 64.
[48] See analysis of *Opinion 1/03* in Chapter 1.3.
[49] (n 42) 64.

## 2.2 Making the Case for External Competence: Case-Law After Lisbon

The CJEU has, perhaps not so inadvertently, been set to task to provide the much-needed equilibrium in external competence. That there is still tension between Member States and the EU on the issue of competence even after Lisbon comes as no surprise. The need for further clarification has therefore been growing in parallel with the political tensions and pressure. The *AETR* misleadingly equates the existence of external competence with exclusivity and seeing as the Lisbon Treaty was not quite able to satisfactorily clarify this notion, contestations persists well to this day, while the *AETR* doctrine has remained a steadfast guidepost in all the rulings on external competence. In this section, a closer look at the post-Lisbon case-law shall be taken in order to draw some parallels with *AETR* and explore the nature of external competence post-Lisbon. Two aspects will be made clear; firstly, the political incongruencies are still resolutely present between Member States and the EU, and secondly, the Court persists in reaffirming the *AETR* doctrine.

Article 3(2) TFEU has resulted in a number of cases before the Court. In particular, the wording of Article 3(2) 'in so far as its conclusion may affect the rules or alter their scope' proved the most problematic. In 2014 alone, three consecutive rulings were made on the interpretation of the Article within the space of three months.[50] In all instances, the cases raised by Member States or the Council, were rejected by the CJEU.[51] In *Broadcasting Organisations* the CJEU annulled a Council Decision on the grounds that the 'mixed-setup' – in mixed agreements both the Members States and Commission are equal partners – of the negotiations in question breached Article 3(2). In brief, consistent with earlier rulings, the CJEU determined the EU should have had exclusivity over broadcasting rights given that the EU had already established an internal position on the matter. Similarly, in *Green Network*, a preliminary ruling was filed by the *Consiglio di Stato* (Italy) on the promotion of electricity produced from renewable sources in the internal electricity market and the agreement between the EEC and Swiss Confederation (1972). The preliminary ruling asked for a

[50] See Case C-114/12 *Broadcasting Organisations* [2014] ECR I-2151; Case C-66/13 *Green Network SpA v Autorità per l'energia elettrica e il gas* [2014] ECR I-2399; and *Opinion 1/13* Convention on the civil aspects of international child abduction [2014] ECR 462/05.

[51] Friedrich Erlbacher, *Recent Case-law on External Competences of the European Union: How Member States Can Embrace Their Own Treaty* (2017) CLEER, CLEER Papers 2017/2, 24.

clarification on Article 3(2) TFEU and 216 TFEU. It bears remembering that, under Article 3(2), the EU qualifies for exclusivity when the conclusion of an international agreement is deemed to 'affect common rules or alter their scope', which posits the referring court's main question. By way of clarifying its positions, CJEU made the following points:

> The words used in that last clause correspond to those by which the Court, in paragraph 22 of the judgment in *Commission v Council*, defined the nature of the international obligations which Member States may not enter into outside the framework of the Community institutions, when common rules have been promulgated by the Community for the attainment of the objectives of the Treaty.[52]

In the *Neighbouring Rights* judgement (*Commission v Council*) - the judgement mentioned in the ruling – on the protection of intellectual property, the CJEU refers to *AETR* for an explanation on what can hinder the scope or the common rules of the Union.[53] The Court explained that Member States are obliged not to engage in agreements which may hinder the common rules or the scope of the Union. This reasoning is partly lacking in *AETR,* and it remains partly veiled now. Nevertheless, throughout its rulings the CJEU has yet to waiver from this position. In subsequent judgments following the *Green Network* case, the Court restated that its interpretation of Article 3(2) falls within the established framework of *AERT* case-law. The implication being that since it has been established, reaffirmed, and now legally binding within the Lisbon Treaty, it cannot be altered:

> According to that case-law, there is a risk that common Community rules might be adversely affected by international commitments undertaken by Member States, or that the scope of those rules might be altered, which is such as to justify an exclusive external competence of the Community, when those commitments fall within the scope of those rules. In particular, the scope of Community rules may be affected or altered by such commitments where the latter fall within an area already largely covered by such rules.[54]

In this instance, the CJEU makes reference to *Opinion 1/13*, which is covered in more depth in the following section. From the Court's reasoning, it is quite clear that the CJEU is ready to protect, by virtue of the established case-law, the negotiating mandate of the European Union if and when it deems that the outcome of an international commitment may

[52] Case C-66/13 *Green Network,* para. [27].
[53] Case C-114/12 *Commission v Council*.
[54] *Green Network* (n 52) para. [29].

adversely affect or condition in such a way to be considered limiting to the future of the Union:

> That said, only conferred powers being vested in the Community, any competence, especially exclusive competence, must have its basis in conclusions drawn from a comprehensive and detailed analysis of the relationship between the international agreement envisaged and the Community law in force. That analysis must take into account the areas covered by the Community rules and by the provisions of the agreement envisaged, respectively, 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 Community rules and the proper functioning of the system which they establish.[55]

Each of these paragraphs of the preliminary ruling either infers or explicitly mentions the *AETR* ruling. The clear implication is that the interpretation of Article 3(2) is constrained by the framework of *AETR* doctrine. Nevertheless, as seen above from para. 33 of *Green Network*, the Court is mindful of the legislative limitations of the EU. If nothing else, the Court has been consistent in its rulings on external relations. However, the same para. 33 of *Green Network* represents a conundrum. By recognising the principle of conferral, the CJEU acknowledges the limits of the Union in external relation, yet the CJEU goes out of its way to protect the functioning of the EU legal system by widening the scope of external competence. Another problematic arises from the fact that, despite repeatedly asserting that the interpretation of Article 3(2) must be based within the explicit framework of the *AETR* doctrine, the court still fails to establish a legitimate understanding of how international commitments and agreements may be considered to alter the scope or breach common rules of the Union.

In a more recent ruling, the deliverance veered more or less on the same path. In *Germany v Council (OTIF)*, Germany, supported by France and the United Kingdom, argued that the Union cannot act externally in an area of shared competence – in this case, the subject matter was railway transport – especially when it has not yet been subject to an EU internal legislative process, which would in theory fall outside the scope of Article 3(2). On these grounds, Germany challenged a Council Decision for arbitrarily issuing a common position for the OTIF Revision Committee regarding a number of proposed amendments to the

[55] *Green Network* (n 52) para. [33].

Convention concerning the International Carriage by Rail (COTIF).[56] The argument put forward by Germany, supported by the other two countries, maintained that the lack of an internal decision on the railroad agreement should have effectively prevented the Council from establishing a common line to take externally.[57] Even more so, considering that the issue in question relates to transportation, an area that remains exclusively in the hands of Member States. However, the case was summarily dismissed in 2017 by CJEU even though by its own admission 'the Union had taken no internal action, by adopting rules of secondary law, in that field.' [58] The implication here is that, even in areas of shared competence, the EU is not automatically precluded from attaining exclusivity, making this perhaps the strongest statement since *Opinion 1/13*.

## 2.3 Reflecting on the Future of External Competence: *Opinion 1/13*

Though by no means as ground-breaking as *AETR*, *Opinion 1/13* represents the present direction of external competence, and therefore, it should be considered as the culmination of the post-Lisbon case-law on external competence. The judgement was delivered after four years the Lisbon Treaty came into force and is among the first in a long series of similar cases representing a new line of enquiry in external competence. For the first time since the *Lugano Opinion* (*Opinion 1/03*) – which at the time strongly influenced the drafting of the Treaties – the CJEU, in *Opinion 1/13,* has made a remarkable effort to systematise the case-law. It made a clear distinction between the existence of an EU competence on the one hand and the nature of that competence on the other.[59]

In terms of context, the EU was unable to ratify international agreements until 2007. The situation was remedied with *Opinion 1/03* (Lugano Convention) but until the ruling was delivered the Union was not in a position to accede international agreements, conventions etc. and this left Member States to their own devices and empowered to accede to

[56] Case C-600/14, *Germany v Council* (OTIF).
[57] ibid. (n 56).
[58] ibid. para. [67].
[59] Erlbacher (n 51) 9.

international agreements at their discretion. This means that even though the EU at the time could not be a member of the Hague Convention – the EU became party to the Convention in 2007 – it was quite aware that its Member States were party to a number of international agreements, which included the Hague Convention. The implication for the EU meant that the road for becoming an influential player in international law and continuing its mandate through secondary legislation made it that much more complicated for the EU to achieve. This issue was particularly prevalent in *Opinion 1/13*. In an effort to close the gaps in its external policy, created by the number of international agreements to which the Member States are party to, the EU decided to play to its own strengths. Indeed, 'the Court's priority has been to ensure the integrity and internal functionality of the EU system'[60] and in that it has been successful and consistent.

The subject matter of *Opinion 1/13* deals with the 1980 Hague Convention on the civil aspects of international child abduction. More specifically, the opinion was pursuant of Article 218(11) under which the CJEU was to determine whether third countries could or could not join the Convention. Article 218, as a whole, lays down the principle mechanisms for European Institutions to carry out international agreements. Article 218(11) is more specifically concerned with granting Member States, the European Parliament, the Council or the Commission the prerogative to obtain the opinion of the Court of Justice on whether any proposed agreements are *de facto* and *de jure* compatible with the constitutional constraints of the Treaties, thereby subscribing to the common rules and scope of the EU. In cases where the CJEU has adverse reactions to the proposed agreement, it must be amended before it can be concluded. In *Opinion 1/13*, the CJEU was asked whether potential breaches could be observed under Article 218(11). In this sense, *Opinion 1/13* is arguably one of the most important in post-Lisbon case-law. Para. 69 of the *Opinion* clearly notes, in tandem with *AETR* doctrine, the existence and nature of external competence:

> The competence of the EU to conclude international agreements may arise not only from an express conferment by the Treaties but may equally flow implicitly from other provisions of the Treaties and from measures adopted, within the framework of those provisions, by the EU institutions. In particular, whenever EU law creates for those institutions powers

[60] Marise Cremona, *Opinions 1/13 and 2/13 and EU External Relations Law*' in Pietro Franzina (ed.) *The External Dimension of EU Private International Law after Opinion 1/13* (Intersentia 2016) 20.

> within its internal system for the purpose of attaining a specific objective, the EU has authority to undertake international commitments necessary for the attainment of that objective even in the absence of an express provision to that effect […] The last-mentioned possibility is also referred to in Article 216(1) TFEU.[61]

It bears remembering that through Article 216(1) explicit external powers may be conferred to the EU either by the Treaty or through secondary acts derived from regulations and directives. Furthermore, since external competence can also be obtained when and where it is determined necessary to achieve a specific Treaty objective. Through all of this, the system guarantees the *effet utile* of EU law, and perhaps here the court is guilty of protecting the superiority of its law by reaffirming a doctrine with the intention to reinforcing its effectiveness. Indeed, in paragraph 71 of the *Opinion,* the court makes it clear that judgements carried out in *AETR* and *Open Skies* more than sufficiently explain the criteria under which exclusive external competence can be invoked.

However, for all intents and purposes, *Opinion 1/13* deals with establishing a balance of power between the EU and Member States, which the court has the means to resolve through Article 218(11).[62] *Opinion 2/13,* on the accession of the European Union to the European Convention on Human Rights, is quite similar in this regard although the subject matter refers specifically to the accession of the EU to the ECHR.[63] In both cases, as Cremona points out, the CJEU has clearly defended the interests of the EU legal order. Indeed, the arguments presented by the Court are based on old reasoning, having maintained the same line since *AETR*. The Court's immediate response to *Opinion 1/13* was to reaffirm how the EU has internal competence in the fields covered by the Convention; it confirmed that the EU has legislated on those issues, thereby granting the Union *de facto* and *de jure* external competence in this field. Even though the specific contents of the Convention do not fall within the exclusive competence of the EU, under Article 3(2), the stipulation is that 'when [their] conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope', and since the CJEU observed that the accession of third

[61] *Opinion 1/13*, para. [69].
[62] Cremona, *Opinions 1/13 and 2/13* (n 60 )3.
[63] See Chapter 3 for an analysis of *Opinion* 2/13.

parties to the Convention may defy or alter the scope of the common rules of the Union, it maintained that the EU has exclusivity over the Convention.

In a way, *Opinion 1/13* can be understood against the backdrop of a series of judgements in which the CJEU explores the implications of the Lisbon Treaty on external relations. The reaffirmation of the existence of implied external competence came at a time when the Court was under pressure to provide adequate clarifications on external competence, and while the CJEU has taken an objectively conservative stance post *AETR*, it has been resolute to uphold its judgment. What can be derived from *Opinion 1/13* is that the 'new' line to take in external relations, is that the CJEU continues to take seriously the role of the EU as a key global player by expanding its jurisdiction in line with the provisions of the Treaties and maintaining a consistent legal order.

## 2.4 Conclusion

Despite the increase in litigation, the CJEU has to a large extent sought to codify, and clarify the case-law by reaffirming the principles of implied competence: '[…] the Lisbon Treaty inserted a new provision in the TFEU which was intended to reflect the doctrine of implied powers as developed by the case-law of the Court of Justice since the famous *AETR* case of 1971.'[64] In this sense, although it is perhaps unfair to state, the Lisbon Treaty introduced no new concepts particular to external competence. The *de facto* interpretation of the CJEU seems to satisfy even the Member States at the outset of the Treaty. It can be easy to forgo that the contents of the Treaty of Lisbon were endorsed by all Member States judging by the increased number of cases seeking clarifications on its provisions. In fact, the progress made in this field can come across as anachronistic – many things have changed but many have remained static. The Lisbon Treaty has managed to codify the case-law and even increase external competences by sustaining the same line of reasoning made in 1971. This chapter begun by stating that the Lisbon Treaty does not exist in vacuum, and indeed it does not. The Lisbon Treaty is based on the core principles and values observed and championed by all Member States. In this case, it is the CJEU that has left an indelible mark as it sought

[64] Cremona, *Opinions 1/13 and 2/13* (n 60) 5.

to observe these principles by strengthening and reinforcing external competences. As Attorney General Bot stated:

> the case-law on that matter has developed in various stages over the years, some of which are more integration-friendly than others. It can no doubt be said that, with its recent judgments, the Court has clearly carried on the most integration-friendly stages of its past case-law.[65]

By way of concluding this Chapter, the idea of 'mixity' or mixed agreements shall be put forward. In mixed agreements, the EU and its Member States are equal parties in an agreement, carrying the same legislative authority. Despite the CJEU efforts to push for a comprehensive external competence, it seems clear that as we move forward, it will become increasingly difficult for the EU to attain exclusivity in matters of external competence, particularly within those areas related to politics, security and social justice. In this sense, it seems consistent and more reasonable to favour 'mixity' over exclusivity in order to establish a balanced position of power between the EU and its Member States. The main question is whether 'mixity' is conducive for a cohesive approach towards the protection of human rights in external relations.

[65] Erlbacher (n 51) 11.

# 3

# Human Rights in External Relations: Protecting non-Economic Factors in International Agreements

## 3.0 Introduction

The practical implications of external competence can be observed through the numerous engagements in international agreements. Moreover, as the EU has established itself as a domineering figure in international trade, the agreements have become increasingly complex. What were initially purely trade arrangements have now become complex multidisciplinary agreements, covering areas from trade to socio-political issues, grounded on the premise that the parties involved in the agreements must observe: democratic principle, rule of law and the protection of human rights. The shift no doubt arises from the Union's desire to widen its competences, and place greater emphasis on establishing a legal order based on the respect of human rights, the rule of law and democracy. Despite the rigmarole and veneer placed around human rights, to a degree they remain an ambiguous, abstract concept that predisposes a specific conception of human nature. The so-called western ideals are in fact symptomatic of this condition, and human rights, right or wrong, are placed at the centre of a Eurocentric vision for the world. In this regard, given the important role placed on human rights by Member States and the EU, this chapter explores the merging of external competence with those human rights obligations which are common and upheld by all Member States, and those countries aspiring to join the EU in the future. In this respect, the main scope of the chapter is to situate EU human rights law within that of EU external relations law by taking into consideration the emergence of implied external competence and the current provisions which allow the EU to enforce human rights in external relations.

After giving a detailed exposition of external competence in Chapter One and Chapter Two, this chapter evaluates how these elements are translated towards the implementation of the protection of human rights in external relations. In this sense, any discussion of human rights in external relations must begin from a wider understanding of the role they play in internal policy. The mutable nature of the EU legal order has allowed for human rights to perform an increasingly important function over the years. Therefore, this Chapter explores this transition – namely the development of the human rights and the legal instruments related thereof within the EU – since this development has an important bearing on human rights in external relations, which is extenuated and compounded by the development of external competences. Following this exposition, the related case-law will be examined. It would be interesting to note how the case-law surrounding human rights in the EU abounds, however case-law specifically concerned with human rights and external relations is lacking, possible reasons for which will be explored below. The conclusion of the Chapter gives a tentative presentation of arguments on how human rights obligations in external relations from a legal and political standpoint can be enhanced, where I make the case for a complementary approach towards the issue.

## 3.1 Analysing the Legal Sources in the Protection of Human Rights in the EU

In its initial stages, the purpose for a European Community was to create a common market for which human rights were not an immediate concern. In a Community whose primary concern was capitalist progress, the protection of fundamental freedoms was given little attention. In this regard, the first consideration to be made is to analyse the sources of law which regulate human rights in the EU, and factor in how they emerged. At present, the protection of human rights in the EU is based on a 'tri-layered' system that includes; the European Convention of Human Rights (ECHR), The Charter of Fundamental Rights of the European Union (the Charter) and the common Constitutional traditions of Member States. Each layer empowers the EU to protect fundamental rights and establishes the legal basis for a cohesive system of rights that play a central function towards the development of a human rights law in the EU. Seen through this light, the emergence of a human rights law in the EU is grounded on the common values of Member States – at least it used to be the case

before the rise of populism across Europe started exposing the fissures in this homogenous conception of Europe. This latest development notwithstanding, the EU successfully development a comprehensive mechanism where not only are human rights protected but they are also enshrined in the Union's core legislative framework.

The first formal acknowledgement of human rights in the EU legal order appeared in the Single European Act of 1986 in an explicit reference to the ECHR and where the EU [EC] publicly committed to protect fundamental rights. The Amsterdam Treaty followed soon after, proclaiming the Union to be grounded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law. In the Lisbon Treaty, this is marked under Article 2 of TEU, which in full reads:

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.[66]

Respect for human dignity, freedom, democracy, and respect for human rights are now binding conditions for the Member States but are also non-negotiable conditions to accede to the European Union.[67] This article sets it apart from previous Treaties in that it gives the EU an identity imbued with values.[68] The strength of the statement reflects how serious the EU has come to consider the protection of human rights in its internal policy. Moreover, Article 6 TEU bequeaths the Charter with equal effect to the Treaty of the European Union and the Treaty on the Functioning of the European Union, which puts the protection of fundamental rights on par with economic integration, and trade harmonisation. The introduction of the Charter not only improves the protection of human rights in the EU but also ascertains that the standards set by the ECHR – which all Member States are part to –

[66] Article 2 TEU.
[67] Charles Leben, *Is there a European Approach to Human Rights?* in The EU and Human Rights, Philip Alston with Mara Bustelo and James Heenan (eds) (Oxford University Press 1999) 89.
[68] See Stephen Weatherill, *Law and Values in the European Union (*Oxford University Press 2016); and Marise Cremona, *Values in EU foreign policy* in Evans M, Koutrakos P (eds) Beyond the established legal orders (Hart Publishing 2011) 275–315.

are comprehensively met across the EU.[69] Furthermore, the Charter, which is largely inspired by international agreements, is contains the codification of previous case-law in the area and is considered as a legal instrument for creating balance between continued economic progress and the protection of fundamental rights.[70] In this sense, the Lisbon Treaty not only solidified the role of the EU as an international player by virtue of legitimising implied competences, but it also made the EU Charter of Fundamental Rights legally binding, highlighting the important role that human rights have come to play in its policies.

Furthermore, as far as the development of human rights case-law is concerned, upon closer inspection, there are identifiable similarities between the decisions taken by the constitutional courts of Member States and those taken by Strasbourg and Luxembourg. The ostensible overlaps are remarkable because they paved the way towards a policy of human rights, which is different than to say that the EU merely upholds the protection of fundamental human rights. An EU policy based on the protection of human rights suggests that forthcoming policies, regulations and agreements must be embedded on those values which respect human dignity and must promise to improve the quality of life of its citizens. In external relations, the situation is quite different because the subject matter affects third country nationals, and those provisions which have now become instrumental for the Union are not automatically applicable for reasons of jurisdiction. Nevertheless, the robust inclination towards the protection of human rights internally, makes for a strong argument in favour of strengthening human rights obligations in external relations.

With regards to external relations, despite the extensive efforts from the Union to widen and solidify the scope of exclusive external competence, a significant portion of EU external relations remains shared and/or joint with the Council and Members States. Craig and de Burca point out that, in post-Lisbon cases, the Court has continued to interpret the scope of the EUs exclusive external competence including the provision on implied exclusivity in a robust and expansive way. Attesting to this, are the implications arising from Chapter One

[69] Tawhida Ahmed, *The EU's Protection of ECHR Standards: More protective than the Bosphorus Legacy?* in James A. Green and Christopher P.M. Waters (eds), Adjudicating International Human Rights: Essays in Honour of Sandy Ghandhi (Brill 2015) 104.
[70] Tanel Kerikmāe, *EU Charter: Its Nature, Innovative Character, and Horizontal Effect in Protecting Human Rights* in The EU Controversies and Challenges of the Charter of Fundamental Rights (Springer 2014) 8.

and Chapter Two, where an analysis of external competence shows how the CJEU has been consistent in its extensive interpretation of external implied competences. From a human rights standpoint, this ought to be a welcome indication since it gives ample space and opportunity for external relations to extend human rights clauses to its international obligations.

The CJEU has certainly played an activist role in shaping external competence, however by looking briefly at the early human rights case-law, it appears that the Court was reticent to rule on issues related to human rights, and this is more significantly apparent in cases related to human rights in external relations. Despite the lack of case-law on human rights in external relations, which is in itself telling, the limited number of cases on international agreements, and the disputes which arose from thus, are noteworthy. In fact, the case-law is particularly important here because it tells us how human rights issues were raised and slowly progressed within the Community, and it also shows how the Court's responses shaped EU human rights law today.

In *Hauer*, for example, one of the earlier ruling of its kind, the ECJ argued that fundamental rights were essential part of the general principles of the law.[71] The court maintained that any measure that is believed to be incompatible with these conditions should not be implemented or observed by the Community. This argument was made again in *Wachauf.* In this instance, the ECJ made a specific reference to *Hauer* to reaffirm its belief that the common constitutional traditions of the Member States must be regarded and respected by the Court, as well as its policies.[72] By accepting the premise that fundamental rights are a source of law, it paved the way for establishing a specialised policy able to protect those fundamental rights which were proclaimed essential to the EU legal order. Furthermore, this has the added benefit of bringing together what the CJEU referred to as the 'common constitutional traditions' - meaning the philosophical and jurisprudential underpinnings of the constitutions of Member States.

[71] Case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727.
[72] Case 5/88 *Wachauf v Germany* [1989] ECR 2609]. See also Case 4/73 *Nold v Commission* [1974] ECR 491 [3].

Adding to this, the *Stauder* ruling is considered as a landmark in this field, the ECJ reasoned that the general principles of the EU must, without compromise, take into consideration the protection of fundamental rights.[73] The judgment, in 1968, proved to be a departure from the ECJ's previous position on human rights and the role they play in the general principles of the EU, since in previous cases the ECJ has been unwilling to hear cases based on human rights issues, citing the lack of competence in the area as its main reasoning. In *Stauder* however, the Court recognised human rights as a central feature of the general principles of the EU legal order. For these reasons, *Stauder* is remarkable because it formally recognises the protection of human rights as a characteristic of the EU law. The case marked the first instance where the protection of human rights emerges as central for the EU in both policy and in law. Moreover, by recognising human rights as general principles of EU law, their protection is established and guaranteed under the same legislative process.

## 3.2 International Human Rights Obligations before the Court of Justice of the European Union

Having established a robust understanding of the role of human rights in internal policies and the EU's legal order, attention must be paid on how international human rights obligations are observed in the EU, and how the CJEU has thus far reacted to the arising problematics. As human rights have become such an intrinsic aspect of the EU law, the EU necessitates an equally strong position in terms of being able to observe human rights obligations outside the confines of its borders. This need is reinforced with the acknowledged understanding that those obligations which, by virtue of agreements or any means equivalent, may go against the very same foundations upon which the EU is grounded. This point has been highlighted by the CJEU in a number of leading judgements pertaining to international obligations which stem from international agreements to which the EU and Member States are party to.

[73] Case 29-69 *Erich Stauder v City of Ulm – Sozialamt* [1969] ECR 419.

In this respect, and as a continuation from the previous section, this section explores specifically those case-laws where the court is asked to give its opinions on international obligations. Whereas in earlier case-law the Court was called to deliberate on a specific function pertaining to the role and nature of human rights in the EU legal order, in subsequent cases – whereby the protection of human rights has been substantially affirmed from a legal standpoint – the focus of the case-law is more concerned with the contents or provisions of international agreements. In this area, the rulings may appear somewhat discordant with previous judgements. However, the researcher argues, that in these cases, the CJEU has the fortitude to reject international obligations in favour of consistency, thereby protecting the EU legal order.

The CJEU has demonstrated that international obligations will not be used as an excuse to compromise the coherence of its legal order, and *Kadi* is a reflection to this effect. In a way *Kadi*, denotes a demarcation in human rights case-law post-Lisbon, the introduction of latter empowered the CJEU to strengthen its enforcement and protection of human rights. *Kadi* evolved as a landmark ruling in its own right for human rights. The CJEU declared that an international binding obligation imposed by a UN Security Council Resolution on counter-terrorism cannot be used as a justification to infringe the fundamental rights of the individual, particularly where such obligations specifically contradict or undermine the values and principles of the Treaties and the common constitutional traditions of Member States.[74] This reasoning is reaffirmed by the Court in the *Opinion 2/13* on the accession of the European Union to the ECHR, the subject matter is vastly different from *Kadi* but the effect is presented along the same lines. A lot can be said about the saga of the EU's accession to the ECHR, however for the purpose of this study the ruling is important because it goes to show how the CJEU is able to stall a legally binding process when it determines that they may impact or compromise the autonomy of the EU legal order.

[74] Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v Council* [2008] ECR 461; Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission and others v* Yassin Abdullah *Kadi* [2013] ECR 518.

*Opinion 2/13* is one ruling in a long line of case-law pertaining to the Union's accession to the ECHR.[75] With the introduction to the Lisbon Treaty, the EU is not only empowered to accede to international agreements but in relation to ECHR it is bound to do so under Article 6(2) TEU. The accession never took place however, and the CJEU is partially to blame. As in *Kadi*, the Court maintained that where the contents of an international agreement impinge, or in one way or another, may alter the provisions of the Treaties, they can be summarily dismissed, as they are deemed incompatible with EU law. The CJEU argued that should the EU accede to the Convention its autonomy will be put into jeopardy, thereby until such a time where the accession to the ECHR is not seen as a threat to the judicial independence of the CJEU, the EU will be unable to accede the Convention. To this effect, *Opinion 2/13,* so to speak, puts the nail in the coffin to this debate by determining that the draft agreement to accede the ECHR is incompatible with EU Treaties. The CJEU stated in one instance that 'the mission set out in the first sentence of Article 6(2) TEU — to accede to the ECHR — would be rendered meaningless if the EU were not in a position to accept the restrictions arising from the ECHR with regard to the exercise of its competences.'[76] In this respect, *Opinion 2/13* goes a long way to show that in those areas that the CJEU determines that it is not in its advantage to partake, it either refrains from ruling – as it did in early cases — or takes a restrictive, conservative approach.

Another example of this myopic conundrum can be analysed in *Portugal v Council*, concerning the cooperation agreement between the European Community and the Republic of India on partnership and development. Portugal challenged Council Decision 94/578/EC of 18 July 1994 on the grounds that the Community lacked the legal basis and thereby competence to conclude the agreement in question. Portugal contested the decision on issue that the EU 'does not confer on the Community the necessary powers to conclude the Agreement as regards, first, the provision therein relating to human rights and, second, the provisions relating to various specific fields of cooperation.'[77] In this instance, the Portuguese government contended that even though the respect for fundamental rights is

[75] *Opinion 2/13* follows from *Opinion 2/94* on the 'Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms'. The notable difference is that in *Opinion 2/94* the accession to the ECHR does not yet hold any legal basis.
[76] *Opinion 2/13* [2014] ECR 2454, para. [41].
[77] Case C-268/94 *Portugal v Council* [1996] ECR *I-06177*, para.[13].

a general principle of EU law, it in no shape or form, allows the EU to conclude such agreements.[78] The ECJ rejected the claim by arguing that if the Community is to:

> "contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms", Article 130u(2) requires the Community to take account of the objective of respect for human rights when it adopts measures in the field of development cooperation.[79]

In this case, the ruling not only acknowledges the role of the Union in protecting human rights, and human dignity in external relations but also ensures that Development Cooperation is seen as a primary mechanism for achieving this end. In this respect, *Portugal v Council* may appear to contrast the ruling given in *Opinion 2/13*, where the CJEU established that the draft agreement to acceded to the ECHR was incompatible with core provisions of the EU.

In this sense, there seems to be a distinction between applying and upholding human rights principles on the one hand and having the competence to develop and implement a human rights external policy on the other.[80] Making the case-law on external human rights appear disjointed. In this respect, *Stauder* [1968] and *Opinion 2/13* would appear to stand at opposed spectrums. As Reid points out, despite this seemingly inconsistent approach, the role of the court should not be understated.[81] What the court in earlier case-law has acknowledged were principles and constitutional traditions that are common and enforced in national courts, which the ECJ could not ignore if it was to establish coherence and impart impartiality to the EU legal order. The activist role played by CJEU in the interpretation of implied competence cannot be justly compared with its reluctance to accede to the ECHR or refusal to acquiescent to the demands of the UN Security Council. In fact, highlighting this distinction will allow for a consistent evaluation of the role played by the CJEU in the protection of human rights beyond its borders.

[78] *Portugal v Council* (n 77) para. [16].
[79] ibid. para. [23].
[80] Emily Reid, *Balancing Human Rights: Environmental Protection and International Trade: Lessons from the EU Experience* (Hart Publishing 2015) 41.
[81] Ibid.

## 3.3. Complementarity as a Way Forward for Human Rights in External Relations

Taking as a point of departure the *AERT* judgement and the introduction of implied competence within the EU legal order, this discussion is used to explain how external competence can exist in harmony between the EU, and the autonomy of Member States, while still pursuing the protection and implementation of human rights obligations on an international stage. The inclusion of human rights in external relations is a relative novelty in the EU. The fact that a supranational entity like the EU is able to legislate with third parties is no small feat in its own right; the fact that it can do so in a number of areas, albeit with specific limitations, is even more so impressive, having done so by surpassing quite a few tricky passages during its relatively brief history. In the previous section, the researcher argues that the CJEU has provided a pivotal trajectory in the evolution and placement of fundamental rights within the EU. Thereby this section explores the complementary mechanism that can be adopted to ascertain that external competences are respected while human rights continue to feature prominently in the negotiations and conclusion of international agreements.

Despite extensive efforts by the Union to widen and solidify the scope of exclusive external competence in EU external relations, a significant portion of EU external relations remain shared and/or joint with the Council and Members States. Over the years, this has resulted in the Union not being able to consolidate a uniform and cohesive external relations strategy but as has been argued by Cremona, the tendency to promote and champion exclusivity over shared competence can have adverse effects.[82] By confining Member States to adopt and uphold an external relations strategy – which necessitates flexibility by its very nature, goes against the interests of Member States and will not help create a unified external relations policy. The key element in a successful amalgamation of external relations is having consistent legal and political frameworks, which the CJEU has been able to provide but within the limitations of its conferred powers. In moving forward, it is important to bear in mind that exclusivity is not the end all and be all for international agreements. In this respect,

[82]Marise Cremona, *External Relations and External Competence of the European Union: The Emergence of an Integrated Policy* in Paul Craig and Grainne de Búrca (eds.) *The Evolution of EU Law* (2nd edn) (Oxford University Press 2011) 172.

understanding the distinction between the three main types of competences in external relations is an important factor, particularly to protect and promote those provisions which are of a non-economic nature, such as human rights. Competences in this area can be either exclusive, shared and mixed. Express powers – which give rise to exclusivity – in external relations are limited to the Common Commercial Policy, Research and Technological Development, Environmental Protection and Development Cooperation.

For quite a long time, Development Cooperation posited the only means to pursue human rights externally. Article 21(2) changed this condition, and under the Lisbon Treaty, the EU has legitimate competence (and an obligation) to pursue human rights in external relations. Furthermore, Article 352 TFEU gives the Union the competence to engage into any measure necessary to achieve the ends of article 217 TFEU which states: 'the Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure.' The current provision for Development Cooperation is as an effective example how Member States and the EU can legislate alongside each other. In fact, this is one instance in external relations where one is not subordinate to another and they co-exists together within the legal and political framework of the EU – 'the exercise of that [development cooperation] shall not result in the Member States being prevented from exercising theirs.'[83] Broadly speaking, Development Cooperation is an example whereby national policy and EU policies are complementary to one another other. In this case, reference to complementarity entails that both Member States and the EU retain competence in the area, creating a balance between observing the objectives of the Union and maintaining national autonomy.

More recently this phenomena can be seen to be successfully observed in the area of environmental protection, whereby Member States are not prohibited from pursuing their own interests, while at the same time the EU is allowed to push forward its agenda and legislate in the field.[84] It also makes sense that the inclusion of non-economical elements in international agreements necessitate a compromise. The Member States will never allow

[83] Article 4(4) TFEU.
[84] Reid (n 80) 116.

for their powers to be waived in all areas of external relations, a case point is the complementary method adopted for environmental protection and development cooperation, where despite the Union being trusted to legislate externally, the Members States have been unwilling to forfeit their powers in these fields. Using this scenario, where external competence is complementary rather than exclusive, would allow for a greater degree of flexibility in protecting human rights externally.

In relation to external relations, the CJEU cannot overtly protect human rights, for the reason that it does not have jurisdiction over third countries. This may also account for the lack of case-law regarding human rights and external relations, and also explains how the Commission, the Council and the European Parliament are more active and therefore able to be more influential in this area.[85] The role of these institutions can be seen through the work of the specialised working parties; the joint collaborations between the High Representative for Foreign Affairs and Security Policy and the Commission, which resulted into a comprehensive action plan entitled Action Plan on Human Rights and Democracy that has recently been renewed for 2020-2024. The action plan, among other things, promotes human rights in all areas of external relations including in trade, environment and development; with the High Representative, the Commission, the Council, Parliament and Member States playing a central role in its implementation – the overarching narrative of the action plan is to provide the much needed consistency and stability in external relations. This goes to show how the protection of human rights can exist independently of the CJEU, while being equally effective. It is also a clear example how competence in external relations and human rights remain fluid but complementary in many ways. Nevertheless, the role played by the CJEU throughout the years, particularly by developing the notion of implied external competence, saw the eventual development of an EU external relation law which is now able to go beyond the scope of economic pursuits.

[85] Yumiko Nakanishi, *Mechanisms to Protect Human Rights in the EU's External Relations in Contemporary Issues* in Human Rights Law Europe and Asia (Springer 2017) 3.

## 3.4 Conclusion

Any argument on the jurisprudence of human rights in the EU must account for the fact that the doctrine has evolved in tandem with the expansion of the single market. The progression of one area explains the need for refinement in the other. It is important to acknowledge the complexity of EU human rights law, but it is naïve to presume that it has developed as a distinct discipline from economic progress. The emergence of non-economic elements in international fora are a direct by-product of this achievement. Without a structured, and particularly specialised internal market, the need for an elaborate human rights doctrine would not have manifested itself. Consequently, the inclusion of human rights provisions in international affairs would be obsolete. In an almost paradoxical turn, the expansion of the internal market has allowed and made space for an EU human rights law, one which in time has stapled itself on par with the former.

In this final chapter, the overall aim has been twofold. The first objective relates to the specific case-law in relation to international human rights obligations and the implementation of human rights in external relations. The case-law of the latter is lacking, whereas in relation the former it is rather telling. Through this case-law, the CJEU has determined not only the sources with which the EU is legitimately allowed to observe its human rights obligations (internally and externally) but also ascertained that its reading of the law remained consistent and faithful to the objectives of the EU. The second objective was to situate human rights obligations within an external relations context. That international agreements now include clauses not purely related to trade is not new, however the inclusion of human rights obligations remain too fluid and at times appear to be *ad hoc*. Furthermore, the lack of a proper enforcement mechanism risks making these inclusions superfluous – as is often the case with regards to providing assistance to migrants arriving by boats. What this chapter argues is that by reinforcing the idea of complementarity over exclusivity, whereby competences are mixed between the EU and its Member States, may result in a stronger, more coherent external position overall and lessen some of the tensions between Member States and the EU.

# CONCLUSION

Finalising this research has not been without its own difficulties. A research such as this is always reliant on the access and availability of sources and materials. As such, one of the issues encountered when putting together this research is the lack of open access material, which results in having to rely almost entirely on the material available online, which is ample but not always specific to the research question. Another problematic with this research is that with hindsight, this project was far more extensive than initially anticipated. In this respect, the researcher feels that more could have been added to provide further examples of case-law and used more authors to substantiate the claims. Nevertheless, taking into account some of the most influential cases and factoring in leading contributions made to this field, enabled this research to make an original contribution to the existing scholarship of EU external relations law.

Every step throughout this work was taken in order to create a linear, cohesive examination of the evolution of external competence in the EU, which is intended to produce a holistic understanding of the research question. That external relations posit a quagmire to the EU law has been made abundantly clear by analysing the case-law and secondary literature, which is reflected in the three chapters of this work. However, external relations remain an important element to the European Union and its legal order. Without which the international strength of the Union would be questioned and irrevocably altered. Presently, reflecting on the legal intricacies of external relations, is even more poignant, as the arising common global challenges necessitate greater coherence and strengthen concerted approaches.

The relevance of each chapter is better highlighted by examining the overall aim of the entire project. In the sense, each chapter served to present a different aspect of the research question. Chapter One examined the research question by outlining the problematic and highlighting the role of the CJEU in its external relations and the development of implied competence. The EU legal order was shaped and moulded by the judgements and opinions

delivered by the Court early on, and external relation is no exception. The activist role played by the CJEU, while contentious, built a framework whereby the EU can operate as a key player in global affairs. The importance of *AERT* is such that even taking into consideration the vastness of the scholarship, its problematics are still unresolved. Nevertheless, the doctrine still enjoys unparalleled power in external relations, but the questions raised by the ruling can never completely satisfy the Member States given that their national autonomy is at stake, which is a direct reflection on the fluidity and everchanging dynamics of the field. For this reason, continued, critical engagement and re-examinations of the issue are still worth pursuing.

On the other hand, the second chapter reflected on the present legislative framework for the implementation of external relations. The impact of the *AERT* ruling can be observed through the Lisbon Treaty. Despite the contentions and merits of the case, the Lisbon Treaty is mirrored on those same provisions (and case-law) which have created tensions with the Member States. In this respect, Chapter Two is a pragmatic exploration of the questions raised before the CJEU on the limits and legitimacy of implied competence in external relations. *Opinion 1/13* has reinforced the very same premise which rendered the *AERT* so influential. In persisting to uphold the concept of implied external competence, the CJEU while consistent with its positions, has made it all the more difficult to formulate a coherent external policy. However, contested as it is, it is indubitable that the competences of external relations have vastly increased, so much so, that international agreements are now increasingly complex with the added competence allowing for a discussion on external relations that goes beyond trade.

In this respect, the last chapter of this research looks into the future of external relations by placing human rights obligations at their core. External relations have developed as a necessary means for the Union to conclude trade agreements with third parties, and with the activist role of the CJEU, external competence have been reinforced to factor in other, non-economical elements. The scope of Chapter Three is therefore to align the present objectives of the EU, among which is the protection of fundamental rights, with the increased functions of external relations. In recent history, the European Union has stapled itself as a champion of human rights, and protector of fundamental freedoms. It was able to

do so because it could draw from the long rich intellectual history and ideologies of its Member States. This is significant for the scope of this research. It shows that in protecting human rights, the EU and its Member States are, in principle, able to reach a consensus, the main contention is therefore one of competence. In this sense, a balance of powers in external relations is unlikely to be achieved, particularly because too many players and issues are at stake. By opting for a middle-way, whereby exclusivity is renounced in favour of mixity, Member States can legislate alongside the EU which, in turn, could substantially make way for non-economic elements to feature more prominently into international agreements.

This argument is not without faults, of course. It is too naïve to assume that the EU and its Member States can happily co-exist without tensions, even more so now as the Union grows larger, and with political operatives having different agendas and priorities. By opening itself to the East (among others) its homogeneity is being tested, putting more stress on prioritising the protection of fundamental rights over economic gains, and finding that elusive balance of power. In this regard, a strong external relations law can only be achieved through consistency and coherence in actions and in law. These elements are key to a successful foreign policy able to ensure the continued fulfilment of human rights obligations and the protection of fundamental rights. Establishing a strong legal basis for external relations also entails a clear balance of power. Given the nature of the Union, the question of competence is central but so are the respect for the principle of conferral, the principle of subsidiarity, and the principle of proportionality. These three pillars of the EU legal framework must be functional and complementary to one another for the EU to create a cohesive external relation policy in the immediate future.

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